Syracuse University College of Law;
the Institute for the Study of the Judiciary, Politics, and the Media;
and the NDNY-Federal Court Bar Association present

United States Supreme Court: The 2017-2018 Term

Program Materials

Friday, October 20, 2017
1:30 to 4:15 p.m.

Melanie Gray Ceremonial Courtroom, Dineen Hall
Syracuse University College of Law
950 Irving Avenue, Syracuse, NY 13244

Syracuse University College of Law and the Northern District of New York Federal Court Bar Association have been certified by the New York State Continuing Legal Education Board as Accredited Providers of continuing legal education in the State of New York.

"United States Supreme Court: the 2017-2018 Term" complies with the requirements of the New York State Continuing Legal Education Board for **3.0 credits** towards the professional practice requirement. This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

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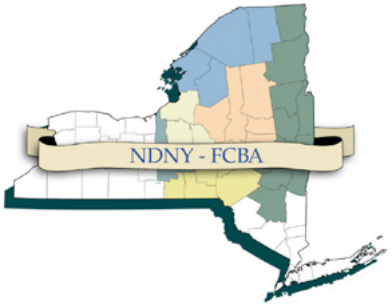

IJPM Institute for the Study of
THE JUDICIARY, POLITICS, AND THE MEDIA
at Syracuse University

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* Special thanks to Jordan B. Charnetsky '18 and Erin A. Shea '18 for their assistance in compiling these materials.

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United States Supreme Court: The 2017-2018 Term

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Timed Agenda

1:00-1:30 p.m. CLE Registration

1:30-1:35 p.m. Welcome and Introduction **Craig M. Boise**, *Dean and Professor of Law*

1:35-2:35 p.m. "When Elections Matter: The Supreme Court, the Scalia Vacancy, and the 2016 Election"
Amy L. Howe, **SCOTUSblog**, *Reporter and Former Editor*

2:35- 2:45 p.m. Break

2:45-4:15 p.m. Panel Discussion: "Supreme Court Preview: 2017-2018 Term"
Moderator: **Keith J. Bybee**, *Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor of Law*

Panel participants:
Hon. Rosemary S. Pooler, *Circuit Judge, United States Court of Appeals for the Second Circuit*
Andrew T. Kim, *Associate Professor of Law*
William M. Wiecek, *Chester Adgate Congdon Professor of Public Law and Legislation Emeritus*
Lauryn P. Gouldin, *Associate Professor of Law*
Amy L. Howe, *SCOTUSblog, Reporter and Former Editor*

4:15-5:30 p.m. Happy Hour

Syracuse University
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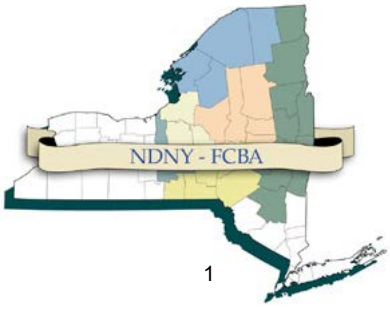

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Program Participants

Amy L. Howe, SCOTUSblog, Reporter and Former Editor

Until recently, Amy served as the editor and a reporter for SCOTUSblog, a blog devoted to coverage of the Supreme Court of the United States; she continues to serve as an independent contractor and reporter for SCOTUSblog. She also writes for her eponymous blog, Howe on the Court. Before turning to full-time blogging, she served as counsel in over two dozen merits cases at the Supreme Court and argued two cases there. From 2004 until 2011, she co-taught Supreme Court litigation at Stanford Law School; from 2005 until 2013, she co-taught a similar class at Harvard Law School. She has also served as an adjunct professor at American University's Washington College of Law and Vanderbilt Law School. Amy is a graduate of the University of North Carolina at Chapel Hill and holds a master's degree in Arab Studies and a law degree from Georgetown University.

The Honorable Rosemary S. Pooler, Circuit Judge, United States Court of Appeals for the Second Circuit

Rosemary S. Pooler is a United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit. At the time of her appointment in 1998, she was a United States District Judge for the Northern District of New York.

Judge Pooler received her B.A. from Brooklyn College in 1959, an M.A. in History from the University of Connecticut in 1961, and her J.D. from the University of Michigan Law School in 1965. She also attended the Program for Senior Managers in Government of Harvard University in 1978, and earned a Graduate Certificate in Regulatory Economics from the State University of New York at Albany in 1978.

Judge Pooler engaged in the private practice of law in Syracuse from 1966 until 1972. She served as Assistant Corporation Counsel/Director of the Consumer Affairs Unit for the City of Syracuse from 1972 to 1973. From 1974 to 1975, Judge Pooler was a District Representative on the Common Council of the City of Syracuse. From 1975 until 1980, she was Chair and Executive Director of the Consumer Protection Board of the State of New York. She served as a member of the New York State Public Service Commission from 1981 until 1986. In 1987, Judge Pooler was Staff Director of the Committee on Corporations, Authorities and Commissions of the New York State Assembly. She was Visiting Professor of Law at Syracuse University from 1987 until 1988, and was Vice-President for Legal Affairs of the Atlantic States Legal Foundation from 1989 until 1990. In 1990, she became a Justice of the Supreme Court, Fifth Judicial District, State of New York, and served in this position until becoming a United States District Judge for the Northern District of New York in 1994. Judge Pooler is a native of the City of New York.

Keith J. Bybee, Vice Dean and Paul E. and Honorable Joanne F. Alper '72 Judiciary Studies Professor of Law

Professor Bybee is the Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor at the College of Law. He holds tenured appointments in the College of Law and in the Maxwell School of Citizenship and Public Affairs. He also directs the Institute for the Study of the Judiciary, Politics, and the Media (IJPM), a collaborative effort between the College of Law, the Maxwell School, and the S.I. Newhouse School of Public Communications. He was recently named as Syracuse University's ACC Distinguished Lecturer for 2016-18.

Professor Bybee's areas of research interest are the judicial process, legal theory, political philosophy, LGBT politics, the politics of race and ethnicity, American politics, constitutional law, and the media. His books include Mistaken Identity: The Supreme Court and the Politics of Minority Representation (Princeton, 1998; second printing, 2002), Bench Press: The Collision of Courts, Politics, and the Media, (Stanford, 2007), and All Judges Are Political - Except When They Are Not: Acceptable Hypocrisies and the Rule of Law (Stanford, 2010). His most recent book is How Civility Works (Stanford University Press, 2016).

Lauryn P. Gouldin, Associate Professor of Law

Professor Gouldin joined the Syracuse University College of Law from New York University School of Law, where she served as the Assistant Director of the Center for Research in Crime and Justice. At the College of Law, she teaches constitutional criminal procedure, criminal law and evidence. Her current research focuses on the Fourth Amendment, pretrial detention, and on the collection and dissemination of criminal records information. Her articles have appeared or are forthcoming in the *University of Chicago Law Review, BYU Law Review, Denver Law Review, Fordham International Law Journal,* and the *American Criminal Law Review,* among others.

In 2015, in recognition of her excellence in teaching, Professor Gouldin was elected by the Syracuse University Meredith Professors to receive the Teaching Recognition Award. In 2014 and in 2015, the College of Law Student Bar Association honored Professor Gouldin with the Outstanding Faculty Award.

Professor Gouldin graduated from Princeton University with a major in the Woodrow Wilson School of Public and International Affairs and she received her JD, magna cum laude, from New York University School of Law. Following law school, Professor Gouldin clerked for Judge Leonard B. Sand in the Southern District of New York and for Judge Chester J. Straub of the U.S. Court of Appeals for the Second Circuit. She also spent several years as a litigation associate at Wachtell, Lipton, Rosen & Katz, working on matters involving white

collar and regulatory defense, internal investigations and compliance, and securities litigation.

Andrew T. Kim, Associate Professor of Law

Professor Kim teaches Immigration Law and Torts. His primary research interest is in immigration and refugee law, with a particular focus on theories of citizenship, cultural accommodation, and judicial review of immigration agency action.

Professor Kim received his B.A. from Duke University and his J.D. from Harvard Law School, where he was a senior editor of the Harvard International Law Journal and was awarded a Chayes Fellowship for international legal study and a Heyman Fellowship for federal government service. Upon graduation, he clerked for the Honorable John R. Gibson of the United Court of Appeals for the Eighth Circuit. He also litigated as an Honors Program Trial Attorney with the Constitutional Torts Section of the Civil Division of the United States Department of Justice and has spent two years as a law teaching fellow at Louisiana State University Law Center. Professor Kim is bilingual in English and Korean.

William M. Wiecek, Chester Adgate Congdon Professor of Public Law and Legislation Emeritus

Professor Wiecek practiced law in New Hampshire and taught legal and constitutional history at the University of Missouri-Columbia for 16 years before coming to Syracuse. He has written or edited ten books, as well as numerous articles and chapters, on slavery and its abolition, republicanism, nineteenth-century constitutional development, nuclear power, and the United States Supreme Court.

Professor Wiecek has written a history of the United States Supreme Court from 1941 to 1953, covering the chief- justiceships of Harlan Fiske Stone and Fred Vinson, for the Holmes Devise History of the Supreme Court of the United States. He has taught courses in legal and constitutional history, constitutional law, property, race and law, corporations, civil procedure, and Roman law. He holds a joint appointment as Professor of History in the Maxwell School of Syracuse University. Professor Wiecek received the University Scholar/ Teacher of the Year Award in 1997 and in 2001 the Chancellor's Citation for Exceptional Academic Achievement, the university's highest academic award.

Professor Wiecek earned a B.A. from Catholic University, a LL.B. from Harvard University and a Ph.D. from the University of Wisconsin at Madison.

October Term 2016

View this list sorted by case name.

October Sitting

Shaw v. U.S., No. 15-5991 [Arg: 10.4.2016 Trans. /Aud.; Decided 12.12.2016]

Holding: (1) The defendant's arguments that subsection (1) of the bank fraud statute, which covers schemes to deprive a bank of money in a customer's deposit account, does not apply to him because he intended to cheat only a bank depositor, not a bank, are unpersuasive; and (2) with regard to the parties' dispute over whether the district court improperly instructed the jury that a scheme to defraud a bank must be one to deceive the bank or deprive it of something of value, instead of one to deceive and deprive, the U.S. Court of Appeals for the 9th Circuit is left to determine whether that question was properly presented and if so, whether the instruction given is lawful, and, if not, whether any error was harmless.

Bravo-Fernandez v. U.S., No. 15-537 [Arg: 10.4.2016 Trans. /Aud.; Decided 11.29.2016]

Holding: The issue-preclusion component of the double jeopardy clause, which bars a second contest of an issue of fact or law raised and necessarily resolved by a prior judgment, does not bar the government from retrying defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency.

Salman v. U.S., No. 15-628 [Arg: 10.5.2016 Trans. /Aud.; Decided 12.6.2016]

Holding: The U.S. Court of Appeals for the 9th Circuit properly applied the court's decision in *Dirks v. Securities and Exchange Commission* to affirm Bassam Salman's conviction because, under *Dirks*, the jury could infer that Salman's tipper personally benefited from making a gift of confidential information to a trading relative.

Buck v. Davis, No. 15-8049 [Arg: 10.5.2016 Trans. /Aud.; Decided 2.22.2017]

Holding: (1) The U.S. Court of Appeals for the 5th Circuit exceeded the limited scope of analysis for a certificate of appealability, which, by statute, follows a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course; and (2) petitioner Duane Buck has demonstrated ineffective assistance of counsel under Strickland v. Washington; and (3) the district court's denial of Buck's motion under Federal Rule of Civil Procedure 60(b)(6) was an abuse of discretion.

Manuel v. City of Joliet, No. 14-9496 [Arg: 10.5.2016 Trans. /Aud.; Decided 3.21.2017]

Holding: (1) Elijah Manuel may challenge his pretrial detention on Fourth Amendment grounds; and (2) on remand, the U.S. Court of Appeals for the 7th Circuit should determine the accrual date of Manuel's Fourth Amendment claim, unless it finds that the city of Joliet has previously waived its timeliness argument.

Manrique v. U.S., No. 15-7250 [Arg: 10.11.2016 Trans. /Aud.; Decided 4.19.2017]

Holding: A defendant wishing to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order; if he fails to do so and the government objects, he may not challenge the restitution order on appeal.

Pena-Rodriguez v. Colorado, No. 15-606 [Arg: 10.11.2016 Trans. /Aud.; Decided 3.6.2017]

Holding: When a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Samsung Electronics Co. v. Apple, No. 15-777 [Arg: 10.11.2016 Trans. /Aud.; Decided 12.6.2016]

Holding: In the case of a multicomponent product, the relevant article of manufacture for arriving at a damages award under Section 289 of the Patent Act need not be the end product sold to the consumer but may be only a component of that product.

November Sitting

Fry v. Napoleon Community Schools, No. 15-497 [Arg: 10.31.2016 Trans. /Aud.; Decided 2.22.2017]

Holding: (1) Exhaustion of the administrative procedures established by the Individuals with Disabilities Education Act is unnecessary when the gravamen of

the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education"; and (2) the case is remanded to the U.S. Court of Appeals for the 6th Circuit for a proper analysis of whether the gravamen of E.F.'s complaint -- which alleges only disability-based discrimination, without making any reference to the adequacy of the special-education services E.F.'s school provided -- charges, and seeks relief for, the denial of a FAPE.

Star Athletica, LLC v. Varsity Brands, No. 15-866 [Arg: 10.31.2016 Trans. /Aud.; Decided 3.22.2017]

Holding: A feature incorporated into the design of a useful article is eligible for copyright protection under the Copyright Act of 1976 only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article, and (2) would qualify as a protectable pictorial, graphic or sculptural work -- either on its own or fixed in some other tangible medium of expression -- if it were imagined separately from the useful article into which it is incorporated; that test is satisfied here.

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, No. 15-927 [Arg: 11.1.2016 Trans. /Aud.; Decided 3.21.2017]

Holding: Laches cannot be invoked as a defense against a claim for damages brought within the six-year limitations period of Section 286 of the Patent Act.

State Farm Fire and Casualty Co. v. U.S. ex rel. Rigsby, No. 15-513 [Arg: 11.1.2016 Trans. /Aud.; Decided 12.6.2016]

Holding: A seal violation does not mandate dismissal of a relator's complaint under the False Claims Act.

Venezuela v. Helmerich & Payne Int'l, No. 15-423 [Arg: 11.2.2016 Trans. /Aud.; Decided 5.1.2017]

Holding: A case falls within the scope of the Foreign Sovereign Immunities Act's expropriation exception only if the property in which a party claims to hold rights was indeed "property taken in violation of international law"; simply making a nonfrivolous argument to that effect is not sufficient; a court should resolve any factual disputes about a foreign sovereign's immunity defense as near to the outset of the case as is reasonably possible.

National Labor Relations Board v. SW General, No. 15-1251 [Arg: 11.7.2016 Trans. /Aud.; Decided 3.21.2017]

Holding: (1) Subsection (b)(1) of the Federal Vacancies Reform Act of 1998, which prevents a person who has been nominated to fill a vacant office requiring presidential appointment and Senate confirmation from performing the duties of that office in an acting capacity, applies to anyone performing acting service under the FVRA and is not limited to first assistants performing acting service under Subsection (a)(1); and (2) Subsection (b)(1) prohibited Lafe Solomon from continuing his service as acting general counsel of the National Labor Relations Board once the president nominated him to fill the position permanently.

Wells Fargo & Co. v. City of Miami, No. 15-1112 [Arg: 11.8.2016 Trans. /Aud.; Decided 5.1.2017]

Holding: (1) The city of Miami is an "aggrieved person" authorized to bring suit under the Fair Housing Act; and (2) the U.S. Court of Appeals for the 11th Circuit erred in concluding that the city's complaints, charging that the banks engaged in discriminatory conduct that led to a disproportionate number of foreclosures and vacancies in majority-minority neighborhoods, which diminished the city's property-tax revenue and increased the demand for police, fire, and other municipal services, met the FHA's proximate-cause requirement based solely on the finding that the city's alleged financial injuries were foreseeable results of the banks' misconduct; proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged"; the lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the city's claims for lost property-tax revenue and increased municipal expenses.

Lightfoot v. Cendant Mortgage Corporation, No. 14-1055 [Arg: 11.8.2016 Trans. /Aud.; Decided 1.18.2017]

Holding: Fannie Mae's sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving Fannie Mae.

Bank of America Corp. v. City of Miami, No. 15-1111 [Arg: 11.8.2016 Trans. /Aud.; Decided 5.1.2017]

Holding: (1) The city of Miami is an "aggrieved person" authorized to bring suit under the Fair Housing Act; and (2) the U.S. Court of Appeals for the 11th Circuit erred in concluding that the city's complaints, charging that the banks engaged in discriminatory conduct that led to a disproportionate number of foreclosures and vacancies in majority-minority neighborhoods, which diminished the city's property-tax revenue and increased the demand for police, fire, and other municipal services, met the FHA's proximate-cause requirement based solely on the finding that the city's alleged financial injuries were foreseeable results of the banks' misconduct; proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged"; the lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the city's claims for lost property-tax revenue and increased municipal expenses.

Sessions v. Morales-Santana, No. 15-1191 [Arg: 11.9.2016 Trans. /Aud.; Decided 6.12.2017]

Holding: (1) The gender line Congress drew in Section 1409(c) of the Immigration and Nationality Act -- which creates an exception for an unwed U.S.-citizen mother, but not for such a father, to the physical-presence requirement for the transmission of U.S. citizenship to a child born abroad -- is incompatible with the Fifth Amendment's requirement that the government accord to all persons "the equal protection of the laws"; and (2) because the Supreme Court is not equipped to convert Section 1409(c)'s exception into the main rule displacing other relevant provisions of the statute, it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender.

December Sitting

Beckles v. U.S., No. 15-8544 [Arg: 11.28.2016 Trans. /Aud.; Decided 3.6.2017]

Holding: The Federal Sentencing Guidelines, including Section 4B1.2(a)'s residual clause, are not subject to vagueness challenges under the due process clause.

Moore v. Texas, No. 15-797 [Arg: 11.29.2016 Trans. /Aud.; Decided 3.28.2017]

Holding: By rejecting the habeas court's application of current medical diagnostic standards and by following the standard under *Ex parte Briseno*, including the nonclinical *Briseno* factors, the decision of the Texas Court of Criminal Appeals does not comport with the Eighth Amendment and Supreme Court precedents.

Cooper v. Harris, No. 15-1262 [Arg: 12.5.2016 Trans. /Aud.; Decided 5.22.2017]

Holding: (1) North Carolina's victory in a similar state-court lawsuit does not dictate the disposition of this case or alter the applicable standard of review; (2) the district court did not err in concluding that race furnished the predominant rationale for District 1's redesign and that the state's interest in complying with the Voting Rights Act of 1965 could not justify that consideration of race; and (3) the district court also did not clearly err by finding that race predominated in the redrawing of District 12.

Bethune-Hill v. Virginia State Board of Elections, No. 15-680 [Arg: 12.5.2016 Trans. /Aud.; Decided 3.1.2017]

Holding: (1) The district court employed an incorrect legal standard in determining that race did not predominate in 11 of 12 new state legislative districts drawn by the Virginia State Legislature after the 2010 census; and (2) the district court's judgment regarding District 75 -- that the legislature had good reason to believe that a 55 percent target for black voting-age population was necessary to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated Section 5 of the Voting Rights Act of 1965 -- is consistent with the basic narrow tailoring analysis explained in *Alabama Legislative Black Caucus v. Alabama*.

Life Technologies Corporation v. Promega Corporation, No. 14-1538 [Arg: 12.6.2016 Trans. /Aud.; Decided 2.22.2017]

Holding: The supply of a single component of a multicomponent invention for manufacture abroad does not give rise to liability under Section 271(f)(1) of the Patent Act, which prohibits the supply from the United States of "all or a substantial portion of the components of a patented invention" for combination abroad.

Czyzewski v. Jevic Holding Corporation, No. 15-649 [Arg: 12.7.2016 Trans. /Aud.; Decided 3.22.2017]

Holding: (1) The petitioners -- a group of former truck-drivers for Jevic Transportation, the respondent -- have Article III standing; and (2) bankruptcy courts may not approve structured dismissals of Chapter 11 bankruptcy cases that provide for asset distributions which do not follow ordinary priority rules established by the Bankruptcy Code without the consent of affected creditors.

January Sitting

Nelson v. Colorado, No. 15-1256 [Arg: 1.9.2017 Trans. /Aud.; Decided 4.19.2017]

Holding: The scheme under Colorado's Exoneration Act -- which permits the state to retain conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence -- does not comport with the 14th Amendment's guarantee of due process.

Lewis v. Clarke, No. 15-1500 [Arg: 1.9.2017 Trans. /Aud.; Decided 4.25.2017]

Holding: (1) In a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated; and (2) an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not be protected.

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406 [Arg: 1.10.2017 Trans. /Aud.; Decided 4.18.2017]

Holding: When a federal court exercises its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other side's legal fees, the award is limited to the fees the innocent party incurred solely because of the misconduct.

Expressions Hair Design v. Schneiderman, No. 15-1391 [Arg: 1.10.2017 Trans. /Aud.; Decided 3.29.2017]

Holding: (1) The Supreme Court's review is limited to whether New York General Business Law Section 518 is unconstitutional as applied to the particular pricing scheme that, before this court, petitioners, five New York businesses and their owners, have argued they seek to employ: a single-sticker regime, in which merchants post a cash price and an additional credit card surcharge; (2) Section 518 prohibits the pricing regime petitioners wish to employ; (3) In regulating the communication of prices rather than prices themselves, Section 518 regulates speech. On remand the court of appeals should determine whether Section 518 survives First Amendment scrutiny as a speech regulation; and (4) Section 518 is not vague as applied to petitioners.

Endrew F. v. Douglas County School District, No. 15-827 [Arg: 1.11.2017 Trans. /Aud.; Decided 3.22.2017]

Holding: To meet its substantive obligation under the Individuals with Disabilities Education Act, a school must offer an "individualized education program" reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Midland Funding, LLC v. Johnson, No. 16-348 [Arg: 1.17.2017 Trans. /Aud.; Decided 5.15.2017]

Holding: The filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair or unconscionable debt-collection practice within the meaning of the Fair Debt Collection Practices Act.

Matal v. Tam, No. 15-1293 [Arg: 1.18.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: The disparagement clause of the Lanham Act violates the First Amendment's free speech clause.

Ziglar v. Abbasi, No. 15-1358 [Arg: 1.18.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: (1) The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized in this case; (2) considering the relevant special factors in this case, a *Bivens*-type remedy should not be extended to the "detention policy claims" -- the allegations that the executive officials and wardens violated the detainees' due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegation that the wardens violated the Fourth and Fifth Amendments by subjecting the detainees to frequent strip searches -- challenging the confinement conditions imposed on the detainees pursuant to the formal policy adopted by the executive officials in the wake of the September 11 attacks; (3) the U.S. Court of Appeals for the 2nd Circuit erred in allowing the prisoner-abuse claim against Warden Dennis Hasty to go forward without conducting the required special-factors analysis; and (4) the executive officials and wardens are entitled to qualified immunity with respect to respondents' claims under 42 U.S.C. § 1985(3).

Ashcroft v. Abbasi, No. 15-1359 [Arg: 1.18.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: (1) The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized in this case; (2) considering the relevant special factors in this case, a *Bivens*-type remedy should not be extended to the "detention policy claims" -- the allegations that the executive officials and wardens violated the detainees' due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegation that the wardens violated the Fourth and Fifth Amendments by subjecting the detainees to frequent strip searches -- challenging the confinement conditions imposed on the detainees pursuant to the formal policy adopted by the executive officials in the wake of the September 11 attacks; (3) the U.S. Court of Appeals for the 2nd Circuit erred in allowing the prisoner-abuse claim against Warden Dennis Hasty to go forward without conducting the required special-factors analysis; and (4) the executive officials and wardens are entitled to qualified immunity with respect to respondents' claims under 42 U.S.C. § 1985(3).

Hasty v. Abbasi, No. 15-1363 [Arg: 1.18.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: (1) The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized in this case; (2) considering the relevant special factors in this case, a *Bivens*-type remedy should not be extended to the "detention policy claims" -- the allegations that the executive officials and wardens violated the detainees' due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegation that the wardens violated the Fourth and Fifth Amendments by subjecting the detainees to frequent strip searches -- challenging the confinement conditions imposed on the detainees pursuant to the formal policy adopted by the executive officials in the wake of the September 11 attacks; (3) the U.S. Court of Appeals for the 2nd Circuit erred in allowing the prisoner-abuse claim against Warden Dennis Hasty to go forward without conducting the required special-factors analysis; and (4) the executive officials and wardens are entitled to qualified immunity with respect to respondents' claims under 42 U.S.C. § 1985(3).

February Sitting

McLane Co. v. EEOC, No. 15-1248 [Arg: 2.21.2017 Trans. /Aud.; Decided 4.3.2017]

Holding: A district court's decision whether to enforce or quash a subpoena issued by the Equal Employment Opportunity Commission should be reviewed for abuse of discretion, not de novo.

Hernández v. Mesa, No. 15-118 [Arg: 2.21.2017 Trans. /Aud.; Decided 6.26.2017]

Holding: (1) A *Bivens* remedy is not available when there are "special factors counselling hesitation in the absence of affirmative action by Congress," and the court recently clarified in *Ziglar v. Abbasi* what constitutes a special factor counselling hesitation; the court of appeals should consider how the reasoning and analysis in *Ziglar* bear on the question whether the parents of a victim shot by a U.S. Border Patrol agent may recover damages for his death; (2) It would be imprudent for the Supreme Court to decide Jesus Hernandez's Fourth Amendment claim when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case; and (3) with respect to Hernandez's Fifth Amendment claim, because it is undisputed that the victim's nationality and the extent of his ties to the United States were unknown to the agent at the time of the shooting, the en banc court of appeals erred in granting qualified immunity based on those facts.

Kindred Nursing Centers Limited Partnership v. Clark, No. 16-32 [Arg: 2.22.2017 Trans. /Aud.; Decided 5.15.2017]

Holding: The Kentucky Supreme Court's clear-statement rule – under which an agent could deprive her principal of the rights of access to the courts and trial by jury through an arbitration agreement only if expressly provided in the power of attorney – violates the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment.

Packingham v. North Carolina, No. 15-1194 [Arg: 2.27.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: The North Carolina statute, which makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages," impermissibly restricts lawful speech in violation of the First Amendment.

Esquivel-Quintana v. Sessions, No. 16-54 [Arg: 2.27.2017 Trans. /Aud.; Decided 5.30.2017]

Holding: In the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of "sexual abuse of a minor" requires the age of the victim to be less than 16.

Dean v. U.S., No. 15-9260 [Arg: 2.28.2017 Trans. /Aud.; Decided 4.3.2017]

Holding: 18 U. S. C. §924(c), which criminalizes using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such an underlying crime, does not prevent a sentencing court from considering a mandatory minimum imposed under that provision when calculating an appropriate sentence for the predicate offense.

Coventry Health Care of Missouri v. Nevils, No. 16-149 [Arg: 3.1.2017 Trans. /Aud.; Decided 4.18.2017]

Holding: (1) Because contractual subrogation and reimbursement prescriptions plainly "relate to ... payments with respect to benefits," as stated in the Section 8902(m)(1) of the Federal Employees Health Benefits Act of 1959, they override state laws barring subrogation and reimbursement; and (2) the regime Congress enacted is compatible with the supremacy clause.

March Sitting

Howell v. Howell, No. 15-1031 [Arg: 3.20.2017 Trans. /Aud.; Decided 5.15.2017]

Holding: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.

Murr v. Wisconsin, No. 15-214 [Arg: 3.20.2017 Trans. /Aud.; Decided 6.23.2017]

Holding: The Court of Appeals of Wisconsin was correct to analyze the lot owners' property as a single unit in assessing the effect of the challenged governmental action.

Microsoft Corp. v. Baker, No. 15-457 [Arg: 3.21.2017 Trans. /Aud.; Decided 6.12.2017]

Holding: Federal courts of appeals lack jurisdiction under 28 U. S. C. §1291 to review an order denying class certification (or, as in this case, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice.

Impression Products v. Lexmark Int'l, No. 15-1189 [Arg: 3.21.2017 Trans. /Aud.; Decided 5.30.2017]

Holding: (1) Lexmark exhausted its patent rights in toner cartridges sold in the United States through its "Return Program"; and (2) Lexmark cannot sue Impression Products for patent infringement with respect to cartridges Lexmark sold abroad, which Impression Products acquired from purchasers and imported into the United States, because an authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.

Water Splash v. Menon, No. 16-254 [Arg: 3.22.2017 Trans. /Aud.; Decided 5.22.2017]

Holding: The Hague Service Convention does not prohibit service of process by mail.

County of Los Angeles v. Mendez, No. 16-369 [Arg: 3.22.2017 Trans. /Aud.; Decided 5.30.2017]

Holding: The Fourth Amendment provides no basis for the U.S. Court of Appeals for the 9th Circuit's "provocation rule," which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation."

Saint Peter's Healthcare System v. Kaplan, No. 16-86 [Arg: 3.27.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: Under the Employee Retirement Income Security Act of 1974, a defined-benefit pension plan maintained by a principal-purpose organization -- one controlled by or associated with a church for the administration or funding of a plan for the church's employees -- qualifies as a "church plan," regardless of who established it.

TC Heartland LLC v. Kraft Foods Group Brands LLC, No. 16-341 [Arg: 3.27.2017 Trans. /Aud.; Decided 5.22.2017]

Holding: The patent venue statute, 28 U.S.C. § 1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." As applied to domestic corporations, "reside[nce]" in Section 1400(b) refers only to the state of incorporation; the amendments to Section 1391 did not modify the meaning of Section 1400(b) as interpreted in *Fourco Glass Co. v. Transmirra Products*.

Advocate Health Care Network v. Stapleton, No. 16-74 [Arg: 3.27.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: Under the Employee Retirement Income Security Act of 1974, a defined-benefit pension plan maintained by a principal-purpose organization -- one controlled by or associated with a church for the administration or funding of a plan for the church's employees -- qualifies as a "church plan," regardless of who established it.

Dignity Health v. Rollins, No. 16-258 [Arg: 3.27.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: Under the Employee Retirement Income Security Act of 1974, a defined-benefit pension plan maintained by a principal-purpose organization -- one controlled by or associated with a church for the administration or funding of a plan for the church's employees -- qualifies as a "church plan," regardless of who established it.

Lee v. U.S., No. 16-327 [Arg: 3.28.2017 Trans. /Aud.; Decided 6.23.2017]

Holding: Jae Lee has demonstrated that he was prejudiced by his counsel's erroneous advice that he would not be deported as a result of pleading guilty to an aggravated felony.

Turner v. U.S., No. 15-1503 [Arg: 3.29.2017 Trans. /Aud.; Decided 6.22.2017]

Holding: The withheld evidence is not material under *Brady v. Maryland*.

Honeycutt v. U.S., No. 16-142 [Arg: 3.29.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: Because forfeiture pursuant to Section 853(a)(1) of the Comprehensive Forfeiture Act of 1984 is limited to property the defendant himself actually acquired as the result of the crime, that provision does not permit forfeiture with regard to Terry Honeycutt, who had no ownership interest in his brother's store and did not personally benefit from the illegal sales.

Overton v. U.S., No. 15-1504 [Arg: 3.29.2017 Trans. /Aud.; Decided 6.22.2017]

Holding: The withheld evidence is not material under *Brady v. Maryland*.

April Sitting

Perry v. Merit Systems Protection Board, No. 16-399 [Arg: 4.17.2017 Trans. /Aud.; Decided 6.23.2017]

Holding: The proper review forum when the Merit Systems Protection Board dismisses a mixed case -- a complaint by an employee of a serious adverse employment action attributable, in whole or in part, to bias based on race, gender, age or disability -- on jurisdictional grounds is district court.

California Public Employees' Retirement System v. ANZ Securities, No. 16-373 [Arg: 4.17.2017 Trans. /Aud.; Decided 6.26.2017]

Holding: The public pension fund's untimely filing of its individual complaint under Section 11 of the Securities Act of 1933 more than three years after the relevant securities offering is ground for dismissal under Section 13 of the act.

Town of Chester v. Laroe Estates, No. 16-605 [Arg: 4.17.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: (1) A litigant seeking to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff; and (2) the court of appeals is to address on remand the question whether Laroe Estates seeks different relief than Steven Sherman: If Laroe wants only a money judgment of its own running directly against the town of Chester, then it seeks damages different from those sought by Sherman and must establish its own Article III standing in order to intervene.

Henson v. Santander Consumer USA, No. 16-349 [Arg: 4.18.2017 Trans. /Aud.; Decided 6.12.2017]

Holding: A company may collect debts that it purchased for its own account without triggering the statutory definition of a "debt collector" under the Fair Debt Collection Practices Act.

Kokesh v. Securities and Exchange Commission, No. 16-529 [Arg: 4.18.2017 Trans. /Aud.; Decided 6.5.2017]

Holding: Because disgorgement sought by the Securities and Exchange Commission operates as a penalty under 28 U.S.C. § 2462, in that it is imposed by the courts as a consequence for violating public laws and for punitive purposes, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.

Trinity Lutheran Church of Columbia v. Comer, No. 15-577 [Arg: 4.19.2017 Trans. /Aud.; Decided 6.26.2017]

Holding: The Missouri Department of Natural Resources' express policy of denying grants to any applicant owned or controlled by a church, sect or other religious entity violated the rights of Trinity Lutheran Church of Columbia, Inc., under the free exercise clause of the First Amendment by denying the church an otherwise available public benefit on account of its religious status.

Weaver v. Massachusetts, No. 16-240 [Arg: 4.19.2017 Trans. /Aud.; Decided 6.22.2017]

Holding: (1) In the context of a public-trial violation during jury selection, when the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial; (2) Because Kentel Weaver has not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial.

Davila v. Davis, No. 16-6219 [Arg: 4.24.2017 Trans. /Aud.; Decided 6.26.2017]

Holding: The ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims.

McWilliams v. Dunn, No. 16-5294 [Arg: 4.24.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: The Alabama courts' determination that James McWilliams received all the assistance to which *Ake v. Oklahoma* entitled him -- when certain threshold criteria are met, access to a state-provided mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" -- was contrary to, or an unreasonable application of, clearly established federal law; and (2) the U.S. Court of Appeals for the 11th Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief under *Davis v. Ayala*, specifically considering whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires could have made a difference.

Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, No. 16-466 [Arg: 4.25.2017 Trans. /Aud.; Decided 6.19.2017]

Holding: California courts lack specific jurisdiction to entertain the claims in this case brought by plaintiffs who are not California residents, because there is an insufficient connection between the forum and the specific claims at issue.

BNSF Railway Co. v. Tyrrell, No. 16-405 [Arg: 4.25.2017 Trans. /Aud.; Decided 5.30.2017]

Holding: (1) Section 56 of the Federal Employers' Liability Act -- which provides that "an action may be brought in a district court of the United States," in, among other places, the district "in which the defendant shall be doing business at the time of commencing such action" -- does not address personal jurisdiction over railroads; and (2) the Montana courts' exercise of general personal jurisdiction under Montana law does not comport with the 14th Amendment's due process clause.

Maslenjak v. U.S., No. 16-309 [Arg: 4.26.2017 Trans. /Aud.; Decided 6.22.2017]

Holding: (1) The text of 18 U.S.C. § 1425(a) -- which prohibits "procur[ing], contrary to law, the naturalization of any person" -- makes clear that, to secure a conviction, the federal government must establish that the defendant's illegal act played a role in her acquisition of citizenship; (2) when the underlying illegality alleged in a Section 1425(a) prosecution is a false statement to government officials, a jury must decide whether the false statement so altered the naturalization process as to have influenced an award of citizenship; and (3) measured against this analysis, the jury instructions in this case were in error, and the government's assertion that any instructional error was harmless is left for resolution on remand.

Amgen Inc. v. Sandoz Inc., No. 15-1195 [Arg: 4.26.2017 Trans. /Aud.; Decided 6.12.2017]

Holding: Section 262(l)(2)(A) of the Biologics Price Competition and Innovation Act of 2009 is not enforceable by injunction under federal law, but the U.S. Court of Appeals for the Federal Circuit on remand should determine whether a state-law injunction is available; an applicant may provide notice of commercial marketing under Section 262(l)(8)(A) prior to obtaining licensure.

Sandoz Inc. v. Amgen Inc., No. 15-1039 [Arg: 4.26.2017 Trans. /Aud.; Decided 6.12.2017]

Holding: Section 262(l)(2)(A) of the Biologics Price Competition and Innovation Act of 2009 is not enforceable by injunction under federal law, but the U.S. Court of Appeals for the Federal Circuit on remand should determine whether a state-law injunction is available; an applicant may provide notice of commercial marketing under Section 262(l)(8)(A) prior to obtaining licensure.

Decided without oral argument

Bosse v. Oklahoma, No. 15-9173 [Decided 10.11.2016]

Holding: The Oklahoma Court of Criminal Appeals erred in concluding that it was not bound by the Supreme Court's holding in *Booth v. Maryland* that the Eighth Amendment prohibits a capital-sentencing jury from considering testimony by a victim's family members about the crime, the defendant, and the appropriate sentence.

White v. Pauly, No. 16-67 [Decided 1.9.2017]

Holding: The police officer did not violate clearly established law on the record described by the panel for the U.S. Court of Appeals for the 10th Circuit, which relied for its analysis on too high a level of generality rather than giving particularized consideration to the facts and circumstances of this case.

Pavan v. Smith, No. 16-992 [Decided 6.26.2017]

Holding: Having chosen to make its birth certificates more than mere markers of biological relationships and to use them to give married parents a form of legal recognition that is not available to unmarried parents, Arkansas may not, consistent with *Obergefell v. Hodges*, deny married same-sex couples that recognition.

North Carolina v. Covington, No. 16-1023 [Decided 06.05.2017]

Holding: In ordering special elections and suspending residency requirements in the state constitution after holding that 28 majority-black districts drawn by the North Carolina General Assembly were unconstitutional racial gerrymanders, the district court did not adequately grapple with the case-specific interests -- such as the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty -- on both sides of the remedial question.

Jenkins v. Hutton, No. 16-1116 [Decided 6.19.2017]

Holding: On the facts of this case, the U.S. Court of Appeals for the 6th Circuit was wrong to hold that it could review Percy Hutton's claim -- that the trial court violated his due process rights during the penalty phase of his trial -- under the miscarriage-of-justice exception to procedural default.

Virginia v. LeBlanc, No. 16-1177 [Decided 6.12.2017]

Holding: The Virginia trial court's ruling denying Dennis LeBlanc's motion to vacate his sentence in light of the Supreme Court's requirement in *Graham v. Florida* that a state give juvenile offenders convicted of a nonhomicide crime "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" -- a ruling which rested on the Virginia Supreme Court's earlier ruling in *Angel v. Commonwealth* that the state's geriatric release program satisfies this requirement -- was not objectively unreasonable in light of the U.S. Supreme Court's current case law.

Rippo v. Baker, No. 16-6316 [Decided 3.6.2017]

Holding: In reviewing Michael Rippo's application for state postconviction relief -- contending under the due process clause of the 14th Amendment that his trial judge, the target of a federal bribery probe, could not have impartially adjudicated the case -- the Nevada Supreme Court did not ask the question required by precedent: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.

Argued but rescheduled for next term

Jennings v. Rodriguez, No. 15-1204 [Arg: 10.03.2017]

Issue(s): (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

Sessions v. Dimaya, No. 15-1498 [Arg: 10.02.2017]

Issue(s): Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Amy Howe *Independent Contractor and Reporter*
Posted Sat, February 13th, 2016 11:55 pm

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Supreme Court vacancies in presidential election years

In the wake of the death of Justice Antonin Scalia, questions have arisen about whether there is a standard practice of not nominating and confirming Supreme Court Justices during a presidential election year. The historical record does not reveal any instances since at least 1900 of the president failing to nominate and/or the Senate failing to confirm a nominee in a presidential election year because of the impending election. In that period, there were several nominations and confirmations of Justices during presidential election years.

The first nomination during an election year in the twentieth century came on March 13, 1912, when President William Taft (a Republican) nominated Mahlon Pitney to succeed John Marshall Harlan, who died on October 14, 1911. The Republican-controlled Senate confirmed Pitney on March 18, 1912, by a vote of fifty to twenty-six.

President Woodrow Wilson (a Democrat) made two nominations during 1916. On January 28, 1916, Wilson nominated Louis Brandeis to replace Joseph Rucker Lamar, who died on January 2, 1916; the Democratic-controlled Senate confirmed Brandeis on June 1, 1916, by a vote of forty-seven to twenty-two. Charles Evans Hughes resigned from the Court on June 10, 1916 to run (unsuccessfully) for president as a Republican. On July 14, 1916, Wilson nominated John Clarke to replace him; Clarke was confirmed unanimously ten days later.

On February 15, 1932, President Herbert Hoover (a Republican) nominated Benjamin Cardozo to succeed Oliver Wendell Holmes, who retired on January 12, 1932. A Republican-controlled Senate confirmed Cardozo by a unanimous voice vote on February 24, 1932.

On January 4, 1940, President Franklin Roosevelt (a Democrat) nominated Frank Murphy to replace Pierce Butler, who died on November 16, 1939; Murphy was confirmed by a heavily Democratic Senate on January 16, 1940, by a voice vote.

On November 30, 1987, President Ronald Reagan (a Republican) nominated Justice Anthony Kennedy to fill the vacancy created by the retirement of Lewis Powell. A Democratic-controlled Senate confirmed Kennedy (who followed Robert Bork and Douglas Ginsburg as nominees for that slot) on February 3, 1988, by a vote of ninety-seven to zero.

In two instances in the twentieth century, presidents were not able to nominate and confirm a successor during an election year. But neither reflects a practice of leaving a seat open on the Supreme Court until after the election.

