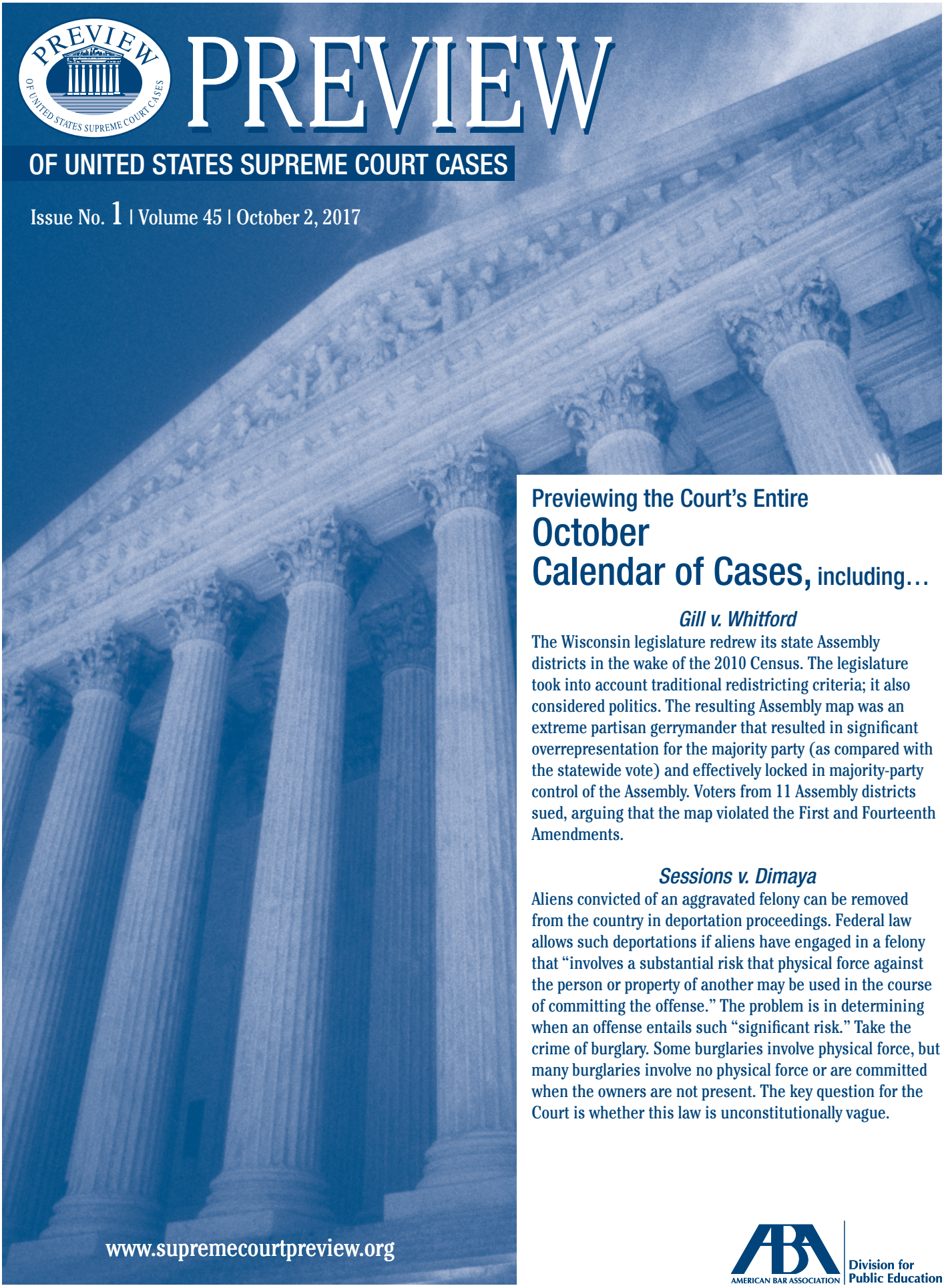
PREVIEW
OF UNITED STATES SUPREME COURT CASES

Issue No. 1 | Volume 45 | October 2, 2017



Previewing the Court's Entire October Calendar of Cases, including…

Gill v. Whitford

The Wisconsin legislature redrew its state Assembly districts in the wake of the 2010 Census. The legislature took into account traditional redistricting criteria; it also considered politics. The resulting Assembly map was an extreme partisan gerrymander that resulted in significant overrepresentation for the majority party (as compared with the statewide vote) and effectively locked in majority-party control of the Assembly. Voters from 11 Assembly districts sued, arguing that the map violated the First and Fourteenth Amendments.

Sessions v. Dimaya

Aliens convicted of an aggravated felony can be removed from the country in deportation proceedings. Federal law allows such deportations if aliens have engaged in a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The problem is in determining when an offense entails such "significant risk." Take the crime of burglary. Some burglaries involve physical force, but many burglaries involve no physical force or are committed when the owners are not present. The key question for the Court is whether this law is unconstitutionally vague.

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U.S. SUPREME COURT October 2017 CALENDAR

MONDAY

OCTOBER 2

Ernst & Young LLP v. Morris, EPIC Systems Corp. v. Lewis, and NLRB v. Murphy Oil USA

Sessions v. Dimaya

TUESDAY

OCTOBER 3

Gill v. Whitford

Jennings v. Rodriguez

WEDNESDAY

OCTOBER 4

District of Columbia v. Wesby

Class v. United States

OCTOBER 9

Legal Holiday

OCTOBER 10

Hamer v. Neighborhood Housing Services of Chicago

OCTOBER 11

National Association of Manufacturers v. U.S. Department of Defense, Department of the Army Corps of Engineers, and U.S. Environmental Protection Agency, et al.

