ABCs of Estate Planning

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I. The A/B Trust

- Above Ground/Below Ground
  - Husband
    - $5,43 Million
    - B Trust
    - Skips Trust
    - Credit Protection Trust
    - Family Trust
  - “Spouse” Orders
    - A Trust
    - Marital Trust
    - QTP Trust

- Wife's Separate Assets
  - Home
  - IRA/R

Spousal Portability

- Effective 1/1/11, as part of two year 2010 Extension Act (extending 2001 Act).
- Effective 1/1/13, as part of 2012 Act.
- Portability allows the surviving spouse to receive the benefit of the most recently deceased spouse’s unused exclusion (DSUE) amount.
Terminology & Assumptions for Examples

"Basic exclusion amount" = $5 million indexed for inflation

- 2013 indexed amount = $5,250,000
- 2014 indexed amount = $5,340,000
- 2015 indexed amount = $5,430,000
- Examples in this presentation = $5,000,000

The A/B Trust

- Above Ground/Below Ground

- Husband
- Wife

- $5.43 Million
- A Trust
- Bypass Trust
- Credit Protection Trust
- Family Trust

- "Estate" Deposit
- A Trust
- Bypass Trust
- Credit Protection Trust
- Family Trust

- Income
- Estate

Another Option: Portability

- Perceived as Simple – All assets may go to surviving spouse, with no other persons having any interest until death of surviving spouse.
- Another advantage is that 100% of assets get a new tax basis on death of surviving spouse.
Requirements for Portability

- Make a portability election by timely filing a "complete and properly prepared" estate tax return for estate of first spouse to die.
  - A correctly filed estate tax return that does not affirmatively say otherwise is considered to make the election.

Timely Filed

- The return must be timely filed.
  - Filed before the due date, including extensions.
- Executor must file the return within 9 months of the date of death, unless a 6 month extension has been granted.
- This applies to estates that are large (require a return) and to those that are smaller (would not otherwise require a return).

Complete and Properly Prepared

- Return must be prepared in accordance with all applicable requirements.
- Executor must include a computation of the deceased spouse unused exclusion (DSUE).
- Certain valuation requirements are more lax in situations where an estate tax return would not otherwise be required (smaller estates).
  - The executor is allowed to make a good faith estimate of the value of certain property qualifying for the marital or charitable deduction.
Special Rules

- Portability does not apply to estates of nonresidents who are not citizens.
- When surviving spouse uses DSUE, the IRS can audit the deceased spouse's gift tax or estate tax return to determine the correct amount of DSUE without regard to statute of limitations.

Remarriage

- General Rule: The surviving spouse must use the portability election of his/her last deceased spouse.
- If a surviving spouse remarries:
  - And outlives the new spouse, the surviving spouse must use the unused exclusion from the last deceased spouse only. (see example 3).
  - And predeceases the new spouse, the unused exclusion from the first spouse can be passed on to the second spouse. (see example 4).

Example 3 - Remarriage

- H1 and W are married.
- H1 dies with a taxable estate of $3 million.
- With portability, W's exclusion is $7 million ($5 million for W and $2 million from H1).
- W gets remarried to H2.
- H2, with a taxable estate of $4 million, also predeceases W.
- An election is made on H2's estate tax return to allow W to use H2's unused exclusion of $1 million.
- W cannot use both the $2 million from H1 and the $1 million from H2.
- She is only allowed to use the unused exclusion from H2.
- Therefore, H now has an exclusion of $6 million.
Example 4 - Remarriage

- What if W predeceases H2?
  - Following H1’s death, W had an exclusion amount of $7 million ($5 million for W and $2 million from H1).
  - W and H2 get married.
  - W dies first with a taxable estate of $3 million and portability is elected.
  - H2’s exclusion increases by $4 million. (W had $7 million and used $3 million, leaving $4 million unused).

Ordering Rules

- If a surviving spouse has an applicable exclusion that is composed of his “basic exclusion” plus a DSUE, then the DSUE is used first.
- This is important for gifts by surviving spouse:
  - Gifts use DSUE before surviving spouse’s “basic exclusion”
  - Enables surviving spouse to use DSUE of multiple prior deceased spouses.

Example 5 - Ordering Rules

- H1 dies with a taxable estate of $3 million.
- With portability, W’s exclusion is $7 million ($5 million from W and $2 million from H1).
- W remarries H2. W makes $2 million of gifts. Under the ordering rules, W uses H1’s $2 million and W still has her own $5 million.
- Then H2 dies with $3 million estate. W again has $7 million exclusion (her own $5 million plus H2’s $2 million).
When is Traditional A/B Trust planning better than Portability?

Benefit #2 of Traditional A/B Trust Compared to Portability

- Post-death appreciation of assets in credit shelter/bypass trust escapes estate taxation whereas with portability, post-death appreciation increases the surviving spouse's taxable estate.
- The DSUE amount is fixed - it does not even have COLI increases.

Example 6 - Credit Shelter/Bypass Trust

- H and W own $10 million in assets; $5 million in H's revocable trust and $5 million in W's revocable trust.
- If dies and all of his $5 million goes into his credit shelter/bypass trust for W's benefit. Because the bypass trust is taxable, it uses his entire exemption and then has $20 unused exemption to "port" to W.
- Assume the family trust assets appreciate and are worth $20 million when W later dies.
- At death W still has $5 million in her trust and therefore has estate tax of $0.
- The $20 million in H's bypass trust passes to the children tax-free.
- Therefore, $25 million total passes to children tax-free.
Example 7 - Compare Portability

- Same facts as Example 6 above, but upon H's death, H's $5 million of assets go outright to W rather than to a bypass trust.
- H then has $5 million of unused exemption and if portability is elected, then W has $10 million of applicable exclusion.
- When W dies, her estate is $25 million and the children will inherit $19 million ($25 million minus $6 million of estate tax).
- Estate tax = 40% times ($25 million estate minus W's $10 million exclusion).

Benefit #2 of Traditional A/B Trust Compared to Portability

- If properly drafted, the bypass trust protects assets from surviving spouse's creditors and from spousal rights if surviving spouse remarries.

Benefit #3 of Traditional A/B Trust Compared to Portability

- Bypass trust will preserve unconsumed assets for remainder beneficiaries (may be important particularly in second marriages).
Benefit #4 of Traditional A/B Trust Compared to Portability

- Portability only applies to most recently deceased spouse, so a large DSUE can be lost if surviving spouse’s second spouse is wealthy, and surviving spouse survives the wealthy second spouse.

Benefit #5 of Traditional A/B Trust Compared to Portability

- Portability does not apply to the GST exemption.
- In Example 7 above (outright to surviving spouse), H’s GST exemption would be lost forever.
- H1’s unused estate tax exemption “ports” to W, but not his unused GST Exemption.

GST Tax Planning

- H & W are age 70.
- H has a revocable trust with $15 million of assets and W has a revocable trust with $15 million of assets.
- Each trust provides an A/B formula to divide assets between a marital and family (bypass) trust for the first spouse to die.
- Trusts further divide into GST exempt and GST non-exempt trusts for descendants.
- Allows basic exemption amounts of both spouses (i.e., $10.46 million for 2015) to transfer to “skip persons”.
Benefit #6 of Traditional A/B Trust Compared to Portability

• Portability can be botched if no estate tax return is filed upon death of first spouse to die.

• This risk does not exist with a bypass trust.

When to use Traditional A/B Trust Planning?

• Generally, if combined assets of Couple close to or exceed basic exclusion amount (i.e., $5.43 million for 2015), and obtaining second increase in tax basis on surviving spouse’s death not a priority; or

• A spouse wants assets given to others upon death of surviving spouse; and

• Couple want to make GST gifts in excess of basic exclusion amount.

When is Portability better than traditional A/B Trust Planning?
When to use Portability?

- No concern about surviving spouse spending or losing assets;
- Both spouses trust each other to decide who receives assets after death of surviving spouse; and
- Combined Assets of couple do not exceed basic exclusion amount (i.e., $5.43 million for 2015).

Benefit #1 of Portability Compared to Traditional A/B Trust Planning

- Simple -- no planning required before first spouse's death if all assets titled as JTWROS.
- But, estate tax return required within 9 months after death of first spouse.

Benefit #2 of Portability Compared to Traditional A/B Trust Planning

- Second tax basis adjustment on death of surviving spouse.
Example 8 - Portability Post-Death Appreciation

- Assume same facts as Example 7 above (outright to W).
- Wife’s assets are worth $25 million at death and kids will take a $25 million basis (although they will have to sell $6 million of assets to pay estate tax).

Benefit #3 of Portability Compared to Traditional A/B Planning

- IRA's and retirement benefits are a lousy asset with which to fund a bypass trust, as trust provisions often require quicker distribution of pre-income tax asset.
- Portability allows surviving spouse to be designated as primary beneficiary of retirement account, without wasting deceased spouse's DSUE.

When to use Portability?

- No concern about surviving spouse spending or losing assets; both spouses trust other to decide who receives assets after death of surviving spouse; and combined Assets of couple substantially below basic exclusion amount (i.e., $5.43 million for 2015).
- Assets of couple close to or exceed basic exclusion amount (i.e., $5.43 million for 2015), and most assets are pre-tax Retirement Accounts.
Example #9

- H & W are age 65 and each have revocable trusts.
- H's trust has $2.5 million and W's trust has $2.5 million. Each trust has formula to divide assets between marital and family trust.
- Should H & W revoke their revocable trusts and rely on portability to fully utilize both spouse's estate tax exclusion amounts? No clear answer. Requires explaining all the options and pros and cons to clients and helping them decide on a strategy.

Factors to Consider

- Future law changes
- Future appreciation of assets
- Future consumption
- Future marriages
- Age, health
- Future audits
- Concern about asset protection
- Concern about preserving assets for children (i.e., second marriages)
- Whether GST exemption use is important
- Ratio of retirement plan assets
- Advantage of second basis step up with portability
- Cost of administering bypass trust (trustee fees, annual 1041 filing, high income tax rates and "trapping income")

II. Transfer of Assets Upon Death
4 ways assets transfer upon Death

- JTWROS (Joint Tenancy with Right of Survivorship).
- Beneficiary Designation.
- Trust owns asset or receives by Beneficiary Designation.
- Probate Assets: Court Order or K.S.A. 59-1507b (if personal property less than $40,000 in value)

Significant Points

- JTWROS assets become probate assets upon simultaneous death of both owners
- Will only controls Probate Assets
- JTWROS and Beneficiary designations have priority over Will.

III. Financial Power of Attorney

- "If the principal is disabled or deceased, a petition for accounting may be filed by the principal's legal representative, an adult member of the principal's family or any person interested in the welfare of the principal." K.S.A. 58-662(a)
Waiver

- "Any requirement for an accounting may be waived or an accounting may be approved by the court without a hearing, if the accounting is waived or approved by a principal who is not disabled, or by a principal whose legal capacity has been restored, or by all creditors and distributees of a deceased principal's estate whose claims or distributions theretofore have not been satisfied in full. The approval or waiver shall be in writing, signed by the affected persons and filed with the court." K.S.A. 58-662(b)

What if Problem Child/Beneficiary?

- Often, client wants problem child to be a beneficiary, but have no control/leverage, and no information about assets not given to problem child.
- Could name Trust as sole beneficiary of the Estate, but would trustee "waive" accounting if a Trust beneficiary demands an accounting?
- Yes, if Trust Agreement provides this instruction, but otherwise, likely not.

What if Principal is Disabled?

- If principal is disabled, the problem child may presumably obtain an accounting even if a Trust is the sole beneficiary of the principal's estate (the statute only allows all creditors and beneficiaries of a deceased principal to waive an accounting).
What is an Accounting?

- An Accounting of actions taken by Agent?
- An Accounting of Receipts, Disbursements, Assets and Liabilities of Principal?

Statute of Limitations?

- If principal is disabled or deceased, how many years of financial records may the beneficiary obtain?

Who pays the attorney fees of the agent to prepare an accounting after the death of the principal?
Recommendations:

- Give Agent right to be reimbursed for reasonable costs and expenses, even those incurred after death of the principal.
- Consider asking Principal to waive accounting for anyone other than Estate beneficiaries.
- Consider releasing claims against Agent for failing to take actions on behalf of Principal.
- Consider releasing claims against Agent for failure to diversify investments under Uniform Prudent Investor Act.

IV. Estate/Trust Administration

Increased Income Taxes

- Effective 1/1/13, 3.8% tax on undistributed Net Investment Income of Estates and Non-Grantor Trusts in 39.6% bracket.
- Effective 1/1/13, capital gains and qualifying dividend tax rate increased from 15% to 20% for taxpayers in the 39.6% income tax bracket.
- 39.6% bracket for Estates and Trusts begins at $12,300/year for 2015.
- Kansas income tax rate increased from 3% to 4.9% for Estate and Trust Income in excess of $15,000/year.
DNI

- Estates and Non-Grantor Trusts may deduct Distributable Net Income ("DNI") distributed to beneficiaries during the fiscal year (and within 65 days after the end of the fiscal year for Non-Grantor Trusts).

Fiscal Year of Estates and Trusts

- Non-Grantor Trusts must generally use a calendar year.
- Estates may have any fiscal year ending not more than one year after the date of death.
- For first two years after the date of death, income of the decedent's trust may generally be reported on the Estate's income tax return.

V. Charitable Gifts
Increased Individual Income Taxes

- Effective 1/1/13, 3.8% tax on Net Investment Income over $200,000 for single taxpayers and $250,000 for married filing jointly.
- Effective 1/1/13, 39.6% bracket restored for upper income taxpayers (for 2014, $406,750 for a single person and $457,600 for married filing jointly).
- Effective 1/1/13, capital gains and qualifying dividend tax rate increased from 15% to 20% for taxpayers in the 39.6% income tax bracket.
- Kansas income tax rate of 4.9% at $30,000 of annual income.

Combined Income Tax

- Combined 48.3% tax for ordinary income
- Combined 28.7% tax for qualified dividends and capital gains
- 15.3% Self-Employment tax on first $117,000, 2.9% above $117,000 and .9% above $200,000 for single person and $250,000 for MFJ

50% Limit

- Contributions to public charities, private operating foundations and private operating foundations that are distributing foundations or maintain a common fund are limited to 50% of Donor’s “contribution base” for the tax year. IRC §170(b)(1)(A), (F).
- The contribution base is defined as “adjusted gross income (computed without regard to any net operating loss carryback to the taxable year under IRC §172)” IRC §170(b)(1)(G).
30% Limit

- Contributions of to semi-public charities and private foundations and "for the use of" any charitable organization are limited to 30% of Donor's contribution base for the tax year. IRC §170(b)(1)(B), (C).

Alternative Minimum Tax

- Exemption for first $82,100 for married couple filing jointly.
- 26% tax rate for next $182,500
- 28% tax rate for remaining AMTI
- The AMT for married taxpayers with $100,000 of income in excess of $457,600 (the bottom of the 39.6% bracket) is $129,490
- The regular income tax for married taxpayers with $557,600 is $187,562, but $100,000 charitable deduction would reduce income taxes by $39,600 to $127,600 (which is $1,528 less than AMT)
- Effective tax benefit of charitable gift reduced to 47%

Pease Limitations

- Pease Limitations on itemized deductions reduce itemized deductions for single taxpayer with income above $254,200 and married taxpayers with income above $508,400 by:
  - (a) 3% of income above these thresholds or
  - (b) 80% of the itemized deductions that would otherwise be phased
- If married taxpayers with $500,000 of income in excess of $457,600 (the bottom of the 39.6% bracket) donate $100,000 to charity, the deduction is reduced by $7,578 (66% of $252,600)
- Effective tax benefit of charitable gift is 40.7% (rather than 48.3%)
Gift of Appreciated Property

- Amount of deduction is generally reduced: (i) by the amount of “ordinary income” that would have been recognized upon a sale of the property (Ordinary Income Exception); (ii) if donated property is tangible personal property unrelated to charity’s purpose, by amount of long-term capital gain that would have been recognized upon a sale of the property (Tangible Personal Property Exception); and (iii) if contribution is to certain private foundations, by amount of long-term capital gain that would be recognized upon a sale of the property except that if the property is publicly traded stock, then there is no reduction. IRC §170(e).

30% and 20% Limits

- Contributions of capital gain property to public charities and all contributions to semi-public charities and private foundations and “for the use of” any charitable organization are limited to 30% of Donor’s contribution base for the tax year. IRC §170(b)(1)(B), (C).
- Contributions of appreciated property to semi-public charities and private foundations are deductible only to the extent of 20% of Donor’s contribution base for the year. IRC §170(b)(1)(D).
- The 50% limitation is applied first, then the 30% deductions are available only to the extent the allowed 50% deduction limit is not used, and then the 20% deductions available only if some of the allowed 30% deduction is not taken.

Appreciated Property Gift Income Tax Benefit

- 23.8% income tax benefit for taxpayers in the 39.6% income tax bracket
- 18.8% income tax benefit for married taxpayers filing jointly with income over $250,000 and single taxpayers with income over $200,000
- Lesser income tax benefit for lower income taxpayers
IRA Charitable Gift
Income Tax Benefit

- Same as Cash Gifts paid with after-tax income, i.e., 100% taxable and deductions subject to same limits as Cash Contributions, unless IRC 408(d)(8) is again amended to allow taxpayers age 70.5 and older to make tax-free distributions of up to $100,000 to charities from traditional and Roth IRAs as a qualified charitable distribution if it is transferred in cash to a qualifying charitable organization.

Charitable Gift Annuity purchased with Cash

- Generally the same tax benefit as cash gifts, IRC §7701(a).
- No recognized gain or less on transaction if cash is paid to charity.
- Amount of deduction is excess of amount of money transferred to charity over fair market value of annuity using IRS provided tables. Treas. Regs. §1.170A-1(d)(3), IRC §7702.
- Income tax consequences to recipient governed by private annuity statute, IRC §77. A portion of cash payment is taxable income and the remaining portion is non-taxable return of principal. The portion of cash payment that is excluded from income tax is determined by the exclusion ratio. The exclusion ratio is determined by dividing the investment cost by the expected return. After the return of the entire principal portion, the annuity is fully taxable.
- No estate tax if annuity payments terminate upon donor’s death, IRC §2103(b).

Charitable Gift Annuity purchased with Appreciated Property

- Income tax deduction for amount by which the fair market value of property transferred to charity (less the IRC §170(h) adjustments for appreciated property) exceeds the fair market value of annuity using IRS provided tables.

- The transfer of property to the charity in exchange for the annuity is treated as a “bargain sale” of the property for the fair value of the annuity. Treas. Regs. §1.170A-1(o)(5), 1.170A-2(e)(8). The adjusted basis is allocated between the gift portion and the annuity portion, IRC §1011(h).

- If certain requirements are satisfied (i.e., annuity is non-assignable and the annuitant is the donor or a family member), the capital gains may be recognized as the annual payments are received. Treas. Regs. §1.1701-2(b)(9).
Charitable Gift Annuity purchased with Appreciated Property

- Thus, a portion of each payment is gain from the sale, a portion is ordinary income and the remaining portion is non-taxable return of principal. The portion of each payment that is excluded from income tax is determined by the exclusion ratio. The exclusion ratio is determined by dividing the investment cost by the expected return. After the return of the entire principal portion, the annuity is fully taxable.
- No estate tax if annuity payments terminate upon donor’s death. IRC §2039.
- Tax Benefit same as gift of Appreciated Property.

Income Tax Benefit of Charitable Lead Trust

- The lead interest value is an immediate charitable deduction. IRC §170, determined under IRC §7520.
- If Grantor charitable lead trust, Grantor pays Income tax.
- If non-Grantor charitable lead trust, complex trust tax rules of IRC §661, et seq. apply, plus the IRC§1411 Net Investment Tax.
- Tax Benefit same as cash gift, if investment returns match IRC §7520 rate.

Appreciated Property to Charitable Lead Trust?

- If Grantor charitable lead trust, Grantor pays income tax so no tax avoidance.
- If non-Grantor charitable lead trust, complex trust tax rules of IRC §661, et seq. apply, plus the IRC§1411 Net Investment Tax.
- Charitable Lead Trust not income tax exempt; the trust receives an income tax charitable deduction for amounts distributed to charity.
Cash Gift to Charitable Remainder Trust

- The remainder interest is an immediate charitable deduction.
- The remainder value is the present value of charity’s interest determined under IRC §7520.
- A qualified charity remainder trust is not subject to income tax, but is subject to a 20% tax on unrelated business taxable income during a taxable year.
- Distribution from a charitable remainder trust are taxed under the "fair market rate" of IRC §7520. Regardless of the tax rate or a particular year, all distributions to the charitable remainder beneficiary are subject to income tax, capital gains second, other income third and last (property principal). Current and prior year income tax on the trust must be estimated before the trust is deemed distributed.
- IRC §5442 Fat Charitable Income Tax: charitable deduction by the trust, but each beneficiary is liable for the net investment tax levied as the portion of Trust net income not received by the beneficiary.
- Benefit same as cash gift, if investment returns match IRC §7520 rate.

Charitable Remainder Trust Funded with Appreciated Property

- Capital gains recognized if contributed property is subject to debt greater than grantor’s basis, Treas. Reg. §1.1001-2., or the grantor receives property from the trust in return for the contribution. IRC §1.1001-2.
- Otherwise, tax benefit same as gift of appreciated property to charity.

Net Cost of Charitable Gifts

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<th>Maximum Tax Basis</th>
<th>Lowest Net Cost for Gift</th>
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<td>Cash Gifts</td>
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<tr>
<td>Appreciated Property Gifts</td>
<td>23.8%</td>
<td>76.2%</td>
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Estate Tax Benefit

- If taxable estate, charitable gift reduces estate tax by 40% of amount of the gift
- i.e., $1,000,000 gift from $10 million estate reduces estate tax by $400,000

Combined Income Tax and Estate Tax Benefit of Cash gift before Death

- If married taxpayers with $557,600 of annual ordinary income donate $100,000 to charity, the effective tax benefit for the income tax donation is 40.7%
- If married taxpayers with $557,600 of annual ordinary income donate $100,000 to charity, the effective tax benefit for the estate tax benefit is 40%
- Combined Income Tax and Estate Tax benefit is 80.7%

Combined Income Tax and Estate Tax Benefit of Gifts to Charitable Remainder Trust Before Death

Generally, the same income tax and estate tax benefit of cash gifts and gifts of appreciated property directly to charities.
- And:
  - Immediate income tax deduction, without reducing income of donor and survivors.
  - If gift of appreciated property, trust gets income from gross value of asset rather than net value of asset – which income might exceed income that would result from sale of asset without charitable gift.
Combined Income Tax and Estate Tax Benefit of Gifts to Charitable Lead Trust Before Death

- Generally the same for cash gifts, but sales of appreciated assets will be taxable to Trust.
- Primary benefit is greater amount left for remainder beneficiaries, if investment returns exceed IRC §7520 rate.

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ETHICS AND DISCIPLINE
Kimberly L. Knoll
Michael R. Serra
Deputy Disciplinary Administrators

I. INTRODUCTION
The Court decided these cases between March 8, 2014, and February 6, 2015. Table 1 indicates the number of cases in which an attorney violated either a Kansas Rule of Professional Conduct (KRPC) or a Kansas Supreme Court Rule (SCR). Table 2 shows the disciplinary disposition imposed due to the violations.

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DISBARMENT

In the Matter of Ira Dennis Hawver
November 14, 2014
Disbarment


In 2003, the respondent entered his appearance on behalf of Phillip Cheatham. The scope of the representation was two felony drug charges.

On December 12, 2003, respondent told Cheatham to leave town because it was believed the police were planning on arresting Cheatham.

On December 13, 2003, Annette Roberson, Gloria Jones and Annetta Thomas were shot. Thomas survived.

After the shooting, Cheatham called respondent and told respondent that Cheatham believed that he was going to be accused of the shootings.

Respondent told Cheatham that such accusation was impossible because Cheatham was on his way to Chicago based on the advice respondent had given Cheatham the day before that Cheatham leave town.

Cheatham was charged with two counts of murder, one count of attempted murder, one count of aggravated battery and one count of felon in possession of a firearm. The basis for the felon in possession of a firearm was that Cheatham has a prior conviction for voluntary manslaughter.

In April of 2005, Cheatham retained respondent for the murder case. Cheatham provided an IOU for the fee of $50,000.00. No money was paid by Cheatham.

In June of 2005, the State amended the complaint to include two counts of capital murder. Respondent had never tried a capital murder case and the last time he tried a murder case was 20 years ago.

The Kansas Board of Indigent Defense Services (BIDS) offered its services, including capital qualified co-counsel, investigators, consultants and experts. Respondent did not use any of the offered resources.

Respondent was not qualified under the ABA standards as a capital defense lawyer and was not familiar with qualifying a jury in a capital case. He did not review any of the standards or read any capital cases prior to trial.

During the time leading up to the trial, respondent did not reduce the size of his practice and he was campaigning to be the Governor of the State of Kansas.

Prior to trial, there was a stipulation that Cheatham had been convicted of an unnamed felony (the manslaughter conviction). During voir dire and during direct examination of Cheatham, respondent referred to Cheatham as a “professional drug dealer” and a “shooter of people,” despite the stipulation.

Cheatham was convicted on all counts. During the penalty phase, respondent told the jury that the killer should be executed. Cheatham was sentenced to death by the jury.

Cheatham appealed and one of the issues asserted was ineffective assistance of trial counsel.

During post-conviction hearings, respondent admitted he believed the State would have been able to introduce the manslaughter conviction during the guilt phase.

Respondent explained he spent approximately 60 hours preparing for trial. Respondent said the $50,000.00 agreed fee was to be paid only if Cheatham was acquitted. Respondent believed that the State’s case was weak. The Kansas Supreme Court held the fee was an impermissible fee because charging a flat fee in a capital case is unreasonable and created a conflict of interest. Additionally, the ABA
specifically disapproves of flat fees in capital cases because it could encourage an attorney to do only the minimum to earn the fee.

Cheatham had identified a possible alibi witness, but respondent did not have the time to personally investigate and he did not have the funds to hire an investigator.

The trial lasted 10 days, respondent spent about 140 hours working on the case during trial, including time in the courtroom. The only witnesses offered in the penalty phase by respondent was Cheatham’s mother who told the jury that she loved Cheatham and would suffer if he were put to death.

During the penalty phase, respondent continued to argue that Cheatham was innocent, in spite of the jury having returned a guilty verdict.

During the Van Cleave hearing, the State stipulated respondent was ineffective during the penalty phase but disputed respondent was ineffective during the guilty phase. The Van Cleave court upheld the convictions, but reversed the sentencing.

In 2013, the Kansas Supreme Court overturned Cheatham’s convictions and affirmed the reversal of the sentencing.

A complaint was received by the Office of the Disciplinary Administrator and respondent was requested to respond to the complaint. Respondent denied violating the Kansas Rules of Professional Conduct. A Formal Complaint was filed in August 2013. Respondent failed to respond within 20 days of the filing of the Complaint. The Complaint was then amended to allege the failure to timely reply to the Complaint. In October 2013, respondent filed a “second answer” that did not admit or deny the specific allegations in the Formal Complaint.

The Hearing Panel found respondent: intentionally violated his duty to his client and caused actual injury to the administration of justice; had a prior disciplinary diversion; engaged in a pattern of misconduct; had been practicing nearly 30 years; was not motivated by selfishness or dishonesty; acknowledged he had engaged in misconduct, however, he repeatedly asserted that the only reason there was a disciplinary hearing was because Cheatham had been convicted.

The Deputy Disciplinary Administrator recommended respondent be disbarred. Respondent requested he be instructed not to accept another capital case and he be permitted to continue to practice. The majority of the Hearing Panel recommended disbarment, the minority recommended indefinite suspension.

Respondent filed exceptions and the matter was briefed. Respondent’s position was that Cheatham had an absolute right to counsel of his choice and Cheatham had a personal right to determine the defense strategy. Additionally, respondent contended that under the First and Sixth Amendments, the State cannot deprive respondent of his property right to practice law simply because respondent followed Cheatham’s instructions regarding strategy.

The Court found respondent’s brief did not contain proper citations to the record and therefore, the Hearing Panel’s findings of facts were deemed to be admitted by respondent.

The Court also found respondent’s First Amendment argument to be without merit because an attorney’s speech is not unlimited. Further, much of the misconduct was not speech and did not implicate the First Amendment and the conduct that involved speech did not involve protected speech. Finally, the Court found that an attorney does not retain personal independent First Amendment rights when representing a client because the lawyer’s duty is to make arguments that are beneficial to the client. The Court found that some of respondent’s arguments were not beneficial.
The Court held that a lawyer cannot assert a client’s Sixth Amendment rights as a defense in a disciplinary action. The Court noted that respondent does not allege that the disciplinary action somehow is prejudicial to Cheatham. The Court held the opposite is true in this situation - respondent’s ethical misconduct created the violation of Cheatham’s Sixth Amendment right.

The Court disagreed with respondents other arguments that: he should not be disciplined because Cheatham approved of the defense; he was free to make judgments as to whether certain things should have been investigated and the ABA guidelines should not be used a conclusive standards to determine competency.

In support of these arguments, respondent attached a document that was purported to be an affidavit from Cheatham. The affidavit was not part of the record and the Court disregarded it.

The Court also noted that respondent’s incompetence created a situation in which respondent could not properly advise Cheatham on a sound strategy. As a result, even if Cheatham approved the strategy, it did not immunize respondent against disciplinary action.

The Court held in light of respondent’s “...inexplicable incompetence in handling Cheatham’s case” ... he should be disbarred.

SURRENDER OF LICENSE RESULTING IN DISBARMENT

In the Matter of Lowell D. Ramsey
299 Kan. 606, 326 P.3d 376 (2014)
May 29, 2014
Disbarment

Lowell Ramsey voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on May 22, 2014. At the time respondent surrendered his license a complaint had been docketed and a finding of probable cause had been made.

In the Matter of David C. Murdock
July 16, 2014
Disbarment

David Murdock voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on July 9, 2014. Respondent had been temporarily suspended, after being convicted of one count of involuntary manslaughter.

In the Matter of Mark A. Sherman
300 Kan. 475, 322 P.3d 172 (2014)
August 5, 2014
Disbarment

Mark A. Sherman voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on July 28, 2014. At the time respondent surrendered his license, a complaint had been docketed by the Disciplinary Administrator's Office in accordance with Supreme Court Rule 211 (2013 Kan. Ct. R. Annot. 356).

In the Matter of Richard Dean Dinkel
___ Kan. ___, 333 P.3d 155 (2014)
September 3, 2014
Disbarment

Richard Dean Dinkel voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on August 26, 2014. At the time, Respondent’s disciplinary action was pending before the Kansas Supreme Court.

In the Matter of Kyle G. Smith
___ Kan. ___, 335 P.3d 66 (2014)
September 26, 2014
Disbarment

Kyle G. Smith voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on September 17, 2014. Respondent had
been temporarily suspended since April 7, 2014, after being convicted of one count of sexual exploitation of a child.

In the Matter of Bart Chavez  
December 16, 2014  
Disbarment  

Bart Chavez voluntarily surrendered his license pursuant to Kansas Supreme Court Rule 217 on December 15, 2014. At the time respondent surrendered his license, complaints had been docketed by the Disciplinary Administrator’s Office in accordance with Supreme Court Rule 211 (2013 Kan. Ct. R. Annot. 356).

INDEFINITE SUSPENSION  

In the Matter of Paul P. Hasty  
_____ Kan. ____, 311 P.3d 321 (2014)  
October 10, 2014  
Indefinite suspension  


Respondent defended a school bus company in an action involving a car-bus accident.

The plaintiffs properly served discovery requests on respondent. Respondent failed to timely respond.

Respondent became aware the bus was equipped with GPS technology that might be helpful in the defense of the case. Respondent failed to investigate the capabilities of the GPS system.

Respondent obtained an extension of time to respond to the request for production. He then filed objections to certain requests for production but did not file objections to any of the interrogatories.

He requested the bus company provide certain information. The company did not provide the information. The respondent did not timely file discovery responses.

The plaintiffs sent a “golden rule” letter requesting discovery. Respondent responded to the letter, but did not produce the requested discovery. A hearing was conducted. Neither the respondent nor his clients appeared.

Prior to the hearing, the plaintiffs filed a request for default judgment for failing to comply with discovery. Respondent did not inform his client of the request.

In the order, the court allowed more time for the respondent to provide discovery and warned that if the respondent failed to respond that the court would grant the requested sanctions.

Respondent did not comply or tell his client of the court’s warning.

Plaintiffs filed another motion for sanctions. The respondent did not tell his client of the request for sanctions.

A year after the first request was made, respondent served answers to interrogatories.

The court set a hearing. Neither respondent nor his client appeared. The court continued the hearing.

The respondent filed a response to the request for production of documents. The court ordered respondent to provide additional information and warned if respondent did not comply, the court was prepared to assess attorney fees against respondent.

The respondent did not timely comply with the court’s order because the client failed to provide documents to respondent.

The plaintiff’s filed a motion requesting $23,000 in attorney fees. Respondent failed to
inform his client of the motion.

Respondent failed to appear at the pretrial conference. The court granted the request for attorney fees. The respondent paid the fees from his own funds and did not inform the client of the sanction.

Respondent failed to appear for a scheduling conference.

Plaintiffs filed another request for sanctions.

Respondent was terminated by the client and permitted to withdraw. The court granted the second motion for sanctions, including striking all pleadings filed by respondent. The court ruled that the only issue remaining was the amount of damages.

The case settled for $2,500,000. The client sued respondent and respondent’s malpractice carrier settled the claim for $1,000,000.

The Hearing Panel found that respondent: knowingly violated his duty to his client to provide diligent representation; failed to adequately communicate with the client; violated his duty to act with fairness to opposing parties; caused actual injury; had prior discipline; acted selfishly; engaged in a pattern of misconduct; engaged in conduct that is prejudicial to the administration of justice and he equivocated his acceptance of responsibility during the hearing.

The Disciplinary Administrator recommended respondent be indefinitely suspended. The respondent requested a public censure. The Hearing Panel recommended a two-year suspension. The Supreme Court noted that the current misconduct was similar to the prior misconduct and that the prior discipline was not adequate. The Court also commented that respondent’s comments to the Court were “less than convincing on his acceptance of responsibility.” A majority of the Court ordered the respondent to be indefinitely suspended.

In re Brian R. Johnson
___ Kan. ___, 335 P.3d 634 (2014)
October 10, 2014
Indefinite suspension


Respondent’s license to practice law was suspended by the Kansas Supreme Court on May 18, 2012 for one year.

Following his suspension he provided a cover letter and packet of information regarding his pending cases to a Pro Tem judge. In the letter, he indicated he was prohibited from practicing and requested the judge appoint new counsel for his existing clients. The packet of information contained police reports, driving records, citations and notes regarding a possible plea.

The respondent did not notify his clients of his suspension, he did not notify the presiding judges in each of his cases and he did not notify opposing counsel.

One of his clients appeared for a sentencing hearing. The client was told by the judge that respondent was not able to practice law. The hearing was continued.

The judge sent a complaint to the Office of the Disciplinary Administrator. The complaint was sent to the respondent. The respondent failed to provide a timely written response.

Eventually, respondent did provide a written response. He indicated he had provided all of his case information to the Pro Tem judge which he had determined to be sufficient.
He followed up with correspondence using “Johnson Law Office” letterhead. Respondent wanted to clarify that the original response was not intended to have been an attempt to convince the investigator that he complied with the court rule regarding actions required to be taken by a suspended attorney. He contended that the response was intended to be a factual narrative.

Another client had retained respondent to file a breach of contract and conversion case against a medical billing company. During the litigation it was agreed an expert was needed. Respondent associated with an individual who assisted respondent with document review. The individual told respondent additional documents needed to be reviewed. Respondent took no action to obtain the documents.

The opposing party filed a motion to compel with discovery and then a motion for sanctions for failing to designate an expert. A hearing was set.

Right before the hearing, the respondent filed a motion to dismiss the breach of contract case without prejudice. The opposing party filed a motion to dismiss with prejudice. The court dismissed the case with prejudice. During the hearing, the respondent agreed to dismiss the conversion claim.

According to the client, the respondent had not discussed dismissal of the cases with the client. Respondent acknowledges that he did not discuss the dismissal of the conversion claim with the client.

At the time the respondent’s license was suspended, the journal entry had not been filed and respondent was counsel of record. After the suspension, respondent failed to notify the court, opposing counsel, the client of the suspension. Respondent also did not file a motion to withdraw.

The client learned of the suspension through the media. The client attempted to contact respondent to retrieve his file. He found respondent’s office vacant. Respondent did not return the file.

On March 5, 2012, respondent filed an application for an insurance license. One of the questions on the application asks if the applicant had ever been a named party in an administrative proceeding regarding any professional license. The respondent answered “no.”

The Insurance Commissioner issued respondent a Kansas Resident Insurance Producer License on March 5, 2012.

Respondent had been admonished in 2001 and 2002. Respondent was the subject of an unpublished disciplinary opinion in 2011. The case that resulted in the one-year suspension was pending before the Supreme Court. Respondent had filed his brief in January 2012 and oral arguments were scheduled for April 2012.

On June 18, 2012, respondent wrote to the Kansas Insurance Commissioner and advised his license to practice law had been suspended. The Insurance Commissioner revoked respondent’s insurance license.

The Insurance Commissioner’s office forwarded the information to the Office of the Disciplinary Administrator.

In his response to the complaint, the respondent contended that he submitted the application in error and had not intended to conceal his pending disciplinary action.

The Hearing Panel found the respondent: failed to reasonably communicate; interfered with the administration of justice; failed to maintain his personal integrity; knowingly violated his duties; caused actual injury to clients and the profession; had been the subject of five prior administrative suspensions; his actions were
motivated by dishonesty and selfishness; engaged in a pattern of misconduct and at the time of the misconduct, had been practicing for 20 years.

The Deputy Disciplinary Administrator recommended the respondent be indefinitely suspended from the practice of law. The respondent requested a definite suspension. The Hearing Panel contemplated disbarment, but recommended an indefinite suspension.

A majority of the Kansas Supreme Court recommended indefinite suspension. A minority of the Court recommended disbarment.

_In re Mindy Lynn Miller_  
Kan. __, 337 P.3d 1286 (2014)

November 26, 2014  
Indefinite suspension


Respondent was employed as in-house counsel for Midwest Health Management (Midwest) in approximately 2008. Midwest owns nursing homes throughout Kansas. Respondent was assigned to handle litigation.

Respondent was administratively suspended from the practice of law in 2012.

The respondent did not tell her employer she was suspended.

Respondent was assigned to a case being litigated in Harvey County, Kansas. She was properly served notice of a hearing after her suspension. She did not appear at the hearing and a default judgment was entered against Midwest.

Respondent was assigned to a case being litigated in Jefferson County, Kansas. She filed an answer on behalf of Midwest after her license was suspended. She was served notice of a pretrial hearing. She did not appear at the hearing and a default judgment was entered against Midwest.

Respondent was assigned to a case being litigated in Johnson County, Kansas. She was properly served notice of a hearing after her suspension. She did not appear at the hearing and a default judgment was entered against Midwest.

Respondent was assigned to a case being litigated in Shawnee County, Kansas. A default judgment was entered against Midwest.

Respondent was terminated from her employment with Midwest. A complaint was filed with the Office of the Disciplinary Administrator.

Respondent was provided with the complaint and asked to respond within 20 days. The respondent did not respond.

The letter explaining the matter had been set for a formal hearing was returned unclaimed. The Formal Complaint, Notice of Hearing and Proposed Exhibits were mailed to the respondent’s registered address. They were returned unclaimed. Special Investigator Morgan from the Office of the Disciplinary Administrator hand-delivered the materials to the registered address, which was also respondent’s residence. The respondent failed to appear at the disciplinary hearing.
The Hearing Panel found that the respondent: failed to provide competent and diligent representation; failed to communicate; failed to cooperate in a disciplinary investigation; knowingly engaged in misconduct; caused actual injury; engaged in a pattern of misconduct and committed multiple offenses.

The Disciplinary Administrator recommended respondent be indefinitely suspended from the practice of law.

The Hearing Panel recommended the respondent be indefinitely suspended from the practice of law.

Prior to argument before the Kansas Supreme Court, respondent retained counsel. She did not contest the recommended sanction.

_In re Karen Eager_

____ Kan. ___, 338 P.3d 1 (2014)

November 26, 2014

Indefinite suspension


Respondent worked for the Disability Rights Center (DRC). In September of 2012, the Kansas Supreme Court suspended respondent’s license to practice law for failure to comply with the annual registration requirements. As of the date of the disciplinary hearing, her license remained suspended.

Prior to her suspension, respondent agreed to represent an individual who had a poor outcome after shoulder surgery. This type of case is not the type of case that the DRC

accepted.

Respondent felt sorry for the client and agreed to file a petition in order to preserve his claim against the statute of limitations. She did not intend to represent him. She was unable to locate subsequent counsel and she never withdrew from the case.

The defendants filed a motion to dismiss. The respondent failed to respond. The court issued an order to show cause why the case should not be dismissed. She did not respond. The court dismissed the case and assessed costs to the client.

The respondent failed to inform the client of the dismissal and the assessed costs.

The respondent entered into the attorney diversion program and stipulated to misconduct. The respondent did not successfully complete the diversion program.

Respondent represented a deaf client who was enrolled in a Master’s program at the University of Kansas. The client reached out to the DRC because he was experiencing difficulties with communication with the professors.

Respondent agreed to file a grievance letter. She failed to file the letter.

The respondent failed to keep a scheduled appointment with the client. When they finally met, the respondent could not provide an explanation as to the status of the grievance.

After respondent was terminated from her employment with the DRC, other complaints were filed by the Deputy Director.

One complaint involved respondent’s failure to satisfy liens over a 5-year period. The funds to satisfy the liens had been held the entire time.

Another complaint involved respondent’s
failure to obtain service in a wrongful death lawsuit that resulted in the dismissal of the action.

A third complaint involved a failure to file a petition on behalf of a child who was alleged to have been improperly discharged from daycare due to a disability. Respondent prepared the petition but her license was suspended and she never filed the petition.

The fourth complaint involved a disabled individual that was being transported by a transport company. The driver ran a red light and the individual was paralyzed as a result of the resulting car accident. The transportation company maintained a $1,000,000 insurance policy.

The respondent filed suit and obtained service. Respondent took no further action. The case was dismissed for lack of prosecution.

Respondent refiled the suit. Two years later, the court again dismissed the suit for lack of prosecution.

The client died without heirs. At the disciplinary hearing, respondent asserted there was no harm because the client died without heirs.

The respondent continued to practice law at the DRC after her license was suspended.

The Hearing Panel found respondent: knowingly violated her duty to provide competent and diligent representation; failed to adequately communicate with her clients; engaged in conduct that was prejudicial to the administration of justice; failed to comply with court orders; caused actual injury; had prior disciplinary history; engaged in a pattern of misconduct; committed multiple offenses; refused to acknowledge her conduct violated the KRPC and was indifferent to making restitution. Further, all clients were vulnerable.

The Panel found that respondent was not motivated by selfishness, suffers from health problems and had a good reputation in the legal community.

The Deputy Disciplinary Administrator recommended the respondent be suspended for one year and be required to undergo a reinstatement hearing. The respondent requested she be placed on probation. In the alternative, the respondent requested the Panel create a probation plan for her.

The respondent was not eligible for probation because her license was suspended and she failed to put the proposed probation plan in place prior to the hearing.

The Panel recommended the respondent be indefinitely suspended.

Before the Kansas Supreme Court, the Deputy Disciplinary Administrator renewed the request for a one year suspension with a reinstatement hearing. Respondent requested a published censure.

The Kansas Supreme Court suspended respondent indefinitely.

SUSPENSION FOR A DEFINITE PERIOD OF TIME

In re Brendon P. Barker
April 11, 2014
Six-month suspension


Respondent was retained to prepare and file a
conservatorship and guardianship for the elderly mother of the client. The respondent, who is licensed in both Kansas and Missouri, prepared and filed the petition for conservatorship in Missouri in October of 2006.

In November of 2006, the Missouri court sent notice that the inventory for the estate was delinquent. The court ordered the client to file the inventory by December of 2006. Respondent did not send the notice to the client and the client did not know the inventory was delinquent.

The client’s mother died in early December of 2006.

In January of 2007, the court issued a citation to the client to appear for a hearing scheduled for February of 2007 to show cause why the inventory had not been filed and why letters of conservatorship should not be revoked. The court sent the notice to the client by certified mail and to respondent by regular mail.

In October of 2007, respondent filed an annual report, a certified copy of the death certificate, a final settlement and an account transaction report. However, the documents were incomplete.

In December of 2007, the client moved and provided respondent with the new address.

In January of 2008, the court issued another order to show cause why the client should not be removed as the conservator. The order also required respondent and the client to appear for a hearing set in February of 2008. The notice was sent to the client at the old address. The notice sent to respondent was by regular mail. Neither the client nor respondent appeared.

In March of 2008, the court sent respondent another order to show cause why the client should not be removed as the conservator. The order also required respondent and the client to appear for a hearing set in April of 2008.

Again, the notice sent to the client was to the old address and the notice sent to respondent was by regular mail. Neither the client nor respondent appeared, but respondent did request the hearing be continued until June of 2008.

The hearing was finally set in July of 2008. Respondent failed to advise the client of the hearing. Neither respondent nor the client appeared. The court revoked the letters of conservatorship.

In September of 2008, the court appointed the Public Administrator to serve as conservator ad litem in the estate case.