On September 7, 1956, Sherman Minton announced his intent to retire in a letter to President Dwight D. Eisenhower, and he served until October 15, 1956. With the Senate already adjourned, Eisenhower made a recess appointment of William J. Brennan to the Court shortly thereafter; Brennan was formally nominated to the Court and confirmed in 1957. The fact that Eisenhower put Brennan on the Court is inconsistent with any tradition of leaving a seat vacant.

And in 1968, President Lyndon B. Johnson nominated Abe Fortas, who was already sitting as an Associate Justice, to succeed Chief Justice Earl Warren, but the Fortas nomination was the target of a bipartisan filibuster – principally in reaction to the Warren Court's liberalism and ethical questions about Fortas, although objections were certainly also made that it was inappropriate to fill the seat in an election year. That filibuster prompted Homer Thornberry, whom Johnson nominated to succeed Fortas as an Associate Justice, to withdraw his name from consideration in October 1968, because there was no vacancy to fill. Moreover, the failure to confirm Fortas as the Chief Justice did not leave the Court short a Justice, because Chief Justice Earl Warren remained on the bench.

Tom Goldstein also contributed to this post.

Posted in Featured, Justice Scalia passes away, Nominations, Supreme Court history

Recommended Citation: Amy Howe, *Supreme Court vacancies in presidential election years*, SCOTUSBLOG (Feb. 13, 2016, 11:55 PM), http://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/

The New York Times | https://nyti.ms/2teIWg8

POLITICS

A Cautious Supreme Court Sets a Modern Record for Consensus

By ADAM LIPTAK JUNE 27, 2017

WASHINGTON — The Supreme Court was short-handed for most of the term that ended Monday, and it responded with caution, setting a modern record for consensus.

"Having eight was unusual and awkward," Justice Samuel A. Alito Jr. told a judicial conference a few days after Justice Neil M. Gorsuch joined the court in April. "That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions than we would have issued otherwise."

As Justice Alito's remarks suggested, the next term, starting in October, will be very different from the past one, which was defined by the long vacancy caused by the death of Justice Antonin Scalia in February 2016 and the court's strenuous efforts to avoid 4-4 votes.

The court has already agreed to hear cases on President Trump's travel ban, a clash between gay rights and claims of religious freedom, constitutional limits on partisan gerrymandering, cellphone privacy, human rights violations by corporations and the ability of employees to band together to address workplace issues.

"Chalk it up to pent-up demand," said Pratik A. Shah, a lawyer with Akin Gump Strauss Hauer & Feld. "The eight-member court dodged the most provocative or consequential cases, and the new nine-member court is making up for lost time."

The last term was marked by a level of agreement unseen at the court in more than 70 years. That resulted from a lack of divisive disputes on social issues and hard work by the justices, who often favored exceedingly narrow decisions to avoid deadlocks.

The court issued "a lot of what I'd call cautiously unanimous opinions — that is, opinions that are carefully written to decide cases on relatively narrow grounds and to steer clear of big jurisprudential tar pits," said Jeffrey L. Fisher, a law professor at Stanford.

The court did deadlock twice, in two immigration cases. Those cases will be reargued before all nine justices in the next term. The court also sent a case on a cross-border shooting back to a lower court for further consideration.

Recent terms have ended with blockbuster decisions on gay rights, abortion, affirmative action, health care and voting. "We got used to the idea that every year the court decides several of the biggest national political issues — six or seven consecutive 'terms of the century' — but this year saw a regression to the mean," said Ilya Shapiro, a lawyer with the libertarian Cato Institute.

Less consequential cases seemed to produce consensus. According to data from Lee Epstein, a law professor and political scientist at Washington University in St. Louis, the percentage of cases decided by a 5-to-4 or a 5-to-3 vote was 14 percent, compared with an average since 1946 of 22 percent.

Professor Epstein also devised another measure of consensus, dividing the number of votes in support of the majority or plurality opinion by the total number of votes cast. The last term's rate, 89 percent, was the highest in at least 70 years.

"This term showed that there is broad agreement across ideological lines, sometimes surprisingly broad, on some important areas of the law," said William M. Jay, a lawyer with Goodwin Procter. For instance, he said, "the court continues to

read the First Amendment to provide robust protection for free speech, even for unpopular speech or unpopular citizens."

There were, of course, major decisions that revealed deep divisions. One of them, Trinity Lutheran Church v. Comer, lowered the wall between church and state by a 7-to-2 vote.

"This case is about nothing less than the relationship between religious institutions and the civil government — that is, between church and state," Justice Sonia Sotomayor wrote in her dissent, which was joined by Justice Ruth Bader Ginsburg. "The court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."

In Ziglar v. Abbasi, the court ruled by a 4-to-2 vote that high-level officials in President George W. Bush's administration could not be sued for abuses they were accused of committing after the Sept. 11, 2001, attacks. In his dissent, Justice Stephen G. Breyer likened the decision to the Supreme Court's "refusal to set aside the government's World War II action removing more than 70,000 American citizens of Japanese origin from their West Coast homes and interning them in camps" in Korematsu v. United States.

But the justices also avoided hearing important disputes by dismissing an appeal in a case on transgender rights after the Trump administration shifted the government's position and by turning down appeals in cases concerning restrictive voting laws in Texas and North Carolina.

In addressing racial discrimination, the court issued a series of decisions that heartened liberals.

In Buck v. Davis, Chief Justice John G. Roberts Jr. wrote a forceful majority opinion siding with a Texas man who had been sent to death row based on testimony laced with what the chief justice called "a particularly noxious strain of racial prejudice." In Peña Rodriguez v. Colorado, Justice Anthony M. Kennedy, writing for the majority, said courts must make an exception to the usual rule that jury deliberations are secret when evidence emerges that those discussions were tainted

by racism. “Racial bias implicates unique historical, constitutional and institutional concerns,” he wrote.

In Bank of America v. Miami, Chief Justice Roberts provided the crucial fifth vote, joining the court’s four-member liberal bloc, to allow Miami to sue two banks for predatory lending under the Fair Housing Act of 1968.

The decisions amounted to a small but significant trend, said Elizabeth Wydra, the president of the Constitutional Accountability Center, a liberal group. “Just as we have recently seen Justice Kennedy more willing to acknowledge systemic racism in his recent affirmative action and fair housing opinions,” she said, “this term saw Chief Justice Roberts vote in a rather surprising — but welcome — way to acknowledge racial bias in the criminal justice system and make it easier for cities to sue over discriminatory mortgage lending practices.”

If the court leaned left in cases concerning race, it continued to lean right in business cases.

“The court added to its recent track record as a business-friendly forum, particularly on the class-action and arbitration front,” Mr. Shah said. “And class plaintiffs may have even more at stake next term.”

He was referring to three cases in which the court will decide whether employees may band together in legal actions to address workplace issues. The cases are the court’s latest encounter with expansive arbitration clauses.

The Obama administration supported the workers in the dispute. The Trump administration, in an unusual move in a pending case, switched sides.

The court is also likely to revisit an issue that makes the labor movement nervous: whether workers who choose not to join public sector unions may be forced to pay fees for the unions’ collective bargaining efforts.

Justice Gorsuch’s early votes were reliably conservative, and he seemed poised to take a place on the far-right side of the court’s ideological spectrum alongside its two most conservative members, Justices Clarence Thomas and Alito. Justice

Gorsuch's first consequential vote was to deny a stay of execution to death row inmates in Arkansas over the dissents of the court's four-member liberal bloc.

Not every case was freighted with ideology. Lisa S. Blatt, a lawyer with Arnold & Porter Kaye Scholer, said a theme ran through any number of cases involving colorful disputes. "The court had no difficulty rallying around the little guy vis-à-vis the government in the name of fairness," she said.

In Fry v. Napoleon Community Schools, for instance, the court unanimously ruled in favor of a girl with cerebral palsy who sought to take her service dog, a goldendoodle named Wonder, to school. And in Nelson v. Colorado, the court ruled that states may not keep fines and restitution paid by defendants whose convictions were overturned.

There will be bigger Supreme Court terms. But the one that just ended was valuable, said William Baude, a law professor at the University of Chicago.

"It has been a quiet term, and that is a good thing for the country," he said. "Over all, this year the court was the least dramatic, and most functional, branch of government."

"We will look back on this term," he added, "as the calm before the storm."

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A version of this article appears in print on June 28, 2017, on Page A16 of the New York edition with the headline: A Cautious Supreme Court Sets a Modern Record for Consensus.

October Term 2017

View this list sorted by case name.

October Sitting

Epic Systems Corp. v. Lewis, No. 16-285 [Arg: 10.02.2017 Trans. /Aud.]

Issue(s): Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

National Labor Relations Board v. Murphy Oil USA, No. 16-307 [Arg: 10.02.2017 Trans. /Aud.]

Issue(s): Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2.

Ernst & Young LLP v. Morris, No. 16-300 [Arg: 10.02.2017 Trans. /Aud.]

Issue(s): Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Sessions v. Dimaya, No. 15-1498 [Arg: 10.02.2017 Trans. /Aud.]

Issue(s): Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

Jennings v. Rodriguez, No. 15-1204 [Arg: 10.03.2017 Trans. /Aud.]

Issue(s): (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

Gill v. Whitford, No. 16-1161 [Arg: 10.03.2017 Trans. /Aud.]

Issue(s): (1) Whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis; (2) whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles; (3) whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*; (4) whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed; and (5) whether partisan-gerrymandering claims are justiciable.

District of Columbia v. Wesby, No. 15-1485 [Arg: 10.04.2017 Trans. /Aud.]

Issue(s): (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2)

whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

Class v. U.S., No. 16-424 [Arg: 10.04.2017 Trans. /Aud.]

Issue(s): Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

Hamer v. Neighborhood Housing Services of Chicago, No. 16-658 [Arg: 10.10.2017 Trans.]

Issue(s): Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the U.S. Courts of Appeals for the 2nd, 4th, 7th and 10th Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the U.S. Courts of Appeals for the 9th and District of Columbia Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver and the unique-circumstances doctrine.

National Association of Manufacturers v. Department of Defense, No. 16-299 [Arg: 10.11.2017 Trans.]

Issue(s): Whether the U.S. Court of Appeals for the 6th Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F), the portion of the Clean Water Act's judicial review provision that requires that agency actions "in issuing or denying any permit" under Section 1342 be reviewed by the court of appeals, to decide petitions to review the waters-of-the-United-States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

Jesner v. Arab Bank, PLC, No. 16-499 [Arg: 10.11.2017 Trans.]

Issue(s): Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.

November Sitting

Ayestas v. Davis, No. 16-6795 [Arg: 10.30.2017]

Issue(s): Whether the U.S. Court of Appeals for the 5th Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.

Wilson v. Sellers, No. 16-6855 [Arg: 10.30.2017]

Issue(s): Whether the court's decision in *Harrington v. Richter* silently abrogates the presumption set forth in *Ylst v. Nunnemaker* – that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision – as a slim majority of the en banc U.S. Court of Appeals for the 11th Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply.

U.S. Bank National Association v. Village at Lakeridge, No. 15-1509 [Arg: 10.31.2017]

Issue(s): Whether the appropriate standard of review for determining non-statutory insider status is the de novo standard of review applied by the U.S. Courts of Appeals for the 3rd, 7th and 10th Circuits, or the clearly erroneous standard of review adopted for the first time by the U.S. Court of Appeals for the 9th Circuit in this action.

Artis v. District of Columbia, No. 16-460 [Arg: 11.1.2017]

Issue(s): Whether the tolling provision in 28 U.S.C. § 1367(d) suspends the limitations period for the state-law claim while the claim is pending and for 30 days after the claim is dismissed, or whether the tolling provision does not suspend the limitations period but merely provides 30 days beyond the dismissal for the plaintiff to refile.

Leidos v. Indiana Public Retirement System, No. 16-581 [Arg: 11.6.2017]

Issue(s): Whether the U.S. Court of Appeals for the 2nd Circuit erred in holding – in direct conflict with the decisions of the U.S. Courts of Appeals for the 3rd and 9th Circuits – that Item 303 of Securities and Exchange Commission Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

Merit Management Group, LP v. FTI Consulting, No. 16-784 [Arg: 11.6.2017]

Issue(s): Whether the safe harbor of Section 546(e) of the Bankruptcy Code prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the U.S. Courts of Appeals for the 2nd, 3rd, 6th, 8th, and 10th Circuits, but contrary to the decisions from the U.S. Courts of Appeals for the 7th and 11th Circuits.

Patchak v. Zinke, No. 16-498 [Arg: 11.7.2017]

Issue(s): Whether a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this court's determination that the "suit may proceed") – without amending the underlying substantive or procedural laws – violates the Constitution's separation of powers principles.

Husted v. A. Philip Randolph Institute, No. 16-980 [Arg: 11.8.2017]

Issue(s): Whether 52 U.S.C. § 20507 permits Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002.

December Sitting

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, No. 16-712 [Arg: 11.27.2017]

Issue(s): Whether inter partes review, an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

SAS Institute Inc. v. Matal, No. 16-969 [Arg: 11.27.2017]

Issue(s): Whether 35 U.S.C. § 318(a), which provides that the Patent Trial and Appeal Board in an inter partes review "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner," requires that Board to issue a final written decision as to every claim challenged by the petitioner, or whether it allows that Board to issue a final written decision with respect to the patentability of only some of the patent claims challenged by the petitioner, as the U.S. Court of Appeals for the Federal Circuit held.

Digital Realty Trust v. Somers, No. 16-1276 [Arg: 11.28.2017]

Issue(s): Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the act's definition of "whistleblower."

Cyan v. Beaver County Employees Retirement Fund, No. 15-1439 [Arg: 11.28.2017]

Issue(s): Whether state courts lack subject matter jurisdiction over covered class actions that allege only Securities Act of 1933 claims.

Carpenter v. U.S., No. 16-402 [Arg: 11.29.2017]

Issue(s): Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment.

Rubin v. Islamic Republic of Iran, No. 16-534 [Arg: 12.4.2017]

Issue(s): Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether assets are otherwise subject to execution under Section 1610.

Christie v. National Collegiate Athletic Association, No. 16-476 [Arg: 12.4.2017]

Issue(s): Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.

New Jersey Thoroughbred Horsemen's Association v. National Collegiate Athletic Association, No. 16-477 [Arg: 12.4.2017]

Issue(s): Whether a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States* and *Printz v. United States*.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, No. 16-111 [Arg: 12.5.2017]

Issue(s): Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

Marinello v. U.S., No. 16-1144 [Arg: 12.5.2017]

Issue(s): Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action.

Murphy v. Smith, No. 16-1067 [Arg: 12.6.2017]

Issue(s): Whether the parenthetical phrase "not to exceed 25 percent," as used in 42 U.S.C. § 1997e(d)(2), means any amount up to 25 percent (as four circuits hold), or whether it means exactly 25 percent (as the U.S. Court of Appeals for the 7th Circuit holds).

Cases Not (Yet) Set for Argument

Dalmazzi v. U.S., No. 16-961

Issue(s): (1) Whether the Court of Appeals for the Armed Forces erred in holding that the petitioner's challenge to Judge Martin T. Mitchell's continued service on the U.S. Air Force Court of Criminal Appeals, after he was nominated and confirmed to the Article I U.S. Court of Military Commission Review, was moot – because his CMCR commission had not been signed until after the U.S. Air Force CCA decided her case on the merits, even though she moved for reconsideration after the commission was signed; (2) whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii), which requires express authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate"; (3) whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the appointments clause; and (4) whether the Supreme Court has jurisdiction to review this case and *Cox v. United States* under 28 U.S.C. § 1259(3).

Cox v. U.S., No. 16-1017

Issue(s): (1) Whether the U.S. Court of Appeals for the Armed Forces erred in holding that petitioners' claims—which asserted that a judge's service on the U.S. Court of Military Commission Review disqualifies him or her from continuing to serve on either the Army or Air Force Court of Criminal Appeals under 10 U.S.C. § 973(b)(2)(A)(ii)—were moot; (2) whether these judges' service on the U.S. Court of Military Commission Review disqualifies them from continuing to serve on the Army or Air Force Court of Criminal Appeals under 10 U.S.C. § 973(b)(2)(A)(ii); (3) whether the judges' simultaneous service on both the U.S Court of Military Commission Review and the Army or Air Force Court of Criminal Appeals violates the appointments clause; and (4) whether the Supreme Court has jurisdiction to review this case and *Dalmazzi v. United States* under 28 U.S.C. § 1259(3).

Collins v. Virginia, No. 16-1027

Issue(s): Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house.

Hall v. Hall, No. 16-1150

Issue(s): Whether the clarity *Gelboim v. Bank of America* gave to multidistrict cases should be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case.

Encino Motorcars, LLC v. Navarro, No. 16-1362

Issue(s): Whether service advisors at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the Fair Labor Standards Act's overtime-pay requirements.

Byrd v. U.S., No. 16-1371

Issue(s): Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

Ortiz v. U.S., No. 16-1423

Issue(s): (1) Whether Judge Martin T. Mitchell's service on the U.S. Court of Military Commission Review disqualified him from continuing to serve on the U.S. Air Force Court of Criminal Appeals under 10 U.S.C. § 973(b)(2)(A)(ii); (2) whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the appointments clause; and (3) whether the Supreme Court has jurisdiction to review *Dalmazzi v. United States* and *Cox v. United States* under 28 U.S.C. § 1259(3).

Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466

Issue(s): Whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

City of Hays, Kansas v. Vogt, No. 16-1495

Issue(s): Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

Trump v. Hawaii, No. 16-1540

Issue(s): (1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable; (2) whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause; (3) whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad; and (4) whether the challenges to Section 2(c) became moot on June 14, 2017.

McCoy v. Louisiana, No. 16-8255

Issue(s): Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

Rosales-Mireles v. U.S., No. 16-9493

Issue(s): Whether, in order to meet the standard for plain error review set forth by the Supreme Court in *United States v. Olano* that "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings,'" it is necessary, as the U.S. Court of Appeals for the 5th Circuit required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge."

Texas v. New Mexico and Colorado, No. 220141

Issue(s): Whether New Mexico is in violation of the Rio Grande Compact and the Rio Grande Project Act, which apportion water to Rio Grande Project beneficiaries.

Florida v. Georgia, No. 220142

Issue(s): Whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region. **CVSG: 09/18/2014.**

United States v. Marinello

United States Court of Appeals for the Second Circuit

February 11, 2016, Argued; October 14, 2016, Decided

Docket No. 15-2224

Reporter
839 F.3d 209 *; 2016 U.S. App. LEXIS 18498 **; 2016-2 U.S. Tax Cas. (CCH) P50,453; 118 A.F.T.R.2d (RIA) 6127

UNITED STATES OF AMERICA, Appellee, v. CARLO J. MARINELLO, II, Defendant—Appellant.

Subsequent History: Rehearing, en banc, denied by ***United States v. Marinello***, *855 F.3d 455, 2017 U.S. App. LEXIS 2686 (2d Cir., Feb. 15, 2017)*

US Supreme Court certiorari granted by *Marinello v. United States, 2017 U.S. LEXIS 4267 (U.S., June 27, 2017)*

Prior History: Defendant-appellant Carlo J. Marinello, II appeals from an amended judgment of conviction entered against him on July 14, 2015 by the United States District Court for the Western District of New York (William M. Skretny, J.). One of the counts of conviction alleged a violation of *26 U.S.C. § 7212(a)* **[**1]** 's "omnibus clause," which criminally penalizes one who "corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of" the Internal Revenue Code in ways not addressed by other specific provisions of the statute. The district court denied Marinello's motion for an acquittal or a new trial on this count, concluding that the government was not required to establish a pending Internal Revenue Service action and a defendant's knowledge thereof as part of its burden of proof. We agree and conclude that these criteria are not offense elements under the omnibus clause. We further conclude that a violation of this provision may be predicated on an omission, and that the district court did not procedurally err in determining Marinello's sentence. The judgment of the district court is therefore.

United States v. Marinello, *2012 U.S. Dist. LEXIS 93902 (W.D.N.Y., July 6, 2012)*

Disposition: AFFIRMED.

Core Terms

omnibus clause, obstruct, district court, impede, due administration, Sentencing, indictment, tax return, Courier, corruptly, records, omission, acceptance of responsibility, convicted, endeavors, due administration of justice, tax loss, reduction, calculate, corrupt, judicial proceeding, returns, counts, superseding, unanimity, Probation, restitution amount, fail to file, two-level, expenses

Case Summary

Overview

HOLDINGS: [1]-Defendant's motion for acquittal or new trial on his conviction for violating *26 U.S.C.S. § 7212(a)*'s omnibus clause was properly denied because the government was not required to establish a pending IRS action and defendant's knowledge thereof as part of its burden of proof, and a violation of that provision could be predicated on an omission; [2]-The district court properly determined defendant's sentence by using the manner of calculating the tax loss and restitution amounts that it did as defendant was afforded some opportunity to dispute the tax loss and restitution amounts and to respond to the government's arguments with respect to his tax returns; [3]-Defendant was properly denied an acceptance of responsibility reduction under *USSG § 3E1.1* because his offer to plead guilty to some counts of the indictment provided limited evidence of acceptance of responsibility.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN1 **Tax, Criminal Tax Offenses**

One portion of *26 U.S.C.S. § 7212(a)* imposes criminal liability on one who corruptly or by force or threats of force endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title (i.e., the Internal Revenue Code). Another portion, often referred to as the omnibus clause, imposes criminal liability on one who in any other way corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title. *§ 7212(a)*.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2 **Standards of Review, De Novo Review**

A district court's interpretation of a federal criminal statute is a question of law subject to de novo review by the court of appeals.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN3 **De Novo Review, Jury Instructions**

A defendant's challenge to a jury instruction is reviewed de novo.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN4 **Reversible Error, Jury Instructions**

The appellate court will conclude that the district court committed reversible error if its instruction either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

HN5 **Standards of Review, Abuse of Discretion**

The appellate court reviews the procedural reasonableness of a sentence under a deferential abuse-of-discretion standard. A district court commits procedural error if, as relevant here, it fails to calculate (or improperly calculates) the Sentencing Guidelines range or selects a sentence based on clearly erroneous facts. Decisions as to the procedures used to resolve sentencing disputes, including disputes concerning an order of restitution, are reviewed for abuse of discretion, and are within the district court's discretion so long as the defendant is given an adequate opportunity to present his position.

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN6 **Tax, Criminal Tax Offenses**

26 U.S.C.S. § 7212(a) criminalizes certain attempts to interfere with the administration of internal revenue laws. Under *§ 7212(a)*, whoever (1) corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or (2) in any other way corruptly or by force or threats of force (including any

threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined or imprisoned, or both. The first clause addresses conduct specifically directed toward federal officers or employees in the discharge of their duties under Title 26 of the United States Code, the Internal Revenue Code. The second clause, the omnibus clause, is a catch-all provision that criminalizes any other way of corruptly obstructing or impeding the due administration of the Internal Revenue Code. The term corruptly within the meaning of this section encompasses conduct that has the intent to secure an unlawful advantage or benefit either for one's self or for another.

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

A canon of statutory construction is that courts will presume that Congress knew of the prevailing law when it enacted the statute at issue.

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN8[] **Tax, Criminal Tax Offenses**

26 U.S.C.S. § 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation.

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN9[] **Tax, Criminal Tax Offenses**

The Department of Justice's internal tax division policy states that the omnibus clause of *26 U.S.C.S. § 7212(a)* may be used to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties. Pursuant to this policy, a defendant may be charged under the omnibus clause in the absence of a pending IRS action.

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN10[] **Waiver, Triggers of Waivers**

The appellate court does not address an argument that the district court has not previously considered.

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN11[] **Tax, Criminal Tax Offenses**

26 U.S.C.S. § 7212(a) broadly prohibits corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the tax laws in any other way.

Business & Corporate Compliance > ... > Tax Law > Federal Tax Administration & Procedures > Criminal Offenses & Penalties

HN12[] **Tax, Criminal Tax Offenses**

An omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code under *26 U.S.C.S. § 7212(a)*.

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN13[] **Waiver, Triggers of Waivers**

Arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.

Criminal Law & Procedure > Sentencing > Imposition of Sentence

HN14[] **Sentencing, Imposition of Sentence**

A district court is not required, by either the Due Process Clause or the federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes. All that is required is that the court afford the defendant some opportunity to rebut the government's allegations.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Acceptance of Responsibility

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review

HN15[] **Adjustments & Enhancements, Acceptance of Responsibility**

A district court's finding that a defendant did not clearly demonstrate acceptance of responsibility for his offense is a decision to which the appellate court accords great deference on review. U.S. Sentencing Guidelines Manual § 3E1.1(a) and cmt. 5.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Acceptance of Responsibility

HN16[] **Adjustments & Enhancements, Acceptance of Responsibility**

An offer to plead guilty to some counts of an indictment provides limited evidence of acceptance of responsibility; even a defendant who pleads guilty is not guaranteed to receive the adjustment for acceptance of responsibility. U.S. Sentencing Guidelines Manual § 3E1.1, cmt. 3.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Acceptance of Responsibility

HN17[] **Adjustments & Enhancements, Acceptance of Responsibility**

The acceptance of responsibility adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.

Counsel: JOSEPH M. LATONA, Buffalo, NY, for Defendant—Appellant.

RUSSELL T. IPPOLITO, JR., **[**2]** Assistant United States Attorney, Buffalo, NY, for William J. Hochul, Jr., United States Attorney for the Western District of New York, Appellee.

Judges: Before: POOLER and SACK, Circuit Judges, and FAILLA, District Judge.*

Opinion by: SACK

Opinion

[*211] SACK, *Circuit Judge*:

Defendant-appellant Carlo J. Marinello, II, a resident of Erie County in western New York State, owned and operated a freight service that couriered items to and from the United States and Canada. From approximately 1992 through 2010, Marinello neither kept corporate books or records nor filed personal or corporate income tax returns. Following an investigation by the Internal Revenue Service (the "IRS"), he was indicted by a grand jury sitting in the United States District Court for the Western District of New York on nine counts of tax-related offenses that allegedly occurred from 2005 through 2009. A jury found him guilty on all counts. He was sentenced to thirty-six months' imprisonment and one year of supervised release, and ordered to pay $351,763.08 to the IRS in restitution.

Under one of the counts of conviction, Marinello **[**3]**

* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

was charged with violating *26 U.S.C. § 7212(a)*. ***HN1***[ ] One portion of the statute imposes criminal liability on one who "corruptly or by force or threats of force . . . endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title" (i.e., the Internal Revenue Code). *Id.* Another portion, often referred to as the "omnibus clause," imposes criminal liability on one who "in any other way corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title." *Id.* Marinello was charged with violating the omnibus clause.

On appeal, Marinello principally argues that we, like the Sixth Circuit addressing the same issue, should construe the phrase "the due administration of this title" in the omnibus clause to include only a pending IRS action of which a defendant was aware. He contends that his conviction under *section 7212(a)* cannot stand under this construction because the government offered no evidence at trial that he knew of a pending IRS investigation against him at the time of the actions on which the conviction was based. He also argues that a conviction under the omnibus clause cannot be premised on a defendant's omission, **[**4]** as it may have been in the case at bar, and that the district court committed procedural error during the sentencing proceedings.

We exercise jurisdiction under *18 U.S.C. § 3742(a)* and *28 U.S.C. § 1291*, and affirm Marinello's conviction and sentence.

BACKGROUND

Factual Background

In 1990, Marinello incorporated Express Courier Group/Buffalo, Inc. ("Express Courier"), a New York corporation. Express Courier maintained a freight service that couriered documents and packages between the United States and Canada. Despite owning and managing the company, Marinello maintained little documentation of his business income or expenses. He shredded or discarded most of the business's records, including bank account statements, employee work statements, gas receipts, and bills. Marinello paid his employees in cash and did not issue them (or himself) tax documents such as familiar Form 1099s or Form W-2s. He often used Express Courier's funds for personal purposes, including mortgage payments on his residence (made indirectly through weekly cash contributions to his wife) and monthly **[*212]** payments to his mother's senior living center.

In December 2004, the IRS received an anonymous letter purporting to outline some of Marinello's business **[**5]** practices and accusing him of tax evasion. IRS Special Agent Angela Klimczak was assigned to investigate those allegations. Upon reviewing its own records, the IRS discovered that, from at least 1992 onward, Marinello failed to file personal or corporate income tax returns. Ultimately, Agent Klimczak recommended that the investigation be closed because the IRS could not at that time determine whether the unreported income was significant. Marinello had no knowledge of this investigation.

In 2005, Marinello sought the advice of counsel, whom he informed of his failure to file his tax returns. Counsel told Marinello that this failure to file was improper and referred him to an accounting firm for a consultation. Allan Wiegley, a certified public accountant at that firm, told Marinello that he needed to provide records of business receipts and expenses in order to pay corporate taxes with respect to Express Courier and its business. Marinello was unable to do so: He had destroyed or failed to keep the documents.

Marinello met with Wiegley again the following year to discuss a different matter. During the meeting, Marinello stated that he had made no progress in gathering Express Courier's **[**6]** business records. Wiegley declined to enter into a contract to perform accounting services for Express Courier or Marinello because there was inadequate documentation for him to prepare a corporate tax return. Despite the advice from counsel and two meetings with Wiegley, Marinello did not begin maintaining books and records for Express Courier.

In each of the years 2005 through 2008, Express Courier had generated annual total gross receipts of between $200,718.88 and $445,184. During each of those years, Marinello took approximately $26,000 to $50,000 from Express Courier's business account and spent it in payment of his personal expenses.

The IRS re-opened its investigation of Marinello in 2009. On June 1, 2009, Agent Klimczak conducted an interview of Marinello at his home. He told her that he could not recall the last time he had filed an income tax return. He initially maintained that he did not file tax returns because he thought they were not required for persons who made less than $1,000 per year. He eventually admitted that he had earned more than that amount annually and should have paid taxes, but "never got around to it." Testimony of Angela Klimczak, August

6, 2014, Trial **[**7]** Transcript ("Trial Tr.") at 172 (App'x 181). He stated that he used business income (by cashing checks from Express Courier's customers and depositing a portion of them into his personal bank account) as well as his business bank account to pay for personal expenses. He confirmed that he shredded bank statements and that he did not keep track of Express Courier's income or expenses. He also remembered telling an accountant that he shredded most of his business records. Marinello explained that he destroyed these documents because "that's what [he had] been doing all along" and that he "took the easy way out." *Id.* at 194 (App'x 203).

Procedural History

On October 16, 2012, in the United States District Court for the Western District of New York, Marinello was charged in a superseding indictment with corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue laws, in violation of *26 U.S.C. § 7212(a)* (Count One), and willfully failing **[*213]** to file individual and corporate tax returns for calendar years 2005 through 2008, in violation of *26 U.S.C. § 7203* (Counts Two through Nine). Count One alleged that Marinello had violated *section 7212(a)* by, "among other thing[s]":

> (1) failing to maintain corporate books and records for [Express Courier] **[**8]** of which the defendant was an employee, officer, owner and operator;
> (2) failing to provide the defendant's accountant with complete and accurate information related to the defendant's personal income and the income of Express Courier;
> (3) destroying, shredding and discarding business records of Express Courier;
> (4) cashing business checks received by Express Courier for services rendered;
> (5) hiding income earned by Express Courier in personal and other non-business bank accounts;
> (6) transferring assets to a nominee;
> (7) paying employees of Express Courier with cash; and
> (8) using business receipts and money from business accounts to pay personal expenses, including the mortgage for the residence in which the defendant resided and expenses related to the defendant's mother's care at a senior living center.

Superseding Indictment, dated October 16, 2012, at 1-2 (App'x 75-76) (formatting altered).[1]

Before trial, Marinello sought an instruction that "the jury . . . be unanimous on at least one of the means under which the government . . . alleged [that] [he] ha[d] violated [title 26 *section 7212(a)*]" in order to convict him of that offense. Defendant's Requested Jury Instruction, dated September 25, 2012, at 1 (App'x 41). If any juror harbored a reasonable doubt on any one of the means alleged, the instruction required an acquittal on Count One. *Id.* The government opposed this proposal as a misstatement of the law, contending that it was not required to prove all of the means specified in Count One.

At a pre-trial conference, the district court (William M. Skretny, *Judge*) reserved ruling on the proposed jury instruction until trial. During that conference, Marinello's counsel represented that there was "no question [that Marinello] did not file his tax returns, corporate and personal," and that he had advised Marinello "to take a plea" to Counts Two through Nine. *See* Transcript of pre-trial conference, October 4, 2012, at 2 (App'x 60). But Marinello declined to plead guilty to **[**10]** Count One, a felony. App'x 60-61.

Marinello subsequently moved for submission to the jury of a special verdict form requiring the jury to indicate whether it found him guilty or not guilty regarding each of the eight means of violating *section 7212(a)* alleged in Count One of the superseding indictment. By text order, the district court deferred ruling on this request until trial.

At trial, defense counsel conceded that Marinello did not file his tax returns[2] but **[*214]** argued that Marinello could not be convicted on Count One because he lacked the requisite criminal intent under *section 7212(a)*, inasmuch as he did not "corruptly" obstruct or impede the administration of the Internal Revenue

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[1] The original indictment alleged a ninth means of corrupt obstruction under Count One: "failing to file with the [IRS] personal income tax returns and corporate tax returns for Express Courier." Indictment, dated February 14, 2012, at 2 (App'x 25). In response to Marinello's motion to strike this allegation **[**9]** as duplicitous of the remaining counts of the indictment, the government filed the superseding indictment, which removed it.

[2] The parties further stipulated that Marinello did not file with the IRS personal tax returns or corporate tax returns for Express Courier for tax periods 1992 through 2010. August 6, 2014 Trial Tr. at 64 (App'x 140).

Code.[3] Defense counsel further argued that Marinello must have affirmatively "do[ne] something," "[l]ike file a phony return," to be guilty of this offense. August 6, 2014 Trial Tr. at 55 (App'x 132).

Over Marinello's objection, the district court declined to instruct the jury that it had to unanimously agree on at least one of the eight specified means by which Marinello allegedly violated *section 7212(a)* to find him guilty under that section. No special verdict form was provided to the jury with respect to this offense. Instead, the district court instructed the jury as to the underlying means contained in Count One as follows:

> [T]he indictment alleges multiple methods in which the crime [of violating *section 7212(a)*'s omnibus clause] can be committed, but the government does not have to prove all of them for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of the obstructive acts listed in the indictment is enough. To return a guilty verdict, all 12 of you must agree that at least one of these has been proved.
> However, all of you need not agree that the same one has been proved.

August 11, 2014 Trial **[**12]** Tr. at 471 (App'x 433).

The jury convicted Marinello on all counts. He then moved for a judgment of acquittal or a new trial under *Federal Rules of Criminal Procedure 29* and *33*, respectively, which the government opposed.[4] Marinello argued, *inter alia*, that the phrase "the due administration of this title" in *section 7212(a)* refers exclusively to pending IRS investigations, and that a defendant may be convicted under the statute only if he knowingly interferes with such an investigation. Employing that construction of the statute, which the Sixth Circuit had previously adopted in *United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998)*, Marinello contended that he should be acquitted because there was no evidence that he had become aware of the IRS's investigation until his June 1, 2009, interview with Agent Klimczak, which occurred after the offense conduct alleged in the superseding indictment had already taken place.

The district court declined to construe *section 7212(a)* that narrowly. Noting that a later panel of the Sixth Circuit had limited *Kassouf* to its facts, and that other courts had declined to follow the *Kassouf* court's reasoning, the district court concluded that "[k]nowledge of a pending [IRS] investigation **[**13]** is not an essential element of the crime." *Decision and Order, **United States v. Marinello**, No. 12 Cr. 53S, 2015 U.S. Dist. LEXIS 181989, *8 (W.D.N.Y. June 26, 2015)* (App'x 549-50) (citing *United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999)* and *United States v. Willner, No. 07 Cr. 183(GEL), 2007 U.S. Dist. LEXIS 75597, at *10-11, 2007 WL 2963711, at *4 (S.D.N.Y. Oct. 11, 2007)* (collecting cases)). In the court's view, "[t]he jury was entitled to infer . . . that Marinello acted **[*215]** corruptly to impede or obstruct the due administration of the Internal Revenue laws" by otherwise hindering the collection of taxes due. *2015 U.S. Dist. LEXIS 181989 at *8 (App'x 549)*.

In the defendant's Presentence Investigation Report (the "PSR"), the Probation Office calculated the total tax loss from Marinello's activities as approximately $598,215.53 by applying a percentage-based formula to his gross income from 2005 through 2008. *See* U.S. Sentencing Guidelines Manual (hereinafter, "*U.S.S.G.") § 2T1.1(c)(2)(A)* (U.S. Sentencing Comm'n 2014) (indicating that this formula should be used "unless a more accurate determination of the tax loss can be made"). The total tax loss resulted in a base offense level of twenty. *See U.S.S.G. §§ 2T1.1(a)(1)*, *2T4.1(H)-(I)* (specifying, for offenses involving willful failure to file returns, a base offense level of 20 where the tax loss is "[m]ore than $400,000" but not more than $1,000,000). A two-level enhancement to the base offense level was applied because Marinello's conviction under Count **[**14]** One implicated an adjustment for obstructing or impeding the administration of justice. *See U.S.S.G. § 3C1.1*. Marinello was also deemed ineligible for the two-level reduction for acceptance of responsibility. *See U.S.S.G. § 3E1.1(a)*. In the view of the Probation Office, Marinello had not clearly demonstrated an acceptance of responsibility for his offense conduct in part because he continued to decline to accept responsibility for the obstruction charge and insisted there was a legal basis to contest this issue. Thus, with a criminal history category of one and a total offense level of twenty-two, Marinello's advisory

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[3] As to the remaining counts, Marinello argued that he was not guilty because the government could not prove he "willfully" failed to file **[**11]** his tax returns. August 6, 2014 Trial Tr. at 50 (App'x 127). *See 26 U.S.C. § 7203* ("Any person required under this title . . . to make a return . . . who willfully fails to . . . make such return . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .").

[4] Before the defense rested at trial, Marinello also made a motion pursuant to *Rule 29*, which was denied by oral order.

Guidelines range for sentencing was forty-one to fifty-one months. The Probation Office also determined that Marinello owed the IRS $331,348.08 in corporate income taxes and $20,415 in personal income taxes from 2005 to 2008, and recommended that those amounts be imposed by the court's restitution order.

Marinello filed objections to the findings in the PSR, two of which are relevant to this appeal. First, he argued that the tax loss and restitution amounts were incorrectly calculated. According to Marinello, "a more accurate determination of tax loss c[ould] be made" based on the actual corporate and personal **[**15]** tax returns he ultimately filed, years after the fact, for tax years 2005 through 2008. Objections to the [PSR] and Statement With Respect to Sentencing Factors, dated January 14, 2015, at 2-3 (App'x 514-15) (quoting *U.S.S.G. § 2T1.1(c)(2)(A)* (emphasis removed)). These returns reflected a tax loss of only $48,890, which would have yielded a base offense level of fourteen instead of twenty. *See* *U.S.S.G. § 2T4.1(E)*. Marinello further asserted that any restitution was also capped at the $48,890 amount.

Second, Marinello urged that the two-level reduction for acceptance of responsibility was applicable.[5] He argued that his conduct merited the reduction because he admitted to keeping poor business records and not paying his taxes; was previously willing to plead to the misdemeanor Counts Two through Nine; and proceeded to trial only to preserve a dispute concerning whether he could be held criminally liable under the *section 7212(a)* obstruction charge.

In response, the government asserted that there were a variety of inaccuracies in Marinello's proffered tax returns (such as using an incorrect **[**16]** filing status and improperly **[*216]** claiming his mother as a dependent), which rendered them unreliable for purposes of calculating either an alternative tax loss or restitution amount. The government further contended that the two-level reduction for acceptance of responsibility was inapplicable because Marinello was evasive during his discussions with Agent Klimczak at the June 1, 2009, interview, disputed that he acted with the requisite *mens rea* to be convicted under Count One, and stated at the time the PSR was prepared that he did not accept responsibility for the obstruction charge.

In his reply brief, Marinello did not address any of the alleged inaccuracies the government highlighted in his tax returns. He continued to argue, however, that he deserved the reduction for acceptance of responsibility.

During Marinello's sentencing proceedings, the district court concluded that Marinello's alternative calculation of the tax loss and restitution at issue could not be used in light of the discrepancies the government identified in his proffered tax returns. The court therefore adopted the Probation Office's calculations of those figures and denied Marinello's first objection. His second **[**17]** objection concerning the acceptance of responsibility reduction was also denied based on the court's view that his case was not one of the "rare" situations specified in the Guidelines where the reduction is appropriate even though the defendant exercised his constitutional right to proceed to trial. Transcript of Sentencing ("Sentencing Tr."), July 1, 2015, at 12 (App'x 566) (applying *U.S.S.G. § 3E1.1 cmt. 2*).

Marinello addressed the court prior to sentencing. He stated that he realized he had made a mistake, but that he did not accept the over half million dollar tax loss calculation by "a probation officer who probably without using an adding machine can't add a column of numbers together." *Id.* at 19 (App'x 573). After the district court observed that Marinello "expressed no remorse whatsoever," Marinello responded:

> I have complete remorse. I have absolutely complete remorse. I was overwhelmed by the job. I was overwhelmed by everything. Business went—turned south. And I tried to keep the company afloat.
>
> I'm 69 years of age. I should be retired, and I'm working every day of the week. Every month the [IRS] gets a check.

Id. at 20 (App'x 574). The government underscored that the defendant's comments demonstrated that he clearly did not accept **[**18]** responsibility for his actions.

Adopting the criminal history category, total offense level, and Guidelines range recommended by the Probation Office, the district court imposed a below-Guidelines sentence of thirty-six months' imprisonment and one year of supervised release. The district court also imposed restitution in the amount of $351,763.08, as recommended by the Probation Office. Following the entry of an amended judgment, this timely appeal followed.

[5] Marinello did not argue that he was eligible for an additional one-level reduction under *U.S.S.G. § 3E1.1(b)*, nor does he make any argument with respect to this provision on appeal.