Joseph Jesner v. Arab Bank, PLC

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A one-year subscription to *PREVIEW of United States Supreme Court Cases* consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present Term, as well as briefly summarize decisions as they are reached. A special eighth issue offers a perspective on the newly completed Term.

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This month, the *PREVIEW* website (www.supremecourtpreview.org) features:

- a sign-up for our weekly e-blasts highlighting all the merits and amicus briefs submitted to the Court and
- all the merits and amicus briefs for the October cases.

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Does a Guilty Plea Waive a Defendant's Right to Challenge the Constitutionality of the Statute of Conviction?

CASE AT A GLANCE

Charged with violating a federal statute prohibiting the possession of weapons on the grounds of the U.S. Capitol in Washington, D.C., Rodney Class admitted to having weapons in his vehicle parked on Capitol Grounds, but claimed that the statute was unconstitutional. After the trial court ruled against Class, he pleaded guilty to the offense and appealed his conviction, raising the constitutional arguments. Holding that the guilty plea waived these issues, the appellate court affirmed the conviction. The defendant now argues to the Supreme Court that the appellate court erred and that guilty pleas waive only issues related to factual guilt but not arguments that the statute of conviction was unconstitutional.

Class v. United States
Docket No. 16-424

Argument Date: October 4, 2017
From: The D.C. Circuit Court of Appeals

by Alan Raphael
Loyola University Chicago School of Law, Chicago, IL

ISSUE

Does a defendant's unconditional guilty plea prevent him from raising on appeal the argument, rejected in pretrial rulings, that the statute under which he was charged was unconstitutional?

FACTS

A federal law, 40 U.S.C. § 5104(e), prohibits weapons on the grounds of the U.S. Capitol in Washington, D.C. Rodney Class, a native of North Carolina where he has a concealed-carry firearm permit, parked his Jeep in a parking lot in D.C. that was 1,000 feet from the U.S. Capitol and, unknown to Class, within the legal definition of the Capitol Grounds. A police officer saw that the vehicle lacked a parking permit and then observed what appeared to be a large blade and a gun holster in the vehicle. Police then searched the Jeep, uncovering three firearms and several knives. Class was charged with one count of violating § 5104(e) for possessing a weapon on Capitol Grounds.

In pretrial proceedings in federal court in the District of Columbia, Class filed numerous motions to dismiss the charge. He asserted that the statute violated his Second Amendment right to bear arms and that the lack of a sign at the parking lot indicating that weapons were barred from vehicles violated his Fifth Amendment right to due process of law because he did not have notice of the law's reach. After denying these motions, the court set the case for trial. Class failed to show up for one trial date but subsequently appeared and pleaded guilty to the charge. The court imposed a sentence of 24 days of incarceration and 12 months of supervised release.

A guilty plea constitutes a waiver, or relinquishment, of numerous constitutional guarantees, including the rights to trial, to present evidence, to cross-examine witnesses, and not to be compelled to be a witness against oneself, as well as the requirement that the government bear the burden of proving guilt beyond a reasonable doubt. Because of the importance of these constitutional protections under our system of criminal justice, Rule 11 of the Federal Code of Criminal Procedure provides that a guilty plea in a federal court is valid only if the trial judge makes clear on the record that the defendant understands the rights he is relinquishing and agrees voluntarily to surrender them. In this case, the court's compliance with these requirements is shown by a question-and-answer colloquy with Class. The judge explained each of the rights surrendered by a guilty plea, and, as to each, Class answered that he understood the right. He further indicated that he was pleading guilty voluntarily. Class did not avail himself of the Rule 11(a)(2) procedure for a defendant to plead guilty and reserve the right to raise on appeal denials from specified pretrial motions, with the consent of the prosecutor and judge.

Regarding appeal, the court informed Class that, after pleading guilty, he still could raise arguments that his plea was involuntary, that there was a fundamental defect in the guilty-plea proceedings, or that his sentence was illegal. Class said he understood these matters. The court did not tell him specifically that his plea prevented him from appealing the rulings on his constitutional claims. However, the court did state, "Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned,

because there will not be any trial, and there will probably be no appeal." Class said that he understood. The court then determined that Class knew the rights he was waiving and was voluntarily agreeing to give them up, thus allowing it to accept the guilty plea and enter a judgment of conviction.

Class raised the constitutional arguments on his appeal. Citing one of its own cases and the Supreme Court precedent of *Tollett v. Henderson*, 411 U.S. 258 (1973), for the rule that "unconditional guilty pleas that are knowing and intelligent…waive the pleading defendant's claims of error on appeal, even constitutional claims," the appellate court dismissed the appeal. On appeal, Class made two arguments. First, he claimed that he never explicitly waived the issues regarding constitutionality of the statute. Second, he argued that a guilty plea does not constitute a waiver of these issues. The appellate court did not rule on his first argument. Instead, it held that, following a guilty plea, the only arguments not waived are defects in taking the plea, ineffective assistance of counsel, and instances in which the trial court had no right to bring the defendant to trial at all or lacked subject matter jurisdiction over the case. Because none of these exceptions applied, the appeals court refused to consider the merits of Class's constitutional claims, and it affirmed his conviction.

The Supreme Court granted a writ of *certiorari* to determine whether Class's guilty plea forfeited his right to appeal the court's denial of his motions to dismiss the case on constitutional grounds.

CASE ANALYSIS

Ninety-seven percent of federal criminal cases resulting in a conviction follow a guilty plea rather than a trial. In state courts, where the overwhelming majority of criminal cases are adjudicated, the percentage of guilty pleas is 94 percent. Because so few criminal convictions follow a trial, the determination of what issues may be considered on appeal after a guilty plea is significant for the criminal justice system.