In November of 2008, the court issued a notice of hearing to the respondent. The hearing was to consider a claim against the estate for an unpaid bond premium.

In February of 2009, the Public Administrator filed suit against the client as conservator of the estate regarding all the expenditures that were made without court approval. Service of the petition was the client’s first notice that there was a problem with the estate. In March of 2009, the client retained new counsel who filed an answer and interpleaded respondent as a third-party defendant.

The respondent never told the client that she needed court approval for expenditures out of the estate, including attorney fees. There was extensive discovery.

Respondent assured subsequent counsel he would help cover the expense of the defense.

In March of 2010, an answer was filed.

In May of 2011, subsequent counsel learned respondent had filed bankruptcy. The client was left to settle the case on her own. She paid the Public Administrator $4,897.00, the Bar Plan $4,080.00 and subsequent counsel $10,548.67, for a total of $19,526.55.
At the time of the hearing on the Formal Complaint, respondent had not reimbursed the client for his unearned fees nor for the expenses as a result of the lawsuit.

The client filed a complaint and in his initial response, the respondent agreed the complaint was accurate.

The Hearing Panel determined the respondent: knowingly violated his duty to provide competent and diligent representation; did not adequately communicate; caused serious financial injury; engaged in a pattern of misconduct and was indifferent in making restitution. However, the Panel found respondent suffers from depression which contributed to the misconduct.

In addition to practicing law, the respondent was engaged in operating four Jimmy Johns restaurants and an ethanol plant with his family. Respondent spent a considerable amount of time trying to keep the ventures from failing. Eventually, the ethanol plant sought protection under bankruptcy laws.

In May of 2006, the respondent and his wife separated and in 2007, his wife filed for divorce. In late 2008, respondent was in a near-fatal car accident, in which respondent sustained head trauma.

The Deputy Disciplinary Administrator recommended a six to nine-month suspension. The respondent requested a public censure because without the ability to practice law, the respondent would not be able to pay restitution. The Hearing Panel recommended a six-month suspension with a reinstatement hearing. The Panel recommended that at the reinstatement hearing the respondent be required to show he submitted to a thorough psychological evaluation, was receiving treatment for depression and had paid or entered into a written plan to pay $21,351.55 in restitution. The respondent filed exceptions to the final hearing report contesting the findings that he violated KRPC 1.16(d); that he knowingly violated his duties; that he engaged in a pattern of misconduct; that the client was vulnerable; that he was indifferent to making restitution and that he failed to timely file an Answer to the Formal Complaint. He contended that the recommended discipline was unwarranted.

The issues were briefed.

The respondent contended that there was no evidence presented that respondent did not earn his fee. The Kansas Supreme Court agreed and found the record did not support clear and convincing evidence that respondent failed to return unearned fees.

The respondent argued that the misconduct arose from omissions and his acts were negligent and not knowing. The Kansas Supreme Court noted that there is a difference between the concepts of intent and knowledge. The Court found that there was no evidence that respondent intended to harm the client, but he was aware that his conduct could cause harm to the client and continued to fail to communicate with the client about the posture of the case.

Respondent argued that his misconduct only spanned a period of two years and five months, not the five year period that the Panel found. The Court held that even if the Court accepted the respondent’s calculations, there was a pattern of misconduct.

The respondent argued the client was not vulnerable, even though she was inexperienced in legal matters. The respondent contended that if that is the standard, then nearly all clients would be considered vulnerable.

The Kansas Supreme Court held that because the Panel’s findings were based on legal inexperience and not the evidence presented of the emotional turmoil that was occurring in the client’s personal life during the representation; that the evidence did not support a finding that the client was vulnerable.
The respondent argued the Panel erred when it found he was indifferent to making restitution. The respondent noted he suffered from financial difficulties that prevented him from making restitution. He noted he paid the client $5,000 at the end of the hearing, which shows he is not indifferent to making restitution.

The Kansas Supreme Court held that the respondent’s failure to make any attempt to make a payment prior to the hearing, supported a finding that the respondent was indifferent to making restitution.

The respondent received an extension to file his Answer. The Court found that respondent filed his Answer on time and the Panel erred in finding the Answer untimely.

The respondent renewed his request for a public censure and contended he had made changes in his practice that would prevent the misconduct from reoccurring. The Court held that because respondent neglected to take a “minuscule” measure to protect the client that a six-month suspension was appropriate. A minority of the Court would have imposed a shorter suspension. The Court also ordered that the respondent did not need to undergo a reinstatement hearing, but that he would have to show proof of payment of all of the restitution in order to become reinstated.

In re Trey Meyer
May 30, 2014
Six-month suspension


Respondent was retained by a Michigan resident to represent her in a case involving a petition for declaratory judgment that had been filed in Shawnee County, Kansas regarding real property. Respondent entered his appearance and filed an answer. He then failed to respond to discovery requests, failed to meet deadlines and failed to adequately communicate with the client.

Respondent moved his office. He failed to inform the client of the new address. The client travelled from Michigan to Kansas in an attempt to meet with respondent. She was unable to meet with respondent.

As a result of the complaint, the respondent entered the attorney diversion program. In the agreement, he stipulated that he failed to respond to discovery requests and failed to adequately communicate with the client.

The respondent failed to comply with the terms of the diversion agreement and the agreement was revoked.

Respondent was retained by a different client to file a divorce action in Douglas County, Kansas. The client wanted to have the matter filed in Douglas County because her estranged husband’s family had a personal relationship with a judge in Jefferson County, Kansas, the county of residency.

The respondent prepared a petition for divorce for filing in the Douglas County District Court. The client signed the pleading and returned it on August 14, 2012, along with the filing fee. The respondent emailed the client and said the petition would be filed that week.

The petition could not be filed in Douglas County without an agreement from the estranged husband. Respondent made no attempt to obtain an agreement.

On August 20, 2012, respondent received an email from the client asking for an update. Respondent replied he would check with the clerk’s office. The next day, the client requested respondent seek an order that would
require the estranged husband to move out of the marital residence and pay child support. The respondent responded that the petition would be filed immediately.

The respondent did not file the petition.

On August 29, 2012, the client sent respondent an email asking if the petition had been filed. She asked that respondent notify her when the petition was filed, so she could anticipate when her estranged husband would find out.

On August 31, 2012, the respondent emailed the client and advised that her “e-case materials” had been forwarded to the court and he would let her know when he received file-stamped copies.

On the morning of September 4, 2012, the client was served with divorce papers that were filed in Jefferson County. The client called the respondent and the respondent advised he had filed a divorce action in Douglas County. The client called the clerk in Douglas County and was told no such petition had been filed.

The respondent filed a petition. The certified copy of the petition shows it was filed on September 4, 2012 at 2:31 p.m.

After September 4, 2012, the client again asked respondent to file a motion to force the husband to move out of the marital residence. She renewed the request on September 9, 2012 and in support of her request forwarded audio communication between herself and her estranged husband. She renewed the request again on September 11, 2012 and attached another audio recording.

Respondent replied he would attempt to negotiate a settlement.

On September 13, 2012 the client emailed respondent and indicated she assumed he had filed the petition. The next day, the respondent replied that the only way to obtain temporary possession of the residence was by agreement. The respondent promised he would file a motion and schedule a hearing.

Not only did respondent not file the motion, he did not file an answer.

The client terminated respondent. Subsequent counsel filed an answer and within a week of the entry of appearance, had served discovery requests, and filed motions for a restraining order, possession of the residence and custody and parenting.

The client requested a refund of the fee paid. Respondent did not timely refund the fee. Subsequent counsel contacted respondent and respondent advised a check was mailed to subsequent counsel’s office (one block from respondent’s office), but the mail was returned due to insufficient postage. Eventually, he repaid the entire fee.

The respondent asserted he had mailed the petition to the court for filing prior to September 4, 2012. The clerk testified before the Hearing Panel that the petition for divorce had been personally presented at the window in the courthouse. The clerk testified that since her initials appeared on the document, the petition had been personally presented to her.

Respondent maintained that he had mailed the petition with a cover letter to the court. Respondent could not produce a cover letter and no letter was located in the court records.

Since the client did not file first, she lost the opportunity to obtain ex parte orders, lost the advantage of a potentially smooth divorce and lost the advantage of temporary orders. The resulting litigation cost the client $10,000 in attorney fees.

The Hearing Panel found that respondent: knowingly and intentionally violated his duty to provide diligent representation; failed to maintain reasonable communication; failed to
maintain personal integrity; caused actual injury; engaged in dishonest conduct; engaged in a pattern of misconduct and the victims were vulnerable. The Panel also found respondent’s personal problems contributed to his misconduct.

The Deputy Disciplinary Administrator recommended the respondent be suspended for a period of three to six months and that he be required to undergo a reinstatement hearing. The respondent recommended no suspension. The Hearing Panel recommended a six-month suspension and a reinstatement hearing. The Panel also recommended that respondent write letters of apology to the clients and be prepared to show he had an alcohol evaluation and completed any recommended treatment at the reinstatement hearing.

The Kansas Supreme Court ordered the respondent’s license to practice law be suspended for six months and that he undergo a reinstatement hearing and that if he is reinstated, his practice should be supervised.

**In re Miriam Rittmaster**

299 Kan. 804, 326 P.3d 376 (2014)

June 6, 2014

**One-year suspension**


Respondent was paid $1,500 to represent a client in a domestic case. Prior counsel had already filed a divorce petition on behalf of the client. The client requested respondent serve the petition on the client’s estranged husband.

Several weeks later, the client texted respondent asking if service had been effectuated. The respondent did not respond. The client contacted the sheriff’s department and learned that no request for service had been made. The client called the court and learned respondent had not entered an appearance.

Later that day, respondent contacted the client and said she would do what was necessary to effectuate service. The estranged husband was served.

Two days later the client asked what the next step was. Respondent explained she was trying to make contact with the estranged husband’s lawyer. For several weeks the client was asking for updates and respondent did not respond.

Respondent then told the client that she would provide the client with sample parenting plans. The client made three other separate attempts to obtain the information. Respondent did not provide the requested information.

The court scheduled a hearing. Respondent was provided notice. Respondent failed to advise the client of the hearing. Neither the client nor respondent appeared for the hearing.

At the hearing, the court reduced the amount of support the client was receiving.

The client learned a hearing had occurred. She contacted the respondent. The respondent falsely told the client that respondent was not aware of the hearing. The respondent told client a new hearing had been set. The client asked again for certain documents.

The next day, the client called the clerk of the court. The clerk told the client that the respondent had been notified of the hearing via email from the court and by written notice from opposing counsel. The clerk told the client that there was no hearing set contrary to what the respondent had told the client.
The client attempted to contact respondent. The respondent returned the call but had to leave a voicemail. The respondent promised to make another return call and failed to do so.

The next day, the client terminated respondent’s services. The client requested her file. The respondent texted the client and said that due to an emergency, respondent would not be able to transfer the file to the client for a few days.

The client asked for an itemized statement and a refund of unearned fees. The respondent never provided an itemized statement.

The client filed a complaint with the Office of the Disciplinary Administrator. The respondent failed to timely respond to the complaint as requested.

The assigned disciplinary investigator sent two letters to respondent requesting information. Respondent did not reply to the investigator. The investigator called the respondent and she promised to reply. Respondent never provided a response to the complaint.

The Hearing Panel found respondent: knowingly and intentionally failed to provide competent and diligent representation; failed to adequately communicate; failed to maintain her personal integrity; caused actual damage; had prior discipline; engaged in dishonest conduct; engaged in a pattern of misconduct and failed to cooperate in the disciplinary process.

The respondent testified about personal and emotional problems that contributed to the misconduct and she expressed genuine remorse for engaging in misconduct.

The Disciplinary Administrator recommended a six-month suspension and be required to undergo a reinstatement hearing. The respondent agreed with the recommendation. The Hearing Panel also recommended a six-month suspension with a reinstatement hearing.

Respondent had agreed to a voluntary suspension during the pendency of the disciplinary process due to her inability to practice law.

Before the case was before the Kansas Supreme Court, the Office of the Disciplinary Administrator filed another Formal Complaint against respondent.

Respondent was retained to represent a client who had been served by publication in a divorce action. The State of Kansas filed a motion to establish support and medical support. The matter was set for hearing.

The client appeared without counsel. At that time, the client had not paid the retainer. The day after the client finished paying the retainer, the respondent told the client she had entered her appearance.

A hearing was set and respondent contacted opposing counsel and requested a continuance. The court rescheduled the matter.

The respondent requested a second continuance, which was denied. The respondent and client failed to appear for the hearing. The court entered an Order of Support against the client and ordered the client to maintain medical insurance.

The respondent filed a Motion to Set Aside the Default Judgment and Motion to Modify Custody, Parenting Time and a request to appoint a guardian ad litem. The respondent took no steps to set the motions for hearing.

After the motions were filed, the client repeatedly requested a status update. The respondent failed to respond to texts, emails and telephone calls.

The client retained subsequent counsel and requested respondent provide an accounting, a refund and return the file. The respondent did nothing.
The Hearing Panel found respondent: knowingly and intentionally failed to provide
diligent representation; failed to adequately communicate; caused actual injury; had prior
discipline; engaged in a pattern of misconduct and was indifferent to making restitution.

The respondent testified she suffers from attention deficit disorder and depression. The Hearing Panel found her mental health issues
contributed to the misconduct. The Panel noted that respondent had made significant progress
since the first hearing. The respondent expressed genuine remorse.

The Hearing Panel recommended respondent be suspended for a period of one-year and the
suspension be made retroactive to the date of the temporary suspension. The Panel also
recommended that respondent be required to undergo a reinstatement hearing and be
required to pay full restitution prior to being reinstated.

During argument before the Kansas Supreme Court, the Disciplinary Administrator
recommended the Court adopt the recommendation of the Panel. The respondent agreed. The Court adopted the
recommendation.

In re Mark R. Singer
__ Kan. ___, 335 P.3d 627 (2014)
October 10, 2014
Two-year suspension

The respondent and the Office of the Disciplinary Administrator entered into a
stipulation that respondent violated: KRPC 4.1(b)(2013 Kan. Ct. R. Annot. 617) and KRPC

Respondent’s practice involved real estate transactions for large purchases like shopping
malls. The respondent represented a buyer in a real estate transaction involving a shopping
mall. Respondent prepared transaction documents that reflected an inflated transaction price.

The buyer agreed to pay the seller the difference between the actual value and the
listed value. That amount was reflected as a “credit.”

The seller was expecting some cash to be paid at closing.

Respondent instructed the title insurance agent to not disclose the fact the buyer considered the
difference to be a credit not cash. Respondent instructed the agent to change the wording from “cash due” to “amount due.”

Respondent testified that he did not think the agent would go along with his request and even if she did, at some point the seller would figure out no cash was going to change hands.

The title agent followed respondent’s instructions, did not ask any questions and made the changes. The seller did not ask any questions either and the transaction closed.

The only equity that had been provided by the buyer was $50,000.

One month after closing the buyer defaulted.

A lawsuit was filed against multiple parties and the allegations were fraud, breach of fiduciary
duty, breach of the covenant of good faith and fair dealing, breach of contract, and intentional
breach of contract.

All the parties settled except respondent.

A jury returned an adverse verdict against respondent and found that respondent made a
false statement to the title agent about an existing fact, or omitted a material fact to the
escrow agent. He knowingly or recklessly
made the false statement or material omission. He made the statement or omission in order to
induce action, the statement was relied upon
and such reliance was justified and there was harm.

The judgment against Respondent was for $1.7 million. Respondent exhausted all of his appeal rights and all findings and the judgment were affirmed.

The Deputy Disciplinary Administrator asked for a one-year suspension and then supervision.

The respondent requested probation. Respondent had the probation plan in effect and contended that any suspension would be the equivalent to disbarment because of his age and he would lose all his clients.

The Hearing Panel recommended a two-year suspension.

The Kansas Supreme Court followed the recommendation of the Hearing Panel and suspended the respondent for two years.

_In re Eric M. Gamble_

____ Kan. ___, 338 P.3d 576 (2014)

December 5, 2014

Six-month suspension


Respondent was retained to represent the natural father in a contested adoption.

The natural mother was eighteen years old and executed a consent for an adoption of her then unborn child on October 12, 2012. Once the child was born, it was immediately placed with the adoptive parents. A petition for adoption was filed in the district court on October 16, 2012.

The natural father did not consent to the adoption, and the district court scheduled a hearing on the termination of his parental rights on June 27, 2012.

Prior to the termination hearing, the respondent deposed the natural mother who at the time was unrepresented. The adoptive parents were represented at the deposition. During the deposition, the natural mother testified she and the natural father were not in a relationship; she was not prepared to be a mother; the entire ordeal was “emotionally exhausting” and she was absolutely sure she wanted to put her child up for adoption.

Two days after the deposition was concluded, the respondent contacted the natural mother through Facebook. In the message, the respondent advised he wished to offer the natural mother “some reasons why [she] should stand up and fight for [her] daughter” and “to make things right.” The respondent included a revocation of the natural mother’s consent to adopt, which the respondent requested she review and consider signing. The respondent went on to tell the natural mother how rewarding parenthood is; how the child deserved to know her parents; how the natural mother would have to live with guilt the rest of her life; how the adoptive parents did not have to ever let the natural mother see the child; the adoptive parents were likely trying to convince her otherwise; that she was unaware of the termination “trial” because the adoptive parents did not want her to attend and revoking her consent was the only way to rid herself of her guilt.

The respondent urged the natural mother to sign; bring the signed revocation to the respondent and to attend the “trial” on June 27, 2013.

The natural mother did subsequently appear at the termination hearing under the adoptive parent’s subpoena. The natural mother did not revoke her consent and counsel for the adoptive parents brought the respondent’s message to the court’s attention.

On June 28, 2013, the respondent self-reported his conduct to the Office of the Disciplinary
Administrator. In his self-report, the respondent stated he believed he had given legal advice to an unrepresented person. The respondent stated the purpose of the message was to advocate for his client’s position in the hopes the natural mother would reconsider putting the child up for adoption.

The respondent cited KRPC 4.3 (2013 Kan. Ct. R. 622) and stated he believed he may have given legal advice to the natural mother beyond what is allowed.

The respondent also cited KRPC 4.1 (2013 Kan. Ct. R. 617) and advised he believed his statement to the natural mother informing her that the adoptive parents did not have to let her see the child after the adoption was final may have also been legal advice. The respondent stated he did not believe the information was false under his reading of the applicable Kansas statute. However, the respondent further stated his accompanying “emotional commentary” could be considered a “false statement.”

The Hearing Panel found the respondent was well aware from his deposition of the natural mother’s what her position was regarding the adoption, and that the message was an attempt by the respondent to manipulate her.

The Panel concluded this attempt at manipulation was prejudicial to the administration of justice and was knowingly done by the respondent.

Second, the Panel found the respondent made false statements of material fact by advising the natural mother that the natural parents were attempting to conceal the date of the termination hearing from her, when in fact the opposite was true. The Panel found the respondent may not have known this statement was false at the time, but that the respondent made no effort to fully investigate the facts before the message was sent. The Panel concluded this false statement was prejudicial to the administration of justice and done recklessly by the respondent.

Third, the Panel found the respondent made false statements of material fact by advising the natural mother that, if the consent were revoked, there was a “very good chance” the child would be hers again. The Panel cited Kan. Stat. Ann., § 59-2114 (2013), which states a consent is final when executed, unless there is clear and convincing evidence the consent was not freely and voluntarily given.

The Panel concluded the respondent had no such evidence and failed to research the applicable law before sending the message. The Panel concluded this false statement was prejudicial to the administration of justice and done negligently by the respondent.

Finally, the Panel found the respondent gave unsolicited legal advice to an unrepresented party by sending a form revocation of consent. The Panel found the respondent never advised the natural mother to seek the guidance of her own attorney. The Panel concluded this act was prejudicial to the administration of justice and knowingly done by the respondent.

The Panel also concluded the respondent violated KRPC 8.4(g) by sending the electronic message to the natural mother. The Panel concluded the respondent was well aware of the natural mother’s position regarding the adoption of the child through her deposition. Despite this knowledge, the respondent sent the message in an attempt to guilt the natural mother into changing her mind. The Panel equated the message to “electronic blackmail” and “bullying tactics.” The Panel concluded the respondent’s actions were done intentionally and adversely reflected on his fitness to practice law.

The Office of the Disciplinary Administrator also alleged the respondent violated KRPC 4.1, 4.3 and KRPC 4.4 (Kan. Ct. R. Annot. 622). However, the Panel found that while those rules were implicated, the respondent’s behavior did
not violate these provisions.

The Panel found the respondent violated his duty to maintain public integrity; negligently, knowingly, and intentionally violated the KRPC and there was actual injury sustained by legal system, legal profession, natural mother, adoptive parents, and possibly the child. The Panel also noted that during the hearing the respondent failed to acknowledge how far reaching the impact of his misconduct actually was. The Panel found the natural mother and adoptive parents were vulnerable to the respondent’s conduct.

The Panel concluded the respondent had a prior disciplinary history, the first resulting in a diversion. The second prior violation also involved a violation of KRPC 8.4(d), which resulted in an informal admonishment, where the Panel warned the respondent in their written opinion that his attitude and behavior throughout the disciplinary process was “unprofessional and [needed] improvement.”

Given that this was the respondent’s third complaint, and in light of the prior warnings, the Panel concluded a pattern of misconduct was present.

The Panel also found the following mitigating factors were present: the respondent self-reported and admitted to the violations, however, his attitude during the hearing and towards the Deputy Disciplinary Administrator was not cooperative; he was inexperienced with the practice of adoption law and he admitted he was remorseful for “being at the disciplinary hearing” and “regretted sending the electronic mail message.”

The Panel noted the respondent’s remorse and regret was a minor mitigating factor.

The Deputy Disciplinary Administrator recommended the respondent be suspended and then subject to a reinstatement hearing. The respondent recommended an informal admonishment.

The Panel was troubled by the respondent’s behavior at the hearing, specifically speaking to his personal attack upon the prosecuting Deputy Disciplinary Administrator and his railing against the disciplinary process as a whole. The Panel also was disturbed the respondent came unprepared for the hearing.

The Panel ultimately recommended the respondent be suspended for a period of sixty days.

The Supreme Court ordered the respondent be suspended from the practice of law for six months. A minority of the Court would have imposed a longer suspension. The Court unanimously ordered the respondent be required to undergo a reinstatement hearing.

_In re Peter E. Goss_  
____ Kan. ___, 338 P.3d 587 (2014)  
December 5, 2014  
One-month suspension


The respondent was retained in a personal injury case against the U.S. Government. Pursuant to 28 U.S.C. § 2678 (2013), the respondent’s attorney’s fees could not exceed twenty-five percent of the settlement.

Mediation occurred and the case settled for $416,050.15. As a term of the settlement, the Government also agreed to pay any claims or causes of action for bodily injury and property damage. The Government informed the district court of the settlement on January 1, 2013, and the district court administratively closed the case on January 23, 2013. The parties filed a joint stipulation of dismissal with prejudice on February 27, 2013.

A lien was placed on the settlement by the
medical company which treated the respondent’s client’s injuries. On March 28, 2013, the respondent called the lien-holder and advised he had a settlement offer for their consideration. The respondent by the settlement offer had an expiration date and that his client would not accept any settlement prior to knowing the amounts of any liens claimed.

On April 2, 2013, the respondent emailed the lien-holder’s attorney advising the “proposed” settlement was for $416,050.15. The respondent proposed splitting the settlement three ways: One-third to his client; one-third to the lien-holder; and one-third to his firm. The respondent advised his out of pocket expenses were approximately $30,000.00 and that he typically gets forty percent of the total expenses. The respondent advised with this settlement offer, he was reducing his fee to twenty-five percent.

Additionally, the respondent called the lien-holder in an attempt to have the lien reduced. The respondent advised the lien-holder if they were unwilling to compromise, the respondent would settle the case, interplead the funds or continue with litigation and proceed to trial with the Government.

The lien-holder subsequently discovered the case with the Government had already settled and obtained a copy of the settlement agreement. The lien-holder contacted the respondent on April 11, 2013 and advised they were now aware of the settlement and alleged they had not been negotiated with in good faith. The lien-holder advised the respondent it was not willing to reduce its lien or its right to full reimbursement/subrogation. The lien-holder demanded payment of the lien in full within seven days.

After the respondent received an itemization of the lien amount, the respondent forwarded the lien-holder a check in the amount of $212,642.21.

The Hearing Panel found the respondent violated KRPC 4.1(a) by knowingly making false statements of material fact to the lien-holder regarding his client’s terms pertaining to the settlement offer. The Panel further concluded the respondent violated KRPC 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The Panel found the violations were knowingly done; the respondent violated his duty of personal integrity to the public and the legal profession; the respondent may have actually incurred injury to his client by negotiating in bad-faith resulting in a potentially unfavorable settlement and the respondent caused actual injury to the legal profession’s reputation as a whole.

The Panel found no aggravating circumstances were present.

The panel found mitigating factors in that the respondent had no prior disciplinary history; there was no selfish or dishonest motive; the respondent cooperated with the disciplinary process; the respondent admitted to all violations; the respondent was a productive member of the bar; and the respondent expressed genuine remorse for his misconduct.

The Disciplinary Administrator recommended the respondent be suspended for three months. The respondent argued for a public censure.

A majority of the Panel recommended the respondent be censured in an unpublished decision.

A minority of the Panel recommended a public censure.

The Supreme Court ordered the respondent be suspended from the practice of law for one month.

In re Michael Peloquin
       Kan. --, 338 P.3d 568 (2014)
December 5, 2014
Three-month suspension


The respondent became involved in the disciplinary process through two separate complaints from two different clients.

The respondent was retained to expunge a criminal conviction for the first client. The client and the respondent agreed to a fee of $500.00. The client was to pay the filing fee. The respondent agreed to file the expungement after the fee was paid in full.

The client paid the fee in full on May 4, 2011, which was noted by the respondent’s legal assistant. After the client paid the filing fee, the respondent failed to file the expungement petition. The client then filed a complaint with the Office of the Disciplinary Administrator.

The respondent failed to provide a written response to the complaint. Two additional letters were mailed, and both were returned as undeliverable.

After encountering some difficulty, the disciplinary investigator made contact with the respondent. After which, the respondent provided a written response to the complaint. The respondent advised he had not received his mail due to an error in forwarding by the post office.

In his response, the respondent advised he had filed the petition in the incorrect court. The respondent then attempted to file the petition in the correct court, but failed to do so because he did not provide the correct number of copies. The respondent did not receive the returned petition because of the aforementioned forwarding error.

After the disciplinary complaint was received, the respondent contacted the client and was requested to file the expungement. The respondent did comply and obtained an order of expungement.

The respondent was retained by a different client in a civil action involving a car accident. The respondent made an initial settlement offer of $2,500.00, which was rejected by the client. The client then terminated the respondent and retained subsequent counsel.

When subsequent counsel attempted to settle the client’s claim, he was informed that the case had already been settled for $15,000.00. It was later discovered that the respondent’s office manager had negotiated the settlement without the respondent’s knowledge. The office manager also negotiated the check, again, without the respondent’s knowledge.

The client proceeded to file suit against the respondent, which was settled via a payment plan for $20,861.30, plus interest.

During the disciplinary investigation, it was also discovered that same office manager negotiated several other settlements without the respondent’s knowledge. The disciplinary investigation discovered the office manager had forged endorsements on checks; stolen the respondent’s office computer and then disappeared from work.

The Hearing Panel found that, while the respondent was charged with violating KRPC 8.4(a), the respondent had not knowingly assisted his office manager in violating the KRPC because the definition of knowing under the KRPC does not include “should have known” in its language.

The Panel found the respondent knowingly failed to act with reasonable promptness and diligence in his representation by failing to file the expungement paperwork in the correct court.
The Panel found the respondent negligently failed to adequately safeguard client property and ensure employees that he directly supervised were in compliance with the KRPC. Specifically, the respondent’s failure to adequately supervise his office manager’s conduct resulted in a violation of both KRPC 1.15 and 5.3.

As a result of the misconduct, the Panel concluded actual injury was incurred by clients and third parties.

The Panel found a pattern of misconduct was present as evidenced by the respondent’s failure to adequately supervise his office manager over an extended period of time; there were multiple KRPC violations and the victims were vulnerable to the misconduct.

The Panel found as mitigating factors from the respondent’s lack of previous discipline; absence of a dishonest or selfish motive; the respondent’s many health issues; his cooperation with the disciplinary process; the respect of colleagues; the entry of multiple financial judgments and his expression of genuine remorse.

The Deputy Disciplinary Administrator recommended the respondent be suspended for a period of six months and then undergo a reinstatement hearing. The respondent requested an informal censure or probation.

The Panel concluded the respondent had not put forth a workable probation plan and recommended the respondent be suspended for three months. The Panel also recommended the respondent undergo a psychological evaluation and undergo a reinstatement hearing and, if reinstated, the respondent be reinstated pursuant to his probation plan for two years. Finally, the Panel recommended the respondent be required to complete a CLE on law practice management as a condition of probation.

The Supreme Court ordered the respondent be suspended from the practice of law for a period of three months. The Court further ordered if the respondent petitioned for reinstatement at the end of his suspension, that the respondent be required to produce reports of compliance with mental health treatment and provide reports from mental health professionals recommending reinstatement.

The Court further ordered that the reinstatement Panel develop recommendations for supervision of the respondent’s practice; the respondent complete one or more CLE programs on law practice management; evaluate whether the respondent had taken all appropriate steps to identify the victims of his office manager’s criminal offenses and evaluate whether the respondent has developed a plan of restitution for all identified clients.

In re Rodney K. Murrow  
___ Kan. ___, 336 P.3d 859 (2014)  
October 24, 2014  
One-year suspension


The respondent became involved in the disciplinary process through representation of four different clients.

On November 30, 2011, the respondent was retained in an employment matter in which the client was alleged to have violated a non-compete clause. The respondent recommended filing suit in order to obtain a temporary restraining order and then seek a permanent injunction. The suit was filed on December 6, 2011.

On October 25, 2012, the defendant filed a motion for summary judgment. The respondent
did not file a response.

On December 4, 2012, the district court contacted the respondent by email and advised the motion would be granted. The court advised the respondent that the motion appeared to be unopposed and should be granted. The district court further advised the respondent could prepare a journal entry for a pre-trial hearing scheduled for December 10, 2012, at which time the district court would also take up a defense motion for punitive damages.

The respondent failed to appear for the pre-trial hearing. Instead, the respondent filed a motion seeking to stay proceedings and to set aside orders due to a personal medical emergency.

The respondent attached a letter from his psychiatrist, which advised the respondent was unable to function in his professional capacity due to severe depression which had been occurring over the past nine months. The letter advised that in-patient treatment was being considered and that the respondent was being placed on medical leave from his job.

The district court denied the motion for a stay and granted the motion for summary judgment. The pre-trial conference was continued to January 17, 2013.

The district court ordered the respondent to have co-counsel enter an appearance on the case, or show cause why co-counsel was not necessary. The district court further ordered the respondent to comply with full disclosure to his client no later than December 28, 2012.

The respondent did not provide his client with full disclosure as ordered.

The respondent next appeared before the court on January 17, 2013 without co-counsel or a replacement. The respondent informed the court that he had been in contact with another attorney, but did not feel co-counsel or replacement counsel was necessary.

The court continued the case to February 19, 2013.

On January 21, 2013, the respondent’s psychiatrist submitted a second letter advising the court the respondent’s depression had a significantly longer history than was originally thought; the respondent was responding well to treatment and that in his opinion the respondent should have been able to return to work on January 7, 2013.

However, the psychiatrist informed the court the respondent suffered an unspecified “setback” after returning to work. The psychiatrist stated “setbacks” were not uncommon and that the psychiatrist recommended the respondent extend his leave to February 1, 2013. After this time, the psychiatrist believed the respondent should be able to return to work without restrictions.

The respondent had no contact with his client between February 6, 2012 and February 14, 2013. The respondent made contact with the client on February 15, 2013 to advise him of the respondent’s personal problems and the issues with the lawsuit. The respondent was terminated by the client on February 17, 2013.

On February 18, 2013, the respondent’s psychiatrist wrote a third letter to the court. This time, the psychiatrist advised the respondent had returned to work at “full strength.”

However, the psychiatrist stated it was his opinion that the respondent was not mentally capable of responding to the district court’s December 10, 2012 order. The psychiatrist informed the court its order “ignored” the psychiatrist’s mandate to the respondent for a thirty-day leave of absence from work. The psychiatrist informed the court it had exacerbated the respondent’s recovery because the respondent did attempt to comply with the
court’s schedule.

The psychiatrist then accused the court of contributing to the respondent’s “setback.”

The psychiatrist explained that since the respondent’s medical leave was “not honored,” this rendered the respondent unable to comply with the court’s orders.

On February 19, 2013, the respondent was permitted to withdraw as counsel for the client.

Subsequently, both the court and subsequent counsel filed complaints against the respondent with the Office of the Disciplinary Administrator.

At some point after the respondent withdrew, the district court vacated the previous summary judgment order.

On May 10, 2013, the respondent wrote to his former client’s subsequent counsel. In this letter the respondent advised he would assist with the case in any way he could; enclosed a check for $500.00 to assist with the client’s legal fees; advised he was doing better than he had in decades and that he believed the district court did the correct thing in vacating the original summary judgment order.

The client returned the respondent’s check.

On April 17, 2012, the respondent was retained by another client to assist her with purchasing her parent’s share of a business she co-owned with them. The client and her parents were in a significant disagreement over the future of the business.

The respondent advised the client to initiate a lawsuit against her parents in order to force them to dissolve the business or sell their ownership interest. The client was not in favor of this plan.

For the next few months, the respondent performed insignificant work on the case.

On September 25, 2012, the client terminated the respondent and retained subsequent counsel. Subsequent counsel contacted the respondent and requested the client’s file and an accounting of the $2,000.00 fee.

Between October 9, 2012 and May 17, 2013, subsequent counsel attempted to contact the respondent seven separate times. Only one communication was returned by the respondent.

On June 4, 2013, the respondent contacted new counsel; apologized for the delay; advised the file was getting pulled and copied and he would get the client’s file out by the end of that week or the beginning of next. The respondent never provided the requested accounting.

On June 18, 2013, the client filed a complaint against the respondent with the Office of the Disciplinary Administrator.

On January 11, 2012, the respondent filed a lawsuit on behalf of another client against defendant American Energy Solutions, Inc. However, the respondent failed to prepare a summons for service for approximately a month. The Panel did not specify when the summons was actually served.

Defense counsel filed an answer and counterclaim on Marcy 9, 2012. The
respondent failed to file an answer to the counterclaim.

The district court set a case management conference for June 4, 2012. The respondent failed to appear and the district court dismissed the suit and awarded a default judgment against the client in the amount of $21,807.32.

One year later, the respondent filed a motion to set aside the default judgment and reinstate the case. Defense counsel filed a written objection. In August of 2013, American Energy sold all of its assets rendering the client’s litigation futile.

On August 22, 2012, the respondent filed a lawsuit on behalf another client against defendant Premium National Products, Inc. The respondent requested a restraining order, a temporary injunction, a permanent injunction and declaratory relief.

The defendant filed an answer along with counterclaims. The respondent failed to file an answer to the counterclaims.

The respondent failed to comply with discovery; failed to respond to the defendant’s attempts to resolve scheduling and discovery disputes and failed to meet other deadlines set in the case.

The defendant filed a motion to compel, which was set for hearing in district court on August 26, 2013.

The respondent failed to appear for the hearing and the district court dismissed the client’s suit. The court granted judgment to the defendant on its counterclaims. A new hearing was set to determine the amount of monetary damages.

On October 1, 2013, the respondent submitted an affidavit, presumably to the court, in which he stated his client had terminated him as of October 1, 2013. The affidavit also contained a litany of other admissions by the respondent of misconduct.

The affidavit stated the respondent had previously advised his client he was addressing the defendant’s motion to compel, which he had not. The respondent admitted he failed to inform the client that the defendant was seeking a dismissal and default due to the respondent’s failure to respond to attempts at communication and discovery requests.

The affidavit admitted the respondent failed to inform his client of the hearing that was scheduled on the defendant’s motion and then failed to inform the client that he did not attend the hearing. The respondent admitted he failed to inform his client of the district court’s ruling in favor of the defendant.

The respondent further stated in the affidavit his client attempted to contact him on September 17, 2013 after the client was served with the journal entry. The respondent contacted the client on September 20, 2013 and advised he was aware of the situation and was attempting to fix it. The respondent stated he made contact with his client on September 25, 2013, at which time he was informed his representation had been terminated.

The client retained subsequent counsel, but the respondent never filed a motion to withdraw.

On November 26, 2013, the court awarded attorney’s fees in favor of the defendant.

The Hearing Panel found the respondent violated KRPC 1.1 by failing to adequately prepare and provide competent representation to all four clients.

The Panel next found the respondent violated KRPC 1.3 by failing to act with reasonable diligence and promptness in his representation of all four clients. The Panel concluded this violation resulted in actual injury to all four clients.

The Panel found the respondent violated KRPC 1.4 by failing to keep all four clients reasonably
informed as to the status of their respective cases.

The Panel found the respondent violated KRCP 1.16(a)(2) by failing to withdraw from representation of the four clients when his mental health deteriorated to the degree he could no longer provide adequate representation. The Panel further concluded the respondent failed to take adequate steps to insure his termination of representation did not have an adverse effect on this clients' interests. Specifically, the panel found the respondent failed to properly account for the fees paid by two clients. Additionally, the respondent failed to turn over a client's file after being requested seven times by subsequent counsel.

The Panel found the respondent violated KRCP 3.2 by causing unnecessary delay in three cases.

Finally, the Panel found the respondent violated KRCP 3.4(d) by failing to diligently comply with, and respond to, discovery requests in one case.

The Panel concluded the respondent’s violations were knowingly done, and there was actual injury to all four clients.

The Panel found aggravating factors in the respondent’s pattern of violating the same or similar rules pertaining to multiple clients; his substantial prior experience practicing law and the respondent’s lack of empathy and “cavalier attitude” towards his client’s damages.

As mitigating factors, the panel found: the absence of a disciplinary record; absence of any selfish or dishonest motive; the respondent’s issues with depression; cooperation with the disciplinary process; and respect among his local bar.

The Deputy Disciplinary Administrator recommended the respondent be indefinitely suspended. The respondent requested his probation plan be adopted.

The Panel denied the respondent’s request for probation, finding the submitted plan was unworkable. Specifically, the Panel found the respondent failed to put his proposed probation plan into effect before the hearing.

The Panel ultimately recommended the respondent be suspended for one year and ordered to pay restitution to the four aggrieved clients.

The Supreme Court ordered the respondent be suspended from the practice of law for one year and then be required to undergo a reinstatement hearing.

The Court also ordered that before the respondent could be reinstated that a reinstatement Panel must find clear and convincing evidence that the respondent had made restitution to his four former clients and that the respondent present a medical recommendation regarding his fitness to practice law.

SUPERVISED PROBATION

In re Kevin Dellett
299 Kan. 69, 324 P.3d 1033 (2014)
March 28, 2014
Two-year suspension, suspended two years’ supervised probation


Respondent stipulated to: failing to respond to requests from a client for updates on their case; having a prior diversion for failing to respond to requests from a client for updates on their case; failing to diligently move the case along; failing to inform an incarcerated client that his jury trial had been continued; failing to inform the client that respondent has requested a
second continuance of the jury trial; only meeting with a client twice; engaging in a fee contract with a client who was facing aggravated indecent liberties with a child charges that indicated the $15,000 fee was non-refundable; being terminated after waiving the preliminary hearing; refusing to provide an accounting and refund; failing to respond to pleadings in a divorce case that resulted in a default judgment being entered against the client and the client learning from her ex-husband she was divorced.

According to the terms of the diversion agreement, he was to take additional Continuing Legal Education hours; to adequately communicate with clients; meet all court deadlines; work with KALAP; remove all references to non-refundable fees in his engagement agreements; clearly state when he would begin working on the matter; resolve the fee dispute; review all cases every 60 days; reconcile his calendar every day and meet with a practice supervisor.

Respondent did resolve the fee dispute. He began working with KALAP. He obtained the required CLE hours, albeit late. He met with his practice supervisor.

After signing the diversion agreement, the Office of the Disciplinary Administrator received a new complaint. A deaf woman sought respondent’s assistance in 2009 to help her sue the Olathe Club for the Deaf because the woman believed she had been defamed, bullied, slandered and libeled.

The disciplinary complaint was filed in October of 2011 and alleged communication and diligence problems. In his answer, respondent admitted he did not respond to all emails and did not promptly file suit or send a demand letter.

Respondent’s diversion was ordered to be revoked.

At some point, respondent had determined that any legal action would not result in any significant monetary recovery and, in fact, expenses were likely to exceed any recovery.

Fifteen days after the Office of the Disciplinary Administrator received the complaint, the respondent filed suit. Respondent was unable to effectuate proper service.

At this point in the litigation, respondent learned the client just wanted an apology. A letter of apology was presented and the case was dismissed by agreement.

The Office of the Disciplinary Administrator received a second new complaint in January of 2012. The respondent had been retained to represent a defendant in a domestic violence case. The complaint paid $4010 as a negotiated fee on January 10, 2012. The retainer was not deposited in the attorney trust account.

Complainant called respondent on January 11, 2012 and requested a return call.

Respondent emailed a “Retainer Agreement” to complainant on January 12, 2012. The complainant never executed the agreement. Complainant tried to contact respondent and respondent did not answer his cell phone.

On January 12, 2012, respondent contacted the prosecutor about modifying the No Contact Order. The State opposed modification.

Respondent was advised the subject of the No Contact Order had submitted paperwork requesting the Order be changed to No Violent Contact. That request had been sent to the judge and the judge had already modified the order.

Respondent told the client about the modification. Respondent told the client he would review the police reports on January 17, 2012. He did not review the reports until
January 18, 2012 because he did not receive the
reports until January 18, 2012.

On January 18, 2012, the complainant called
respondent a total of three times. Respondent’s
assistant called complainant on January 19,
2012 and set up an appointment on January 20,
2012.

Complainant and respondent met for an hour.
Respondent promised he would contact the
prosecution on January 23, 2012 to discuss
further modification of the contact order.

On January 23, 2012, complainant called
respondent and informed him that complainant
was considering terminating respondent’s
services. Respondent set up a meeting for that
afternoon.

During the meeting, complainant asked for half
of his retainer to be returned and to modify the
unsigned retainer agreement so that the second
half would be paid at the end of the
representation.

Respondent refused to return half of the retainer
and refused to modify the proposed engagement
agreement.

Respondent reports he had no contact with
complainant on January 24, 2012 or January 25,
emailed respondent and terminated his services.
Complainant requested a refund of $3,500
which was based on complainant’s estimation
of the amount of time respondent had spent on
his case.

Complainant filed the disciplinary complaint
and the respondent withdrew. Respondent
emailed a billing statement representing 5.75
hours for a total of $1,382.50. Respondent
proposed a refund of $2,700.

Complainant countered that he believed
respondent only worked 3.1 hours and
requested a refund of $3,165.

Respondent countered with an offer of a refund
of $2,877.50. Then, respondent offered to
reduce his fee to $1,000 to avoid having to
resolve the dispute through the Johnson County
Fee Dispute Committee. On February 3, 2012
respondent provided a refund of $3,000 to
complainant.

The unexecuted retainer agreement provided, in
material part:
Initial retainer: At or before the signing of this
agreement, you agree to pay a flat fee of
$4,000.00, representing a “Commitment Fee”
tended to commit the Firm to represent you
and not as a fee to be earned by future services.
You agree that the Commitment Fee is earned
in full when tendered and will be deposited in
the general operating account and will not be
held ‘in trust’ for you. You acknowledge that
the Commitment Fee represents a sum that you
are paying to ensure the Firm’s availability to
represent you in this matter. You further
acknowledge that the Commitment Fee
represents a sum that you agree the Firm’s
services and efforts are worth irrespective of
the actual total amount of time devoted to the
representation.”

* * *

“Costs of Delay: If resolution of the case is
delayed or complicated as a result of your
actions, (for example, if you fail to appear as
ordered, cancel appointments, or fail to provide
information or documents necessary for your
representation) you agree to pay additional
attorney fees based on my hourly rate of
$350.00/hr. At such point, the Firm charges for
attorney services in intervals of one-tenth of an
hour, or 6-minute intervals rounded up to the
nearest one-tenth. For example, a six minute
telephone call is billed as .1 hour; a seven
minute telephone call is billed as .2 hour.

* * *

“USE OF OUTSIDE COUNSEL Occasionally,
it may be necessary for outside counsel to
appear in your case due to unavoidable
scheduling conflicts such as hearing in different
courts at the same time. You agree to allow the
Firm, at its discretion, to retain outside counsel
to appear in your case if and when such a scheduling conflict occurs. We agree that the Firm will pay any fee for any services of such outside counsel and that you are not responsible for any fee owed to any such outside counsel.”

* * *

“ATTORNEY CASE-LOAD You understand that the Firm’s attorneys have a significant case load, and that yours is not our only case. You understand that the Firm’s attorneys must determine in their sole discretion when work is to be performed on your case. Additionally, we strive to return phone calls by the end of the next business day, but many times this may not be possible due to a number of factors, such as hearings, depositions, meetings etc.

The Hearing Panel found that respondent: did not adequately communicate; violated his duty to charge a reasonable fee; did not properly terminate representation; engaged in conduct that interfered with the administration of justice; knowingly engaged in a pattern of misconduct; that his actions caused actual injury to clients and the legal system and he had previously been placed on diversion for similar misconduct.