DISCUSSION

Marinello makes three arguments on appeal. First, he urges us to adopt the Sixth Circuit's interpretation of the phrase "the due administration of this title" in section 7212(a), as set forth in United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998), which requires the prosecution to establish the defendant's knowledge of a pending IRS action[6] in order to support a conviction **[*217]** under the omnibus clause. Marinello seeks reversal of his conviction on Count One and dismissal of that count from the superseding indictment because there is no evidence that he knew of the IRS's investigation while engaging in the offense conduct alleged.

Second, Marinello contends that a violation of the omnibus clause must be premised on an underlying affirmative act, not on an omission. Because the district court did not charge the jury with the unanimity instruction he requested or provide it with the special verdict form he suggested, he maintains that his conviction on Count One could have been improperly based on either of the two omissions alleged in the indictment: failure to keep Express Courier's books and records, and failure to provide complete records of personal and corporate income to his accountant. He seeks reversal and remand for a new trial on that ground if his conviction under section 7212(a) is not otherwise vacated.

Third, Marinello argues that vacatur and remand for resentencing is required because the district court procedurally erred in imposing his sentence. In his view, the district court impermissibly rejected his proffered tax returns as a measure of the tax loss and restitution amounts without further inquiry by way of an evidentiary hearing or supplemental briefing. He also asserts that he was entitled to the two-level reduction to his **[**20]** base offense level for acceptance of responsibility because he offered to plead guilty to the eight counts of willful failure to file tax returns.

I. Standard of Review

HN2[] A district court's interpretation of a federal criminal statute is a question of law subject to *de novo* review by the Court of Appeals. United States v. Aleynikov, 676 F.3d 71, 76 (2d Cir. 2012). HN3[] A defendant's challenge to a jury instruction is also reviewed *de novo.* United States v. Sabhnani, 599 F.3d 215, 237 (2d Cir. 2010). HN4[] We will conclude that the district court committed reversible error if its instruction "either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." Id. (quoting United States v. Quattrone, 441 F.3d 153, 177 (2d Cir. 2006)).

HN5[] We review the procedural reasonableness of a sentence "under a 'deferential abuse-of-discretion standard.'" United States v. Jesurum, 819 F.3d 667, 670 (2d Cir. 2016) (quoting Gall v. United States, 552 U.S. 38, 41, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)). A district court commits procedural error if, as relevant here, it "fails to calculate (or improperly calculates) the Sentencing Guidelines range" or "selects a sentence based on clearly erroneous facts." United States v. Chu, 714 F.3d 742, 746 (2d Cir. 2013) (quoting United States v. Robinson, 702 F.3d 22, 38 (2d Cir. 2012)). Decisions as to the procedures used to resolve sentencing disputes, including disputes concerning an order of restitution, are reviewed for abuse of discretion, United States v. Maurer, 226 F.3d 150, 151-52 (2d Cir. 2000) (per curiam) (citing United States v. Slevin, 106 F.3d 1086, 1091 (2d Cir. 1996)), and "are within the district court's discretion so long as the defendant is given an adequate **[**21]** opportunity to present his position," Sabhnani, 599 F.3d at 257-58.

II. A Pending IRS Action and a Defendant's Knowledge of That Action Are Not Offense Elements Under 26 U.S.C. § 7212(a)'s Omnibus Clause

HN6[] Section 7212(a) criminalizes certain "[a]ttempts to interfere with [the] administration **[*218]** of internal revenue laws." Under section 7212(a),

> [w]hoever [1] corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or* [2] *in any other way corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title*, shall, upon conviction thereof, be [fined or imprisoned, or both].

26 U.S.C. § 7212(a) (emphases added). The first clause addresses conduct specifically directed toward federal officers or employees in the discharge of their duties

[6] Marinello's argument presumably encompasses any pending IRS action and not only an IRS investigation or proceeding concerning the defendant charged with the omnibus **[**19]** clause violation, although he does not clarify this point in his appellate briefs.

under Title 26 of the United States Code—the Internal Revenue Code. The second clause, the "omnibus clause," is a catch-all provision that criminalizes "any other way" of corruptly obstructing or impeding the due administration of the Internal Revenue Code. The term "corruptly" within the meaning of this section **[**22]** encompasses conduct that has "the intent to secure an unlawful advantage or benefit either for one's self or for another." *United States v. Parse, 789 F.3d 83, 121 (2d Cir. 2015)* (quoting *United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998)*).

Marinello asks that we conclude, as the Sixth Circuit did in *Kassouf*, that the statutory phrase "the due administration of this title" under the omnibus clause refers exclusively to pending IRS investigations or proceedings, of which a defendant must have knowledge in order to corruptly obstruct or impede them. For the reasons that follow, we decline to adopt this construction.

In *Kassouf*, the defendant was charged with corruptly endeavoring to obstruct and impede the due administration of the tax laws, in violation of *section 7212(a)*. *144 F.3d at 953*. He allegedly failed to maintain partnership books and records, transferred business funds into various bank accounts for personal expenditures, and filed false tax returns that did not disclose substantial assets. *Id. at 953 & n.1*. The district court granted the defendant's motion to dismiss the *section 7212(a)* count from the indictment for failure to state an offense, finding that the government had not alleged as elements of the crime that the defendant had knowledge of a pending IRS proceeding or investigation. *See id. at 954*. On appeal, the Sixth Circuit affirmed, **[**23]** agreeing with the district court that "due administration of the Title requires some pending IRS action"—such as "subpoenas, audits or criminal tax investigations"—"of which the defendant was aware." *Id. at 957 & n.2*.

The Sixth Circuit based its conclusion on a comparison of the omnibus clause with another statute, *18 U.S.C. § 1503*. *See id. at 957*. *Section 1503*, entitled "Influencing or injuring officer or juror generally," provides in relevant part:

> Whoever corruptly, or by **[*219]** threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly* or by threats or force, or by any threatening letter or **[**24]** communication, *influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be punished as provided in *subsection (b)*.

18 U.S.C. § 1503(a) (emphasis added). Relying on the similarities between the texts of *section 1503(a)* and *section 7212(a)*, the Sixth Circuit consulted case law interpreting *section 1503* for guidance on how to construe "the due administration of this title" under *section 7212(a)*. *See Kassouf, 144 F.3d at 956-58*. In particular, the Sixth Circuit looked to *United States v. Aguilar, 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995)*, a decision addressing the scope of offense conduct covered by *section 1503(a)*'s broad prohibition on corrupt efforts to influence, obstruct, or impede the due administration of justice, *see id. at 598-600*. In *Aguilar*, the Supreme Court limited this provision's reach by imposing "a 'nexus' requirement": To be found guilty of this offense, the "action taken by the accused must be with an intent to influence judicial or grand jury proceedings." *Id. at 599*; *see also id.* (describing the nexus requirement as "a relationship in time, causation, or logic" between the defendant's offense conduct and a judicial proceeding). In so deciding, the Supreme Court appeared to assume that "the due administration of justice" under *section 1503(a)* only applied to pending grand jury or judicial proceedings, in line with the way courts have **[**25]** previously read this statutory phrase.[7] *See id.* The Supreme Court's decision was motivated by a concern that *section 1503(a)* could sweep too broadly: Not just "*any* act, done with the intent to obstruct the due administration of justice, is sufficient to impose criminal liability"; otherwise, the connection between a defendant's corrupt endeavors

[7] *See, e.g., United States v. Bashaw, 982 F.2d 168, 170 (6th Cir. 1992)* ("Because *section 1503* is intended to protect the administration of justice in federal court and those participating therein, due administration of justice has been interpreted as extending only to pending judicial proceedings." (internal quotation marks and citation omitted)).

and a judicial proceeding could be too attenuated. *See id. at 602* (emphasis in original) (ellipsis and internal quotation marks removed). Instead, in order to be convicted of corruptly interfering with the due administration of justice under *section 1503(a)*, a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *Id. at 599*.

Deeming *Aguilar*'s analysis of *section 1503(a)* to be instructive, including the Supreme Court's implicit adoption of the longstanding reading of "the due administration of justice,"[8] the Sixth Circuit interpreted by analogy "the due administration of this title" under *section 7212(a)* to require, **[**26]** as offense elements, that a defendant (1) have knowledge of (2) "some pending IRS action." *Kassouf, 144 F.3d at 956-57*. Noting again the similar language contained in the two statutes, the court used a canon of construction to find that this similarity permitted it to infer that Congress meant for *section 7212(a)* to apply to analogous situations. *See id. at 957-58* (applying ***HN7***[⬆] the "canon of statutory construction that courts will presume that Congress knew of the prevailing law when it enacted the statute" at issue). The court also expressed its concern that, were the omnibus clause not limited to pending IRS actions, a defendant could be subject to **[*220]** undefined "liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." *Id. at 957*; *see also id. at 958* ("[I]t would be highly speculative to find conduct such as the destruction of records, which might or might not be needed, in an audit which might or might not ever occur, is sufficient to make out an omnibus clause violation." (citation omitted)). The court then affirmed the dismissal of the disputed count of the indictment on the basis of the rule it had enunciated.[9] *Id. at 960*.

We think the Sixth Circuit's analogy is inapposite. To begin with, the text of *section 1503(a)* is distinguishable from *section 7212(a)* in at least two ways. First, *section 1503(a)*'s statutory language focuses principally on grand jury or judicial proceedings. Indeed, its prohibition of corrupt endeavors to influence, obstruct, or impede the due administration of justice "follows a long list of specific prohibitions of conduct that interferes with actual judicial proceedings," *United States v. Wood, 384 F. App'x 698, 704 (10th Cir. 2010)*, *cert. denied*, *562 U.S. 1225, 131 S. Ct. 1476, 179 L. Ed. 2d 315 (2011)*; *accord Willner, 2007 U.S. Dist. LEXIS 75597, at *11, 2007 WL 2963711, at *4*; *see also United States v. Sorensen, 801 F.3d 1217, 1232 (10th Cir. 2015)* (endorsing the reasoning in *Wood*), *cert. denied*, *136 S. Ct. 1163, 194 L. Ed. 2d 176 (2016)*. This list—which specifically mentions jurors, officers of the court, magistrate judges, and committing magistrates, as well as "examination[s] or other proceeding[s]" before a magistrate judge or committing magistrate, "verdict[s]," and "indictment[s]"—supports a reading that tethers the "due administration of justice" to actual grand jury or judicial proceedings. *See 18 U.S.C. § 1503(a)*. By contrast, *section 7212(a)* does not contain any such reference to IRS actions, investigations, or proceedings that would support analogizing it to *section 1503(a)*. Instead, the first part of *section 7212(a)* refers broadly to attempts **[**29]** to interfere with officers or employees "acting in an official capacity" under the tax code, *26 U.S.C. § 7212(a)*, which suggests that the omnibus provision similarly applies to the full range of these individuals' official duties.

Second, and most apparent, the statutes employ different statutory phrases: "the due administration of *justice*," *18 U.S.C. § 1503(a)* (emphasis added), and

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[8] The independent meaning of "the due administration of justice," **[**27]** however, was never at issue in *Aguilar*—in fact, the defendant there was charged with "corruptly endeavor[ing] to influence, obstruct, and impede [a] *grand jury investigation*." *See id. at 598-99* (emphasis added).

[9] Judge Daughtrey dissented from the majority's conclusion in this regard, noting that no other circuit at the time had required that a defendant knowingly obstruct or impede a pending IRS action in order to be convicted under *section 7212(a)*'s omnibus clause. *Kassouf, 144 F.3d at 960-61 (Daughtrey, J., dissenting in part)*.

Shortly after *Kassouf* was decided, another panel of the Sixth Circuit suggested its disapproval of this rule by concluding that "*Kassouf* must be limited to its precise holding and facts." *See Bowman, 173 F.3d at 600*; *see also id. at 599-600* (deciding that "an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within *§ 7212(a)*'s proscribed conduct," even though "no IRS proceeding or investigation was underway" when the defendant engaged in the underlying offense conduct). However, the court has more recently stated to the contrary that the rule articulated in *Kassouf* remains the law of the Sixth Circuit. *See United States v. Miner, 774 F.3d 336, 345 (6th Cir. 2014)* ("[P]ost-*Kassouf* and post-*Bowman*, a defendant may not be convicted **[**28]** under the omnibus clause unless he is 'acting in response to some pending IRS action of which [he is] aware.'" (second brackets in original) (quoting *United States v. McBride, 362 F.3d 360, 372 (6th Cir. 2004)*), *cert. denied*, ***135 S. Ct. 2060, 191 L. Ed. 2d 964 (2015)***.

"the due administration of *this title*," 26 U.S.C. § 7212(a) (emphasis added). This difference indicates that the statutes carry different **[*221]** meanings. *See* Kassouf, 144 F.3d at 960 (Daughtrey, *J.*, dissenting in part) ("[I]f Congress wished 26 U.S.C. § 7212(a) to be interpreted in an identical fashion, identical language would have been inserted into that statute."). The plain language of section 7212(a)'s omnibus clause "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities." Willner, 2007 U.S. Dist. LEXIS 75597, at *12, 2007 WL 2963711, at *5 (emphasis in original). As the Sixth Circuit noted in *Kassouf*, the administration of the Internal Revenue Code "encompass[es] a vast range of activities": "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers['] submissions; as well as monitoring taxpayers' compliance with **[**30]** their obligations." 144 F.3d at 956; *see also* Sorensen, 801 F.3d at 1232 ("[T]he IRS duly administers the internal-revenue laws . . . [by] carrying out its lawful functions to ascertain income[and to] compute, assess, and collect income taxes[.]" (internal quotation marks and citation omitted)). In light of these responsibilities, it is apparent that "the IRS does duly administer the tax laws even before initiating a proceeding." Sorensen, 801 F.3d at 1232; *see* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1129, 191 L. Ed. 2d 97 (2015) ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection."). Thus, it is possible to violate section 7212(a) by corruptly obstructing or impeding the due administration of the Internal Revenue Code "without an awareness of a particular [IRS] action or investigation" (for instance, "by thwarting the annual reporting of income"). Wood, 384 F. App'x at 704.

Section 1503's legislative history also makes clear that Congress intended "the due administration of justice" to refer only to grand jury or judicial proceedings; however, no comparable legislative history points to interpreting "the due administration of this title" under section 7212(a) in a similar manner. A predecessor version of section 1503 criminalized "corrupt[] endeavors to influence, intimidate, or impede any witness **[**31]** or officer *in any court of the United States* in the discharge of his duty, or corrupt[] . . . endeavors to obstruct or impede[] the due administration of justice *therein*." *See* Pettibone v. United States, 148 U.S. 197, 202, 13 S. Ct. 542, 37 L. Ed. 419 (1893) (emphases added) (quoting Rev. Stat., Tit. LXX, ch. 4, § 5399 (2d ed. 1878)); *see also* Aguilar, 515 U.S. at 599 (noting that *Pettibone* "construe[ed] the predecessor statute to § 1503"). Although the word "therein" has since been removed from section 1503(a), there is no indication by Congress that, in so doing, it intended to fundamentally alter the statute's meaning. *See* Willner, 2007 U.S. Dist. LEXIS 75597, at *12, 2007 WL 2963711, at *4 ("Nothing about the history of revision of [section 1503] . . . indicates that the elimination of the last word ['therein'] was intended to affect the meaning.").

In addition to what we think is a mistaken analogy to section 1503(a), we find unpersuasive the vagueness or overbreadth concern identified in Kassouf in support of that court's construction of the omnibus clause. The Sixth Circuit narrowly interpreted "the due administration of this title" under section 7212(a) in part based on a concern that, were proof of a defendant's awareness of a pending IRS action not otherwise required, a defendant could be subject to punishment for engaging in lawful conduct. *See* Kassouf, 144 F.3d at 957-58. But we have already rejected a similar challenge to section 7212(a) on grounds of vagueness **[**32]** and overbreadth. *See* Kelly, 147 F.3d at 176 **[*222]** (agreeing with five other circuits concluding that the use of the term "corruptly" in section 7212(a) does not render this provision unconstitutionally vague or overbroad (citing United States v. Brennick, 908 F. Supp. 1004, 1010-13 (D. Mass. 1995))). Moreover, other courts, including the Sixth Circuit, have decided that section 7212(a)'s "*mens rea* requirement" sufficiently "restricts the omnibus clause's reach only to conduct that is committed 'corruptly.'" United States v. Miner, 774 F.3d 336, 347 (6th Cir. 2014) (collecting cases), *cert. denied*, *135 S. Ct. 2060, 191 L. Ed. 2d 964 (2015)*.[10]

[10] To the extent *Kassouf* based its vagueness or overbreadth concern on the Supreme Court's analysis in *Aguilar*, we note that the reliance is likely misplaced. In fashioning the nexus requirement previously discussed, the Supreme Court suggested that its interpretation of the term "corruptly" under section 1503(a) adequately addressed any potential problems of overbreadth, inasmuch as a defendant must be aware that his conduct is "likely to affect the judicial proceeding." *See* 515 U.S. at 599; *see also* id. at 602 (concluding that, "if [a man] knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts," **[**33]** the husband could not be convicted under section 1503 because his knowledge of the likely effect on a judicial proceeding is unclear). By raising the specter that the "*due administration*" of the tax

For those reasons, we decline Marinello's invitation to adopt the *Kassouf* rule. Instead, we join three of our sister circuits in concluding that ***HN8***[↑] section 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation. *See* *Sorensen, 801 F.3d at 1232* (disagreeing with *Kassouf* because section 1503(a) and section 7212(a) "are [in]sufficiently similar to apply *Aguilar*'s reasoning to § 7212(a)"); *United States v. Floyd, 740 F.3d 22, 32 & n.4 (1st Cir.)* (determining that "[a] conviction for violation of section 7212(a) does not require proof of either a tax deficiency or an ongoing audit," and rejecting *Kassouf* (citations omitted)), *cert. denied sub nom. Dion v. United States, 135 S. Ct. 124, 190 L. Ed. 2d 95 (2014)*; *United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005)* (stating that "the government need not prove that the defendant was aware of an ongoing tax investigation **[**34]** to obtain a conviction under § 7212(a)"), *cert. denied*, *547 U.S. 1132, 126 S. Ct. 2019, 164 L. Ed. 2d 786 (2006)*.[11] Notably, although we have not explicitly adopted this rule in any previous opinion, we have implicitly applied it by affirming convictions under section 7212(a)'s omnibus clause without discussion of the defendant's awareness of a pending IRS proceeding. *See* *United States v. McLeod, 251 F.3d 78, 80 (2d Cir. 2001)* (affirming sentence imposed where the defendant helped his clients falsify tax returns), *cert. denied*, *534 U.S. 935, 122 S. Ct. 304, 151 L. Ed. 2d 226 (2001)*; *Kelly, **[*223]** 147 F.3d at 174-75* (affirming the defendant's conviction for providing a false agreement to the tax authorities to substantiate a deduction on his tax return).

Our conclusion is consistent with at least two other sources. First, in the body of case law that developed within the forty-four years that elapsed between section 7212's enactment in 1954[12] and *Kassouf*'s issuance in 1998, the government assures **[**35]** us (and we have found no reason to doubt) that no court had limited the omnibus clause's application to the corrupt obstruction or impediment of a known and pending IRS action. *See* Appellee's Br. at 19. To the contrary, contemporary model jury instructions for use outside of the Sixth Circuit do not include these criteria as elements of the offense. *See* 3 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 59.05, Instruction 59-32 & cmt. (2016) (containing pattern instructions or formulations for a violation of section 7212(a)'s omnibus clause in the First, Seventh, Tenth, and Eleventh Circuits).

Second, ***HN9***[↑] the Department of Justice's internal tax division policy states that the omnibus clause may be used "to prosecute a person who, *prior to any audit or investigation*, engaged in large-scale obstructive conduct involving the tax liability of third parties." U.S. Dep't of Justice, *Criminal Tax Manual* § 17.03 (2012 ed.), *https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf* (last visited August 1, 2016) (emphasis added), *archived at https://perma.cc/QWW4-DTJL* . Pursuant to this policy, a defendant may be charged under the omnibus clause in the absence of a pending IRS action. *See also id.* § 17.04 ("To establish a Section 7212(a) omnibus clause violation, **[**36]** the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code.").

Because we conclude that, under section 7212(a), "the due administration of this title" is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge, we reject Marinello's first argument as without merit.[13]

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code under section 7212(a) could be too vague or overbroad, however, *Kassouf* misconstrues *Aguilar*'s focus on the *mens rea* requirement ("corruptly") as also encompassing a focus on the "due administration" language. We do not read *Aguilar* as expressing any concern regarding, much less tying its holding to, the "due administration" language in section 1503(a).

[11] In addition to the First, Ninth, and Tenth Circuits, the Eleventh Circuit, in a decision that predates *Kassouf*, upheld an attorney's conviction under section 7212(a)'s omnibus clause for creating a corporation to "disguise the character of [a client's] illegally earned income and repatriate it," even where the attorney had no knowledge that his client was engaged in a "sting operation" with the government against him. *See* *United States v. Popkin, 943 F.2d 1535, 1536-37, 1541 (11th Cir. 1991)*, *cert. denied*, ***503 U.S. 1004, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992)***.

[12] *See* *Act of Aug. 16, 1954, ch. 736, 68A Stat. 855*.

[13] In his reply brief, Marinello also raises for the first time an argument that the enactment of a statute in 2002 prohibiting the knowing destruction, alteration, or falsification of records "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . , *or in relation to or contemplation of any such matter*," *18 U.S.C. § 1519* (emphasis added), demonstrates that Congress employs specific language when it prohibits conduct "not predicated upon the existence of any federal action or

[*224] III. An Omnibus Clause Violation May Be Premised on an Omission

Marinello's next argument proceeds in two steps. First, citing *Kelly*, Marinello asserts that an omission cannot form the basis of a conviction under the omnibus clause. Second, to ensure that he was not improperly convicted for a failure to act, he contends that the jury should have been instructed that it was required to unanimously agree on at least one of the underlying means alleged in Count One (two of which pertained to omissions) and to render a special verdict specifying which of those underlying means it found were met.[14]

In *Kelly*, we described section 7212(a)'s omnibus clause as "render[ing] criminal 'any other' action which serves to obstruct or impede the due administration of the revenue laws." 147 F.3d at 175 (quoting 26 U.S.C. § 7212(a)). From this statement, Marinello attempts to extract the principle that a violation of the omnibus clause must be predicated on a defendant's affirmative "action," and not an omission. But *Kelly* did not cabin offense conduct under the omnibus clause in this manner; **HN11**[↑] section 7212(a) broadly prohibits corruptly obstructing or impeding, or endeavoring to **[**40]** obstruct or impede, the due administration of the tax laws "in any other way." *See* 26 U.S.C. § 7212(a). We do not see how a defendant could escape criminal liability under the omnibus clause for a corrupt omission that is designed to delay the IRS in the administration of its duties merely because the offense conduct involved an omission. *Cf.* Kelly, 147 F.3d at 177 (approving a jury instruction defining the term "endeavors" under section 7212(a) to mean "to knowingly and intentionally act *or* to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result" (emphasis added)). For example, a defendant surely could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses.[15] While apparently not as common **[*225]** as

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proceeding," Appellant's Reply Br. at 9. Marinello points to the absence of similar language in 26 U.S.C. § 7212(a) prohibiting corrupt obstruction or impediment "in relation to or contemplation of" an IRS action—which **[**37]** Congress did not add to section 7212(a) in 2002—as support for his theory that a defendant's knowledge of such a pending action is required to violate the omnibus clause. Ordinarily, **HN10**[↑] we do not address an argument that the district court has not previously considered. *See* In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 132 (2d Cir. 2008) (*per curiam*); Allianz Ins. Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005). Even if we did so here, however, we have found no authority that supports Marinello's attempt to create offense elements by contrasting 18 U.S.C. § 1519 with 26 U.S.C. § 7212(a). Moreover, "Congressional inaction," such as the lack of retroactive amendment to section 7212(a) in light of section 1519, "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990) (quoting United States v. Wise, 370 U.S. 405, 411, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962)).

[14] Marinello further **[**38]** argues in passing that Count One falsely states that "the defendant's accountant" was not provided with complete and accurate records for tax purposes, *see* Superseding Indictment at 1 (App'x 75), because he maintains that no professional relationship existed between him and Wiegley. The record shows that Marinello consulted with Wiegley, although the two did not sign a contract for accounting services. While the superseding indictment's description of Wiegley could have been more precise, we conclude that Marinello's argument fails for at least two reasons. First, assuming that the jury had relied on the allegations pertaining to "the defendant's accountant" in order to convict under Count One, its verdict demonstrates that, based on the evidence introduced at trial, it agreed with the superseding indictment's description of Wiegley as his accountant. Thus, the jury resolved the instant factual dispute in the government's favor. Moreover, if and to the extent that the superseding indictment's description of Wiegley was erroneous, that error is harmless. The jury clearly did not convict Marinello on Count One based solely on his offense conduct in connection with his consultations with **[**39]** Wiegley, whether or not Wiegley was his accountant. Marinello's counsel effectively conceded at trial that Marinello engaged in all of the other means alleged under Count One, *see* August 6, 2014 Trial Tr. at 51-56 (App'x 128-33), and counsel only disputed whether Marinello performed any of the acts or omissions alleged with the requisite corrupt intent. The jury's verdict of conviction demonstrates that it concluded that the government proved such corrupt intent with respect to the other conduct alleged in the indictment, in which Marinello concedes he engaged. Thus, whether or not the alleged omission describing Wiegley as Marinello's accountant was properly before the jury is immaterial.

[15] We nonetheless recognize that the scope of omissions on which an omnibus clause violation could be based is not limitless. *See* Wood, 384 F. App'x at 708 (suggesting it is "a questionable **[**41]** proposition" that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the "willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203"). Whatever those limits may be, the omissions at issue here do not exceed them.

prosecutions based on one or more affirmative acts, we are aware of several cases in which the government has prosecuted on the basis of an omission as a means of violating section 7212(a)'s omnibus clause.[16]

We conclude, then, that HN12[↑] an omission may be a means by which a defendant corruptly obstructs or impedes the due administration of the Internal Revenue Code **[**42]** under section 7212(a). And it follows that Marinello's second argument on appeal is also without merit because the jury could have relied on his alleged failure to keep Express Courier's books and records, or to provide Wiegley with complete and accurate information on his personal and corporate income, as a basis for its conviction on Count One. No unanimity instruction or special verdict form was therefore required in order to distinguish the jury's assessment of the underlying affirmative actions as opposed to the omissions alleged under this count, because there is no requirement under the statute to make certain that, if Marinello were convicted, the conviction was based solely on an affirmative action and not an omission.

Marinello has not raised in this Court the issue of whether a unanimity instruction or special verdict form is required for any other reason during trials arising out of alleged section 7212(a) omnibus clause violations, and we therefore do not decide or offer an opinion with respect to any such argument. His pre-trial filings sought an instruction that the jury unanimously agree on at least one of the eight means alleged in order to convict, as well as a special verdict form requiring that **[**43]** the jury specify its findings on each of those means. However, he does not repeat arguments concerning those requests on appeal. *Cf.* JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (HN13[↑] "[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").[17]

[*226] IV. The District Court Did Not Procedurally Err In [44] Determining Marinello's Sentence**

Finally, Marinello's remaining arguments—that the district court should have conducted further inquiries to calculate the tax loss and restitution amounts, and should have applied the two-level reduction for acceptance of responsibility—do not convince us that the district court committed procedural error meriting resentencing.

Marinello argues that the district court's "cursory review" of his proffered tax returns in arriving at a tax loss of $598,215.53 and a total restitution amount of $351,763.08, without conducting an evidentiary hearing or receiving supplemental submissions, "was unfair and violated his due process rights." *See* Appellant's Br. at 29. But HN14[↑] a district court "is not required, by either the *Due Process Clause* or the federal Sentencing Guidelines, to hold a full-blown evidentiary hearing in resolving sentencing disputes. . . . All that is required is that the court afford the defendant some opportunity to rebut the [g]overnment's allegations." Sabhnani, 599 F.3d at 258 (quoting Maurer, 226 F.3d at 151-52). Here, Marinello challenged the Probation Office's calculations in his objections to the PSR, attaching his personal and corporate tax returns in an effort to show that $48,890 was a more appropriate tax loss and **[**45]** restitution amount. He did not, however,

[16] *See, e.g.,* Kassouf, 144 F.3d at 953 n.1 (alleging the defendant "failed to maintain or cause to be maintained partnership books and records"; "failed to report or cause to be reported substantial amounts of interest earned on [certain] bank accounts"; and transferred property "without making or causing to be made any record of that sale or transfer"); United States v. Armstrong, 974 F. Supp. 528, 531 (E.D. Va. 1997) (alleging the defendant "provided false information to, and withheld material information from, his tax return preparer with regard to his travel expense reimbursements and income"); United States v. Bezmalinovic, No. S3 96 CR 97 MGC, 1996 U.S. Dist. LEXIS 18976, at *5-6, 1996 WL 737037, at *2 (S.D.N.Y. Dec. 26, 1996) (alleging the defendant failed to report salary payments to certain employees "in any IRS Form W-2" or "to remit to the IRS the [payroll and unemployment] tax[es] due and owing").

[17] We note nevertheless that while the Ninth Circuit does not appear to object to the use of a unanimity instruction in this context, *see* United States v. Murphy, 824 F.3d 1197, 1201, 1206 (9th Cir. 2016), at least two courts (the Tenth Circuit and a district court in Washington D.C.) have ruled that the instruction is erroneous. *See* Sorensen, 801 F.3d at 1237 (concluding that the district court erred by requiring unanimity on one or more of the listed means, in part because the instruction "ignored the indictment's language charging that [the defendant] violated § 7212(a) 'by the following means, *among others* . . . .'" (emphasis in original)); United States v. Adams, 150 F. Supp. 3d 32, 37-38 (D.D.C. 2015) (agreeing with *Sorensen*'s conclusion, and quoting Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999) for the proposition that "[a] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime").

respond on reply to the many inaccuracies the government identified in these returns. The district court considered his objection and, crediting the government's arguments, ultimately rejected it before imposing sentence. Because Marinello was afforded "some opportunity" to dispute the tax loss and restitution amounts, and to respond to the government's arguments with respect to his tax returns, the district court did not abuse its discretion by not obtaining additional information regarding this issue. *See id.*

Nor can we say that the district court abused its discretion by denying Marinello a two-level decrease to his base offense level because ***HN15***[⬆] he did not "clearly demonstrate[] acceptance of responsibility for his offense," a decision to which we accord "great deference on review," *see* U.S.S.G. § 3E1.1(a) & cmt. 5. Marinello's sole relevant contention on appeal is that his "offer[] to plead guilty to the failures to file income tax returns" "should have received some consideration in sentencing." Appellant's Br. at 30. But ***HN16***[⬆] an offer to plead guilty to some counts of an indictment provides limited evidence of acceptance of responsibility; even a defendant who pleads **[**46]** guilty is not guaranteed to receive the adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 cmt. 3.

Moreover, we agree with the district court's conclusion that Marinello's case is not one of the "rare situations" contemplated in the Guidelines in which a defendant "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial"—for instance, by "go[ing] to trial to assert and preserve issues that do not relate to factual guilt." *See id.* cmt. 2. Marinello proceeded to trial on the theory that he lacked the requisite *mens rea* to commit the omnibus clause **[*227]** violation, an issue of factual guilt. It was only in post-trial briefing that Marinello's legal argument pertaining to the elements of an omnibus clause violation and the *Kassouf* rule was first raised. In our view, it was reasonable for the district court to deny a reduction for acceptance of responsibility in these circumstances. *See id.* (stating ***HN17***[⬆] the acceptance of responsibility adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then **[**47]** admits guilt and expresses remorse"); *cf.* United States v. Melot, 732 F.3d 1234, 1244-45 (10th Cir. 2013) (concluding that the district court clearly erred in applying the acceptance of responsibility reduction where the defendant went to trial "so he could challenge the *mens rea* element of the crimes charged in the indictment," including a violation of section 7212(a)'s omnibus clause).[18]

We therefore conclude that the district court did not commit procedural error by using the manner of calculating the tax loss and restitution amounts that it did, or by deciding not to apply a two-level reduction to Marinello's base offense level for acceptance of responsibility.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[18] Three additional considerations under U.S.S.G. § 3E1.1 bolster the district court's conclusion on this score. First, "prior to adjudication of [his] guilt," no "voluntary restitution payment" to the IRS had been made. *See id.* cmt. 1(c). Second, Marinello did not timely manifest acceptance of responsibility: He stated that he "never got around" to paying his taxes instead of admitting to his guilt during his interview with Agent Klimczak, August 6, 2014 Trial Tr. at 172 (App'x 181), and he persisted in denying responsibility for the section 7212(a) count while his PSR was being prepared. *See* U.S.S.G. § 3E1.1 cmt. 1(h) (providing that "timeliness" is a consideration for determining whether a defendant has accepted responsibility). Even during the sentencing proceedings, he told the court that the Probation Office "c[ould]n't add a column of numbers together" to calculate the total tax loss, and blamed his misconduct on feeling "overwhelmed **[**48]** by the job." Sentencing Tr. at 19-20 (App'x 573-74). Third, the district court's application of a U.S.S.G. § 3C1.1 enhancement for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct," *see* U.S.S.G. § 3E1.1 cmt. 4. Marinello offers no reason to conclude that this is an "extraordinary case[]" warranting "adjustments under both §§ 3C1.1 and 3E1.1." *See id.*

United States v. Marinello

United States Court of Appeals for the Second Circuit

February 15, 2017, Decided

15-2224

Reporter
855 F.3d 455 *; 2017 U.S. App. LEXIS 2686 **; 119 A.F.T.R.2d (RIA) 770; 2017 WL 640078

UNITED STATES OF AMERICA, Appellee, v. CARLO J. MARINELLO, II, Appellant.

Prior History: *United States v. Marinello, 839 F.3d 209, 2016 U.S. App. LEXIS 18498 (2d Cir. N.Y., Oct. 14, 2016)*

Core Terms

omnibus clause, impede, obstruct, corruptly, threat of force, employees, due administration, convict, legislative history, intimidation, destroy, ongoing

Counsel: **[**1]** Joseph M. LaTona, Buffalo, NY, for Defendant-Appellant.

Russell T. Ippolito, Jr., Assistant United States Attorney, Buffalo, NY, for James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York,[1] Appellee.

Judges: PRESENT: ROBERT A. KATZMANN, Chief Judge, DENNIS JACOBS, JOSÉ A. CABRANES, ROSEMARY S. POOLER, REENA RAGGI, PETER W. HALL, DEBRA ANN LIVINGSTON, DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, CHRISTOPHER F. DRONEY, Circuit Judges. DENNIS JACOBS, Circuit Judge, joined by JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc.

Opinion

[*455] ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Dennis Jacobs, *Circuit Judge*, joined by José A. Cabranes, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

Dissent by: DENNIS JACOBS

Dissent

DENNIS JACOBS, Circuit Judge, joined by JOSÉ A. CABRANES, Circuit Judge, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing in banc. The panel weighed in on the wrong side of **[**2]** a circuit split, affirmed a criminal conviction based on the most vague of residual clauses, and in so doing has cleared a garden path for prosecutorial abuse.

I

Marinello was convicted at trial on nine counts. Eight of them (for willful failure to file tax returns) raise no issue. The single problematic count is for violating the "omnibus clause" of the criminal portion of the Internal Revenue Code, which makes it a felony to "in any other way corruptly . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of this title."

[1] Pursuant to ***Federal Rule of Appellate Procedure 43(c)(2)***, Acting United States Attorney James P. Kennedy, Jr., is automatically substituted for former United States Attorney William J. Hochul, Jr.

26 U.S.C. § 7212(a). *Yes*: "this title" is the entire corpus of the Internal Revenue Code--a slow read in 27 volumes of the United States Code Annotated.

The government charged that Marinello violated the omnibus clause in eight different ways. And the district court instructed the jury that it was enough for conviction that Marinello violated the statute in any single one of those several ways--and that **[*456]** the jurors did not need to agree among themselves as to which.

Among the acts listed in the jury charge as violating the omnibus clause are:

- "failing to maintain corporate books and records for Express Courier [his small business]";
- "failing to provide **[**3]** [his] accountant with complete and accurate information related to [his] personal income and the income of Express Courier";
- "destroying, shredding and discarding business records of Express Courier";
- "cashing business checks received by Express Courier for services rendered"; and
- "paying employees of Express Courier with cash."

839 F.3d at 213 (internal brackets omitted). If this is the law, nobody is safe: the jury charge allowed individual jurors to convict on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept them and preserved them from destruction, he failed to give them to his accountant.

After conviction on all counts, Marinello moved for a new trial on the ground, inter alia, that the omnibus clause applied only to knowing obstruction of an ongoing IRS investigation, not to every possible impediment to the administration of any of the uncountable provisions of the Internal Revenue Code; and that he therefore should have been acquitted because there was no evidence that he was aware of an IRS investigation.

The district court rejected the argument and the panel affirmed, holding: "under section 7212(a), 'the due administration **[**4]** of this title' is not limited to a pending IRS investigation or proceeding of which the defendant had knowledge." ***839 F.3d at 223***. Accordingly, the law in the Second Circuit today is that it is a felony to "corruptly" take (or try to take) any of the actions listed above--or to take or try to take any other action that impedes the "due administration" of the Internal Revenue Code.

The Sixth Circuit, alert to the sweep of criminalizable conduct, held that the omnibus clause was limited to cases in which the defendant knew of a pending IRS action. United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998); United States v. Miner, 774 F.3d 336, 342-45 (6th Cir. 2014). The Sixth Circuit's view is now distinctly in the minority, and the panel's opinion here signs on to the emerging consensus of error in the circuit courts.

II

Increasingly, the Supreme Court casts a cold eye on broad residual criminal statutes (particularly omnibus clauses like the one here), and has saved such statutes by construing the statutory text to cabin them.

In United States v. Aguilar, the Court considered a similarly worded statute concerning grand juror intimidation: the residual clause imposed criminal liability for one who "corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice." 515 U.S. 593, 599-600, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995) (interpreting 18 U.S.C. § 1503). To curb **[**5]** the impermissible breadth of the wording, the Court (a) implicitly interpreted "the due administration of justice" to require a court or grand jury proceeding (and thus excluded "an investigation independent of the court's or grand jury's authority"), and (b) explicitly required a "nexus" with a grand jury or judicial proceeding to support criminal liability.

Similar alarm about fair warning and overbreadth animates Arthur Andersen **[*457]** LLP v. United States, which recognized and generously construed a knowledge requirement to limit the scope of a statute that criminalized "corruptly persuad[ing]" someone to destroy documents. 544 U.S. 696, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005) (interpreting 18 U.S.C. § 1512). For much the same reason, the Supreme Court sharply curtailed so-called honest-services fraud in Skilling v. United States, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). Further, in Yates v. United States, the government used a provision of the Sarbanes-Oxley Act criminalizing destruction of evidence to prosecute a poaching fisherman who threw fish overboard; the plurality invoked the rule of lenity to reverse on the ground that, under the statute, a fish was not a "tangible object." 135 S. Ct. 1074, 1088, 191 L. Ed. 2d 64 (2015) (interpreting 18 U.S.C. § 1519). And in Johnson v. United States, the Court held that the "residual clause"

of the Armed Career Criminal Act was so vague that it failed **[**6]** to provide the constitutionally required fair notice of what conduct it actually punished. *135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)* (interpreting *18 U.S.C. § 924(e)*). Most recently, in McDonnell v. United States, the Court rejected an expansive view of what qualifies as an "official act" in public corruption cases. *136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016)*.

III

The panel opinion in Marinello affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed.

The actus reus for this crime is the failure to keep sufficient books and records. The panel opinion likely took comfort in the mens rea requirement that the act or acts be done "corruptly." Any such comfort is surely an illusion, for two reasons. First, the risk of wrongful conviction, even with a mens rea requirement, is real: the line between aggressive tax avoidance and "corrupt" obstruction can be hard to discern, especially when no IRS investigation is active. Second, *alleging* a corrupt motive is no burden at all. Prosecutorial power is not just the power to convict those we are sure have guilty minds; it is also the power to destroy people. How easy it is under the panel's opinion for an overzealous or partisan prosecutor to investigate, to threaten, **[**7]** to force into pleading, or perhaps (with luck) to convict *anybody*.

The saving requirement that the Sixth Circuit added is that there must have been a pending IRS action of which the defendant was aware. That measure goes a good way toward setting some bounds. It construes the statute as a specialized tool for active IRS investigations, rather than a prosecutor's hammer that can be brought down upon any citizen.

And what is lost in confining this statute to interference with ongoing proceedings? Failure to pay taxes is already a crime, as is tax evasion. See *26 U.S.C. § 7201-7207*; *18 U.S.C. § 371*. Marinello himself, who is certainly culpable for his tax evasion, was in fact convicted of eight such felonies aside from the single count of violating the omnibus clause. Indiscriminate application of this omnibus clause serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted.

The panel opinion does not consider the risk of prosecutorial abuse at all, and dismisses overbreadth and vagueness in a single paragraph--and that paragraph merely cites other decisions. ***839 F.3d at 221-22***. Instead, the panel opinion spends pages positing differences between **[**8]** the phrases "due administration of justice" and **[*458]** "due administration of this title," and looking to statutory context and legislative history in an attempt to distinguish the Supreme Court's interpretation of a nearly identical statute in Aguilar.

The attempt fails. Aguilar looked to the conduct specified in the rest of the statute in construing the omnibus clause of *18 U.S.C. § 1503(a)*, and the panel opinion seeks to distinguish the omnibus clause here (*§ 7212(a)*) on that basis. But reading *§ 7212(a)* in context subverts rather than supports the panel's broad interpretation: a contextual reading demonstrates that *§ 7212(a)* is about impediments to the work of *particular officers and employees* of the IRS, rather than to the work of the IRS in the abstract or in whole. The relevant text of *§ 7212(a)* is as follows, with the omnibus clause italicized:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, **[**9]** the due administration of this title*, shall, upon conviction thereof . . . The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

The Supreme Court construed the Aguilar clause to require a grand jury or judicial proceeding because earlier parts of the Aguilar statute implicitly require a grand jury or judicial proceeding. By the same token, the text that precedes the omnibus clause here, and is part of the same sentence and subsection, presupposes an identifiable officer or employee. That is because it prohibits corruptly or threateningly attempting "to intimidate or impede any officer or employee of the United States acting in an official capacity." Statutory cross-references to *§ 7212(a) in the Internal Revenue Code* (which were passed as part of the same

legislative act as § 7212(a) itself)[1] also presuppose a particular officer or employee who has been impeded. Section 6531(6) describes it as "relating to intimidation of officers and employees of the United States," and section 7601(b) describes it as forbidding "forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties." 26 U.S.C. § 6531(6); 26 U.S.C. § 7601(b).