In order to contest the constitutionality of the statute under which he was charged, Class was required to file pretrial motions raising the issues. Had he not done so, he would have been barred from raising the issue after conviction, regardless of whether he had gone to trial or pleaded guilty. He did, however, raise the issues to the trial court and thus was not barred from raising the claims on appeal under two circumstances. If Class had pleaded not guilty and been convicted, he would have been able to raise on appeal the arguments rejected by the trial court that his convictions were under an unconstitutional statute. If he had made a conditional guilty plea specifying which rulings he was contesting, with the agreement of the prosecutor and court, he would have been able to raise the same constitutional arguments on appeal. If he had succeeded in his arguments, the conviction would have been overturned. He did not, however, follow either of these procedures.

By pleading guilty, Class saved the government the time and expense of holding a trial and ruled out the possibility that he would be found not guilty. The guilty plea also provided Class with considerable benefits. First, his case was resolved more quickly than it would have been had he insisted on his right to trial. Second, the government agreed not to prosecute him for the separate crime of his failure to appear for trial. Third, the prosecutor recommended a sentence at the low end of the Sentencing Guidelines range, which called for a sentence of up to six months of imprisonment and a fine of $500–$5,000.

In *Tollett*, the Supreme Court held that, following a valid guilty plea for a state conviction, a defendant could not obtain a writ of *habeas corpus* by asserting that the grand jury that charged him, having excluded African Americans, had been unconstitutionally selected. Relying on earlier cases known as the *Brady* trilogy, the *Tollett* Court stated that a guilty plea is "a break in the chain of events which has preceded it in the criminal process" and that, therefore, a criminal defendant who pleaded guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the guilty plea." The only issues that could be pursued after a guilty plea were the voluntary and intelligent nature of the plea and whether the defendant's counsel provided competent representation.

In two subsequent cases, the Court determined that certain types of claims could be raised on appeal after a guilty plea. The defendant in *Blackledge v. Perry*, 417 U.S. 21 (1974), was charged and convicted in a North Carolina court of a misdemeanor assault and availed himself of his statutory right to a trial *de novo* in a higher state court. The prosecutor then charged the defendant with a felony assault offense based on the same incident. The defendant pleaded guilty to that charge and appealed, asserting that the prosecutor had violated due process through vindictively bringing the more serious charge to punish him for exercising his statutory right to a new trial.

According to the *Blackledge* Court, this issue survived the guilty plea and could be raised on appeal. The Court found for the defendant and reversed the conviction. It reasoned that, although *Tollett* and the *Brady* trilogy involved constitutional issues that were held to be waived by guilty pleas, "none went to the very power of the State to bring the defendant into court to answer the charge against him." The Supreme Court in *Blackledge* held that neither *McMann v. Richardson*, 397 U.S. 759 (1970) (one of the *Brady* trilogy, concerning use of an allegedly coerced confession against the defendant), nor *Tollett*, (concerning the composition of the grand jury), involved prosecutions that could not properly be brought. By contrast, in *Blackledge* allowing the felony charge to go to trial violated the Due Process Clause as a vindictive punishment for the defendant's exercise of statutorily guaranteed rights. The *Blackledge* Court referred to the "defendant's right not to be haled into court upon the felony charge." Therefore, his guilty plea did not prevent him from attacking his conviction through a federal *habeas corpus* proceeding.

Similarly, a claim that a prosecution violated the right against double jeopardy can be maintained in a *habeas* action despite a guilty plea, because it too involved a prosecution that should never have been allowed. In *Menna v. New York*, 423 U.S. 61 (1975), the defendant was called to testify before a grand jury about a murder conspiracy; in exchange for his testimony, the defendant was granted immunity barring prosecution for the crime about which he testified. He refused to answer the questions of the grand jury and received a 30-day sentence for contempt of court. Subsequently indicted for his refusal to answer the questions, the defendant claimed that the indictment violated double jeopardy because he

had already been found in contempt and sentenced for the same offense; the trial court denied his motion to dismiss the indictment. He then pleaded guilty and was sentenced. On appeal, the New York Court of Appeals affirmed the conviction, holding that under *Tollett*, the defendant had waived the issue by pleading guilty. The Supreme Court reversed. Relying on *Blackledge*, the *Menna* Court indicated that the guilty plea is not a waiver of the issue if "the State is precluded by the United States Constitution from haling a defendant into court on a charge." The Supreme Court did not rule on the double jeopardy issue but remanded the question to the New York Court of Appeals.

Class asserts that a defendant pleading guilty does not lose the ability to argue on appeal that the statute of conviction was unconstitutional as long as he had presented the issue to the trial court before making the guilty plea, which he had done, and had not made an explicit waiver of the issue when he pleaded guilty, which he claims not to have done. Thus, his assertion is that the Court should treat the constitutionality of a criminal statute as similar to the *Blackledge* and *Menna* exceptions rather than being governed by the *Tollett* rule. In Class's view, *Tollett* "stands for the proposition that a valid guilty plea admits factual guilt and thus removes that issue from the case." He contends that *Tollett* is not applicable here because Class never denied that he had weapons in his vehicle and the vehicle was parked on the Capitol Grounds. Class does not contest that a defendant can waive the right to an appeal totally or waive the issue of constitutionality of the statute on appeal, but contends that neither his plea agreement nor the Rule 11 colloquy made such a waiver.