The respondent testified he suffers from attention deficit disorder and depression, which the Hearing Panel concluded contributed to the misconduct. The respondent admitted his misconduct and expressed genuine remorse.

The Deputy Disciplinary Administrator and the respondent jointly recommended the panel consider placing the respondent on probation. The Panel found respondent had complied with all the requirements of Supreme Court Rule 211 and the Panel recommended the respondent be suspended for a period of two years, but the suspension be stayed and the respondent be placed on supervised probation for two years. The Panel also recommended that respondent’s practice be limited to criminal, traffic and collection cases.

The Kansas Supreme Court agreed and ordered the respondent be suspended for two years but suspended the suspension and placed respondent on probation for two years.

_in re Andrew M. Delaney__


November 26, 2014

Six-month suspension, suspended two years’ supervised probation


The respondent was granted diversion for two disciplinary complaints. The respondent stipulated to the facts as alleged. After the diversion agreement was completed, the respondent failed to comply with the terms of diversion, which was revoked pursuant to Kansas Sup. Ct. R. 203(d)(2)(vii).

In the first complaint, the respondent was retained as counsel in a divorce action in 2007 for a retainer of $500.00. There was an issue getting a hearing scheduled. The hearing was eventually scheduled for February, 2008.

After the hearing, the respondent prepared a journal entry and sent it to opposing counsel for signature. By late March, the respondent had not received the journal entry back, so he sent another copy. The journal entry was signed on April 7, 2008.

A qualified domestic relations order (“QDRO”) specified the respondent’s client receive 100% of a 401k. The respondent contacted the administering agency the same day as the February hearing for guidance on how to proceed. The QDRO paperwork was completed on August 14, 2008.
The respondent forgot about the QDRO until the following January, 2009. The client contacted respondent about withdrawing funds. By this time, the 401k had lost $3,000.00 in value due to a decline in the stock market. The actual financial damage to the client was estimated to be $2,000.00.

In 2009, the client retained the respondent’s services to arrange for the adoption of her son by her new fiancé. The client’s ex-husband had already signed a written consent for the adoption in April of 2009. The respondent suggested the client wait to proceed with the adoption until after she and her fiancé became officially married. The client was married in September of 2009, but the adoption case was not set until December of 2009. By the time the hearing came before the district court, the court would not accept the consent due to its age.

The respondent contacted the ex-husband and had him sign a new written consent, which allowed the adoption to be completed.

The respondent waived his fee and did not request his client pay the filing fee. The respondent refunded $300.00 of the retainer to the client and gave her an additional $500.00 for the purchase of Christmas gifts.

In the second complaint, the respondent was retained in February of 2009 to assist with the dissolution of a partnership. No attorney’s fees were paid.

The petition of dissolution and partition was filed in April of 2009, followed by motion for default judgment in June of 2009. The respondent advised he had difficulty completing service on all parties.

The respondent contacted the client in December 2009 to apologize for the delay. This was one of the few times the respondent returned communication to the client, despite the client’s repeated attempts at contact.

In February 2010, the client attempted to secure new counsel and threatened the respondent with a disciplinary complaint in March 2010. The respondent did not have any further contact with the client.

In a third complaint unrelated to the respondent’s Diversion, the respondent was engaged to represent the natural mother in a child in need of care (CINC) proceeding. The panel considered this complaint on allegations by the Deputy Disciplinary Administrator that the respondent failed to promptly respond and cooperate with the disciplinary process.

The client complained that the respondent failed to appear in court; failed to return phone calls and failed to provide her with advice on the return of her children from State custody.

The disciplinary complaint was docketed and mailed to the respondent. The respondent was directed to provide a written response within twenty days. The respondent failed to respond.

After an investigator was assigned, the investigator attempted to contact the respondent twice; once in April of 2013 and then again in May of 2013. The respondent did not reply to the investigator.

On June 6, 2013, Special Investigator Delaney of the Office of the Disciplinary Administrator made contact with the respondent at the Brown County Courthouse. The respondent advised he was aware of the complaint and did not have an excuse for his failure to reply. The respondent advised he would provide a written response within few days. The special investigator granted the respondent an additional ten days to respond. The respondent provided a written response on June 13, 2013.

The Hearing Panel concluded the respondent violated multiple provisions of the KRPC in the two diversion cases.

The Panel found the respondent violated KRPC
by failing to promptly and diligently take action on the QDRO and complete the adoption. The Panel also found the same violation present for the respondent’s failure to obtain service in the partnership dissolution.

The Panel found the respondent violated KRPC 1.4(a) by failing to promptly respond to and keep his client reasonably informed in the partnership dissolution.

The Panel found the respondent violated KRPC 1.8(c) by paying the filing fee and giving his client $500.00 in the adoption case.

The Panel found the respondent violated KRPC 3.2 by failing to expedite litigation in both the adoption and the partnership dissolution.

The Panel found the respondent violated both KRPC 8.1 and Kan. Sup. Ct. R. 207(b) by failing to cooperate with the disciplinary investigation. Specifically, the respondent failed to respond to the complaint made by the respondent’s CINC client despite repeated attempts at communication by the Office of the Disciplinary Administrator; the assigned investigator; and the special investigator.

The Panel concluded these violations were done knowingly and caused actual harm to his clients, the legal profession, and the legal system.

The Panel found the following aggravating factors from the respondent’s pattern of misconduct; multiple rule violations; intentionally failing to cooperate with the disciplinary process and the respondent’s substantial prior experience in the practice of law.

The Panel found the following mitigating factors from the respondent’s lack of a dishonest or selfish motive; respondent’s mental health issues concerning depression; his subsequent cooperation with the disciplinary process; his good standing and reputation with the local bar and expression of genuine remorse.

The Deputy Disciplinary Administrator recommended the respondent be placed on probation under the proposed probation plan. The Panel noted the recommendation would have been different, but for the significant proactive steps taken by the respondent to rectify his various issues.

The Panel recommended the respondent be suspended for six months. The Panel further recommended the suspension be suspended and the respondent be placed on probation for a period of two years with the following conditions: participation with KALAP; maintaining an inventory of clients and cases; returning all client calls within forty-eight hours and contacting clients by letter once every three months; paying restitution in the amount of $2,000.00 within ninety days; cooperate with a practice supervisor; continue with his mental health treatment; comply with a prescribed medication plan; draft and follow office procedures to ensure deadlines and court appearances are maintained; maintain a calendar; use a third person to receive and open mail; review billing procedures and maintain a conflict list; cooperate with audits; continue cooperation with the Office of the Disciplinary Administrator and not commit any further violations of the KRPC.

The Supreme Court ordered the respondent be suspended from the practice of law for six months; that the suspension be stayed and the respondent placed on two years of probation as recommended by both the Deputy Disciplinary Administrator and the Hearing Panel. The Court further ordered that if the respondent’s probation were to be revoked and suspension imposed, the respondent be required to undergo a reinstatement hearing.

PUBLISHED CENSURE

In re William E. Colvin
On January 8, 2010, counsel for the ex-husband filed a response motion arguing the agreements became effective on December 23, 1999. The ex-husband argued the judgment was now extinguished because the respondent’s client failed to timely execute or revive the judgment.

The district court granted the motion and dismissed the respondent’s motion to resolve the divorce decree.

The ex-husband then moved to dismiss the breach of contract case. This motion was denied and the court granted leave for the respondent to amend the petition on or before April 2, 2010. The respondent’s client was ordered to provide an itemization of damages as part of the factual contentions.

On April 12, 2010, the respondent filed a motion to amend the journal entry in the divorce case. The respondent included an affidavit from his client stating his client’s original intentions were that the payment from the ex-husband would become due upon demand. The motion to amend indicated the respondent sent a demand for payment on September 9, 2009. The motion failed to mention the two prior demands for payment sent to the ex-husband in 2001 and 2003.

The respondent’s client was deposed on May 14, 2010. The client testified as to the affidavit and the client’s belief that the statute of limitations on the debts did not begin to run until the respondent sent the demand letter. The client specifically testified that the respondent’s demand letter was the first time she had made demand for payment. When confronted about the 2001 demand communication, the client denied having ever seen it before.

Counsel for the ex-husband filed a motion for sanctions against the respondent and his client, based on the production of the 2001 and 2003 demand letters.

In response, the respondent argued the affidavit
was not false because it did not allege the 2009 letter was the first and only demand for payment. The respondent argued that because the ex-husband did not agree that the debts were due upon demand, the previous letters were not relevant to his claims. Respondent further argued the statute of limitations only began to run on the ex-husband’s repudiation of the 2009 letter.

The respondent eventually stipulated the previous two demand letters were authentic on August 30, 2010.

On September 1, 2010, the court granted the motion for sanctions and denied the respondent’s motion to amend the divorce case journal entry. The court concluded the respondent violated the provisions of Kan. Stat. Ann. § 60-211 (2010). The court also found the failure to mention the two previous demand letters in the affidavit was “misleading by omission;” the omission was material because its purpose was an attempt to set aside the prior ruling on the divorce decree; the respondent failed to correct the omission when he became aware of it and continued to maintain that the 2009 letter was the only demand and up until the evidentiary hearing and the respondent continued to contest and deny whether the two prior letters were authorized by his client.

The court awarded the ex-husband attorney’s fees. The district court also dismissed the breach of contract case.

The respondent appealed the district court’s denial of the motion to modify the divorce decree; imposition of attorney’s fees; and imposition of sanctions to the Kansas Court of Appeals.

On May 4, 2012, the Kansas Court of Appeals affirmed all of the district court’s rulings and dismissed the appeal of the journal entry amendment as moot.

In upholding the imposition of sanctions, the Court of Appeals found the respondent had violated his duty of candor to the district court by not correcting the affidavit’s omission. The Court took particular issue with the respondent’s failure to correct the omission over the course of the two or three months after it became clear the respondent became aware of the two previous demand letters.

The Court of Appeals also found the appeal was frivolous and awarded $10,000.00 in attorney’s fees against the respondent and his client.

Finally, the Court of Appeals forwarded a copy of its decision to the Office of the Disciplinary Administrator.

The Hearing Panel found the respondent violated his duty to refrain from bringing frivolous proceedings and engaged in conduct prejudicial to the administration of justice by taking an appeal of the motion to amend the divorce decree journal entry.

The Panel found the respondent violated his duty of candor towards the tribunal and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by failing to inform the district court of the two previous demand letters.

Finally, the Panel found the respondent engaged in conduct which adversely reflected on this fitness to practice law by persisting with arguments which lacked merit.

The Panel concluded the respondent’s violations were knowingly done and the respondent’s acts caused injury to the administration of justice.

The Panel found the following aggravating factors from the respondent’s pattern of misconduct; his multiple violations and his substantial prior experience in the practice of law.

The Panel found the following mitigating
factors from the respondent’s lack of a disciplinary history; his cooperation with the disciplinary process; his admission to violations of the KRPC and the impositions of other sanctions by the district court and Kansas Court of Appeals.

The Deputy Disciplinary Administrator recommended published censure. The respondent concurred with the recommendation.

The Panel took note of the concurring recommendations, but was troubled by the respondent’s stipulation that he engaged in dishonest conduct. The Panel ultimately recommended the respondent be suspended for thirty days.

The Supreme Court ordered the respondent be publicly censured.

REINSTATEMENT

_In re Brandon Barker_
_Citation unavailable_
_January 8, 2015_

Barker was suspended for six months. He timely petitioned for reinstatement and was reinstated.

_In re Peter Goss_
_Citation unavailable_
_January 8, 2015_

Goss was suspended for one month. He timely petitioned for reinstatement and was reinstated.
TOP 8 RULE VIOLATIONS

KRPC 1.3 Diligence

KRPC 1.4 Communication

KRPC 8.4(d) Conduct prejudicial to the administration of justice

KRPC 1.1 Competence

KRPC 8.4(c) Conduct involving dishonesty, fraud or deceit

KRPC 8.4(g) Conduct that adversely reflects on the lawyer's fitness to practice law

KRPC 8.1 Bar Application and Disciplinary Matters

Supreme Court Rule 207 Cooperation in Disciplinary Proceeding
STATE OF KANSAS

STANTON A. HAZLETT
Disciplinary Administrator
ALEXANDER M. WALCZAK
KIMBERLY L. KNOLL
KATE F. BAIRD
DEBORAH L. HUGHES
MICHAEL R. SERRA
Deputy Disciplinary Administrators

OFFICE OF
THE DISCIPLINARY ADMINISTRATOR

ANATOMY OF A COMPLAINT

I. PURPOSE OF THE LAWYER DISCIPLINARY SYSTEM


II. WHERE COMPLAINTS COME FROM – RULE 209

A. Clients – over 60% - some of which are forwarded by a local bar association grievance committee – RULE 207(a) and 209.

B. Citizens – around 25% -- attorney-client relationship NOT prerequisite for filing a complaint.

C. Judges or attorneys – about 15% -- duty to report – primary rule is RULE 207(c) – secondary rule is KRPC 8.3.

III. ORAL COMPLAINTS OR INQUIRIES – RULE 209

A. Citizen’s phone call or in person – listen to person – resolve it then if possible Phone call to attorney – no further action – complaint must be in writing.

B. Attorney’s phone call with question or information request – discuss and suggest applicable rules – no written opinion – not binding – KBA Ethics Advisory Committee, Box 1037, Topeka, Kansas 66601, issues non-binding written ethics opinions.

IV. WRITTEN COMPLAINT OR REPORT OF MISCONDUCT

RULE 209, RULE 226 AND ATTORNEY OATH OF OFFICE RULE 704(i)

A. Complaints of misconduct under Kansas Rules of Professional Conduct, case law or oath of office -- can be made by individual lawyers, NOT firms – conduct can be in or out of attorney-client relationship – RULES 202, 226 and 704(i).
B. Informal procedure – obtain attorney’s version of events by letter without
docketing a complaint – 50% of complaints are handled this way – attorney
should fully respond – complaint will be dismissed if determined to be frivolous or
without merit after response of attorney – RULE 209.

C. Formal procedure - all other complaints will be docketed – assigned a number
– respondent’s attorney identified and notified – sent to local committee for full
investigation - attorney’s truthful written response required within 7 days – RULE
207(b).

V. INVESTIGATION OF COMPLAINT – RULES 205, 207 AND 210

A. All investigations are conducted by or under the supervision of the
Disciplinary Administrator – RULE 210 and 205(c)(2). Investigations are
conducted by in-house investigators or by outside attorneys.

B. Duty of Cooperation - Disciplinary Administrator can and does in every case
call directly upon the responding lawyer for assistance in investigating the case –
RULE 207(b) and (c).

C. Disciplinary Administrator may use state or local bar grievance and ethics
committees – all investigations under supervision of Disciplinary Administrator –
RULE 207(a), RULE 210(b). Over 200 lawyers are on these committees and do
almost all of the investigative work.

D. Any individual member of the bar or judiciary can be called upon for
assistance – RULE 207(b) and (d) and 210(b).

E. Report of investigation received by Disciplinary Administrator and then sent
to review committee with complaint, attorney’s response and recommendation
of the Disciplinary Administrator – investigation time 2 to 12 months.

F. Additional investigation can be done at any time by the Disciplinary
Administrator – RULE 210(e), 211(c). Additional investigation is always done in
preparation for hearings.

VI. MISCELLANEOUS CONCEPTS

RULES 213, 214, 203(b), 222, 203(a)(4) and (5), 211(f), 217, 204, 223

A. RULE 213 – Refusal of complainant to proceed – settlement – compromise –
restitution – DOES NOT abate the complaint.

B. RULE 214 – Related civil or criminal litigation does not necessarily abate the
complaint.

C. Temporary suspension by Supreme Court – RULE 203(b) – order to show
cause – generally criminal conduct – expedited proceeding – suspension during
pendency of disciplinary proceeding – inherent power of court.
D. Confidentiality – RULE 222 – The case becomes public record after the Review Committee finding of probable cause – confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent who are never covered by the rule of confidentiality.

E. Informal Admonition – RULE 203(a)(4) and (5) – done by Disciplinary Administrator in person – informal admonition is public discipline. There is no private disciplinary sanction - RULE 210(c). The majority of sanctions are informal admonitions.

1. Given on order of Review Committee after probable cause is found – appealable by the respondent to a formal hearing – RULE 210(c) and (d)

2. Given on report of hearing panel after hearing – RULE 211(f) – no appeal

3. Given on order of Supreme Court after hearing arguments – RULE 203(a)(5)

F. Disbarment by Consent – RULE 217 (voluntary surrender of license) – any attorney surrendering license during disciplinary proceeding shall be disbarred. Surrender stops pending disciplinary proceeding. Most disbarments occur this way.

G. Kansas Board for Discipline of Attorneys – RULE 204 – 20 lawyers appointed by the Supreme Court – decision makers within the disciplinary system - sit on Review Committee and Hearing Panels.

H. Immunity – disciplinary proceedings are deemed a judicial proceeding – all participants in disciplinary proceedings are granted judicial immunity and public-official immunity – RULE 223.

VII. REVIEW COMMITTEE

RULES 204, 205 and 210

A. Review Committee – consists of three members – two of whom must be members of Kansas Board for Discipline of Attorneys – RULE 204(e) and 210(c) – major function is to determine probable cause as to each docketed complaint – RULE 210(c).

B. After investigation, Disciplinary Administrator makes recommendation to the Review Committee. RULE 210(c). Recommendations may be:

1. Dismissal
2. Diversion
3. Informal Admonition
4. Institution of formal charges before a hearing panel

C. The Review Committee has the following powers:

1. **Before** a probable cause finding:
   
   (a) Direct further investigation – RULE 210(c)
   
   (b) Place case on hold pending outcome of related civil or criminal cases – RULE 214

2. **After** a probable cause finding – RULE 210(c), (d)
   
   (a) Dismiss -- over 75%
   
   (b) Offer diversion
   
   (c) Direct imposition of informal admonition
   
   (d) Direct the institution of panel hearing procedures against the lawyer

VIII. FORMAL HEARINGS

RULES 211, 215, 216, 223 and 224

A. Heard by a panel of three attorneys - two are members of the Kansas Board for Discipline of Attorneys and the third member is an “at-large” attorney. Chair of Board of Discipline chooses hearing panel members – RULE 211(a).

B. Hearings held in Topeka in the hearing room at the office of the Disciplinary Administrator – but may be conducted any place in the state – RULE 211(a).

C. Disciplinary Administrator drafts the Formal Complaint and serves it on the Respondent at his or her last registered address – RULE 215 and 208.

D. Respondent’s answer due within 20 days after service – RULE 211(b).

E. Hearing date set by presiding officer of hearing panel – notice of hearing is served on respondent by Disciplinary Administrator – RULE 211(d) – hearing is usually scheduled to be held at least 60 days after date of Formal Complaint.

E. Formal evidentiary hearing – RULE 211

1. Rules of evidence and the rules of civil procedure apply, except where the Rules provide otherwise – RULE 211(d) and (e) and 224

2. Disciplinary Administrator prosecutes case – RULE 205(c)(6)
3. Disciplinary Administrator has burden of proof by clear and convincing evidence – RULE 211(f)

4. Criminal convictions and civil judgments based on clear and convincing evidence shall be conclusive evidence of the commission of that crime or wrong – a diversion agreement is deemed a conviction. All other civil judgments are prima facie evidence requiring respondent to disprove the findings – RULE 202

5. Adjudication of attorney misconduct in another jurisdiction is binding in Kansas – only issue is discipline – RULE 202

6. Deviation from rules or procedures are not a defense or grounds for dismissal absent actual prejudice – RULE 224(d)

7. If attorney intends to request probation, the attorney must file with the panel a written plan of probation at least 14 days before the hearing – RULE 211(g)

F. Final Hearing Report – Rule 211(f).

1. Panel must prepare a report setting out findings of fact and recommendations of discipline

2. Hearing Panel may consider prior record of respondent and any other mitigating or aggravating circumstances – which must be set forth in the Final Hearing Report – RULE 211(f)

3. American Bar Association Center for Professional Responsibility publishes the Standards for Lawyer Sanctions, which the hearing panel and the Supreme Court use in considering sanction - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf

4. Possible actions by Hearing Panel:

   a. Dismissal

   b. Imposition of informal admonition by panel through Disciplinary Administrator

   c. Recommendation of public censure, suspension, disbarment or any other methods of disposition with or without conditions – any of which require the case to be sent to the Supreme Court – RULE 203(a)(1)(2)(3) and (5) and RULE 211(f)

5. Appeal by Disciplinary Administrator – RULE 211(f)
6. Hearing Panel may assess costs of the proceeding to the respondent – RULE 224(c)

IX. SUPREME COURT HEARING

RULES 212, 224 AND 203

A. Docketing with the Court – RULE 211(f) and RULE 212. Case is captioned: In the Matter of [Respondent’s Name].

B. The record of the case consists of formal complaint, answer, panel report, transcript of hearing, if any, and all evidence admitted by the panel – RULE 212(b).

C. Respondent must, within 20 days, waive exceptions or file exceptions to the panel report. Any part of the hearing report not specifically excepted to shall be deemed admitted – RULE 212(c).

D. If exceptions are waived or not filed, the case will be set for hearing before the Supreme Court at which time respondent may make arguments with respect to the discipline to be imposed – RULE 212(d).

E. If respondent files timely exceptions:

1. Respondent’s brief due 30 days after service of transcript – RULE 212(e)(2)

2. Disciplinary Administrator’s brief due 30 days after respondent’s brief – RULE 212(e)(3)

3. Respondent has 10 days to file a reply brief

4. If respondent fails to file brief within 30 days after service of transcript the facts of the panel report are deemed to be supported by the evidence – RULE 212(e)(4)

5. The matter is then set for oral argument – RULE 212(e)(5)

F. Disposition – recommended sanction of hearing panel or Disciplinary Administrator is only a recommendation – Supreme Court can do any of the following – RULE 212 and 203:

1. Dismiss

2. Disbar

3. Suspend license – indefinite or definite
a. With or without probation

4. Impose public censure – published or unpublished

5. Impose informal admonition.

6. Impose any other sanction, discipline or condition deemed appropriate by the Supreme court

G. Sanction of disbarment or suspension is effective immediately upon the filing of the opinion – opinions are filed on Friday of court week following arguments – a known date.

H. Imposition of costs by Supreme Court if discipline is imposed – RULE 224(c).

I. Direct appeal by way of certiorari to U.S. Supreme Court – only remedy.

X. ACTION AFTER DISCIPLINE OF SUSPENSION OR DISBARMENT

RULE 218

A. Respondent must notify all clients in writing of suspension or disbarment and respondent must notify courts and opposing counsel in writing and withdraw as counsel of record – violation of any suspension order is the unauthorized practice of law and a violation of KRPC 5.5 - RULE 218.

B. Respondent must pay costs assessed – RULE 224 and 218.

C. Proof of compliance with RULE 218 is condition precedent to filing Petition of Reinstatement – RULE 218(b).

XI. REINSTATMENT OF SUSPENDED OR DISBARRED ATTORNEYS

RULE 219

A. Disbarred attorney not eligible to apply for reinstatement for 5 years; suspended attorney not eligible for 3 years – RULE 219(a).

B. Petition for Reinstatement to Supreme Court – RULE 219(b).

C. Payment of $1,250 and any outstanding costs before any action by court – RULE 219(b)(2).

D. Determination by Supreme Court of whether sufficient time has elapsed considering the gravity of the acts leading to suspension or disbarment to justify reconsideration of prior order – RULE 219(d).
E. If petition for reinstatement is not dismissed it is then referred to Disciplinary Administrator for investigation and then to the Board of Discipline for hearing – RULE 219(d).

F. Full evidentiary hearing before hearing panel – respondent must prove a list of factors set out in the Rule by clear and convincing evidence – RULE 219(d)(4).

G. If hearing panel report recommends reinstatement the matter is then submitted to the Supreme Court – if hearing panel report recommends denial of reinstatement petitioner has 15 days to file written exceptions with the court – RULE 219(e).

H. Supreme Court may deny the petition or grant the petition with or without conditions or limitations - RULE 219(f) – Decision is made without briefs or oral argument unless requested by the Court – RULE 219(e).

XII. PROCEDINGS WHERE ATTORNEY IS INCAPACITATED – RULE 220; APPOINTMENT OF COUNSEL TO PROTECT CLIENTS’ INTEREST – RULE 221; AND IMPAIRED LAWYERS ASSISTANCE PROGRAM – RULE 206

These three rules constitute the court’s directions in assisting attorneys who have, because of mental, physical or other impairment, become incapacitated – allows district court to appoint attorney to protect the interests of clients of neglectful or incapacitated attorney – allows state and local bar association to establish and fund impaired lawyers assistance committees.

XIII. ANNUAL REGISTRATION – RULE 208

Establishes system for annual attorney registration – establishes 4 groups of attorneys – active, inactive, retired, or inactive due to physical or mental disability – only active attorneys may practice law – attorneys who are retired or inactive and not engaged in the practice of law for any reason cannot reenter the practice of law without obtaining an order of the court – no registration or practice without payment of CLE fee and compliance with CLE requirements.
COMPLAINT (can be from many different sources)

Intake review
- Does complaint allege possible misconduct?
  - NO: Complaint dismissed
  - MAYBE: Informal inquiry
  - YES: Copy of complaint sent to respondent for response within 20 days

Complaint docketed
- Investigated in-house or assigned out to volunteer attorneys for investigation
- Investigation report sent to Disciplinary Administrator
- DA submits Rule 254 report with complaint, response, & investigators' report to Review Committee (RC) with recommendation for disposition

Review Committee
- Orders informal admonition (IA)
- Orders Formal Hearing
- DA files Formal Complaint

PANEL HEARING & FINAL HEARING REPORT
- No misconduct
- Disciplinary Recommendation
  - Published censure
  - Suspension for a term
  - Indefinite suspension
  - Probation

Docketed with Kansas Supreme Court
- Appearance before Kansas Supreme Court

DECISION
- Discipline imposed
  - Published censure
  - Suspension for a term
  - Indefinite suspension
  - Probation
  - Disbarment
- Complaint dismissed

NOTE: Once a complaint is docketed, Review Committee approval is required for any disposition on the complaint, e.g., diversion, dismissal, filing formal charges, etc.
SELECTED TOPICS AND MISCELLANY 2015 CLE

Recent Developments in Labor and Employment Law

Prof. Joseph P. Mastrosimone
Bailie Bern

It has been another busy year in labor and employment law. The U.S. Supreme Court took decided five significant cases this term, the National Labor Relations Board continues to find new ways to apply the act to nonunion workplaces, and we even had a rare case applying the Genetic Information Nondiscrimination Act to a rather unique set of circumstances.

I. U.S. SUPREME COURT REVIEW

A. When Standing in Line is Not Compensable Time

In Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014), the Supreme Court held the time employees spend undergoing security screenings following the completion of their shifts was noncompensable under the Fair Labor Standards Act as amended by the Portal-to-Portal Act.

Jesse Busk and Laurie Castro worked as hourly employees for warehouses in Nevada, retrieving and packaging products for delivery to Amazon customers. Integrity Staffing required all employees undergo a security screening following the end of their workday. The screenings required employees to remove personal items like belts, wallets, and keys and move through metal detectors. The employees allege this process took twenty-five minutes for which they were not compensated. The employees further argue the screenings were for the sole benefit of Integrity Staffing and its customers and were conducted to prevent employee theft. In 2010, Busk and Castro filed a class action against Integrity Staffing on behalf of all similarly situated Nevada employees for violations of the Fair Labor Standards Act and Nevada labor laws.

The district court dismissed the class action for failure to state a claim, finding that the time spent in the screening process was noncompensable under the FLSA. The district court reasoned the screenings were not integral and indispensable to the principal activities the employees were employed to perform but rather were noncompensable postliminary activities.

The employees appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court’s decision finding post-shift activities that are ordinarily noncompensable become compensable if they are necessary to the employee’s principal work and completed for the benefit of the employer. The Ninth Circuit accepted the employees’ assertion that the security screenings solely benefitted the employer and were necessary to the employees’ principal work in the warehouse.

Overturning the Ninth Circuit, the Court found Congress explicitly exempted postliminary activities like the security screenings at issue from the FLSA compensation requirements in the Portal-to-Portal Act. The Court reasoned that Congress’ intent in passing the Portal-to-Portal Act was to overturn the Supreme Court’s broad interpretation of work and workweek and the vast amount of

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litigation that resulted. The Portal-to-Portal Act held activities occurring after a shift were only compensable if they were part of the employee’s principal activity. The Court interpreted principal activity to refer to all conduct that is an integral and indispensable part of the principal activities. Conduct is integral or indispensable if it is an intrinsic element of the principal activity and the employee cannot perform his principal activity without the conduct in question. Utilizing this definition, the Court reasoned the screenings were not part of the principal activities for which the employees were employed to perform. The security measures were not an intrinsic element of retrieving and packaging warehoused goods and Integrity Staffing could have eliminated the security protocol without impairing the employees’ ability to perform their work. The Court clarified the Ninth Circuit’s reasoning that any post-shift work required by the employer must be compensable was faulty; finding the integral and indispensable standard was rooted in the work the employee was employed to perform.

B. Yard-Man Presumption Deep Sixed

The Supreme Court recently held in M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015), that the Sixth Circuit’s precedent of extending retiree health care benefits for life violated ordinary principles of contract law and could not be utilized in interpreting the collective bargaining agreement at issue.

Several former employees, now retirees, of the Point Pleasant Polyester Plant were represented by various unions in collective bargaining efforts. When M&G Polymers purchased the Plant, it entered into a master collective-bargaining agreement as well as a Pension, Insurance, and Service Award Agreement with the Union. The agreement provided for retiree health care benefits paid solely by the company’s contributions. The agreements opened with a durational clause establishing that the agreement would be renegotiated in three years. Six years later, M&G declared that retirees were now required to contribute to their health care benefits. Several retirees filed a class action suit against M&G alleging that the alteration requiring their contributions breached the collective bargaining agreement because M&G had promised to provide lifetime health care benefits contribution-free.

The district court dismissed the class action for failure to state a claim. The court held the agreement was unambiguous and failed to create a vested right to retiree health benefits. Relying on its precedent in Yard-Man, the Sixth Circuit reversed the district court’s decision in finding the retirees stated a plausible claim upon which relief could be granted. International Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983). The Sixth Circuit concluded in Yard-Man that in the absence of contrary extrinsic evidence, the contract indicated an intent to vest lifetime retiree benefits. The court premised its reasoning on the context of labor negotiations in arguing it was unlikely the union would endorse an agreement that enabled the company to unilaterally change the level of contribution for retiree health benefits. The court determined the intent was to vest lifetime contribution-free retiree health care benefits.

On remand, the district court held for the retirees finding the Sixth Circuit effectively resolved the issue that the agreement created a vested retiree benefits right. The Sixth Circuit affirmed.

The Supreme Court first determined that ERISA distinguishes between pension plans and welfare benefits plans by explicitly exempting the latter from the strict minimum funding and vesting standards outlined in the statute. ERISA generally allows employers or plan sponsors to adopt, modify, or terminate welfare benefits plans for any reason at any time. The Court reiterated that the rule requiring contractual provisions to be enforced as written was particularly relevant to ERISA welfare
plans; thus, ERISA plans are interpreted according to principles of contract law unless inconsistent with federal labor policy.

The Court further concluded that the Sixth Circuit’s reasoning in Yard-Man and subsequent cases misapplied multiple traditional contract principles and was not rooted in a factual basis. The Sixth Circuit’s ruling was contradictory and failed to apply the crucial principles that courts should not interpret ambiguous writings to create lifetime promises and contractual obligations terminate upon the termination of the bargaining agreement. The Court remanded the case for the district court to apply principles of contract law rather than the principles outlined in Yard-Man.

C. PDA Accommmodations Meet the McDonnell Douglas Burden Shifting Analysis

In Young v. United Parcel Service, Inc. 135 S. Ct. 1338 (2015), the Supreme Court held a pregnant employee may assert an Americans with Disabilities Act (ADA) and Pregnancy Discrimination Act (PDA) violation by showing the employer accommodates a large amount of non-pregnant workers but fails to accommodate a large amount of pregnant workers. In alleging a disparate treatment claim, a pregnant employee must show either intentional discrimination through direct evidence or make out a prima facie discrimination case under the McDonnell Douglas framework.

Peggy Young worked as a part-time driver for UPS. Her job duties included pickup and delivery of packages arriving the previous night. After several miscarriages, Young became pregnant and her doctor told her not to lift more than twenty pounds in the first twenty weeks and no more than ten pounds for the remainder of the pregnancy. UPS required drivers to lift parcels weighing up to seventy pounds and informed Young she could not work with a lifting restriction. Young remained home without pay during most of her pregnancy and lost her employee medical coverage. Young filed a federal lawsuit against UPS alleging UPS violated federal law in failing to accommodate her pregnancy-related lifting restriction even though her co-workers were willing to assist her with heaving packages and UPS accommodated other drivers who had similar restrictions.

UPS responded that the only other workers it accommodated were drivers who were disabled on the job, employees who lost their DOT certifications, and individuals suffering from a disability covered by the ADA. UPS argued Young did not meet any of these categories; therefore it did not discriminate against Young but treated her just like other similar workers.

The district court granted UPS’ motion for summary judgment, finding Young could not prove intentional discrimination through direct evidence nor could she meet the McDonnell Douglas prima facie case of discrimination standard because the individuals UPS accommodated were too different from Young to qualify as similarly situated for comparison purposes. The court further held UPS had provided a legitimate, non-discriminatory reason for its failure to accommodate pregnant women. Young appealed to the Court of Appeals for the Fourth Circuit who affirmed the district court’s judgment. The Fourth Circuit found UPS created a pregnancy-blind policy that is facially neutral and part of a legitimate business practice. The court argued Young was not disabled, as her lifting restriction was only temporary and not a significant reduction on her ability to complete major life activities.

The Supreme Court first noted the significance of the holding in this case is diminished by Congress’ expansion of the definition of disability under the ADA in a 2008 amendment to require employers to accommodate employees for temporary lifting restrictions that originated off the job.
The Court clarified the question at issue to revolve around the interpretation of which characteristics a court can rely upon in comparing a pregnant worker with non-pregnant workers receiving accommodations. Young argued the ADA and PDA require employers provide the same accommodations to a pregnant employee as the employer would provide that employee if the work limitation resulted from a different cause but had a similar effect on the employee’s inability to work. UPS asserts pregnant employees should only be compared to others within a facially neutral category.

The Court rejected both parties’ interpretations. First, the Court rejected Young’s argument by finding it doubtful that Congress would intend to grant pregnant employees an unconditional “most-favored-nation” position. Additionally, the Act allows employers to create policies that unintentionally harm a protected class if the employer establishes a legitimate, nondiscriminatory, non-pretextual rationale for the action. Prior to the PDA, the EEOC issued guidance stating pregnancy related disabilities were temporary disabilities that should be treated the same as other temporary disabilities. Following the PDA, the EEOC further clarified that if other employees temporarily unable to lift are offered an accommodation, pregnant employees with the same inability to lift must be offered the same accommodation. However, the Court found this was unhelpful because it did not establish how an employer should act when the employer does not treat all non-pregnancy disabilities the same.

The Court ultimately resolved the issues it had with Young and UPS’s approaches by extending the McDonnell Douglas framework. The Court held an employee alleging the denial of an accommodation established a disparate treatment claim under the PDA, may provide a prima facie case by showing: (1) the pregnant employee belongs to the protected class; (2) the employee sought an accommodation; (3) the employer failed to accommodate her; and (4) the employer accommodated other employees similar in their inability to work. The employer may justify its failure to accommodate the pregnant employee by showing reliance or legitimate, nondiscriminatory reasons for denial of the accommodation. The employee can then respond by arguing the employer’s reasons were in fact pretextual and imposed a significant burden on pregnant workers that was not justified by a sufficiently strong legitimate and nondiscriminatory purpose. The pregnant employee may show a genuine issue of material fact concerning the existence of a significant burden by illustrating the employer accommodates a large amount of non-pregnant workers but fails to accommodate a large amount of pregnant workers.

D. Mach Ado About Nothing: EEOC’s Obligation of Conciliation

The Supreme Court held judicial review extended to the determination of whether the EEOC satisfied its statutory obligation to try to conciliate with an employer prior to commencing a Title VII action. The Court elaborated in finding the review was limited and narrow leaving extensive discretion to the EEOC to determine the appropriate form and amount of communication necessary in a given case.

Upon receipt of a complaint, the EEOC may pursue two separate paths. First, the EEOC may find no reasonable cause to believe the allegation has merit and dismiss the charge while notifying the parties and allowing the complainant to pursue her own lawsuit if she wishes. Alternatively, the EEOC may find reasonable cause for the allegation in which case the EEOC is required to attempt to eliminate the practice by informal means of conference, conciliation, and persuasion. The EEOC has ultimate power to determine whether to accept a settlement or bring a lawsuit.

A woman filed a complaint with the EEOC claiming that Mach Mining, LLC refused to hire her as a coal miner due to her gender. The EEOC found reasonable cause existed to believe that Mach Mining discriminated against the woman and a class of women who had applied for similar mining jobs.
The EEOC then sent a letter declaring this determination and inviting Mach Mining and the complainant to participate in dispute resolution. The EEOC stated a representative would contact the parties soon to set up the conciliation process. A year later the EEOC sent Mach Mining a second letter stating the required conciliation process had occurred, was unsuccessful, and future efforts would be futile. The EEOC then sued Mach Mining. Mach Mining responded by arguing the EEOC failed to conciliate in good faith before filing suit. The EEOC argued its conciliation process was not subject to judicial review.

The trial court held judicial review of the EEOC’s conciliation efforts was warranted to determine if the Commission made a sincere and reasonable attempt to negotiate before bringing suit. The court authorized an immediate appeal of the ruling. The Seventh Circuit reversed the trial court’s decision in finding the statutory requirement of conciliation was not subject to judicial review and was solely left to the EEOC’s expert judgment.

The Court granted review because other circuits have concluded Title VII allows judicial review of the EEOC’s efforts to conciliate. The Court found Congress seldom intends to prevent judicial review to enforce Congressional directives to federal agencies, meaning the Court applies a strong presumption of judicial review of administrative action. The presumption may only be rebutted if the statutory language or structure shows Congress wanted the agency to police its own conduct. The agency must meet the heavy burden of showing Congress precluded all judicial review of the agency’s compliance with the statutory requirements.

The statutory requirement of conciliation is mandatory and imposes a duty that serves as a necessary prerequisite to filing a lawsuit. The Court compared the conciliation requirement to other prerequisites within Title VII. For example, an employee may only bring a Title VII claim if she first filed a timely charge with the EEOC and obtained a right-to-sue letter before bringing suit. While the statute provides broad discretion to the EEOC concerning the extent of the conciliation process, the Court found this is only relevant to the determination of the scope of the judicial review rather than whether judicial review exists at all. The Court concluded Title VII provides reviewable standards regarding what the conciliation process must contain, including communication between parties, exchange of information and viewpoints concerning the nature of the claim, and an opportunity for the employer to achieve voluntary compliance.

After concluding the Court may review the EEOC’s efforts at conciliation, the Court limited the judicial review to a very narrow area. The Court ultimately stated a sworn affidavit from the EEOC alleging it performed its conciliation obligations and was ultimately unsuccessful would suffice to meet the statutory requirement. However, the employer may provide credible evidence in a sworn affidavit or other means to indicate the EEOC did not provide the required information about the charge or failed to attempt to engage in conciliation of the claim. The court must then conduct a limited factfinding to decide the dispute. If the court finds in favor of the employer, the court must order the EEOC to engage in the required efforts to obtain voluntary compliance.

E. “You [Don’t Have] the Look:” Religious Accommodations Under Title VII

In EEOC v. Abercrombie & Fitch Stores, Inc., -- S. Ct. --, 2015 WL 2464053 (2015), the Supreme Court found an applicant does not have to prove the employer had actual knowledge of a religious practice requiring an accommodation. The applicant need only show the necessity for an accommodation was a motivating factor in the hiring process.
Title VII of the Civil Rights Act forbids an employer from refusing to hire an applicant to avoid accommodating a religious practice it could have accommodated without undue hardship. Abercrombie & Fitch imposes a Look Policy on all employees including a prohibition against “caps.” Samantha Elauf, a practicing Muslim, applied for a position with Abercrombie and was interviewed by the store’s assistant manager. Consistent with her religion’s requirements, Elauf wears a headscarf. Using Abercrombie’s evaluation system, the assistant store manager gave Elauf a rating high enough to get her hired. However, the assistant manager was concerned Elauf’s headscarf conflicted with the Look Policy. The assistant manager consulted with the district manager, informing her she believed Elauf wore the headscarf because of her faith. The district manager confirmed the headscarf violated the Look Policy regardless of any religious basis. The EEOC sued Abercrombie on Elauf’s behalf alleging a Title VII violation.

The district court granted the EEOC’s motion for summary judgment on the liability issue and awarded damages of $20,000 following a trial. Abercrombie appealed and the Tenth Circuit reversed and awarded Abercrombie summary judgment. The Tenth Circuit concluded that an employer is only liable under Title VII for failing to accommodate a religious practice if the applicant provides actual knowledge of the need for the accommodation.

The Court disagreed with Abercrombie’s argument that an applicant must show the employer has actual knowledge of the applicant’s need for an accommodation in order to prove disparate treatment. The Court found an applicant must only show the necessity for an accommodation was a motivating factor in the employer’s refusal to hire the applicant. In so holding, the Court determined the language “because of” in Title VII incorporated a requirement that an individual’s religious practice must not be a motivating factor in the hiring process. Unlike many other antidiscrimination statutes, the statute at issue does not impose a knowledge requirement but rather prohibits certain motives regardless of the employer’s knowledge. Further, Title VII requires employers change neutral policies to adapt for the need for an accommodation for religious purposes.

II. GENETICS DISCRIMINATION: DEFECATION, DNA, AND DAMAGES


Atlas provides transportation and storage of grocery food items and maintains several warehouse facilities. Beginning in 2012, an unknown employee(s) began defecating in one of Atlas’s warehouses, requiring the destruction of grocery products following at least one occurrence. Atlas requested its loss prevention manager conduct an investigation consisting of a comparison of employee work schedules to the timeline and location of the defecation periods. The investigation resulted in Atlas requesting employees Jack Lowe and Dennis Reynolds consent to a cheek swab to compare their DNA to the DNA in the fecal matter. The DNA analysis allowed the lab hired by the employer to compare the employees’ DNA with the fecal matter, but did not allow for a determination of the employees’ proclivity for a particular disease or disorder. The DNA results from the two employees did not match the DNA in the fecal matter (and the true culprits are still at large!).

The two employees filed an EEOC complaint and received a right to sue letter. The employees then filed a federal lawsuit against Atlas. Atlas argues the DNA analysis does not meet the definition of
“genetic information” as defined in GINA. Atlas asserts GINA defines genetic information to refer solely to an individual’s propensity for disease.

The court determined a plain language interpretation of GINA precluded Atlas from requesting the employees’ genetic information in the form of a cheek swab. GINA defines genetic information as an individual’s genetic test which is further defined as an analysis of human DNA. The court found both parties agreed the lab conducted an analysis of the employees’ DNA that at a minimum detects genotypes and mutations. The parties also agree Atlas requested the comparison of the employees’ DNA to the fecal DNA, thus violating GINA’s prohibition against employers requesting genetic information from employees.

The court’s holding was limited to the determination of liability. The trial to determine damages will begin this month and legal scholars are paying close attention to see just how much fecal matter will hit the fan. While there is plenty of precedent regarding remedies for employment discrimination, GINA has been seldom litigated. Where, as here, an employer requests and obtains genetic information but fails to act on it, the extent of a damage award is new territory.

III. TRADITIONAL LABOR LAW UPDATE³

As has been this Board’s history, the NLRB has been active in applying the National Labor Relations Act and particularly the right of employees to engage in protected concerted activities under Section 7 of the Act to non-union workplaces.

A. Employer Handbooks v. Section 7

The National Labor Relations Board has long held that the mere maintenance of certain work rules may violate Section 8(a)(1) of the Act even in the absence of enforcement.⁴ The appropriate inquiry is whether the rule in question “would reasonably tend to chill employees in the exercise of their Section 7 rights.”⁵ The Board has adopted a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1):⁶

Step 1: A rule is unlawful if it explicitly restricts Section 7 activities.
Step 2: If the rule does not explicitly restrict protected activities, it will still violate the Act if:

1. Employees would reasonably construe the language to prohibit Section 7 activity,
2. The rule was promulgated in response to union activity, or
3. The rule has been applied to restrict the exercise of Section 7 rights.

³ The following material is based on CLE materials created for a KBA CLE presentation drafted by Joseph Mastrosimone, Julie Covel, and Alexander Rodriguez.
⁵ Id. at 825.
Within that analysis, rules that are promulgated in response to particular union activity, that reference specific union activity, or that are applied to restrict Section 7 activity present easy cases. Rules that are merely capable of being reasonably construed as prohibiting Section 7 activity present employers with the most difficult situations given the potential universe of rules that would fall within 8(a)(1)’s sweep.

The Board has over the last few years applied those principles to a wide swath of seemingly neutral and fairly common employer work rules

1. Confidentiality Rules

Three recent cases illustrate the Board’s developing position on rules that require employees to keep certain information confidential.

In *Lafayette Park Hotel*, the Board found that an employer’s general confidentiality provision did not run afoul of Section 7. There, the Employer’s “Standard of Conduct 17” made unacceptable “Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.” The Board held that “the rule reasonably is addressed to protecting the Respondent’s interest in confidentiality and does not implicate employees Section 7 rights” and the mere maintenance of the rule does not violate Section 8(a)(1). *Id.* The Board acknowledged that businesses have a “substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.” Although the term “hotel private” was not defined elsewhere in the rule, the Board concluded that employees would not reasonably understand the rule to prohibit the discussion of wages or other terms and conditions of employment.