The same subsection defines **[**10]** "threats of force" in terms that bear upon individual agents, and thereby compels the inference of an ongoing matter: "The term 'threats of force', as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family." 26 U.S.C. § 7212(a). Both the initial clause of § 7212(a) and the omnibus clause ban threats of force; so the omnibus clause also supposes an identifiable IRS officer or employee. Similarly, the one statutory example of obstruction--in each clause of § 7212(a)--is sending a "threatening letter or communication." Inasmuch as there are nearly 80,000 IRS officers or employees, it is scarcely possible a letter (however threatening) that is sent without a named addressee would in any way "impede" the work of this army.[2]

[*459] The same point can be made about the destruction of documents. Unless an investigation is ongoing, it is impossible to point to a particular IRS employee among those 80,000 whose work has been impeded. And only when an IRS investigation is ongoing can one posit, *as the statute itself does*, a particular officer who has been impeded (such as by a taxpayer writing a threatening letter or destroying personal documents)--and that officer **[**11]** is the investigator on the case. Reading § 7212(a)'s omnibus clause in light of the section that precedes it thus leads us back to the requirement of an active investigation.

As to legislative history, the panel relies on its absence to distinguish this case from Aguilar. ***839 F.3d at 221***. That is a thin reed; in any event, there is relevant legislative history for § 7212(a), and it confirms my view.[3]

Finally, unlike the panel, I decline to defer to the Department of Justice's views to determine the scope of a criminal statute. ***Id. at 223***.

Even if the majority is correct--even **[**12]** if any limit to the omnibus clause is insupportable--then we should have gone in banc to determine whether such a limitless statute is constitutional. At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, "Show me the man and I'll find you the crime."

End of Document

[1] See Internal Revenue Code of 1954, ***Pub.L. 83-591***.

[2] The legislative history, discussed in footnote 3, also backs up the view that § 7212(a) is aimed at obstruction of particular IRS officers or employees.

[3] The prior version of § 7212(a) only prohibited *forcible* obstruction of IRS officers. Int. Rev. Code of 1939, ch. 34, § 3601(c)(1). When Congress re-wrote the tax code and re-drafted § 7212(a) in 1954, the Senate and House Reports only briefly explained the purpose of § 7212(a) (their explanation for the addition to the statute is in italics):

> Subsection (a) of this section, relating to the intimidation or impeding of any officer or employee of the United States acting in an official capacity under this title, or by force or threat of force attempting to obstruct or impede the due administration of this title is new in part. This section provides for the punishment of threats or threatening acts against agents of the Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, on account of the performance by such agents or officers or employees of their official duties. *This section will also punish the corrupt solicitation of an internal revenue employee*.

H.R.Rep. No. 1337, 83rd Cong., 2d Sess. (1954); S.Rep. No. 1622, 83rd Cong., 2d Sess. (1954) (emphasis added). If Congress intended to dramatically expand the scope of the law in the way the panel conceives, the legislative history gives no hint of it.

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What Constitutes Obstruction? A Tax Case May Narrow the Definition

White Collar Watch

By PETER J. HENNING JULY 4, 2017

Prosecutors have enormous discretion in the American criminal justice system, aided greatly by catchall provisions in statutes.

Congress often adopts broadly worded laws to catch a wide range of conduct, especially for white-collar crimes, and regularly tacks on a section to catch actions that might otherwise slip through the cracks.

Over the past few years, the Supreme Court has shown a conspicuous concern when the Justice Department seemed to push the envelope of what constitutes a crime in a way that could reach ostensibly innocent acts, or at least conduct that does not deserve the severe punishment meted out under federal law.

Last week, the justices agreed to review the conviction of Carlo J. Marinello II for obstructing the administration of the tax laws, presenting another opportunity to cut back on the scope of white-collar prosecutions under a catchall section.

Mr. Marinello was convicted of failing to file tax returns and obstructing the tax laws for not submitting returns for himself or his company, a courier service in upstate New York, and for taking funds from the business to pay for personal expenses. He discarded most of his business records, like bank statements and receipts, and paid employees in cash without any withholding or providing annual income statements.

The issue in the case was not the failure to file tax returns, which he essentially admitted despite being told to do so by a lawyer and an accountant. He objected to the obstruction charge brought under a provision known as the "omnibus clause," making it a crime for a person who "corruptly" or by force or by threats of force "obstructs or impedes, or endeavors to obstruct or impede, the due administration of" the Internal Revenue Service laws.

This is a felony offense that can result in a sentence of up to three years in prison, unlike the failure to file charges, which are only misdemeanors. Mr. Marinello asked the trial judge to instruct the jury that the government had to prove he knew about an I.R.S. investigation or audit when he destroyed records and failed to provide the required information. The judge refused, and after the conviction sentenced Mr. Marinello to three years in prison.

The general obstruction of justice statute, about which we have heard much lately, applies to conduct that affects the "due administration of justice," which means a pending judicial proceeding or grand jury investigation. The tax obstruction provision applies to actions affecting the administration of the tax laws, but it is unclear whether it requires that the I.R.S. be scrutinizing a person's taxes at the time or only that the conduct somehow touch on the filing of returns and payment of what is due.

The United States Court of Appeals for the Second Circuit in Manhattan affirmed Mr. Marinello's conviction, stating that the "omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known I.R.S. investigation." That means a wide range of conduct that could affect the collection of taxes can rise to the level of obstruction, regardless of whether that is what the defendant intended.

In an opinion dissenting from a denial of Mr. Marinello's request that the full appeals court review the case, Judge Dennis Jacobs wrote that this broad reading "had cleared a garden path for prosecutorial abuse." Such a reading, he added, means that anything making it harder for the I.R.S. to enforce provisions of the federal tax code — "a slow read in 27 volumes" — could be subjected to prosecution. He argued for a narrower reading of the omnibus clause because "at some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, 'Show me the man and I'll find you the crime.'"

Judge Jacobs's words echo the approach taken by the Supreme Court over the past few years when the Justice Department defended prosecutions brought under broadly written provisions that seemed to reach too far.

In Yates v. United States, a 2014 decision, the court overturned the conviction of a fishing boat captain, who had thrown overboard undersized red grouper found on his vessel, for violating an obstruction of justice statute that prohibits destroying or altering "any record, document or tangible object." The justices found that the law covered only physical items that held information, but not fish disposed of to frustrate an investigation.

That conclusion drew a sharp retort from Justice Elena Kagan in a dissenting opinion, who wrote that "a 'tangible object' is an object that's tangible."

This narrow interpretation of the obstruction law in the Yates decision required a majority of the justices to ignore the obvious meaning of "tangible" to impose a limit on prosecutorial discretion. Accepting the government's position would mean almost anything that someone changed or disposed of could result in an obstruction of justice charge, especially because the statute applies to conduct even when there is no pending investigation.

In McDonnell v. United States, decided in 2016, the court unanimously overturned the conviction of a former Virginia governor who had received over $100,000 in gifts from a friend interested in securing government support for a new dietary supplement. The justices concluded that merely "arranging a meeting, contacting another official or hosting an event" did not constitute an "official act" under federal bribery and unlawful gifts law.

The court expressed concern that "we cannot construe a criminal statute on the assumption that the government will use it responsibly." The narrower interpretation keeps prosecutors from using the statute to reach conduct many would consider to be a part of ordinary politics.

On June 22, the Supreme Court announced its decision in Maslenjak v. United States, overturning a conviction for unlawfully procuring citizenship by making a false statement on an application. The government argued that any false statement in seeking citizenship can result in a violation, regardless of whether the response contributed to the decision to approve the application.

In rejecting that broad approach, which could result in the automatic loss of citizenship, the court explained that "if whatever illegal conduct occurring within the naturalization process was a causal dead end — if, so to speak, the ripples from that act could not have reached the decision to award citizenship — then the act cannot support a charge that the applicant obtained naturalization illegally."

The court expressed a concern that the Justice Department's analysis "opens the door to a world of disquieting consequences."

The apprehension in these decisions is that prosecutors are essentially arguing that judges should not be too concerned about a broad interpretation of the law, because the government can be trusted to bring only those cases that involve real misconduct and not mere technical violations. The problem with this approach is that it is often difficult to distinguish benign conduct that might be illegal under a broad interpretation of the law but should not be pursued from wrongdoing acts truly worthy of a criminal prosecution.

That issue is especially pertinent in white-collar cases when the impact of simply filing criminal charges can be so significant. An accusation alone can lead to the loss of a job along with spending all of one's savings to pay for lawyers to defend the case, while a "not guilty" verdict does little to restore a reputation.

In Mr. Marinello's case, he clearly violated the requirement of filing annual income tax returns and did not appeal his convictions on those charges. Whether one can obstruct the tax laws by destroying documents and not reporting the income

of workers is a different issue, because almost anything that might reveal your tax liability could be a violation under the approach taken by the Second Circuit.

The Supreme Court's concern with provisions that serve as a catchall is that they appear to catch too much. Mr. Marinello may find his name added to the list of defendants who skirted crossing over the line of criminality under a narrower view of the law.

Dimaya v. Lynch (Sessions) – Court of Appeals for the Ninth Circuit

OPINION

REINHARDT, Circuit Judge:

Petitioner James Garcia Dimaya seeks review of the Board of Immigration Appeals' (BIA) determination that a conviction for burglary under California Penal Code Section 459 is categorically a "crime of violence" as defined by 8 U.S.C. § 1101(a)(43)(F), a determination which rendered petitioner removable for having been convicted of an aggravated felony. During the pendency of petitioner's appeal, the United States Supreme Court decided Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the Armed Career Criminal Act's ("ACCA") so-called "residual clause" definition of a "violent felony" is unconstitutionally vague. In this case, we consider whether language similar to ACCA's residual clause that is incorporated into § 1101(a)(43)(F)'s definition of a crime of violence is also void for vagueness. We hold that it suffers from the same indeterminacy as ACCA's residual clause and, accordingly, grant the petition for review.

I.

Petitioner, a native and citizen of the Philippines, was admitted to the United States in 1992 as a lawful permanent resident. In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code section 459 and sentenced each time to two years in prison. If a non-citizen is convicted of an aggravated felony, he is subject to removal. 8 U.S.C. § 1227(a)(2)(A)(iii). Citing petitioner's two first-degree burglary convictions, the Department of Homeland Security ("DHS") charged that petitioner was removable because he had been convicted of a "crime of violence . . . for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).1 That statute defines a "crime of violence" by reference to 18 U.S.C. § 16, which provides the following definition:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. . .

Because the charging documents for each conviction alleged an unlawful entry, and because the term of imprisonment for each conviction was greater than one year, the IJ determined that these convictions were crimes of violence. On the basis of this conclusion, the IJ held that petitioner was removable and ineligible for any relief. The BIA dismissed petitioner's appeal on the same ground. Citing § 16(b) and Becker, the BIA concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk

of the use of force," and therefore affirmed the IJ's holding that petitioner was convicted of a crime of violence.

. . .

II

The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Alphonsus, 705 F.3d at 1042 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

. . .

Previously, we have recognized the vagueness doctrine's applicability in the context of withholding of removal "because of the harsh consequences attached to . . . denial of withholding of removal." Alphonsus, 705 F.3d at 1042 (citing Jordan, 341 U.S. at 230–31). In this case, Petitioner challenges a statute as unconstitutionally vague in the context of denial of cancellation of removal.

For due process purposes, this context is highly analogous to denial of withholding of removal because both pose the harsh consequence of almost certain deportation. Under withholding of removal, a non-citizen who is otherwise removable cannot be deported to his home country if he establishes that his "life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Under cancellation of removal, immigration authorities may cancel the removal of a lawful permanent resident who satisfies certain criteria based on length of residency, good behavior, and exceptional hardship. Id. § 1229b(b)(1). Non-citizens who commit certain criminal offenses are ineligible for these forms of relief. See id. §§ 1231(b)(3)(B)(ii), 1229b(b)(1)(C).

. . .

The government argues that our circuit's reliance on Jordan "is misguided as Jordan did not authorize vagueness challenges to deportation statutes." We find this suggestion baffling. Jordan considered whether the term "crime involving moral turpitude" in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to "be taken into custody and deported," was void for vagueness. 341 U.S. at 225–31 (emphasis added). In considering this challenge, the Court explicitly rejected the argument that the vagueness doctrine did not apply. Id. at 231. The government also argues that subsequent Supreme Court decisions rejected due process challenges to various immigration statutes. See Marcello v. Bonds, 349 U.S. 302, 314 (1955); Galvan v. Press, 347 U.S. 522, 530–31 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 588–91 (1952). None of these cases, however, suggests that the Due Process Clause does not apply to deportation proceedings. Nor could they, for it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Demore v. Kim, 538 U.S. 510, 523 (2003) (internal quotation marks omitted).

. . .

III.

To understand Johnson's effect on this case, it is helpful to view §16(b), as incorporated into the INA, alongside the residual clause at issue in Johnson. The INA provides for the removal of non-citizens who have been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an aggravated felony includes numerous

offenses, including "a crime of violence (as defined in section 16 of Title 18 . . .)." 8 U.S.C. § 1101(a)(43)(F). . . Importantly, both the provision at issue here and ACCA's residual clause are subject to the same mode of analysis. Both are subject to the categorical approach, which demands that courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." Leocal v. Ashcroft, 543 U.S. 1, 7 (2004).
. . .

In Johnson, the Supreme Court recognized two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. First, the Court explained, the clause left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves." Id. That is, the provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Id. Second, the Court stated, ACCA's residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2558. . . The Court's reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA. The result is that because of the same combination of indeterminate inquiries, § 16(b) is subject to identical unpredictability and arbitrariness as ACCA's residual clause. In sum, a careful analysis of the two sections, the one at issue here and the one at issue in Johnson, shows that they are subject to the same constitutional defects and that Johnson dictates that § 16(b) be held void for vagueness.

A.

In Johnson, the Supreme Court condemned ACCA's residual clause for asking judges "to imagine how the idealized ordinary case of the crime subsequently plays out." Id. at 2557–58.
. . .

As with ACCA's residual clause, the INA's crime of violence provision requires courts to "inquire whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents'" a substantial risk of force. Delgado- Hernandez v. Holder, 697 F.3d 1125, 1128 (9th Cir. 2012) (quoting James, 550 U.S. at 208); see also Rodriguez- Castellon, 733 F.3d at 854. We see no reason why this aspect of Johnson would not apply here, and indeed the government concedes that it does. As with the residual clause, the INA's definition of a crime of violence at issue in this case offers "no reliable way to choose between these competing accounts" of what a crime looks like in the ordinary case. Johnson, 135 S. Ct. at 2558.

B.

In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. See Supplemental Brief for Respondent at 1a, Johnson v. United States, 135 S. Ct. 2551 (2015) (No. 13-7120) (cataloguing federal statutes). The vast majority of those statutes pose no vagueness problems because they "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." Johnson, 135 S. Ct. at 2561. The statute at issue in Johnson was not one of those statutes, however. Nor is the provision at issue here. . . Accordingly, Johnson's holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b). As with ACCA's residual clause, § 16(b)'s definition of a crime of violence, combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as" a crime of violence. 35 S. Ct. at 2558.

C.

Notwithstanding the undeniable identity of the constitutional defects in the two statutory provisions, the government and dissent offer several unpersuasive arguments in an attempt to save the INA provision at issue in this case. First, the government and dissent argue that the Supreme Court found ACCA's standard to be arbitrary in part because the residual clause "force[d] courts to interpret 'serious potential risk' in light of the four enumerated crimes" in the provision,11 crimes which are "far from clear in respect to the degree of risk each poses." Id. (quoting Begay v. United States, 553 U.S 137, 143 (2008) (internal quotation marks omitted)). . . Johnson therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses.

Next, the government argues that ACCA's residual clause requires courts to consider the risk that would arise after completion of the offense, see Johnson, 135 S. Ct. at 2557, and that § 16(b) applies only to violence occurring "in the course of committing the offense," 18 U.S.C. § 16(b). First, we doubt that this phrase actually creates a distinction between the two clauses.
. . .

The government also argues that § 16(b) has not generated the same degree of confusion among courts that ACCA's residual clause generated.

IV.

In Johnson, the Supreme Court held that ACCA's residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S. Ct. at 2558. Although the government can point to a couple of minor distinctions between the text of the residual clause and that of the INA's definition of a crime of violence, none undermines the applicability of Johnson's fundamental holding to this case. As with ACCA, section 16(b) (as incorporated in 8 U.S.C. §1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,'" not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under Johnson, these uncertainties render the INA provision unconstitutionally vague.

We GRANT the petition for review and REMAND to the BIA for further proceedings consistent with this opinion.

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Editor's Note : We expect additional orders from the justices' September 25 conference on Monday at 9:30 a.m.
On Monday the court hears oral argument in Epic Systems Corp. v. Lewis. Amy Howe has our preview.
On Monday the court also hears oral argument in Sessions v. Dimaya. Kevin Johnson has our preview.

Kevin Johnson *Immigration*
Posted Mon, September 25th, 2017 1:45 pm

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Argument preview: Criminal removal – Is "crime of violence" void for vagueness?

Recent years have seen the Supreme Court regularly review criminal immigration cases. That should be no surprise in light of the fact the immigration courts have relied on criminal-removal grounds to remove hundreds of thousands of noncitizens annually from the United States. *Sessions v. Dimaya*, which will be reargued next week, is another criminal-removal case. However, it is not just any criminal-removal case.

Unlike other recent removal cases decided by the court revolving around the interpretation of the immigration laws – for example, 2017's *Esquivel-Quintana v. Sessions*, in which the Supreme Court interpreted the statutory phrase "sexual abuse of a minor" for removal purposes – *Sessions v. Dimaya* involves a constitutional challenge to a provision of the immigration laws allowing for removal of an immigrant convicted of a crime. Those laws historically have been largely immune from judicial review under what is known as the "plenary power" doctrine, originally announced in 1889, in *The Chinese Exclusion Case*. Although not yet overruling the doctrine, the court has slowly moved away from a hands-off approach to the judicial review of the immigration laws; just last term, in *Sessions v. Morales-Santana*, it rejected gender distinctions favoring mothers over fathers in the award of derivative citizenship.

The issue in *Dimaya* is whether, and if so how, the Constitution applies to judicial review of the immigration laws. The court's approach to the question could mean big things for a body of law chock full of nationality, gender and class classifications, many which would be constitutionally suspect if the rights of U.S. citizens were involved.

A noncitizen, including a lawful permanent resident, who is convicted of an "aggravated felony" is subject to mandatory removal. The Immigration and Nationality Act defines "aggravated felonies" expansively, including some misdemeanor as well as felony convictions. Part of that definition includes a "residual clause," 18 U.S.C. §16(b), which defines a "crime of violence" to encompass "any ... offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in course of committing the offense."

A lawful permanent resident, James Garcia Dimaya lawfully immigrated to the United States from the Philippines in 1992. His two burglary convictions did not involve violence. Nonetheless, concluding that the convictions were for "crime[s] of violence," the immigration court and the Board of Immigration Appeals ordered Dimaya removed from the United States. Dimaya appealed the BIA's order to the U.S. Court of Appeals for the 9th Circuit.

Vagueness challenges tend to be limited to criminal laws. However, in 1951, the Supreme Court in *Jordan v. DeGeorge* found that, because of "the grave nature of deportation," due process requires fair notice of which criminal convictions will result in possible removal. The court went on in *Jordan* to reject a vagueness challenge to a provision of the immigration laws that authorized removal of an immigrant for "any crime of moral turpitude."

In 2015, while Dimaya's appeal was pending, the court held in *Johnson v. United States* that the Armed Career Criminal Act's definition of "violent felony" was so vague as to violate due process. Relying on *Johnson,* the 9th Circuit found that Section 16(b) was unconstitutionally vague and vacated Dimaya's removal order.

Defending the constitutionality of Section 16(b), the U.S. solicitor general contends that the court of appeals erred in applying the due process clause's prohibition of vagueness in criminal statutes to a civil immigration law. The government relies on *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, in which the court stated that it has shown "greater tolerance of enactments with civil rather than criminal penalties." The solicitor general bolsters that argument by claiming, in language echoing the court's plenary-power decisions, that vagueness challenges to the immigration laws are especially inappropriate: "[T]he Executive Branch possesses broad authority in the administration of the immigration laws because of their foreign relations and national security implications." He further argues that, even if subject to a vagueness challenge, Section 16(b) satisfies due process.

Dimaya counters by accusing the federal government of seeking to overrule *Jordan* "sub silentio" and to fully immunize the immigration removal provisions from vagueness challenges. He further contends that "*Jordan* is ... consistent with this Court's cases demonstrating that contemporary vagueness standards in criminal cases apply to civil statutes that impose similarly severe consequences." Recent decisions such as *Padilla v. Kentucky*,

in 2009, which expanded the scope of immigrants' Sixth Amendment right to effective assistance of counsel in criminal cases, have acknowledged that removal is a critical part of punishments for immigrants convicted of crimes. Given that background, Dimaya argues that *Johnson* compels a finding that Section 16(b) is unconstitutionally vague.

Divisions among the justices emerged in the initial argument of the case. However, no justice seemed interested in overruling *Jordan*'s holding that removal provisions are subject to review under due process vagueness standards. Even if the justices were willing to review the constitutionality of Section 16(b), they appeared divided on whether this case is distinguishable from *Johnson v. United States* and thus whether the statute is void for vagueness. Short-handed after Justice Antonin Scalia's death, the court ordered reargument.

Over more than two centuries, the Supreme Court has not yet firmly established that the Constitution applies (much less how it applies) to the immigration laws. *Sessions v. Dimaya,* along with *Jennings v. Rodriguez*, a challenge to the constitutionality of immigrant-detention provisions in the immigration statute that will be reargued the day after *Dimaya*, offers an opportunity for the court to begin to provide a full answer to this fundamental question.

Posted in *Sessions v. Dimaya*, Featured, Merits Cases

Recommended Citation: Kevin Johnson, *Argument preview: Criminal removal – Is "crime of violence" void for vagueness?*, SCOTUSBLOG (Sep. 25, 2017, 1:45 PM), http://www.scotusblog.com/2017/09/argument-preview-criminal-removal-crime-violence-void-vagueness/

Amy Howe *Independent Contractor and Reporter*
Posted Mon, July 10th, 2017 1:19 pm

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An introduction to the travel ban: In Plain English

In December 2015, the presidential campaign of then-candidate Donald Trump issued a statement calling for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what's going on." Trump's statement continued: "Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victim of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life." Fifteen months later, on March 6, 2017, citing national security concerns, President Trump signed an executive order that ordered a freeze on new visas for travelers from six Muslim-majority countries and suspended travel by refugees into the United States. Two federal appeals courts blocked the Trump administration from implementing the ban, but on June 26 the Supreme Court stepped in. The justices not only agreed to review the lower courts' rulings in October, when they return from their summer break, but they also allowed the federal government to put at least part of the ban into effect until they can rule on the federal government's appeals.

Trump's March 6 order was not the administration's first effort to restrict travel to the United States by visitors from predominantly Muslim countries. On January 27, Trump signed an order that barred citizens from seven such countries – Iraq, Syria, Sudan, Iran, Somalia, Libya and Yemen – from entering the country and suspended the refugee program. That order led to confusion around the world, with some travelers stranded in airports after they were denied entry to the United States and others prevented from boarding planes overseas. The order also prompted legal challenges, and on February 3 a federal district judge in Seattle temporarily blocked the government from enforcing the order. Six days later, a federal appeals court left that ruling in place.

Shortly after the appeals court's ruling, Trump took to Twitter, with a message that seemed to promise an imminent appeal to the Supreme Court: "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!" But that appeal never came. Instead, on March 6, the president signed a new executive order that in many ways resembled its predecessor: It suspended both refugee admissions and travel to the United States for citizens of six of the seven predominantly Muslim countries covered by the January 27 order (removing Iraq from the list). But the second order did not contain the first order's preference for religious minorities seeking to come to the United States as refugees, nor did it ban – as the first order did – Syrian refugees indefinitely.

Like the first executive order, the second order was quickly challenged in court. On May 25, the U.S. Court of Appeals for the 4th Circuit upheld a ruling by a federal district court from Maryland that barred the Trump administration from implementing the March 6 order. The 4th Circuit stated that the order violated the Constitution's establishment clause, which (among other things) prohibits the government from favoring one religion over another. Pointing to statements made by Trump both as a candidate for the presidency and while in office, the court of appeals concluded that the order was intended to discriminate against Muslims, even if it did not say so specifically.

A few weeks later, on June 12, the U.S. Court of Appeals for the 9th Circuit also upheld a federal district court's ruling – this time, from Hawaii – putting the executive order on hold. The 9th Circuit did not address whether the travel ban violates the establishment clause; instead, it ruled, the order cannot go into effect because it exceeds the president's power, given to him by Congress, to regulate immigration.

This time, the Trump administration did ask the Supreme Court to intervene, both by reviewing the two lower-court rulings and by allowing the executive order to go into effect until it could hear oral argument and rule on the dispute. On June 26, the justices announced that they would indeed weigh in, with new briefing over the summer and oral argument when they return from their summer recess in October. And the justices took a middle ground on what should happen with the order during that time: In a brief and unsigned opinion, they allowed the Trump administration to put the order into effect, at least for travelers to the United States who don't already have some connection to the country.

There are likely to be two main points of contention before the court when the justices hear oral argument in the fall. The first is whether, as the 4th Circuit held, the March 6 order violates the Constitution's establishment clause. In the government's view, it does not. The Supreme Court's earlier cases, along with the need for courts to accord respect to a separate branch of government, the government contends, bar courts from blocking the executive order when it did not, on its face, discriminate against any specific religion but instead rested on the president's determination that it was necessary to protect national security. Indeed, the government stresses, the 4th Circuit's decision was "the first to hold that a provision of federal law—neutral on its face and in operation—violates the Establishment Clause based on speculation about its drafters' supposedly illicit purpose." And even if there were cases in which it would be appropriate for courts to consider more than just the text of the order and how it works to discern the order's "true" purpose, the government adds, courts should not look to statements made by a candidate while campaigning, because ideas suggested during the campaign may well change once the candidate is elected and sees a need to do things differently.

The challengers counter that the 4th Circuit's ruling that the order violates the establishment clause is completely consistent with the Supreme Court's earlier case law. The Supreme Court, they emphasize, "has never held that courts must close their eyes to affirmative evidence that the executive branch has acted with an unconstitutional purpose." This is particularly true, they continue, when ascertaining the purpose of this order does not require "judicial psychoanalysis": There is, they say, an "extraordinary volume of publicly available, undisputed evidence that the Order was intended to disfavor Muslims."

The federal government argues that the 9th Circuit's conclusion that the executive order went beyond the president's authority under federal immigration laws was "even more novel and extraordinary" than the 4th Circuit's ruling that the order violates the Constitution. The government explains that federal law gives the president "exceedingly broad discretion" to suspend visas for foreigners when he believes that allowing them to enter the United States would be "detrimental" to the country's interest. But it does not require, as the 9th Circuit ruled, the president to make specific factual findings to that effect. Indeed, the federal government points out, presidents have historically suspended the entry of foreigners for decades. And in any event, the government notes, the order makes "extensive findings" concerning the national-security risks the six countries covered by the order present.

The challengers characterize the government's position as amounting to "unilateral and practically limitless immigration power" for the president. Although courts can certainly defer to a president's determination regarding the relationship between immigration and national security, they contend, deference does not foreclose meaningful judicial review; it is exactly the job of the courts, they argue, to evaluate whether the president's actions violate the Constitution. Moreover, although the Trump administration has argued that the freeze on refugees and travelers from the six predominantly Muslim countries is necessary to give government officials time to review the procedures that they use to vet applicants, the government has already had plenty of time to conduct such a review.

The two issues relating to the establishment clause and the president's authority to issue the order are the main points of contention in the litigation, but at least two other questions could affect whether the justices reach those key issues at all. The first question is whether the challengers have a legal right to contest the executive order. The lower courts concluded that at least some of the individuals challenging the order have that right, for two reasons: The plaintiffs have relatives who want to travel to the United States but would be barred from doing so under the order, and the order is effectively a "state-sanctioned message condemning [their] religion and causing [them] to feel excluded and marginalized." As for the state of Hawaii, which is also a plaintiff in one case, the 9th Circuit agreed that it could sue the government because the order would (among other things) prevent students and faculty from coming to the state's university. But the Trump administration disputes both of these conclusions.

The second potential sticking point is whether the challenges to the provision that suspends entry for travelers from the six countries are still ongoing disputes. The challengers in the 4th Circuit case had told the justices that the provision would expire on June 14, 2017, because the order stated that the bar on travelers and refugees would apply for a 90-day period – beginning on March 16, when the order went into effect, and ending on June 14. However, on June 14, Trump amended the order, making clear that the bar would go into effect when the lower-court orders blocking its implementation had been lifted. When they granted review, the justices specifically asked both the government and the challengers to address this question in their briefs.

Under the Supreme Court's rules, the federal government's opening brief is due in early August, with the challengers' briefs to follow in mid-September. But litigation in the lower courts has continued, as the two sides argue over what exactly the Supreme Court meant when it barred the government from enforcing the order against travelers who have a "close" relationship with people or institutions within the United States. In guidance issued shortly after the Supreme Court's June 26 order, the federal government indicated that relatives such as parents, spouses, children and siblings will qualify as "close" relatives, but the government did not include other relatives – such as grandparents, grandchildren, nieces, nephews, aunts and uncles – in its definition. It's not clear whether this dispute will make it to the Supreme Court before October's oral argument, but it certainly could.

Posted in *Trump v. Int'l Refugee Assistance Project*, *Trump v. Hawaii*, Legal challenges to Trump's entry ban, Plain English / Cases Made Simple, Summer symposium on Trump v. International Refugee Assistance Project and Trump v. Hawaii, Featured, Merits Cases

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Recommended Citation: Amy Howe, *An introduction to the travel ban: In Plain English*, SCOTUSblog (Jul. 10, 2017, 1:19 PM), http://www.scotusblog.com/2017/07/introduction-travel-ban-plain-english/

Federal Register
Vol. 82, No. 20
Wednesday, February 1, 2017

Presidential Documents

Title 3—

The President

Executive Order 13769 of January 27, 2017

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including ''honor'' killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. *Policy.* It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President

a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C–2 visas for travel to the United Nations, and G–1, G–2, G–3, and G–4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C–2 visas for travel to the United Nations, and G–1, G–2, G–3, and G–4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for All Immigration Programs.* (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not

used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

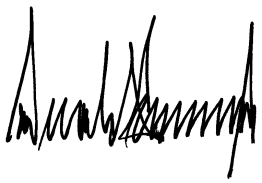
Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 27, 2017.

[FR Doc. 2017–02281
Filed 1–31–17; 11:15 am]
Billing code 3295–F7–P

Federal Register
Vol. 82, No. 45
Thursday, March 9, 2017

Presidential Documents

Title 3—

The President

Executive Order 13780 of March 6, 2017

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: ''(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists.'' 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: ''Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.''

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the ''political branches are far better equipped to make appropriate distinctions'' about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called ''honor killings,'' in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

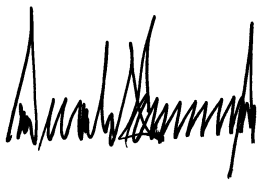
Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 6, 2017.

[FR Doc. 2017–04837
Filed 3–8–17; 11:15 am]
Billing code 3295–F7–P

(ORDER LIST: 583 U.S.)

MONDAY, OCTOBER 10, 2017

CERTIORARI – SUMMARY DISPOSITION

16-1436 TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

We granted certiorari in this case to resolve a challenge to "the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780." Because that provision of the Order "expired by its own terms" on September 24, 2017, the appeal no longer presents a "live case or controversy." *Burke* v. *Barnes*, 479 U. S. 361, 363 (1987). Following our established practice in such cases, the judgment is therefore vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss as moot the challenge to Executive Order No. 13,780. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). We express no view on the merits.

Justice Sotomayor dissents from the order vacating the judgment below and would dismiss the writ of certiorari as improvidently granted.

Amy Howe *Independent Contractor and Reporter*
Posted Tue, October 10th, 2017 8:58 pm

Email Amy
Bio & Post Archive »

Justices end 4th Circuit travel-ban challenge

One of the challenges to President Donald Trump's March 6 executive order, often known as the "travel ban," came to an end at the Supreme Court today, at least for now. In a brief order issued this evening, the justices sent *Trump v. International Refugee Assistance Project* back to the U.S. Court of Appeals for the 4th Circuit with instructions to dismiss the case as moot – that is, no longer a live controversy. The justices did not act on *Trump v. Hawaii*, the challenge that it had agreed to review along with *Trump v. IRAP* last June. The likely explanation for the different treatment of the two cases is that the Hawaii case challenges a provision of the March 6 order that is still in effect, but will expire later this month. This means that the justices could also dismiss that case, but even if they do, they are probably not done with the issues at the heart of both cases – whether the Trump administration's restrictions on entry into the United States violate the Constitution or exceed the president's authority. Those questions are likely to return to the court soon, perhaps even this term.

Both of the challenges were filed after the president's March 6 order imposed a 90-day freeze on the entry into the United States by travelers from six Muslim-majority countries: Somalia, Sudan, Libya, Yemen, Syria and Iran. The Hawaii case also challenged a provision of the order that suspended the admission of refugees into the United States for 120 days. On September 24, as the 90-day period was due to expire, however, Trump issued a new proclamation that restricted travel to the United States by nationals from five of the six countries on his March 6 list (Somalia, Syria, Libya, Iran and Yemen) and added three more countries: North Korea, Venezuela and Chad. Trump explained that the federal government had, as directed in the March 6 order, evaluated the procedures that it used to vet travelers to the United States. Although the country as a whole "has improved its capability and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat," he indicated, travel restrictions are still necessary for these eight countries.

One day after Trump issued his proclamation, the Supreme Court removed the travel-ban cases, which had been scheduled for oral argument on October 10, from its argument calendar. The justices also instructed the two sides to file briefs, due last week, addressing whether the challenges are moot in the wake of Trump's proclamation and the scheduled expiration of the March 6 order's temporary suspension of the admission of refugees on October 24.

In the briefs that they filed last week, the two sides disagreed on two central questions: Whether the cases are moot and, if they are, the fate of the lower-court decisions ruling for the challengers. The federal government insisted that the two cases "are now or soon will be moot," because the 90-day suspension on the entry of nationals from the six Muslim-majority countries has already expired (and been replaced by the September 24 proclamation), while the 120-day suspension of the admission of refugees into the United States will expire on October 24. And the government urged the court to vacate the lower courts' decisions, so that they would not carry any legal weight in the future, describing such a step as essential to avoid "'legal consequences' in future cases, on critical issues including justiciability and the President's authority to protect national security."

The challengers countered that the disputes are not moot and should be returned to the court's calendar for oral argument and an eventual decision on the merits. Part of the March 6 executive order remains in place, they reasoned, while the September 24 proclamation restores and even extends many other parts of that order. But even if the disputes were moot, they argued, the court should not vacate the decisions below (which would give the challengers useful precedent to use in litigation over the September 24 proclamation), because doing so would effectively reward the government for its efforts to manipulate the litigation and the timing of the order to make the disputes moot in the first place. Instead, the challengers urged, the justices should dismiss the cases as "improvidently granted" (that is, on the ground that it was a mistake for the court to have agreed to review them), an outcome that would leave the decisions below in place, and allow the two sides to renew their dispute in litigation over the newest proclamation.

Explaining that the freeze on the entry of travelers from the six countries "'expired by its own terms' on September 24" and therefore "no longer presents a live case or controversy," the court agreed with the federal government that the 4th Circuit's ruling for the challengers should be vacated. Justice Sonia Sotomayor was the only justice to note her disagreement with this outcome; she would have dismissed the case as improvidently granted.

If the justices are indeed waiting for the 120-day suspension of the refugee program to expire on October 24, there may not be any action on the Hawaii case in the Supreme Court until then. However, litigation challenging the September 24 proclamation could be well under way in the lower courts by that point. Attorneys in both *Trump v. Hawaii* and *Trump v. IRAP* have sought to amend their original complaints (here and here) to challenge the new proclamation, while another group – the Council on American-Islamic Relations – has filed its own challenge.

This post originally appeared at Howe on the Court.

Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015)

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, Abel Perez Ruelas, and Efren Orozco ("petitioners") represent a certified class of non-citizens who challenge their prolonged detention pursuant to 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings and determinations to justify their continued detention. Their case is now on appeal for the third time. After a three-judge panel of our court reversed the district court's denial of petitioners' motion for class certification, and after our decision affirming the district court's entry of a preliminary injunction, the district court granted summary judgment to the class and entered a permanent injunction. Under the permanent injunction, the government must provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge ("IJ"). At that hearing, the government must prove by clear and convincing evidence that the detainee is a flight risk or a danger to the community to justify the denial of bond. The government appeals from that judgment. We affirm in part and reverse in part.

(I) Background

On May 16, 2007, Alejandro Garcia commenced this case by filing a petition for a writ of habeas corpus in the Central District of California. Garcia's case was consolidated with a similar case filed by Alejandro Rodriguez, and the petitioners moved for class certification. The motion was denied on March 21, 2008.

A three-judge panel of our court reversed the district court's order denying class certification. Rodriguez I, 591 F.3d 1105. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typical of the class's because "the determination of whether [he] is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention"; and Rodriguez, through his counsel, adequately represented the class. Id. at 1122-25. The panel also noted that "any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class" could be addressed through "the formation of subclasses." Id. at 1123.

The government petitioned our court for panel rehearing or rehearing en banc. In response, the panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") does not bar certification of the class and, with that amendment, unanimously voted to deny the government's petition. The full court was advised of the suggestion for rehearing en banc, and no judge requested a vote on whether to rehear the matter. See Fed. R. App. P. 35. The government did not file a petition for certiorari in the United States Supreme Court.

On remand, the district court certified a class defined as:

> all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.

The district court also approved the proposed subclasses, which correspond to the four statutes under which the class members are detained—8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). The class does not include suspected terrorists, who are detained pursuant to 8 U.S.C. § 1537. Additionally, because the class is defined as non-citizens who are detained "pending completion of removal proceedings," it excludes any detainee subject to a final order of removal.

On September 13, 2012, the district court entered a preliminary injunction that applied to class members detained pursuant to two of these four "general immigration detention statutes"—§§ 1225(b) and 1226(c). Under the preliminary injunction, the government was required to "provide each [detainee] with a bond hearing" before an IJ and to "release each Subclass member on reasonable conditions of supervision . . . unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."

The government appealed, and on April 16, 2013, we affirmed. See Rodriguez II, 715 F.3d 1127. We applied the Court's preliminary injunction standard set forth in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), which requires the petitioner to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Rodriguez II, 715 F.3d at 1133.

Evaluating petitioners' likelihood of success on the merits, we began with the premise that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." . . . "Thus, the Supreme Court has held that the indefinite detention of a once-admitted alien 'would raise serious constitutional concerns.'"

Addressing those concerns, we recognized that we were not writing on a clean slate: "[I]n a series of decisions since 2001, 'the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.'"

. . .

To avoid those "serious constitutional concerns," the Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. Noting that the "proceedings at issue here are civil, not criminal," the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation," and recognized six months as a "presumptively reasonable period of detention[.]"

Although in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, disagreed with the majority's application of the canon of constitutional avoidance and argued that the holding would improperly interfere with international repatriation negotiations, Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." Justice Kennedy further noted that although the government may detain non-citizens "when necessary to avoid the risk of flight or danger to the community," due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large."

. . .

Applying these precedents to Rodriguez class members detained under § 1226(c), which requires civil detention of non-citizens previously convicted of certain crimes who have already served their state or federal periods of incarceration, we have concluded that "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." Rodriguez II, 715 F.3d at 1137 (quoting Casas, 535 F.3d at 951). To avoid these constitutional concerns, we held that "§ 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.'" Id. at 1138 (quoting Zadvydas, 533 U.S. at 682). "[W]hen detention becomes prolonged," i.e., at the six-month mark, "§ 1226(c) becomes inapplicable"; the government's authority to detain the non-citizen shifts to § 1226(a), which provides for discretionary detention; and detainees are then entitled to bond hearings. Id.

In so holding, we rejected the government's attempt to distinguish Casas on the basis that "Casas concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA," whereas this case involves "aliens awaiting the conclusion of their initial administrative proceedings." We found that this argument reflected "a distinction without a difference": "'Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.'"

We also noted that our conclusion was consistent with the decisions of the two other circuits that have directly addressed this issue.

As to the Rodriguez subclass detained under § 1225(b), we found "no basis for distinguishing between" non-citizens detained under that section and under § 1226(c). Rodriguez II, 715 F.3d at 1143. The cases relied upon by the government for the proposition that arriving aliens are entitled to lesser due process protections—namely, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953) and Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (en banc)—were decided under pre-IIRIRA law and, as such, were inapposite. We therefore held that "to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited." As we had with § 1226(c), we explained that "the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the non-citizen would shift to § 1226(a), which is discretionary and which we have already held requires a bond hearing."

After establishing that class members detained under § 1226(c) and § 1225(b) are entitled to bond hearings after six months of detention, we clarified that the procedural requirements set forth in Singh apply to those hearings. These requirements include proceedings before "a neutral IJ" at which "the government bear[s] the burden of proof by clear and convincing evidence," . . . a lower burden of proof than that required to sustain a criminal charge.