In his view, the government has no jurisdiction to prosecute under an unconstitutional statute, and thus, his conviction should be voided despite his guilty plea. He is not objecting to a ruling on admissibility of evidence or the application of a procedural rule, which would be barred from appeal by a guilty plea, but rather to the government's ability to obtain a conviction at all. According to Class, "the assertion that the underlying statute is unconstitutional most certainly would stand in the way of conviction even if factual guilt is established, since the State has no lawful basis for convicting a defendant in the absence of a valid statute criminalizing his conduct." To support his argument, Class points to earlier Supreme Court decisions finding statutes unconstitutional in cases in which the defendant pleaded guilty. In those cases, however, the government never claimed that the issues were waived, and thus, the Court did not make any ruling on the issue. In addition, he notes a split among the appellate courts on the issue raised in this case and refers to some Supreme Court decisions regarding the retroactive application of its decisions to pending appeals.

Class's second argument is that he never explicitly waived the issue of the statute's constitutionality. The D. C. Circuit did not address the issue. Therefore, if the Court does not rule in his favor on his first argument, Class urges the Court to remand the case to the D.C. Circuit for a ruling on whether he had in fact waived the issues.

The United States contends that the court of appeals correctly held that Class made an unconditional guilty plea, voluntarily and knowingly, and therefore forfeited his right to contest the unconstitutionality of the statute. He clearly could have attacked the statute's unconstitutionality on appeal after conviction had he pleaded not guilty or had he made a conditional plea under Rule 11(a)(2), but he chose to do neither. During the plea colloquy, Class stated that he understood that he was giving up the right to appeal most issues, including constitutional claims. The interest of finality supports denying appeals when a defendant has not made a conditional plea reserving specified claims. The government stresses that the defendant may make a valid guilty plea waiving most issues for appeal as long as the record shows that the defendant knew his rights and voluntarily relinquished them, which the United States contends is clearly true in this case.

According to the government, a federal court clearly has jurisdiction over a charge based on a statute that has not been found to be unconstitutional. It contrasts the claim in the present case to the situations involved in *Blackledge* and *Menna*, in which, if the defendant's arguments were correct, the charge should never have been brought. The United States also relies on *Williams v. United States*, 341 U.S. 58 (1951), for the proposition that a district court has jurisdiction to adjudicate charges against a defendant under a statute the defendant claims is unconstitutional. The government points to dismissal of numerous appeals of criminal convictions, in which the defendant claims that the statute of conviction was unconstitutional, because the defendant had failed to raise the issue in the trial court or preserve the issue for review. These rulings, it argues, would not be possible if the alleged unconstitutionality of the statute had deprived the court of jurisdiction over the case. As to the cases Class cites regarding retroactivity, the government finds them inapplicable, because they all refer to instances where the statute involved in a criminal case has been declared unconstitutional by the Supreme Court and thus bar convictions in other cases in which the appeal is still pending.

SIGNIFICANCE

If the Court were to hold as Class requests that a guilty plea does not prevent a defendant from challenging on appeal the statute of conviction as unconstitutional, this would be a significant extension of the *Blackledge* and *Menna* exceptions to the *Tollett* rule. Such a holding would apply not just in federal criminal cases, such as the present case, but also to the more numerous state court convictions. Obviously, that ruling would affect only cases in which the defendant questioned the constitutionality of the statute under which he or she was convicted. The language of the Court's decision might encourage arguments for broader exceptions to the *Tollett* rule.

On the other hand, a ruling that such claims could not be considered on appeal would insulate most statutes from adjudication of this constitutional issue, unless the defendant pleaded not guilty or made a conditional plea. Many states do not allow conditional pleas, so that method of reserving an issue for appeal despite a guilty plea would not be available in many jurisdictions if the Supreme Court rules against Class. Enough benefits exist to encourage defendants to plead guilty that many defendants may simply surrender the issue of the statute's constitutionality; thus prosecutors could continue to file charges based on statutes alleged to violate the United States Constitution.

A ruling for Class might be seen as inconsistent with the language of Rule 11(a)(2), which does not indicate that any type of issue is automatically appealable after a guilty plea but instead requires a defendant to specify what issues should be raised on appeal after a conditional plea, so that the prosecutor and court can decide

whether to allow them to be considered. A ruling in Class's favor would mean that a defendant pleading guilty would have to seek a conditional plea only as to issues other than the constitutionality of the statute under which charges were brought.

If Class were to succeed on this argument, the government's response in future cases might well be to include routinely a waiver of the right to appeal any issues or the right to appeal regarding the constitutionality of the statute of conviction in plea agreements and in the guilty plea colloquy in court. Obviously, as with any plea, whether in federal or state court, the record would have to show a knowing and voluntary waiver of rights. Thus, the practical effect of the Court adopting the rule sought by Class may be minimal. Class might obtain resolution of his challenge to the statute; if successful, his conviction would be vacated. Litigants making an explicit waiver of the right to challenge the statute after a guilty plea would be unable to challenge their convictions. In some future case, a defendant agreeing to such a waiver but seeking to raise the statute's unconstitutionality on appeal might argue that no such waiver should be allowed, even if it were knowing and voluntary, because a prosecution under an invalid statute is beyond the jurisdiction of a court. In this case, both parties accept that such a waiver is permissible, but in another case, a defendant might seek to contest that view.

The Supreme Court could avoid addressing the issue in this appeal by remanding this case to the D.C. Circuit for a ruling on the issue it did not address, whether Class had in fact, in his plea agreement or in the guilty plea colloquy in court, waived the issue of the constitutionality of the statute under which he was convicted. Even a ruling for Class on the effect of his guilty plea might not result in the reversal of his conviction if it were accompanied by a remand to the appellate court, to determine if the plea agreement and colloquy had waived his right to appeal the issues regarding the statute's constitutionality. If upon remand the appellate court ruled for the government on this issue, the conviction would stand and there would be no decision on the validity of the statute.