The Board reached the opposite conclusion in *Flamingo Hilton-Laughlin*. There, the employer’s rule outlawed employees from revealing “confidential information regarding our customers, fellow employees, or Hotel business.” The Board affirmed the ALJ’s finding that the maintenance of the rule was unlawful. The majority of the Board distinguished this rule from the rule found lawful in *Lafayette Park Hotel* on the basis that, unlike that rule which made no reference to disclosure of employee information, the rule in *Flamingo* specifically prohibited the disclosure of confidential information about “fellow employees.”

Likewise in *Flex Frac Logistics, LLC*, the Board struck down an employer confidentiality rule. The rule defined confidential information as including “but is not limited to, information that is related to: . . . personnel information and documents” and prevented employees from sharing that information

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7 326 NLRB 824, 826 (1998).
8 *Id.* at 826.
10 *Id.* at 292.
11 *Id.* at 288 n.3.
12 358 NLRB No. 127 (September 11, 2012).
“outside the organization . . . .” The Board affirmed the ALJ’s finding that the maintenance of the rule was unlawful because employees would reasonably believe they were prohibited from discussing terms and conditions of employment with nonemployees, including union representatives. Significantly, the Board majority noted that “ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer.” The Board majority characterized the Employer’s confidentiality rule as being “broadly written with sweeping, nonexhaustive categories” and cited Hyundai America Shipping for the established principle that employees should not have to decide whether the law excludes some information from the Employer’s prohibition.

2. Wages

An employer rule that forbids employees from sharing wage information will almost always violate Section 7. In Design Tech. Grp., LLC, the Board struck down such a rule. The rule in question included the following language: “Compensation programs are confidential between the employee and [Bettie Page]. Disclosure of wages and compensation to any third party or other employee is prohibited and could be grounds for termination.” The Board affirmed ALJ’s ruling that the maintenance of such a rule was unlawful. It is well-established that Section 7 of the Act protects the right of employees to discuss wages with other employees and nonemployees. Thus, an employer may not maintain a rule prohibiting employees from engaging in such activity.

3. Investigations

The Board has taken a fairly controversial position among management lawyers and human resources professionals regarding the confidentiality of internal investigations. In Hyundai Am. Shipping Agency, Inc. the Employer maintained an oral rule prohibiting its employees from discussing with other persons matters under investigation by human resources. The Board adopted the ALJ’s finding and rationale that the maintenance of such a rule violated Section 8(a)(1). In maintaining a rule prohibiting employees from discussing investigations, the burden is on the employer to “demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.” In this case, the Board acknowledged that the employer gave this instruction in every

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13 Id. at *2.
14 361 NLRB No. 79 (October 31, 2014). This case was originally decided and the decision published at 359 NLRB No. 96 but subsequently vacated following the U.S. Supreme Court’s decision in Noel Canning. That prior Decision and Order was incorporated into 361 NLRB No. 79.
15 See also LWD, Inc., 309 NLRB 214 (1992); Triana Indus., 245 NLRB 1258 (1979). A rule prohibiting employees from discussing their salaries with anyone outside of the company is also unlawful. Bigg’s Foods, 347 NLRB 425 n. 4 (2006).
16 357 NLRB No. 80 (August 26, 2011).
17 Id. at 27. Compare Caesar’s Palace, 336 NLRB 271 (2001) (finding lawful an employer’s rule prohibiting discussion of on-going drug investigation, with Phoenix Transit Sys., 337 NLRB 510 (2002) (finding unlawful an employer’s rule prohibiting employees from discussing their sexual harassment complaints). In Caesar’s Palace, the Board concluded that the Employer had demonstrated legitimate justifications for the rule, specifically protection of witnesses and evidence. The Board distinguished the rule in Phoenix Transit Systems from that in Caesar’s Palace, concluding that the timing of the sexual harassment investigation did not support a legitimate need by the Employer to prohibit such discussions. See also Whole Food Market-Green Hills, Case 26-CA-23655, Advice Memorandum, dated July 19, 2010 (Division of Advice concluding that maintenance of rule prohibiting disclosure of information related to internal investigations unlawful).
investigation and there was no indication that the employer considered whether such confidentiality was “truly necessary.”

In *Battle’s Transp., Inc.*,18 struck down a written confidentiality statement. There, the Employer required employees to sign the following confidentiality agreement:

The Employee acknowledges that, in the course of employment by the Employer, the Employee has, and may in the future, come into the possession of certain confidential information belonging to the employer including but not limited to human resources related information, . . . investigations by outside agencies (formal and informal) . . . The Employee hereby covenants and agrees that he or she will at no time, during or after the term of employment, use for his or her own benefit or the benefit of others, or disclose or divulge to others, any such confidential information.19

The Board found maintenance of the rule unlawful. The Board concluded that the rule was “overbroad to the extent that it bars employees from discussing human resources related information and investigations by outside agencies” because employees could reasonably interpret such conditions has prohibiting the discussion of protected activity. The Board also highlighted the second paragraph of the agreement, concluding that the prohibition on sharing the confidential information would reasonably be interpreted to limit protected concerted activity.20

4. **Limits on Other Employee Communications:**

The Board has found that more general civil codes also violate the Act. In *Hills & Dales General Hosp.*,21 the Employer maintained the following rule: “[Employees] will not engage in or listen to negativity or gossip. [Employees] will recognize that listening without acting to stop it is the same as participating.” The Board adopted the ALJ’s finding that maintenance of the rule violated Section 8(a)(1). The Board noted that it has been well established that rules prohibiting “negativity” violate Section 8(a)(1).22 The Board also concluded that the rule was too broad and patently ambiguous and

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18 362 NLRB No. 17 (Feb. 24, 2015).
19 Id. at *2.
20 Id.
21 360 NLRB No. 70 (April 1, 2014). See also Laurus Tech. Institute, 360 NLRB No. 133 (June 14, 2014) (finding no gossip policy unlawful both facially and as applied).
22 See The Roomstore, 357 NLRB No. 143, slip op. at *1 n.3 (Dec. 20, 2011); Salon/Spa at Boro, Inc., 356 NLRB No. 69, slip op. at 14-15 (2010).
would reasonably be construed as prohibiting discussions and disagreements about Section 7 activity.\textsuperscript{23} Significantly the Board noted that if the rule had been limited to gossip that it would have been lawful under the decision in *Hyundai American Shipping Agency*.\textsuperscript{24}

A rule banning defamatory comments was also found to violate Section 7 in *Dish Network Corp.*\textsuperscript{25} There, the Employer maintained the following social media rule: “You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services.” The Board found the rule unlawful. The Board relied on numerous cases which held similar rules creating limitations on negativity unlawful.\textsuperscript{26}

A rule banning “negative comments” received similar treatment from the Board in *Hills & Dales General Hosp.*\textsuperscript{27} There, the Employer banned “negative comments about our fellow team members.” The Board affirmed the ALJ’s finding that the rule was unlawful. The Board concluded that “team member” includes managers and employees. Based on that conclusion, the Board held that a rule prohibiting negative comments about “team members” would reasonably be construed as a bar to discussions about employee complaints about managers.\textsuperscript{28}

B. **NLRB and Modern Methods of Communication**

The Board has been aggressively applying the Act to employer policies regarding the use of employer owned e-mail systems and employee comments on social media.

1. **Employer’s Email System**

In *Purple Communications, Inc.*\textsuperscript{29} the Board held (3-2) that employees have a statutorily protected right to use their employer’s email system for protected communications, overruling its prior

\textsuperscript{23} Relying on the decision in *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at *2* (2011) (finding phrase “inability or unwillingness to work harmoniously” patently ambiguous). The Board recently found rule prohibiting “discourteous or inappropriate attitude or behavior to passengers, or other employees, or members of the public” to be unlawfully overbroad. *First Transit Inc.*, 360 NLRB No. 72, slip op. at *3* (April 2, 2014) (finding phrase “inappropriate attitude or behavior to be “patently ambiguous” similar to the rule in *2 Sisters Food Group*). However, the Board in *First Transit, Inc.* found lawful the portion of the rule prohibiting “profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious.” *Id.* The Board rejected the argument that “uncivil” and “insulting” were so patently ambiguous to render the entire rule unlawful. *Id.* Rather the Board concluded that employees would reasonably construe that they “comport themselves with general notions of civility and decorum.” *Id.* (citing *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 654 (2004)).

\textsuperscript{24} 357 NLRB No. 80, slip op. at *2* (2011).

\textsuperscript{25} 359 NLRB No. 108 (Apr. 30, 2013).

\textsuperscript{26} See *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at *2* (2012); *Karl Knauz Motors*, 358 NLRB No. 164 (2012).

\textsuperscript{27} 360 NLRB No. 70 (April 1, 2014).

\textsuperscript{28} The Board relied on the decision in *Claremont Resort & Spa*, 344 NLRB 832 (2005) where a rule prohibiting negative conversations about managers and other employees was found unlawful. Compare *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011) (finding a rule that prohibited “harmful gossip” lawful because the Board concluded that the rule did not prohibit discussion about managers).

\textsuperscript{29} 361 NLRB No. 126 (2014).
2007 holding in *Register Guard*. There, the Employer maintained a policy on the use of employer provided electronic communication devices including “Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment.” The policy stated that those devices and systems are “provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.” The policy prohibited employees from using those devices and systems for “2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company” and “5. Sending uninvited email of a personal nature.”

In finding that the policy violated the Act, the Board relied heavily on the increased use of e-mail as a method of communication and noted that it had “drastically expanded in recent years.” The Board stressed that the prior decisions focused “too much on employers’ property rights and too little on the importance of email as a means of workplace communication.” The Board suggested that in modern workplaces, email has become the natural gathering place used for employee-to-employee conversations, an electronic water-cooler around which employees gather. The Board noted that there are no longer concerns that employees use of certain employer equipment for personal reasons will add substantial costs and substantially limit the employers’ use of the equipment, especially communication mediums like high-capacity email and phone systems—although the Board did not expressly include phone systems in its holding, the opinion suggests that it is likely this Board would rule the same way if presented with the issue.

*Purple Communications* represents a break with past precedent and employers should be aware of the practical results. Employers who have chosen to give employees access to their email systems must presumptively permit employee use of email for statutorily protected communications on nonworking time. It should be noted that the new rule applies only to employees who have already been granted access to employer’s email system in the course of their work and does not require employer to provide such access. An employer may justify a total ban on non-work use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. But, absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. This holding does not address email access by nonemployees, and does not address any other type of electronic communication systems (e.g. Facebook, social media, etc.). Finally, the expanded use of employer controlled and monitored e-mail systems for Section 7

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30 *Register Guard*, 351 NLRB 1110 (2007). Dating back to 2000, the Board had held that employees have no Section 7 right to the use of their employers’ email systems. *Adtranz, ABB Daimler-Benz Trans., N.A., Inc.*, 331 NLRB 291 (2000). In 2007, the Board held in *Register Guard* that an employer may completely prohibit employees from using the employer’s email system for Section 7 purposes, even if employees are otherwise permitted access to the system, without demonstrating any business justification, so long as the employer’s ban is not applied discriminatorily. 359 NLRB 1110, 1116 (2007).
activity is bound to create difficulties for employers. Employers will need to assess how they implement their monitoring programs. The existence of monitoring programs may also increase employer exposure for 8(a)(3) and 8(a)(1) charges associated with employee discipline or discharge for engaging in protected concerted activities as those on-line activities will likely be presumptively within the employer’s knowledge if conducted over the employer’s monitored communication’s system.\textsuperscript{31}

2. Social Media Policies

The Board has continued to take a close look at employer policies that seek to restrict use of employees’ use of social media to make work-related comments.

In \textit{Triple Play Sports Bar and Grille},\textsuperscript{32} the Board struck down an employer’s social media policy as violating Section 7. The Employer maintained the following policy:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

The Board found that the policy violated 8(a)(1) of the Act. The Board used the test articulated in \textit{Lutheran Heritage Village}. Because the policy did not explicitly restrict any Section 7 activities, the Board discussed whether an employee would reasonably construe it to prohibit Section 7 activities. The Board held that Triple Play employees would reasonably interpret the rule as prohibiting any communication about their terms and conditions of employment that management deemed inappropriate and that this is unlawfully overbroad. The Board also noted that the policy did not contain any illustrative examples that would clarify to the employees what would be considered

\textsuperscript{31} \textit{Heath Cc.}, 196 NLRB 134 (1972).
\textsuperscript{32} 361 NLRB No. 31 (2014)
inappropriate. For these reasons the Board held that Triple Play’s Internet policy violated Section 8(a)(1).

In addition to looking at policies considered by the Board, Employers and their counsel should refer to the Agency’s memoranda for examples of lawful and unlawful social media policies. In general, rules found to be lawful clarify the prohibited conduct by including examples of clearly illegal or unprotected conduct. By including such examples, rules would not reasonably be construed to cover activity protected by the NLRA. In contrast, rules found to be unlawful generally contain no limiting language or examples that would indicate to employees that the rule does not prohibit Section 7 rights.

C. Off-Duty Employee Access Rules

In general, the Board will find a rule barring off-duty employee access to a facility is valid only if: (1) it limits access solely to the interior of the facility; (2) it is clearly disseminated to all employees; and (3) it applies to off-duty access for all purposes, not just for union activity.

In Saint John’s Health Center, the Board found that a policy barring off-duty employee access to the employer’s facility except for employer-sponsored events violated the NLRA. The Board stressed that an employer dictating a policy that employees cannot enter the facility after their shift except when the employer says they can violates the Act because it “does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose.”

However, in Sodexo America LLC, the Board opened up same space for employer exceptions to blanket no-reentry rules. There the Employer’s “no-access” policy stated that off-duty employees of the hospital were prohibited from entering or re-entering the hospital except to visit a patient, receive medical care, or to conduct hospital-related business. Hospital-related business was defined as the employee’s normal duties or duties specifically directed by management. The rule stated that any employee in violation would be subject to disciplinary action. The Board affirmed that the “visiting patients” and “seeking medical care” exceptions within the rule did not violate the Act. In situations such as these two exceptions, where off-duty employees are seeking access to the facility for reasons

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34Tri-County Med. Ctr., 222 NLRB 1089 (1976). The Board also held that rules prohibiting off-duty employees from accessing parking lots, gates, and other outside non-working areas will be found unlawful absent some business justification. Id. at 1089. See also EYM King of Michigan, LLC d/b/a Burger King, 2014 WL 4832569, JD-58-14 (NLRB Div. of Judges Sept. 29, 2014) (finding unlawful Employer’s policy prohibiting employees from loitering and soliciting either inside or outside the Employer’s premises). The Administrative Law Judge rejected the Employer’s justification that the rule was necessary because the restaurant was located in a high-crime area. The Employer also contended that work took place in the parking lot and thus it should not be considered a non-working area. The Judge characterized the work conducted in the parking lot (picking up trash and maintaining drive-thru signs) as incidental and concluded that incidental work performed on the exterior of the business does not justify a policy banning all off-duty employee access from the entire premises.
36 361 NLRB No. 97 (November 19, 2014). The original decision, 358 NLRB No. 79 (2012), was vacated and remanded to the Board for further proceedings after the U.S. Supreme Court’s decision in Noel Canning.
“unrelated to their employment, and access is granted or denied on the same basis and under the same procedures as for members of the public,” the Board stated that the third prong of the Tri-County rule is not violated. The Board also found that the “hospital related business” exception was also consistent with the Act. The Board concluded that the provision is not really an exception by a “clarification” that employees performing “hospital related business” are really on-duty employees because they are performing work under the direction of management and getting paid.

Moving forward, employers should carefully review any policies restricting off-duty employee access to ensure the policies uniformly prohibit access. Any exceptions should be drafted to avoid granting the Employer broad, unlimited discretion to decide when and why employees may access the facility.37

D. The NLRB and Arbitration

Since 2011, the NLRB has been locked in battle with various courts of appeal over the intersection of the NLRA and the Federal Arbitration Act (“FAA”). While the Supreme Court has been reading the FAA increasingly broadly and in favor of ever increasing numbers of arbitration, the NLRB has been reading the NLRA to make arbitration agreements with class action waiver unlawful under section 8(a)(1).

In D.R. Horton, Inc.,38 the Board found that arbitration agreements that waive judicial forums and that ban class treatment violate the Act by effectively banning a particular kind of protected concerted activity. Arbitration agreements containing class action waivers violate Sections 7 and 8(a)(1). The NLRB determined that Section 7 granted the employees a substantial right to act in concert together and allowed for class-action claims. The NLRB stated that the arbitration provision contained in Horton’s agreement violated 8(a)(1) because requiring employees to waive their right to maintain a class or collective employment-related action in any forum restricted the rights of the employees.

However, the Board’s position has been routinely rejected by the courts. The U.S. Court of Appeals for the Fifth Circuit recently refused to enforce the NLRB’s holding that D.R. Horton, Inc. violated the NLRA by requiring its employees to sign arbitration agreements prohibiting collective or class action claims. The NLRB’s decision failed to give proper weight to the Federal Arbitration Act (FAA). Although Section 7 of the NLRA allows employees to organize for the purposes of collective action and Section 8(a)(1) restricts an employer from restraining any right granted by the NLRA, class action claims are not a substantive right and are free to be contracted away. Although the court held that Horton’s employees had agreed to surrender collective claims and class action proceedings according to a provision within the arbitration agreement, the court did enforce the NLRB’s requirement that Horton

37 See Lytton Rancheria of California d/b/a Casino San Pablo, 361 NLRB No. 148 (2014). In Lytton Rancheria of California, the Board evaluated the rule under the Tri-County test, finding the rule was in violation of the third prong—applies to off-duty access for all purposes, not just for union activity. The Board stated that because the rule specifically permits access for business with the human resources department and pre-arranged training and orientation sessions, and the rule vests management with seemingly unlimited discretion to expand or deny access to off-duty employees, the rule violates the NLRA.
38 357 NLRB No. 184 (2012).
clarify to its employees that the agreement did not eliminate their right bring claims of unfair labor practices before the NLRB. According to the U.S. Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, class action waivers are not unlawful and the NLRB’s holding did not reflect this. There is no indication that Congress intended for the NLRA to supersede the FAA’s allowance of waiving class-action claims through an arbitration agreement. There was no conflict between the NLRA and the FAA because arbitration has been a “central pillar of Federal labor relations policy.” Modern class action procedures did not exist when the NLRA was originally enacted, so it was unlikely that Congress had intended for the NLRA to protect the procedure.

In addition to the refusal to enforce *D.R. Horton* by the Fifth Circuit, every circuit court to address the Board’s holding has rejected it.\(^{40}\)

Despite this rejection by the Fifth Circuit, the Board continues to apply *D.R. Horton* under the Board’s policy of “nonacquiescence.” Accordingly, until the make-up of the Board changes or the U.S. Supreme Court rejects the Board’s reasoning, employers should remain aware that class action waivers in arbitration policies will continue to be found to violate Section 7 by the Board. It would require expensive and lengthy appellate litigation to overturn such decisions.

**E. Franchising Under Attack**

For 30 years, the NLRB has held that “to establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.”\(^{41}\) However, on December 19, 2014, the NLRB published a public notice stating that the General Counsel had issued 13 unfair labor practice complaints against McDonald’s USA, LLC, and McDonald’s franchisees alleging that McDonalds and the franchisees are joint-employers. The 13 complaints stem from 291 charges filed since 2012.

The 13 complaints allege that certain McDonald’s franchisees violated the rights of employees by making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, as well as taking part in nationwide fast food worker protests over the past two years. The complaints are scheduled for litigation by NLRB administrative law judges across the country starting on March 30, 2015.

The General Counsel now requests that the NLRB hold McDonald’s liable because it allegedly has “sufficient control” over its franchisee operations even if McDonald’s does not have the power or authority to hire, fire, discipline, supervise or control the franchisees’ employees – a much lower standard than that set in *Laerco Transportation*. A change in the current joint-employer law would mean that both the franchisor and the franchisee would be jointly liable for any violations of the NLRA and

\(^{39}\) 131 S. Ct. 1740 (2011),
\(^{40}\) *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2nd Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).
would potentially share responsibilities in collective bargaining if the franchisors’ workers were organized.

“At this point, the primary takeaway is that employers should keep an eye on this issue as the cases against McDonald’s and Browning-Ferris go forward. If you oversee related but legally separate entities or use staffing agencies or other independent contractors to provide employees, you should consider the degree to which you exert influence over those employees to assess your exposure to liability as a joint employer. You may want to strengthen the language in your contractor agreements to provide evidence of the related entity’s control over working conditions and to indemnify your company for labor and employment law violations. Employers with joint liability exposure should be more vigilant in monitoring related entities to ensure compliance with labor and employment law.” 25 No. 9 Mich. Emp. L. Letter 4.

F. NLRB “Quickie” Election Rules In Effect

On December 12, 2014, the Board by a 3-2 vote approved final rules on representation case procedures. Representation–Case Procedures, 79 Fed. Reg. 74,307 (Dec. 15, 2014)(to be codified at 29 C.F.R. pts. 101-103). Those rules, nearly identical to the rules proposed in June 2011, make a number of fundamental changes to the long-standing procedures that the Board uses to conduct elections in union representation cases. Some highlights of those changes are:

a. Scope of Pre-Election Hearing Limited: Prior to the new rules, employers and other interested parties often litigated all of the issues involved in a representation petition— including the eligibility of voters, the method of the election, the scope of the proposed bargaining unit, the union’s showing of interest (although limited in scope), etc. Under the new rules, then hearing is more circumscribed but employers will need to compile and produce much information. Under the new rules, employers must file prior to the hearing (which will be approximately 8-days from the Board’s Notice of Hearing) a statement of position which would include: (1) an identification of all issues to be litigated and if the unit is to be challenged a list of the classifications, locations, or other groupings that must be added to make the unit appropriate, (2) an electronic list of all employees in the proposed unit with full names, work locations, shifts, and job classifications and any that the employer proposes should be added, (3) a separate list of employees who the employer proposes should be excluded from the unit, and (4) a list of employees who the non-petitioning party intends to contest their eligibility to vote at the hearing and the basis for that contest. The purpose of the hearing will ordinarily be limited to whether there is a question concerning representation, whether the unit is “appropriate,” and whether there are any statutory bars to the election. The status of individual employees need not be considered during the hearing and the hearing officer would have the authority to limit the scope of the issues.
b. **Filing of Post-Hearing Briefs Limited:** The new rules allow hearing officers the discretion to disallow the filing of post-hearing briefs.

c. **Elimination of Mandatory Pre-Election Request for Review:** Prior to the new rules, aggrieved parties in an election hearing could (and must to preserve their rights) petition the Board to review the decision of the Regional Director. Those pre-election petitions for review were discretionary and as a matter of rule and practice did not stay the election while the petition was pending or even if the petition was granted. The new rules eliminate the necessity for a pre-election request for review and instead encourages filing those as post-election requests for review.

d. **Elimination of 25-Day Waiting Period:** Prior to the new rules, Regional Directors were not to schedule elections until 25 days after the close of a pre-election hearing to allow for a petition for review to be filed and for the Board to decide whether review should be granted and the election stayed. However, with the elimination of the Petition for Review, the 2-day period is unnecessary from a procedural standpoint. From a timing standpoint, this is the most significant change and the one likely to significantly shorten the time between petition filing and election.

e. **Voter List:** Under the new rules, the employer must serve the petitioner and the Board with a voter list within 2-days of the direction of election. That list must include an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters and, on a separate list, of all individuals who are to vote under challenge. The list is to be electronically served.

f. **Elimination of Mandatory Post-Election Review:** Prior to the new rules, appeals from a Regional Director’s consideration of post-election objections were reviewed, as of right, by the Board. Under the new rules, these mandatory appeals are replaced with discretionary post-election requests for review.

Two new lawsuits challenging those rules have been filed in federal court in DC and in Texas. Those suits challenge the rules on a number of grounds. First, the board did not set a maximum or minimum number of days between when a union election is requested and when it actually takes place, but the business groups say the proposed procedural changes could result in an election within 14 days, instead of the current average of nearly 40 days. Some of the process changes in the rule to speed up elections, which the plaintiffs allege will harm employers, include elimination of an automatic 25-day waiting period between when the board issues an election directive and when the election can take place.
Review of United States Supreme Court Decisions 2014-15

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.


SUPREME COURT OF THE UNITED STATES

Syllabus

INTEGRITY STAFFING SOLUTIONS, INC. v. BUSK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


Petitioner Integrity Staffing Solutions, Inc., required its hourly warehouse workers, who retrieved products from warehouse shelves and packaged them for delivery to Amazon.com customers, to undergo a security screening before leaving the warehouse each day. Respondents, former employees, sued the company alleging, as relevant here, that they were entitled to compensation under the Fair Labor Standards Act of 1938 (FLSA) for the roughly 25 minutes each day that they spent waiting to undergo and undergoing those screenings. They also alleged that the company could have reduced that time to a de minimis amount by adding screeners or staggering shift terminations and that the screenings were conducted to prevent employee theft and, thus, for the sole benefit of the employers and their customers.

The District Court dismissed the complaint for failure to state a claim, holding that the screenings were not integral and indispensable to the employees’ principal activities but were instead postliminary and noncompensable. The U. S. Court of Appeals for the Ninth Circuit reversed in relevant part, asserting that postshift activities that would ordinarily be classified as noncompensable postliminary activities are compensable as integral and indispensable to an employee’s principal activities if the postshift activities are necessary to the principal work and performed for the employer’s benefit.

Held: The time that respondents spent waiting to undergo and undergoing security screenings is not compensable under the FLSA. Pp. 3–9.

(a) Congress passed the Portal-to-Portal Act to respond to an economic emergency created by the broad judicial interpretation given to the FLSA’s undefined terms “work” and “workweek.” See 29 U. S. C.
§251(a); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598. The Portal-to-Portal Act exempted employers from FLSA liability for claims based on “activities which are preliminary to or postliminary to” the performance of the principal activities that an employee is employed to perform. §254(a)(2). Under this Court’s precedents, the term “principal activities” includes all activities which are an “integral and indispensable part of the principal activities.” *Steiner v. Mitchell*, 350 U.S. 247, 252–253. An activity is “integral and indispensable” if it is an intrinsic element of the employee’s principal activities and one with which the employee cannot dispense if he is to perform his principal activities. This Court has identified several activities that satisfy this test—see, e.g., *id.*, at 249, 251; *Mitchell v. King Packing Co.*, 350 U.S. 260, 262—and Department of Labor regulations are consistent with this approach, see 29 CFR §§790.8(c), 790.7(g). Pp. 5–7.

(b) The security screenings at issue are noncompensable postliminary activities. To begin with, the screenings were not the principal activities the employees were employed to perform—i.e., the workers were employed not to undergo security screenings but to retrieve products from warehouse shelves and package them for shipment. Nor were they “integral and indispensable” to those activities. This view is consistent with a 1951 Department of Labor opinion letter, which found noncompensable under the Portal-to-Portal Act both a preshift screening conducted for employee safety and a postshift search conducted to prevent employee theft. The Ninth Circuit’s test, which focused on whether the particular activity was required by the employer rather than whether it was tied to the productive work that the employee was employed to perform, would sweep into “principal activities” the very activities that the Portal-to-Portal Act was designed to exclude from compensation. See, e.g., *IBP*, supra, at 41. Finally, respondents’ claim that the screenings are compensable because Integrity Staffing could have reduced the time to a *de minimis* amount is properly presented at the bargaining table, not to a court in an FLSA claim. Pp. 7–9.

713 F. 3d 525, reversed.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which KAGAN, J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

WARGER v. SHAUERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT


Petitioner Gregory Warger sued respondent Randy Shauers in federal court for negligence for injuries suffered in a motor vehicle accident. After the jury returned a verdict for Shauers, one of the jurors contacted Warger’s counsel, claiming that Regina Whipple, the jury foreperson, had revealed during deliberations that her daughter had been at fault in a fatal motor vehicle accident, and that a lawsuit would have ruined her daughter’s life. Armed with an affidavit from the juror, Warger moved for a new trial, arguing that Whipple had deliberately lied during voir dire about her impartiality and ability to award damages. The District Court denied Warger’s motion, holding that Federal Rule of Evidence 606(b), which bars evidence “about any statement made . . . during the jury’s deliberations,” barred the affidavit, and that none of the Rule’s three exceptions, see Rule 606(b)(2), were applicable. The Eighth Circuit affirmed.

Held:

1. Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire. Pp. 3–10.

(a) This reading accords with the plain meaning of Rule 606(b), which applies to “an inquiry into the validity of [the] verdict.” This understanding is also consistent with the underlying common-law rule on which Congress based Rule 606(b). The so-called “federal rule” made jury deliberations evidence inadmissible even if used to demonstrate dishonesty during voir dire. Both the majority of courts and this Court’s pre-Rule 606(b) cases, see McDonald v. Pless, 238 U. S. 264, 268; Clark v. United States, 289 U. S. 1, favored this rule over the “Iowa rule,” which permitted the use of such jury deliberations evidence. The federal approach is clearly reflected in the lan-
Syllabus

guage Congress chose when it enacted Rule 606(b), and legislative history confirms that Congress’ choice was no accident. See Tanner v. United States, 483 U.S. 107, 125. Pp. 3–8.

(b) Warger’s arguments against this straightforward understanding are not persuasive. Pp. 8–10.

(1) First, Warger insists that proceedings for a new trial based on *voir dire* dishonesty do not involve an “inquiry into the validity of the verdict.” His reading would restrict Rule 606(b)’s application to claims of error for which a court must examine the manner in which the jury reached its verdict, but the Rule does not focus on the means by which deliberations evidence might be used to invalidate a verdict. It simply applies during a proceeding in which a verdict may be rendered invalid. Pp. 8–9.

(2) Warger also contends that excluding jury deliberations evidence that shows *voir dire* dishonesty is unnecessary to fulfill Congress’ objectives, but his arguments would apply to all evidence rendered inadmissible by Rule 606(b), and he cannot escape the scope of the Rule merely by asserting that Congress’ concerns were misplaced. P. 9.

(3) Finally, Warger invokes the canon of constitutional avoidance, contending that only its interpretation protects the right to an impartial jury. But that canon has no application here, where there is no ambiguity. See United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 494. Moreover, this Court’s Tanner decision forecloses any claim that Rule 606(b) is unconstitutional. Similar to the right at issue in that case, Warger’s right to an impartial jury remains protected despite Rule 606(b)’s removal of one means of ensuring unbiased jurors. Even if a juror lies to conceal bias, parties may bring to the court’s attention evidence of bias before the verdict is rendered and use nonjuror evidence after the verdict is rendered. Pp. 9–10.

2. The affidavit at issue was not admissible under Rule 606(b)(2)(A)’s exception for evidence of “extraneous prejudicial information.” Generally speaking, extraneous information derives from a source “external” to the jury. See Tanner, 483 U. S., at 117. Here, the excluded affidavit falls on the “internal” side. Warger contends that any information Whipple shared with the other jurors was extraneous because she would have been disqualified from the jury had she disclosed her daughter’s accident. However, such an exception would swallow up much of the rest of the restrictive version of the common-law rule that Congress adopted in enacting Rule 606(b). Pp. 11–13.

721 F. 3d 606, affirmed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.
SUPREME COURT OF THE UNITED STATES

HEIEN v. NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA


Following a suspicious vehicle, Sergeant Matt Darisse noticed that only one of the vehicle’s brake lights was working and pulled the driver over. While issuing a warning ticket for the broken brake light, Darisse became suspicious of the actions of the two occupants and their answers to his questions. Petitioner Nicholas Brady Heien, the car’s owner, gave Darisse consent to search the vehicle. Darisse found cocaine, and Heien was arrested and charged with attempted trafficking. The trial court denied Heien’s motion to suppress the seized evidence on Fourth Amendment grounds, concluding that the vehicle’s faulty brake light gave Darisse reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, holding that the relevant code provision, which requires that a car be “equipped with a stop lamp,” N. C. Gen. Stat. Ann. §20–129(g), requires only a single lamp—which Heien’s vehicle had—and therefore the justification for the stop was objectively unreasonable. Reversing in turn, the State Supreme Court held that, even assuming no violation of the state law had occurred, Danase’s mistaken understanding of the law was reasonable, and thus the stop was valid.

Held: Because Darisse’s mistake of law was reasonable, there was reasonable suspicion justifying the stop under the Fourth Amendment. Pp. 4–13.

(a) The Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials “fair leeway for enforcing the law,” Brinegar v. United States, 338 U. S. 160, 176. Searches and seizures based on mistakes of fact may be reasonable. See, e.g., Illinois v. Rodriguez, 497 U. S. 177, 183–186. The limiting factor is that “the mistakes must be those of reasonable men.” Brinegar, supra, at 176. Mistakes of law are no less compatible with the concept of reasonable suspicion, which arises from an under-
standing of both the facts and the relevant law. Whether an officer is reasonably mistaken about the one or the other, the result is the same: the facts are outside the scope of the law. And neither the Fourth Amendment’s text nor this Court’s precedents offer any reason why that result should not be acceptable when reached by a reasonable mistake of law.

More than two centuries ago, this Court held that reasonable mistakes of law, like those of fact, could justify a certificate of probable cause. *United States v. Riddle*, 5 Cranch 311, 313. That holding was reiterated in numerous 19th-century decisions. Although *Riddle* was not a Fourth Amendment case, it explained the concept of probable cause, which this Court has said carried the same “fixed and well known meaning” in the Fourth Amendment, *Brinegar*, *supra*, at 175, and n. 14, and no subsequent decision of this Court has undermined that understanding. The contrary conclusion would be hard to reconcile with the more recent precedent of *Michigan v. DeFillippo*, 443 U.S. 31, where the Court, addressing the validity of an arrest made under a criminal law later declared unconstitutional, held that the officers’ reasonable assumption that the law was valid gave them “abundant probable cause” to make the arrest, *id.*, at 37. Heien attempts to recast *DeFillippo* as a case solely about the exclusionary rule, not the Fourth Amendment itself, but *DeFillippo*’s express holding is that the arrest was constitutionally valid because the officers had probable cause. See *id.*, at 40. Heien misplaces his reliance on cases such as *Davis v. United States*, 564 U.S. —, where any consideration of reasonableness was limited to the separate matter of remedy, not whether there was a Fourth Amendment violation in the first place.

Heien contends that the rationale that permits reasonable errors of fact does not extend to reasonable errors of law, arguing that officers in the field deserve a margin of error when making factual assessments on the fly. An officer may, however, also be suddenly confronted with a situation requiring application of an unclear statute. This Court’s holding does not discourage officers from learning the law. Because the Fourth Amendment tolerates only objectively reasonable mistakes, cf. *Whren v. United States*, 517 U.S. 806, 813, an officer can gain no advantage through poor study. Finally, while the maxim “Ignorance of the law is no excuse” correctly implies that the State cannot impose punishment based on a mistake of law, it does not mean a reasonable mistake of law cannot justify an investigatory stop. Pp. 4–12.

(b) There is little difficulty in concluding that Officer Darise’s error of law was reasonable. The North Carolina vehicle code that requires “a stop lamp” also provides that the lamp “may be incorpo-
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rated into a unit with one or more other rear lamps," N. C. Gen. Stat. Ann. §20–129(g), and that "all originally equipped rear lamps" must be "in good working order," §20–129(d). Although the State Court of Appeals held that "rear lamps" do not include brake lights, the word "other," coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable to think that a faulty brake light constituted a violation. Pp. 12–13.

367 N. C. 163, 749 S. E. 2d 278, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG, J., joined. SOTOMAYOR, J., filed a dissenting opinion.
SUPREME COURT OF THE UNITED STATES

DART CHEROKEE BASIN OPERATING CO., LLC, ET AL. v. OWENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT


A defendant seeking to remove a case from state to federal court must file in the federal forum a notice of removal “containing a short and plain statement of the grounds for removal.” 28 U. S. C. §1446(a).

Respondent Owens filed a putative class action in Kansas state court, seeking compensation for damages class members allegedly sustained when petitioners (collectively, Dart) underpaid royalties due under certain oil and gas leases. Dart removed the case to the Federal District Court, invoking the Class Action Fairness Act of 2005 (CAFA), which gives federal courts jurisdiction over class actions if the amount in controversy exceeds $5 million, 28 U. S. C. §1332(d)(2). Dart’s notice of removal alleged that the purported underpayments totaled over $8.2 million. Owens moved to remand the case to state court, asserting that the removal notice was “deficient as a matter of law” because it included “no evidence” proving that the amount in controversy exceeded $5 million. In response, Dart submitted an executive’s detailed declaration supporting an amount in controversy in excess of $11 million. The District Court granted Owens’ remand motion, reading Tenth Circuit precedent to require proof of the amount in controversy in the notice of removal itself. Dart petitioned the Tenth Circuit for permission to appeal, see §1453(c)(1), but that court denied review and rehearing en banc.

Held:

1. As specified in §1446(a), a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions.

Section 1446(a) tracks the general pleading requirement stated in
Syllabus

Rule 8(a) of the Federal Rules of Civil Procedure. By borrowing Rule 8(a)'s "short and plain statement" standard, corrobative history indicates Congress intended to clarify that courts should "apply the same liberal rules [to removal allegations as] to other matters of pleading." H. R. Rep. No. 100–889, p. 71. The amount-in-controversy allegation of a plaintiff invoking federal-court jurisdiction is accepted if made in good faith. See, e.g., Mt. Healthy City Bd. of Ed. v. Doyle, 429 U. S. 274, 276. Similarly, the amount-in-controversy allegation of a defendant seeking federal-court adjudication should be accepted when not contested by the plaintiff or questioned by the court. In the event that the plaintiff does contest the defendant's allegations, both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied, see §1446(c)(2)(B).

In remanding the case to state court, the District Court relied, in part, on a purported "presumption" against removal, but no antiremoval presumption attends cases invoking CAFA, a statute Congress enacted to facilitate adjudication of certain class actions in federal court. See Standard Fire Ins. Co. v. Knowles, 568 U. S. ___, ___, Pp. 4–7.

2. The District Court erred in remanding this case for want of an evidentiary submission in the notice of removal, and the Tenth Circuit abused its discretion in denying review of that decision. Pp. 7–14.

(a) This Court concludes that no jurisdictional barrier impedes settlement of the question presented: whether evidence supporting the amount in controversy must be included in a notice of removal. The case was "in" the Tenth Circuit because of Dart's application for leave to appeal, and the Court has jurisdiction to review what the Court of Appeals did with that application. See 28 U. S. C. §1254; Hohn v. United States, 524 U. S. 236, 248. Pp. 7–8.

(b) While appellate review of a remand order is discretionary, exercise of that discretion is not rudderless, see Highmark Inc. v. Allcare Health Management System, Inc., 572 U. S. ___, ___, and a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," Cooter & Gell v. Hartmarx Corp., 496 U. S. 384, 405. The Tenth Circuit had previously stated considerations bearing on the intelligent exercise of discretion under §1453(c)(1). One of those considerations is particularly relevant here: a court of appeals should inquire whether, if a district court's remand order remains undisturbed, the case will "leave the ambit of the federal courts for good, precluding any other opportunity for [the defendant] to vindicate its claimed legal entitlement [under CAFA] . . . to have a federal tribunal adjudicate the merits." BP America, Inc. v. Oklaho-
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*ma ex rel. Edmondson*, 613 F. 3d 1029, 1035. Thus the Tenth Circuit's own guide weighed heavily in favor of accepting Dart's appeal. In practical effect, the Court of Appeals' denial of review established the law—the requirement of proof of the amount in controversy in the removal notice—not simply for this case, but for future CAFA removals sought by defendants in the Tenth Circuit, leaving those defendants with no realistic opportunity to resist making the evidentiary submission.

The District Court, driven by its conscientious endeavor to follow Circuit precedent, erred in ruling that Dart's amount-in-controversy allegation failed for want of proof. It was an abuse of discretion for the Tenth Circuit to deny Dart's request for review, for that disposition fastened on district courts within the Circuit an erroneous view of the law. Contrary to the law the District Court derived from Tenth Circuit precedent, a removal notice need only plausibly allege, not detail proof of, the amount in controversy. Pp. 8–14.

Vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which KENNEDY and KAGAN, JJ., joined, and in which THOMAS, J., joined as to all but the final sentence. THOMAS, J., filed a dissenting opinion.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JESINOSKI ET UX. v. COUNTRYWIDE HOME LOANS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT


Exactly three years after borrowing money from respondent Countrywide Home Loans, Inc., to refinance their home mortgage, petitioners Larry and Cheryle Jesinoski sent Countrywide and respondent Bank of America Home Loans, which had acquired Countrywide, a letter purporting to rescind the transaction. Bank of America replied, refusing to acknowledge the rescission’s validity. One year and one day later, the Jesinoskis filed suit in federal court, seeking a declaration of rescission and damages. The District Court entered judgment on the pleadings for respondents, concluding that a borrower can exercise the Truth in Lending Act’s right to rescind a loan, see 15 U. S. C. §1635(a), (f), only by filing a lawsuit within three years of the date the loan was consummated. The Jesinoskis’ complaint, filed four years and one day after the loan’s consummation, was ineffective. The Eighth Circuit affirmed.

Held: A borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3-year period, not file suit within that period. Section 1635(a)’s unequivocal terms—a borrower “shall have the right to rescind . . . by notifying the creditor . . . of his intention to do so” (emphasis added)—leave no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. This conclusion is not altered by §1635(f), which states when the right to rescind must be exercised, but says nothing about how that right is exercised. Nor does §1635(g)—which states that “in addition to rescission the court may award relief . . . not relating to the right to rescind”—support respondents’ view that rescission is necessarily a consequence of judicial action. And the fact that the Act modified the common-law condition precedent to rescission at
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law, see §1635(b), hardly implies that the Act thereby codified rescission in equity. Pp. 2–5.

729 F. 3d 1092, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.
SUPREME COURT OF THE UNITED STATES

SYLLABUS

WHITFIELD v. UNITED STATES

CERTIORAR TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


Petitioner Whitfield, fleeing a botched bank robbery, entered 79-year-old Mary Parnell’s home and guided a terrified Parnell from a hallway to a room a few feet away, where she suffered a fatal heart attack. He was convicted of, among other things, violating 18 U.S.C. §2113(e), which establishes enhanced penalties for anyone who “forces any person to accompany him without the consent of such person” in the course of committing or fleeing from a bank robbery. On appeal, the Fourth Circuit held that the movement Whitfield required Parnell to make satisfied the forced-accompainment requirement, rejecting his argument that §2113(e) requires “substantial” movement.

HELD: A bank robber “forces [a] person to accompany him,” for purposes of §2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance, as was the case here. At the time the forced-accompainment provision was enacted, just as today, to “accompany” someone meant to “go with” him. The word does not, as Whitfield contends, connote movement over a substantial distance. Accompaniment requires movement that would normally be described as from one place to another. Here, Whitfield forced Parnell to accompany him for at least several feet, from one room to another, and that surely sufficed. The severity of the penalties for a forced-accompainment conviction—a mandatory minimum of 10 years, and a maximum of life imprisonment—does not militate against this interpretation, for the danger of a forced accompaniment does not vary depending on the distance traversed. This reading also does not make any other part of §2113’s graduated penalty scheme superfluous. Pp. 2–5.

548 Fed. Appx. 70, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JENNINGS v. STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


Petitioner Jennings sought federal habeas relief based on three theories of ineffective assistance of counsel during the punishment phase of his state capital murder trial. The District Court granted relief on his two “Wiggins theories”—that counsel failed to present evidence of a deprived background and failed to investigate evidence of mental impairment, see Wiggins v. Smith, 539 U.S. 510—but not on his “Spisak theory”—that counsel expressed resignation to a death sentence during his closing argument, see Smith v. Spisak, 558 U.S. 139. The court ordered Texas to release Jennings unless, within 120 days, the State granted him a new sentencing hearing or commuted his death sentence. The State attacked the Wiggins theories on appeal, but Jennings defended on all three theories. The Fifth Circuit reversed the grant of habeas corpus under the two Wiggins theories and determined that it lacked jurisdiction over the Spisak claim. Implicitly concluding that raising this argument required a cross-appeal, the court noted that Jennings neither filed a timely notice of appeal, see Fed. Rule App. Proc. 4(a)(1)(A), nor obtained the certificate of appealability required by 28 U.S.C. §2253(c).

Held: Jennings’ Spisak theory was a defense of his judgment on alternative grounds, and thus he was not required to take a cross-appeal or obtain a certificate of appealability to argue it on appeal. Pp. 4–12.

(a) Because Jennings is an appellee who did not cross-appeal, he may “urge” his Spisak theory unless doing so would enlarge his rights or lessen the State’s rights under the District Court’s judgment.
United States v. American Railway Express Co., 265 U. S. 425, 435. Jennings' rights under the judgment were release, retrial, or commutation within a fixed time, at the State's option, and his Spisak claim, if accepted, would give him no more. The State's rights under the judgment were to retain Jennings in custody pending retrial or to commute his sentence; the Spisak claim, if accepted, would not further encumber the State. The State contends that, because the District Court's opinion entitled Jennings only to retrial (or resentencing) without the challenged errors, each additional basis asserted by Jennings sought to lessen the State's rights at retrial, and thus requires a cross-appeal. But this view is contrary to the ordinary behavior of courts, which reduce their opinions and verdicts to judgments precisely to define the parties' rights and liabilities. A prevailing party seeks to enforce a district court's judgment, not its reasoning. Rogers v. Hill, 289 U. S. 532, 537. Thus, any potential claim that would have entitled Jennings to a new sentencing proceeding could have been advanced consistent with American Railway. Pp. 4–9.