Having found that the class was likely to succeed on the merits, we turned to the other preliminary injunction factors. We found that the class members "clearly face irreparable harm in the absence of the preliminary injunction" because "the deprivation of constitutional rights unquestionably constitutes irreparable injury." . . . The preliminary injunction safeguards constitutional rights by ensuring that "individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained." Similarly, we found that the balance of equities favored the class members because "needless prolonged detention" imposes "major hardship," whereas the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." Finally, we held that the preliminary injunction was consistent with the public interest, which is "implicated when a constitutional right has been violated," and "benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions." We therefore affirmed the district court's order.

On August 6, 2013, after we issued our decision in Rodriguez II, the district court granted summary judgment to the class members and entered a permanent injunction. The permanent injunction applies to class members detained under any of the four civil "general immigration detention statutes"—§§ 1225(b), 1226(a), 1226(c), and 1231(a)—and requires the government to provide each detainee with a bond hearing by his 195th day of detention. Applying our decisions in Casas, Singh, and Rodriguez II, the district court further ordered that bond hearings occur automatically, that detainees receive "comprehendible notice," that the government bear the burden of proving "by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond," and that hearings are recorded. However, the district court declined to order IJs to consider the length of detention or the likelihood of removal during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing.

The government now appeals from the entry of the permanent injunction, arguing that the district court—and we—erred in applying the canon of constitutional avoidance to each of the statutes at issue. Relying on the Supreme Court's decisions in Zadvydas and Demore, the government argues that none of the subclasses are categorically entitled to bond hearings after six months of detention. Accordingly, the government contends that we should decertify the class and instead permit as-applied challenges to individual instances of prolonged detention, which could occur only through habeas proceedings. Petitioners counter that Rodriguez II is the law of the case and law of the circuit, requiring us to affirm the permanent injunction as to the § 1225(b) and § 1226(c) subclasses, and that non-citizens detained pursuant to § 1226(a) and § 1231(a) are entitled to bond hearings for reasons similar to those discussed in Rodriguez II. Petitioners cross-appeal the district court's order as to the procedural requirements for bond hearings; they argue that the district court erred in declining to require that IJs consider the likelihood of removal and

the total length of detention, and in declining to require that non-citizens detained for twelve or more months receive periodic bond hearings every six months.

(II) Nature of Civil Immigration Detention

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.

. . .

Lead petitioner Alejandro Rodriguez's story is illustrative. Rodriguez came to the United States as an infant and has lived here continuously since then. Rodriguez is a lawful permanent resident of the United States, and his entire immediate family—including his parents, siblings, and three young children—also resides in the United States as citizens or lawful permanent residents. Before his removal proceedings began, Rodriguez worked as a dental assistant. In 2003, however, Rodriguez was convicted of possession of a controlled substance and sentenced to five years of probation and no jail time. He had one previous conviction, for "joyriding."

In 2004, ICE commenced removal proceedings and subjected Rodriguez to civil detention. An IJ determined that Rodriguez's prior conviction for "joyriding," i.e. driving a stolen vehicle, qualified as an "aggravated felony" that rendered him ineligible for relief in the form of cancellation of removal, and therefore ordered him removed. Rodriguez appealed the IJ's decision to the BIA, which affirmed, and then to the Ninth Circuit. In July 2005, a three-judge panel of our court granted the government's motion to hold Rodriguez's case in abeyance until the Supreme Court decided a related case, Gonzales v. Penuliar, 549 U.S. 1178, 127 S. Ct. 1146, 166 L. Ed. 2d 992 (2007), which issued eighteen months later, in January 2007.

In Penuliar, the Supreme Court vacated our court's opinion and remanded for further consideration in light of Gonzales v. Duenas-Alvarez, 549 U.S. 183, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007), which held that violating a California statute prohibiting taking a vehicle without the owner's consent qualifies as a "theft offense." Between July 2005 and January 2007, while Rodriguez's case was in abeyance, ICE conducted four custody reviews on Rodriguez and repeatedly determined that Rodriguez was required to remain in detention until our court issued a decision on the merits of his claim. In mid-2007, about a month after Rodriguez had moved for class certification, however, ICE released him. At that point, Rodriguez had been detained for 1,189 days, roughly three years and three months. In April 2008, in the related case on remand from the Supreme Court, our court held that driving a stolen vehicle did not qualify as an aggravated felony. Penuliar v. Mukasey, 528 F.3d 603, 614 (9th Cir. 2008). On motion of the parties, we then remanded Rodriguez's petition to the BIA, which granted his application for cancellation of removal, vindicating his right to lawfully remain in the United States.

(III) Standard of Review

"We review legal conclusions . . . de novo, factual findings for clear error, and the scope of the injunction for abuse of discretion."

(IV) Discussion

In resolving whether the district court erred in entering the permanent injunction, we consider, first, petitioners' entitlement to bond hearings and, second, the procedural requirements for such hearings. Based on our precedents, we hold that the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk. However, we also conclude that individuals detained under § 1231(a) are not members of the certified class. We affirm the district court's order insofar as it requires automatic bond hearings and requires IJs to consider alternatives to detention because we presume, like the district court, that IJs are already doing so when determining whether to release a non-citizen on bond. Because the same constitutional concerns arise when detention approaches another prolonged period, we hold that IJs must provide bond hearings periodically at six month intervals for class members detained for more than twelve months. However, we reject the class's suggestion that we mandate additional procedural requirements.

(A) Civil Detention

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

Civil detention violates the Due Process Clause except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." Zadvydas, 533 U.S. at 690 (citations omitted). Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection.

In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.

Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future."

Similarly, the Court has held that pretrial detention of individuals charged with "the most serious of crimes" is constitutional only because, under the Bail Reform Act, an "arrestee is entitled to a

prompt detention hearing" to determine whether his confinement is necessary to prevent danger to the community.

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings as to the individual's ability to comply with the court order.

Early cases upholding immigration detention policies were a product of their time.
. . .
More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."
. . .
Since Zadvydas and Demore, our court has "grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing."

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction "between detention being authorized and being necessary as to any particular person." Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community." And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes "prolonged" at the six-month mark.

(B) Entitlement to a Bond Hearing

With this well-established precedent of the Supreme Court and our Court in mind, we review the district court's grant of summary judgment and entry of a permanent injunction. We consider, in turn, whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months.

(1) The Section 1226(c) Subclass

Section 1226(c) requires that the Attorney General detain any non-citizen who is inadmissible or deportable because of his criminal history upon that person's release from imprisonment, pending proceedings to remove him from the United States. Detention under § 1226(c) is mandatory. Individuals detained under that section are not eligible for release on bond or parole, see 8 U.S.C. § 1226(a); they may be released only if the Attorney General deems it "necessary" for witness protection purposes, id. § 1226(c)(2).

An individual detained under § 1226(c) may ask an IJ to reconsider whether the mandatory detention provision applies to him, see 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual is properly included in a category of non-citizens subject to mandatory detention based on his criminal history.

As a result of § 1226(c)'s mandatory language and the limited review available through a Joseph hearing, individuals are often detained for years without adequate process.

In Rodriguez II, we held that "the prolonged detention of an alien [under § 1226(c)] without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." 715 F.3d at 1137-38 (quoting Casas, 535 F.3d at 951). To avoid these "constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation.'" Id. at 1138 (quoting Zadvydas, 533 U.S. at 682). Accordingly, at the six-month mark, "when detention becomes prolonged, § 1226(c) becomes inapplicable," and "the Attorney General's detention authority rests with § 1226(a)." Id. (citation omitted). Under Casas, those detainees are then entitled to a bond hearing. See id. (discussing Casas, 535 F.3d at 951).

Contrary to the government's argument, this holding is consistent with the text of § 1226(c), which requires that the government detain certain non-citizens but does not mandate such detention for any particular length of time.

Since Rodriguez II, no intervening changes in the law have affected our conclusions.

Moreover, district courts have relied on Rodriguez II in resolving numerous habeas petitions filed by immigration detainees.

Thus, Rodriguez II is law of the case and law of the circuit.

The "'general rule' is that our decisions 'at the preliminary injunction phase do not constitute the law of the case.'"

The question resolved in Rodriguez II—whether non-citizens subject to prolonged detention under § 1226(c) are entitled to bond hearings—is a pure question of law. We interpreted the statute by applying the canon of constitutional avoidance, and were bound to do so by our prior precedent. The decision was not made "hastily"; it provided a "fully considered appellate ruling" on the legal issues. Ranchers Cattlemen, 499 F.3d at 1114 (quoting 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2002)). We therefore follow Rodriguez II as law of the case and law of the circuit.

(2) The Section 1225(b) Subclass

Section 1225(b) applies to "applicants for admission" who are stopped at the border or a port of entry, or who are "present in the United States" but "ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." Id. § 1225(b)(1)(B)(iii)(IV). As to all other applicants for admission, the statute

provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. Id. § 1225(b)(2)(A).

Under DHS regulations, non-citizens detained pursuant to § 1225(b) are generally not eligible for release on bond. 8 C.F.R. § 236.1(c)(2). If there are "urgent humanitarian reasons or significant public benefit[s]" at stake, however, the Attorney General has discretion to temporarily parole such an individual into the United States, provided that the individual presents neither a danger nor a risk of flight.

As with § 1226(c), the government often cites § 1225(b)'s mandatory language to justify indefinite civil detention without an individualized determination as to whether the detainee would pose a danger or flight risk if released.

In Rodriguez II, we extended Casas and held that to avoid serious constitutional concerns, mandatory detention under § 1225(b), like mandatory detention under § 1226(c), must be construed as implicitly time-limited. Rodriguez II, 715 F.3d at 1144. Accordingly, "the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien shifts to § 1226(a), which is discretionary and which we have already held requires a bond hearing." Id. (citing Casas, 535 F.3d at 948).

In so holding, we recognized that many members of the § 1225(b) subclass are subject to the "entry fiction" doctrine, under which non-citizens seeking admission to the United States "may physically be allowed within its borders pending a determination of admissibility," but "are legally considered to be detained at the border and hence as never having effected entry into this country."

The government now argues that "[d]espite years of discovery, petitioners have not identified any member of the Section 1225(b) subclass who is a [lawful permanent resident]." Petitioners represent that they have found lawful permanent residents who have been detained for more than six months under § 1225(b), although their submissions do not identify any specific individuals who fit that description. The question, however, is whether "one possible application of [the] statute raises constitutional concerns." Rodriguez II, 715 F.3d at 1141. Because the government concedes that detention of lawful permanent residents under § 1225(b) is possible under § 1101(a)(13)(C), "the statute as a whole should be construed through the prism of constitutional avoidance."

The government also argues that lawful permanent residents treated as seeking admission are entitled to lesser due process protections than other lawful permanent residents. But the government has not provided any authority to support that proposition: The cases cited in the government's brief address statutory and regulatory distinctions between lawful permanent residents treated as applicants for admission and other lawful permanent residents; they do not reflect any constitutional distinction between those groups.

Finally, the government argues that, instead of requiring bond hearings, we could avoid constitutional concerns by interpreting § 1225(b) not to apply to lawful permanent residents. This argument relies on an implausible construction of the statutes at issue.
Section 1225(b) applies to "applicants for admission," and § 1101 defines six categories of lawful permanent residents as "seeking an admission into the United States for purposes of the immigration laws."

Accordingly, we adhere to Rodriguez II's holding regarding the § 1225(b) subclass as law of the case and law of the circuit. See Gonzalez, 677 F.3d at 390 n.4. The government's attempts to re-litigate Rodriguez II are unavailing.

(3) the Section 1226(a) Subclass

Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The statute expressly authorizes release on "bond of at least $1,500" or "conditional parole." Id. § 1226(a)(2). Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. See 8 C.F.R. §§ 236.1, 1003.19. At these hearings, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." Guerra, 24 I. & N. Dec. at 38. "After an initial bond redetermination," a request for another review "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The government has taken the position that additional time spent in detention is not a "changed circumstance" that entitles a detainee to a new bond hearing.

Although § 1226(a) provides for discretionary, rather than mandatory, detention and establishes a mechanism for detainees to seek release on bond, non-citizens often face prolonged detention under that section.

The district court's decision regarding the § 1226(a) subclass was squarely controlled by our precedents.

The government does not contest that Casas is the binding law of this circuit or that individuals detained under § 1226(a) are entitled to bond hearings. Instead, the government argues that § 1226(a) affords detainees the right to request bond hearings, see 8 C.F.R. § 236.1, so there is no basis for requiring the government to automatically provide bond hearings after six months of detention. This argument is foreclosed by Casas, which held that "§ 1226(c) must be construed as requiring the Attorney General to provide the alien with [a bond] hearing."

(4) The Section 1231(a) Subclass

Section 1231(a) governs detention of non-citizens who have been "ordered removed." 8 U.S.C. § 1231(a). The statute provides for mandatory detention during a ninety-day removal period. Id. § 1231(a)(2). Under the statute:

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). The removal period may be extended beyond ninety days if a detainee "fails or refuses" to cooperate in his removal from the United States. Id. § 1231(a)(1)(C). "If the alien does not leave or is not removed within the removal period," he "shall be subject to supervision," but detention is no longer mandatory. Id. § 1231(a)(3). Rather, the Attorney General has discretion to detain certain classes of non-citizens and to impose conditions of release on others. Id. § 1231(a)(3), (a)(6). Before releasing a detainee, the government must conclude that removal is "not practicable or not in the public interest," that the detainee is "non-violent" and "not likely to pose a threat to the community following release," and that the detainee "does not pose a significant flight risk" and is "not likely to violate the conditions of release." 8 C.F.R. § 241.4(e); see also id. § 241.4(f) (enumerating factors the review panel should "weigh[] in considering whether to recommend further detention or release of a detainee").

Here, the class is defined, in relevant part, as non-citizens who are detained "pending completion of removal proceedings, including judicial review." The class therefore by definition excludes any detainee subject to a final order of removal.

Petitioners describe the § 1231(a) subclass as individuals detained under that section who have received a stay of removal from the BIA or a court. However, if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet "administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The non-citizen has not been "ordered removed," and the removal period has not begun, so § 1231(a) is inapplicable. See Owino v. Napolitano, 575 F.3d 952, 955 (9th Cir. 2009) ("[W]hile administrative proceedings are pending on remand, Owino will not be subject to a final order of removal, so § 1231 cannot apply."). Similarly, as long as a non-citizen's removal order is stayed by a court pending judicial review, that non-citizen is not subject to "the court's final order." 8 U.S.C. § 1231(a)(1)(B)(ii). In such circumstances, § 1231(a) is, again, inapplicable. See Prieto-Romero v. Clark, 534 F.3d 1053, 1059 (9th Cir. 2008) ("[Section] 1231(a) does not provide authority to detain an alien . . . whose removal has been stayed by a court of appeals pending its disposition of his petition for review."); Casas, 535 F.3d at 947 ("If an alien has filed a petition for review with this court and received a judicial stay of removal, the 'removal period' under § 1231(a) does not begin until this court 'denies the petition and withdraws the stay of removal.'") (quoting Prieto-Romero, 534 F.3d at 1060).

Simply put, the § 1231(a) subclass does not exist. The district court's grant of summary judgment and permanent injunction are therefore reversed to the extent they pertain to individuals detained under § 1231(a).

(C) Procedural Requirements

In addition to challenging the class members' entitlement to automatic bond hearings after six months of detention, the government objects to the district court's order regarding the burden and standard of proof at such hearings. The government also appeals the district court's ruling that IJs must consider alternatives to detention. Petitioners cross-appeal the district court's rulings that IJs are not required to consider the ultimate likelihood of removal, assess the total length of detention, or conduct periodic hearings at six-month intervals. We address each issue in turn.

(1) Burden and standard of proof

The government argues that the district court erred in requiring the government to justify a non-citizen's detention by clear and convincing evidence, an intermediate burden of proof that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt. As we noted in Rodriguez II, however, we are bound by our precedent in Singh, which held that "the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a Casas hearing."

The government now contends that Singh was wrongly decided. However, it is well established that only a full court, sitting en banc, may overrule a three-judge panel decision. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003). Right or wrong, we are bound to follow Singh unless intervening Supreme Court authority is to the contrary. Id.

(2) Restrictions Short of Detention

The government also argues that the district court erred in "determin[ing] that IJs are required to consider the use of alternatives to detention in making bond determinations." As the district court's order states, however, IJs "should already be considering restrictions short of incarceration." Indeed, Rodriguez II affirmed a preliminary injunction that directed IJs to "release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government" satisfied its burden of justifying continued detention. 715 F.3d at 1131 (emphasis added).

The government's objections to this requirement are unpersuasive. First, the government relies on Demore for the proposition that the government is not required "to employ the least burdensome means" of securing immigration detainees. Demore, 538 U.S. at 528. But Demore applies only to "brief period[s]" of immigration detention. Id. at 513, 523. "When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required."

Second, the government argues that IJs are not empowered to impose conditions of release. However, federal regulations authorize IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS. 8 C.F.R. § 1236.1(d)(1). Accordingly,

if DHS detains a noncitizen, an IJ is already empowered to "ameliorat[e] the conditions" by imposing a less restrictive means of supervision than detention.

Finally, the government argues that IJs lack the resources to engage in continuous monitoring of released individuals. However, the government fails to cite any law or evidence indicating that IJs, rather than DHS or ICE agents, would be responsible for implementing the conditions of release. Moreover, the record indicates that Congress authorized and funded an ICE alternatives-to-detention program in 2002, and DHS has operated such a program, called the Intensive Supervision and Appearance Program, since 2004. It is abundantly clear that IJs can and do consider conditions of release on bond when determining whether the government's interests can be served by detention only, and we conclude that DHS will administer any such conditions, regardless of whether they are imposed by DHS in the first instance or by an IJ upon later review.

(3) Length of Detention and Likelihood of Removal

In their cross-appeal, petitioners argue that the district court erred in failing to require IJs to consider the length of a non-citizen's past and likely future detention and, relatedly, the likelihood of eventual removal from the United States. In our prior decisions, we have not directly addressed whether due process requires consideration of the length of future detention at bond hearings. We have noted, however, that "the due process analysis changes as 'the period of . . . confinement grows,'" and that longer detention requires more robust procedural protections. Diouf II, 634 F.3d at 1086 (quoting Zadvydas, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653). Accordingly, a noncitizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that "detention incidental to removal must bear a reasonable relation to its purpose." Tijani, 430 F.3d at 1249 (Tashima, J., concurring) (citing Demore, 538 U.S. at 527; Zadvydas, 533 U.S. at 690). At some point, the length of detention could "become[] so egregious that it can no longer be said to be 'reasonably related' to an alien's removal." Id. (citation omitted). An IJ therefore must consider the length of time for which a non-citizen has already been detained.

As to the likely duration of future detention and the likelihood of eventual removal, however, those factors are too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing. We therefore affirm the district court's ruling that consideration of those factors "would require legal and political analyses beyond what would otherwise be considered at a bond hearing" and is therefore not appropriate. We note that Zadvydas and its progeny require consideration of the likelihood of removal in particular circumstances, but we decline to require such analysis as a threshold inquiry in all bond hearings.

(4) Periodic Hearings

The record shows that many class members are detained well beyond the six-month mark: Almost half remain in detention at the twelve-month mark, one in five at eighteen months, and

one in ten at twenty-four months. Petitioners argue that due process requires additional bond hearings at six-month intervals for class members who are detained for more than six months after their initial bond hearings. We have not had occasion to address this issue in our previous decisions, and it has been a source of some contention in the district courts.

The district court here did not address this proposed requirement. For the same reasons the IJ must consider the length of past detention, we hold that the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as "the period of . . . confinement grows."

(V) Conclusion

This decision flows from the Supreme Court's and our own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country. By upholding the district court's order that Immigration Judges must hold bond hearings for certain detained individuals, we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the community or risk of flight—to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty. Immigration Judges, a specialized and experienced group within the Department of Justice, are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk after hearing and weighing the evidence. Accordingly, we affirm all aspects of the district court's permanent injunction, with three exceptions: We reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Kevin Johnson *Immigration*
Posted Tue, September 26th, 2017 1:37 pm

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Argument preview: The constitutionality of mandatory and lengthy immigrant detention without a bond hearing

Detention as a tool of immigration enforcement has increased dramatically following immigration reforms enacted in 1996. Two Supreme Court cases at the dawn of the new millennium offered contrasting approaches to the review of decisions of the U.S. government to detain immigrants. In 2001, in *Zadvydas v. Davis*, the Supreme Court interpreted an immigration statute to require judicial review of a detention decision because "to permit[] indefinite detention of an alien would cause a serious constitutional problem." Just two years later, the court in *Demore* v. *Kim* invoked the "plenary power" doctrine – something exceptional to immigration law and inconsistent with modern constitutional law – to immunize from review a provision of the immigration statute requiring detention of immigrants awaiting removal based on a crime.

How the Supreme Court reconciles these dueling decisions will no doubt determine the outcome in *Jennings v. Rodriguez*. This case involves the question whether immigrants, like virtually any U.S. citizen placed in criminal or civil detention, must be guaranteed a bond hearing and possible release from custody. Relying on *Zadvydas v. Davis*, the U.S. Court of Appeals for the 9th Circuit affirmed a district court injunction that avoided "a serious constitutional problem" by requiring bond hearings every six months for immigrant detainees. The court of appeals further mandated that, in order to continue to detain an immigrant, the government must prove that the noncitizen poses a flight risk or a danger to public safety.

Defending mandatory immigration detention without bond hearings, the U.S. solicitor general challenges the lower court ruling:

> Some may believe that the Ninth Circuit's vision of immigration detention is wiser or more humane, while others would disagree. But Congress weighed the interests in controlling the border, protecting the public from criminal aliens, affording individual aliens adequate protections and opportunities for relief and review, and minimizing the adverse foreign-relations impact of U.S. immigration law. The canon of constitutional avoidance is not a tool for courts to comprehensively rewrite those laws and strike a different balance.

The government further contends that judicial review through the filing of writs of habeas corpus by individual noncitizens satisfies any constitutional concerns raised by detention.

In arguing for reversal, the United States relies on *Demore v. Kim* and enthusiastically invokes the plenary-power doctrine, claiming that the 9th Circuit's ruling "conflicts with this Court's longstanding rule that the political Branches have plenary control over which aliens may physically enter the United States and under what circumstances." The government also cites *Shaughnessy* v. *United States ex rel. Mezei*, a Cold War relic from 1953 that law professors love to hate but that nonetheless remains good law. In an outcome difficult to square with modern constitutional law, the court in *Mezei* denied judicial review of a decision to detain an immigrant indefinitely based on secret evidence.

Defending the injunction entered by the lower court, the class of immigrant detainees contends that due process requires a bond hearing to determine whether the noncitizen is a danger to the public or a flight risk. Focusing on *Zadvydas v. Davis*, they claim that the Constitution requires a hearing but not a right to release. The class cites a litany of decisions in support of this position, including *United States v. Salerno*, from 1987 (upholding pretrial detention of criminal defendants only after individualized findings of dangerousness or flight risk at bond hearings); *Foucha v. Louisiana*, from 1992 (requiring individualized findings of mental illness and dangerousness before civil commitment); and *Kansas v. Hendricks*, from 1997 (allowing civil commitment of sex offenders after a jury trial). The only distinction between those cases and *Jennings*, the detainees argue, is that U.S. citizens, not immigrants, were being detained. The class further contends that habeas-corpus review fails to satisfy the due-process concerns implicated by prolonged mandatory detention.

Respondents do not confront the plenary-power doctrine head on; however, the amicus brief of Asian Americans Advancing Justice calls for the overruling of the doctrine, which "belongs in the ash heap of history along other racist doctrines," a reference to the fact that its origins can be traced to 19th-century decisions, such as 1889's Chinese Exclusion Case, in which the Supreme Court upheld laws excluding noncitizens from China.

During oral argument last term, some justices expressed concern that the 9th Circuit had behaved more like a legislature than a court in mandating a bond hearing every six months. Along those lines, Chief Justice John Roberts and others suggested that the case might need to be decided on constitutional grounds.

The court subsequently issued an order requesting supplemental briefing on the constitutionality of provisions of the immigration laws that allow for detention of noncitizens without bond hearings. For the most part, those briefs reinforced the parties' views on the merits. Even after the supplemental briefing, the court apparently needed an additional vote to decide the case. After Justice Neil Gorsuch replaced the late Justice Antonin Scalia, the court ordered reargument.

By holding that the immigration statute permitted a bond hearing at reasonable intervals and possible release from custody, the 9th Circuit sidestepped the serious constitutional concerns presented by the statute. The Supreme Court now must decide whether the court of appeals reasonably construed the statute to avoid the constitutional issues by requiring a periodic hearing and, if not, whether ordinary constitutional rules apply to immigrants in detention.

At oral argument, the justices no doubt will again grapple with the Supreme Court's two warring immigrant-detention decisions, *Zadvydas v. Davis* and *Demore v. Kim*. With briefing on the constitutionality of the detention scheme complete, the court is primed to reaffirm the plenary-power doctrine, or modify it to review the constitutionality of the immigrant-detention provisions of the immigration statute.

Whatever the outcome, a decision in the case will have an immediate and significant impact. In a January 2017 executive order, which included numerous immigration-enforcement initiatives, President Donald Trump announced an end to the "catch and release" of immigrants facing removal from the United States. Detention without bond became official immigration-enforcement policy. The court's decision in *Jennings v. Rodriguez* is therefore likely to bear on the administration's ability to implement its immigrant-detention program.

Posted in *Jennings v. Rodriguez*, Featured, Merits Cases

Recommended Citation: Kevin Johnson, *Argument preview: The constitutionality of mandatory and lengthy immigrant detention without a bond hearing*, SCOTUSblog (Sep. 26, 2017, 1:37 PM), http://www.scotusblog.com/2017/09/argument-preview-constitutionality-mandatory-lengthy-immigrant-detention-without-bond-hearing/

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission – Excerpt from the Court of Appeals of Colorado Decision

Opinion by JUDGE TAUBMAN
Loeb, C.J., and Berger, J., concur

This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodations law to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.

This appeal arises from an administrative decision by appellee, the Colorado Civil Rights Commission (Commission), which upheld the decision of an administrative law judge (ALJ), who ruled in favor of Craig and Mullins and against Masterpiece and Phillips on crossmotions for summary judgment. For the reasons discussed below, we affirm the Commission's decision.

I. Background

In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods.

. . .

The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.

. . .

Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (CADA), §§ 24-34-301 to -804, C.R.S. 2014.

. . .

[T[he ALJ issued a lengthy written order finding in favor of Craig and Mullins.

The ALJ's order was affirmed by the Commission. The Commission's final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial. Masterpiece and Phillips now appeal the Commission's order.

. . .

III. CADA Violation

Masterpiece contends that the ALJ erred in concluding that its refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation. Specifically, Masterpiece asserts that its refusal to create the cake was "because of" its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex

marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.

. . .

B. Applicable Law

Section 24-34-601(2)(a), C.R.S. 2014, reads, as relevant here:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

C. Analysis

Masterpiece asserts that it did not decline to make Craig's and Mullins' wedding cake "because of" their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake. Masterpiece asserts that its decision was solely "because of" Craig's and Mullins' intended conduct — entering into marriage with a same-sex partner — and the celebratory message about same-sex marriage that baking a wedding cake would convey. Therefore, because its refusal to serve Craig and Mullins was not "because of" their sexual orientation, Masterpiece contends that it did not violate CADA. We disagree.

Masterpiece argues that the ALJ made two incorrect presumptions. First, it contends that the ALJ incorrectly presumed that opposing same-sex marriage is tantamount to opposing the rights of gays, lesbians, and bisexuals to the equal enjoyment of public accommodations. Second, it contends that the ALJ incorrectly presumed that only gay, lesbian, and bisexual couples engage in same-sex marriage.

Masterpiece thus distinguishes between discrimination based on a person's status and discrimination based on conduct closely correlated with that status. However, the United States Supreme Court has recognized that such distinctions are generally inappropriate.

. . .

In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is "engaged in exclusively or predominantly" by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.

. . .

Further, Masterpiece admits that it refused to serve Craig and Mullins "because of" its opposition to persons entering into same sex marriages, conduct which we conclude is closely correlated with sexual orientation. Therefore, even if we assume that CADA requires plaintiffs to establish an intent to discriminate, as in section 1985(3) action, the ALJ reasonably could have

inferred from Masterpiece's conduct an intent to discriminate against Craig and Mullins "because of" their sexual orientation.

. . .

We reject Masterpiece's related argument that its willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers establishes that it did not violate CADA. Masterpiece's potential compliance with CADA in this respect does not permit it to refuse services to Craig and Mullins that it otherwise offers to the general public.

. . .

Finally, Masterpiece argues that the ALJ wrongly presumed that only same-sex couples engage in same-sex marriage. In support, it references the case of two heterosexual New Zealanders who married in connection with a radio talk show contest. However, as the Bray court explained, we do not distinguish between conduct and status where the targeted conduct is engaged in "predominantly by a particular class of people." 506 U.S. at 270. An isolated example of two heterosexual men marrying does not persuade us that same-sex marriage is not predominantly, and almost exclusively, engaged in by gays, lesbians, and bisexuals.

Therefore, we conclude that the ALJ did not err by concluding that Masterpiece refused to create a wedding cake for Craig and Mullins "because of" their sexual orientation. CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.

Having concluded that Masterpiece violated CADA, we next consider whether the Commission's application of the law under these circumstances violated Masterpiece's rights to freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

IV. Compelled Expressive Conduct and Symbolic Speech

Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.

We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.

B. Applicable Law

The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. . . This compelled speech doctrine, on which Masterpiece relies, was first articulated by the Supreme Court in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), and has been applied in two lines of cases.

The first line of cases prohibits the government from requiring that an individual "speak the government's message." FAIR, 547 U.S. at 63.

. . .

These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. Barnette, 319 U.S. at 642.

. . .

The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." FAIR, 547 U.S. at 63. . . . These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message.

The Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. United States v. O'Brien, 391 U.S. 367, 376 (1968) . . . the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," FAIR, 547 U.S. at 65-66 (some internal quotation marks omitted). Rather, First Amendment protections extend only to conduct that is "inherently expressive." Id.

In deciding whether conduct is "inherently expressive," we ask whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)). The message need not be "narrow," or "succinctly articulable." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

. . .

Masterpiece's contentions involve claims of compelled expressive conduct. In such cases, the threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections. See Jacobs, 526 F.3d at 437-38 . . . The party asserting that conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere "plausible contention" that its conduct is expressive. Clark v. Cmty. for Creative Non- Violence, 468 U.S. 288, 293 n.5 (1984).

Finally, a conclusion that the Commission's order compels expressive conduct does not necessarily mean that the order is unconstitutional. If it does compel such conduct, the question is then whether the government has sufficient justification for regulating the conduct. The Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms." O'Brien, 391 U.S. at 376. In other words, the government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose. Id.; see also Barnes v. Glen Theatre Inc., 501 U.S. 560, 567-68 (1991); Johnson, 491 U.S. at 407.

C. Analysis

Masterpiece contends that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, the Commission's cease and desist order unconstitutionally compels it to express a celebratory message about same-sex marriage that it does not support. We disagree.

. . .

We begin by identifying the compelled conduct in question. As noted, the Commission's order requires that Masterpiece "cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples." Therefore, the compelled conduct is the Colorado government's mandate that Masterpiece comport with CADA by not basing its decision to serve a potential client, at least in part, on the client's sexual orientation. This includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner.

Next, we ask whether, by comporting with CADA and ceasing to discriminate against potential customers on the basis of their sexual orientation, Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece. See Spence, 418 U.S. at 410-11.

We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

First, Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally.

. . .

As in FAIR, we conclude that, because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

. . .

We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections. See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010). . . However, we must consider the allegedly expressive conduct within "the context in which it occurred." Johnson, 491 U.S. at 405. The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law. See FAIR, 547 U.S. at 64-65.

. . .

Finally, CADA does not preclude Masterpiece from expressing its views on same-sex marriage — including its religious opposition to it — and the bakery remains free to disassociate itself from its customers' viewpoints. We recognize that section 24-34-601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating

that those engaging in same-sex marriage are unwelcome at the bakery. However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct. See PruneYard, 447 U.S. at 87 ("[S]igns, for example could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.").

Therefore, we conclude that the Commission's order requiring Masterpiece not to discriminate against potential customers because of their sexual orientation does not force it to engage in compelled expressive conduct in violation of the First Amendment. Accordingly, because we conclude that the compelled conduct here is not expressive, the State need not show that it has an important interest in enforcing CADA.

V. First Amendment and Article II, Section 4 —Free Exercise of Religion

Next, Masterpiece contends that the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution and article II, section 4 of the Colorado Constitution. We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4.

. . .

B. Applicable Law

The Free Exercise Clause of the First Amendment provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I.

C. Analysis

1. First Amendment Free Exercise

Masterpiece contends that its claim is not governed by Smith's rational basis exception to general strict scrutiny review of free exercise claims for two reasons: (1) CADA is not "neutral and generally applicable" and (2) its claim is a "hybrid" that implicates both its free exercise and free expression rights. Again, we disagree.

First, we address Masterpiece's contention that CADA is not neutral and not generally applicable. A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

. . .

The Court has found only one law to be neither neutral nor generally applicable.

a. Neutral Law of General Applicability

Masterpiece contends that, like the law in Church of Lukumi, CADA is neither neutral nor generally applicable. First, it argues that CADA is not generally applicable because it

provides exemptions for "places principally used for religious purposes" such as churches, synagogues, and mosques, see § 24-34-601(1), as well as places that restrict admission to one gender because of a bona fide relationship to its services, see § 24-34-601(3). Second, it argues that the law is not neutral because it exempts "places principally used for religious purposes," but not Masterpiece.

We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. See Church of Lukumi, 508 U.S. at 542-43 ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."). CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes." § 24-34-601(1).

Further, CADA is generally applicable because it does not exempt secular conduct from its reach. Church of Lukumi, 508 U.S. at 543. Second, we conclude that CADA is neutral. Masterpiece asserts that CADA is not neutral because, although it exempts "places primarily used for religious purposes," Masterpiece is not exempt. However, Masterpiece does not contend that its bakery is primarily used for religious purposes. CADA forbids all discrimination based on sexual orientation regardless of its motivation.

. . .

Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views.

. . .

Therefore, we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, CADA is a neutral law of general applicability.

b. "Hybrid" Rights Claim

Next, we address Masterpiece's contention that its claim is not governed by Smith's rational basis standard and that strict scrutiny review applies because its contention is a "hybrid" of both free exercise rights and free expression rights.

We note that Colorado's appellate courts have not applied the "hybrid-rights" exception, and several decisions have cast doubt on its validity. See, e.g., Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006).

Accordingly, we hold that CADA is a neutral law of general applicability, and does not offend the Free Exercise Clause of the First Amendment.

2. Article II, Section 4 Free Exercise of Religion

Masterpiece argues that, although neutral laws of general applicability do not violate the First Amendment, Smith, 494 U.S. at 879, the Free Exercise Clause of the Colorado Constitution requires that we review such laws under heightened, strict scrutiny. We disagree.

Masterpiece gives two reasons supporting this assertion. First, it argues that Colorado appellate courts uniformly apply strict scrutiny to laws infringing fundamental rights. See, e.g., In re Parental Rights Concerning C.M., 74 P.3d 342, 344 (Colo. App. 2002) . . . Second, it argues that the Colorado Constitution provides broader protections for individual rights than the United States Constitution. See, e.g., Lewis, 941 P.2d at 271 (Colorado Constitution provides greater

free speech protection than the United States Constitution); Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991).

. . .

Given the consistency with which article II, section 4 has been interpreted using First Amendment case law — and in the absence of Colorado Supreme Court precedent suggesting otherwise — we hesitate to depart from First Amendment precedent in analyzing Masterpiece's claims. Therefore, we see no reason why Smith's holding — that neutral laws of general applicability do not offend the Free Exercise Clause — is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires the application of a heightened scrutiny test.

3. Rational Basis Review

Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest. See Hurley, 515 U.S. at 572.

. . .

Without CADA, businesses could discriminate against potential patrons based on their sexual orientation.

. . .

Therefore, CADA's proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clauses of the First Amendment and article II, section 4.

Precedents referred to in Professor Bill Wiecek's
presentation on *Masterpiece Cakeshop*

(1) Speech

a. *West Virginia State Board of Education v. Barnette* (1943) (flag salute)

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

b. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* (1995) (parades)
c. *Rumsfeld v. FAIR* (2006) (military recruiting in law schools)
d. *Miami Herald v. Tornillo* (1974) (right of reply)
e. *Wooley v. Maynard* (1977) ("Live Free or Die")

(2) Free exercise

a. *Reynolds v. United States* (1878) (Mormon polygamy)
b. *Sherbert v. Verner* (1963) (work on Sabbath)
c. *Wisconsin v. Yoder* (1972) (compulsory education for Amish children)
d. *Lee v. Weisman* (1992) (religious invocation in public school commencement address)
e. *Employment Division v. Smith* (1990) (sacramental ingestion of peyote)

(3) Equal protection

a. *Romer v. Evans* (1996) (ban on antidiscrimination protection for gay people)
b. *Obergefell v. Hodges* (2015) (same-sex marriage)

Editor's Note : The new SCOTUSblog iOS app is now available in the App Store for free download.

Briefly Mentioned : Justice Neil Gorsuch has asked Missouri to respond by Thursday to an application by Planned Parenthood asking the Supreme Court to reinstate a lower court's order blocking the state from enforcing two of its abortion requirements. Amy Howe covers the application at this link.
Today the Supreme Court denied a motion by the challengers in two Texas redistricting cases. The challengers had asked the justices to speed up consideration of the state's request to weigh in on the merits of two lower-court orders striking down two of the state's federal congressional districts and the map for the lower house of the state's legislature. The justices have already put those lower-court orders on hold.

Amy Howe *Independent Contractor and Reporter*
Posted Mon, September 11th, 2017 11:59 am

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Wedding cakes v. religious beliefs?: In Plain English

Colorado's anti-discrimination law bars places of public accommodation – that is, businesses that sell to the public – from discriminating based on (among other things) sexual orientation. In 2012, Charlie Craig and David Mullins went to Masterpiece Cakeshop, a Denver-area bakery, to order a cake to celebrate their upcoming wedding. But the couple left empty-handed ... and upset. Masterpiece's owner, Jack Phillips, is a Christian who closes his business on Sundays and refuses to design custom cakes that conflict with his religious beliefs – for example, cakes that contain alcohol, have Halloween themes or celebrate a divorce. And because Phillips also believes that marriage should be limited to opposite-sex couples, he told Craig and Mullins that he would not design a custom cake for their same-sex wedding celebration.

Craig and Mullins went to the Colorado Civil Rights Division, where they accused Phillips of discriminating against them based on their sexual orientation. The agency initiated proceedings against Phillips, who responded that he had turned down the couple not because of their sexual orientation as such, but because "he could not in good conscience create a wedding cake that celebrates their marriage." The agency, however,

dismissed that explanation as "a distinction without a difference," and it ruled both that Phillips' refusal to provide the custom cake violated Colorado anti-discrimination laws and that Phillips had "no free speech right" to turn down Craig and Mullins' request. The Colorado Civil Rights Commission upheld that ruling and told Phillips – among other things – that if he decided to create cakes for opposite-sex weddings, he would also have to create them for same-sex weddings. A Colorado court affirmed, and Phillips asked the Supreme Court to take his case, which it agreed to do in June.

In his brief at the Supreme Court, Phillips depicts the legal battle as a pivotal one that threatens "his and all likeminded believers' freedom to live out their religious identity in the public square," as well as the "expressive freedom of all who create art or other speech for a living." He stresses that the First Amendment protects expression, which is not limited to words but can also include visual art, from traditional paintings and movies to tattoos to stained-glass windows. The "expression" protected by the First Amendment also extends to Phillips' wedding cakes, he says, even if they are made with "mostly edible materials like icing and fondant rather than ink and clay," because they convey messages about marriage and the couple being married. And the First Amendment also bars the state both from requiring Phillips to design cakes bearing messages that violate his beliefs and from punishing him for refusing to create such cakes – particularly when Phillips could, if he supported same-sex marriage, refuse requests to design cakes that oppose it.

Because of the burden that Colorado's public-accommodations law places on his religious beliefs, Phillips asserts, the law should be subject to the toughest constitutional test, known as "strict scrutiny." But the state cannot meet that test, he continues. First, he contends, although the state "has an interest in ensuring that businesses are open to all people, it has no legitimate—let alone compelling—interest in forcing artists to express ideas that they consider objectionable." And even if the state did have a compelling interest in making sure that same-sex couples have access to the services that they need to celebrate their marriages, he adds, the state's efforts to enforce that interest sweep too broadly, because it has not shown that same-sex couples have had any trouble obtaining such services. To the contrary, he notes, Craig and Mullins received a free rainbow-themed custom cake from another local business.

Masterpiece has a number of allies – none more important than the Trump administration, which this week filed a brief supporting the bakery. The federal government argues that public-accommodations laws like Colorado's will generally pass constitutional muster, because they normally only regulate discrimination in providing goods and services – conduct that is not protected by the First Amendment – rather than expression. For example, the government says, when wedding vendors rent out a banquet hall or a limousine, that is not a form of expression. And even if the vendors believed that they were expressing a message about marriage by renting out a venue or providing a chauffeured vehicle, others would not necessarily agree, nor would they necessarily pick up on that message.

But some laws will be subject to a more searching review, the government explains, if applying the law would either alter someone's speech or compel that person to participate in an event that conflicts with his beliefs. The government maintains that, at least in this case, Colorado's public-accommodations law triggers that more searching review because it compels Phillips to create custom cakes for same-sex marriage celebrations, which (depending on the cake) can be either actual speech or, at a minimum, the kind of expressive conduct that conveys a message to others, without allowing Phillips to make clear that he does not share his customers' viewpoints on same-sex marriage. Moreover, Colorado does not have a sufficiently strong interest to justify infringing on Phillips' religious beliefs, particularly because same-sex marriage was not even legal in Colorado when Craig and Mullins asked Phillips to create a cake. Indeed, the federal government emphasizes, this is a far cry from the kind of discrimination that the public-accommodations law was designed to combat: The Supreme Court itself has acknowledged that "opposition to same-sex marriage 'long has been held—and continues to be held—in good faith by reasonable and sincere people.'"