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PREVIEW of United States Supreme Court Cases, pages 4–7.

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The Alien Tort Statute and Corporate Liability in the Age of International Terrorism

CASE AT A GLANCE

The Court will decide whether the Alien Tort Statute (ATS), 28 U.S.C. § 1350, embraces or forecloses corporate liability. The plaintiffs, foreign citizens who were injured in Israel during the Second Intifada, alleged that the defendant, the Arab Bank based in Jordan, provided financial services to terrorists who engaged in the Second Intifada. The Bank argued, and the lower court agreed, that the ATS barred corporate liability for such a case.

Joseph Jesner v. Arab Bank, PLC
Docket No. 16-499

Argument Date: October 11, 2017
From: The Second Circuit

by Linda S. Mullenix
University of Texas, Austin, TX

ISSUE

Does the Alien Tort Statute, 28 U.S.C. § 1350, create a federal common law right of action against corporations, or foreclose corporate liability?

FACTS

The Arab Bank Ltd. (Bank) is a multinational financial corporation based in Jordan with a federally chartered branch in New York City. It is the largest bank in Jordan and operates in nearly 30 countries. It is the leading bank operating in the Palestinian Territories, where it partners with relief agencies and the international donor community. It is closely regulated by financial oversight agencies in both the United States and Jordan. Jordanian domestic law prohibits money laundering and assistance to would-be terrorists, and the Bank complies with the financial legal requirements in the countries in which it operates.

The plaintiffs are 6,000 foreign citizens who were injured in Israel during the Second Intifada. The plaintiffs alleged that the Bank provided financial services to terrorists who engaged in actions against Israel, including the Second Intifada uprising waged by Palestinians in 2000.

The plaintiffs did not sue the attack perpetrators or any other banks. Instead, they sued only the Arab Bank, alleging the Bank maintained accounts for Hamas leaders and reviewed and approved fund transfers into accounts with Hamas designated beneficiaries. The plaintiffs alleged the Bank processed 282 fund transfers through the New York branch, valued at approximately $2.5 million.

The Bank countered that the alleged 282 transfers never transited through the United States but occurred entirely outside the United States. Moreover, the New York branch checked and cleared transactions against prohibited persons' lists and processed transactions for individuals who *subsequently* were placed on prohibited lists. The Bank further contended that, with four exceptions involving computer or human error, none of the transactions designated individuals or entities on terrorist blacklists.

The plaintiffs further alleged that the Bank accepted and transferred private donations solicited to fund terrorism. They claimed that the Bank served as the paymaster for Hamas and other terrorist organizations through the Saudi Committee for the Support of the Intifada Al-Quds, assisting that organization in identifying and paying families of suicide bombers and other terrorists. The plaintiffs contended that an internal document indicated that the Bank knew the purpose of these disbursements. The document listed families designated to receive payments for deceased persons whose deaths were "martyrdom operations."

In 2004–05, the United States Financial Crimes Enforcement Network (FinCEN) and the Office of the Comptroller of the Currency (OCC) investigated the Bank on suspicion of money laundering and violation of Bank Secrecy Act regulations. The agencies concluded that the New York operations did not sufficiently monitor transfers from nonaccount holders and that the Bank's practices posed a risk of terrorist financing. The OCC agreed and ordered the Bank to stop offering fund transfers and other services. The Bank agreed to pay a $24 million civil penalty and the matter closed in 2005.

Between 2004 and 2010, victims of terrorist attacks that took place in Israel, the West Bank, and Gaza filed five lawsuits in the District Court for the Eastern District of New York against the Bank.

They alleged that the Bank, through the involvement of its New York branch, knowingly and intentionally facilitated terrorism by distributing millions of dollars to terrorists. They also alleged the Bank supported terrorism through its compensation payments to families of deceased terrorists.

The plaintiffs pursued their litigation under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS). They alleged that the Bank had violated the law of nations by financing terrorism and had directly and indirectly engaged in genocide and crimes against humanity. The plaintiffs did not allege any connection between the Bank's activities and the attacks that caused their injuries. The plaintiffs sought to recover 100 percent for their injuries, as well as punitive damages. The district court consolidated the five cases and related litigation. The court held that the complaints included claims of actionable conduct by the Bank in New York.

A separate set of American nationals pursued relief under the Antiterrorism Act (ATA), 18 U.S.C. § 2331. The ATA provides that United States citizens may recover for injuries caused upon proof that a corporation has materially supported terrorist activities. The district court severed the ATA claims, which were then tried. In 2014, a jury found the Bank liable under the ATA for providing material support to a designated foreign terrorist organization; namely, Hamas. The jury found that the Bank's activities had substantially contributed to 22 terrorist attacks. The court upheld the verdict, which currently is on appeal.

In 2010, while the foreign plaintiffs' claims were pending, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d Cir. 2010). Based on its interpretation of a footnote in a prior decision, the court held that the ATS does not recognize corporate liability. In a concurring opinion, Judge Pierre Leval suggested that the issue of corporate liability is left to the domestic law of individual nation-states. Corporate liability is a staple of United States remedial law.

In 2013, the Supreme Court granted *certiorari* to determine whether the ATS recognized corporate liability. After supplemental briefing, the Court decided *Kiobel* on grounds relating to the extraterritorial reach of the ATS, leaving the issue of corporate liability open. 133 S. Ct. 1659 (2013). However, the Court's reasoning and concurring opinions suggested that the ATS might allow for corporate liability.