(b) Helvering v. Pfeiffer, 302 U. S. 247, and Alexander v. Cosden Pipe Line Co., 290 U. S. 484, would be in considerable tension with American Railway if they were read, as the State insists, as requiring Jennings to raise his Spisak claim on cross-appeal even if his rights under the court's judgment would remain undisturbed. Pfeiffer and Alexander involved disputes over multiple discrete federal tax liabilities, and the assertion of additional tax liabilities or defenses necessarily sought to enlarge or to reduce the rights of the Internal Revenue Service Commissioner. In contrast, Jennings, whether prevailing on a single theory or all three, sought the same indivisible relief: a new sentencing hearing. Thus, Pfeiffer and Alexander cannot be viewed as contradicting the "inveterate and certain" American Railway rule. Greenlaw v. United States, 554 U. S. 237, 245. Pp. 9–11.

(c) The question whether 28 U. S. C. §2253(c)'s certificate of appealability requirement applies to cross-appeals need not be addressed here, for it is clear that the provision does not embrace the defense of a judgment on alternative grounds. Pp. 11–12.

537 Fed. Appx. 326, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined.
SUPREME COURT OF THE UNITED STATES

T-MOBILE SOUTH, LLC v. CITY OF ROSWELL,
GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT


Respondent Roswell’s city council (Council) held a public hearing to
consider an application by petitioner T-Mobile South, LLC, to build a
cell phone tower on residential property. During the hearing, several
Council members expressed concerns about the tower’s impact on the
area. The hearing ended with the Council unanimously passing a
motion to deny the application. Two days later, the City’s Planning
and Zoning Division informed petitioner by letter that the application
had been denied and that minutes from the hearing would be made
available. The detailed minutes were published 26 days later.

Petitioner filed suit, alleging that the Council’s denial was not sup-
ported by substantial evidence in the record. The District Court
agreed, concluding that the City, by failing to issue a written decision
stating its reasons for denying the application, had violated the Tele-
communications Act of 1996, which provides that a locality’s denial
“shall be in writing and supported by substantial evidence contained
in a written record,” 47 U.S.C. §332(c)(7)(B)(iii). The Eleventh Cir-
cuit, following its precedent, found that the Act’s requirements were
satisfied here because petitioner had received a denial letter and pos-
sessed a transcript of the hearing that it arranged to have recorded.

Held:
1. Section 332(c)(7)(B)(iii) requires localities to provide reasons
when they deny applications to build cell phone towers. This conclu-
sion follows from the Act’s provisions, which both preserve and speci-
fically limit traditional state and local government authority. It
would be considerably difficult for a reviewing court to determine
whether a locality’s denial was “supported by substantial evidence
contained in a written record,” §332(c)(7)(B)(iii), or whether a locality
had "unreasonably discriminate[d] among providers of functionally equivalent services," §332(c)(7)(B)(i)(I), or regulated siting "on the basis of the environmental effects of radio frequency emissions," §332(c)(7)(B)(iv), if localities were not obligated to state their reasons for denial. And nothing in the Act suggests that Congress meant to use the phrase "substantial evidence" as anything but an administrative law "term of art" that describes how "an administrative record is to be judged by a reviewing court." United States v. Carlo Bianchi & Co., 373 U. S. 709, 715. Pp. 6–8.

2. Localities are not required to provide their reasons for denying siting applications in the denial notice itself, but may state those reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial. Pp. 8–13.

(a) Nothing in the Act's text imposes a requirement that the reasons be given in any particular form, and the Act's saving clause, §332(c)(7)(A), makes clear that the only limitations imposed on local governments are those enumerated in the statute. Localities comply with their obligation to give written reasons so long as those reasons are stated clearly enough to enable judicial review. Because an adversely affected entity must decide whether to seek judicial review within 30 days from the date of the denial §332(c)(7)(B)(v), and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial. Pp. 8–11.

(b) Petitioner's contrary arguments are unavailing. The statute's word "decision" does not connote a written document that itself provides all the reasons for a given judgment. The absence of the word "notify" in the provision at issue also does not signal an intention to require communication of more than a judgment. Nor does an obligation to provide reasons in the writing conveying the denial arise from the "substantial evidence" requirement itself or from the requirement of court review "on an expedited basis," §332(c)(7)(B)(v). It is sufficient that a locality's reasons be provided in a manner that is clear enough and prompt enough to enable judicial review. Pp. 11–13.

3. The City failed to comply with its statutory obligations under the Act. Although it issued its reasons in writing and did so in an acceptable form, it did not provide its written reasons essentially contemporaneously with its written denial when it issued detailed minutes 26 days after the date of the written denial and 4 days before expiration of petitioner's time to seek judicial review. P. 14.

731 F. 3d 1213, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which SCALIA,
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KENNEDY, BREYER, ALITO, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. ROBERTS, C. J., filed a dissenting opinion in which GINSBURG, J., joined, and in which THOMAS, J., joined as to Part I. THOMAS, J., filed a dissenting opinion.
Syllabus

NOTE: Where it is feasible a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TEVA PHARMACEUTICALS USA, INC., ET AL. v. SANDOZ, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT


Petitioners, Teva Pharmaceuticals (and related firms), own a patent that covers a manufacturing method for the multiple sclerosis drug Copaxone. When respondents, Sandoz, Inc. (and other firms), tried to market a generic version of the drug, Teva sued them for patent infringement. Sandoz countered that the patent was invalid. Specifically, Sandoz argued that the claim that Copaxone’s active ingredient had “a molecular weight of 5 to 9 kilodaltons” was fatally indefinite, see 35 U. S. C. §112 ¶2, because it did not state which of three methods of calculation—the weight of the most prevalent molecule, the weight as calculated by the average weight of all molecules, or weight as calculated by an average in which heavier molecules count for more—was used to determine that weight. After considering conflicting expert evidence, the District Court concluded that the patent claim was sufficiently definite and the patent was thus valid. As relevant here, it found that in context a skilled artisan would understand that the term “molecular weight” referred to molecular weight as calculated by the first method. In finding the “molecular weight” term indefinite and the patent invalid on appeal, the Federal Circuit reviewed de novo all aspects of the District Court’s claim construction, including the District Court’s determination of subsidiary facts.

Held: When reviewing a district court’s resolution of subsidiary factual matters made in the course of its construction of a patent claim, the Federal Circuit must apply a “clear error,” not a de novo, standard of review. Pp. 4–16.

(a) Federal Rule of Civil Procedure 52(a)(6) states that a court of appeals “must not . . . set aside a district court’s ‘[f]indings of fact’ unless they are ‘clearly erroneous.’” It sets out a “clear command,”
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Anderson v. Bessemer City, 470 U. S. 564, 574, and “does not make exceptions or . . . exclude certain categories of factual findings” from the court of appeals’ obligation, Pullman-Standard v. Swint, 456 U.S. 273, 287. The Rule thus applies to both subsidiary and ultimate facts. *Ibid.* And the function of an appeals court reviewing the findings of a “district court sitting without a jury . . . is not to decide factual issues de novo.” *Anderson, supra,* at 573. Even if exceptions to the Rule were permissible, there is no convincing ground for creating an exception here. *Markman v. Westview Instruments, Inc.*, 517 U. S. 370, neither created, nor argued for, such an exception. There, the Court held that the ultimate question of claim construction is for the judge, not the jury, *id.*, at 372, but it did not thereby create an exception from the ordinary rule governing appellate review of factual matters. Instead, the Court pointed out that a judge, in construing a patent claim, is engaged in much the same task as the judge would be in construing other written instruments, such as deeds, contracts, or tariffs. *Id.*, at 384, 386, 388, 389. Construction of written instruments often presents a “question solely of law,” at least when the words in those instruments are “used in their ordinary meaning.” *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291. But if a written instrument uses “technical words or phrases not commonly understood,” *id.*, at 292, those words may give rise to a factual dispute. If so, extrinsic evidence may help to “establish a usage of trade or locality.” *Ibid.* And in that circumstance, the “determination of the matter of fact” will “preced[e]” the “function of construction.” *Ibid.*

The *Markman* Court also recognized that courts will sometimes have to resolve subsidiary factual disputes in patent construction; Rule 52 requires appellate courts to review such disputes under the “clearly erroneous” standard. Application of this standard is further supported by precedent and by practical considerations. Clear error review is “particularly” important in patent cases because a district court judge who has presided over, and listened to, the entire proceeding has a comparatively greater opportunity to gain the necessary “familiarity with specific scientific problems and principles,” *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 610, than an appeals court judge who must read a written transcript or perhaps just those portions referenced by the parties. Pp. 4–8.

(b) Arguments to the contrary are unavailing. Sandoz claims that separating “factual” from “legal” questions may be difficult and, like the Federal Circuit, posits that it is simpler for the appellate court to review the entirety of the district court’s claim construction *de novo* than to apply two separate standards. But courts of appeals have long been able to separate factual from legal matters, *see, e.g.*, *First*
Options of Chicago, Inc. v. Kaplan, 514 U. S. 938, 947–948, and the Federal Circuit’s efforts to treat factual findings and legal conclusions similarly have brought with them their own complexities. As for Sandoz’s argument that “clear error” review will bring about less uniformity, neither the Circuit nor Sandoz has shown that divergent claim construction stemming from divergent findings of fact on subsidiary matters should occur more than occasionally. Pp. 8–11.

(c) This leaves the question of how the clear error standard should be applied when reviewing subsidiary factfinding in patent claim construction. When the district court reviews only evidence intrinsic to the patent, the judge’s determination is solely a determination of law, and the court of appeals will review that construction de novo.

However, where the district court needs to consult extrinsic evidence in order to understand, for example, the background science or the meaning of a term in the relevant art during the relevant time period, and where those subsidiary facts are in dispute, courts will need to make subsidiary factual findings about the extrinsic evidence. The district judge, after deciding the factual dispute, will then interpret the patent claim in light of the facts as he has found them. The ultimate construction of the claim is a legal conclusion that the appellate court can review de novo. But to overturn the judge’s resolution of an underlying factual dispute, the appellate court must find that the judge, in respect to those factual findings, has made a clear error. Pp. 11–14.

(d) Here, for example, the District Court made a factual finding, crediting Teva’s expert’s account, and thereby rejecting Sandoz’s expert’s contrary explanation, about how a skilled artisan would understand the way in which a curve created from chromatogram data reflects molecular weights. Based on that factual finding, the District Court reached the legal conclusion that figure 1 did not undermine Teva’s argument that molecular weight referred to the first method of calculating molecular weight. When the Federal Circuit reviewed the District Court’s decision, it did not accept Teva’s expert’s explanation, and it failed to accept that explanation without finding that the District Court’s contrary determination was “clearly erroneous.” The Federal Circuit erred in failing to review this factual finding only for clear error. Teva asserts that there are two additional instances in which the Federal Circuit rejected the District Court’s factual findings without concluding that they were clearly erroneous; those matters are left for the Federal Circuit to consider on remand. Pp. 14–16.

723 F. 3d 1363, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS,
Syllabus

C. J., and SCALIA, KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

HOLT, AKA MUHAMMAD v. HOBBES, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT


Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides that “[n]o government shall impose a substantial burden on the religious exercise” of an institutionalized person unless the government demonstrates that the burden “is the least restrictive means of furthering [a] compelling governmental interest.” 42 U. S. C. §2000cc–1(a).

Petitioner is an Arkansas inmate and devout Muslim who wishes to grow a ¼-inch beard in accordance with his religious beliefs. Respondent Arkansas Department of Correction (Department) prohibits its prisoners from growing beards, with the single exception that inmates with diagnosed skin conditions may grow ¼-inch beards. Petitioner sought an exemption on religious grounds and, although he believes that his faith requires him not to trim his beard at all, he proposed a compromise under which he would be allowed to maintain a ¼-inch beard. Prison officials denied his request, and petitioner sued in Federal District Court. At an evidentiary hearing before a Magistrate Judge, Department witnesses testified that beards compromised prison safety because they could be used to hide contraband and because an inmate could quickly shave his beard to disguise his identity. The Magistrate Judge recommended dismissing petitioner’s complaint, emphasizing that prison officials are entitled to deference on security matters and that the prison permitted petitioner to exercise his religion in other ways. The District Court adopted the recommendation in full, and the Eighth Circuit affirmed, holding that the Department had satisfied its burden of showing that the grooming policy was the least restrictive means of furthering its compelling security interests, and reiterating that courts should defer to prison
HOLD v. HOBBINS

Syllabus

Held: The Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a ½-inch beard in accordance with his religious beliefs. Pp. 6–16.

(a) Under RLUIPA, the challenging party bears the initial burden of proving that his religious exercise is grounded in a sincerely held religious belief, see Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, ___ n. 28, and that the government's action substantially burdens his religious exercise. Here, petitioner's sincerity is not in dispute, and he easily satisfies the second obligation. The Department's policy forces him to choose between "engag[ing] in conduct that seriously violates [his] religious belie[f]," id., at ___, or contravening the grooming policy and risking disciplinary action. In reaching the opposite conclusion, the District Court misunderstood the analysis that RLUIPA demands. First, the District Court erred by concluding that the grooming policy did not substantially burden petitioner's religious exercise because he could practice his religion in other ways. Second, the District Court erroneously suggested that the burden on petitioner's religious exercise was slight because petitioner testified that his religion would "credit" him for attempting to follow his religious beliefs, even if that attempt proved unsuccessful. RLUIPA, however, applies to religious exercise regardless of whether it is "compelled." §2000cc-5(7)(A). Finally, the District Court improperly relied on petitioner's testimony that not all Muslims believe that men must grow beards. Even if petitioner's beliefs were idiosyncratic, RLUIPA's guarantees are "not limited to beliefs which are shared by all of the members of a religious sect." Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 715–716. Pp. 6–8.

(b) Once the challenging party satisfies his burden, the burden shifts to the government to show that substantially burdening the religious exercise of the "particular claimant" is "the least restrictive means of furthering [a] compelling governmental interest." Hobby Lobby, supra, at ___. §2000cc-1(a). The Department fails to show that enforcing its beard prohibition against petitioner furthers its compelling interests in preventing prisoners from hiding contraband and disguising their identities. Pp. 8–13.

(i) While the Department has a compelling interest in regulating contraband, its argument that this interest is compromised by allowing an inmate to grow a ½-inch beard is unavailing, especially given the difficulty of hiding contraband in such a short beard and the lack of a corresponding policy regulating the length of hair on the head. RLUIPA does not permit the unquestioning deference required to accept the Department's assessment. See Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 434. Even if the De-
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The Department could show that denying petitioner a ½-inch beard furthers its interest in rooting out contraband, it would still have to show that its policy is the least restrictive means of furthering that interest, a standard that is "exceptionally demanding" and requires the government to "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." Hobby Lobby, supra, at ___. Here, the Department fails to establish that its security concerns cannot be satisfied by simply searching a ½-inch beard. Pp. 9–11.

(ii) Even if the Department’s grooming policy furthering its compelling interest in prisoner identification, its policy still violates RLUIPA as applied in the present circumstances. As petitioner argues, requiring inmates to be photographed both with and without beards and then periodically thereafter is a less restrictive means of solving the Department’s identification concerns. The Department fails to show why its prison system is so different from the many institutions that allow facial hair that the dual-photo method cannot be employed at its institutions. It also fails to show why the security risk presented by a prisoner shaving a ½-inch beard is so different from the risk of a prisoner shaving a mustache, head hair, or ¼-inch beard. Pp. 11–13.

(c) In addition to the Department’s failure to prove that petitioner’s proposed alternatives would not sufficiently serve its security interests, the Department also fails to adequately explain the substantial underinclusiveness of its policy, since it permits ¼-inch beards for prisoners with medical conditions and more than ½ inch of hair on the head. Its failure to pursue its proffered objectives with regard to such “analogous nonreligious conduct” suggests that its interests “could be achieved by narrower ordinances that burdened religion to a far lesser degree.” Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546. Nor does the Department explain why the vast majority of States and the Federal Government can permit inmates to grow ½-inch beards, either for any reason or for religious reasons, but it cannot. Such evidence requires a prison, at a minimum, to offer persuasive reasons why it believes it must take a different course. See Procunier v. Martinez, 416 U. S. 396, 414, n. 14. Pp. 13–16.


ALITO, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which SOTOMAYOR, J., joined. SOTOMAYOR, J., filed a concurring opinion.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF HOMELAND SECURITY v.
MACLEAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT


That Act provides that the Transportation Security Administration
(TSA) “shall prescribe regulations prohibiting the disclosure of infor-
mation . . . if the Under Secretary decides that disclosure would . . .
be detrimental to the security of transportation.” 49 U. S. C.
§114(r)(1)(C). Around the same time, the TSA promulgated regu-
lations prohibiting the unauthorized disclosure of “sensitive security in-
formation,” 67 Fed. Reg. 8351, which included “[s]pecific details of
aviation security measures . . . [such as,] information concerning spe-
cific numbers of Federal Air Marshals, deployments or missions, and
the methods involved in such operations,” 49 CFR §1520.7(j).

In July 2003, the TSA briefed all federal air marshals—including
Robert J. MacLean—about a potential plot to hijack passenger
flights. A few days after the briefing, MacLean received from the
TSA a text message cancelling all overnight missions from Las Vegas
until early August. MacLean, who was stationed in Las Vegas, be-
lieved that cancelling those missions during a hijacking alert was
dangerous and illegal. He therefore contacted a reporter and told
him about the TSA’s decision to cancel the missions. After discov-
ering that MacLean was the source of the disclosure, the TSA fired him
for disclosing sensitive security information without authorization.

MacLean challenged his firing before the Merit Systems Protection
Board. He argued that his disclosure was whistleblowing activity
under 5 U. S. C. §2302(b)(8)(A), which protects employees who dis-
close information that reveals “any violation of any law, rule, or regu-
lation,” or “a substantial and specific danger to public health or safe-
ty.” The Board held that MacLean did not qualify for protection
under that statute because his disclosure was "specifically prohibited by law," §2302(b)(8)(A)—namely, by 49 U.S.C. §114(r)(1). The Court of Appeals for the Federal Circuit vacated the Board's decision, holding that Section 114(r)(1) was not a prohibition.

Held: MacLean’s disclosure was not “specifically prohibited by law.” Pp. 5–16.

(a) The Government argues that MacLean’s disclosure was “specifically prohibited by law” in two ways: first, by the TSA’s regulations on sensitive security information, and second, by Section 114(r)(1) itself, which authorized the TSA to promulgate those regulations. Pp. 5–14.

(i) MacLean’s disclosure was not prohibited by the TSA’s regulations for purposes of Section 2302(b)(8)(A) because regulations do not qualify as “law” under that statute. Throughout Section 2302, Congress repeatedly used the phrase “law, rule, or regulation.” But Congress did not use that phrase in the statutory language at issue here: it used the word “law” standing alone. Congress’s choice to say “specifically prohibited by law,” instead of “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations. In addition, Section 2302(b)(8)(A) creates a second exception for disclosures “required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” That the second exception is limited to actions by the President himself suggests that the first exception does not include action taken by executive agencies. Finally, interpreting the word “law” to include rules and regulations could defeat the purpose of the whistleblower statute. That interpretation would allow an agency to insulate itself from Section 2302(b)(8)(A) simply by promulgating a regulation that “specifically prohibited” all whistleblowing.

The Government proposes two alternative interpretations, but neither is persuasive. First, the Government argues that the word “law” includes all regulations that have the “force and effect of law.” The Government bases this argument on the decision in Chrysler Corp. v. Brown, 441 U.S. 281, where this Court held that legislative regulations generally fall within the meaning of the word “law” unless there is a “clear showing of contrary legislative intent.” Id., at 295–296. But Congress’s use of the word “law,” in close connection with the phrase “law, rule, or regulation,” provides the necessary “clear showing” that “law” does not include regulations in this case. Second, the Government argues that the word “law” includes at least those regulations that were “promulgated pursuant to an express congressional directive.” The Government, however, was unable to find a single example of the word “law” being used in that way. Pp. 6–11.

(ii) Likewise, MacLean’s disclosure was not prohibited by Section
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114(c)(1). That statute does not prohibit anything; instead, it authorizes the TSA to "prescribe regulations." Thus, by its terms, Section 114(c)(1) did not prohibit the disclosure here. The Government responds that Section 114(c)(1) did prohibit MacLean's disclosure by imposing a "legislative mandate" on the TSA to promulgate regulations to that effect. But the statute affords substantial discretion to the TSA in deciding whether to prohibit any particular disclosure. Thus, it is the TSA's regulations—not the statute—that prohibited MacLean's disclosure, and those regulations do not qualify as "law" under Section 2302(b)(8)(A). Pp. 11–14.

(b) The Government argues that providing whistleblower protection to individuals like MacLean would "gravely endanger public safety" by making the confidentiality of sensitive security information depend on the idiosyncratic judgment of each of the TSA's 60,000 employees. Those concerns are legitimate, but they must be addressed by Congress or the President, rather than by this Court. Pp. 14–15.

714 F. 3d. 1301, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

GELBOIM ET AL. v. BANK OF AMERICA CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT


Three legal prescriptions figure in this case. Title 28 U. S. C. § 1291 gives the courts of appeals jurisdiction over appeals from “all final decisions of the district courts of the United States,” and its core application is to rulings that terminate an action. Federal Rule of Civil Procedure 54(b) permits district courts to authorize immediate appeal of dispositive rulings on separate claims in a civil action raising multiple claims. And 28 U. S. C. § 1407 authorizes the Judicial Panel on Multidistrict Litigation (JPML) to transfer civil actions “involving one or more common questions of fact . . . to any district for coordinated or consolidated pretrial proceedings” in order to “promote the just and efficient conduct of such actions,” § 1407(a).

The London InterBank Offered Rate (LIBOR) is a reference point in determining interest rates for financial instruments in the United States and globally. The JPML established a multidistrict litigation (MDL) for cases involving allegations that defendant-banks understated their borrowing costs, thereby depressing LIBOR and enabling the banks to pay lower interest rates on financial instruments sold to investors. Over 60 actions were consolidated for pretrial proceedings in the U. S. District Court for the Southern District of New York, including a class action filed by petitioners Ellen Gelboim and Linda Zacher, who raised the single claim that several banks, acting in concert, had violated federal antitrust law. Determining that no plaintiff could assert a cognizable antitrust injury, the District Court granted the banks’ motion to dismiss all antitrust claims, including the Gelboim-Zacher complaint’s sole claim. The District Court thus dismissed the Gelboim-Zacher complaint, denied leave to amend, and dismissed the case in its entirety. Other cases made part
Syllabus

of the LIBOR MDL, however, presented discrete claims which remained before the District Court. Assuming that the Gelboim-Zacher plaintiffs were entitled to an immediate appeal of right under §1291, the District Court granted Rule 54(b) certifications authorizing the plaintiffs in some of the multiple-claim actions to appeal the dismissal of their antitrust claims while their other claims remained pending in the District Court. On its own initiative, the Second Circuit dismissed the Gelboim-Zacher appeal because the order appealed from did not dispose of all of the claims in the consolidated action. The District Court thereafter withdrew its Rule 54(b) certifications.

Held: The order dismissing their case in its entirety removed Gelboim and Zacher from the consolidated proceeding, thereby triggering their right to appeal under §1291.

Because cases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, an order disposing of one of the discrete cases in its entirety should qualify under §1291 as an appealable final decision. Section 1407 refers to individual "actions" transferrable to a single district court, not to a monolithic multidistrict "action" created by transfer. See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 37. And §1407(a)'s language—"at or before the conclusion of . . . pretrial proceedings, each transferred action must be remanded to the originating district "unless [the action] shall have been previously terminated"—indicates Congress' anticipation that, during the pendency of pretrial proceedings, final decisions might be rendered in one or more of the actions consolidated pursuant to §1407. The District Court's order dismissing the Gelboim-Zacher complaint was a final decision. The District Court completed its adjudication of petitioners' complaint and terminated their action. Petitioners thus are no longer participants in the consolidated proceedings. Nothing about the initial consolidation of their civil action with other LIBOR MDL cases renders the dismissal of their complaint tentative or incomplete.

To hold, as the banks contend, that no appeal of right accrues until a §1407 consolidation ends would leave plaintiffs like Gelboim and Zacher in a quandary about the event that triggers the 30-day period for taking an appeal. The sensible solution to the appeal-clock trigger is to allow an immediate appeal in a case such as this, where the transferee court in an MDL grants a defendant's dispositive motion on every claim (or the sole claim) in a transferred case. The banks are also concerned about allowing plaintiffs with the weakest cases to appeal because their complaint states only one claim, while leaving those with stronger cases unable to appeal simultaneously because they have other pending claims. But that concern is attended to by Rule 54(b), which authorizes district courts to grant certifications to
Syllabus

parties with multiple-claim complaints, thereby enabling plaintiffs in actions that have not been dismissed in their entirety to pursue immediate appellate review of discrete claims. The District Court did that in this very case. Rule 54(b), however, is of no avail to Gelboim and Zacher, who asserted only one claim. See Sears, Roebuck & Co. v. Mackey, 351 U. S. 427, 435. Section 1292(b)—which allows district courts to designate for review certain interlocutory orders—is also inapposite here, for there is nothing “interlocutory” about the dismissal order in the Gelboim-Zacher action. Pp. 6–10.

Reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

SYLLABUS

HANA FINANCIAL, INC. v. HANA BANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


Petitioner, Hana Financial, Inc., and respondent Hana Bank both provide financial services to individuals in the United States. When Hana Financial sued Hana Bank for trademark infringement, Hana Bank invoked in defense the tacking doctrine, under which lower courts have provided that a trademark user may make certain modifications to its mark over time while, in limited circumstances, retaining its priority position. Petitioner's claim was tried before a jury, and the District Court adopted in substantial part the jury instruction on tacking proposed by petitioner. The jury returned a verdict in respondent's favor. Affirming, the Ninth Circuit explained that the tacking inquiry was an exceptionally limited and highly factsensitive matter reserved for juries, not judges.

Held: Whether two trademarks may be tacked for purposes of determining priority is a question for the jury. Pp. 3–8.

(a) Lower courts have held that two marks may be tacked when they are considered to be “legal equivalents,” i.e., they “create the same, continuing commercial impression.” Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F. 2d 1156, 1159. And “commercial impression” “must be viewed through the eyes of a consumer.” DuoProSS Meditech Corp. v. Inverio Medical Devices, Ltd., 695 F. 3d 1247, 1253. When the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer. See, e.g., United States v. Gaudin, 515 U. S. 506, 512. Pp. 3–5.

(b) Each of petitioner's four arguments in support of its view that tacking is a question of law to be resolved by a judge is unpersuasive. First, it may be true that the "legal equivalents" test involves a legal standard, but such "mixed question[s] of law and fact," [have] typi-
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cally been resolved by juries." *Gaudin*, 515 U.S., at 512. And any concern that a jury may improperly apply the relevant legal standard can be remedied by crafting careful jury instructions. Second, petitioner offers no support for its claim that tacking determinations create new law in a unique way that requires those determinations to be reserved for judges. Third, petitioner worries that the predictability required for a functioning trademark system will be absent if tacking questions are assigned to juries, but offers no reason why trademark tacking should be treated differently from the tort, contract, and criminal justice systems, where juries answer often-dispositive factual questions or make dispositive applications of legal standards to facts. Finally, in arguing that judges have historically resolved tacking disputes, petitioner points to cases arising in the contexts of bench trials, summary judgment, and the like, in which it is undisputed that judges may resolve tacking disputes. Pp. 5–8.

735 F. 3d. 1158, affirmed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.
SUPREME COURT OF THE UNITED STATES

M&G POLYMERS USA, LLC, ET AL. v. TACKETT ET AL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT


When petitioner M&G Polymers USA, LLC (M&G), purchased the Point Pleasant Polyester Plant in 2000, it entered a collective-bargaining agreement and related Pension, Insurance, and Service Award Agreement (P & I agreement) with respondent union. As relevant here, the P & I agreement provided that certain retirees, along with their surviving spouses and dependents, would “receive a full Company contribution towards the cost of [health care] benefits”; that such benefits would be provided “for the duration of [the] Agreement”; and that the agreement would be subject to renegotiation in three years.

Following the expiration of those agreements, M&G announced that it would require retirees to contribute to the cost of their health care benefits. Respondent retirees, on behalf of themselves and others similarly situated, sued M&G and related entities, alleging that the P & I agreement created a vested right to lifetime contribution-free health care benefits.

The District Court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed based on the reasoning of its earlier decision in International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc., 716 F. 2d 1476. On remand, the District Court ruled in favor of the retirees, and the Sixth Circuit affirmed.

Held: The Sixth Circuit’s decision rested on principles that are incompatible with ordinary principles of contract law. Pp. 5–14.

(a) The Employee Retirement Income Security Act of 1974 (ERISA) governs pension and welfare benefits plans, including those established by collective-bargaining agreements. ERISA establishes minimum funding and vesting standards for pension plans, but exempts
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(b) This Court interprets collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. See Textile Workers v. Lincoln Mills of Ala., 353 U. S. 448, 456–457. When a collective-bargaining agreement is unambiguous, its meaning must be ascertained in accordance with its plainly expressed intent. 11 R. Lord, Williston on Contracts §30:6, p. 108. P. 7.

(c) In Yard-Man, the Sixth Circuit found a provision governing retiree insurance benefits ambiguous as to the duration of those benefits; and, looking to other provisions of the agreement, purported to apply ordinary contract law to resolve the ambiguity. First, the court inferred from the existence of termination provisions for other benefits that the absence of a termination provision specifically addressing retiree benefits expressed an intent to vest those benefits for life. The court then purported to apply the rule that contracts should be interpreted to avoid illusory promises, reasoning that, absent vesting, the promise would be illusory for the subset of retirees who would not become eligible for those benefits before the contract expired. Finally, the court relied on "the context" of labor negotiations to resolve the ambiguity, inferring that the parties would have intended such benefits to vest for life because they are not mandatory subjects of collective bargaining; and "typically understood as a form of delayed compensation," 716 F. 2d, at 1482; and are keyed to the acquisition of retirement status. The court concluded that these contextual clues "outweigh[ed] any contrary implications derived from a routine duration clause." Id., at 1483. The Sixth Circuit has since extended its Yard-Man analysis in a series of other cases. Pp. 7–10.

(d) The inferences applied in Yard-Man and its progeny do not represent ordinary principles of contract law. Yard-Man distorts the attempt to ascertain the intention of the parties by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. Rather than relying on known customs and usages in a particular industry as proven by the parties, the Yard-Man court relied on its own suppositions about the intentions of parties negotiating retiree benefits. It then compounded the error by applying those suppositions indiscriminately across industries. Furthermore, the Sixth Circuit's refusal to apply general durational clauses to provisions governing retiree benefits distorts an agreement's text and con-
Syllabus

flicts with the principle that a written agreement is presumed to encompass the whole agreement of the parties.

Perhaps tugged by its inferences, the Sixth Circuit also misapplied the illusory promises doctrine. It construed provisions that admittedly benefited some class of retirees as “illusory” merely because they did not benefit all retirees. That interpretation is a contradiction in terms—a promise that is “partly illusory” is by definition not illusory. And its use of this doctrine is particularly inappropriate in the context of collective-bargaining agreements, which often include provisions inapplicable to some category of employees.

The Sixth Circuit also failed even to consider other traditional contract principles, including the rule that courts should not construe ambiguous writings to create lifetime promises and the rule that “contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,” Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB, 501 U.S. 190, 207. Pp. 10–14.

(e) Though there is no doubt that Yard-Man and its progeny affected the outcome here, the Sixth Circuit should be the first to review the agreements under ordinary principles of contract law. P. 14.

733 F. 3d 589, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

KANSAS v. NEBRASKA ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 126, Orig. Argued October 14, 2014—Decided February 24, 2015

In 1943, Congress approved the Republican River Compact, an agreement between Kansas, Nebraska, and Colorado to apportion the “virgin water originating in” the Republican River Basin. 57 Stat. 87. In 1996, Kansas filed an original action in this Court contending that Nebraska’s increased groundwater pumping was subject to regulation by the Compact to the extent that it depleted stream flow in the Basin. This Court agreed. Ensuing negotiations resulted in the 2002 Final Settlement Stipulation (Settlement), which established mechanisms to accurately measure water and promote compliance with the Compact. The Settlement identified the Accounting Procedures, a technical appendix, as the tool by which the States would measure stream flow depletion, and thus consumption, due to groundwater pumping. The Settlement also reaffirmed that “imported water”—that is, water brought into the Basin by human activity—would not count toward a State’s consumption. Again, the Accounting Procedures were to measure, so as to exclude, that water flow.

In 2007, following the first post-Settlement accounting period, Kansas petitioned this Court for monetary and injunctive relief, claiming that Nebraska had substantially exceeded its water allocation. Nebraska responded that the Accounting Procedures improperly charged the State for using imported water and requested that the Accounting Procedures be modified accordingly. The Court appointed a Special Master. His report concludes that Nebraska “knowingly failed” to comply with the Compact, recommends that Nebraska disgorged a portion of its gains in addition to paying damages for Kansas’s loss, and recommends denying Kansas’s request for an injunction. In addition, the report recommends reforming the Accounting Procedures. The parties have filed exceptions.

Held:
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1. Proceedings under this Court’s original jurisdiction are “basically equitable in nature,” Ohio v. Kentucky, 410 U. S. 641, 648, and in exercising that jurisdiction over a controversy between two States, the Court may “mould the process [to] best promote the purposes of justice.” Kentucky v. Dennison, 24 How. 66, 98. Where the States have negotiated a Compact, the Court is confined to declaring rights under and enforcing its terms. But within those bounds, the Court may invoke equitable principles to devise “fair … solution[s]” to compact violations. Texas v. New Mexico, 482 U. S. 124, 134. And where Congress has approved the Compact so that it counts as federal law, see Cuyler v. Adams, 449 U. S. 433, 438, the Court may, consistent with the Compact’s express terms, exercise its full authority to remedy violations of, and promote compliance with, the agreement, see Porter v. Warner Holding Co., 328 U. S. 395, 398. Pp. 6–9.

2. The Special Master’s determination that Nebraska “knowingly failed” to comply with its Settlement obligations, his recommendation that Nebraska pay Kansas an additional $1.8 million in disgorgement, and his recommendation that Kansas’s request for injunctive relief be denied are all adopted. The parties’ exceptions are overruled. Pp. 9–20.

(a) Nebraska “knowingly failed” to comply with its Settlement obligations, and disgorgement is an appropriate remedy for Nebraska’s breach. Pp. 10–17.

(i) As the Special Master found, Nebraska failed to put adequate compliance mechanisms in place in the face of a known substantial risk that it would violate Kansas’s rights. Nebraska’s argument that it could not have anticipated unprecedented drought conditions fails, because its efforts to comply would have been inadequate absent the luckiest of circumstances. Nor can the State find refuge in the Compact’s retrospective compliance calculation methods, because it had been warned each year leading up to the final compliance check that it had exceeded its allotment. The Court therefore agrees with the Master that Nebraska “knowingly exposed Kansas to a substantial risk” of receiving less water than it was entitled to under the Compact. Report 130. In other words, Nebraska recklessly gambled with Kansas’s rights. Pp. 10–14.

(ii) Because Nebraska’s benefit from its breach exceeded the $3.7 million loss Kansas suffered, the Special Master recommended that Nebraska disgorge part of its additional gain. Nebraska contends that disgorgement is improper because it did not act “deliberately,” which it argues is required for disgorgement in a private contract suit. But disgorgement is appropriate where one State has recklessly gambled with another State’s rights to a scarce natural resource. This Court has said that awarding actual damages in a com-
Syllabus

The Syllabus of the United States Supreme Court. The Court's decision in this case is based on the Syllabus, which summarizes the legal arguments and issues in the case. The Syllabus provides a concise overview of the case, including the parties involved, the legal questions presented, and the Court's analysis of the case.

(b) Contrary to Kansas's contentions, the Master's partial disgorgement award is sufficient to achieve those goals. The "flexibility inherent in equitable remedies," Brown v. Plato, 563 U.S. ___, allows the Court to order partial disgorgement if appropriate to the facts of the particular case, cf. Kansas v. Colorado, 533 U.S. 1, 14. The Special Master properly took into account Nebraska's incentives, past behavior, and especially its more recent successful compliance efforts to determine that a small disgorgement award suffices. For related reasons, Kansas has failed to demonstrate a "cognizable danger of recurrent violation" necessary to obtain an injunction. United States v. W. T. Grant Co., 345 U.S. 629, 633. Pp. 17–20.

3. The Special Master's recommendation to amend the Accounting Procedures so that they no longer charge Nebraska for imported water is adopted, and Kansas's exception is overruled. As the Special Master found, in dry conditions, the Accounting Procedures improperly treat Nebraska's use of imported water as if it were use of Basin water. Nothing suggests that anyone seriously thought the Accounting Procedures would systematically err in this way. Rather, the Procedures' designers assumed that they had succeeded in their goal to implement a strict demarcation between virgin and imported water.

Kansas argues that in spite of these failures, the States must be held to the bargain they struck. That is the ordinary rule. But two special considerations warrant conforming the Accounting Procedures to the Compact and the Settlement. First, the remedy is necessary to prevent serious inaccuracies from distorting the States' intended apportionment of interstate waters, as reflected in those documents. Doing so is consistent with past instances where this Court opted to modify a technical agreement to correct material errors in the way it operates and thus align it with the compacting States' intended apportionment. Second, this remedy is required to avert an outright breach of the Compact—and so a violation of federal law. As written, the Accounting Procedures go beyond the Compact's boundaries and deprive Nebraska of its compact rights. The Master's proposed "5-run formula" solves this problem by excluding
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imported water from the calculation of each State's consumption. Given Kansas's failure despite ample opportunity to devise another solution or to demonstrate flaws in this one, as well the long and contentious history of this case that casts doubt on the States' ability to come to an agreement themselves, the Court adopts the Master's solution. Pp. 20–28.

Exceptions to Special Master's Report overruled, and Master's recommendations adopted.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and in which ROBERTS, C. J., joined as to Parts I and III. ROBERTS, C. J., and SCALIA, J., filed opinions concurring in part and dissenting in part. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and ALITO, JJ., joined, and in which ROBERTS, C. J., joined as to Part III.
SUPREME COURT OF THE UNITED STATES

SYLLABUS

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS v. FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


North Carolina’s Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in
all respects.

**Held:** Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown*, 317 U.S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if “the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,’ and . . . ‘the policy . . . [is] actively supervised by the State.’” *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. ___ (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(i) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal's* two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this
Syllabus

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from Midcal’s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See Hallie v. Eau Claire, 471 U. S. 34, 35. That Hallie excused municipalities from Midcal’s supervision rule for these reasons, however, all but confirms the rule’s applicability to actors controlled by active market participants. Further, in light of Omni’s holding that an otherwise immune entity will not lose immunity based on ad hoc and ex post questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see FTC v. Texor Title Ins. Co., 504 U. S. 621, 633, and Phoebe Putney, supra, at ___. The clear lesson of precedent is that Midcal’s active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board’s argument that entities designated by the States as agencies are exempt from Midcal’s second requirement cannot be reconciled with the Court’s repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing Midcal’s supervision requirement was created to address. See Goldfarb v. Virginia State Bar, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals. While Hallie stated “it is likely that active state supervision would also not be required” for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy Midcal’s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See Hallie, supra, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,
the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure Parker immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking Parker immunity must be rejected, see Patrick v. Burget, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive Parker immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists’ competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board’s actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State’s review mechanisms provide “realistic assurance” that a non-sovereign actor’s anticompetitive conduct “promotes state policy, rather than merely the party’s individual interests.” Patrick, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see id., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see ibid.; and the “mere potential for state
Syllabus

supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

YATES v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT


While conducting an offshore inspection of a commercial fishing vessel in the Gulf of Mexico, a federal agent found that the ship’s catch contained undersized red grouper, in violation of federal conservation regulations. The officer instructed the ship’s captain, petitioner Yates, to keep the undersized fish segregated from the rest of the catch until the ship returned to port. After the officer departed, Yates instead told a crew member to throw the undersized fish overboard. For this offense, Yates was charged with destroying, concealing, and covering up undersized fish to impede a federal investigation, in violation of 18 U. S. C. §1519. That section provides that a person may be fined or imprisoned for up to 20 years if he “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence” a federal investigation. At trial, Yates moved for a judgment of acquittal on the §1519 charge. Pointing to §1519’s origin as a provision of the Sarbanes-Oxley Act of 2002, a law designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation, Yates argued that §1519’s reference to “tangible object” subsumes objects used to store information, such as computer hard drives, not fish. The District Court denied Yates’s motion, and a jury found him guilty of violating §1519. The Eleventh Circuit affirmed the conviction, concluding that §1519 applies to the destruction or concealment of fish because, as objects having physical form, fish fall within the dictionary definition of “tangible object.”

Held: The judgment is reversed, and the case is remanded.

733 F. 3d 1059, reversed and remanded.
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Justice Ginsburg, joined by The Chief Justice, Justice Breyer, and Justice Sotomayor, concluded that a "tangible object" within §1519's compass is one used to record or preserve information. Pp. 6–20.

(a) Although dictionary definitions of the words "tangible" and "object" bear consideration in determining the meaning of "tangible object" in §1519, they are not dispositive. Whether a statutory term is unambiguous "is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341. Identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. See, e.g., FAA v. Cooper, 566 U.S. ___, ___. Pp. 7–10.

(b) Familiar interpretive guides aid the construction of "tangible object." Though not commanding, §1519's heading—"Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"—conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records.

Section 1519's position within Title 18, Chapter 73, further signals that §1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence. Congress placed §1519 at the end of Chapter 73 following immediately after pre-existing specialized provisions expressly aimed at corporate fraud and financial audits.

The contemporaneous passage of §1512(c)(1), which prohibits a person from "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding," is also instructive. The Government argues that §1512(c)(1)'s reference to "other object" includes any and every physical object. But if §1519's reference to "tangible object" already included all physical objects, as the Government also contends, then Congress had no reason to enact §1512(c)(1). Section 1519 should not be read to render superfluous an entire provision passed in proximity as part of the same Act. See Marx v. General Revenue Corp., 568 U.S. ___.

The words immediately surrounding "tangible object" in §1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. Applying the canons noscitur a sociis and ejusdem generis, "tangible object," as the last in a list of terms that begins "any record [or] document," is appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects used to record or preserve information. This moderate interpretation accords with the list of actions §1519 proscribes; the verbs "falsify[ing]" and "mak[e] a false entry in" typically
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take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See Gustafson v. Alloy Co., 513 U. S. 581, 575.

Use of traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself thus call for rejection of an aggressive interpretation of "tangible object."

Furthermore, the meaning of "record, document, or thing" in a provision of the 1962 Model Penal Code (MPC) that has been interpreted to prohibit tampering with any kind of physical evidence is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in §1519. There are significant differences between the offense described by the MPC provision and the offense created by §1519. Pp. 10–18.

(c) Finally, if recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object" in §1519, it would be appropriate to invoke the rule of lenity. Pp. 18–19.

Justice Alito concluded that traditional rules of statutory construction confirm that Yates has the better argument. Title 18 U. S. C. §1519’s list of nouns, list of verbs, and title, when combined, tip the case in favor of Yates. Applying the canons nosciitur a sociis and ejusdem generis to the list of nouns—"any record, document, or tangible object"—the term "tangible object" should refer to something similar to records or documents. And while many of §1519’s verbs—"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in"—could apply to far-flung nouns such as salamanders or sand dunes, the term "makes a false entry in" makes no sense outside of filekeeping. Finally, §1519’s title—"Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"—also points toward filekeeping rather than fish. Pp. 1–4.

Ginsburg, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Breyer and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Kagan, J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

DIRECT MARKETING ASSOCIATION v. BROHL,
EXECUTIVE DIRECTOR, COLORADO DEPARTMENT
OF REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT


Colorado requires residents who purchase tangible personal property from a retailer that does not collect sales or use taxes to file a return and remit those taxes directly to the State Department of Revenue. To improve compliance, Colorado enacted legislation requiring noncollecting retailers to notify any Colorado customer of the State’s sales and use tax requirement and to report tax-related information to those customers and the Colorado Department of Revenue.

Petitioner, a trade association of retailers, many of which sell to Colorado residents but do not collect taxes, sued respondent, the Director of the Colorado Department of Revenue, in Federal District Court, alleging that Colorado’s law violates the United States and Colorado Constitutions. The District Court granted petitioner partial summary judgment and permanently enjoined enforcement of the notice and reporting requirements, but the Tenth Circuit reversed. That court held that the Tax Injunction Act (TIA), which provides that federal district courts “shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State,” 28 U. S. C. §1341, deprived the District Court of jurisdiction over the suit.

Held: Petitioner’s suit is not barred by the TIA. Pp. 4–13.

(a) The relief sought by petitioner would not “enjoin, suspend or restrain the assessment, levy or collection” of Colorado’s sales and use taxes. Pp. 4–12.