The state and Craig and Mullins counter that there is no constitutional problem because the public-accommodations law targets only conduct, not speech: The law makes clear that when businesses sell products or services to the public, they cannot discriminate against some members of that public based on, for example, their sexual orientation. The state and couple dismiss Phillips' argument that the application of the public-accommodations law to him effectively compels him to speak out in favor of same-sex marriage. They maintain that no "reasonable observer would understand the Company's provision of a cake to a gay couple as an expression of its approval of the customer's marriage, as opposed to its compliance with a non-discrimination mandate" – especially because Masterpiece is also required to post a sign indicating that the law bars discrimination based on, among other things, sexual orientation. Indeed, they point out, Masterpiece could even use its own sign to make clear that providing baked goods for an event does not constitute endorsement of that event. And the law does not impinge on Phillips' right to exercise his religion, they insist, because the Supreme Court has ruled that the free-exercise right "does not include a right to disobey neutral and generally applicable laws, including non-discrimination laws."

The implications of a ruling for Masterpiece, the state and the couple suggest, would be sweeping, far beyond the "countless businesses" such as hair salons, tailors, architects and florists that "use artistic skills when serving customers or clients." They contend that a wide range of businesses could "claim a safe harbor from any commercial regulation simply by claiming that [they] believe[] complying with the law would send a message with which [they] disagree[]." Such an outcome, they conclude, would "eviscerate" the government's ability, including through labor and health laws, to regulate all kinds of transactions.

In 2014, the Supreme Court turned down a request by a photography studio to review a New Mexico Supreme Court decision holding that the studio violated the state's anti-discrimination laws when it refused to photograph a same-sex commitment ceremony. The petitioners in that case, *Elane Photography v. Willock*, argued that taking those photographs would violate their religious beliefs, but – after considering the petition at three consecutive conferences – the justices declined to weigh in. Many court-watchers believed that Phillips' case might meet a similar fate: If the photography studio couldn't muster the four votes needed to grant review while the late Justice Antonin Scalia was still on the court, Phillips presumably also would not be able to do so even once Scalia's successor, Justice Neil Gorsuch, took the bench. But after considering the case at 15

conferences, the justices announced on June 26 that they had granted Phillips' petition.

The case is likely to be scheduled for oral argument during the court's December sitting; that oral argument could give us more insight into the justices' apparent change of heart and how they view Phillips' claims.

This post was originally published at Howe on the Court.

Posted in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Summer symposium on Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, Plain English / Cases Made Simple, Featured, Merits Cases

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Recommended Citation: Amy Howe, *Wedding cakes v. religious beliefs?: In Plain English*, SCOTUSblog (Sep. 11, 2017, 11:59 AM), http://www.scotusblog.com/2017/09/wedding-cakes-v-religious-beliefs-plain-english/

United States v. Carpenter – Sixth Circuit Opinion Excerpt

KETHLEDGE, Circuit Judge. In Fourth Amendment cases the Supreme Court has long recognized a distinction between the content of a communication and the information necessary to convey it. Content, per this distinction, is protected under the Fourth Amendment, but routing information is not. Here, Timothy Carpenter and Timothy Sanders were convicted of nine armed robberies in violation of the Hobbs Act. The government's evidence at trial included business records from the defendants' wireless carriers, showing that each man used his cellphone within a half-mile to two miles of several robberies during the times the robberies occurred. The defendants argue that the government's collection of those records constituted a warrantless search in violation of the Fourth Amendment. In making that argument, however, the defendants elide both the distinction described above and the difference between GPS tracking and the far less precise locational information that the government obtained here. We reject the defendants' Fourth Amendment argument along with numerous others, and affirm the district court's judgment.

I.

In April 2011, police arrested four men suspected of committing a string of armed robberies at Radio Shacks and T-Mobile stores in and around Detroit. One of the men confessed that the group had robbed nine different stores in Michigan and Ohio between December 2010 and March 2011, supported by a shifting ensemble of 15 other men who served as getaway drivers and lookouts. The robber who confessed to the crimes gave the FBI his own cellphone number and the numbers of other participants; the FBI then reviewed his call records to identify still more numbers that he had called around the time of the robberies.

In May and June 2011, the FBI applied for three orders from magistrate judges to obtain "transactional records" from various wireless carriers for 16 different phone numbers. As part of those applications, the FBI recited that these records included "[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones from December 1, 2010 to present[,]" as well as "cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls[.]" The FBI also stated that these records would "provide evidence that Timothy Sanders, Timothy Carpenter and other known and unknown individuals" had violated the Hobbs Act, 18 U.S.C. § 1951. The magistrates granted the applications pursuant to the Stored Communications Act, under which the government may require the disclosure of certain telecommunications records when "specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

The government later charged Carpenter with six counts, and Sanders with two, of aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, and aiding and abetting the use or carriage of a firearm during a federal crime of violence. See 18 U.S.C. §§ 924(c), 1951(a). Before trial, Carpenter and Sanders moved to suppress the government's cell-site evidence on Fourth Amendment grounds, arguing that the records could be seized only

with a warrant supported by probable cause. The district court denied the motion.

. . .

The jury convicted Carpenter and Sanders on all of the Hobbs Act counts and convicted Carpenter on all but one of the § 924(c) gun counts. Carpenter's convictions on the § 924(c) counts subjected him to four mandatory-minimum prison sentences of 25 years, each to be served consecutively, leaving him with a Sentencing Guidelines range of 1,395 to 1,428 months' imprisonment. The district court sentenced Carpenter to 1,395 months' imprisonment and Sanders to 170 months' imprisonment. Carpenter and Sanders now appeal their convictions and sentences.

II. A.

Carpenter and Sanders challenge the district court's denial of their motion to exclude their cell-site data from the evidence at trial. Those data themselves took the form of business records created and maintained by the defendants' wireless carriers: when the defendants made or received calls with their cellphones, the phones sent a signal to the nearest cell-tower for the duration of the call; the providers then made records, for billing and other business purposes, showing which towers each defendant's phone had signaled during each call. The government thereafter collected those records, and hence these cell-site data, for a range of dates (127 days of records for Carpenter, 88 days for Sanders) encompassing the robberies at issue here. The government did so pursuant to a court order issued under the Stored Communications Act, which required the government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). Carpenter and Sanders argue that the Fourth Amendment instead required the government to obtain a search warrant, pursuant to a showing of probable cause, before collecting the data. The district court rejected that argument, holding that the government's collection of cell-site records created and maintained by defendants' wireless carriers was not a search under the Fourth Amendment. We review the district court's decision de novo. See United States v. Lee, 793 F.3d 680, 684 (6th Cir. 2015).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." United States v. Jones, 132 S.Ct 945, 950 (2012). Government trespasses upon those areas normally count as a search. Id. In Katz v. United States, 389 U.S. 347 (1967), however, the Supreme Court moved beyond a property-based understanding of the Fourth Amendment, to protect certain expectations of privacy as well. To fall within these protections, an expectation of privacy must satisfy "a twofold requirement": first, the person asserting it must "have exhibited an actual (subjective) expectation of privacy"; and second, that expectation must "be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

. . .

This case involves an asserted privacy interest in information related to personal

communications. As to that kind of information, the federal courts have long recognized a core distinction: although the content of personal communications is private, the information necessary to get those communications from point A to point B is not.

. . .

The business records here fall on the unprotected side of this line. Those records say nothing about the content of any calls. Instead the records include routing information, which the wireless providers gathered in the ordinary course of business. Carriers necessarily track their customers' phones across different cell-site sectors to connect and maintain their customers' calls. And carriers keep records of these data to find weak spots in their network and to determine whether roaming charges apply, among other purposes. Thus, the cell-site data—like mailing addresses, phone numbers, and IP addresses—are information that facilitate personal communications, rather than part of the content of those communications themselves. The government's collection of business records containing these data therefore is not a search.

. . .

The defendants of course lack any property interest in cell-site records created and maintained by their wireless carriers. More to the point, when the government obtained those records, it did "not acquire the contents of communications." Id. at 741. Instead, the defendants' cellphones signaled the nearest cell towers—thereby giving rise to the data obtained by the government here—solely "as a means of establishing communication." Id. Moreover, any cellphone user who has seen her phone's signal strength fluctuate must know that, when she places or receives a call, her phone "exposes" its location to the nearest cell tower and thus to the company that operates the tower. Accord United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015) (en banc); In re Application for Historical Cell Site Data, 724, F.3d 600, 614 (5th Cir. 2013). And any cellphone user who has paid "roaming" (i.e., out-of-network) charges—or even cellphone users who have not— should know that wireless carriers have "facilities for recording" locational information and that "the phone company does in fact record this information for a variety of legitimate business purposes." Id. at 743. Thus, for the same reasons that Smith had no expectation of privacy in the numerical information at issue there, the defendants have no such expectation in the locational information here. On this point, Smith is binding precedent.

. . .

This case involves business records obtained from a third party, which can only diminish the defendants' expectation of privacy in the information those records contain. See United States v. Miller, 425 U.S. 435, 443 (1976); Phibbs, 999 F.2d at 1077-78. Jones, in contrast, lands near the other end of the spectrum: there, government agents secretly attached a GPS device to the underside of Jones's vehicle and then monitored his movements continuously for four weeks. That sort of government intrusion presents one set of Fourth Amendment questions; government collection of business records presents another. And the question presented here, as shown above, is answered by Smith.

The second problem with the defendants' reliance on Jones is that—unlike Jones—this is

not a GPS-tracking case. GPS devices are accurate within about 50 feet, which is accurate enough to show that the target is located within an individual building. . . . But here the cell-site data cannot tell that story. Instead, per the undisputed testimony at trial, the data could do no better than locate the defendants' cellphones within a 120- (or sometimes 60-) degree radial wedge extending between one-half mile and two miles in length. Which is to say the locational data here are accurate within a 3.5 million square-foot to 100 million square-foot area—as much as 12,500 times less accurate than the GPS data in Jones.

. . .

Some other points bear mention. One is that Congress has specifically legislated on the question before us today, and in doing so has struck the balance reflected in the Stored Communications Act. The Act stakes out a middle ground between full Fourth Amendment protection and no protection at all, requiring that the government show "reasonable grounds" but not "probable cause" to obtain the cell-site data at issue here.

. . .

A second point is related. Constitutional judgments typically rest in part on a set of empirical assumptions. When those assumptions concern subjects that judges know well—say, traffic stops—courts are well-equipped to make judgments that strike a reasonable balance among the competing interests at stake. See Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case For Caution, 102 Mich. L. Rev. 801, 863 (2004). But sometimes new technologies—say, the latest iterations of smartphones or social media—evolve at rates more common to superbugs than to large mammals. In those situations judges are less good at evaluating the empirical assumptions that underlie their constitutional judgments. . . .

In sum, we hold that the government's collection of business records containing cell-site data was not a search under the Fourth Amendment.

B.

Sanders argues that the district court should have suppressed the government's cell-site evidence for another reason, namely that (in his view) the government's applications to obtain the cell-site records failed to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). There are several problems with that argument, but the simplest is that suppression of evidence is not among the remedies available under the Stored Communications Act.

STRANCH, Circuit Judge, concurring. . . I concur only in the judgment with respect to Part II.A because I believe that the sheer quantity of sensitive information procured without a warrant in this case raises Fourth Amendment concerns of the type the Supreme Court and our circuit acknowledged in United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring), and in United States v. Skinner, 690 F.3d 772, 780 (6th Cir. 2012). Though I write to address those concerns, particularly the nature of the tests we apply in this rapidly changing area of technology, I find it unnecessary to reach a definitive conclusion on the Fourth Amendment issue. I concur with the majority on the basis that were there a Fourth Amendment violation, I

would hold that the district court's denial of Carpenter and Sanders's motion to suppress was nevertheless proper because some extension of the goodfaith exception to the exclusionary rule would be appropriate.

A. Fourth Amendment Concerns

At issue here is not whether the cell-site location information (CSLI) for Carpenter and Sanders could have been obtained under the Stored Communications Act (SCA). The question is whether it should have been sought through provisions of the SCA directing the government to obtain a warrant with a probable cause showing, 18 U.S.C. § 2703(c)(1)(A), or a court order based on the specified "reasonable grounds[,]" id. §§ 2703(c)(1)(B), (d). This leads us to the requirements of the Fourth Amendment.

. ..

I am inclined to favor the latter approach for several reasons, particularly one suggested by Justice Sotomayor: "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Jones, 132 S. Ct. at 957 (Sotomayor, J., concurring) (citations omitted).

. . .

First, the distinction between GPS tracking and CSLI acquisition. CSLI does appear to provide significantly less precise information about a person's whereabouts than GPS and, consequently, I agree that a person's privacy interest in the CSLI his or her cell phone generates may indeed be lesser.

. . .

I begin by acknowledging that this case involves CSLI that does not reach the specificity of GPS. Nonetheless, Skinner recognizes "situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes. [. . .]" I do not think that treating the CSLI obtained as a "business record" and applying that test addresses our circuit's stated concern regarding long-term, comprehensive tracking of an individual's location without a warrant. At issue here is neither relatively innocuous routing information nor precise GPS locator information: it is personal location information that partakes of both. I am also concerned about the applicability of a test that appears to admit to no limitation on the quantity of records or the length of time for which such records may be compelled. I conclude that our precedent suggests the need to develop a new test to determine when a warrant may be necessary under these or comparable circumstances.

The Washington Post

The Volokh Conspiracy • Opinion

Third party rights and the Carpenter cell-site case

By Orin Kerr June 15

In *Carpenter v. United States*, the Supreme Court will decide whether a warrant is required for the government to obtain historical cell-site records from a customer's account. This post asks a question for those who think the answer should be "yes": How do you deal with the Fourth Amendment rights of the cellphone providers? I'm not sure what the answer should be, but I think it's an important question to help understand the issues and stakes in *Carpenter*.

This is a complex issue, so I'm going to break it down into three steps. I'll start with an overview of the third-party doctrine. I'll then turn to third-party rights under current law. I'll next consider different ways the third-party rights might work if the Supreme Court holds that a warrant is required.

I. Overview of the Third-Party Doctrine

Lower courts have held, consistently with U.S. Supreme Court precedent, that historical cell-site records are not protected under the Fourth Amendment. They have mostly based this holding on the third-party doctrine, the rule that you don't maintain Fourth Amendment rights in

information that you voluntarily disclose to a third party.

As I explained in this article, the third-party doctrine was originally intended to be the subjective expectation of privacy test in Justice Harlan's *Katz* concurrence. The idea was that you can only have privacy in what you try to hide from others: You need to manifest your subjective expectation of privacy to have Fourth Amendment rights, shielding it from observation, so that you can't have such rights in what you knowingly disclose to others. As my article explains, this rule has been around for a very long time, but it accidentally moved over time from the subjective expectation test into the objective expectation of privacy test in the 1970s and 1980s.

The third-party doctrine has had very wide application. If a criminal confesses to his friend about his crimes, the government can get the information from the friend without implicating the criminal's Fourth Amendment rights. If a person commits an offense in front of an eyewitness, the government can get the information from the eyewitness without implicating the criminal's Fourth Amendment rights. If a person goes to the bank and deposits a check, the government can get the information from the bank without implicating his Fourth Amendment rights. And if a person dials a number to place a phone call, the government can get the numbers dialed from the phone company without implicating his Fourth Amendment rights.

II. What About the Constitutional Rights of the Third Party?

A key implication of the third-party doctrine is that the government only has to deal with the constitutional rights of the person or business that received and now possesses the information. Upon the information's receipt, the thinking goes, the sender of the information no longer has Fourth Amendment rights in it. Only the rights of the recipient/holder of the information matter.

That raises the question of to what extent the constitutional rights of the

holder of the information can limit law enforcement. The answer is: some, although not much. First, the Supreme Court has held that there are no Fourth Amendment limits to the government compelling a person to testify about what they know and what they saw. That raises Fifth Amendment issues if the person who would testify may be thought to be involved in criminal activity, but the compelled testimony is not a search or seizure under the Fourth Amendment. *See United States v. Dionisio*, 410 U.S. 1 (1973).

Second, if the government compels a person or company to hand over stored records as opposed to live testimony, the Fourth Amendment applies to the records but the constitutional limit is only unreasonable burdensomeness. There is no warrant or probable cause requirement. *See, e.g., Hale v. Henkel*, 201 U.S. 43 (1906); In re Horowitz, 482 F.2d 72 (2d Cir. 1973) (Friendly, J.). To be sure, the Fourth Amendment still applies fully to direct entry. The government ordinarily needs a warrant to break into a business and seize records just like it needs a warrant to break into a home. But it's a different situation when the government is compelling assistance rather than searching directly.

These same Fourth Amendment rules apply when the government is seeking information that a business happens to hold about its customers. Whether the target of the investigation is the business or its customers doesn't matter under the Fourth Amendment. This means that if the government is seeking a company's assistance to disclose records about the business's customers, the information is protected under the Fourth Amendment in the abstract because the business has its own Fourth Amendment rights. At the same time, the third-party business generally can be required to keep and disclose the records under a fairly low burden. *See, e.g., California Bankers Association v. Shultz*, 416 U.S. 21 (1974); *Couch v. United States*, 409 U.S. 322 (1973); *Donaldson v. United States*, 400 U. S. 517 (1971). And because the information or records ordinarily could not incriminate the third party in criminal activity, the third party business cannot assert a Fifth Amendment privilege against production. *See Fisher v. United States*, 425 U.S. 391

(1976).

The idea that a business has only modest Fourth Amendment rights to fight compelled disclosure of customer records isn't new. It has been around a long time. For example, in *First National Bank v. United States*, 267 U.S. 576 (1925), the IRS wanted to see if a couple had underreported their income on their federal income tax forms. The IRS issued a summons to the couple's bank requiring the bank to produce their books showing the couple's banking account records. The idea was that the bank statements would reveal whether the couple had falsely reported their income. The bank refused to comply under the Fourth Amendment on the ground that producing the records was an unreasonable search or seizure and that the bank wanted to keep its customer's account records private.

The district court rejected the bank's claim. "This is not a question of a search and seizure of a party's books and papers," the court wrote, "but of whether a witness who has information as to a party's dealings may be required to testify to those facts, and produce book entries as to such entries in connection with and supporting such testimony." It would be "monstrous," the court rather dramatically added, for the government not to be able to determine the proper taxes that a person owed simply "because the bank desires to protect the dealings of its customers from unauthorized investigation." The Supreme Court then affirmed the district court in a one-sentence per curiam opinion "upon the authority" of the court's precedents about subpoenas for business records (including *Hale v. Henkel*, cited above).

III. Applying the Traditional Approach to Historical Cell-Site Records

Applying this traditional body of law to historical cell-site records is pretty straightforward, I think. The cellphone company generates and stores business records of what cell towers were used to connect a customer's calls. Those records are like the bank's records in *First National Bank*. The

cellphone provider is ordered to be a "witness who has information as to a party's dealings [and] may be required to testify to those facts, and produce book entries as to such entries in connection with and supporting such testimony."

Granted, Congress requires an intermediate facts court order under the Stored Communications Act for the government to compel those records. A mere subpoena, which would be sufficient under the Fourth Amendment, isn't enough under the statute. But if the lesser process of a subpoena is sufficient to satisfy the rights of the company, presumably the greater process of an intermediate facts court order is as well (although that hasn't been challenged), And under the third-party doctrine, access to the account records wouldn't implicate any Fourth Amendment rights of the user.

If you'll pardon a brief digression, it's not even clear you need the third-party doctrine to say that the records don't implicate the user's Fourth Amendment rights. The third-party doctrine is traditionally about the disclosure of private information that a suspect has revealed. The idea is that the suspect has private information, chose to reveal that information (often in confidence) to someone, and then the government sought that private information from that person. The cell-site business records in *Carpenter* are arguably one step removed from that. They are business records of how a private company decided to direct calls to and from the user. The records are about what a private company did for a user, not necessarily what a user chose to disclose in confidence to the company.

But at the very least, the third-party doctrine seems to fit the *Carpenter* case under traditional caselaw principles. So the old answer would be no Fourth Amendment rights for the customer, although statutory rights provided by Congress, and only modest Fourth Amendment rights for the cellphone provider.

IV. If the Third-Party Doctrine is Rejected, How Should Courts Deal With Third-Party Rights?

That's the old law, at least. Now let's consider how the Fourth Amendment would work if the Supreme Court rejects that traditional approach. Let's assume the Supreme Court agrees with the defendant on both issues in *Carpenter*: First it holds that users have Fourth Amendment rights in cell-site records, and second it holds that the records are protected by a warrant protection.

Now we get to my question: Assuming the Supreme Court makes these two holdings, how would this work with respect to the provider's rights? The government does not seek cell-site records by breaking into the provider's business and rummaging around its offices and computers. That would ordinarily require a warrant even under the traditional law of the third-party doctrine. The records are already protected under the Fourth Amendment as held by the company, after all, and ordinarily the government would need a warrant to break into the company headquarters and seize them because of the company's Fourth Amendment rights.

The tricky problem, I think, is what to do with the provider's rights once the user also has rights in the records. Assume, for now, that the company does not want to comply with the government's legal process. If the records were about the provider, a subpoena would be enough for the government to force the company to disclose them.

Here's what I'm stuck on: How do you reconcile the conflict between that rule and a warrant requirement if the Fourth Amendment rights belong to the user? Is the idea that a company served with a subpoena for business records has to figure out if the subpoena implicates only its own Fourth Amendment rights (in which case the subpoena complies with the Fourth Amendment so long as it is not overbroad) or if it also implicates a user's Fourth Amendment rights (in which case the subpoena is insufficient and a warrant is required?). If the government issues a subpoena for business records and it turns out that a customer also had rights in the data, would we say that compelled compliance with the subpoena violated the rights of the user but not the company?

Alternatively, if it doesn't make sense for every subpoena and sub-warrant court order to require a standing analysis before knowing if compliance is legal, which rule do you apply to both situations if a single rule has to be chosen? Do you say that both situations require a warrant, such that all subpoenas issued to businesses now require probable cause and warrant particularity (effectively eliminating the use of business record subpoenas for investigations)? Or do you say that neither situation requires a warrant, such that the user has Fourth Amendment rights in cell-site records but that a valid subpoena is enough to overcome the Fourth Amendment rights just as it it would for ordinary business records?

Next assume that the cellphone company wants to cooperate. If both the user and the company have Fourth Amendment rights in the records, then I imagine the common authority doctrine would apply. Under the common authority doctrine, if there is "mutual use of the property by persons generally having joint access or control for most purposes," they both can consent to a search. *See United States v. Matlock*, 415 U.S. 164 (1974). Cellphone customers may not have joint access and control over cell site records: They don't know what the records say and have no ordinary means of accessing them. But if they nonetheless have Fourth Amendment rights in the records, I would think that at least the company has common authority over the records allowing them to legally consent to law enforcement access to the records.

If that's right, though, how does it work if the phone company is willing to help the government? Imagine *Carpenter* holds that users have Fourth Amendment rights in cell-site records, and that a warrant is ordinarily required. Can a provider tell the government that as long as the government has a 2703(d) court order, as required by the statute, that it will voluntarily consent to hand over the records under the common authority doctrine? If so, whether there is really a warrant requirement would depend on what the company wants to do: Because both the user and the company have common authority over the company's business record, the company could consent and eliminate the right.

You could try to avoid this by saying that the cellphone providers lack common authority over their own business records. But that seems like a hard result to justify. The companies created and used the records and keep them. It seems hard to say that they lack access to or control over the records that they created and keep for their own use.

Granted, caselaw would suggest that companies lack common authority to consent to a government search of the *contents* of communications, such as emails. In physical space, the landlord of an apartment or the hotel employee at the hotel lacks common authority to consent. *See Chapman v. United States*, 365 U.S. 610 (1961) (landlord); *Stoner v. California*, 376 U.S. 483 (1964) (hotel employee). By analogy, I would think that an email provider couldn't ordinarily consent to a search of the contents of a user's emails, at least barring some unusual terms of service. But with cell-site records, I would think that the phone companies have at least common authority (if not exclusive authority) over the records of how their network connected calls.

V. Let Me Know Your Thoughts

For the seven readers that have made it this far, let me know your thoughts! There may be good answers to these questions. But it seems like largely uncharted territory, and I'm not sure yet what those good answers are.

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Wesby v. District of Columbia, 765 F.3d 13 (2014)

A group of late-night partygoers responded to a friend's invitation to gather at a home in the District of Columbia. The host had told some friends she was moving into a new place and they should come by for a party. Some of them informally extended the invitation to their own friends, resulting in a group of twenty-one people convening at the house. With the festivities well underway, Metropolitan Police Department ("MPD") officers responded to a neighbor's complaint of illegal activity. When the police arrived, the host was not there. The officers reached her by phone, and then called the person she identified as the property owner, only to discover that the putative host had not finalized any rental agreement and so lacked the right to authorize the soiree. The officers arrested everyone present for unlawful entry. But because it was undisputed that the arresting officers knew the Plaintiffs had been invited to the house by a woman that they reasonably believed to be its lawful occupant, the officers lacked probable cause for the arrest. Nor was there probable cause to arrest for disorderly conduct because the evidence failed to show any disturbance of sufficient magnitude to violate local law. We accordingly affirm the district court's grant of summary judgment to Plaintiffs on the ground that the arrests violated their clearly established Fourth Amendment rights and District of Columbia law against false arrest. Because the supervising police sergeant at the scene also overstepped clear law in directing the arrests, the district court also correctly held the District of Columbia liable for negligent supervision.

The District of Columbia and two police officers in their individual capacities appeal the district court's liability determinations resulting from the grant of partial summary judgment against them. The court granted partial summary judgment in Plaintiffs' favor because, given the uncontroverted evidence of record regarding the information known to the sergeant and two of the officers at the time of the arrests, no reasonable officer in their shoes could have found probable cause to arrest any of the Plaintiffs. The court's grant of summary judgment was only partial, however, in several ways: First, the court denied Plaintiffs' motion for summary judgment against several other officers in the face of factual disputes about what they knew at the scene; the Plaintiffs then abandoned those claims and the court dismissed them with prejudice. Second, the court granted the Defendants' cross-motion for summary judgment on claims against all of the officers in their official capacities, dismissing those claims, too, with prejudice. Finally, the Plaintiffs' summary judgment motion was limited to liability, leaving remedial determinations to the jury. At a trial on damages, the jury awarded each Plaintiff between $35,000 and $50,000 in compensatory damages. The only questions on this appeal address the validity of the partial summary judgment liability holding.

In the early morning hours of March 16, 2008, the MPD dispatched officers to investigate a complaint of illegal activities taking place at a house in Washington, D.C. The officers heard loud music as they approached the house and, upon entering, saw people acting in a way they viewed as consistent "with activity being conducted in strip clubs for profit"—several scantily clad women with money tucked into garter belts, in addition to "spectators . . . drinking alcoholic beverages and holding [U.S.] currency in their hands." Some of the guests scattered into other rooms when the police arrived. The parties dispute how fully the house was "furnished," but the police observed at least some folding chairs, a mattress, and working electricity and plumbing.

The partygoers gave conflicting responses, with some saying they were there for a birthday party and others that the occasion was a bachelor party. Someone told Officer Campanale that a woman referred to as "Peaches" had given them permission to be in the house; others said that they had been invited to the party by another guest. Peaches was not at the house. Nobody who was present claimed to live there or could identify who owned the house.

The woman then used her cell phone to call Peaches. Officer Parker spoke to Peaches, who refused to return to the house because she said she would be arrested if she did. When Officer Parker asked who gave her permission to be at the house, Peaches told Officer Parker that he could "confirm it with the grandson." Officer Parker then used the same phone to call the apparent owner, identified in the record only as Mr. Hughes, who told Officer Parker that he was trying to work out a lease arrangement with Peaches but had yet to do so. Hughes also told Officer Parker that the people in the house did not have his permission to be there that evening.

According to Sergeant Suber, Peaches told him that "she was possibly renting the house from the owner who was fixing the house up for her" and that she "gave the people who were inside the place, told them they could have the bachelor party." As the police continued to talk to Peaches, she acknowledged that she did not have permission to use the house. On that basis—and notwithstanding the undisputed statements of both the guests and Peaches that she had given them permission to be at the house—Sergeant Suber ordered the officers to arrest everyone for unlawful entry.

Sixteen of the arrestees sued five officers for false arrest under 42 U.S.C. § 1983, the officers and the District for false arrest under common law, and the District for negligent supervision. On cross-motions for partial summary judgment as to liability, the district court granted the parties' motions in part and denied both motions on some issues. The court ruled in favor of the Plaintiffs on their claims of false arrest against Officers Parker and Campanale in their individual capacities,

and on the common law false arrest and negligent supervision claims against the District. Defendants appeal these liability determinations.

As with most false arrest claims, Plaintiffs' claims "turn on the issue of whether the arresting officer[s] had probable cause to believe that [Plaintiffs] committed a crime." Defendants argue that the district court erred in finding the arrests unsupported by probable cause because, in their view, the officers had objectively valid bases to arrest the Plaintiffs both for unlawful entry and disorderly conduct. In the alternative, Defendants contend that, even if probable cause were lacking, the officers are shielded from liability by qualified immunity and a common-law privilege. We address these contentions in turn.

An arrest is supported by probable cause if, "at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect has committed or is committing a crime.

Upon examination of the relevant statutes and case law, we conclude that no reasonable officer could have concluded that there was probable cause to arrest Plaintiffs for either crime.

Unlawful Entry. At the time of Plaintiffs' arrests, District of Columbia law made it a misdemeanor for a person to, "without lawful authority, . . . enter, or attempt to enter, any public or private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2008). To sustain a conviction for unlawful entry, the government must prove that "(1) the accused entered or attempted to enter public or private premises or property; (2) he did so without lawful authority; (3) he did so against the express will of the lawful occupant or owner; and (4) general intent to enter."

The probable-cause inquiry in this case centers on the third and fourth elements, which together identify the culpable mental state for unlawful entry. Specifically, the question is whether a reasonable officer with the information that the officers had at the time of the arrests could have concluded that Plaintiffs knew or should have known they had entered the house "against the will of the lawful occupant or of the person lawfully in charge thereof," and intended to act in the face of that knowledge.

Peaches' invitation is central to our consideration of whether a reasonable officer could have believed that the Plaintiffs had entered the house unlawfully. That is because, in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of Plaintiffs' intent to enter against the will of the lawful owner. A reasonably prudent officer aware that the Plaintiffs gathered pursuant to

an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully.

Ignoring the significance of Peaches' invitation, Defendants argue that Hughes's statement that he had not given the Plaintiffs permission to be in the house is dispositive because a homeowner's denial that he has given permission to enter his property is sufficient to establish probable cause to arrest for unlawful entry. We disagree. Importantly, Hughes never said that he or anyone else had told the Plaintiffs that they were not welcome in the house. Peaches eventually admitted that she did not have permission to be in the house or to invite others, but there is no evidence that she had told the Plaintiffs as much.

The arresting officers in this case, unlike those in McGloin and Culp, observed nothing inconsistent with the reason the Plaintiffs gave for being there—a reason that was corroborated, rather than undermined, by the information that Peaches gave to the officers: Peaches had invited them to her new apartment. Defendants point to the "highly suspicious and incriminating" activities the officers observed in the house to bolster the argument that the officers had no reason to credit the Plaintiffs' explanation for their presence. But the officers acknowledged that, other than the ostensible unlawful entry, they did not see anyone engaging in illegal conduct. Moreover, the activities they did observe—scantily clad women dancing, bills slipped into their garter belts, and people drinking—were consistent with Plaintiffs' explanations that they were there for a bachelor or birthday party. To the extent that people scattered or hid when the police entered the house, such behavior may be "suggestive" of wrongdoing, but is not sufficient standing alone to create probable cause.

Having concluded that Plaintiffs' arrests were unsupported by probable cause, we must consider whether qualified immunity shields the officers from liability. "An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" If Officers Parker and Campanale had "an objectively reasonable basis for believing that the facts and circumstances surrounding [Plaintiffs'] arrest were sufficient to establish probable cause," they would be immune from Plaintiffs' suit for damages.

Here, the question is whether, in light of clearly established law and the information that Officers Parker and Campanale had at the time, it was objectively reasonable for them to conclude that there was probable cause to believe Plaintiffs were engaging in either unlawful entry or disorderly conduct.

Turning first to the claim of false arrest for unlawful entry, we conclude that no reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully where, as here, there was uncontroverted evidence that

Plaintiffs believed they had entered at the invitation of a lawful occupant. Defendants argue that, because no case identified by Plaintiffs had "invalidated an arrest for unlawful entry under similar circumstances," it was not clearly established that arresting Plaintiffs for unlawful entry was unconstitutional. But that is not the applicable standard. Qualified immunity need not be granted every time police act unlawfully in a way that courts have yet to specifically address.

Under District of Columbia law, criminal intent is a necessary element of the offense of unlawful entry. A person who has a good purpose and bona fide belief of her right to enter "lacks the element of criminal intent required" to violate the unlawful-entry statute.

The controlling case law in this jurisdiction therefore made perfectly clear at the time of the events in this case that probable cause required some evidence that the Plaintiffs knew or should have known that they were entering against the will of the lawful owner. Defendants are simply incorrect to suggest that the officers could not have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry.

Dissent

The court today articulates a broad new rule—one that essentially removes most species of unlawful entry from the criminal code. Officers must prove individuals occupying private property know their entry is unauthorized; otherwise police lack probable cause to make arrests. Moreover, any plausible explanation resolves the question of culpability in the suspects' favor. Thus, unless the property is posted with signs or boarded up and attempts to prevent access have been deliberately breached, i.e., there is direct evidence of unauthorized entry, law enforcement's options are limited to politely asking any putative invitee to leave.

The Court concludes that, as a matter of law, no reasonably prudent officer could believe Plaintiffs entered unlawfully because the undisputed evidence shows an individual with (illusory) authority invited their entry, vitiating Plaintiffs' formation of the requisite intent. Maj. Op. at 11. Yet the mere presence of an invitation by one with ostensible authority is not dispositive if, under the totality of the circumstances, the officers could still conclude the suspects knew or reasonably should have known their invitation was against the will of the lawful owner. The absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence.

Today's decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify. The Court's decision broadly extends Ortberg and Christian to apply standards designed

for materially disparate contexts to the probable cause inquiry for general intent crimes. As a result, the Court finds officers may only lawfully arrest suspects for unlawful entry where the officers have evidence affirmatively proving each element of an offense, including clear proof of what the suspect knew or reasonably should have known. But cf. 1 Corinthians 2:11 ("For who knows a person's thoughts except their own spirit within them?"). This is tantamount to an invitation to abuse vacation rentals or houses being marketed for sale or lease where prospective tenants can gain entry and retain or misappropriate a key or a lockbox combination, or leave a point of entry unsecured. Such a heightened threshold is not called for under our precedents. For general intent crimes, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," The proper inquiry is not whether the element of knowledge was conclusively satisfied; it is instead whether, based on the totality of the circumstances, officers could reasonably believe Plaintiffs committed the offense of unlawful entry.

Here the totality of the circumstances could cause reasonable minds to question whether Plaintiffs were as blameless as the attendees of a Sunday brunch whose imprudent host has overstayed her lease. Contra Maj. Op. at 13 (finding this case indistinguishable from such a scenario). The officers responded to a call reporting illegal activity in a home at least some residents of the neighborhood knew to be vacant. As the officers entered, the partygoers' first response was to scatter into different rooms or hide. The house's interior was bare and in disarray; beyond fixtures or large appliances, it contained only folding chairs and food, and one room upstairs had a bare mattress and lighted candles—along with "females . . . that had provocative clothing on with money in . . . their garter belt[s]."

After rounding up and interviewing the partygoers, the officers found their claim to lawful entry was an invitation from the house's supposed tenant, Peaches, who was "throwing a party." However, Peaches was not actually present when the officers arrived on the scene. The partygoers also gave inconsistent explanations for the party to which they had allegedly been invited. Some claimed to be attending a birthday party while others insisted it was a bachelor's party; in any event, none could identify the guest of honor.

When ultimately reached by telephone, Peaches admitted to inviting various partygoers, and claimed she had permission to enter, an assertion she quickly recanted in a series of conflicting answers she made to investigators before becoming evasive and hanging up. The officers also confirmed from the actual owner that the house had been vacant since its last resident's death, the current owner was attempting to rent the property out, and neither Peaches nor anyone else had the owner's permission to enter or use the premises.

The totality of the evidence does not need to show the officers' beliefs regarding the unlawfulness of Plaintiffs' entry were "correct or more true than false. A practical, nontechnical probability . . . is all that is required." The surrounding context may not convince a jury to find probable cause. But likewise, taken in the light most favorable to the officers, the facts are not so clear cut that no reasonable officer could believe the partygoers knew or should have known Peaches' invitation was not credible or that their entry into the home was not properly authorized.

The very purpose of a totality of the circumstances inquiry is to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances.

In light of the facts known to the officers at the time of the arrests, summary judgment is unwarranted on the question of probable cause for unlawful entry. From their investigation, the officers knew the house was an unoccupied private rental dwelling, which would likely not require a sign or express warning forbidding entry.They further determined none of the Plaintiffs owned or rented the house; that the property was, in fact, vacant; and the true owner had provided neither the partygoers nor any tenants with permission to enter, Plaintiffs' party was taking place in a home so sparsely furnished as to be consistent with a vacant building; the guests' immediate response to the presence of police was to run and hide, an action suggestive of consciousness of guilt; the partygoers gave conflicting accounts about "why" the party was being held; and they purported to rely on an invitation from a "tenant" who was not actually present. When reached by telephone the "tenant" gave conflicting accounts as to her own permission to access the home, finally admitted she lacked any right to use the house, and—upon further questioning—became evasive and yelled at officers before hanging up.

Even assuming Plaintiffs' arrests were not supported by adequate probable cause for unlawful entry, qualified immunity shields the officers from individual liability for Plaintiffs' section 1983 claims because the officers' "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Here the pre-existing law of unlawful entry is not so clear that a reasonable officer would have known he lacked probable cause to arrest Plaintiffs. The officers were faced with an unusual factual scenario, not well represented in the controlling case law. The property where Plaintiffs were found was somewhere between an occupied private dwelling and a vacant or abandoned building. The situation the officers encountered rests uneasily between two distinct strands of District law.

Thus, in the absence of pre-existing case law clearly establishing the contours of Plaintiffs' rights, the officers were shielded by qualified immunity when, acting under color of state law, they reasonably arrested plaintiffs for unlawful entry.

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Argument preview: Parties, probable cause and the Fourth Amendment

When District of Columbia police officers Andre Parker and Anthony Campanale responded to reports of unauthorized goings-on at a supposedly vacant home nearly a decade ago, they probably didn't expect the evening's events to lead to all the way to the U.S. Supreme Court. But that's exactly what happened in *District of Columbia v. Wesby*, in which the justices are scheduled to consider whether the arrests that the officers made that night violated the Fourth Amendment, along with whether – even if they did – the partygoers can sue the arresting officers, or the police are instead immune from suit.

In March 2008, Parker and Campanale arrived to investigate neighbors' reports of a party and "illegal activities" at an unoccupied house. When the two approached the house, many of the 21 people inside ran upstairs or moved into different rooms. The officers found that there had indeed been a party (of sorts) in progress: Among other things, they found women who had apparently been selling "lap dances" and were "dressed only in their bra and thong with money hanging out [of] their garter belts"; the officers also smelled marijuana. Some of the partygoers told the officers that they had been invited to the house, while others told the officers that they had received permission to be there from a woman whose name was either "Peaches" or "Tasty." But "Peaches" gave the officers conflicting stories about whether she had permission from the owner to use the house. When police officers eventually talked to the owner, he confirmed that he had not authorized anyone, including "Peaches," to be at his house.

The officers arrested the partygoers for trespassing and took them to the police station, where a commander opted to charge them with disorderly conduct instead. Those charges were eventually dropped, but 16 partygoers went to federal court, arguing that the police had lacked probable cause to arrest them. The district court agreed, ruling that police had not learned anything in the house to suggest that the partygoers "knew or should have known that they were entering against the owner's will." After a trial, the court ordered the officers to pay nearly $700,000, plus attorneys' fees.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed, concluding that the officers lacked probable cause to arrest the partygoers because they had no reason to believe that the partygoers either knew or should have known that they were not allowed in the house. In the court's view, the homeowner's statement to the police that he had not given anyone permission to enter the house was not enough, because the homeowner "never said that he or anyone else had told" the partygoers that they were not welcome. Indeed, the court reasoned, there was "no evidence that the officers had asked either Peaches or" the homeowner whether the partygoers "knew that Peaches had no right to be in the house." After the full court of appeals denied rehearing, over the dissent of four judges, the District of Columbia government and the officers asked the Supreme Court to weigh in, which it agreed to do last winter.

The District of Columbia and the police officers argue that whether there was probable cause to arrest the partygoers turns on whether, in light of all the facts, the officers could have reasonably believed that the partygoers were trespassing. That test is easily met here, they

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contend, even if the partygoers told police that they believed they were authorized to be in the house: They were in the vacant house late at night; officers smelled marijuana and saw women who were barely clothed; the partygoers scattered (and one was found hiding in a closet) after police entered the house; the homeowner had told police that they didn't have permission to be there; and even "Peaches" had admitted that she didn't have authorization from the homeowner. Police officers should not be required to determine exactly what a suspect knows before arresting him, particularly when virtually all suspects will profess innocence. If it is allowed to stand, the government and the officers conclude, the D.C. Circuit's decision will "have a broad chilling effect on law enforcement officers when making on-the-scene credibility judgments, adversely affecting their everyday ability to do their jobs and protect the public."