Subsequently, the Bank moved to dismiss the plaintiffs' ATS claims based on the Second Circuit's prior determination that the ATS barred corporate liability, arguing this holding was binding precedent that had not been overruled by the Supreme Court. The Second Circuit affirmed dismissal. The Second Circuit denied rehearing *en banc* in an 8–5 vote, which generated an array of opinions.

Some panel judges defended the prior circuit holding. One dissenting judge suggested that the original panel's holding was "almost certainly incorrect"; while two other panel judges suggested the need to bring the Second Circuit into line with other appellate courts that had decided the ATS embraced corporate liability. Finally, another panel judge indicated that the Supreme Court was the best way to settle the issue of corporate liability under the ATS.

CASE ANALYSIS

The *Jesner* appeal addresses the issue of corporate liability under the ATS that the Supreme Court left unresolved in its 2013 decision in *Kiobel.* The ATS simply provides: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Congress enacted the ATS in 1789. The ATS lay dormant for nearly 200 years as a means for redressing tortious injuries to foreign nationals. The ATS was resuscitated in 1980 in federal court in New York, in litigation brought by Paraguayan nationals against Paraguayan officials for events occurring in Paraguay. *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), set the precedent that foreign nationals could invoke the ATS to punish non-American citizens for tortious acts committed outside the United States for violations of public international law. *Filartiga,* however, left many questions unanswered relating to application of the ATS, including what constituted violations of the law of nations and who could be sued as an ATS defendant.

The Supreme Court addressed the issue of corporate liability in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). In *Sosa,* the Court held that the ATS grants federal courts jurisdiction to redress violations of a small number of well-established customary norms of international law, such as war crimes, genocide, and crimes against humanity. In an ambiguous footnote 20, the Court alluded to whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor, "such as a corporation or an individual." But the Court provided no further definitive guidance as to whether a corporation was a viable defendant under the ATS.

The Second Circuit was next to address the issue of corporate liability in 2010 in *Kiobel. Kiobel* involved a lawsuit brought by 12 Niger nationals who sued three oil company defendants under the ATS. The plaintiffs alleged human rights violations by the Abacha dictatorship in the Ogoni region of the Niger delta from 1992–95. They further alleged that the oil companies enlisted the Niger military in a systematic campaign of torture, extrajudicial executions, and prolonged arbitrary detention aimed at suppressing a grassroots movement protesting Shell's operations in Ogoni.

The district court granted the defendant's motion to dismiss. The Second Circuit affirmed, holding that corporations could not be sued under the ATS for torts committed in violation of the law of nations. The court held that, under *Sosa,* plaintiffs in ATS cases had to demonstrate a customary international law norm of corporate liability, and no such norm existed for the plaintiffs' claims.

The Second Circuit held that *Sosa* required a court "to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued," rather than applying domestic law (under which corporations are liable as juridical persons). The court further held that corporate liability under the ATS is an issue of subject matter jurisdiction, an issue that had not been raised in the district court.

In a concurring opinion, Judge Leval rejected the majority's reasoning and conclusions regarding corporate liability. He suggested that international law takes no position on whether to impose liability for law-of-nations violations, and leaves that decision to each country to resolve individually. He disagreed that the absence of corporate criminal liability in international tribunals precluded corporate liability under the ATS.

The *Kiobel* plaintiffs appealed to the Supreme Court, which originally granted *certiorari* to consider the question of corporate liability under the ATS. *Kiobel* was briefed and argued to the Court twice. In the first instance, after briefing and oral argument, the Court declined to decide the question of corporate liability under the ATS. Instead, the Court requested that the parties submit supplemental briefing on the issue of the jurisdictional reach of the ATS. In the second round of briefing and argument, the Court addressed the question of the extraterritorial extent of the ATS.

In 2013, the Court unanimously decided *Kiobel.* The Court held that the presumption against extraterritoriality applied to claims under the ATS and neither the statute's text, history, nor purposes rebutted that presumption. Thus, nothing in the ATS indicated a clear extraterritorial reach. Moreover, the historical background against which Congress enacted the ATS did not overcome the presumption. This historical background illustrated that the ATS was enacted to apply to three principal offenses against the law of nations: violations of safe conduct, infringements of the rights of ambassadors, and piracy.

The Court suggested that there was no indication that the ATS had been enacted to make the United States a "uniquely hospitable forum for enforcement of international norms." The Court also stressed that the danger of unwarranted judicial interference in the conduct of foreign policy might be magnified in the context of ATS actions. In addition, the Court expressed concern with the possibility of United States citizens being hauled into foreign courts for violations of the law of nations.

The Court did not directly address the question of corporate liability under the ATS. Nonetheless, the Court indicated as follows: "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."

While *Kiobel* was on appeal, the Court decided *Mohamad v. Palestinian Authority* under the Torture Victim Protection Act (TVPA). 566 U.S. 449 (2012); 28 U.S.C. § 1350. The *Mohamad* litigation was brought against the Palestinian Authority and the Palestinian Liberation Organization. In a unanimous decision, the Court held that the TVPA was aimed at individuals, a term Congress did not define. The Court concluded that TVPA lawsuits targeted only human beings, not organizations that might engage in human rights violations. The Court stated that it would not give an unnatural meaning to the word "individual," by saying that it meant corporations, also.

The *Jesner* appeal returns the Court to the question of corporate liability under the ATS, largely left open after *Kiobel* and *Mohamad.* The Court is well prepared to hear argument because the corporate liability issue was exhaustively well briefed and argued in *Kiobel* and *Sosa.* The plaintiffs-petitioners now renew the position of the *Kiobel* plaintiffs that the text, history, and purposes of the ATS permit corporate liability.