(i) The terms “assessment,” “levy,” and “collection” do not ea-
compensate Colorado's enforcement of its notice and reporting requirements. These terms, read in light of the Federal Tax Code, refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability. Information gathering has long been treated as a phase of tax administration that occurs before assessment, levy, or collection. See, e.g., 26 U.S.C. §6041 et seq. Respondent portrays the notice and reporting requirements as part of the State's assessment and collection process, but the State's assessment and collection procedures are triggered after the State has received the returns and made the deficiency determinations that the notice and reporting requirements are meant to facilitate. Enforcement of the requirements may improve the State's ability to assess and ultimately collect its sales and use taxes, but the TIA is not keyed to all such activities. Such a rule would be inconsistent with the statute's text and this Court's rule favoring clear boundaries in the interpretation of jurisdictional statutes. See Hertz Corp. v. Friend, 559 U.S. 77, 94. Pp. 5–9.

(2) Petitioner's suit cannot be understood to "restrain" the "assessment, levy or collection" of Colorado's sales and use taxes merely because it may inhibit those activities. While the word "restrain" can be defined as broadly as the Tenth Circuit defined it, it also has a narrower meaning used in equity, which captures only those orders that stop acts of assessment, levy, or collection. The context in which the TIA uses the word "restrain" resolves this ambiguity in favor of this narrower meaning. First, the verbs accompanying "restrain"—"enjoin" and "suspend"—are terms of art in equity and refer to different equitable remedies that restrict or stop official action, strongly suggesting that "restrain" does the same. Additionally, "restrain" acts on "assessment," "levy," and "collection," a carefully selected list of technical terms. The Tenth Circuit's broad meaning would defeat the precision of that list and render many of those terms surplusage. Assigning "restrain" its meaning in equity is also consistent with this Court's recognition that the TIA "has its roots in equity practice," Tully v. Griffin, Inc., 429 U.S. 68, 73, and with the principle that "[j]urisdictional rules should be clear," Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 321 (THOMAS, J., concurring). Pp. 10–12.

(b) The Court takes no position on whether a suit such as this might be barred under the "comity doctrine," which "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction," Levin v. Commerce Energy, Inc., 560 U.S. 413, 421. The Court leaves it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado. P. 13.
THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, and in which SOTOMAYOR, J., joined in part.
SUPREME COURT OF THE UNITED STATES

ALABAMA DEPARTMENT OF REVENUE ET AL. v. CSX TRANSPORTATION, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT


Alabama imposes sales and use taxes on railroads when they purchase or consume diesel fuel, but exempts from those taxes trucking transport companies (motor carriers) and companies that transport goods interstate through navigable waters (water carriers), both railroad competitors. Motor carriers pay an alternative fuel-excise tax on diesel, but water carriers pay neither the sales tax nor the excise tax. Respondent (CSX), an interstate rail carrier that operates in Alabama, sought to enjoin state officers from collecting sales tax on its diesel fuel purchases, claiming that the State’s asymmetrical tax treatment “discriminates against a rail carrier” in violation of the Railroad Revitalization and Regulation Reform Act of 1976, or 4–R Act, 49 U. S. C. §11501(b)(4). This Court held that a tax “discriminates” under subsection (b)(4) when it treats “groups [that are similarly situated] differently without sufficient “justification for the difference in treatment,” CSX Transp. v. Ala. Dept. of Revenue, 562 U. S. 277, 287 (CSX I). On remand, the District Court rejected CSX’s claim. Reversing, the Eleventh Circuit held that CSX could establish discrimination by showing that Alabama taxed rail carriers differently than their competitors, but rejected Alabama’s argument that imposing a fuel-excise tax on motor carriers, but not rail carriers, justified imposing the sales tax on rail carriers, but not motor carriers.

Held:

1. The Eleventh Circuit properly concluded that CSX’s competitors are an appropriate comparison class for its subsection (b)(4) claim.

All general and commercial taxpayers may be an appropriate comparison class for a subsection (b)(4) claim, but it is not the only one. Nothing in the ordinary meaning of the word “discrimination” sug-
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suggests that it occurs only when the victim is singled out relative to the population at large. Context confirms this reading. The 4-R Act is an "asymmetrical statute." CSX I, supra, at 296. In subsections (b)(1) to (b)(3)—which specify prohibitions directed toward property taxes—the comparison class is limited to commercial and industrial property in the same assessment jurisdiction. But subsection (b)(4) contains no such limitation, so the comparison class is to be determined based on the theory of discrimination alleged in the claim. Thus, when a railroad alleges that a tax disadvantages it compared to its transportation industry competitors, its competitors in that jurisdiction are the comparison class. Because subsection (b)(4) requires a showing of discrimination, however, the comparison class must consist of individuals similarly situated to the claimant.

Subsection (b)(4) would be deprived of all real-world effect if "similarly situated" were given the same narrow construction the concept has in the Equal Protection Clause context, where it would be permissible for a State to tax a rail carrier more than a motor carrier, despite their seemingly similar lines of business. The category of "similarly situated" (b)(4) comparison classes must at least include the commercial and industrial taxpayers specified in the other subsections. But it also can include a railroad’s competitors. Discrimination in favor of that class both falls within the ordinary meaning of "discrimination" and frustrates the 4-R Act’s purpose of "restor[ing] the financial stability of the [Nation’s] railway system" while "fost[ering] competition among all carriers by railroad and other modes of transportation," 90 Stat. 33. Contrary to Alabama’s argument, normal rules of interpretation would say that the explicit limitation to "commercial and industrial" in the first three provisions, and its absence in the fourth, suggests that no such limitation applies to the fourth. Alabama’s additional arguments are also unavailing. Pp. 4–8.

2. The Eleventh Circuit erred in refusing to consider whether Alabama could justify its decision to exempt motor carriers from its sales and use taxes through its decision to subject motor carriers to a fuel excise tax. It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay another comparable tax from which the rail carrier is exempt, since both competitors could then claim to be discriminated against relative to each other. The Court’s negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. Gregg Dyeing Co. v. Query, 286 U. S. 472, 479–480. Similarly, an alternative, roughly equivalent tax is one possible justification that renders a tax disparity non-discriminatory. CSX’s counterarguments
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are rejected. On remand, the Eleventh Circuit is to consider whether Alabama’s fuel-excise tax is the rough equivalent of Alabama’s sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption. Although the State cannot offer a similar defense with respect to its water carrier exemption, the court should also examine whether any of the State’s alternative rationales justify that exemption. Pp. 8–10.

720 F. 3d 863, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which GINSBURG, J., joined.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF TRANSPORTATION ET AL. v. ASSOCIATION OF AMERICAN RAILROADS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


In 1970, Congress created the National Railroad Passenger Corporation (Amtrak). Congress has given Amtrak priority to use track systems owned by the freight railroads for passenger rail travel, at rates agreed to by the parties or, in case of a dispute, set by the Surface Transportation Board. And in 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue “metrics and standards” addressing the performance and scheduling of passenger railroad services, see §207(a), 122 Stat. 4907, including Amtrak’s on-time performance and train delays caused by host railroads. Respondent, the Association of American Railroads, sued petitioners—the Department of Transportation, the FRA, and two officials—claiming that the metrics and standards must be invalidated because it is unconstitutional for Congress to allow and direct a private entity like Amtrak to exercise joint authority in their issuance. Its argument rested on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected respondent’s claims, but the District of Columbia Circuit reversed as to the separation of powers claim, reasoning in central part that Amtrak is a private corporation and thus cannot constitutionally be granted regulatory power under §207.

Held: For purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Pp. 6–12.

(a) In concluding otherwise, the Court of Appeals relied on the statutory command that Amtrak “is not a department, agency, or instrumentality of the United States Government,” 49 U. S. C. §24301(a)(3), and the pronouncement that Amtrak “shall be operated and managed as a for profit corporation,” §24301(a)(2). But congres-
sional pronouncements are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution, and an independent inquiry reveals the Court of Appeals' premise that Amtrak is a private entity was flawed. As Amtrak's ownership and corporate structure show, the political branches control most of Amtrak's stock and its Board of Directors, most of whom are appointed by the President, §24302(a)(1), confirmed by the Senate, ibid., and understood by the Executive Branch to be removable by the President at will. The political branches also exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. See, e.g., §24315. Also of significance, Amtrak is required by statute to pursue broad public objectives, see, e.g., §§24101(b), 24307(a); certain aspects of Amtrak's day-to-day operations are mandated by Congress, see, e.g., §§24101(c)(6), 24902(b); and Amtrak has been dependent on federal financial support during every year of its existence. Given the combination of these unique features and Amtrak's significant ties to the Government, Amtrak is not an autonomous private enterprise. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in jointly issuing the metrics and standards with the FRA, Amtrak acted as a governmental entity for separation of powers purposes. And that exercise of governmental power must be consistent with the Constitution, including those provisions relating to the separation of powers. Pp. 6–10.

(b) Respondent's reliance on congressional statements about Amtrak's status is misplaced. Lebron v. National Railroad Passenger Corp., 513 U. S. 374, teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an accountable actor, for the political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Pp. 10–11.

(c) The Court of Appeals may address in the first instance any properly preserved issues respecting the lawfulness of the metrics and standards that may remain in this case, including questions implicating the Constitution's structural separation of powers and the Appointments Clause. Pp. 11–12.

721 F. 3d 666, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS,
Syllabus

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PEREZ, SECRETARY OF LABOR, ET AL. v. MORTGAGE BANKERS ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13–1041. Argued December 1, 2014—Decided March 9, 2015*

The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for “rule making,” defined as the process of “formulating, amending, or repealing a rule.” 5 U.S.C. §551(5). The APA distinguishes between two types of rules: So-called “legislative rules” are issued through notice-and-comment rulemaking, see §§553(b), (c), and have the “force and effect of law,” Chrysler Corp. v. Brown, 441 U.S. 281, 302–303. “Interpretive rules,” by contrast, are “issued . . . to advise the public of the agency’s construction of the statutes and rules which it administers,” Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99, do not require notice-and-comment rulemaking, and “do not have the force and effect of law,” ibid.

In 1999 and 2001, the Department of Labor’s Wage and Hour Division issued letters opinion that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938. In 2004, the Department issued new regulations regarding the exemption. Respondent Mortgage Bankers Association (MBA) requested a new interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006

*Together with No. 13–1052, Nickols et al. v. Mortgage Bankers Association, also on certiorari to the same court.
opinion letter and issued an Administrator’s Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending, as relevant here, that the Administrator’s Interpretation was procedurally invalid under the D. C. Circuit’s decision in *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F. 3d 579. The *Paralyzed Veterans* doctrine holds that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The District Court granted summary judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

**Held:** The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA’s rulemaking provisions and improperly imposes on agencies an obligation beyond the APA’s maximum procedural requirements. Pp. 6–14.

(a) The APA’s categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit’s reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, see 5 U. S. C. §551(5), but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule. Pp. 7–8.

(b) This straightforward reading of the APA harmonizes with longstanding principles of this Court’s administrative law jurisprudence, which has consistently held that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness,” *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 513. The APA’s rulemaking provisions are no exception: §4 establishes “the maximum procedural requirements” that courts may impose upon agencies engaged in rulemaking. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress’ standards. Pp. 8–9.

(c) MBA’s reasons for upholding the *Paralyzed Veterans* doctrine are unpersuasive. Pp. 9–14.

(i) MBA asserts that an agency interpretation of a regulation
that significantly alters the agency's prior interpretation effectively amends the underlying regulation. That assertion conflicts with the ordinary meaning of the words "amend" and "interpret," and it is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. MBA's theory is particularly odd in light of the limitations of the Paralyzed Veterans doctrine, which applies only when an agency has previously adopted an interpretation of its regulation. MBA fails to explain why its argument regarding revised interpretations should not also extend to the agency's first interpretation. Christensen v. Harris County, 529 U.S. 576, and Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, distinguished. Pp. 9–12.

(2) MBA also contends that the Paralyzed Veterans doctrine reinforces the APA's goal of procedural fairness. But the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decisionmaking, e.g., the arbitrary and capricious standard. In addition, Congress may include safe-harbor provisions in legislation to shelter regulated entities from liability when they rely on previous agency interpretations. See, e.g., 29 U.S.C. §§259(a), (b)(1). Pp. 12–13.

(3) MBA has waived its argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. From the beginning, this suit has been litigated on the understanding that the Administrator's Interpretation is an interpretive rule. Neither the District Court nor the Court of Appeals addressed this argument below, and MBA did not raise it here in opposing certiorari. P. 14.

720 F. 3d 966, reversed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined except for Part III–B. ALITO, J., filed an opinion concurring in part and concurrence in the judgment. SCALIA, J., and THOMAS, J., filed opinions concurring in the judgment.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued.
The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

SUPREME COURT OF THE UNITED STATES

Syllabus

B&B HARDWARE, INC. v. HARGIS INDUSTRIES, INC.,
DBA SEALTITE BUILDING FASTENERS ET AL., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT


Respondent Hargis Industries, Inc. (Hargis) tried to register its trademark for SEALTITE with the United States Patent and Trademark Office pursuant to the Lanham Act. Petitioner, B&B Hardware, Inc. (B&B), however, opposed registration, claiming that SEALTITE is too similar to B&B’s own SEALTIGHT trademark. The Trademark Trial and Appeal Board (TTAB) concluded that SEALTITE should not be registered because of the likelihood of confusion. Hargis did not seek judicial review of that decision.

Later, in an infringement suit before the District Court, B&B argued that Hargis was precluded from contesting the likelihood of confusion because of the TTAB’s decision. The District Court disagreed. The Eighth Circuit affirmed, holding that preclusion was unwarranted because the TTAB and the court used different factors to evaluate likelihood of confusion, the TTAB placed too much emphasis on the appearance and sound of the two marks, and Hargis bore the burden of persuasion before the TTAB while B&B bore it before the District Court.

Held: So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before a district court, issue preclusion should apply. Pp. 8–22.

(a) An agency decision can ground issue preclusion. The Court’s cases establish that when Congress authorizes agencies to resolve disputes, “courts may take it as given that Congress has legislated with the expectation that [issue preclusion] will apply except when a statutory purpose to the contrary is evident.” Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U. S. 104, 108. Constitutional avoidance
does not compel a different conclusion. Pp. 8–12.

(b) Neither the Lanham Act's text nor its structure rebuts the "presumption" in favor of giving preclusive effect to TTAB decisions where the ordinary elements of issue preclusion are met. *Astoria*, 501 U. S., at 108. This case is unlike *Astoria*. There, where exhausting the administrative process was a prerequisite to suit in court, giving preclusive effect to the agency's determination in that very administrative process could have rendered the judicial suit "strictly pro forma." *Id.*, at 111. By contrast, registration involves a separate proceeding to decide separate rights. Pp. 12–14.

(c) There is no categorical reason why registration decisions can never meet the ordinary elements of issue preclusion. That many registrations will not satisfy those ordinary elements does not mean that none will. Pp. 15–22.

(1) Contrary to the Eighth Circuit's conclusion, the same likelihood-of-confusion standard applies to both registration and infringement. The factors that the TTAB and the Eighth Circuit use to assess likelihood of confusion are not fundamentally different, and, more important, the operative language of each statute is essentially the same.

Hargis claims that the standards are different, noting that the registration provision asks whether the marks "resemble" each other, 15 U. S. C. §1052(d), while the infringement provision is directed towards the "use in commerce" of the marks, §1114(1). That the TTAB and a district court do not always consider the same usages, however, does not mean that the TTAB applies a different standard to the usages it does consider. If a mark owner uses its mark in materially the same ways as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation. For a similar reason, the Eighth Circuit erred in holding that issue preclusion could not apply because the TTAB relied too heavily on "appearance and sound." Pp. 15–19.

(2) The fact that the TTAB and district courts use different procedures suggests only that sometimes issue preclusion might be inappropriate, not that it always is. Here, there is no categorical "reason to doubt the quality, extensiveness, or fairness," *Montana v. United States*, 440 U. S. 147, 164, n. 11, of the agency's procedures. In large part they are exactly the same as in federal court. Also contrary to the Eighth Circuit's conclusion, B&B, the party opposing registration, not Hargis, bore the burden of persuasion before the TTAB, just as it did in the infringement suit. Pp. 19–21.

(3) Hargis is also wrong that the stakes for registration are always too low for issue preclusion in later infringement litigation.
Syllabus

When registration is opposed, there is good reason to think that both sides will take the matter seriously. Congress' creation of an elaborate registration scheme, with many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion. Pp. 21–22.

716 F. 3d 1020, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.
SUPREME COURT OF THE UNITED STATES

OMNICARE, INC., ET AL. v. LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT


The Securities Act of 1933 requires that a company wishing to issue securities must first file a registration statement containing specified information about the issuing company and the securities offered. See 15 U.S.C. §§77g, 77a. The registration statement may also include other representations of fact or opinion. To protect investors and promote compliance with these disclosure requirements, §11 of the Act creates two ways to hold issuers liable for a registration statement’s contents: A purchaser of securities may sue an issuer if the registration statement either “contain[s] an untrue statement of a material fact” or “omit[s] to state a material fact . . . necessary to make the statements therein not misleading.” §77k(a). In either case, the buyer need not prove that the issuer acted with any intent to deceive or defraud. Herman & MacLean v. Huddleston, 459 U.S. 375, 381–382.

Petitioner Omnicare, a pharmacy services company, filed a registration statement in connection with a public offering of common stock. In addition to the required disclosures, the registration statement contained two statements expressing the company’s opinion that it was in compliance with federal and state laws. After the Federal Government filed suit against Omnicare for allegedly receiving kickbacks from pharmaceutical manufacturers, respondents, pension funds that purchased Omnicare stock (hereinafter Funds), sued Omnicare under §11. They claimed that Omnicare’s legal-compliance statements constituted “untrue statement[s] of . . . material fact” and that Omnicare “omitted to state [material] facts necessary” to make those statements not misleading.
The District Court granted Omnicare’s motion to dismiss. Because the Funds had not alleged that Omnicare’s officers knew they were violating the law, the court found that the Funds had failed to state a §11 claim. The Sixth Circuit reversed. Acknowledging that the statements at issue expressed opinions, the court held that no showing of subjective disbelief was required. In the court’s view, the Funds’ allegations that Omnicare’s legal-compliance opinions were objectively false sufficed to support their claim.

Held:

1. A statement of opinion does not constitute an "untrue statement of . . . fact" simply because the stated opinion ultimately proves incorrect. The Sixth Circuit’s contrary holding wrongly conflates facts and opinions. A statement of fact expresses certainty about a thing, whereas a statement of opinion conveys only an uncertain view as to that thing. Section 11 incorporates that distinction in its first clause by exposing issuers to liability only for “untrue statement[s] of . . . fact.” §77k(a) (emphasis added). Because a statement of opinion admits the possibility of error, such a statement remains true—and thus is not an “untrue statement of . . . fact”—even if the opinion turns out to have been wrong.

But opinion statements are not wholly immune from liability under §11’s first clause. Every such statement explicitly affirms one fact; that the speaker actually holds the stated belief. A statement of opinion thus qualifies as an “untrue statement of . . . fact” if that fact is untrue—i.e., if the opinion expressed was not sincerely held. In addition, opinion statements can give rise to false-statement liability under §11 if they contain embedded statements of untrue facts. Here, however, Omnicare’s sincerity is not contested and the statements at issue are pure opinion statements. The Funds thus cannot establish liability under §11’s first clause. Pp. 6–10.

2. If a registration statement omits material facts about the issuer’s inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself, then §11’s omissions clause creates liability. Pp. 10–20.

(a) For purposes of §11’s omissions clause, whether a statement is "misleading" is an objective inquiry that depends on a reasonable investor’s perspective. Cf. TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 446. Omnicare goes too far by claiming that no reasonable person, in any context, can understand a statement of opinion to convey anything more than the speaker's own mindset. A reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about the speaker’s basis for holding that view. Specifically, an issuer's statement of opinion may fairly imply
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facts about the inquiry the issuer conducted or the knowledge it had. And if the real facts are otherwise, but not provided, the opinion statement will mislead by omission.

An opinion statement, however, is not misleading simply because the issuer knows, but fails to disclose, some fact cutting the other way. A reasonable investor does not expect that every fact known to an issuer supports its opinion statement. Moreover, whether an omission makes an expression of opinion misleading always depends on context. Reasonable investors understand opinion statements in light of the surrounding text, and §11 creates liability only for the omission of material facts that cannot be squared with a fair reading of the registration statement as a whole. Omnicare’s arguments to the contrary are unavailing. Pp. 10–15.

(b) Because neither court below considered the Funds’ omissions theory under the right standard, this case is remanded for a determination of whether the Funds have stated a viable omissions claim. On remand, the court must review the Funds’ complaint to determine whether it adequately alleges that Omnicare omitted from the registration statement some specific fact that would have been material to a reasonable investor. If so, the court must decide whether the alleged omission rendered Omnicare’s opinion statements misleading in context. Pp. 19–20.

719 F. 3d 498, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment.
SUPREME COURT OF THE UNITED STATES

Syllabus

YOUNG v. UNITED PARCEL SERVICE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT


The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII’s prohibition against sex discrimination applies to discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. §2000e(k). The Act’s second clause says that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” Ibid. This case asks the Court to determine how the latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792. Under that framework, the plaintiff has “the initial burden” of “establishing a prima facie case” of discrimination. Id., at 802. If she carries her burden, the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason[s] for” the difference in treat-
Syllabus

If the employer articulates such reasons, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the reasons . . . were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons," but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all "other" relevant "persons."

The District Court granted UPS summary judgment, concluding, *inter alia*, that Young could not make out a prima facie case of discrimination under *McDonnell Douglas*. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator[s]." The Fourth Circuit affirmed.

Held:


   i. Young claims that as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Brief for Petitioner 28. Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional "most-favored-nation" status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to all pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "any other per-
sions" who are similar in their ability or inability to work, nor does it specify the particular "other persons" Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonprotextual reason for doing so. See, e.g., Burdine, supra, at 252–258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach. Pp. 12–14.

(i) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, "consistency," and "thoroughness" of "consideration" necessary to "give it power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance. Pp. 14–17.

(iii) UPS claims that the Act's second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act's second clause as UPS proposes would render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of General Elec. Co. v. Gilbert, 429 U.S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy. Pp. 17–20.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the McDonnell Douglas framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a "legitimate, nondiscriminatory" reason, the plaintiff may show that it
Syllabus

is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see Burdine, supra, at 255, n. 10, and with Congress' intent to overrule Gilbert. Pp. 20–23.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual. Pp. 23–24. 707 F. 3d 437, vacated and remanded.

SYNOPSIS COURT OF THE UNITED STATES

Syllabus

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. v. ALABAMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA


In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—e.g., compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district's deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities' "ability to elect their preferred candidates of choice" under §5 of the Voting Rights Act of 1965, 52 U. S. C. §10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama's new district boundaries create a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," Miller v. Johnson, 515 U. S. 900, 913, 916, and the use of race is not "narrowly tailored to serve a compelling state interest," Shaw v. Hunt, 517 U. S. 899, 902 (Shaw II).

In ruling against appellants, it made four critical determinations:

*Together with No. 13–1138, Alabama Democratic Conference et al. v. Alabama et al., also on appeal from the same court.
Syllabus

(1) that both appellants had argued "that the Acts as a whole constitute racial gerrymanders," and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants' claims must fail because race "was not the predominant motivating factor" in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was "narrowly tailored" to serve a "compelling state interest" in avoiding retrogression under §5.

Held:

1. The District Court's analysis of the racial gerrymandering claim as referring to the State "as a whole," rather than district-by-district, was legally erroneous. Pp. 5–12.

   (a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more specific electoral districts, see, e.g., Shaw v. Reno, 509 U.S. 630, 649 (Shaw I), and has described the plaintiff's evidentiary burden similarly, see Miller, supra, at 916. The Court's district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see Bush v. Vera, 517 U.S. 952, 957; Shaw I, supra, at 648. Pp. 5–6.

   (b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State as an undifferentiated whole. But a showing that race-based criteria did not significantly affect the drawing of some Alabama districts would have done little to defeat a claim that race-based criteria predominately affected the drawing of other Alabama districts. Thus, the District Court's undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 7–8.

   (c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs' evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the leg-
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1. The District Court erred in applying the "one person, one vote" rule to the legislative districts in the State. It concluded that the "districts are gerrymandered, the State "as" an undifferentiated "whole." Pp. 8-12.

2. The District Court also erred in deciding, *sua sponte*, that the Conference lacked standing. It believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside." But the Conference's post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference's burden of establishing standing. At the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in those circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte*, to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 12-15.

3. The District Court also did not properly calculate "predominance" in its alternative holding that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the "traditional" factors to be weighed against the use of race to determine whether race "predominates," see *Miller*, *supra*, at 916. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met. Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 15-19.

4. The District Court's final alternative holding—that "the [challenged] Districts would satisfy strict scrutiny"—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Pp. 19-23.

(a) The statute's language, 52 U. S. C. §§10504(b), (d), and Department of Justice Guidelines make clear that §5 is satisfied if mi-
minority voters retain the ability to elect their preferred candidates. The history of §5 further supports this view, as Congress adopted the language in §5 to reject this Court's decision in Georgia v. Ashcroft, 539 U. S. 461, and to accept the views of Justice Souter's dissent—that, in a §5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances, id., at 493, 498, 505, 509. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 19–22.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine precisely what percent minority population §5 demands. A court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as Amicus Curiae 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court's conclusion. Pp. 22–23.

989 F. Supp. 2d 1227, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

ARMSTRONG ET AL. v. EXCEPTIONAL CHILD CENTER, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


Providers of “habilitation services” under Idaho’s Medicaid plan are reimbursed by the State’s Department of Health and Welfare. Section 30(A) of the Medicaid Act requires Idaho’s plan to “assure that payments are consistent with efficiency, economy, and quality of care” while “safeguard[ing] against unnecessary utilization of . . . care and services.” 42 U. S. C. §1396a(a)(30)(A). Respondents, providers of habilitation services, sued petitioners, Idaho Health and Welfare Department officials, claiming that Idaho reimbursed them at rates lower than §30(A) permits, and seeking to enjoin petitioners to increase these rates. The District Court entered summary judgment for the providers. The Ninth Circuit affirmed, concluding that the Supremacy Clause gave the providers an implied right of action, and that they could sue under this implied right of action to seek an injunction requiring Idaho to comply with §30(a).

Held: The judgment is reversed.


Justice Scalia delivered the opinion of the Court, except as to Part IV, concluding that the Supremacy Clause does not confer a private right of action, and that Medicaid providers cannot sue for an injunction requiring compliance with §30(a). Pp. 3–10.

(a) The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. Gibbons v. Ogden, 9 Wheat. 1, 210. But it is not the “source of any federal rights,” Golden State Transit Corp. v. Los Angeles, 493 U. S. 103, 107, and certainly does not create a cause of action. Nothing in the Clause’s text suggests otherwise, and nothing suggests it was ever understood as conferring
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a private right of action. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers. Art I., §8; *McCulloch v. Maryland*, 4 Wheat. 319, 421. It is unlikely that the Constitution gave Congress broad discretion with regard to the enactment of laws, while simultaneously limiting Congress’s power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. Pp. 3–5.

(b) Reading the Supremacy Clause not to confer a private right of action is consistent with this Court’s preemption jurisprudence. The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. This Court has never held nor suggested that this judge-made remedy, in its application to state officers, rests upon an implied right of action contained in the Supremacy Clause. Pp. 5–6.

(c) Respondents’ suit cannot proceed in equity. The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 74. Here, the express provision of a single remedy for a State’s failure to comply with Medicaid’s requirements—the withholding of Medicaid funds by the Secretary of Health and Human Services, 42 U. S. C. §1396c—and the sheer complexity associated with enforcing §30(A) combine to establish Congress’s “intent to foreclose” equitable relief, *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U. S. 635, 647. Pp. 6–10.

*Scalia, J.*, delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJs., joined, and an opinion with respect to Part IV, in which ROBERTS, C. J., and THOMAS and ALITO, JJs., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, GINSBURG, and KAGAN, JJs., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

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RODRIGUEZ v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT


Officer Struble, a K–9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, inter alia, checking the driver’s licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge recommended denial of the motion. He found no reasonable suspicion supporting detention once Struble issued the written warning. Under Eighth Circuit precedent, however, he concluded that prolonging the stop by “seven to eight minutes” for the dog sniff was only a de minimis intrusion on Rodriguez’s Fourth Amendment rights and was for that reason permissible. The District Court then denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed. Noting that the seven or eight minute delay was an acceptable “de minimis intrusion on Rodriguez’s personal liberty,” the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez’s detention after issuing the written warning.

Held:
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1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution’s shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under Terry v. Ohio, 392 U.S. 1, than an arrest, see, e.g., Arizona v. Johnson, 555 U.S. 323, 330. Its tolerable duration is determined by the seizure’s “mission,” which is to address the traffic violation that warranted the stop, Illinois v. Caballes, 543 U.S. 405, 407 and attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, Johnson, 555 U.S. at 327–328 (questioning); Caballes, 543 U.S., at 406, 408 (dog sniff), but a traffic stop “become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission” of issuing a warning ticket, id., at 407.

Beyond determining whether to issue a traffic ticket, an officer’s mission during a traffic stop typically includes checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See Delaware v. Prouse, 440 U.S. 648, 658–659. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer’s traffic mission.

In concluding that the de minimis intrusion here could be offset by the Government’s interest in stopping the flow of illegal drugs, the Eighth Circuit relied on Pennsylvania v. Mimms, 434 U.S. 106. The Court reasoned in Mimms that the government’s “legitimate and weighty” interest in officer safety outweighed the “de minimis” additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, id., at 110–111. The officer-safety interest recognized in Mimms, however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer’s traffic-control mission and therefore gains no support from Mimms.

The Government’s argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop “prolonged beyond” the time in fact needed for the officer to complete his traffic-based inquiries is “unlawful,” Caballes, 543 U.S., at 407. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds
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time to the stop. Pp. 5–8.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. P. 9.

741 F. 3d 905, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which KENNEDY, J., joined as to all but Part III. ALITO, J., filed a dissenting opinion.
SUPREME COURT OF THE UNITED STATES

Syllabus

ONEOK, INC., ET AL. v. LEARJET, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


Respondents, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines, sued petitioner interstate pipelines, claiming that the pipelines had engaged in behavior that violated state antitrust laws. In particular, respondents alleged that petitioners reported false information to the natural-gas indices on which respondents’ natural-gas contracts were based. The indices affected not only retail natural-gas prices, but also wholesale natural-gas prices.

After removing the cases to federal court, the petitioner pipelines sought summary judgment on the ground that the Natural Gas Act pre-empted respondents’ state-law claims. That Act gives the Federal Energy Regulatory Commission (FERC) the authority to determine whether rates charged by natural-gas companies or practices affecting such rates are unreasonable. 15 U. S. C. §717d(a). But it also limits FERC’s jurisdiction to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies engaged in such transportation or sale. §717(b). The Act leaves regulation of other portions of the industry—such as retail sales—to the States. Ibid.

The District Court granted petitioners’ motion for summary judgment, reasoning that because petitioners’ challenged practices directly affected wholesale as well as retail prices, they were pre-empted by the Act. The Ninth Circuit reversed. While acknowledging that the pipelines’ index manipulation increased wholesale prices as well as retail prices, it held that the state-law claims were not pre-empted because they were aimed at obtaining damages only for excessively high retail prices.

Held: Respondents’ state-law antitrust claims are not within the field of
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(a) The Act "was drawn with meticulous regard for the continued exercise of state power." Panhandle Eastern Pipe Line Co. v. Public Serv. Comm’n of Ind., 332 U.S. 507, 517–518. Where, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court’s precedents. Those precedents emphasize the importance of considering the target at which the state-law claims aim. See, e.g., Northern Natural Gas Co. v. State Corporation Comm’n of Kan., 372 U.S. 84; Northwest Central Pipeline Corp. v. State Corporation Comm’n of Kan., 489 U.S. 493. Here, respondents’ claims are aimed at practices affecting retail prices, a matter "firmly on the States’ side of [the] dividing line." Id., at 514.

Schneiderwind v. ANR Pipeline Co., 485 U.S. 293, is not to the contrary. That opinion explains that the Act does not pre-empt "traditional" state regulation, such as blue sky laws. Id., at 308, n. 11. Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. The broad applicability of state antitrust laws supports a finding of no pre-emption here.

So, too, does the fact that States have long provided "common-law and statutory remedies against monopolies and unfair business practices," California v. ARC America Corp., 490 U.S. 93, 101. As noted earlier, the Act circumscribes FERC’s powers and preserves traditional areas of state authority. §717(b). Pp. 10–14.

(b) Neither Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, nor FPC v. Louisiana Power & Light Co., 496 U.S. 621, supports petitioners’ position. Mississippi Power is best read as a conflict pre-emption case, not a field pre-emption case. In any event, the state inquiry in Mississippi Power was pre-empted because it was directed at jurisdictional sales in a way that respondents’ state antitrust suits are not. Louisiana Power is also a conflict pre-emption case, and thus does not significantly help petitioners’ field pre-emption argument. Pp. 14–15.

(c) Because the parties have not argued conflict pre-emption, questions involving conflicts between state antitrust proceedings and the federal rate-setting process are left for the lower courts to resolve in the first instance. Pp. 15–16.

(d) While petitioners and the Government argue that this Court should defer to FERC’s determination that field pre-emption bars respondents’ claims, they fail to point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Thus, this Court need not consider what legal ef-
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fact such a determination might have. P. 16.
715 F. 3d 716, affirmed.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined as to all but Part I-A. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

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UNITED STATES v. KWAI FUN WONG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


The Federal Tort Claims Act (FTCA) provides that a tort claim against the United States "shall be forever barred" unless the claimant meets two deadlines. First, a claim must be presented to the appropriate federal agency for administrative review "within two years after [the] claim accrues." 28 U. S. C. §2401(b). Second, if the agency denies the claim, the claimant may file suit in federal court "within six months" of the agency's denial. Ibid.

 Kwai Fun Wong and Marlene June, respondents in Nos. 13–1074 and 13–1075, respectively, each missed one of those deadlines. Wong failed to file her FTCA claim in federal court within 6 months, but argued that that was only because the District Court had not permitted her to file that claim until after the period expired. June failed to present her FTCA claim to a federal agency within 2 years, but argued that her untimely filing should be excused because the Government had, in her view, concealed facts vital to her claim. In each case, the District Court dismissed the FTCA claim for failure to satisfy §2401(b)'s time bars, holding that, despite any justification for delay, those time bars are jurisdictional and not subject to equitable tolling. The Ninth Circuit reversed in both cases, concluding that §2401(b)'s time bars may be equitably tolled.

Held: Section 2401(b)'s time limits are subject to equitable tolling. Pp. 4–18.

(a) Irwin v. Department of Veterans Affairs, 498 U. S. 89, provides the framework for deciding the applicability of equitable tolling to statutes of limitations on suits against the Government. There, the

* Together with No. 13–1075, United States v. June, Conservator, also on certiorari to the same court.
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Court adopted a "rebuttable presumption" that such time bars may be equitably tolled. Id., at 95. Irwin's presumption may, of course, be rebutted. One way to do so—pursued by the Government here—is to demonstrate that the statute of limitations at issue is jurisdictional; if so, the statute cannot be equitably tolled. But this Court will not conclude that a time bar is jurisdictional unless Congress provides a "clear statement" to that effect. Sebelius v. Auburn Regional Medical Center, 568 U.S. ___ (2013). And in applying that clear statement rule, this Court has said that most time bars, even if mandatory and emphatic, are nonjurisdictional. See id., at ___. Congress thus must do something special to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it. Pp. 4–7.

(b) Congress did no such thing in enacting §2401(b). The text of that provision speaks only to a claim's timeliness; it does not refer to the jurisdiction of the district courts or address those courts' authority to hear untimely suits. See Arbaugh v. Y & H Corp., 546 U.S. 500, 515. Instead, it "reads like an ordinary, run-of-the-mill statute of limitations." Holland v. Florida, 560 U.S. 631, 647. Statutory context confirms that reading. Congress's separation of a filing deadline from a jurisdictional grant often indicates that the deadline is not jurisdictional, and here the FTCA's jurisdictional grant appears not in §2401(b) but in another section of Title 28, §1346(b)(1). That jurisdictional grant is not expressly conditioned on compliance with §2401(b)'s limitations periods. Finally, assuming it could provide the clear statement that this Court's cases require, §2401(b)'s legislative history does not clearly demonstrate that Congress intended the provision to impose a jurisdictional bar. Pp. 7–9.

(c) The Government's two principal arguments for treating §2401(b) as jurisdictional are unpersuasive and foreclosed by this Court's precedents. Pp. 9–17.

(i) The Government first points out that §2401(b) includes the same "shall be forever barred" language as the statute of limitations governing Tucker Act claims, which this Court has held to be jurisdictional. See, e.g., Kendall v. United States, 107 U.S. 123, 125–126. But that phrase was a commonplace in statutes of limitations enacted around the time of the FTCA, and it does not carry talismanic jurisdictional significance. Indeed, this Court has construed the same language to be subject to tolling in the Clayton Act's statute of limitations. See American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 559. And in two decisions addressing the Tucker Act's statute of limitations, the Court has dismissed the idea that that language is jurisdictionally significant. See Irwin, 498 U.S., at 95; John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 137, 139. The "shall be forever barred" phrase is thus nothing more than an ordinary way to
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The Government next argues that §2401(b) is jurisdictional because it is a condition on the FTCA's waiver of sovereign immunity. But that argument is foreclosed by Irwin, which considered an identical objection but concluded that even time limits that condition a waiver of immunity may be equitably tolled. See 498 U. S., at 95–96. The Government's invocation of sovereign immunity principles is also peculiarly inapt here. Unlike other waivers of sovereign immunity, the FTCA treats the Government much like a private party, and the Court has accordingly declined to construe the Act narrowly merely because it waives the Government's immunity from suit. There is no reason to do differently here. Pp. 14–17.


KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

WILLIAMS-YULEE v. FLORIDA BAR

CERTIORARI TO THE SUPREME COURT OF FLORIDA


Florida is one of 39 States where voters elect judges at the polls. To
promote public confidence in the integrity of the judiciary, the Florida
Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct,
which provides that judicial candidates “shall not personally solicit
campaign funds . . . but may establish committees of responsible per-
sons” to raise money for election campaigns.

Petitioner Lanell Williams-Yulee (Yulee) mailed and posted online
a letter soliciting financial contributions to her campaign for judicial
office. The Florida Bar disciplined her for violating a Florida Bar
Rule requiring candidates to comply with Canon 7C(1), but Yulee
contended that the First Amendment protects a judicial candidate’s
right to personally solicit campaign funds in an election. The Florida
Supreme Court upheld the disciplinary actions, concluding that
Canon 7C(1) is narrowly tailored to serve the State’s compelling in-
terest.

Held: The judgment is affirmed.

138 So. 3d 379, affirmed.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except
as to Part II, concluding that the First Amendment permits Canon
7C(1)’s ban on the personal solicitation of campaign funds by judicial
candidates. P. 8–22.

(a) Florida’s interest in preserving public confidence in the integri-

ty of its judiciary is compelling. The State may conclude that judges,
charged with exercising strict neutrality and independence, cannot
supplicate campaign donors without diminishing public confidence in
judicial integrity. Simply put, the public may lack confidence in a
judge’s ability to administer justice without fear or favor if he comes
to office by asking for favors. This Court’s precedents have recog-
nized the “vital state interest” in safeguarding “public confidence in
the fairness and integrity of the nation's elected judges," Caperton v. A. T. Massey Coal Co., 556 U. S. 868, 889. Unlike the legislature or the executive, the judiciary "has no influence over either the sword or the purse," Federalist No. 78, p. 465 (A. Hamilton), so its authority depends in large measure on the public's willingness to respect and follow its decisions. Public perception of judicial integrity is accordingly "a state interest of the highest order." 556 U. S., at 889.

A State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, because a judge's role differs from that of a politician. Republican Party of Minn. v. White, 536 U. S. 765, 783. Unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors. As in White, therefore, precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States allowing personal solicitation serve with fairness and honor, but in the eyes of the public, a judicial candidate's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." Tumey v. Ohio, 273 U. S. 510, 532. That risk is especially pronounced where most donors are lawyers and litigants who may appear before the judge they are supporting. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. Pp. 9–12.

(b) Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evan. enhandedly to all judges and judicial candidates, regardless of viewpoint or means of solicitation. And unlike some laws that have been found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. When the judicial candidate himself asks for money, the stakes are higher for all involved. A judicial candidate
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asking for money places his name and reputation behind the request, and the solicited individual knows that the same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public.

Permitting a judicial candidate to write thank you notes to campaign donors likewise does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. The State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400. The State should not be punished for leaving open more, rather than fewer, avenues of expression, especially when there is no indication of a pretextual motive for the selective restriction of speech. Pp. 12–16.

(c) Canon 7C(1) is also not overinclusive. By any measure, it restricts a narrow slice of speech. It leaves judicial candidates free to discuss any issue with any person at any time, to write letters, give speeches, and put up billboards; to contact potential supporters in person, on the phone, or online; and to promote their campaigns through the media. Though they cannot ask for money, they can direct their campaign committees to do so.

Yulee concedes that Canon 7C(1) is valid in numerous applications, but she contends that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. This argument misperceives the breadth of the compelling interest underlying Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge person-
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ally asking for money. Canon 7C(1) must be narrowly tailored, not “perfectly tailored.” *Burson v. Freeman*, 504 U.S. 191, 209. The First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Yulee errs in contending that Florida can accomplish its compelling interest through recusal rules and campaign contribution limits. A rule requiring recusal in every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions, and a flood of postelection recusal motions could exacerbate the very appearance problem the State is trying to solve. As for contribution limits, Florida already applies them to judicial elections, and this Court has never held that adopting such limits precludes a State from pursuing its compelling interests through additional means.

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years, but it is not the Court’s place to resolve that enduring debate. The Court’s limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State’s decision to elect judges does not compel it to compromise public confidence in their integrity. Pp. 16–22.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part II. BREYER, SOTOMAYOR, and KAGAN, JJ., joined that opinion in full, and GINSBURG, J., joined except as to Part II. BREYER, J., filed a concurring opinion. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined as to Part II. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. KENNEDY, J., and ALITO, J., filed dissenting opinions.
(Slip Opinion)  OCTOBER TERM, 2014  

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SUPREME COURT OF THE UNITED STATES

Syllabus

MACH MINING, LLC v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT


Before suing an employer for employment discrimination under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC or Commission) must first “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U. S. C. §2000e–5(b). Once the Commission determines that conciliation has failed, it may file suit in federal court. §2000e–5(f)(1). However, “[n]othing said or done during” conciliation may be “used as evidence in a subsequent proceeding without written consent of the persons concerned.” §2000e–5(b).

After investigating a sex discrimination charge against petitioner Mach Mining, LLC, respondent EEOC determined that reasonable cause existed to believe that the company had engaged in unlawful hiring practices. The Commission sent a letter inviting Mach Mining and the complainant to participate in informal conciliation proceedings and notifying them that a representative would be contacting them to begin the process. About a year later, the Commission sent Mach Mining another letter stating that it had determined that conciliation efforts had been unsuccessful. The Commission then sued Mach Mining in federal court. In its answer, Mach Mining alleged that the Commission had not attempted to conciliate in good faith. The Commission countered that its conciliation efforts were not subject to judicial review and that, regardless, the two letters it sent to Mach Mining provided adequate proof that it had fulfilled its statutory duty. The District Court agreed that it could review the adequacy of the Commission’s efforts, but granted the Commission leave to immediately appeal. The Seventh Circuit reversed, holding that the
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Commission's statutory conciliation obligation was unreviewable.

Held:

1. Courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation. This Court has recognized a "strong presumption" that Congress means to allow judicial review of administrative action. *Bouie v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670. That presumption is rebuttable when a statute's language or structure demonstrates that Congress intended an agency to police itself. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 351. But nothing rebuts that presumption here.

   By its choice of language, Congress imposed a mandatory duty on the EEOC to attempt conciliation and made that duty a precondition to filing a lawsuit. Such compulsory prerequisites are routinely enforced by courts in Title VII litigation. And though Congress gave the EEOC wide latitude to choose which "informal methods" to use, it did not deprive courts of judicially manageable criteria by which to review the conciliation process. By its terms, the statutory obligation to attempt conciliation necessarily entails communication between the parties concerning the alleged unlawful employment practice. The statute therefore requires the EEOC to notify the employer of the claim and give the employer an opportunity to discuss the matter. In enforcing that statutory condition, a court applies a manageable standard. Pp. 4–8.

2. The appropriate scope of judicial review of the EEOC's conciliation activities is narrow, enforcing only the EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance. This limited review respects the expansive discretion that Title VII gives the EEOC while still ensuring that it follows the law.

The Government's suggestion that review be limited to checking the facial validity of its two letters to Mach Mining falls short of Title VII's demands. That standard would merely accept the EEOC's word that it followed the law, whereas the aim of judicial review is to verify that the EEOC actually tried to conciliate a discrimination charge. Citing the standard set out in the National Labor Relations Act, Mach Mining proposes review for whether the EEOC engaged in good-faith negotiation, laying out a number of specific requirements to implement that standard. But the NLRA's process-based approach provides a poor analogy for Title VII, which ultimately cares about substantive outcomes and eschews any reciprocal duty to negotiate in good faith. Mach Mining's proposed code of conduct also conflicts with the wide latitude Congress gave the Commission to decide how to conduct and when to end conciliation efforts. And because information obtained during conciliation would be necessary evidence in a
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good-faith determination proceeding, Mach Mining's brand of review would violate Title VII's confidentiality protections.