Even if the Supreme Court rejects the police officers' argument that they had probable cause to arrest the partygoers, the officers could still prevail on another ground: Their claim that they generally cannot be sued, known as qualified immunity. The Supreme Court's cases impose a high bar on lawsuits for damages against public officials, shutting down suits like these against police officers as long as the officers' conduct does not run afoul of "clearly established law." But there is no such clearly established law here, the officers tell the justices; if anything, the decisions by the District of Columbia's highest court "have found probable cause to arrest under similar facts." And at the very least, that court's earlier cases certainly did not establish "beyond doubt" that there was no probable cause to arrest the partygoers – as evidenced by the fact that four judges on the federal court of appeals agreed that the officers did have probable cause.

The partygoers depict their case as an easy one. In their view, it was clearly established that the officers had probable cause to arrest them for trespassing only if there was evidence supporting each element of the crime – including, in this case, the requirement that the partygoers knew or should have known that they were not supposed to be in the house. But here, they suggest, their only offense was being "invited guests at a standard, though debauched, house party in a cheaply furnished house in a poor neighborhood." Police officers had no reason to believe that the partygoers "interrogated (or should have interrogated) their host about" whether she was actually renting the house from the homeowner or otherwise had permission to be there. Therefore, not only did the police officers lack probable cause to arrest them, but the lack of probable cause was so clearly established that the officers are not entitled to qualified immunity.

The partygoers may see the case as straightforward, but it's not clear that the Supreme Court (at least so far) agrees. The justices considered the case at nine consecutive conferences before finally granting review. That kind of extended consideration often signals either that the court is preparing to summarily reverse (that is, reverse without briefing on the merits or oral argument) the lower court's ruling or that a justice is dissenting from the denial of review. We likely will never know what was going on behind the scenes, but we will learn a lot more about the justices' current views after the oral argument.

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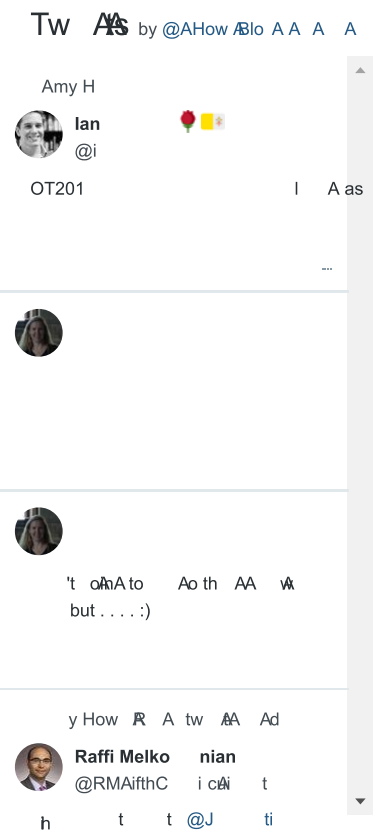

United States v. Byrd, 679 F. App'x 146 (3d Cir. 2017)

Terrence Byrd entered a conditional guilty plea to charges of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possessing body armor as a prohibited person in violation of 18 U.S.C. § 931(a)(1). He reserved the right to appeal several suppression rulings. He now appeals, arguing: (1) the initial traffic stop was pre-textual and the District Court clearly erred in accepting the officer's testimony describing a traffic violation; (2) officers impermissibly extended the stop; and (3) the District Court erred by holding Byrd lacked standing to challenge the vehicle search. We affirm the judgment of the District Court.

Byrd was driving a rental car on a four-lane divided highway near Harrisburg, Pennsylvania. A state police officer parked in the median recognized Byrd's car as a rental and noticed the driver's seat was reclined to an unusual degree such that the driver was not clearly visible. The officer followed Byrd and eventually pulled Byrd over. The officer claimed he observed Byrd violate a state law requiring drivers to limit use of the left-hand lane to passing maneuvers.

When the officer approached Byrd's stopped car and asked for Byrd's license and the rental agreement, Byrd appeared nervous and conspicuously avoided opening a center console even though Byrd had difficulty locating the requested documents. Eventually, Byrd produced an interim New York driver's license that did not include a photo. Byrd also produced the rental agreement. The rental agreement did not list Byrd as the renter or as a permissive driver.

A second officer then arrived, and the officers continued to attempt to sort out the identification information. In doing so, they discovered an outstanding New Jersey warrant that indicated New Jersey did not request other jurisdictions to arrest Byrd for extradition. The officers determined James Carter was an alias, and also discovered Byrd's criminal history included drug, weapon, and assault charges. The officers requested their dispatching center to contact New Jersey officials to confirm New Jersey did not wish Pennsylvania to arrest Byrd for extradition. When attempting to clarify Byrd's identity, aliases, and criminal history, the officers experienced connection difficulties with their computer.

The officers then returned to Byrd's vehicle, asked him to exit the car, and asked him about the warrant and his alias. They also asked if he had anything illegal in the car. Byrd appeared nervous and said he had a "blunt" in the vehicle. The officers then asked Byrd for permission to search the vehicle, but stated they did not need his consent because he was not listed on the rental agreement. The officers assert that Byrd gave his consent. They subsequently found heroin and body armor in the trunk of the car and arrested Byrd.

In the District Court, Byrd moved to suppress the evidence resulting from the stop and the search, challenging the initial stop, the extension of the stop, and the search.

The District Court determined that Byrd, as the sole occupant of a rented car, had no expectation of privacy because he was not listed on the rental agreement. The District Court also found the first officer credible and accepted the officer's characterization of Byrd's passing maneuver as sufficient to justify the initial stop. Finally, the District Court held the officers developed

additional reasonable suspicion of other criminal activity during the stop and all of the officers' inquiries were related to the initial stop or the newly developed suspicion.

The Fourth Amendment permits a traffic stop based on reasonable suspicion that a traffic violation has occurred regardless of the officer's subjective motivations for making the stop. . . . And, although the traffic violation at issue seemingly was minor, a stop based on the perceived violation passes constitutional muster.

Regarding the duration of the stop, officers conducting a traffic stop must act with reasonable diligence in carrying out permissible tasks related to the purpose for the stop.
Confirming the identity of the driver of a rental vehicle, sorting out aliases, and asking a driver to move to a more safe location are all permissible tasks.

An officer does not lack diligence merely because these tasks are slightly delayed by computer issues or because a driver's use of an alias and lack of photo identification complicate the identification process. Here, the several explanations set forth by the District Court are well supported and demonstrate that the officers acted with reasonable diligence in conducting the stop.

Further, "[o]nce a valid traffic stop is initiated, 'an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.'".

The first officer's observation of Byrd's nervous avoidance of the center console coupled with Byrd's non-photographic identification, his use of an alias, and the absence of his name on the rental agreement gave rise to additional suspicion of other criminal activity.

A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement. The Third Circuit has spoken as to this issue, however, and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle.
As such, we need not address Byrd's arguments concerning his lack of consent for the search.

We will affirm the judgment of the District Court.

Collins v. Commonwealth, 292 Va. 486 (2016)

Collins was convicted in the Circuit Court of Albemarle County ("trial court") of receiving stolen property in violation of Code § 18.2-108, and sentenced to three years' imprisonment with all but two months suspended. Prior to trial, Collins moved to suppress the Commonwealth's evidence linking him to a stolen motorcycle. The trial court denied Collins' motion to suppress and held that the police search, although conducted without a warrant, did not violate the Fourth Amendment. The Court of Appeals affirmed the trial court's ruling and Collins now challenges that decision.

On June 4, 2013, Officer Matthew McCall of the Albemarle County Police Department was patrolling on Route 29 near the border of Albemarle County and the City of Charlottesville when he observed a traffic infraction by the operator of an orange and black motorcycle with an extended frame. Officer McCall activated his emergency lights and attempted to stop the motorcycle, but the motorcycle eluded him at a high rate of speed.

Several weeks later, on July 25, 2013, Officer David Rhodes, also of the Albemarle Police Department, was in his police car on the Route 250 Bypass when he observed an orange and black motorcycle traveling at 100 miles per hour in a 55 mph zone. Officer Rhodes engaged his emergency equipment and pursued the motorcycle. Instead of stopping, the motorcyclist increased his speed to at least 140 mph and sped away from the police car. In the interest of safety, Officer Rhodes abandoned his pursuit. However, Officer Rhodes' police car video camera recorded the incident, and police were able to use this footage to obtain a still photograph of the motorcycle, including its license plates.

The motorcycle was an orange and black Suzuki with chrome accents and a "stretched out" rear wheel, indicating that it had been modified for drag racing. Officer Rhodes could not identify the driver through the darkly tinted helmet, but he observed that the motorcyclist wore blue jeans and "tan Timberland-type work boots." The motorcyclist who eluded Officer McCall two months earlier also wore jeans and "Timberland-type-style boots." After comparing notes and identifying "an awful lot of similarities" between the two eluding incidents, Officers McCall and Rhodes concluded the same motorcyclist had eluded each of them.

When Officer Rhodes entered the motorcycle's license plate number in a police database, he discovered that the tags were "not on file" and had been inactive for several years. The license plate was most recently registered to Eric Jones ("Jones"). In the course of his investigation, Officer Rhodes learned that Jones had sold the motorcycle to Collins before the eluding incidents. Later, at trial, Jones testified that he sold Collins the motorcycle in April 2013 with the caveat that motorcycle lacked title and was stolen.

On September 10, 2013, Albemarle Police responded to the Department of Motor Vehicles ("DMV") to investigate an unrelated matter involving Collins. Upon hearing Collins' name on the police radio, Officers Rhodes and McCall also responded to the DMV to question Collins since he was a suspect in the motorcycle eluding incidents. Officer McCall advised Collins of his

Miranda rights, and Collins agreed to speak to the officers. When questioned about the motorcycle, Collins denied knowing anything about it, and told the officers that he "hadn't ridden a motorcycle in months." Meanwhile, Officer Rhodes searched a social media website (Facebook) and found two photographs posted on Collins' Facebook page depicting the motorcycle which appeared to have been involved in the eluding incidents. The photographs showed the orange and black motorcycle parked in a driveway next to the vehicle Collins was attempting to register at the DMV.

Officer Rhodes later testified that upon seeing the photographs of the motorcycle on Collins' Facebook page, he "knew 100% sure that . . . was the same motorcycle that had not stopped for me on the bypass based on looking at it.

After the questioning concluded, Collins left the DMV and the officers continued their investigation. Officer Rhodes learned from an informant that the house in the Facebook photograph was located on Dellmead Lane in the City of Charlottesville near the border of Albemarle County. Less than half an hour later, Officer Rhodes located the house and parked along the street. From his position on the street, Officer Rhodes could see what appeared to be a motorcycle covered with a white tarp. At trial, Officer Rhodes testified that "a quarter of the wheel [was] sticking out from underneath the cover" and that despite the tarp, he recognized the distinct chrome accents and "stretched out" shape of the motorcycle. Additionally, the location and angle of the partially covered motorcycle matched that of the motorcycle in Collins' Facebook photographs.

Officer Rhodes then walked onto the property, "a car length or two" up the driveway, between the street and the front steps of the house. While standing on the driveway, Officer Rhodes uncovered the motorcycle and confirmed that it appeared to be the same orange and black Suzuki that had eluded him on July 25, 2013. He then recorded the motorcycle's vehicle identification number or "VIN." A computer search of the VIN revealed the motorcycle had been "stolen out of New York" several years before. After gathering this information, Officer Rhodes re-covered the motorcycle, left the property, and returned to his police car to conduct surveillance and wait for Collins.

Shortly thereafter, a vehicle dropped off Collins at the Dellmead Lane residence. Officer Rhodes returned to the house and knocked on the door, which Collins answered. Although it was "over 90 [degrees] that day," Collins came to the door dressed in jeans, a sweatshirt, and Timberland-style boots. Officer Rhodes later testified that "at the DMV 30 minutes prior" Collins had been wearing "shorts and flip flops and a t-shirt." When asked about the motorcycle, Collins initially said he "didn't know anything about it." He then told Officer Rhodes it belonged to a friend. Eventually, Collins admitted that he purchased the motorcycle, without a title, from Eric Jones.

A grand jury indicted Collins for possession of stolen property, in violation of Code § 18.2-108. Collins moved to suppress the evidence obtained by Officer Rhodes on Fourth Amendment grounds.

Collins argued:

> What we're really talking about here is trespassing on real property. Trespassing on the curtilage of a home for the purposes of doing investigation. I would conclude that Officer Rhodes violated the law in trespassing on private property. It was for the purpose of the search. He has no probable cause to do so. He certainly had no exigent circumstances. And any information that he gained as a result of that illegal trespass including [the] VIN number [should be suppressed].

The Commonwealth responded:

> Your Honor, while there is a Constitutional Fourth Amendment action against a [un]reasonable search and seizure, Mr. Collins' arguments are misguided. The search that Officer Rhodes conducted of the orange motorcycle [on] September 10th, 2013 was reasonable and lawful. The Supreme Court has long recognized an automobile exception to the traditional requirement of probable cause in a warrant. In Carroll v. United States, the Court concluded that automobiles were readably mobile and therefore eas[ily] moved from a jurisdiction. Probable cause alone is enough to justify a search and a warrant is unnecessary. The Supreme Court confirmed this in Maryland v. Dyson ...where the [Court] explicitly ruled that warrantless search of a vehicle [was] lawful within the Fourth Amendment.

The Commonwealth's Attorney further argued that Officer Rhodes had probable cause because he had seen on Collins' Facebook page, a photograph of the uncovered motorcycle parked in the same spot in front of the house.

Collins Argued:

> Your Honor, the automobile exception to my understanding is the search of the automobile not a search for an automobile... [The] [a]utomobile exception was created for officers on the street when they stop somebody and they know there is going to be maybe contraband in the vehicle and it's an exception to a warrant requirement. That exception does not apply in this case. That vehicle was parked in a private driveway.

After hearing argument from both parties, the trial court ruled on Collins' motion. The trial court held that Officer Rhodes did not violate Collins' Fourth Amendment rights.

> So the Court finds that ... where this is in an area where it is exposed to the public where the officer asked Mr. Collins about the motorcycle and [Collins] indicated he didn't know anything about it, where it's in the exact same location [as the Facebook photograph], where it matches the officer's description ... and where it has the chrome wheels, the Court finds that there was probable cause for the search and therefore it was not an unreasonable governmental intrusion. The Court is going to deny the motion to suppress.

A bench trial ensued, and the trial court convicted Collins of receiving stolen property.

The Court of Appeals affirmed Collins' conviction in a published opinion. The Court of Appeals held that Officer Rhodes "unquestionably had probable cause to believe the motorcycle was the one from the eluding incident." The Court of Appeals also concluded that Officer Rhodes' warrantless search was justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement. The Court of Appeals declined to address the automobile exception on the basis that other "exigencies existed aside from the inherent mobility of the motorcycle.

In this case, Officer Rhodes lacked a search warrant when he walked up Collins' driveway and searched the motorcycle by removing the tarp and locating the VIN. "Warrantless searches, of course, are per se unreasonable, subject to a few well-defined exceptions." These narrowly delineated exceptions include: consent, search incident to a lawful arrest, e plain view, of the note and exigent circumstances. We have recognized several common examples of exigent circumstances such as hot pursuit, the imminent destruction of evidence, and the possibility of danger to others. In this case, however, neither the Commonwealth nor the trial court invoked the exigent circumstances exception. Although the Court of Appeals based its decision on exigent circumstances, we do not find it necessary to independently assess whether exigent circumstances existed here.

Rather, the facts of this case are more properly addressed by a different exception to the warrant requirement: the automobile exception.

The Supreme Court of the United States has expressly held that the automobile exception is a distinct and independent exception to the warrant requirement.

The Supreme Court has articulated a simple, bright-line test for the automobile exception: "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." Applying that test to this case, we hold that Officer Rhodes' warrantless search of the motorcycle was justified under the automobile exception to the warrant requirement of the Fourth Amendment.

The facts of this case supported a finding of probable cause sufficient to allow Officer Rhodes to search the motorcycle under the automobile exception.

Collins contends that because Officer Rhodes was conducting surveillance of the residence, Collins could not have removed the tarp, started the motorcycle, and fled the premises without first being apprehended. He suggests that Officer Rhodes could have stopped the motorcycle by blocking the driveway with his police car.
These arguments both defy common sense and misapply the automobile exception, which is a bright-line test. The suggestion that Officer Rhodes could have "immediately approached [Collins] to further investigate" conveniently ignores the fact that this motorcycle had twice eluded police at high speeds. And, since he had questioned Collins about the motorcycle earlier that same day, Officer Rhodes had good reason to suspect that Collins would return from the DMV and speed away on the motorcycle in order to hide it and potentially remove the VIN.

Moreover, "a vehicle's inherent mobility—not the probability that it might actually be set in motion—is the foundation of the automobile exception's mobility rationale."

Consequently, in this case, we need not decide whether the motorcycle was immediately mobile at the precise moment of the search.

During the suppression hearing, Collins argued that the automobile exception does not apply to a vehicle parked in a private driveway. . . . However, the Court of Appeals misconstrued the automobile exception when it unnecessarily restricted its application to vehicles stopped on public highways. The Supreme Court has never limited the automobile exception such that it would not apply to vehicles parked on private property. Our Court has held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view.

The dissent contends that "Officer Rhodes did not search the motorcycle, he searched the tarp." This argument ignores the fact that Officer Rhodes' stated purpose in lifting the tarp was not to determine whether the tarp covered a motorcycle, but rather to verify the identity of the partially covered motorcycle and record its VIN.
The dissent argues that the Commonwealth characterized the search as one of the tarp. However, the very first sentence uttered by the Commonwealth's Attorney during the suppression hearing described Officer Rhodes' actions as a search of the motorcycle.

. . . here Officer Rhodes removed the tarp in order to reveal the VIN on a motorcycle he believed to be linked to criminal activity.

Dissent:

The majority holds that Officer Rhodes' search was permitted under the automobile exception to the Fourth Amendment's warrant requirement. However, Officer Rhodes did not search an automobile, he searched a tarp. I therefore must respectfully dissent.

The majority holds that Officer Rhodes' warrantless search was permitted by the automobile exception. However, the automobile exception permits a warrantless search of a vehicle, not for a vehicle.

As the majority notes, the automobile exception, distilled to its essence, provides that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." The motorcycle did not contain contraband, it was contraband; Officer Rhodes did not search the motorcycle, he searched the tarp.

Although the majority repeatedly says that Officer Rhodes "searched the motorcycle" and merely "remov[ed]" or "lift[ed]" the tarp, . . . the tarp was the only thing searched. Searching the tarp revealed the motorcycle. Once the motorcycle was exposed by searching the tarp, examining the motorcycle's vehicle identification number was not a search because vehicle identification numbers are not protected by the Fourth Amendment.

There is no question that Officer Rhodes was entitled to observe whatever he could see from the street. . . . But he was not entitled to search the tarp to reveal what it covered without a warrant.

Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017)

Mr. Matthew Vogt alleges a violation of the Fifth Amendment through the compulsion to incriminate himself and the use of his compelled statements in a criminal case. Based on the alleged Fifth Amendment violation, Mr. Vogt invokes 42 U.S.C. § 1983, suing (1) the City of Hays, Kansas; (2) the City of Haysville, Kansas; and (3) four police officers. The district court dismissed the complaint for failure to state a claim, reasoning that

- the right against self-incrimination is only a trial right and

- Mr. Vogt's statements were used in pretrial proceedings, but not in a trial.

We draw four conclusions:

1. The Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing.

2. The individual officers are entitled to qualified immunity.

3. The City of Haysville did not compel Mr. Vogt to incriminate himself.

4. Mr. Vogt has stated a plausible claim for relief against the City of Hays.

Accordingly, we (1) affirm the dismissal of the claims against the four police officers and Haysville and (2) reverse the dismissal of the claim against the City of Hays.

Mr. Vogt was employed as a police officer with the City of Hays. In late 2013, Mr. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Mr. Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Notwithstanding this disclosure, Haysville offered the job to Mr. Vogt. But his disclosure about the knife led Haysville to make the offer conditional: Mr. Vogt could obtain the job only if he reported his acquisition of the knife and returned it to the Hays police department. Two Haysville police officers said that they would follow up with Hays to ensure that Mr. Vogt complied with the condition.

Mr. Vogt satisfied the condition, reporting to the Hays police department that he had kept the knife. The Hays police chief reacted by ordering Mr. Vogt to submit a written report concerning his possession of the knife. Mr. Vogt complied, submitting a vague one-sentence report. He then provided Hays with a two-week notice of resignation, intending to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Mr. Vogt's possession of the knife. In addition, a Hays police officer required Mr. Vogt to give a more detailed statement in order to keep his job with the Hays police department. Mr. Vogt complied, and the Hays police used the additional statement to locate additional evidence.

Based on Mr. Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. In light of this request, the Hays police department supplied Mr. Vogt's statements and additional evidence to the Kansas Bureau of Investigation. The criminal investigation led the Haysville police department to withdraw its job offer.

Mr. Vogt was ultimately charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

This suit followed, with Mr. Vogt alleging use of his statements (1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing. Mr. Vogt argues that these uses of his compelled statements violated his right against self-incrimination.

The Fifth Amendment protects individuals against compulsion to incriminate themselves "in any criminal case." This amendment prohibits compulsion of law enforcement officers to make self-incriminating statements in the course of employment. As a law enforcement officer, Mr. Vogt enjoyed protection under the Fifth Amendment against use of his compelled statements in a criminal case.

The district court held that Mr. Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used at trial. We disagree, concluding that the phrase "criminal case" includes probable cause hearings.

Our precedents provide conflicting signals on whether the term "criminal case" includes pretrial proceedings as well as the trial.

The U.S. Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment. In dicta, the Supreme Court suggested in a 1990 opinion, United States v. Verdugo-Urquidez, that the right against self-incrimination is only a trial right.

But the Supreme Court later appeared to retreat from that dicta. In Mitchell v. United States, for instance, the Court held that the right against self-incrimination extends to sentencing hearings.

Even more recently, the Court again addressed the scope of the Fifth Amendment in Chavez v. Martinez, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003) . . . Justice Thomas's plurality opinion explained that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." Justice Thomas added that "[a] 'criminal case' at the very least requires the initiation of legal proceedings." Two other justices agreed with the outcome, reasoning that the Fifth Amendment's text "focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony."

The Chavez Court did not decide "the precise moment when a 'criminal case' commences." Justice Thomas cited Verdugo-Urquidez, but apparently did not read it to limit the Fifth Amendment to use at trial.

Three other justices stated that a violation of the Self-Incrimination Clause is complete the moment a confession is compelled.

Following Chavez, a circuit split developed over the definition of a "criminal case" under the Fifth Amendment. The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right.

In contrast, the Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment.

Different approaches have emerged because the Chavez Court declined to pinpoint when a "criminal case" begins.

The defendants argue that we have consistently held that the Fifth Amendment right is only a trial right. We disagree.

In re Grand Jury Subpoenas Dated Dec. 7 & 8 (Stover), 40 F.3d 1096 (10th Cir. 1994), . . . Notwithstanding the parties' agreement on this issue, we quoted language from an earlier opinion describing the Fifth Amendment as a trial right.

Though we quoted this restrictive language, we also suggested in dicta that the parties had correctly assumed that the Fifth Amendment is triggered when a compelled statement is used during grand jury proceedings. Thus, Stover arguably suggests that the right against self-incrimination is not simply a trial right.

These precedents supply conflicting signals on whether the term "criminal case" extends beyond the trial itself. The dicta in Verdugo-Urquidez suggests that the

term "criminal case" refers only to the trial. This dicta would ordinarily guide us, for Supreme Court dicta is almost as influential as a Supreme Court holding. Indep. Inst. v. Williams, 812 F.3d 787, 798 n.13 (10th Cir. 2016). But after deciding Verdugo-Urquidez, the Supreme Court interpreted the term "criminal case" in Mitchell to include sentencing proceedings. And even later, the Supreme Court declined in Chavez to define when a "criminal case" begins.

Like the Supreme Court, we have declined until now to unequivocally state whether the term "criminal case" covers pretrial proceedings as well as the trial. Precedents like Stover provide conflicting signals without squarely deciding the issue. Nonetheless, today's case requires us to decide whether the term "criminal case" covers at least one pretrial proceeding: a hearing to determine probable cause.

The right against self-incrimination applies to use in a probable cause hearing as well as at trial.
To decide this issue, we join the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right. In reaching this conclusion, we rely on

• the text of the Fifth Amendment, which we interpret in light of the common understanding of the phrase "criminal case," and

• the Framers' understanding of the right against self-incrimination.

. . .

***Gill v. Whitford* – W.D. of Wisc.**

OPINION
Before RIPPLE, Circuit Judge, and CRABB and GRIESBACH, District Judges.

RIPPLE, Circuit Judge. The plaintiffs have brought this action alleging that Act 43, the redistricting plan enacted by the Wisconsin Legislature in 2011, constitutes an unconstitutional partisan gerrymander. Specifically, they maintain that the Republican-controlled legislature drafted and enacted a redistricting plan that systematically dilutes the voting strength of Democratic voters statewide. We find that Act 43 was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats. Moreover, as demonstrated by the results of the 2012 and 2014 elections, among other evidence, we conclude that Act 43 has had its intended effect. Finally, we find that the discriminatory effect is not explained by the political geography of Wisconsin nor is it justified by a legitimate state interest. Consequently, Act 43 constitutes an unconstitutional political gerrymander. This opinion constitutes our findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

I. BACKGROUND

We begin our consideration of the plaintiffs' claims by examining Wisconsin's statutory requirements for redistricting as well as its recent redistricting history.

A. Reapportionment in Wisconsin

1. The State's constitutional and statutory framework

Reapportionment of state legislative districts is a responsibility constitutionally vested in the state government. See, e.g., Growe v. Emison, 507 U.S. 25, 34 (1993) (citing U.S. Const. art I., § 2); Chapman v. Meier, 420 U.S. 1, 27 (1975).

. . .

The Wisconsin Constitution directs the Wisconsin legislature, "[a]t its first session after each enumeration made by the authority of the United States," to "apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. The Wisconsin Constitution also imposes specific requirements for reapportionment plans. Assembly districts are "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Id. § 4.

. . .

In addition to the state constitutional requirements, the Wisconsin legislature must comply with federal law when redistricting. In particular, state legislatures must ensure that districts are approximately equal in population, so that they do not violate the "one-person, one-vote" principle embedded in the Equal Protection Clause of the Fourteenth Amendment. See Reynolds v. Sims, 377 U.S. 533, 568 (1964) . . . Further, states also must comply with § 2 of the Voting Rights Act of 1965, which focuses on preserving the voting power of minority groups. 52 U.S.C. § 10301; see also Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

. . .

2. The modern history of reapportionment in Wisconsin

In the wake of the 1980 census, the plan that had been enacted in 1972 could no longer satisfy the constitutional requirement of "one-person one-vote." See Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 631 (E.D. Wis. 1982). . . This "AFL-CIO Plan" remained in effect for one election in 1982. As a result of that election, the Democratic Party held control of both houses of the Wisconsin legislature and also gained the governor's office. The legislature passed, and the governor signed, a new apportionment plan that lasted for the rest of the decennial period. See 1983 Wis. Sess. Laws 633.

Following the 1990 election, the Wisconsin government again was divided between two political parties. See Prosser v. Elections Bd., 793 F. Supp. 859, 862 (W.D. Wis. 1992).

Following the 2000 census, a divided Wisconsin legislature again was unable to agree upon a redistricting plan. Arrington v. Elections Bd., 173 F. Supp. 2d 856, 862 (E.D. Wis. 2001). In an ensuing law suit, the federal district court determined that "the existing Wisconsin Assembly and Senate districts," which had not been redrawn since 1992, were "violative of the 'one person, one vote' standard." Baumgart, 2002 WL 34127471, at *1. A new plan was therefore necessary. . . The court therefore drew a plan "in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." Id. at *7. In making these changes, the court attempted to "maintain[] municipal boundaries and unit[e] communities of interest." Id. The "Baumgart Plan" was in effect from 2002 until 2010.

B. Drafting of Act 43

In 2010, for the first time in over forty years, the voters of Wisconsin elected a Republican majority in the Assembly, a Republican majority in the Senate, and a Republican Governor. This uniformity in control led the Republican leadership to conclude that a legislatively enacted redistricting plan was possible.

. . .

The drafters created spreadsheets which collected the partisan scores, by district, for each of the statewide map alternatives. Each spreadsheet included a corresponding table comparing the partisan performance of the draft plan to the prior map drawn by the Baumgart court, which they called the "Current Map." These performance comparisons were made on the following criteria: "Safe" Republican seats, "Lean" Republican seats, "Swing" seats, "Safe" Democratic seats, and "Lean" Democratic seats.

The process of drafting and evaluating these alternative district maps spanned several months. In early April 2011, the drafters produced a document comparing the partisan performance of the Current Map to two early draft maps: Joe's Basemap Basic and Joe's Basemap Assertive. Under the Current Map, the drafters anticipated that the Republicans would win 49 Assembly seats. This number increased to under the Joe's Basemap Basic map and to 56 under the Joe's Basemap Assertive map. The number of safe and leaning Republican seats increased from 40 under the Current Map to under the Joe's Basemap Basic map and 49 under the Joe's Basemap Assertive map; the number of swing seats decreased from 19 to 14 to 12.42 The number of safe and leaning Democratic seats, however, remained roughly the same under all three maps, hovering between 38 and 40.43

The drafters prepared and evaluated the partisan performance of at least another six statewide alternative maps. Each of these maps improved upon the anticipated pro-Republican advantage generated in the initial two draft plans. The total number of safe and leaning Republican seats now ranged between 51 and 54, and the number of swing seats was decreased to between 6 and 11.45 The number of safe and leaning Democratic seats again remained about the same under each draft map, ranging between 37 and 39.46

. . .

They highlighted specifically that under the Current Map, 49 seats are "50% or better" for Republicans, but under the Team Map, "59 Assembly seats are 50% or better."

. . .

The Team Map was then sent to Professor Gaddie, who conducted an "S" curve analysis. The Team Map demonstrated that Republicans would maintain a majority under any likely voting scenario; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority.

. . .

Ottman also made a presentation to the Republican caucus. His notes for that meeting state: "The maps we pass will determine who's here 10 years from now," and "[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades."

. . .

C. Prior Court Challenges to Act 43

Even before Act 43 was passed, two actions were brought challenging the plan on constitutional and statutory grounds, including under Section 2 of the Voting Rights Act. See Baldus v. Members of the Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 846–47 (E.D. Wis. 2012). The court consolidated the actions for decision and concluded that the plan did not violate the "one-person, one-vote" principle, nor did it violate the Equal Protection Clause by "disenfranchise[ing]" voters who were moved to a new Senate district and were unable to vote for their state senator for another two years. Id. at 849– 51, 852–53. However, the court did find that the plaintiffs were entitled to relief on their claim that Act 43 violated the Voting Rights Act by diluting the voting power of Latino voters in Milwaukee County, and it ordered the State to redraw these districts. Id. at 859. The remainder of Act 43, however, remained intact and governed the 2012 and 2014 Assembly elections.

In 2012, the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly. In 2014, the Republican Party received 52% of the two-party statewide vote share and won 63 assembly seats.

II. PROCEDURAL HISTORY

A. Allegations of the Complaint

We now turn to the dispute before this court. Plaintiffs . . . are United States citizens registered to vote in Wisconsin. They reside invarious counties and legislative districts throughout Wisconsin. All of them are "supporters of the Democratic party and of Democratic candidates and they almost always vote for Democratic candidates in Wisconsin elections."

Defendants are . . . , each in his or her official capacity as a member of the Wisconsin Elections Commission.

According to the plaintiffs, in drafting Act 43, the Republicans employed two gerrymandering techniques: "cracking"—"dividing a party's supporters among multiple districts so that they fall short of a majority in each one"—and "packing"— "concentrating one party's backers in a few districts that they win by overwhelming margins,"78 in order to dilute the votes of Democrats statewide. . . They therefore urge the court to adopt a new measure for assessing the discriminatory effect of political gerrymanders—the efficiency gap (or "EG"). "The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast." When two parties waste votes at an identical rate, a plan's EG is equal to zero. An EG in favor of one party, however, means that the party wasted votes at a lower rate than the opposing party. . . In short, the complaint alleges that Act 43 purposely distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats, while purposely distributing the Democratic vote share with less efficiency so that it would translate into fewer seats.

B. Motion to Dismiss

The defendants filed a motion to dismiss on August 18, 2015, which contended that the court could not grant relief for three primary reasons. First, the defendants argued that the EG was directly analogous to the proportional-representation standard rejected by the Supreme Court in Vieth v. Jubelirer, 541 U.S. 267, 287–88 (2004). Second, the defendants argued that the EG failed to account for the impact of traditional districting criteria like contiguity and compactness. Finally, the defendants argued that the plaintiffs lacked the standing to challenge Act 43 on a statewide basis, and instead could only challenge their individual districts. In an order dated December 17, 2015, we denied defendants' motion to dismiss.

. . .

C. Motion for Summary Judgment

Defendants subsequently filed a motion for summary judgment, raising new challenges to the plaintiffs' claims.93 In the motion, the defendants argued that the EG metric was overinclusive and captured several plans—including court-drawn plans in Wisconsin—that were not drawn with any partisan intent. Furthermore Democratic voters tended to live in cities, which created a "natural packing" effect and distorted the EG.

. . .

We denied the motion for summary judgment. We explained that judgment "as a matter of law would be premature because there [we]re factual disputes regarding the validity of plaintiffs' proposed measurement."

. . .

III. THE LEGAL LANDSCAPE

The plaintiffs' claim is that Act 43 violates their First and Fourteenth Amendment rights because it discriminates against Democratic voters by diminishing the strength of their votes in comparison to their Republican counterparts.

. . .

A. The Foundational Case Law

1. . . .

Reynolds therefore establishes that, in electing state representatives, the votes of citizens must be weighted equally. If an apportionment scheme violates the principle of one-person, one-vote, it must be justified on the basis of other, permissible, legislative considerations.

2.

In Fortson v. Dorsey, 379 U.S. 433 (1965), the Court considered the constitutionality of an apportionment scheme which included traditional single-member districts and multimember districts, where citizens reside in a comparatively larger district and vote for multiple representatives. Voters alleged that these multimember districts were "defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district." Id. at 437. The district court granted summary judgment to the plaintiffs, finding that the statute was unconstitutional on its face.

. . .

Following Fortson, the Court has held that multimember districts violate the Constitution when the plaintiffs have produced evidence that an election was "not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, 412 U.S. 755, 766 (1973).

. . .

B. Present Supreme Court Precedent

1.

The Court drew heavily from the Fortson line of cases in resolving the political gerrymandering claim asserted in Gaffney v. Cummings, 412 U.S. 735 (1973).

. . .

In its analysis, the Supreme Court acknowledged that "[s]tate legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment"; it stated:

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, the Apportionment Board's plan was invidiously discriminatory because a "political fairness principle" was followed in making up the districts in both the House and Senate.

. . .

The Court made clear, however, that the drawing of legislative districts along political lines "is not wholly exempt from judicial scrutiny under the Fourteenth Amendment." Id. at 754.

. . .

In sum, the Court reiterated that its concern was invidious discrimination by the State; absent the plaintiffs' establishing an intent to dilute the strength of a particular group or party, the Equal Protection Clause was not offended.

2.

The Court next addressed partisan gerrymandering in Davis v. Bandemer, 478 U.S. 109 (1986).

. . .

Turning to the standard to be applied, a majority of the Court agreed that the "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." Id. at 127. A majority of the Court also believed that the first requirement—intentional discrimination against an identifiable group—had been met. See id. (citing Mobile v. Bolden, 446 U.S. 55, 67–68 (1980)).161 Indeed, it observed that, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." Id. at 129.

. . .

3.

The Court revisited the issue of political gerrymandering in Vieth v. Jubelirer, 541 U.S. 267 (2004). In Vieth, the Court addressed an action filed by Democratic voters in Pennsylvania that challenged the state legislature's new congressional districting plan. Justice Scalia, writing for a plurality, began with a critique of the standard articulated in Bandemer[.]

. . .

The plurality concluded, therefore, that the Equal Protection Clause did not "provide[] a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." Id. at 305.

. . .

4.

The Supreme Court's most recent case on partisan gerrymandering, League of United Latin American Citizens v. Perry ("LULAC"), 548 U.S. 399 (2006), gives little more in the way of guidance. Nevertheless, we set forth those aspects of the decision that may be useful in evaluating the plaintiffs' claims.

. . .

Justices Souter and Ginsburg adhered to their view, set forth in Vieth, as to the proper test for political gerrymandering, but concluded that there was "nothing to be gained by working through these cases on th[at] standard" because, like in Vieth, the Court "ha[d] no majority for any single criterion of impermissible gerrymander." Id. at 483 (Souter, J., concurring in part and dissenting in part). Chief Justice Roberts, joined by Justice Alito, agreed with Justice Kennedy "that appellants ha[d] not provided a reliable standard for identifying unconstitutional political gerrymanders," but took no position as to "whether appellants ha[d] failed to state a claim on which relief can be granted, or ha[d] failed to present a justiciable controversy." Id. at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (internal quotation marks omitted). Finally, Justices Scalia and Thomas reiterated their view that the voters' political gerrymandering claims were nonjusticiable. See id. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part).

. . .

IV. ELEMENTS OF THE CAUSE OF ACTION

. . .

We conclude, therefore, that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the

effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.

A. Discriminatory Intent or Purpose

The Supreme Court has stressed the "basic equal protection principle that the invidious quality of a law … must ultimately be traced to a discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

. . .

The Court explicitly has held that equal protection challenges to redistricting plans require a showing of discriminatory purpose or intent. See Rogers, 458 U.S. at 617.

1.

When considering the level of partisan intent necessary to establish a political-gerrymandering claim, our first task is to determine what kind of partisan intent offends the Constitution. The plurality in Bandemer simply required a plaintiff to show any level of "intentional discrimination against an identifiable political group." 478 U.S. at 127; see also Vieth, 541 U.S. at 284

. . .

The Court's members appear to acknowledge that some level of partisanship is permissible, or at least inevitable, in redistricting legislation. As a starting point, it is safe to say that this concept of abuse of power seems at the core of the Court's approach to partisan gerrymandering.

. . .

Whatever gray may span the area between acceptable and excessive, an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process that impinges on the representational rights of those associated with the party out of power. Such a showing, therefore, satisfies the intent requirement for an equal protection violation.

2.

A "'discriminatory purpose' … implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979); see also Chavez v. Ill. State Police, 251 F.3d 612, 645 (7th Cir. 2001) (quoting same). The plaintiffs therefore must show that the intent to entrench the Republican Party in power was "a motivating factor in the decision." Arlington Heights, 429 U.S. at 265–66.

. . .

Relying on traditional districting principles, defendants propose a novel rule: a redistricting plan that "is consistent with, and not a radical departure from, prior plans with respect to traditional districting principles" cannot, as a matter of law, evince an unconstitutional intent. In other words, compliance with traditional districting principles necessarily creates a constitutional "safe harbor" for state legislatures. The defendants' approach finds no support in the law.

. . .

We therefore must confront the question of how we are to discern whether, in creating the map that became Act 43, the drafters employed an impermissible intent— cutting out for the longterm those of a particular political affiliation.

. . .

The Court never has invalidated a redistricting plan on the ground of partisan gerrymandering, and the Court's recent pronouncements have caused some district courts to question the viability of the cause of action.176 Here, the record demonstrates that, although the drafters were aware of some constitutional limits on the degree to which they could neutralize the political power of the opposition party, those limits were not firmly established. We therefore turn to the sequence of events that led to the enactment of Act 43 to discern whether one purpose behind the legislation was to entrench a political party in power.

3.

a. Evidence of intent

The evidence at trial establishes that one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period.

. . .

We find that the maps the drafters generated, as well as the statistical comparisons made of the various maps, reveal that a focal point of the drafters' efforts was a map that would solidify Republican control.

. . .

In sum, from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing. They designed a measure of partisanship and confirmed the accuracy of this measure with Professor Gaddie. They used this measure to evaluate regional and statewide maps that they drew. They labeled their maps by reference to their partisanship scores, they evaluated partisan outcomes of the maps, and they compared the partisanship scores and partisan outcomes of the various maps. When they completed a statewide map, they submitted it to Professor Gaddie to assess the fortitude of the partisan design in the wake of various electoral outcomes.

The map that emerged from this process reduced markedly the possibility that the Democrats could regain control of the Assembly even with a majority of the statewide vote. The map that would become Act 43 had a pickup of 10 Assembly seats compared to the Current Map.225 As well, if their statewide vote fell below 48%, the design of Act 43 ensured that the Republicans would maintain a comfortable majority.

Finally, it is clear that the drafters were concerned with, and convinced of, the durability of their plan. Professor Gaddie confirmed the staying power of the Republican majority under the plan, and Ottman emphasized to the Republican caucus the long-term consequences of enacting the plan. We conclude, therefore, that the evidence establishes that one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power.

b. Alleged shortcomings in the evidence

The defendants point to the miscalculation of the composite measure, to limitations of the composite measure itself, and to the drafters' lack of reliance on Professor Gaddie's analysis as evidence that they did not have the requisite intent to subjugate the voting strength of Democrats.

The defendants also disparage the notion that "the partisan scores were a crystal ball with predictive powers ensuring that Act 43 would lock Democrats out from seats that leaned Republican."

Finally, the defendants contend that the partisan intent shown by the evidence in this case cannot be considered invidious because Act 43's districts are consistent with traditional districting principles.

. . .

These facts, in tandem with the overwhelming number of reports and memoranda addressing the partisan outcomes of the various maps, lead us to conclude that, although Act 43 complied with traditional redistricting principles, it nevertheless had as one of its objectives entrenching the Republicans' control of the Assembly.

B. Discriminatory Effect of Act 43

Act 43 also achieved the intended effect: it secured for Republicans a lasting Assembly majority. It did so by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%.

. . .

1.

It is clear that the drafters got what they intended to get. There is no question that Act 43 was designed to make it more difficult for Democrats, compared to Republicans, to translate their votes into seats.

. . .