In fleshing out this argument, the plaintiffs argue that the ATS does not differentiate among types of defendants. The plaintiffs contend that Congress's failure to specify any particular class of defendants indicates that the statute embraces corporate liability. If Congress wanted to limit the range of defendants, it would have indicated this in the statute's text.

The plaintiffs contend that the text, history, and purposes of the ATS reinforce the appropriateness of subjecting corporations to liability under the ATS. Congress enacted the ATS to provide a federal forum to redress violations of the law of nations. Subjecting corporate defendants to such jurisdiction for such transgressions, they argue, is consistent with tort law, which embraces a "bedrock principle" that corporations be held accountable and liable for their injurious conduct.

The plaintiffs argue that when Congress enacted the ATS, it was unquestionable that corporations could be held liable for torts. In an inventive approach to historical application of the ATS to the narrow category of piracy claims, the plaintiffs note that when Congress enacted the ATS, courts regularly imposed liability on ships when their occupants violated the law of nations by committing piracy. Thus, the plaintiffs find a historical basis for entity liability in the piracy example.

The plaintiffs further suggest that the *Sosa* Court's opaque footnote 20 poses no problem to imposing corporate liability under the ATS. They argue that the Second Circuit incorrectly applied *Sosa* in the underlying *Jesner* litigation and misinterpreted footnote 20. The plaintiffs argue that footnote 20 does not suggest that international law dictates whether corporations may be held liable. Rather, international law leaves that question to domestic law.

Hence, if domestic American law would hold corporate defendants liable for their tortious acts, then courts may impose corporate liability under the ATS. Extending this argument, the plaintiffs contend that "every common law guidepost" in American jurisprudence counsels in favor of corporate liability. They also find support for corporate liability in an array of state and federal statutes. Corporations can violate customary international law norms as can individuals. Furthermore, international law supports holding corporations liable for tortious conduct in violations of the law of nations.

Distinguishing the Court's holding in *Mohamad,* the plaintiffs point to different statutory language in the TVPA, which limits liability to an "individual" acting under the color of state law. The plain text of the TVPA, they argue, forecloses entity liability. But the text of the ATS does not exclude corporate defendants, and so the respondent's reliance on *Mohamad* is misplaced and inaccurate.

The plaintiffs note that basic fairness requires that corporations not be able to evade responsibility for especially noxious violations of human rights, such as torture, murder, genocide, slavery, and terrorism. Finally, the plaintiffs address concerns over the possibility

of creating international friction by the interference of American courts into foreign affairs, suggesting that courts have various procedural tools to avoid such friction. These include the doctrine of *forum non conveniens* and international comity.

In response, the defendant-respondent counters with a central theme emphasizing the dangers to diplomatic relations of permitting foreign corporations to be sued under the ATS in American courts. The Bank argues that the *Sosa* Court cautioned against creating new causes of action not recognized by international common law. The Bank points out that, historically, most international obligations attached to nation-states, and not to artificial entities like corporations. In addition, the Bank finds primary support in the analogous TVPA, which specifically excludes corporations as a potential defendant in international lawsuits. Moreover, the Bank contends, the Court signaled its resistance to recognize corporate liability in a *Bivens* action. *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61 (2001).

Focusing on the ATS, the Bank argues that the statute does not create a private right of action, and therefore, the Court should not invent a common law implied right of action against corporate defendants under the ATS. The Bank points out that in absence of express statutory command, courts always disfavor implied rights of action. The *Sosa* Court narrowly interpreted the ATS to recognize causes of action for violations of international law that are "specific, universal, and obligatory."

The Bank contends that "[t]here is nothing remotely resembling a specific, universal, and obligatory norm of corporate liability under international law." Instead, for centuries, international law norms have addressed relations between nations. Moreover, numerous international institutions have been unwilling to impose international law obligations on corporations, pointing to the Nuremberg Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. All these institutions asserted jurisdiction only over individuals, not corporations or organizations. Citing *Mohamad,* the Bank notes that the Court determined that the TVPA does not impose liability against corporations and rejected corporate liability in *Malesko.*

The Bank notes the exponential growth in litigation under the ATS in recent years and suggests that this lawsuit is a poster-child for everything wrong with ATS litigation. The litigation has been going on for more than 13 years, generating more than a decade of friction between the Jordanian government and the United States. The defendant stresses that Jordan is a major United States ally in the Middle East, and the continuation of this litigation—against a major stakeholder in the Jordanian economy—has exacerbated diplomatic relations between the two countries. The Bank points out that when the ATS originally was enacted in 1789, its main purpose was to avoid diplomatic friction with other sovereign states. Ironically, the Bank suggests, the ATS has turned into an engine for creating and perpetuating diplomatic friction.

The Bank recognizes that the Court has discretion to resolve this appeal on alternative grounds. One ground is to conclude that the plaintiffs' claims are barred by the Court's *Kiobel* holding. The Bank argues that, under *Kiobel,* it is clear that the case does not "touch and concern" the United States. The Bank contends that the Second Circuit's conclusion that the New York clearing-house transactions were sufficient to give rise to ATS jurisdiction is inconsistent with *Kiobel.*

The Bank urges that even if the Court declines to set forth a black-letter rule against corporate liability, the Court should at least find that there is no corporate liability on these facts. The Bank recommends that the Court should put an end to this litigation, which has dragged on for 13 years, exacerbating diplomatic relations with an important and strategic ally.