The proper scope of review thus matches the terms of Title VII's conciliation provision. In order to comply with that provision, the EEOC must inform the employer about the specific discrimination allegation. Such notice must describe what the employer has done and which employees (or class of employees) have suffered. And the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. A sworn affidavit from the EEOC stating that it has performed these obligations should suffice to show that it has met the conciliation requirement. Should the employer present concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to resolve that limited dispute. Should it find for the employer, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. Pp. 8–14.

738 F. 3d 171, vacated and remanded.

KAGAN, J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

BULLARD v. BLUE HILLS BANK, FKA HYDE PARK
SAVINGS BANK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT


After filing for Chapter 13 bankruptcy, petitioner Bullard submitted a
proposed repayment plan to the Bankruptcy Court. Respondent Blue
Hills Bank, Bullard’s mortgage lender, objected to the plan’s treat-
ment of its claim. The Bankruptcy Court sustained the Bank’s objec-
tion and declined to confirm the plan. Bullard appealed to the First
Circuit Bankruptcy Appellate Panel (BAP). The BAP concluded that
the Bankruptcy Court’s denial of confirmation was not a final, ap-
pealable order, see 28 U. S. C. §158(a)(1), but heard the appeal under
a provision permitting interlocutory appeals “with leave of the court,”
§158(a)(3), and agreed with the Bankruptcy Court that Bullard’s pro-
posed plan was not allowed. Bullard appealed to the First Circuit,
but it dismissed for lack of jurisdiction. It concluded that its juris-
diction depended on the finality of the BAP’s order, which in turn de-
depended on the finality of the Bankruptcy Court’s order. And it found
that the Bankruptcy Court’s order denying confirmation was not final
so long as Bullard remained free to propose another plan.

Held: A bankruptcy court’s order denying confirmation of a debtor’s
proposed repayment plan is not a final order that the debtor can im-
mediately appeal. Pp. 4–12.

(a) Congress has long treated orders in bankruptcy cases as imme-
diately appealable “if they finally dispose of discrete disputes within
the larger case,” Howard Delivery Service, Inc. v. Zurich American
Ins. Co., 547 U. S. 651, 657, n. 3. This approach is reflected in the
current statute, which provides that bankruptcy appeals as of right
may be taken not only from final judgments in cases but from “final
judgments, orders, and decrees . . . in cases and proceedings.” 28
U. S. C. §158(a). Bullard argues that a bankruptcy court conducts a
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Separate proceeding each time it reviews a proposed plan, and therefore a court’s order either confirming or denying a plan terminates the proceeding and is final and immediately appealable. But the relevant proceeding is the entire process of attempting to arrive at an approved plan that would allow the bankruptcy case to move forward. Only plan confirmation, or case dismissal, alters the status quo and fixes the parties’ rights and obligations; denial of confirmation with leave to amend changes little and can hardly be described as final. Additional considerations—that the statute defining core bankruptcy proceedings lists “confirmations of plans” §107(b)(2)(L), but omits any reference to denials; that immediate appeals from denials would result in delays and inefficiencies that requirements of finality are designed to constrain; and that a debtor’s inability to immediately appeal a denial encourages the debtor to work with creditors and the trustee to develop a confirmable plan—bolster the conclusion that the relevant proceeding is the entire process culminating in confirmation or dismissal. Pp. 4–8.

(b) The Solicitor General suggests that because bankruptcy disputes are generally classified as either “adversary proceedings” or “contested matters,” and because an order denying confirmation and an order granting confirmation both resolve a contested matter, both should be considered final. This argument simply assumes that confirmation is appealable because it resolves a contested matter, and that therefore anything else that resolves the contested matter must also be appealable. But one could just as easily contend that confirmation is appealable because it resolves the entire plan consideration process, while denial is not because it does not. Any asymmetry in denying the debtor an immediate appeal from a denial while allowing a creditor an immediate appeal from a confirmation simply reflects the fact that confirmation allows the bankruptcy to go forward and alters the legal relationships among the parties, while denial lacks such significant consequences. Nor is it clear that the asymmetry will always advantage creditors. Finally, Bullard contends that unless denial orders are final, a debtor will be required to choose between two untenable options: either accept dismissal of the case and then appeal, or propose an amended but unwanted plan and appeal its confirmation. These options will often be unsatisfying, but our litigation system has long accepted that certain burdensome rulings will be “only imperfectly reparable” by the appellate process. Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872. That prospect is made tolerable by the Court’s confidence that bankruptcy courts rule correctly most of the time and by the existence of several mechanisms for interlocutory review, e.g., §§108(a)(3), (d)(2), which “serve as useful safety valves for promptly correcting serious errors”
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and resolving legal questions important enough to be addressed immediately. *Mohawk Industries, Inc. v. Carpenter*, 558 U. S. 100, 111. Pp. 8–12.

752 F. 3d 483, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

HARRIS v. VIEGELAHN, CHAPTER 13 TRUSTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14–400. Argued April 1, 2015—Decided May 18, 2015

Individual debtors may seek discharge of their financial obligations under either Chapter 7 or Chapter 13 of the Bankruptcy Code. In a Chapter 7 proceeding, the debtor’s assets are transferred to a bankruptcy estate. 11 U.S.C. §541(a)(1). The estate’s assets are then promptly liquidated, §704(a)(1), and distributed to creditors, §726. A Chapter 7 estate, however, does not include the wages a debtor earns or the assets he acquires after the bankruptcy filing. §541(a)(1).

Chapter 13, a wholly voluntary alternative to Chapter 7, permits the debtor to retain assets during bankruptcy subject to a court-approved plan for payment of his debts. Payments under a Chapter 13 plan are usually made from a debtor’s “future income.” 1322(a)(1). The Chapter 13 estate, unlike a Chapter 7 estate, therefore includes both the debtor’s property at the time of his bankruptcy petition, and any assets he acquires after filing. §1306(a). Because many debtors fail to complete a Chapter 13 plan successfully, Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 “at any time.” §1307(a). Conversion does not commence a new bankruptcy case, but it does terminate the service of the Chapter 13 trustee. §348(e).

Petitioner Harris, indebted to multiple creditors and $3,700 behind on his home mortgage payments to Chase Manhattan, filed a Chapter 13 bankruptcy petition. His court-confirmed plan provided that he would resume making monthly mortgage payments to Chase, and that $530 per month would be withheld from his postpetition wages and remitted to the Chapter 13 trustee, respondent Viegelnah. Trustee Viegelnah would make monthly payments to Chase to pay down Harris’ mortgage arrears, and distribute remaining funds to Harris’ other creditors. When Harris again fell behind on his mortgage pay-
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Chase foreclosed on his home. Following the foreclosure, Viegelnah continued to receive $530 per month from Harris’ wages, but stopped making the payments earmarked for Chase. As a result, funds formerly reserved for Chase accumulated in Viegelnah’s possession. Approximately a year after the foreclosure, Harris converted his case to Chapter 7. Ten days after this conversion, Viegelnah distributed $5,513.22 in Harris’ withheld wages mainly to Harris’ creditors. Asserting that Viegelnah lacked authority to disburse his postpetition wages to creditors postconversion, Harris sought an order from the Bankruptcy Court directing refund of the accumulated wages Viegelnah paid to his creditors. The Bankruptcy Court granted Harris’ motion, and the District Court affirmed. The Fifth Circuit reversed, concluding that a former Chapter 13 trustee must distribute a debtor’s accumulated postpetition wages to his creditors.

Held: A debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee. Pp. 5–11.

(a) Absent a bad-faith conversion, §348(f) limits a converted Chapter 7 estate to property belonging to the debtor “as of the date” the original Chapter 13 petition was filed. Because postpetition wages do not fit that bill, undistributed wages collected by a Chapter 13 trustee ordinarily do not become part of a converted Chapter 7 estate. Pp. 5–6.

(b) By excluding postpetition wages from the converted Chapter 7 estate (absent a bad-faith conversion), §348(f) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. *Pp. 7–8.

(c) This conclusion is reinforced by §348(e), which “terminates the service of [the Chapter 13 trustee] upon conversion. One service provided by a Chapter 13 trustee is disbursing “payments to creditors.” §1326(c). The moment a case is converted from Chapter 13 to Chapter 7, a Chapter 13 trustee is stripped of authority to provide that “service.” *P. 8.

(d) Section 1327(a), which provides that a confirmed Chapter 13 plan “bind[s] the debtor and each creditor,” and §1326(a)(2), which instructs a trustee to distribute “payment[s] in accordance with the plan,” ceased to apply once the case was converted to Chapter 7. §103(i). Sections 1327(a) and 1326(a)(2), therefore, offer no support for Viegelnah’s assertion that the Bankruptcy Code requires a terminated Chapter 13 trustee to distribute to creditors postpetition wages remaining in the trustee’s possession. Continuing to distribute funds to creditors pursuant to a defunct Chapter 13 plan, moreover, is not
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(e) Because Chapter 13 is a voluntary alternative to Chapter 7, a debtor’s postconversion receipt of a fraction of the wages he earned and would have kept had he filed under Chapter 7 in the first place does not provide the debtor with a “windfall.” A trustee who distributes payments regularly may have little or no accumulated wages to return, while a trustee who distributes payments infrequently may have a sizable refund to make. But creditors may gain protection against the risk of excess accumulations in the hands of trustees by seeking to have a Chapter 13 plan include a schedule for regular disbursement of collected funds. Pp. 10–11.

757 F. 3d 468, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

TIBBLE ET AL., v. EDISON INTERNATIONAL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


In 2007, petitioners, beneficiaries of the Edison 401(k) Savings Plan (Plan), sued Plan fiduciaries, respondents Edison International and others, to recover damages for alleged losses suffered by the Plan from alleged breaches of respondents' fiduciary duties. As relevant here, petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. Because ERISA requires a breach of fiduciary duty complaint to be filed no more than six years after “the date of the last action which constitutes a part of the breach or violation” or “in the case of an omission the latest date on which the fiduciary could have cured the breach or violation,” 29 U. S. C. §1113, the District Court held that petitioners' complaint as to the 1999 funds was untimely because they were included in the Plan more than six years before the complaint was filed, and the circumstances had not changed enough within the 6-year statutory period to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class funds. The Ninth Circuit affirmed, concluding that petitioners had not established a change in circumstances that might trigger an obligation to conduct a full due diligence review of the '999 funds within the 6-year statutory period.

 Held: The Ninth Circuit erred by applying §1113's statutory bar to a breach of fiduciary duty claim based on the initial selection of the investments without considering the contours of the alleged breach of fiduciary duty. ERISA's fiduciary duty is "derived from the common
law of trusts," Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U. S. 559, 570, which provides that a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments. So long as a plaintiff’s claim alleging breach of the continuing duty of prudence occurred within six years of suit, the claim is timely. This Court expresses no view on the scope of respondents’ fiduciary duty in this case, e.g., whether a review of the contested mutual funds is required, and, if so, just what kind of review. A fiduciary must discharge his responsibilities “with the care, skill, prudence, and diligence” that a prudent person “acting in a like capacity and familiar with such matters” would use. §1104(a)(1). The case is remanded for the Ninth Circuit to consider petitioners’ claims that respondents breached their duties within the relevant 6-year statutory period under §1113, recognizing the importance of analogous trust law. Pp. 4–8.

729 F. 3d 1110, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

COLEMAN, AKA COLEMAN-BEY v. TOLLEFSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT


Ordinarily, a federal litigant who is too poor to pay court fees may proceed in forma pauperis. This means that the litigant may commence a civil action without prepaying fees or paying certain expenses. See 28 U. S. C. §1915(a). But a special “three strikes” provision prevents a court from affording in forma pauperis status to a prisoner who “has, on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.” §1915(g).

Petitioner Coleman, a state prisoner, filed three federal lawsuits that were dismissed on grounds enumerated in §1915(g). While the third dismissal was pending on appeal, he filed four additional federal lawsuits, moving to proceed in forma pauperis in each. The District Court refused to permit him to proceed in forma pauperis in any of those lawsuits, holding that a prior dismissal is a strike under §1915(g) even if it is pending on appeal. The Sixth Circuit agreed with the District Court.

Held: A prior dismissal on one of §1915(g)'s statutorily enumerated grounds counts as a strike, even if the dismissal is the subject of an ongoing appeal. Pp. 4–9.

(a) Coleman suggests that that a dismissal should count as a strike only once appellate review is complete. But the word “dismissed” does not normally include subsequent appellate activity.

*Together with Coleman, aka Coleman-Bey v. Boxerman et al.; Coleman, aka Coleman-Bey v. Dykehouse et al., and Coleman, aka Coleman-Bey v. Vroman et al. (see this Court’s Rule 12.4), also on certiorari to the same court.
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See, e.g., Heintz v. Jenkins, 514 U. S. 291, 294. And §1915 itself describes dismissal as an action taken by a single court, not as a sequence of events involving multiple courts. See §1915(e). Coleman further contends that the phrase "prior occasions" creases ambiguity. But nothing about that phrase transforms a dismissal into a dismissal-plus-appellate-review. In the context of §1915(g), a "prior occasion" merely means a previous instance in which a "prisoner has . . . brought an action or appeal . . . that was dismissed on" statutorily enumerated grounds.

A literal reading of the "three strikes" provision is consistent with the statute's treatment of the trial and appellate states of litigation as distinct. See §§1915(a)(2), (a)(3), (b)(1), (e)(2), (g). It is also supported by the way in which the law ordinarily treats trial court judgments, i.e., a judgment normally takes effect despite a pending appeal, see Fed. Rule Civ. Proc. 62; Fed. Rule App. Proc. 8(a), and its preclusive effect is generally immediate, notwithstanding any appeal, see Clay v. United States, 537 U. S. 522, 527.

Finally, the statute's purpose favors this Court's interpretation. The "three strikes" provision was "designed to filter out the bad claims and facilitate consideration of the good," Jones v. Boot, 549 U. S. 199, 204. To refuse to count a prior dismissal because of a pending appeal would produce a leaky filter, because a prisoner could file many new lawsuits before reaching the end of the often lengthy appellate process. By contrast, the Court perceives no great risk that an erroneous trial court dismissal might wrongly deprive a prisoner of in forma pauperis status in a subsequent lawsuit. Pp. 4–8.

(b) Coleman also argues that if the dismissal of a third complaint counts as a third strike, a litigant will lose the ability to appeal in forma pauperis from that strike itself. He believes this is a result that Congress could not possibly have intended. Because Coleman is not appealing from a third-strike trial-court dismissal here, the Court declines to address that question. Pp. 8–9.

733 F. 3d 175, affirmed.

BREYER, J., delivered the opinion for a unanimous Court.
SUPREME COURT OF THE UNITED STATES

COMPTROLLER OF THE TREASURY OF MARYLAND
v. WYNNE ET UX.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND


Maryland’s personal income tax on state residents consists of a “state” income tax, Md. Tax-Gen. Code Ann. §10–105(a), and a “county” income tax, §§10–103, 10–106. Residents who pay income tax to another jurisdiction for income earned in that other jurisdiction are allowed a credit against the “state” tax but not the “county” tax. §§10–703. Nonresidents who earn income from sources within Maryland must pay the “state” income tax, §§10–105(d), 10–210, and nonresidents not subject to the county tax must pay a “special nonresident tax” in lieu of the “county” tax, §10–106.1.

Respondents, Maryland residents, earned pass-through income from a Subchapter S corporation that earned income in several States. Respondents claimed an income tax credit on their 2006 Maryland income tax return for taxes paid to other States. The Maryland State Comptroller of the Treasury, petitioner here, allowed respondents a credit against their “state” income tax but not against their “county” income tax and assessed a tax deficiency. That decision was affirmed by the Hearings and Appeals Section of the Comptroller’s Office and by the Maryland Tax Court, but the Circuit Court for Howard County reversed on the ground that Maryland’s tax system violated the Commerce Clause of the Federal Constitution. The Court of Appeals of Maryland affirmed and held that the tax unconstitutionally discriminated against interstate commerce.

Held: Maryland’s personal income tax scheme violates the dormant Commerce Clause. Pp. 4–28.

(a) The Commerce Clause, which grants Congress power to “regulate Commerce . . . among the several States,” Art I, §8, cl. 3, also has “a further, negative command, known as the dormant Commerce Clause,” Oklahoma Tax Comm’n v. Jefferson Lines, Inc., 514 U.S.
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175, 179, which precludes States from "discriminating between transactions on the basis of some interstate element." *Boston Stock Exchange v. State Tax Comm'n*, 429 U. S. 318, 332, n. 12. Thus, *inter alia*, a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco Inc. v. Hardesty*, 467 U. S. 638, 642, or "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation,'" *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 458. Pp. 4–6.


(c) This conclusion is not affected by the fact that these three cases involved a tax on gross receipts rather than net income, and a tax on corporations rather than individuals. This Court's decisions have previously rejected the formal distinction between gross receipts and net income taxes. And there is no reason the dormant Commerce Clause should treat individuals less favorably than corporations; in addition, the taxes invalidated in *J. D. Adams* and *Guin, White* applied to the income of both individuals and corporations. Nor does the right of the individual to vote in political elections justify disparate treatment of corporate and personal income. Thus the Court has previously entertained and even sustained dormant Commerce Clause challenges by individual residents of the State that imposed the alleged burden on interstate commerce. See *Department of Revenue of Ky. v. Davis*, 553 U. S. 328, 336; *Granholm v. Heald*, 544 U. S. 460, 469 (2005). Pp. 7–12.

(d) Maryland's tax scheme is not immune from dormant Commerce Clause scrutiny simply because Maryland has the jurisdictional power under the Due Process Clause to impose the tax. "[W]hile a state may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." *Quill Corp. v. North Dakota*, 504 U. S. 298, 305. Pp. 12–15.

(e) Maryland's income tax scheme discriminates against interstate commerce. The "internal consistency" test, which helps courts identify tax schemes that discriminate against interstate commerce, as-
Syllabus

sumes that every State has the same tax structure. Maryland's income tax scheme fails the internal consistency test because if every State adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce. Maryland's tax scheme is inherently discriminatory and operates as a tariff, which is fatal because tariffs are "[t]he paradigmatic example of a law discriminating against interstate commerce." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193. Petitioner emphasizes that by offering residents who earn income in interstate commerce a credit against the "state" portion of the income tax, Maryland actually receives less tax revenue from residents who earn income from interstate commerce rather than intrastate commerce, but this argument is a red herring. The critical point is that the total tax burden on interstate commerce is higher. Pp. 18-26.

431 Md. 147, 64 A. 3d 453, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts I and II. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined except as to the first paragraph. GINSBURG, J., filed a dissenting opinion, in which SCALIA and Kagan, JJ., joined.
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SUPREME COURT OF THE UNITED STATES

Syllabus

CITY AND COUNTY OF SAN FRANCISCO,
CALIFORNIA, ET AL. v. SHEEHAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT


Respondent Sheehan lived in a group home for individuals with mental
illness. After Sheehan began acting erratically and threatened to kill
her social worker, the City and County of San Francisco (San Fran-
cisco) dispatched police officers Reynolds and Holder to help escort
Sheehan to a facility for temporary evaluation and treatment. When
the officers first entered Sheehan’s room, she grabbed a knife and
threatened to kill them. They retreated and closed the door. Con-
cerned about what Sheehan might do behind the closed door, and
without considering if they could accommodate her disability, the offi-
cers reentered her room. Sheehan, knife in hand, again confronted
them. After pepper spray proved ineffective, the officers shot
Sheehan multiple times. Sheehan later sued petitioner San Francis-
cisco for, among other things, violating Title II of the Americans with
Disabilities Act of 1990 (ADA) by arresting her without accommodat-
ing her disability. See 42 U. S. C. §12132. She also sued petitioners
Reynolds and Holder in their personal capacities under 42 U. S. C.
§1983, claiming that they violated her Fourth Amendment rights.
The District Court granted summary judgment because it concluded
that officers making an arrest are not required to determine whether
their actions would comply with the ADA before protecting them-
selves and others, and also that Reynolds and Holder did not violate
the Constitution. Vacating in part, the Ninth Circuit held that the
ADA applied and that a jury must decide whether San Francisco
should have accommodated Sheehan. The court also held that Reyn-
olds and Holder are not entitled to qualified immunity because it is
clearly established that, absent an objective need for immediate en-
try, officers cannot forcibly enter the home of an armed, mentally ill
person who has been acting irrationally and has threatened anyone who enters.

Held:

1. The question whether §12132 “requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody,” Pet. for Cert. i, is dismissed as improvidently granted. Certiorari was granted on the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco merely argues that Sheehan was not “qualified” for an accommodation, §12132, because she “posed[d] a direct threat to the health or safety of others,” which threat could not “be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services,” 28 CFR §§35.139(a), 35.104. This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, is reinforced by the parties’ failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers. Pp. 7–10.

2. Reynolds and Holder are entitled to qualified immunity from liability for the injuries suffered by Sheehan. Public officials are immune from suit under 42 U. S. C. §1983 unless they have “violated a statutory or constitutional right that was ‘clearly established’” at the time of the challenged conduct,” Plumhoff v. Rickard, 572 U. S. __, __, an exacting standard that “gives government officials breathing room to make reasonable but mistaken judgments,” Ashcroft v. al-Kidd, 563 U. S. __, __. The officers did not violate the Fourth Amendment when they opened Sheehan’s door the first time, and there is no doubt that they could have opened her door the second time without violating her rights had Sheehan not been disabled. Their use of force was also reasonable. The only question therefore is whether they violated the Fourth Amendment when they decided to reopen Sheehan’s door rather than attempt to accommodate her disability. Because any such Fourth Amendment right even assuming it exists, was not clearly established, Reynolds and Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted. Pp. 10–17.

Certiorari dismissed in part; 743 F. 3d 1211, reversed in part and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, and SOTOMAYOR, JJ., joined. SCALIA,
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J., filed an opinion concurring in part and dissenting in part, in which KAGAN, J., joined. BREYER, J., took no part in the consideration or decision of the case.
SYNOPSIS

HENDERSON v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT


After being charged with the felony offense of distributing marijuana, petitioner Tony Henderson was required as a condition of his bail to turn over firearms that he lawfully owned. Henderson ultimately pleaded guilty, and, as a felon, was prohibited under 18 U.S.C. §922(g) from possessing his (or any other) firearms. Henderson therefore asked the Federal Bureau of Investigation, which had custody of his firearms, to transfer them to his friend. But the agency refused to do so. Henderson then filed a motion in federal district court seeking to transfer his firearms, but the court denied the motion on the ground that Henderson’s requested transfer would give him constructive possession of the firearms in violation of §922(g).

Held: A court-ordered transfer of a felon’s lawfully owned firearms from Government custody to a third party is not barred by §922(g) if the court is satisfied that the recipient will not give the felon control over the firearms, so that he could either use them or direct their use. Federal courts have equitable authority to order law enforcement to return property obtained during the course of a criminal proceeding to its rightful owner. Section 922(g), however, bars a court from ordering guns returned to a felon-owner like Henderson, because that would place the owner in violation of the law. And because §922(g) bans constructive as well as actual possession, it also prevents a court from ordering the transfer of a felon’s guns to someone willing to give the felon access to them or to accede to the felon’s instructions about their future use.

The Government goes further, arguing that §922(g) prevents all transfers to a third party, no matter how independent of the felon’s influence, unless that recipient is a licensed firearms dealer or other
third party who will sell the guns on the open market. But that view conflates possession, which §922(g) prohibits, with an owner's right merely to alienate his property, which it does not. After all, the Government's reading of §922(g) would prohibit a felon from disposing of his firearms even when he would lack any control over and thus not possess them before, during, or after the disposition. That reading would also extend §922(g)'s scope far beyond its purpose; preventing a felon like Henderson from disposing of his firearms, even in ways that guarantee he never uses them again, does nothing to advance the statute's goal of keeping firearms away from felons. Finally, the Government's insistence that a felon cannot select a third-party recipient over whom he exercises no influence fits poorly with its concession that a felon may select a firearms dealer or third party to sell his guns. The Government's reading of §922(g) is thus overbroad.

Accordingly, a court may approve the transfer of a felon's guns consistently with §922(g) if, but only if, the recipient will not grant the felon control over those weapons. One way to ensure that result is to order that the guns be turned over to a firearms dealer, himself independent of the felon's control, for subsequent sale on the open market. But that is not the only option; a court, with proper assurances from the recipient, may also grant a felon's request to transfer his guns to a person who expects to maintain custody of them. Either way, once a court is satisfied that the transferee will not allow the felon to exert any influence over the firearms, the court has equitable power to accommodate the felon's transfer request. Pp. 3–8.


KAGAN, J., delivered the opinion for a unanimous Court.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMMIL USA, LLC v. CISCO SYSTEMS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT


Petitioner Commil USA, LLC, holder of a patent for a method of implementing short-range wireless networks, filed suit, claiming that respondent Cisco Systems, Inc., a maker and seller of wireless networking equipment, had directly infringed Commil’s patent in its networking equipment and had induced others to infringe the patent by selling the infringing equipment for them to use. After two trials, Cisco was found liable for both direct and induced infringement. With regard to inducement, Cisco had raised the defense that it had a good-faith belief that Commil’s patent was invalid, but the District Court found Cisco’s supporting evidence inadmissible. The Federal Circuit affirmed the District Court’s judgment in part, vacated in part, and remanded, holding, as relevant here, that the trial court ered in excluding Cisco’s evidence of its good-faith belief that Commil’s patent was invalid.

Held: A defendant’s belief regarding patent validity is not a defense to an induced infringement claim. Pp. 5–14.

(a) While this case centers on inducement liability, 35 U. S. C. §271(b), which attaches only if the defendant knew of the patent and that “the induced acts constitute patent infringement,” Global-Tech Appliances, Inc. v. SEB S. A., 563 U. S. ____, the discussion here also refers to direct infringement, §271(a), a strict-liability offense in which a defendant’s mental state is irrelevant, and contributory infringement, §271(c), which, like inducement liability, requires knowledge of the patent in suit and knowledge of patent infringement, Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U. S. 476, 488 (Aro II). Pp. 5–6.

(b) In Global-Tech, this Court held that “induced infringement . . . requires knowledge that the induced acts constitute patent infringe-
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ment," 563 U. S., at ___, relying on the reasoning of Aro II, a contribu-
tory infringement case, because the mental state imposed in each
instance is similar. Contrary to the claim of Commil and the Gov-
ernment as amicus, it was not only knowledge of the existence of re-
spondent's patent that led the Court to affirm the liability finding in
Global-Tech, but also the fact that petitioner's actions demonstrated
that it knew it would be causing customers to infringe respondent's
patent. 563 U. S., at ___. Qualifying or limiting that holding could
make a person, or entity, liable for induced or contributory infringe-
ment even though he did not know the acts were infringing. Global-
Tech requires more, namely proof the defendant knew the acts were
infringing. And that opinion was clear in rejecting any lesser mental
state as the standard. Id., at ___. Pp. 6–9.

(c) Because induced infringement and validity are separate issues
and have separate defenses under the Act, belief regarding validity
cannot negate §271(b)'s scienter requirement of "actively induce[d]
infringement," i.e., the intent to "bring about the desired result" of in-
fringement, 563 U. S., at ___. When infringement is the issue, the
patent's validity is not the question to be confronted. See Cardinal
Chemical Co. v. Morton Int'l, Inc., 508 U. S. 83. Otherwise, the long
held presumption that a patent is valid, §282(a), would be under-
mined, permitting circumvention of the high bar—the clear and con-
vincing standard—that defendants must surmount to rebut the pre-
sumption. See Microsoft Corp. v. i4i Ltd. Partnership, 564 U. S. ___,
_____. To be sure, if a patent is shown to be invalid, there is no pa-
tent to be infringed. But the orderly administration of the patent
system requires courts to interpret and implement the statutory
framework to determine the procedures and sequences that the par-
ties must follow to prove the act of wrongful inducement and any re-
lated issues of patent validity.

There are practical reasons not to create a defense of belief in inval-
lidity for induced infringement. Accused inducers who believe a pa-
tent is invalid have other, proper ways to obtain a ruling to that ef-
fact, including, e.g., seeking ex parte reexamination of the patent by
the Patent and Trademark Office, something Cisco did here. Crea-
ting such a defense could also have negative consequences, including,
e.g., rendering litigation more burdensome for all involved. Pp. 9–13.

(d) District courts have the authority and responsibility to ensure
that frivolous cases—brought by companies using patents as a sword
to go after defendants for money—are dissuaded, though no issue of
frivolity has been raised here. Safeguards—including, e.g., sanction-
ing attorneys for bringing such suits, see Fed. Rule Civ. Proc. 11—
combined with the avenues that accused inducers have to obtain rul-
ings on the validity of patents, militate in favor of maintaining the
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KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined as to Parts II–B and III. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., joined. BREYER, J., took no part in the consideration or decision of the case.
Private parties may file civil *qui tam* actions to enforce the False Claims Act (FCA), which prohibits making "a false or fraudulent claim for payment or approval," 31 U. S. C. §3729(a)(1), "to . . . the United States," 3729(b)(2)(A)(i). A *qui tam* action must generally be brought within six years of a violation, §3731(b), but the Wartime Suspension of Limitations Act (WSLA) suspends "the running of any statute of limitations applicable to any offense" involving fraud against the Federal Government. 18 U. S. C. §3287. Separately, the FCA's "first-to-file bar" precludes a *qui tam* suit "based on the facts underlying [a] pending action," §3730(b)(5).

In 2005, respondent worked for one of the petitioners, providing logistical services to the United States military in Iraq. He subsequently filed a *qui tam* complaint (*Carter I*), alleging that petitioners, who are defense contractors and related entities, had fraudulently billed the Government for water purification services that were not performed or not performed properly. In 2010, shortly before trial, the Government informed the parties that an earlier-filed *qui tam* suit (*Thorpe*) had similar claims, leading the District Court to dismiss *Carter I* without prejudice under the first-to-file bar. While respondent's appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the court dismissed it under the first-to-file rule because *Carter I* 's appeal was pending. Respondent then dismissed that appeal, and in June 2011, more than six years after the alleged fraud, filed the instant complaint (*Carter III*). The District Court dismissed this complaint with prejudice under the first-to-file rule because of a pending Maryland suit. Further, because the WSLA applies only to criminal
charges, the court reasoned, all but one of respondent’s civil actions were untimely. Reversing, the Fourth Circuit concluded that the WSLA applied to civil claims and that the first-to-file bar ceases to apply once a related action is dismissed. Since any pending suits had by then been dismissed, the court held, respondent had the right to refile his case. It thus remanded Carter III with instructions to dismiss without prejudice.

Held:

1. As shown by the WSLA’s text, structure, and history, the Act applies only to criminal offenses, not to civil claims like those in this case. Pp. 5–11.
   (a) The 1921 and 1942 versions of the WSLA were enacted to address war-related fraud during, respectively, the First and Second World Wars. Both extended the statute of limitations for fraud offenses “now indictable under any existing statutes.” Since only crimes are “indictable,” these provisions quite clearly were limited to criminal charges. In 1944, Congress made the WSLA prospectively applicable to future wartime frauds rather than merely applicable to past frauds as earlier versions had been. In doing so, it deleted the phrase “now indictable under any statute,” so that the WSLA now applied to “any offense against the laws of the United States.” Congress made additional changes in 1948 and codified the WSLA in Tit. 18 U. S. C. Pp. 5–6.
   (b) Section 3287’s text supports limiting the WSLA to criminal charges. The term “offense” is most commonly used to refer to crimes, especially given the WSLA’s location in Title 18, titled “Crimes and Criminal Procedure,” where no provision appears to employ “offense” to denote a civil violation rather than a civil penalty attached to a criminal offense. And when Title 18 was enacted in 1948, its very first provision classified all offenses as crimes. In similar circumstances, this Court has regarded a provision’s placement as relevant in determining whether its content is civil or criminal. Kansas v. Hendricks, 521 U. S. 346, 361. The WSLA’s history provides further support for this reading. The term “offenses” in the 1921 and 1942 statutes, the parties agree, applied only to crimes. And it is improbable that the 1944 Act’s removal of the phrase “now indictable under any statute” had the effect of sweeping in civil claims, a fundamental change in scope not typically accomplished with so subtle a move. The more plausible explanation is that Congress removed that phrase in order to change the WSLA from a retroactive measure designed to deal exclusively with past fraud into a permanent measure applicable to future fraud as well. If there were any ambiguity in the WSLA’s use of the term “offense,” that ambiguity should be resolved in favor of a narrower definition. See Bridges v. United States, 346
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2. The FCA’s first-to-file bar keeps new claims out of court only while related claims are still alive, not in perpetuity. Thus, dismissal with prejudice was not called for in this case. This reading of §3730(b)(5) is in accordance with the ordinary dictionary meaning of the term “pending.” Contrary to petitioners’ reading, the term “pending” cannot be seen as a sort of “short-hand” for first-filed, which is neither a lengthy nor a complex term. Petitioners’ reading would also bar even a suit dismissed for a reason having nothing to do with the merits, such as Thorpe, which was dismissed for failure to prosecute. Pp. 11–13.

710 F. 3d 171, reversed in part, affirmed in part, and remanded.

ALITO, J., delivered the opinion for a unanimous Court.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is
being done in connection with this case, at the time the opinion is issued.
The syllabus constitutes no part of the opinion of the Court but has been
prepared by the Reporter of Decisions for the convenience of the reader.

SUPREME COURT OF THE UNITED STATES

Syllabus

WELLNESS INTERNATIONAL NETWORK, LTD., ET AL.
v. SHARIF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT


Respondent Richard Sharif tried to discharge a debt he owed petitioners, Wellness International Network, Ltd., and its owners (collectively Wellness), in his Chapter 7 bankruptcy. Wellness sought, inter alia, a declaratory judgment from the Bankruptcy Court, contending that a trust Sharif claimed to administer was in fact Sharif’s alter-ego, and that its assets were his personal property and part of his bankruptcy estate. The Bankruptcy Court eventually entered a default judgment against Sharif. While Sharif’s appeal was pending in District Court, but before briefing concluded, this Court held that Article III forbids bankruptcy courts to enter a final judgment on claims that seek only to “augment” the bankruptcy estate and would otherwise “exist[ ] without regard to any bankruptcy proceeding.” Stern v. Marshall, 564 U.S. ___. After briefing closed, Sharif sought permission to file a supplemental brief raising a Stern objection. The District Court denied the motion, finding it untimely, and affirmed the Bankruptcy Court’s judgment. As relevant here, the Seventh Circuit determined that Sharif’s Stern objection could not be waived because it implicated structural interests and reversed on the alter-ego claim, holding that the Bankruptcy Court lacked constitutional authority to enter final judgment on that claim.

Held:

1. Article III permits bankruptcy judges to adjudicate Stern claims with the parties’ knowing and voluntary consent. Pp. 8–17.

(a) The foundational case supporting the adjudication of legal disputes by non-Article III judges with the consent of the parties is Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833. There, the Court held that the right to adjudication before an Article III
court is “personal” and therefore “subject to waiver.” Id., at 848. The Court also recognized that if Article III’s structural interests as “an inseparable element of the constitutional system of checks and balances” are implicated, “the parties cannot by consent cure the constitutional difficulty.” Id., at 850–851. The importance of consent was reiterated in two later cases involving the Federal Magistrates Act’s assignment of non-Article III magistrate judges to supervise voir dire in felony trials. In Gomez v. United States, 490 U. S. 858, the Court held that a magistrate judge was not permitted to select a jury without the defendant’s consent, id., at 864. But in Peretz v. United States, 501 U. S. 923, the Court stated that “the defendant’s consent significantly changes the constitutional analysis,” id., at 932. Because an Article III court retained supervisory authority over the process, the Court found “no structural protections . . . implicated” and upheld the Magistrate Judge’s action. Id., at 937. Pp. 8–12.

(b) The question whether allowing bankruptcy courts to decide Stern claims by consent would “impermissibly threaten[] the institutional integrity of the Judicial Branch,” Schor, 478 U. S., at 851, must be decided “with an eye to the practical effect that the” practice “will have on the constitutionally assigned role of the federal judiciary,” ibid. For several reasons, this practice does not usurp the constitutional prerogatives of Article III courts. Bankruptcy judges are appointed and may be removed by Article III judges, see 28 U. S. C. §§152(a)(1), (e); “serve as judicial officers of the United States district court,” §151; and collectively “constitute a unit of the district court” for the district in which they serve, §152(a)(1). Bankruptcy courts hear matters solely on a district court’s reference, §187(a), and possess no free-floating authority to decide claims traditionally heard by Article III courts, see Schor, 478 U. S., at 854, 856. “[T]he decision to invoke” the bankruptcy court’s authority “is left entirely to the parties,” id., at 855, and “the power of the federal judiciary to take jurisdiction” remains in place, ibid. Finally, there is no indication that Congress gave bankruptcy courts the ability to decide Stern claims in an effort to aggrandize itself or humble the Judiciary. See, e.g., Peretz, 501 U. S., at 937. Pp. 12–15.

(c) Stern does not compel a different result. It turned on the fact that the litigant “did not truly consent to” resolution of the claim against it in a non-Article III forum, 564 U. S., at ___, and thus, does not govern the question whether litigants may validly consent to adjudication by a bankruptcy court. Moreover, expanding Stern to hold that a litigant may not waive the right to an Article III court through consent would be inconsistent with that opinion’s own description of its holding as “a ‘narrow’ one” that did “not change all that much” about the division of labor between district and bankruptcy courts.
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Id., at ___. Pp. 15–17.

2. Consent to adjudication by a bankruptcy court need not be express, but must be knowing and voluntary. Neither the Constitution nor the relevant statute—which requires “the consent of all parties to the proceeding” to hear a Stern claim, §157(c)(2)—mandates express consent. Such a requirement would be in great tension with this Court’s holding that substantially similar language in §636(c)—which authorizes magistrate judges to conduct proceedings “[u]pon consent of the parties”—permits waiver based on “actions rather than words,” Roell v. Withrow, 538 U.S. 580, 589. Roell’s implied consent standard supplies the appropriate rule for bankruptcy court adjudications and makes clear that a litigant’s consent—whether express or implied—must be knowing and voluntary. Pp. 18–19.

3. The Seventh Circuit should decide on remand whether Sharif’s actions evinced the requisite knowing and voluntary consent and whether Sharif forfeited his Stern argument below. P. 20.

727 F. 3d 751, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined in part. ALITO, J., filed an opinion concurring in part and concurring in the judgment. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, J., joined, and in which THOMAS, J., joined as to Part I. THOMAS, J., filed a dissenting opinion.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ELONIS v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13–983. Argued December 1, 2014—Decided June 1, 2015

After his wife left him, petitioner Anthony Douglas Elonis, under the pseudonym “Tone Dougie,” used the social networking Web site Facebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement. These posts were often interspersed with disclaimers that the lyrics were “fictitious” and not intended to depict real persons, and with statements that Elonis was exercising his First Amendment rights. Many who knew him saw his posts as threatening, however, including his boss, who fired him for threatening co-workers, and his wife, who sought and was granted a state court protection-from-abuse order against him.

When Elonis’s former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring Elonis’s Facebook activity and eventually arrested him. He was charged with five counts of violating 18 U. S. C. §875(c), which makes it a federal crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.” At trial, Elonis requested a jury instruction that the Government was required to prove that he intended to communicate a “true threat.” Instead, the District Court told the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

Held: The Third Circuit’s instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a
conviction under Section 875(c). Pp. 7–17.

(a) Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, and the parties can show no indication of a particular mental state requirement in the statute's text. Elonis claims that the word "threat," by definition, conveys the intent to inflict harm. But common definitions of "threat" speak to what the statement conveys—not to the author's mental state. The Government argues that the express "intent to extort" requirements in neighboring Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). The most that can be concluded from such a comparison, however, is that Congress did not mean to confine Section 875(c) to crimes of extortion, not that it meant to exclude a mental state requirement. Pp. 7–9.

(b) The Court does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Morissette v. United States*, 342 U.S. 246, 250. This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.*, at 252. The "general rule" is that a guilty mind is "a necessary element in the indictment: and proof of every crime." *United States v. Bolint*, 258 U.S. 250, 251. Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70. This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples v. United States*, 511 U.S. 600, 608, n. 3. Federal criminal statutes that are silent on the required mental state should be read to include "only that mens rea which is necessary to separate" wrongful from innocent conduct. *Carter v. United States*, 530 U.S. 255, 269. In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Ibid.* Pp. 9–13.

(c) The "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S., at 72. In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," *id.*, at 73, is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a
threat. Elonis's conviction was premised solely on how his posts would be viewed by a reasonable person, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of "awareness of some wrongdoing." Staples, 511 U.S., at 606–607. This Court "has long been reluctant to infer that a negligence standard was intended in criminal statutes." Rogers v. United States, 422 U.S. 35, 47 (Marshall, J., concurring). And the Government fails to show that the instructions in this case required more than a mental state of negligence. Hamling v. United States, 418 U.S. 87, distinguished. Section 875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declines to address whether a mental state of recklessness would also suffice. Given the disposition here, it is unnecessary to consider any First Amendment issues. Pp. 13–17.

730 F. 3d. 321, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed a dissenting opinion.
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
v. ABERCROMBIE & FITCH STORES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

No. 14–86. Argued February 25, 2015—Decided June 1, 2015

Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim, because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie’s employee dress policy. The Equal Employment Opportunity Commission (EEOC) filed suit on Elauf’s behalf, alleging a violation of Title VII of the Civil Rights Act of 1964, which, inter alia, prohibits a prospective employer from refusing to hire an applicant because of the applicant’s religious practice when the practice could be accommodated without undue hardship. The EEOC prevailed in the District Court, but the Tenth Circuit reversed, awarding Abercrombie summary judgment on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation.

Held: To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer had knowledge of his need. Title VII’s disparate-treatment provision requires Elauf to show that Abercrombie (1) “fail[ed] . . . to hire” her (2) “because of” (3) “[her] religion” (including a religious practice). 42 U.S.C. §2000e–2(a)(1). And its “because of” standard is understood to mean that the protected characteristic cannot be a “motivating factor” in an employment decision. §2000e–2(m). Thus, rather than imposing a knowledge standard, §2000e–2(a)(1) prohibits certain motives, regardless of the state of the actor’s knowledge: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions. Title VII contains no knowledge requirement. Furthermore, Title VII’s definition of religion clearly in-
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dicates that failure-to-accommodate challenges can be brought as disparate-treatment claims. And Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices. Pp. 2–7.

731 F. 3d 1106, reversed and remanded.

OCTOBER TERM, 2014

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BANK OF AMERICA, N. A. v. CAULKETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 13–1421. Argued March 24, 2015—Decided June 1, 2015*

Respondent debtors each filed for Chapter 7 bankruptcy, and each owned a house encumbered with a senior mortgage lien and a junior mortgage lien, the latter held by petitioner bank. Because the amount owed on each senior mortgage is greater than each house’s current market value, the bank would receive nothing if the properties were sold today. The junior mortgage liens were thus wholly under water. The debtors sought to void their junior mortgage liens under §506 of the Bankruptcy Code, which provides, “To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void.” 11 U. S. C. §506(d). In each case, the Bankruptcy Court granted the motion, and both the District Court and the Eleventh Circuit affirmed.

Held: A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor’s claim is both secured by a lien and allowed under §502 of the Bankruptcy Code. Pp. 2–7.

(a) The debtors here prevail only if the bank’s claims are “not . . . allowed secured claim[s].” The parties do not dispute that the bank’s claims are “allowed” under the Code. Instead, the debtors argue that the bank’s claims are not “secured” because §506(a)(1) provides that “[a]n allowed claim . . . is a secured claim to the extent of the value of such creditor’s interest in . . . such property” and “an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim.” Because the value of the bank’s

*Together with No. 14–163, Bank of America, N. A. v. Toledo-Cordona, also on certiorari to the same court.
interest here is zero, a straightforward reading of the statute would seem to favor the debtors. This Court's construction of §506(d)'s term "secured claim" in Dewsnup v. Timm, 502 U.S. 410, however, forecloses that reading and resolves the question presented here. In declining to permit a Chapter 7 debtor to "strip down" a partially underwater lien under §506(d) to the value of the collateral, the Court in Dewsnup concluded that an allowed claim "secured by a lien with recourse to the underlying collateral . . . does not come within the scope of §506(d)." Id., at 415. Thus, under Dewsnup, a "secured claim" is a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. Pp. 2–4.

(b) This Court declines to limit Dewsnup to partially underwater liens. Dewsnup's definition did not depend on such a distinction. Nor is this distinction supported by Nobelman v. American Savings Bank, 508 U.S. 324, which addressed the interaction between the meaning of the term "secured claim" in §506(a)—a definition that Dewsnup declined to use for purposes of §506(d)—and an entirely separate provision, §1322(b)(2). See 508 U.S., at 327–332. Finally, the debtors' suggestion that the historical and policy concerns that motivated the Court in Dewsnup do not apply in the context of wholly underwater liens is an insufficient justification for giving the term "secured claim" a different definition depending on the value of the collateral. Ultimately, the debtors' proposed distinction would do nothing to vindicate §506(d)'s original meaning and would leave an odd statutory framework in its place. Pp. 5–7.


THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, ALITO, and KAGAN, JJ., joined, and in which KENNEDY, BREYER, and SOTOMAYOR, JJ., joined except as to the footnote.
Syllabus

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SUPREME COURT OF THE UNITED STATES

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MELLOULI v. LYNCH, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT


Petitioner Moones Mellouli, a lawful permanent resident, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia “to . . . store [or] conceal . . . a controlled substance.” Kan. Stat. Ann. §21–5709(b)(2). The sole “paraphernalia” Mellouli was charged with possessing was a sock in which he had placed four unidentified orange tablets. Citing Mellouli’s misdemeanor conviction, an Immigration Judge ordered him deported under 8 U.S.C. §1227(a)(2)(B)(i), which authorizes the deportation (removal) of an alien “convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21).” Section 802, in turn, limits the term “controlled substance” to a “drug or other substance” included in one of five federal schedules. 21 U.S.C. §802(6). Kansas defines “controlled substance” as any drug included on its own schedules, without reference to §802. Kan. Stat. Ann. §21–5701(a). At the time of Mellouli’s conviction, Kansas’ schedules included at least nine substances not on the federal lists. The Board of Immigration Appeals (BIA) affirmed Mellouli’s deportation order, and the Eighth Circuit denied his petition for review.


(a) The categorical approach historically taken in determining whether a state conviction renders an alien removable looks to the statutory definition of the offense of conviction, not to the particulars of the alien’s conduct. The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. The BIA has long applied the categorical approach to assess whether a state drug conviction trig-
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gers removal under successive versions of what is now §1227(a)(2)(B)(i). Matter of Paulus, 11 I & N. Dec. 274, is illustrative. At the time the BIA decided Paulus, California controlled certain “narcotics” not listed as “narcotic drugs” under federal law. Id., at 275. The BIA concluded that an alien’s California conviction for offering to sell an unidentified “narcotic” was not a deportable offense, for it was possible that the conviction involved a substance controlled only under California, not federal, law. Under the Paulus analysis, Mellouli would not be deportable. The state law involved in Mellouli’s conviction, like the California statute in Paulus, was not confined to federally controlled substances; it also included substances controlled only under state, not federal, law.

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in Matter of Martinez Espinoza, 25 I. & N. Dec. 118. There, the BIA ranked paraphernalia statutes as relating to “the drug trade in general,” reasoning that a paraphernalia conviction “relates to” any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. Id., at 120–121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802.

The BIA’s disparate approach to drug possession and distribution offenses and paraphernalia possession offenses finds no home in §1227(a)(2)(B)(i)’s text and “leads to consequences Congress could not have intended.” Moncrieffe v. Holder, 569 U.S. ——. That approach has the anomalous result of treating less grave paraphernalia possession misdemeanors more harshly than drug possession and distribution offenses. The incongruous upshot is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance. Because it makes scant sense, the BIA’s interpretation is owed no deference under the doctrine described in Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 843. Pp. 5–11.

(b) The Government’s interpretation of the statute is similarly flawed. The Government argues that aliens who commit any drug crime, not just paraphernalia offenses, in States whose drug schedules substantially overlap the federal schedules are deportable, for “state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws ‘relating to’ federally controlled substances.” Brief for Respondent 17. While the words “relating to” are broad, the Government’s reading stretches the construction of §1227(a)(2)(B)(i) to the breaking point, reaching state-
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court convictions, like Mellouli’s, in which “[no] controlled substance (as defined in §802)” figures as an element of the offense. Construction of §1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of “controlled substance,” for removal purposes, to the substances controlled under §802. Accordingly, to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien’s conviction to a drug “defined in [§802].” Pp. 11–14.

719 F. 3d 995, reversed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.
(Slip Opinion) OCTOBER TERM, 2014

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SUPREME COURT OF THE UNITED STATES

Syllabus

ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS,
ZIVOTOFSKY ET UX.  v.  KERRY, SECRETARY OF STATE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT


Petitioner Zivotofsky was born to United States citizens living in Jerusalem. Pursuant to §214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, his mother asked American Embassy officials to list his place of birth as “Israel” on, inter alia, his passport. Section 214(d) states for “purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” The Embassy officials refused to list Zivotofsky’s place of birth as “Israel” on his passport, citing the Executive Branch’s longstanding position that the United States does not recognize any country as having sovereignty over Jerusalem. Zivotofsky’s parents brought suit on his behalf in federal court, seeking to enforce §214(d). Ultimately, the D. C. Circuit held the statute unconstitutional, concluding that it contradicts the Executive Branch’s exclusive power to recognize foreign sovereigns.

Held:

1. The President has the exclusive power to grant formal recognition to a foreign sovereign. Pp. 6–26.

   (a) Where, as here, the President’s action is “incompatible with the expressed or implied will of Congress,” the President “can rely [for his authority] only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 637 (Jackson, J., concurring). His asserted power must be both “exclusive” and “conclusive” on the issue, id., at 637–638, and he may rely solely on powers the Constitution grants to him alone, id., at 638. To determine whether
the President's power of recognition is exclusive, this Court examines
the Constitution's text and structure and relevant precedent and his-

(b) The Constitution's text and structure grant the President the
power to recognize foreign nations and governments. The Reception
Clause directs that the President "shall receive Ambassadors and
other public Ministers," Art. II, §3. And at the time of the founding,
receiving an ambassador was considered tantamount to recognizing
the sending state's sovereignty. It is thus logical and proper to infer
that the Reception Clause would be understood to acknowledge the
President's power to recognize other nations. This inference is fur-
ther supported by the President's additional Article II powers: to ne-
gotiate treaties and to nominate the Nation's ambassadors and dis-
patch other diplomatic agents. Though ratifying a treaty and con-
firming an ambassador require congressional approval, Congress
lacks authority to initiate the actions without the President's in-
volvement. The President, unlike Congress, also has the power to
open diplomatic channels simply by engaging in direct diplomacy
with foreign heads of state and their ministers. The Constitution
thus assigns the President, not Congress, means to effect recognition
on his own initiative.

Functional considerations also suggest that the President's recog-
nition power is exclusive. The Nation must "speak ... with one
voice" regarding which governments are legitimate in the eyes of the
United States and which are not, American Insurance Assn. v. Gara-
mendi, 539 U. S. 396, 424, and only the Executive has the character-
istic of unity at all times. Unlike Congress, the President is also ca-

capable of engaging in the delicate and often secret diplomatic contacts
that may lead to a recognition decision, see, e.g., United States v.
Pink, 315 U. S. 203, 229, and is better positioned to take the decisive,
unequivocal action necessary to recognize other states at interna-
tional law. The President has also exercised unilateral recognition
power since the founding, a practice endorsed by this Court, see, e.g.,

Under basic separation-of-powers principles, Congress, which has
the central role in making laws, see Art. I, §8, cl. 18, does have sub-
stantial authority regarding many policy determinations that precede
and follow an act of recognition. The President's recognition deter-
mination is thus only one part of a political process. Pp. 7–14.

(b) A fair reading of relevant precedent illustrates that this
Court has long considered recognition to be the exclusive prerogative
of the Executive. See, e.g., Williams v. Suffolk Ins. Co., 13 Pet. 415,
420; United States v. Belmont, 301 U. S. 324, 330; United States v.
Pink, supra, at 229; Banco Nacional de Cuba v. Sabbatino, supra, at
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410; National City Bank of N. Y. v. Republic of China, 348 U. S. 356, 358. United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 320, does not support a broader definition of the Executive's power over foreign relations that would permit the President alone to determine the whole content of the Nation's foreign policy. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, e.g., Medellín v. Texas, 552 U. S. 491, 523–532. Nonetheless, it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, and his position must be clear. Pp. 14–20.

(c) The weight of historical evidence also indicates Congress has accepted that the recognition power is exclusive to the Presidency. Cf. NLRB v. Noel Canning, 573 U. S. ___. Since the first Administration, the President has claimed unilateral authority to recognize foreign sovereigns. And Congress, for the most part, has acquiesced, generally respecting the Executive's policies and positions on formal recognition and even defending the President's constitutional prerogative. Pp. 20–26.

2. Because the power to recognize foreign states resides in the President alone, §214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem. See Nixon v. Administrator of General Services, 433 U. S. 425, 443. The provision forces the President, through the Secretary of State, to identify, upon request, citizens born in Jerusalem as being born in Israel when, as a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem.

If the recognition power is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also may maintain that determination in his and his agent's statements. Under international law, recognition may be effected by written or oral declaration. In addition, an act of recognition must leave no doubt as to the intention to grant it. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power. An "exclusive" Presidential power "disabl[es] the Congress from acting upon the subject." Youngstown, supra, at 638 (Jackson, J., concurring). If Congress may not pass a law, speaking in its own voice, effecting formal recognition, then it may not force the President, through §214(d), to contradict his prior recognition determination in an official document issued by the Secretary of State. See Urretavizcaya v. D'Arcy, 9 Pet. 692, 698.

Section 214(d)'s flaw is further underscored by the fact that the statute's purpose was to infringe on the President's exclusive recognition power. While Congress may have power to enact passport legis-
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...ation of wide scope, it may not “aggrandiz[e] its power at the expense of another branch” by requiring the President to contradict an earlier recognition determination in an official Executive Branch document. Freytag v. Commissioner, 501 U. S. 868, 878. Pp. 26–29.

The Broader Implications of Marriage Equality

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The “Modern” Equal Protection Framework

Animus Case Law

*Dep’t of Agric. v. Moreno* (1973)


*City of Cleburne v. Cleburne Living Ctr.* (1985)

The Evolving Framework

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<th>Date</th>
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Multiple Paths to Marriage Equality

1. Marriage bans discriminate with respect to the fundamental right of marriage → STRICT SCRUTINY
2. Sexual orientation is a suspect or quasi-suspect classification and marriage bans rely on that classification → STRICT SCRUTINY OR INTERMEDIATE SCRUTINY
3. Marriage bans are facially neutral but have other discriminatory effects or purpose → INTERMEDIATE SCRUTINY
4. Marriage bans promote children's welfare beyond their control → PER SE VIOLATION OF EQUAL PROTECTION
5. Marriage bans are based on unconstitutional animus → HEAVILY WEIGHTED RATIONAL BASIS REVIEW OR PER SE VIOLATION OF EQUAL PROTECTION
6. Even under the lowest level of scrutiny, differential rational basis review, marriage bans serve no legitimate state interest → PER SE VIOLATION OF EQUAL PROTECTION

The Larger Doctrinal Implications of the Marriage Equality Decisions

- Is suspect classification analysis still viable?
- How does the Court identify and understand fundamental rights?
- What counts as a facial gender classification?
- Do child-centered arguments present promise or peril?
- Will the Court adopt a subjective or objective theory of animus?
- What is the nature of rational basis review?
MARRIAGE EQUALITY, UNITED STATES V. WINDSOR, AND THE CRISIS IN EQUAL PROTECTION JURISPRUDENCE

Susannah W. Polivogt*

I. INTRODUCTION

Equal protection jurisprudence is in crisis. While this crisis has manifested elsewhere, the claim to marriage equality—as addressed both in the lower courts and at the level of the U.S. Supreme Court—provides a particularly comprehensive catalog of the confusion and difficulty in this area of law.

Specifically, lower courts relied on a multitude of equal protection theories in deciding marriage equality challenges prior to the Court’s decision in United States v. Windsor, and continue to invoke multiple theories in deciding marriage equality cases even after Windsor.

Why is this so? One would expect that, once the Supreme Court issues a major decision on a closely analogous, if not identical, issue, the lower courts would begin to consolidate their reasoning.

One reason for this lack of doctrinal consolidation is that Windsor did not provide the level of clear guidance lower courts might have hoped for. Specifically, Justice Kennedy, writing for the majority, did not invoke any of the traditional doctrinal structures of equal protection

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1. See, e.g., Schuette v. BANN, 134 S. Ct. 1623, 1634 (2014) (refusing to apply strict judicial scrutiny to state constitutional amendment repealing and prohibiting policies allowing consideration of race in University admissions process); Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013) (applying strict judicial scrutiny to policy allowing consideration of race in University admissions process). Reva Siegel in particular has described how the Court’s equal protection jurisprudence has evolved to be more protective of majority interests than of minority interests, essentially turning the mandate of the Equal Protection Clause on its head. Reva B. Siegel, Foreword: Equality Divided, 127 HARV. L. REV. 1, 2-3 (2013).

2. 133 S. Ct. 2675 (2013).
analysis, such as suspect classification analysis, fundamental rights analysis, or the associated mechanism of heightened scrutiny.

Instead of relying on these well-established equal protection doctrines, Justice Kennedy invoked the intriguing but underdeveloped doctrine of unconstitutional animus (and its unacknowledged kin, so-called “heightened rational basis review”). As I have argued elsewhere, it is possible to carefully read the Court’s precedent for a vigorous theory of animus, including a framework for analyzing evidence of animus. But this is not the approach that Justice Kennedy took. Rather, he seized upon one of the weakest and most malleable conceptions of unconstitutional animus: that is, something evidenced when a law enacts “[d]iscriminations of an unusual character.”

There are two fundamental problems with this definition of animus. First, it ignores decades of doctrinal development aimed at providing the Court with standards for distinguishing between permissible and impermissible forms of discrimination. As we know, the Equal Protection Clause does not prohibit discrimination or reliance on classifications of persons per se. Rather, it is concerned only with invidious discrimination—that is, discrimination that is arbitrary or

3. Suspect classification analysis asks, in essence, whether the group being discriminated against by a particular law possesses certain characteristics (for example, a history of discrimination) such that discrimination against this group is inherently of concern (that is, suspect). In such instances, the Court will apply a more probing form of judicial scrutiny to the challenged law, departing from the Court’s traditional deference to legislative determinations and requiring more substantiat justification for the discrimination than in the typical case. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (explaining the rationale for applying more vigorous scrutiny to laws discriminating against certain groups).

4. Under the fundamental rights prong of equal protection analysis, the Court will apply more vigorous scrutiny to laws that discriminate between groups—suspect or not—with respect to a fundamental right. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (subjecting restrictions on access to marriage to strict scrutiny because such restrictions implicate a fundamental right); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (noting that the fact that anti-miscegenation laws were discriminatory with respect to marriage was an independent basis for applying strict scrutiny, separate from the fact that the laws relied on race classifications).

5. Conventional wisdom holds that an equal protection plaintiff will prevail only if the Court decides to apply heightened scrutiny. See Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Renner v. Evans, 32 IND. L. REV. 357, 373-82 (1999).

6. Widdos, 133 S. Ct. at 2693.

7. Susannah W. Pollvogt, Unconstitutional Animus, 81 FORDHAM L. REV. 887, 899, 929-30 (2012) (citing Farrell, supra note 5, at 373-82) (discussing the “heightened rational basis review” and the proposition that the “rational basis with bite” standard has failed to take sufficient hold in the courts).

8. See Pollvogt, supra note 7, at 899-900, 905-06.

9. Widdos, 133 S. Ct. at 2692 (internal quotation marks omitted).

otherwise unjustified.\textsuperscript{11} Thus, the core purpose of the Court’s equal protection jurisprudence has been to develop mechanisms to distinguish between those discriminations that are invidious and those that are not.\textsuperscript{12} These mechanisms—the doctrines of suspect classification analysis and heightened scrutiny referred to above—are far from perfect.\textsuperscript{11} But they are at least expressed at a level of concreteness and specificity that can be critiqued, leading to further development of the doctrine. The “discrimination of an unusual character” rule, by contrast, is so vague and lacking in substance as to evade structured critique. It is elusive to its enemies, but also to those who might want to rely on it, including advocates and the lower courts. Indeed, lower courts attempting to follow the reasoning of Windsor regarding the doctrine of animus have openly expressed confusion about the analysis Windsor purports to apply.\textsuperscript{14}

The second problem is that the “discrimination of an unusual character” standard repeats a critical mistake that has compromised the Court’s equal protection jurisprudence since its inception. In short, it makes identification of invidious discrimination dependent on commonsense and unarticulated notions of what is and is not “unusual” with respect to discrimination. It incorporates and relies upon contemporary consensus regarding discrimination and the relative entitlement of

\textsuperscript{11} Loving v. Virginia, 388 U.S. 1, 10 (1967) (“[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” (citing McLaughlin v. Florida, 379 U.S. 184, 188 (1964) and the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873))).

\textsuperscript{12} See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 78 (1996). Sunstein postulates that employing tiers of scrutiny in equal protection analysis serves two goals:

The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. ... The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor’s foot is not a promising basis for antidiscrimination law.

\textsuperscript{13} See, e.g., Mario I. Barnes & Ervin Chemerinsky, The Once and Future Equal Protection Doctrine?, 43 Conn. L. Rev. 1059, 1067 & n.13 (2011) (citing numerous scholars in support of the statement that “[s]cholars have long noted the struggle of courts to resolve how the concept of equality should be defined and measured,” while further discussing the text, structure, and history of the Amendment, itself, as drafted); Suzanne B. Goldberg, Equality Without Tiers, 77 S. Cal. L. Rev. 481, 485 (2004) (noting that suspect classification analysis is plagued by “intractable internal contradictions”); see also Louisville Gas & Elec. Co., 277 U.S. at 37 (stating that the Equal Protection Clause “is not susceptible to exact delimitation”).

\textsuperscript{14} See, e.g., Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1208 (D. Utah 2013) (“While [plaintiffs’ animus argument] appears to follow the Supreme Court’s reasoning in Romer and Windsor, the court is wary of adopting such an approach here in the absence of more explicit guidance.”).
various social groups. In 1896, racial segregation in train cars was likely not seen as "unusual;"\textsuperscript{15} similarly, in 1986, criminalizing homosexual sodomy likely did not strike most as "unusual" either.\textsuperscript{16} Pinning the recognition of harmful discrimination on such an inherently subjective and consensus-based standard does not serve the larger goal of facilitating equality.

Quite simply, Justice Kennedy’s rule for animus does not force reasoned analysis or the recognition of contemporary prejudices. These are two things that standards in equal protection law must do.\textsuperscript{17}

The question then becomes: why did Justice Kennedy avoid the established mechanisms of equal protection jurisprudence in Windsor, instead invoking an unstable concept that could (and did) subject the reasoning of the decision to pointed criticism?\textsuperscript{18} As some have suggested, Justice Kennedy’s approach could simply represent a commitment to shoring up his own esoteric equal protection jurisprudence.\textsuperscript{19} It could represent an expedient approach to consensus

\textsuperscript{15} See, e.g., Plessy v. Ferguson, 163 U.S. 537, 547 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954) (comparing the Louisiana statute in question to Mississippi state statute segregating train cars in a similar fashion). In upholding the Louisiana train car segregation statute on "separate but equal" grounds, the Plessy Court took a notably backward-looking approach, stating that the state legislature has the prerogative "to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." Id. at 550-51. Such language all but directly states that segregation was anything but "unusual" at the time and blesses the statute on precisely that basis.

\textsuperscript{16} See Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003) (citing the "ancient roots" of proscriptions against sodomy to bolster the majority’s opinion). But see Bowers, 478 U.S. at 217 (Stevens, J., dissenting) (drawing attention to the problem of structuring the issue before the court as a fundamental rights analysis when societal norms establishing a legal scheme, such as prohibiting sodomy, may not currently be questioned as unusual).


\textsuperscript{18} United States v. Windsor, 133 S. Ct. 2675, 2705-07 (2013) (Scalia, J., dissenting) (criticizing the majority’s holding based on an animus analysis and stating that by focusing on animus, the majority failed to address “whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”).

building on a controversial issue.\textsuperscript{20} It could represent an exercise in judicial restraint—"leaving things undecided."\textsuperscript{21}

This Idea offers another possibility: that application of traditional equal protection doctrine to the problem of same-sex marriage reveals the deep confusion that currently exists about the meaning of equal protection and whether equal protection doctrines can enforce that meaning in our contemporary, pluralistic society. This confusion was manifest in Windsor by its avoidance of traditional doctrines, and is manifest in the lower courts by persistent, varying interpretations of those doctrines.

Sooner or later, one of the myriad of pending state-level marriage equality challenges will arrive at the doorstep of the Supreme Court. When this happens, what role—if any—will traditional equal protection doctrines play? To explore this question, this Idea examines the potential outcomes of applying the traditional equal protection doctrine to the same-sex marriage problem, with a focus on the inconsistencies and confusions this reveals. The Idea concludes that the problem of same-sex marriage has brought to a head the long-existing, latent crisis in equal protection jurisprudence, and points to the need for a new direction in this area of law.

II. TRADITIONAL EQUAL PROTECTION DOCTRINE AND MARRIAGE EQUALITY

Prior to the Court’s decision in Windsor, many commentators believed that the only chance a marriage-equality plaintiff would have to prevail would be to persuade the Court to apply some form of heightened scrutiny to her challenge.\textsuperscript{22} Indeed, for decades, heightened judicial scrutiny has been the holy grail of equal protection advocacy. This is because there is a high correlation between a court’s decision to apply heightened scrutiny and a positive outcome for the plaintiff.\textsuperscript{23}

\begin{footnotesize}
\textsuperscript{20} See Starger, supra note 19.
\textsuperscript{21} Id. (attributing Justice Kennedy’s decision to intentional obscenity and stating that one element of obscenity was minimalism, which was described in Cass Sunstein’s article, Foreword: Leaving Things Undecided, supra note 12).
\textsuperscript{22} See William N. Eskridge, Jr., Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?, 50 Washburn L.J. 1, 1 (2010) ("[A]dvocates for marriage equality almost invariably seek a reason for judges to apply heightened scrutiny.").
\textsuperscript{23} See Farrell, supra note 5, at 357 (noting the overwhelming lack of success of plaintiffs when the case is reviewed under rational basis review). Over time, the tiers of scrutiny analysis has been criticized as being outcome determinative. Erwin Chemerinsky aptly summarized the sentiment as follows:

Although the levels of scrutiny are firmly established in constitutional law and especially in equal protection analysis, there are many who criticize the rigid tiers of review. For
\end{footnotesize}
Conversely, in the absence of heightened scrutiny, plaintiffs rarely prevail. Accordingly, arguments in favor of heightened scrutiny have been a central component in the marriage equality cases.

Under the traditional paradigm, equal protection plaintiffs can achieve heightened scrutiny in one of two ways: by demonstrating that the challenged law (1) relies on a suspect or quasi-suspect classification; or (2) burdens a fundamental right. But, attaining heightened scrutiny has in some ways become a pipe dream. The Supreme Court has not recognized a new suspect or quasi-suspect classification since 1977, and has expressed a strong aversion to “discovering” new fundamental rights.

Nonetheless, there are a number of strong arguments for applying heightened scrutiny in marriage equality cases. But each of these arguments raises profound questions about the workability of equal protection doctrine.

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24. The notable exception to this trend is the enigmatic set of winning rational basis cases. For a discussion of these rational basis cases through 1996, see Farrell, supra note 5, at 370.


27. Philer v. Doe, 457 U.S. 202, 216-17 (1982) (noting that laws implicating fundamental rights are subject to strict scrutiny review); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (finding that legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications are reviewed under heightened scrutiny).

28. See Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 757 (2011) (“Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977.”); see also City of Cleburne, 473 U.S. at 445 (rejecting cognitive disability as a quasi-suspect classification).


Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Id.
A. Sexual Orientation, Suspect Classification Analysis, and the Futility of Assessing Political Power

The first route to heightened scrutiny in the marriage equality context would be to conclude that sexual orientation is a suspect or quasi-suspect classification. While the Supreme Court in *Windsor* conspicuously declined to consider this question, several lower courts prior to *Windsor* (including the Second Circuit in *Windsor v. United States*)\(^{30}\) itself relied on a suspect classification analysis. Furthermore, some courts ruling on same-sex marriage after *Windsor* have continued to conduct a suspect classification analysis, despite the Supreme Court’s reluctance to do so.\(^{31}\) Is it possible that the Court will take this approach when it inevitably faces a challenge to a state-level marriage ban?

For the Supreme Court to conclude that marriage bans merit heightened scrutiny under this particular approach, the Court would have to first conclude such laws discriminate on the basis of sexual orientation. The Court could avoid this conclusion because, in fact, bans on same-sex marriage do not directly mention sexual orientation on their face.\(^{32}\) While it seems obvious that limiting marriage to one man and one woman targets homosexuals, or prescribes an orthodox sexual orientation (heterosexuality), this conclusion nonetheless requires an inferential step beyond what appears on the face of the law.\(^{33}\)

If the Court nonetheless were to determine that marriage bans discriminate on the basis of sexual orientation, despite the absence of a facial reference to sexual orientation, the Court would next have to analyze sexual orientation against the backdrop of the suspect classification criteria, famously originating in footnote four of

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30. See, e.g., 699 F.3d 169, 181-85 (2d Cir. 2012) (analyzing suspect classification factors and concluding that sexual orientation is a quasi-suspect classification). In an important essay, Katie Eyer observes the way in which lower courts reversed the tide on this issue, reaching beyond what the Supreme Court had yet to decide in declaring that sexual orientation was properly considered a suspect or quasi-suspect classification. Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 199 (2013).


32. See, e.g., Baker v. State, 744 A.2d 864, 899 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (observing that the law at issue did not facially discriminate against gays and lesbians).

33. See, e.g., id. at 905 (discussing Vermont's then extant definition of marriage as between a man and a woman). Justice Johnson in her concurrence wrote:

Thus, an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.

*Id.*
United States v. Carolene Products Co. 34 To “qualify” as a suspect classification, the group disfavored under that classification 35 must: (1) be politically powerless; (2) have suffered a history of discrimination; (3) be defined by an immutable trait; and (4) be a discrete and insular minority. 36 The Court has also looked at (5) the extent to which the trait relates to one’s ability to participate in society, such that the trait is presumptively more or less relevant to legitimate legislative goals. 37

Recently, lower courts, as well as other government actors and academics, have concluded that sexual orientation should be treated as a suspect basis for legislation. Attorney General Eric Holder took this position early in 2011. 38 Similarly, numerous academics have detailed compelling arguments for why sexual orientation should be considered inherently suspicious as a legislative classification. 39

Still, it is unclear how the trait of sexual orientation would fare under this standard if the Supreme Court were to directly engage the

34. 304 U.S. 144, 153 n.4 (1938) (observing laws that reflect “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

35. The relationship between suspect classifications (e.g., race) and suspect classes (e.g., originally emancipated slaves, and more generally black Americans and other racial minorities) is confounding because courts consider factors that are at once historical and ahistorical, and factors that are at once deeply substantive and highly formalistic. For an in-depth discussion of this conundrum, see generally Sonu Bedi, Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough, 47 GA L. REV. 301 (2013).

36. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 438, 464, 473 n.24 (1985). For a discussion of the meaning of the phrase “discrete and insular,” see Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 729 (1985) (“I propose to define a minority as ‘discrete’ when its members are marked out in ways that make it relatively easy for others to identify them.”); see also id. at 726 (describing insularity in part as a type of geographic or social proximity that results in a “dense communications network”).

37. City of Cleburne, 473 U.S. at 440-41. While these criteria are often characterized as mandatory (that is, as an element test), the Court has given greater and lesser emphasis to certain criteria in certain cases (treating the analysis as a factor test). The Court has examined these criteria most strenuously in denying claims to suspect or quasi-suspect status. See Susannah W. Pollvoigt, Beyond Suspect Classifications, 16 U. PENN. J. CON. L. 739, 748, 783 (2014).


issue. There are plausible arguments on both sides of the issue. The best argument that sexual orientation should be recognized as a suspect classification is that it is a trait, like race, that is unrelated to one’s ability to participate in society, and is therefore presumptively irrelevant to law-making. Indeed, the watershed Supreme Court decision Lawrence v. Texas, which held that bare moral disapproval of homosexual conduct or identity was not a valid basis for the public laws, went, and continues to go, a long way toward establishing that regulation of private sexual conduct and sexual identity is beyond the scope of the valid exercise of police power. Specifically, the Lawrence Court held that “[p]ersons in a homosexual relationship may seek autonomy for these purposes [making intimate and personal choices], just as heterosexual persons do,” implying that sexual orientation was not a relevant trait for the legislature to consider in the context of regulating basic liberties.

But this factor—relevance of the trait to valid law-making interests—is but one aspect of the suspect classification analysis. The real sticking point (and the factor that William Eskridge understandably focuses on) is political power. There is possibly no civil rights movement that has been as swift and dynamic as the LGBT rights movement in recent years. It is undeniable that members of the LGBT community have faced—and continue to face—horrible acts of violence and routine discrimination by both private and public actors. But it is also impossible to deny that change is afoot. Suspect classification designations are designed as a stop-gap when the democratic process is

40. See Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting “two members of this Court have already stated that they ‘cannot conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense’”). While there has been quite some debate over whether sexual orientation is “immutable,” the inquiry into its “relevance—which was the focal point of the gender cases—is a slightly different inquiry. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting that sex is different than other immutable traits such as intelligence or physical disability because “the sex characteristic frequently bears no relation to ability to perform or contribute to society”).

42. Id. at 582-83 (O’Connor, J., concurring).
43. Id. at 574 (majority opinion).
44. See generally Eskridge, supra note 22.
47. See 33 Marriage Equality-Related 2012 Election Results, MARRIAGE EQUALITY USA (Dec. 10, 2012, 6:40 AM), http://www.marriageequality.org/election-results (showing four states changed their legal stance on marriage equality in the 2012 general election. Maine, Maryland, and Washington voted to approve same-sex marriage, while voters in Minnesota defeated an amendment to the state constitution defining marriage as a union between one man and one woman).
failing to sufficiently protect minority groups. 48 But here, it appears that the democratic process is working, albeit in fits and starts. 49

Thus, the critical "political powerlessness" factor in suspect classification analysis is inherently problematic as a basis for formulating doctrine because estimations of political power are necessarily subjective, fact intensive, and changing over time. 50

Further, separate from the question of whether the Court should recognize sexual orientation as a suspect classification is the question of whether the Court would do so, as a matter of realpolitik. Eskridge argues persuasively that the gay rights movement strongly parallels the civil rights and feminist movements before it, and that the historical pattern is for groups to receive protected status not when they are, in fact, politically powerless, but when they have achieved enough political power to be reckoned with. 51 Under this theory, the level of political power achieved by gay men and lesbians at this point in time—power that is incomplete, but not inconsequential—makes sexual orientation the perfect candidate for suspect classification recognition. On the other side of the debate, Kenji Yoshino contends that the Court will not recognize additional suspect classifications, regardless of the merits of the underlying argument, because of the palpable pluralism anxiety manifest in the Court’s contemporary equal protection jurisprudence. 52

48. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (observing laws that reflect "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); see also Ackerman, supra note 36, at 715 (interpreting Carolene Prods as permitting judicial intervention to correct a defective political process).


50. As Justice Powell noted in another context: "The kind of variable sociological and political analysis necessary to produce such rankings [of the relative hardships borne by different social groups] simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978).

51. Eskridge, supra note 22, at 18-19; see also Letter from Eric H. Holder, supra note 38 ("[W]hen the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination.").

52. See Yoshino, supra note 28, at 757 (noting that the Supreme Court has not accorded heightened scrutiny to any new group based on suspect classification since 1977, and arguing that "[a]t least with respect to federal equal protection jurisprudence, this canon has closed").
In other words, recognizing a new suspect classification could start the Court down a slippery slope.

If the Court were to analyze whether sexual orientation is a suspect or quasi-suspect classification, this would expose the suspect classification analysis as based in subjective judgments about the relative power of different social groups, and whether such groups must truly be without political power to gain recognition. Further, such an analysis would potentially re-open the floodgates to claims by a multitude of other social groups.

B. Marriage Bans as Sex Discrimination and the Equal Application Fallacy

The second route to heightened scrutiny would be to conclude that marriage bans rely on sex classifications, mandating the application of heightened scrutiny. Intriguingly, the Court could avoid recognizing a new suspect classification by taking this route, because sex discrimination has long been held to trigger intermediate scrutiny. In terms of rigor, intermediate scrutiny falls short of the gold standard of strict scrutiny, but is nonetheless a form of heightened scrutiny, vastly preferable to deferential rational basis review.

It seems beyond argument that laws prohibiting same-sex marriage rely on—indeed, must invoke—facial sex classifications. States that define marriage as an exclusively heterosexual institution do so by

53. See Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); see also United States v. Virginia, 518 U.S. 515, 534 (1996) (requiring an "exceedingly persuasive justification" for sex-based discrimination). While a number of scholars have argued that marriage bans constitute sex discrimination, courts have struggled with framing the issue as such. See, e.g., Mary Ann Case, What Feminists Have to Lose in Same-Sex Marriage Litigation, 57 UCLA L. REV. 1199, 1204 (2010) (discussing same-sex marriage cases historically brought under the sex discrimination theory); Debrah A. Widiss et al., Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 HARY. L. & GENDER 461, 464-79 (2007) (describing how courts rejecting claims to marriage equality relied on sex role stereotypes). There are, however, several instances where state supreme courts judges have concluded that marriage bans are a form of sex discrimination. See, e.g., Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Grecous, J., concurring); Baker v. State, 44 A.2d 864, 904-05 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

defining marriage as a union between “one man and one woman.” By invoking these terms and making access to legal rights dependent upon them, such laws facially discriminate on the basis of sex. Further, beyond merely relying on facial gender classifications as a matter of mechanics, marriage bans arguably enact sex discrimination on a substantive level by prescribing orthodox gender roles. This view is reflected in the arguments advanced by proponents of such laws, who frequently rely on the twin claims that: (1) male and female parental roles are necessarily differentiated on the basis of gender; and (2) that this gender differentiation represents the ideal form of parenting.

And yet courts have nonetheless declined to recognize the facial sex classifications at work in these laws, citing the fact that the laws do not disadvantage one sex relative to the other. At the core of this reasoning is an implicit requirement that laws must tangibly disadvantage one group with respect to the other to trigger an equal protection analysis. For example, in Jackson v. Abercrombie, a pre-Windsor decision, the federal district court reasoned that Hawaii’s law defining marriage as an exclusively heterosexual institution “does not treat males and females differently as a class. It is gender-neutral on its face; it prohibits men and women equally from marrying a member of the same-sex.”

This reasoning displays a fundamental confusion about the concerns of the Equal Protection Clause, and is in blatant conflict with powerful precedent, most notably the Supreme Court’s decisions in Brown v. Board of Education and Loving v. Virginia. Brown did not

55. See, e.g., Ky. Rev. Stat. Ann. § 233a (LexisNexis 2013) (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.”).
56. See Baker, 744 A.2d at 905. Justice Johnson wrote: A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.
57. Id.
58. As of this idea, only one federal court has recognized that marriage bans constitute sex discrimination. See Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1215-16 (D. Utah 2013).
60. Id. at 1098.
explicitly deal with the significance of facial classifications, but did so implicitly in refuting the reasoning and outcome of Plessy v. Ferguson,63 the case that infamously solidified the “separate but equal” doctrine in the service of validating racial segregation.64 The law at issue in Plessy, which mandated that train cars be segregated on the basis of race, patently relied on facial race classifications.65 Indeed, the law could not serve its primary function—racial segregation—without relying on facial race classifications. Nonetheless, the Plessy Court concluded that this form of segregation did not implicate the Equal Protection Clause because the train cars, while separate, were still equal in terms of the quality of accommodations.66 In other words, the Plessy Court made differential treatment above and beyond the use of facial classifications.

The Court’s decision in Brown68 refuted both the notion that racially segregated schools could ever be equal,69 and also the notion that a facial classification was, on its own, insufficient to trigger equal protection scrutiny in the absence of some independent showing of underlying unequal treatment. Rather, the Court will apply the level of equal protection scrutiny triggered by the classification relied upon. As the Court later stated, “[J]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation.”70

Loving is even more on point.71 There, the State of Virginia, in an effort to excuse its anti-miscegenation law72 from equal protection scrutiny, contended that the Equal Protection Clause’s protections did not apply to the law at all, because the law did not enact race discrimination per se.73 Race discrimination, according to Virginia, existed only where a law subjected different races to different treatment.74 Because neither blacks nor whites could intermarry under

63. 163 U.S. 537 (1896).
64. Id. at 552 (Harlan, J., dissenting) (coining the phrase “separate but equal”).
65. Id. at 540.
66. Id. at 548-49.
67. Id. at 551-52.
69. Id. at 495 (“Separate educational facilities are inherently unequal.”).
72. The relevant provision stated: “All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” Id. at 4 n.3 (quoting Va. CODE ANN. § 20-57 (1960)). Related provisions imposed criminal penalties for violating this prohibition. Id. at 4.
73. Id. at 7-8.
74. Id. at 8.
the law, and because the criminal penalties imposed on each group were the same, there was no differential treatment of the two classes, therefore no race discrimination, and thus no equal protection claim based on race.75

The Loving Court rejected this argument.76 Because the anti-miscegenation law relied on facial race classifications, it thereby made legal rights dependent on race, and constituted actionable race discrimination under the Equal Protection Clause to which strict scrutiny would apply.77 In other words, facial classifications on the basis of a particular trait trigger the level of equal protection scrutiny asserted with that trait.78 Under this logic, because laws prohibiting same-sex marriage necessarily rely on facial sex classifications, they necessarily make legal rights dependent on sex, and constitute actionable sex discrimination to which intermediate scrutiny would apply.

Some courts have rejected the analogy to Loving, pointing out that in Loving, the racial classifications were motivated by an ideology of white supremacy—that is, an ideology of subordination that is supposedly absent from the same-sex marriage context.79 However, the Court’s concern with white supremacy is expressed in a separate portion of the opinion80 from the analysis of whether anti-miscegenation laws relied on facial classifications.81

The failure of courts to recognize marriage bans as sex discrimination reveals a cabined vision of the Equal Protection Clause’s guarantees. As the Court has recognized (at least at times), the Equal Protection Clause embodies a fundamental suspicion of class-based legislation.82 This is true even where classifications are not being used to

75. Id.
76. Id.
77. Id. at 11. The Loving Court treated the laws at issue as a form of race discrimination based on the classifications employed by the law. See id. at 4 (quoting VA. CODE ANN. § 20-59 (1960)) (“If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”). Significantly, the Court did not treat it as a case of discrimination against persons inclined to enter interracial relationships. Thus, the facial classification upon which rights were made dependent determined the type of discrimination at issue.
78. Id. at 9.
80. Loving, 388 U.S. at 8-11 (rejecting equal application argument, concluding that laws relied on facial race classifications, and applying strict scrutiny as a result).
81. Id. at 11-12 (concluding that the laws failed strict scrutiny because they had no purpose outside of invidious racial discrimination).
82. Romer v. Evans, 517 U.S. 620, 635 (2003) (“[C]lass legislation...[is] obnoxious to the
directly impose differential treatment as between the classified groups—a point amply supported by both *Loving* and *Brown.* This is because class-based legislation raises concern even where there is, on a superficial level, "equal application" of the laws (as there was in *Loving* and *Brown*), because such laws nonetheless tend to cement a certain ordering of social groups, which in turn tends to support formation of an undemocratic caste society.

If the Court were to analyze whether marriage bans are a form of sex discrimination, this would expose the fact that—after decades of relying on the concept—we are still not really certain how facial classifications are identified for equal protection purposes.

C. **Marriage Bans, Fundamental Rights Analysis, and the Problem of Tautological Reasoning**

The third route to heightened scrutiny would be to find that laws prohibiting same-sex marriage burden the fundamental right to marriage, such that strict scrutiny applies. Again, it seems beyond argument that such laws implicate the right to marriage. And in fact, the current, post-*Windsor* trend is for courts to conclude as such.

But at prior stages in the marriage equality battle, at least some courts found a way around the argument by reframing the fundamental rights inquiry. For example, in *Abercrumbie,* the district court rejected the argument that bans on same-sex marriage implicate the fundamental right to marriage, beginning with the observation that courts are obligated to define asserted fundamental rights with precision. Applying this rule, the court characterized the asserted right not as the right to "marriage," but as a right to "same-sex marriage," something inherently different than traditional, opposite-sex marriage. In support of this characterization, the court emphasized that marriage has always been understood as the union of one man and one woman, and that the fundamental nature of the marriage right is grounded in its

prohibitions of the Fourteenth Amendment." (citing Civil Rights Cases, 109 U.S. 3, 24 (1883) (alterations in original)).

85. Most recently, this approach was taken by the Tenth Circuit Court of Appeals in striking down Utah’s marriage ban. See *Kutcher v. Herbert,* No. 13-4178, slip op. at 3 (10th Cir. June 25, 2014).
87. *Id.* at 1095-96.
linkage to procreation. Having concluded that same-sex couples could not lay claim to this—the traditional, fundamental right to marry—the court then examined whether history and tradition recognized a fundamental right to same-sex marriage, and unsurprisingly concluded that they did not.

This move is deeply problematic from the perspective of core equal protection values because what it does, in essence, is ask whether members of a disfavored group (in this case, same-sex couples) are entitled to the right to marriage rather than asking whether the marriage right itself is fundamental in nature, as a universal proposition. In other words, asking whether there is a fundamental right to same-sex marriage is really asking whether same-sex couples (or homosexuals) are entitled to the fundamental right to marriage that heterosexual citizens enjoy. This is analogous to asking in the 1960s whether there was a fundamental right to interracial marriage, which was really asking whether interracial couples are entitled to that right. The posing of the question creates its own answer, because of course historically excluded groups will not be perceived as entitled to participation in the rights from which they have historically been excluded. That is to say, the phrasing of the question matters.

This point—that the characterization of the asserted right matters—was made abundantly clear by Lawrence, the case that overturned the Court’s regrettable decision in Bowers v. Hardwick. At issue in Bowers

88. Id. at 1095. Needless to say, many advocates have argued persuasively that marriage is not now, and never has been, primarily a vehicle for regulating procreation. See, e.g., Brief for Family and Child Welfare Law Professors as Amici Curiae Supporting Respondents at 4-16, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); (arguing procreation is not the primary focus of marriage). In addition, other courts addressing this argument have found it unpersuasive. See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (“Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse.”); see also Lawrence v. Texas, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting). Justice Scalia wrote:

If moral disapproval of homosexual contact is “no legitimate state interest” for purposes of prescribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[the liberty protected by the Constitution” . . . . Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

Id. (alterations in original) (internal citation omitted).

89. Jackson, 884 F. Supp. 2d at 1096-98. By contrast, the district court in Perry v. Schwarzenegger acknowledged that marriage was traditionally a heterosexual institution, but that other aspects of marriage had proven transcendent through the ages—the prescription of differentiated gender roles not being among them. See 764 F. Supp. 2d at 992 (asserting that the persistent, overarching state interest in marriage was to “create[] stable households, which in turn form the basis of a stable, governable populace”).

91. 478 U.S. 186 (1986); see Lawrence, 539 U.S. at 578.
was a state law criminalizing all acts of sodomy. Among its other shortcomings in reasoning, the Bowers Court initially made the mistake of framing the controlling question: “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” This formulation incorporates and emphasizes the marginalized group in the very phrasing of the right. In addition, the Constitution does not confer rights at the level of specificity required to find a right to “sodomy.” By phrasing the question this way, the Bowers Court mocked the seriousness of the claim asserted in the case, and made the answer to the question a foregone conclusion.

This was, of course, recognized by Justice Blackmun in his dissent, and by the majority in Lawrence some seventeen years later. As in Bowers, the issue in Lawrence was a state law criminalizing sodomy. However, the Lawrence Court characterized the right at issue as a universal right to privacy in consensual sexual relations between adults, to which homosexuals and heterosexuals alike were entitled.

Thus, when courts ask whether there is a fundamental right specifically to same-sex marriage, they commit the same logical error as the Court made in Bowers. First, this formulation incorporates a reference to the disfavored/historically excluded group; second, it defines the right too narrowly when it is easily and appropriately categorized within the broader, yet still concrete, established fundamental right to marriage. The vulnerability of the fundamental rights inquiry to tautological manipulation reveals that it is a doctrine not necessarily adept at transcending contemporary prejudices.

If the Court were to analyze whether marriage bans implicate the fundamental right to marriage, it would have to articulate a clearer rule for how the fundamental rights inquiry is properly framed.

93. Id. at 190 (emphasis added).
94. Id. at 199 (Blackmun, J., dissenting). Justice Blackmun stated: “This case is no more about a fundamental right to engage in homosexual sodomy, as the Court purports to declare, than Stanley v. Georgia was about a fundamental right to watch obscene movies, or Katz v. United States was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”
95. Lawrence, 539 U.S. at 566-67 (stating that the Bowers Court’s narrow framing of the controlling question “discloses[] the Court’s own failure to appreciate the extent of the liberty at stake”).
96. Id. at 562.
97. Id. at 578 (“The petitioners are entitled to respect for their private lives.”).
III. CONCLUSION

The courts’ analyses of same-sex marriage both before and after *Windsor* reveal significant problems in equal protection jurisprudence—problems that are not resolved when the Court itself avoids applying traditional equal protection doctrine to cases that seem amenable to it.

But perhaps this avoidance itself is an admission that the traditional doctrinal mechanisms are not as compelling, universal, or transcendent as one might hope. The Court appears to be afraid of its own creation in suspect classification analysis, anxious that recognizing a new group deserving of judicial solicitude will open the floodgates to innumerable claims of suspect status. Perhaps even more disturbing, there is a marked lack of consensus on what constitutes a facial classification, such that it is not clear whether the Court would consider marriage bans a form of sex discrimination. Finally, the Court has yet to model a disciplined approach to framing the fundamental rights inquiry, and as a result we are unsure whether one of the greatest social and legal issues of our time—the question of same-sex marriage—is a question of fundamental rights.

In short, all the usual suspects have been sidelined due to an embarrassing degree of doctrinal sloppiness. This leaves heightened rational basis review and the doctrine of animus as leading candidates for the Court’s ultimate decision on state-level marriage equality.

Despite the fact that the twin doctrines of animus and heightened rational basis review were poorly and incompletely articulated in *Windsor*, they together represent the most promising option for the future development of equal protection jurisprudence. But that future is in jeopardy. Because the doctrines of unconstitutional animus and heightened rational basis review are unconsolidated (and, indeed, in the case of the latter, unacknowledged by the Court itself), it is not certain that they will evolve to fully meet their robust potential.