The fact that Democrats and Republicans were treated differently under Act 43 becomes even more stark when we examine the number of seats secured when the parties obtain roughly equivalent statewide vote shares. In 2012, the Democrats received 51.4% of the statewide vote, but that percentage translated into only 39 Assembly seats. A roughly equivalent vote share for Republicans (52% in 2014), however, translated into 63 seats—a 24 seat disparity. Moreover, when Democrats' vote share fell to 48% in 2014, that percentage translated into 36 Assembly seats. Again, a roughly equivalent vote share for Republicans (48.6% in 2012) translated into 60 seats— again a 24 seat disparity. The evidence establishes, therefore, that, even when Republicans are an electoral minority, their legislative power remains secure.

2.

. . .

The record here answers the shortcomings that the Bandemer plurality identified. First, we now have two elections under Act 43. In 2012, the Democrats garnered 51.4% of the vote, but secured only 39 seats in the Assembly—or 39.3% of the seats. In 2014, the Democrats garnered 48% of the vote and won only 36 seats—or 36.4% of the seats. If it is true that a redistricting "plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination," LULAC, 548 U.S. at 419 (opinion of Kennedy, J.), then a plan that deviates this strongly from the distribution of statewide power suggests the opposite.

Moreover, as described in some detail above, Professor Gaddie's "S" curve and Professor Mayer's swing analysis reveal that the Democrats are unlikely to regain control of the Assembly.

Furthermore, because we have the actual election results to confirm the reliability of Professor Gaddie's model and "S"-curve analysis, we are not operating only in the realm of hypotheticals—a prospect that at least one member of the Court in LULAC found troubling.

. . .

3.

While the evidence we have just described certainly makes a firm case on the question of discriminatory effect, that evidence is further bolstered by the plaintiffs' use of the "efficiency gap," or EG for short, to demonstrate that, under the circumstances presented here, their representational rights have been burdened. . .

a.

. . .

The EG calculation is relatively simple. First, it requires totaling, for each party, statewide, (1) the number of votes cast for the losing candidates in district races (as a measure of cracked voters), along with (2) the number of votes cast for the winning candidates in excess of the 50% plus one votes necessary to secure the candidate's victory (as a measure of packed voters). The resulting figure is the total number of "wasted" votes for each party. The EG is the difference between the wasted votes cast for each party, divided by the overall number of votes cast in the election. An EG in favor of one party (Party A), however, means that Party A wasted votes at a lower rate than the opposing party (Party B).

. . .

Both Professors Mayer and Jackman calculated the EG for the 2012 Assembly elections in Wisconsin. In his analysis, Professor Mayer employed the "full method," which requires aggregating, district-by-district, the wasted votes cast for each party. Applying this methodology, he determined that Act 43 yielded a pro-Republican EG of 11.69%. Professor Jackman, however, used the "simplified method," that assumes equal voter turnout at the district level. His calculations estimated a pro-Republican EG of 13% for the 2012 election. Professor Jackman also calculated an EG for the 2014 election; that calculation resulted in a pro-Republican EG of 10%.

. . .

b.

The defendants have made a number of legal, methodological, and policy-based attacks against judicial use of the EG as a measure of a district plan's partisan effect. We begin with their claim that use of the EG is foreclosed by Supreme Court precedent.

. . .

We cannot accept this argument. To say that the Constitution does not require proportional representation is not to say that highly disproportional representation may not be evidence of a discriminatory effect.

. . .

As it has been presented here, the EG does not impermissibly require that each party receive a share of the seats in proportion to its vote share. Rather, the EG measures the magnitude of a plan's deviation from the relationship we would expect to observe between votes and seats. We do not believe Vieth or LULAC preclude our consideration of the EG measure.

We turn next to what are best described as methodological and operational critiques of the EG measure. First, the defendants point out that the plaintiffs have proposed two distinct methods for calculating the EG. The differing approaches can yield materially different EG

values, which, in turn, will produce uncertainty in the maps that should be subject to judicial scrutiny.

Although we view the full method as preferable because it accounts for the reality that voters do not go to the polls at equal rates across districts, we do not believe that this calls into question Professor Jackman's use of the simplified method in his analysis.

. . .

The defendants also contend that the EG, as an indicator of partisan gerrymandering, is both overinclusive and underinclusive. . . Here, the plaintiffs have put forward sufficient evidence showing both that Act 43 was enacted with impermissible intent and that it demonstrates a large and durable EG value.

Lastly, the defendants argue that the EG measure is overly sensitive to small changes in voter preferences.

. . .

We acknowledge these as legitimate criticisms of the EG measure generally; however, they are less compelling in the context of this case. Both concerns are rooted in an EG being drawn from only a single election, which, for any number of reasons, may represent an electoral aberration.305 Here we have the results of two elections under Act 43, one in which the Republicans failed to garner a majority of the statewide vote (2012), and one in which they exceeded it by two percentage points. Under both electoral scenarios, there was a sizeable pro-Republican efficiency gap: 13% in 2012 and 10% in 2014.

. . .

The defendants also raise policy-based objections to the EG as a measure of discriminatory effect. First, they claim that the creation of many competitive districts, which may be a desirable and non-partisan policy choice, will result in a highly sensitive map in which the EG could swing rather wildly with even mild electoral shifts. We do not doubt this is the case. However, as with some of the criticisms that we already have discussed, this concern is ameliorated by other aspects of the equal protection analysis. It would be difficult to establish that drafters who designed a map with many competitive districts had the requisite partisan intent to show a constitutional violation.

The defendants similarly claim that identifying an EG of zero as the baseline or ideal would discourage states from enacting systems of proportional representation. See Gaffney, 412 U.S. at 752.

. . .

In sum, we conclude that the plaintiffs have established, by a preponderance of the evidence, that Act 43 burdens the representational rights of Democratic voters in Wisconsin by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43. We therefore turn our attention to whether the burden is justified by some legitimate state interest.

V. JUSTIFICATION

. . .

In the absence of explicit guidance from the Supreme Court, we think that the most appropriate course in this context is to evaluate whether a plan's partisan effect is justifiable, i.e., whether it can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process. . . The record before us does not require us to anticipate

how the Supreme Court will resolve the allocations of proof on this issue. It is clear that the parties, recognizing the present ambiguity on this point, placed before us all the evidence they could in support of their respective positions. Assuming the plaintiffs have the ultimate burden of proof on the issue, they have carried that burden. The evidence further makes clear that, although Wisconsin's natural political geography plays some role in the apportionment process, it simply does not explain adequately the sizeable disparate effect seen in 2012 and 2014 under Act 43.

. . .

A.

The defendants' primary argument is that Wisconsin's political geography naturally favors Republicans because Democratic voters reside in more geographically concentrated areas, particularly in urban centers like Milwaukee and Madison. The plaintiffs have stressed, as a general matter throughout this litigation, that even if there were some inherent pro-Republican bias in Wisconsin, there is no evidence that such a bias could explain Act 43's large EG measures.

. . .

Although Mr. Trende's report and testimony provides some helpful background information on political trends and political geography generally, they do not provide the level of analytical detail necessary to conclude that political geography explains Act 43's disparate partisan effects.

. . .

Having carefully examined the evidence bearing on this issue, we find that substantial portions of the record indicate, at least circumstantially, that Wisconsin's political geography affords Republicans a modest natural advantage in districting. Indeed, the plaintiffs conceded as much in their closing argument when counsel stated that "there likely is some natural packing" of Democratic voters, "especially of minority voters in places like Milwaukee."

. . .

For these reasons, we find that Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process.

B.

Because the evidence at trial establishes that Wisconsin has a modestly pro-Republican political geography, we now examine whether this inherent advantage explains Act 43's partisan effect. We conclude that it does not. The record reveals that, before the legislature enacted Act 43, its drafters had produced several alternative district plans that performed satisfactorily on traditional districting criteria but secured a materially smaller partisan advantage when compared to the advantage produced by Act 43.

. . .

Careful review of the record convinces us that benign factors cannot explain this substantial increase in Republican advantage between the Current Map and the plan that would become Act 43. Rather, it is evident that the drafters achieved this end by making incremental "improvements" to their plan alternatives throughout the drafting process.

. . .

The evidence of multiple statewide plan alternatives produced during the drafting process, coupled with Professor Mayer's Demonstration Plan, convinces us that Wisconsin's

modest, pro-Republican political geography cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin. . .

VI. STANDING

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), makes clear that we must assess the issue of standing at all stages of the proceedings.

. . .

In short, there is no question that Act 43 imposed a disability on Democratic voters and that redrawing a district map—indeed, perhaps employing one of the drafters' earlier efforts—would remove that disability.

Editor's Note : We expect additional orders from the justices' September 25 conference on Monday at 9:30 a.m.
On Monday the court hears oral argument in Epic Systems Corp. v. Lewis. Amy Howe has our preview.
On Monday the court also hears oral argument in Sessions v. Dimaya. Kevin Johnson has our preview.

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Posted Tue, September 26th, 2017 10:30 am

Argument preview: The justices tackle partisan gerrymandering again

[Editor's note: An earlier version of this post ran on August 7, as an introduction to the blog's symposium on Gill v. Whitford, as well as at Howe on the Court, where it was originally published.]

Justice Ruth Bader Ginsburg has suggested that it might be the most important case of the upcoming term. On October 3, the Supreme Court will hear oral argument in *Gill v. Whitford*, a challenge to the redistricting plan passed by Wisconsin's Republican-controlled legislature in 2011. A federal court struck down the plan last year, concluding that it violated the Constitution because it was the product of partisan gerrymandering – that is, the practice of purposely drawing district lines to favor one party and put another at a disadvantage. The challengers argue that the redistricting plan would allow Republicans to cement control of the state's legislature for years to come, even if popular support for the party wanes; the lower court's decision, they contend, merely corrected "a serious democratic malfunction that would otherwise have gone unremedied." By contrast, the state of Wisconsin counters that if the lower court's decision is allowed to stand, it will open the door to "unprecedented intervention in the American political process."

The Wisconsin case is not the Supreme Court's first foray into partisan gerrymandering. When the Supreme Court tackled the issue 13 years ago, in a challenge to Pennsylvania's redistricting plan, the justices were deeply divided. Four justices – Justice Antonin Scalia, joined by then-Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas – agreed in *Vieth v. Jubelirer* that courts should never review partisan-gerrymandering claims, because it is too hard to come up with a manageable test to determine when politics plays too influential a role in redistricting. Four other justices – Justices John Paul Stevens, Ruth Bader Ginsburg, David Souter and Stephen Breyer – disagreed; they would have allowed courts to review partisan-gerrymandering claims. The key vote in the case came (as it so often does) from Justice Anthony Kennedy, who agreed that the Supreme Court should stay out of the Pennsylvania case but left open the door for courts to have a role in reviewing partisan-gerrymandering cases in the future if a workable standard could be found.

Over several decades, federal courts – rather than the Wisconsin legislature – drew the state's redistricting maps, after politicians could not agree on a plan. But in 2010, Republicans won control of both houses of the state legislature and the governor's office, which led to the legislature, instead of the courts, redrawing the maps after the 2010 census. Republicans fared well in the two elections that followed: In 2012, they won 48.6% of the statewide vote, giving them 60 seats in the state's 99-seat assembly, while in 2014 they won 52% of the vote, giving them 63 seats. By contrast, in 2012, Democrats won 51.4% of the vote but secured 39 seats, while in 2014 they won approximately 48% of the vote, which gave them 36 seats.

A group of challengers, led by retired law professor William Whitford, went to court to oppose the new redistricting plan as an unconstitutional partisan gerrymander. They argued that the legislature had created a plan that was intended to dilute Democratic votes across the state, using two methods: "cracking," which divides up supporters of one party among different districts so that they do not form a majority in any of them; and "packing," which puts large numbers of a party's supporters in relatively few districts, where they win by large margins.

A divided three-judge district court (which, under federal law, is the designated forum for redistricting challenges) agreed with the challengers. The court acknowledged that politics can play a role in redistricting, and that there is no violation of the Constitution simply because one party's share of the seats in a legislature exceeds its share of the statewide vote. But, the court continued, even if it can sometimes be difficult to tell when politics plays too influential a role in redistricting, this case is "far more straightforward." The record in the case, the court concluded, showed that the state legislature intended to, and did, draft a redistricting plan to lock in Republican control of the state legislature, even though it could have drafted a different plan that would have accomplished other valid redistricting goals "while generating a substantially smaller partisan advantage."

Urging the justices to reverse the district court's ruling, the state of Wisconsin emphasizes that partisan gerrymandering is both a longstanding and common practice. Moreover, it continues, the 2010 map does not violate the Constitution because politics was only one of several factors that the legislature considered in drafting a map that "complies with traditional redistricting principles." It goes on to point out that the 2010 map is not

significantly different from the map drawn by a federal court in 2002, under which Republicans won 53.5% of the statewide vote, giving them 60 seats in the assembly.

The state also argues that the challengers lack a legal right – known as "standing" – to challenge the whole 2010 map. For example, they point out, lead plaintiff William Whitford lives in a district that Democrats have historically won by wide margins. Whitford's injury, therefore, is not that his own vote is diluted, but that the 2010 map makes it harder for him to "engage in campaign activity to achieve a majority" in the assembly. But that is not the kind of specific and personal injury that Whitford would need to file a lawsuit, the state stresses. Instead, the state contends, it is "a subjective preference that any person could assert, so long as that person is interested in the election of more Wisconsin Democrats."

Allowing claims by plaintiffs like Whitford to go forward would also create an "unthinkable and perverse loophole," the state tells the justices, by permitting statewide partisan-gerrymandering challenges even though the Supreme Court has ruled that plaintiffs in racial-gerrymandering cases can only challenge their own districts, rather than statewide maps. Given the close correlation between race and party affiliation, the state suggests, allowing statewide challenges based on partisan gerrymandering would almost certainly prompt plaintiffs to bring their racial-gerrymandering cases as partisan challenges.

Finally, the state observes that one of the most important tests for whether something is a "political question" – that is, an issue best left to the elected branches of the government, rather than the courts – is whether there are standards that courts can easily identify and apply to resolve the dispute. That is certainly not the case for partisan gerrymandering, the state contends, as the "last three decades of fruitless litigation" have shown. But in any event, the state tells the court, the challengers cannot win because their proposed rule is not "limited and precise," but in fact is the "opposite," because it relies on a mix of social-science techniques that would "sow chaos": Each plan drawn by a state legislature "would be immediately challenged in federal court. A trial would follow, where each side would present dueling 'social science' expert(s), and then the district court would need to pick a winner. There would be no way for any legislature to know, ex ante, what metric would guide the inevitable future trial."

The challengers seemingly agree with the state that a key question in the dispute now before the Supreme Court is whether there is an identifiable and manageable test for partisan gerrymandering. But the answer to that question, they counter, is yes. Each of the three parts of the test that the lower court applied to reach its conclusion that the 2010 map violates the Constitution, they argue, is both squarely grounded in the Supreme Court's cases and "highly workable."

First, they note, the district court looked at whether the 2010 map reflects an intent by Republicans to discriminate against Democrats. Pointing to the court's earlier partisan-gerrymandering cases that specifically refer to the map drafters' intent, they argue that the Supreme Court itself has indicated that the intent inquiry is a manageable one that can be applied consistently.

Turning to the district court's conclusion that the 2010 map also had a discriminatory effect, the challengers assert that several justices specifically envisioned an inquiry into whether a redistricting plan had a discriminatory effect in *League of United Latin American Citizens v. Perry*, a 2006 case in which the court rejected the claim that Texas' 2003 congressional redistricting was an unconstitutional partisan gerrymander. The challengers emphasize that they are not asking the Supreme Court to endorse a specific social-science technique to measure a plan's discriminatory effect. Rather, they stress, they are simply asking the court to do what it has done in other redistricting cases involving allegations of discriminatory effect: announce a standard "whose precise contours are filled in through subsequent litigation."

The third prong in the district court's test – whether there is a "legitimate justification" for the map – is, the challengers contend, "drawn directly" from the Supreme Court's cases involving the "one-person, one-vote" doctrine – the principle that legislative districts should contain roughly equal populations. Experience demonstrates that this prong is workable, the challengers add, because it has been used in "one-person, one-vote" cases for 50 years; the "legitimate justification" test has also been suggested by "several" justices in the court's partisan-gerrymandering cases.

The challengers also push back against two other arguments advanced by the state, beginning with the idea that, like racial-gerrymandering cases, partisan-gerrymandering claims cannot challenge an entire statewide map. In his concurring opinion in *Vieth*, the challengers stress, Kennedy clearly "contemplated partisan gerrymandering claims proceeding on a statewide basis." And four years later in *LULAC*, they note, the plaintiffs "challenged Texas's congressional plan in its entirety," but "not a single Justice hinted that the suit was foreclosed for this reason." The state's suggestion that the 2010 map passes constitutional muster because it complies with "traditional" redistricting principles is also both unfounded and still in dispute, the challengers contend: The 2010 map not only "splits more counties than any other map in Wisconsin's history and was found to violate" the Voting Rights Act, but the districts that it outlines "are also less compact, on average, than those of any other Wisconsin map for which data is available."

Only four of the current justices – Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer – were on the court in 2004, when the justices declined to act in *Vieth*. And three of the current justices – Justices Sonia Sotomayor, Elena Kagan and Neil Gorsuch – had not yet joined the court when it decided *LULAC* in 2006. We may be able to discern at least a hint of those three justices' views on this case from an order that the court issued the same day that it announced that it would review the case: The justices granted the state's request to block an order by the lower court that would have required the state legislature to create a new redistricting plan by the fall. The state had argued that it should not have to spend time and money creating a new map until the Supreme Court can rule on the validity of the old plan; at a minimum, the state claimed, the court's eventual opinion will provide "significant guidance" for the state to use in drafting a new redistricting plan. Ginsburg, Breyer, Sotomayor and Kagan indicated that they would have denied the state's request, but the state's ability to muster the five votes that it needed to put the lower court's order on hold could bode poorly for the challengers, because one factor that the justices had to consider in making their decision was whether the state is likely to succeed on the merits of its claim. On the other hand, the case appears to have been scheduled for oral argument earlier than it might normally have been: Although the justices did not announce until June 19 that they would review *Gill v. Whitford*, it leapfrogged over several other cases (including two granted in February, two granted in March and one granted in April) to take a spot on the October argument calendar. That could suggest that the justices intend to try to decide the case quickly, which would in turn allow new maps to be drawn sooner even if the district court's order is not in effect. We will likely know more after the justices hear oral argument in early October.

Posted in *Gill v. Whitford*, Featured, Merits Cases

Recommended Citation: Amy Howe, *Argument preview: The justices tackle partisan gerrymandering again*, SCOTUSblog (Sep. 26, 2017, 10:30 AM), http://www.scotusblog.com/2017/09/argument-preview-justices-tackle-partisan-gerrymandering/

Rick Esenberg *Guest*
Posted Wed, August 9th, 2017 2:24 pm

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Symposium: *Whitford* is nothing new

Rick Esenberg is the founder, president and general counsel of the Wisconsin Institute for Law & Liberty, which filed an amicus brief in support of the state appellants in Gill v. Whitford.

From the moment it first adopted a constitutional requirement of "one-person, one vote," the Supreme Court has emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination." This deference is rooted not in an overly roseate view of the capabilities and character of the typical state legislator, but in clear-eyed assessment of the judiciary's competence to superintend a highly political process. The court has long acknowledged that politicians will seek partisan advantage – indeed it has gone so far to suggest that such intent can be presumed – but it has never held that any legislative consideration of maps' likely partisan impact is invalid. The redistricting process requires weighing a panoply of nonpartisan and widely accepted objectives – contiguity, compactness, continuity, respect for political boundaries, keeping intact communities of interest, protecting the ability of minority voters to elect candidates of their choice, and even political compromise – that often work at cross-purposes and produce maps that are more a potpourri of conflicting objectives than the product of an identifiable set of principles. Faced with such a process, it is not surprising that the Supreme Court has been unable to articulate a way to determine how much partisanship is "too much."

In 1986, after years of confused and contradictory litigation in the lower courts, the Supreme Court affirmed the possibility of political-gerrymandering claims in *Davis v. Bandemer*. But the justices could not agree on a standard by which such claims could be measured, and more years of conflicting and futile litigation ensued. In 2004, a majority of the justices agreed in *Vieth v. Jubelirer* that partisan-gerrymandering claims could be considered only rarely, if at all. A plurality, after noting that *Bandemer*'s legacy had proved to be "one long record of puzzlement and consternation," was prepared to declare political-gerrymandering claims to be nonjusticiable political questions. Concurring in the result, Justice Anthony Kennedy was not ready to go that far. Although he agreed that no standard had yet been identified, he was unwilling to foreclose the possibility that someday it would be found.

But, 13 years later, that standard remains missing. Two years after *Vieth*, the Supreme Court returned to the question of political apportionment and once again failed to agree on an acceptable standard. In *League of United Latin American Citizens v. Perry*, the court noted again that "disagreement persists" regarding the justiciability of political-gerrymandering claims but declined to revisit *Vieth*. It could not, however, escape the confusion and discord that has marked decades of litigation. Although a majority of the court apparently agreed that the Texas legislature did "seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority," the justices could not agree on whether the results were unconstitutional. None of the court's six opinions garnered a majority. Lower courts have fared no better, with one panel asking, earlier this year, "how we could 'allow a claim to go forward that no one understands.'"

In *Gill v. Whitford*, the plaintiffs convinced a divided three-judge panel of the Western District of Wisconsin that they had finally located the grail that had eluded detection for the better part of a half-century. Although the district court conceded that maps drawn by the Wisconsin legislature respected traditional redistricting criteria, it nevertheless held that they were a partisan gerrymander that unconstitutionally favored Republicans. The standard that supposedly solves the puzzle that stumped the court in *Bandemer* and *Veith* turns on something called the "efficiency gap." Calculation of the gap begins with the assumption that all votes cast for a losing candidate, along with any votes cast for a winning candidate that exceed the number of votes necessary for that candidate to win, are "inefficient" or "wasted." If more "wasted" votes have been cast for the candidates of one party than have been cast for another, there is an "efficiency gap" – i.e., the votes that were cast for candidates of one party were more "efficiently" translated into legislative seats than were the votes for candidates of the other party.

This gap is nothing more than a measure of the extent to which the degree of concentration of each party's voters within districts differs. Eliminating the gap requires ensuring that, say, Democratic voters are not more likely to be in heavily Democratic districts in a way that results in a "disproportionate" number of Republican victories. Treating departure from such proportionality as a constitutional problem works only if there is a constitutional obligation to ensure that the voters of one party are not more concentrated than voters of another, or if the lack of proportionality in the distribution of partisan votes or the degree of their concentration is a reliable indicator of partisan skullduggery.

But there is no reason to presume that voters who prefer Democrats and Republicans will be distributed evenly across a state or that each party's voters will be equally geographically concentrated. Parties suffer large numbers of "wasted" votes because like-minded voters increasingly live in close proximity to each other. After every presidential election, we see maps of the United States depicting results by county that reveal our country to be a sea of red dotted with islands of deep blue. As Michael Barone has noted, electoral outcomes are "largely the result of demographic clustering, the fact that heavily Democratic voting groups—blacks, Hispanics (in many states) and gentry liberals—tend to be clustered in most central cities, many sympathetic suburbs and most university towns, while Republican voters are spread more evenly around the rest of the country."

Although the district-court panel in this case recognized that the "efficiency gap" was a product of the geographic concentration of voters who have historically preferred Democrats, it nonetheless found that the gap was just "too big." However, it offered no standard to measure how much of a gap is

too much, providing no answer to the question that has stumped the courts for years. It held that the gap in Wisconsin was unacceptable because it was possible to draw maps with lower gaps. And that gives the game away. The obligation to eliminate the "efficiency gap" is rooted in a presumption that the partisan composition of the legislature should track (to some unspecified degree) the statewide vote totals for candidates of each political party and is a function of the lack of proportionality between those two numbers. But a lack of statewide proportionality is constitutionally "inefficient" and votes are "wasted" only if statewide proportionality is a constitutional goal. The contrived nature of its name suggests that this is not an "efficiency gap," but a "proportionality gap."

The Supreme Court has already considered proportionality and rejected it. There is no constitutional right for all persons who prefer the candidates of one party to have the same number of "wasted" votes or proportional representation in the legislature. To create a presumption that deviation from proportionality is constitutionally problematic is to judge the elections we do hold – multiple single-member elections held in geographic districts in which voters select an individual – by the degree to which the results conform to elections that we do not hold – statewide elections in which voters select a preferred party. To make the latter the measure of the former is to change the nature of legislative elections and place pressure on both legislatures and lower courts to ensure partisan proportionality.

To be sure, the district court in this case required a finding that the legislative majority "intended" to benefit itself and relied on law-office history to conclude this was so. But, as the Supreme Court recognized in *Bandemer* itself, that intention will almost always be present. Although the district court allowed for the possibility that the gap might be explained away by the greater concentration of the voters of one party, it rejected that explanation for the Wisconsin maps because the mapmakers could have drawn a set of maps with a lower efficiency gap. In other words, the district court imposed on the legislature a constitutional obligation to gerrymander for competitiveness. Ironically, in the interest of rooting out partisan bias, it endorsed a project of balancing partisan interests that would embroil the courts in partisan concerns.

The efficiency gap is nothing new and does not move our redistricting jurisprudence to a law-based, judicially manageable standard. Its failure suggests that the *Vieth* plurality had it right. Sometimes the absence of an answer means that we have asked the wrong question.

Posted in *Gill v. Whitford*, Summer symposium on Gill v. Whitford, Featured, Merits Cases

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Recommended Citation: Rick Esenberg, *Symposium: Whitford is nothing new*, SCOTUSBLOG (Aug. 9, 2017, 2:24 PM), http://www.scotusblog.com/2017/08/symposium-whitford-nothing-new/

Janus v. AFSCME, Council 31, 851 F.3d 746 (7th Cir. 2017)

In Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), the Supreme Court upheld, against a challenge based on the First Amendment, a Michigan law that allowed a public employer (in that case a municipal board of education), whose employees (public-school teachers) were represented by a union, to require those of its employees who did not join the union nevertheless to pay fees to it because they benefited from the union's collective bargaining agreement with the employer. The fees could only be great enough to cover the cost of the union's activities that benefited them; they could not be expanded to enable the union to use a portion of them "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." For were that permitted, the workers who disagreed with the political views embraced by the union would be unwilling contributors to expenditures for promoting political views anathema to them, and the law requiring those contributions would thereby have infringed their constitutional right of free speech.

Illinois has a law, similar to the Michigan law, called the Illinois Public Relations Act, 5 ILCS 315/1 et seq., under which a union representing public employees collects dues from its members, but only "fair share" fees (a proportionate share of the costs of collective bargaining and contract administration) from non-member employees on whose behalf the union also negotiates. See 5 ILCS 315/6. But in 2015 the governor of Illinois filed suit in federal district court to halt the unions' collecting these fees, his ground being that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.

The district court dismissed the governor's complaint, however, on the ground that he had no standing to sue because he had nothing to gain from eliminating the compulsory fees, as he is not subject to them. But two public employees—Mark Janus and Brian Trygg—had already moved to intervene in the suit as plaintiffs seeking the overruling of Abood.

While dismissing the governor's complaint for lack of standing, the district court granted the employees' motion to intervene and declared that the complaint appended to their motion would be a valid substitute for Governor Rauner's dismissed complaint. Technically, of course, there was nothing for Janus and Trygg to intervene in, given the dismissal of the governor's complaint. But to reject intervention by Janus and Trygg on that ground would be a waste of time, for if forbidden to intervene the two of them would simply file their own complaint when Rauner's was dismissed.

But we need to distinguish between the two plaintiffs, Janus and Trygg, because while Janus has never before challenged the requirement that he pay the union "fair share" fees, Trygg has. First before the Illinois Labor Relations Board and then before the Illinois Appellate Court, Trygg complained that the union bargaining on his behalf (the Teamsters Local No. 916, one of the defendants in this case) was ignoring a provision of the Illinois law that allows a person who has religious objections to paying a fee to a union to instead pay the fee to a charity. 5 ILCS 315/6(g). The Illinois court agreed, and on remand to the Board Trygg obtained the relief he sought: instead of paying the fair-share fee to the union, he could pay the same amount to a

charity of his choice. The defendants (the unions that bargain on behalf of Janus and Trygg, respectively—AFSCME for Janus, the Teamsters for Trygg—the Director of the Illinois Department of Central Management Services, which is the state agency that has collective bargaining agreements with both unions; and the Attorney General of Illinois intervening on the side of the defendants) argue that Trygg's claim in the present suit is precluded by his earlier litigation.

Claim preclusion is designed to prevent multiple law-suits between the same parties where the facts and issues are the same in all of the suits, and 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to a state court judgment that it would be given by the courts of the state in question. Trygg's First Amendment claim and his earlier Illinois statutory claim arise from the same fact: the existence of an Illinois law requiring that he pay fees to the Teamsters, the union required to bargain on his behalf. But the parties disagree as to whether Trygg could have raised his First Amendment claim in the earlier litigation. It's true that the Illinois Labor Relations Board could not have entertained a constitutional challenge to the statute, but Trygg could have included the claim in his appeal from the Board's decision to the court, because it presented an issue relevant to the legality of the Board's action. He did not do so; and because he had a "full and fair opportunity" to do so, he is precluded by Illinois law from litigating the claim in the present suit. He missed his chance.

Janus's claim was also properly dismissed, though on a different ground: that he failed to state a valid claim because, as we said earlier, neither the district court nor this court can overrule Abood, and it is Abood that stands in the way of his claim.

The judgment of the district court dismissing the complaint is therefore Affirmed.

Editor's Note : We expect additional orders from the justices' September 25 conference on Monday at 9:30 a.m.
On Monday the court hears oral argument in Epic Systems Corp. v. Lewis. Amy Howe has our preview.
On Monday the court also hears oral argument in Sessions v. Dimaya. Kevin Johnson has our preview.

Amy Howe *Independent Contractor and Reporter*
Posted Wed, June 7th, 2017 9:49 am

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Will the third time be the charm for challenge to public-sector union fees?

It is settled law that public employees who do not belong to the union that represents them cannot be required to pay fees that the union would use for political activity like union organizing. But in 1977, the Supreme Court ruled that public employees who do not belong to a union can be required to pay a fee – often known as a "fair share" or "agency" fee – to cover the union's costs to negotiate a contract that applies to all public employees, including those who are not union members. That decision, in *Abood v. Detroit Board of Education*, turned 40 last month. But if an Illinois state employee, Mark Janus, has his way, *Abood* may not survive to see 41. Yesterday Janus asked the Supreme Court to overrule that decision and hold that requiring an unwilling employee to pay even this more limited fee violates the First Amendment. If the court agrees to weigh in, as it is likely to do, its ruling could affect not only the financial health of public-employee unions, but possibly even politics more broadly. And its decision could also be one of the first tangible and significant signs of the impact of the 2016 presidential election on the Supreme Court.

For eight of the nine justices, the issue is a familiar one. It first came before them three years ago, in another case from Illinois. But the court didn't rule on the question then; instead, it concluded that the employees in that case – home health aides, who usually take care of family members and were compensated by the state – were not actually public employees. However, five justices – Justice Samuel Alito, whose opinion for the court was joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas – suggested that they might be willing to reconsider *Abood*.

Two years later, the issue was back, this time in a challenge filed by a group of California public-school teachers who objected to having to pay agency fees. The court heard oral argument in the case on January 11, 2016, but had not yet announced its decision before Scalia died just over a month later. On March 29 of last year, the remaining eight justices revealed that they were deadlocked, issuing a one-sentence order that left the lower court's ruling in favor of the union in place. The teachers asked the court to reconsider that ruling, but – after repeatedly putting off action on the request – it declined to do so.

With Justice Neil Gorsuch now on the bench, however, Janus hopes that the Supreme Court will seize its third opportunity to reverse *Abood*. The U.S. Court of Appeals for the 7th Circuit rejected Janus' argument that requiring him to pay an agency fee violated his rights under the First Amendment, explaining that it did not have the power to overrule *Abood*. But the Supreme Court does have that power, and yesterday Janus asked the justices to step in. He argues that, because issues like salaries, pensions and benefits for government employees are inherently political, agency fees – even if characterized as the costs of contract negotiations – are supporting "speech designed to influence governmental policies." Therefore, he maintains, requiring him to pay an agency fee isn't actually any different from forcing him to subsidize a group that lobbies the government. Indeed, he observes, an agency fee may require state employees to "subsidize advocacy that they oppose and that may harm their interests. This is perverse, akin to requiring kidnapping victims to pay their captors for room and board."

The stakes in this case are high, not only for the parties but also for any other union that represents public employees who must pay agency fees. If employees are not required to pay the fees, many of them probably won't, which would have a direct effect on the financial health of public-employee unions. And although the fees now at issue before the court cannot be used for politics and lobbying, that could in turn lead to a reduced role on the political stage for organized labor, which by one estimate spent $1.7 billion during the 2012 election cycle.

The respondents in the case, the state of Illinois and the union that represents Janus, have 30 days to file their response to Janus' petition for review. The justices will almost certainly not consider the petition until late September, when they return from their summer recess. If they were to grant review then, the case would likely be argued in early 2018, with a decision before the end of next June.

Posted in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, Cases in the Pipeline, Featured

Recommended Citation: Amy Howe, *Will the third time be the charm for challenge to public-sector union fees?*, SCOTUSblog (Jun. 7, 2017, 9:49 AM), http://www.scotusblog.com/2017/06/will-third-time-charm-challenge-public-sector-union-fees/

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On Monday the court also hears oral argument in Sessions v. Dimaya. Kevin Johnson has our preview.

Amy Howe *Independent Contractor and Reporter*
Posted Mon, September 25th, 2017 10:56 am

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Argument preview: Reconciling class waivers and the National Labor Relations Act (UPDATED)

(This post was updated at 3:13 p.m. to account for the court's September 25 order granting motions for divided argument by the U.S. solicitor general and the National Labor Relations Board.)

When the justices return to the bench on Monday, October 2, they will hear arguments in a trio of consolidated cases – *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA* – involving the intersection of two federal laws, both of which date back nearly a century. The first law, the Federal Arbitration Act, provides that arbitration agreements "shall be valid, irrevocable, and enforceable." The second, the National Labor Relations Act, provides that employees have the right to engage in "concerted activities" for "mutual aid or protection." But what happens when employers include a clause in their employment contracts that requires employees to arbitrate any disputes with the company individually, and to waive the right to resolve those disputes through either class actions or collective proceedings? That is the question before the justices next week; their answer could have a significant impact on how and whether employer-employee disputes are resolved in the future.

Each of the three cases now before the justices made its way to the Supreme Court along a slightly different path, but all arose when an employee who had entered into an arbitration agreement with an employer filed a class action or collective action in federal court. In June 2010, Sheila Hobson and three other employees of Murphy Oil, which runs gas stations around the country, filed a collective action in which they alleged that they had not received overtime pay that they were owed. At the company's request, the district court ordered the employees to take their dispute to arbitration, and it dismissed the case after they failed to do so. Hobson went instead to the National Labor Relations Board, which charged Murphy Oil with committing an unfair labor practice. In an earlier case, the NLRB had ruled that arbitration agreements like Murphy Oil's that require employees to waive their rights to collective or class proceedings violate the employees' right under the NLRA to "engage in concerted action for mutual aid or protection." But the U.S. Court of Appeals for the 5th Circuit disagreed, ruling for Murphy Oil.

In February 2015, Jacob Lewis filed a lawsuit in federal court in which he alleged that Epic Systems, a Wisconsin-based software company, had denied overtime pay to him and others. The lower courts allowed Lewis' lawsuit to go forward, rejecting Epic's motion to compel arbitration; like the NLRB in Hobson's case, they ruled that the arbitration agreement's waiver of class and collective proceedings could not be enforced because it interfered with Lewis' right to "concerted activity."

In the third case, two former Ernst & Young employees filed a class action against the accounting firm in federal court, alleging that the company had violated both the Fair Labor Standards Act and state law. A federal district court ruled that an arbitration provision in the employees' contracts was enforceable, but the U.S. Court of Appeals for the 9th Circuit reversed and held that the arbitration provision was unenforceable. The Supreme Court agreed in early January to review all three rulings.

In their briefs on the merits at the Supreme Court, the employers argue that the justices' job is to try to harmonize the Federal Arbitration Act and the National Labor Relations Act. The interpretation that they have proposed, they contend, does exactly that. Section 2 of the FAA is, they say, "unequivocal": It provides that arbitration provisions "must be enforced." And in cases involving the FAA, they stress, the Supreme Court has ruled that the FAA's "unequivocal" command to enforce arbitration agreements "will yield only when it has been overridden by a contrary congressional command in another federal statute." No such command exists here, the employers continue, because the NLRA does not refer to class proceedings at all, nor is there anything in the history of the NLRA indicating that Congress wanted it to trump agreements to arbitrate.

The employers add that there is no reason for the Supreme Court to defer to the NLRB's interpretation of the NLRA because the law is not ambiguous (a necessary predicate for deference): The NLRA "unambiguously does not prohibit class waivers." But even if the statute were ambiguous, they note, their interpretation is the only way to read the NLRA in light of the FAA's command to enforce arbitration agreements. And even if the two laws

cannot be harmonized, they conclude, the class waivers should be enforced because the FAA, as a more specific statute, overrides the less specific NLRA.

The NLRB and the employees, by contrast, argue that there is no need for the justices to try to harmonize the NLRA and the FAA. They acknowledge that, when it enacted the FAA, Congress wanted arbitration agreements to be enforced the same way that other contracts would be. But that does not mean, they say, that arbitration agreements are entitled to more protection than regular contracts. Instead, they argue, just like normal contracts, agreements to arbitrate will not be enforced when they are illegal. The NLRA's reference to the right of employees to engage in "concerted activities" for "mutual aid or protection" has long been understood to include the right of employees to pursue joint legal claims; therefore, class waivers like the ones at issue in this case are illegal and unenforceable.

Because there is no valid contract to individually resolve work-related disputes, the NLRB and employees suggest, the justices do not need to determine whether the NLRA contains a "contrary congressional command" that can override the FAA's presumption in favor of enforcing arbitration agreements. In any event, they continue, the NLRA and another federal labor law, the Norris-La Guardia Act, are precisely that kind of "contrary congressional command": The two laws' "text, history, and purposes unambiguously conflict with contract terms" that prohibit employees from joining forces "for the purposes of mutual aid or protection." "No magic words," they conclude, "are required."

One sign of how high the stakes are in these cases is the sheer volume of "friend of the court" briefs supporting each side in the dispute – 17 supporting the employers and 11 supporting the NLRB and the employees. The Business Roundtable, a group of CEOs for major U.S. corporations that backs the employers, tells the justices that a ruling that deems class waivers void "would force employers to undergo 'arbitration' that is bereft of the benefits of arbitration, shorn of the efficiency and cost savings that make arbitration favored in the first place."

A group of experienced arbitrators, supporting the NLRB and the employees, counters that any such losses are significantly overstated. In fact, the arbitrators contend, prohibiting group challenges could result in duplicative individual claims that would create "a procedural morass" and a burden on the employers. But employers would nonetheless prefer to require individual arbitration, the arbitrators suggest, because the relatively low stakes of each individual arbitration and the cost of getting a lawyer mean that, as a practical matter, even meritorious claims are far less likely to be brought.

Although the dispute itself is a significant one, it has also drawn attention for another reason: the complications surrounding which attorneys will argue the case. The justices agreed to review all three cases – *Epic Systems*, *Ernst & Young* and *Murphy Oil* – but consolidated them for one hour of oral argument, the same time that the court would normally allot to a single case. When the employers filed their opening briefs on the merits, the three private employers were represented by two well-respected veterans of the Supreme Court bar: former acting solicitor general Neal Katyal, now at Hogan Lovells, and Williams & Connolly's Kannon Shanmugam.

But it is relatively rare for two private parties to argue on the same side at the court – particularly when they are sharing their time with yet another lawyer (more on that in a moment). This meant that the employers and their attorneys would have to decide who should argue on behalf of all three companies. In other cases, lawyers and their clients have sometimes opted for a coin flip or a "moot-off," in which the attorneys jockeying to appear before the court compete against each other in practice arguments. But in this case, the employers went with a third option and brought in a new lawyer – former solicitor general Paul Clement, now with Kirkland & Ellis – to represent all three companies.

The drama over who will represent the employers at the Supreme Court pales, however, in comparison with the developments within the federal government. When the NLRB filed its petition for certiorari in September 2016, it was represented by the U.S. solicitor general's office, which urged the justices to review (and eventually reverse) the 5th Circuit's decision in favor of Murphy Oil. But in June of this year, the solicitor general's office filed a "friend of the court" brief on behalf of the United States in which it supported the employers. Acting Solicitor General Jeffrey Wall told the justices in that brief that, although his office had previously filed a cert petition on behalf of the NLRB, "defending the Board's view that agreements of the sort at issue here are unenforceable," the office – in the wake of the change in administrations – had "reconsidered the issue and reached the opposite conclusion."

At around the same time that the United States filed its brief supporting the employers, the NLRB announced that it had been authorized to represent itself in the Supreme Court proceedings. In a brief filed on August 9, it did exactly that, once again urging the justices to reverse the 5th Circuit's ruling. And both the federal government and the NLRB have asked the Supreme Court to allow them to share oral argument time with their allies. The justices have not yet acted on those motions, but they are very likely to be granted – creating the very real possibility that an attorney representing the federal government will be arguing against an attorney for a U.S. government agency.

UPDATED: On September 25, the justices granted the motions of the U.S. solicitor general and the National Labor Relations Board for divided argument. This means that the employers will share their 30 minutes of argument time with the United States, while the employees will share their 30 minutes with the National Labor Relations Board.

This post was originally published at Howe on the Court.

Posted in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, *National Labor Relations Board v. Murphy Oil USA*, Featured, Merits Cases

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Recommended Citation: Amy Howe, *Argument preview: Reconciling class waivers and the National Labor Relations Act (UPDATED)*, SCOTUSblog (Sep. 25, 2017, 10:56 AM), http://www.scotusblog.com/2017/09/argument-preview-reconciling-class-waivers-national-labor-relations-act/