The defendant notes that banks are highly regulated institutions in their respective countries, as is true for the Arab Bank in Jordan. Thus, in order to preserve important diplomatic goals, issues relating to banking practices are better accomplished through "a finely tuned regulatory solution" in the defendant's domestic forum.

SIGNIFICANCE

Jesner is an important appeal precisely because of the pervasiveness of multinational corporations as actors on a global stage, punctuated with egregious eruptions of human rights violations. In its most elemental distillation, the *Sosa-Kiobel-Jesner* case-line pits human rights advocates (the presumptive good guys) against multinational corporations (the presumptive bad guys). As such, the essential nature of the problem invites resolution along the Court's liberal and conservative divide.

The original *Kiobel* appeal, which first raised the ATS corporate liability question, incited the passions of the human rights community as well as the hackles of the worldwide business community. *Kiobel* alerted the corporate community to the threat of being sued in American courts for corporate actions abroad. In *Kiobel* round one, the Court was inundated with numerous amicus briefs counseling the Court with regard to the corporate liability question.

The business community takes solace in the Court's unanimous *Mohamad* decision, which definitively foreclosed corporate liability under the TVPA. The business community also takes comfort in *Sosa's* ambiguous footnote 20, which has dogged lower court consideration of ATS litigation and provides an argumentative platform for precluding corporate liability. At a minimum, the Court should provide some clarity to footnote 20 to lay that quandary to rest.

The Court will now have to evaluate the ATS against the TVPA, and sort out the corporate liability question, which it decided differently in *Mohamad* as compared to *Kiobel* and *Sosa*. It remains to be seen whether the Court will default to its earlier *Kiobel* statement, that if Congress wants to impose corporate liability, it needs to amend the statute or draft one that explicitly provides for such liability.

The high stakes involved in the Court's resolution of the corporate liability question is evidenced again by the array of amicus briefs filed on behalf of the parties in *Jesner*. In a "usual suspects" fashion, an array of liberal organizations; constitutional, admiralty, comparative, and international law professors; historians; and at least one foreign ambassador have weighed in with support of the plaintiffs. On behalf of the Bank, a lineup of business concerns have

filed briefs to stave off corporate liability under the ATS. It should be noted, however, somewhat unusually, the United States, the United States Chamber of Commerce, the Center for Constitutional Rights, and International Federation for Human Rights have filed amicus briefs supporting neither party.

Finally, for those Court watchers who enjoyed the extensive briefing and arguments on the history of piracy (and the so-called General Bradford memorandum) in *Kiobel,* you may be delighted to learn that we may have another go-round of piracy-related arguments.

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Class Action Waivers in Employment Contracts: The Clash Between the National Labor Relations Act and the Federal Arbitration Act

CASE AT A GLANCE

In *Ernst & Young LLP v. Morris,* the Court will decide if the provisions of the National Labor Relations Act (NLRA) invalidate class action waivers included in arbitration clauses in employment contracts. The Court will decide whether the NLRA invalidates such provisions, requiring that employees arbitrate their claims individually, rather than on a collective basis.

Ernst & Young LLP v. Morris, EPIC Systems Corp. v. Lewis, and NLRB v. Murphy Oil USA
Docket No. 16-300, 16-285, 16-307

Argument Date: October 2, 2017
From: The Ninth Circuit

by Linda S. Mullenix
University of Texas, Austin, TX

ISSUE

Do provisions of the National Labor Relations Act effectively invalidate class action waivers in employment arbitration clauses, requiring that employees arbitrate their grievances on an individual, rather than a collective basis?

FACTS

The facts underlying *Ernst & Young LLP v. Morris* are relatively straightforward. Stephen Morris and Kelly McDaniel were employees of Ernst & Young, the accounting and financial services company. Nationally, Ernst & Young LLP and Ernst & Young U.S. LLP employ approximately 40,000 employees. (This case includes three cases in total consolidated together for oral argument. All three deal with the same question. The two other cases are *Epic Systems Corp. v Lewis* (Docket No. 16-285) and *NLRB v. Murphy Oil USA* (Docket No. 16-307).)

Between 2005 and 2011, Morris and McDaniel worked in the auditing divisions of two California Ernst & Young offices. In 2012, Morris and McDaniel filed an action in federal court in the Southern District of New York alleging that they had been misclassified as employees for the purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. 29 U.S.C. §§ 201– 219. The plaintiffs sought back pay. Their action was pursued as a collective action under the FLSA, with a separate federal class action of California employees. The FLSA provides for opt-in collective actions that are similar to class actions under Federal Rule of Civil Procedure 23.

Ernst & Young employees are required to sign an employment contract as a condition of employment, which includes an alternative dispute resolution provision. This provision specifies that "[a]ll claims, controversies, or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved by the company's Common Ground Dispute Resolution Program. Thus, the arbitration agreement bars court proceedings, as well as arbitration proceedings conducted on a classwide or collective basis.

If an employee asserts a grievance against the company, the Common Ground Program proceeds in two phases. The first phase involves mediation. If mediation does not resolve the dispute, the Common Ground Program proceeds to binding arbitration. In this second phase, the contract specifies that "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class action or other collective proceedings are prohibited. The Common Ground Program provides for discovery, including depositions of fact and expert witnesses, and a full evidentiary hearing.

The respondents (Morris and McDaniel) contend that Ernst & Young's Common Ground Program is so complex and expensive that the cost entailed in seeking relief generally outstrips the small amounts that might be recovered in a typical overtime pay dispute. In a similar action brought against the company, evidence indicated that the potential cost of going through the Common Ground Program was approximately $200,000, with a possible recovery of $1,800.

After Morris and McDaniel initiated their New York litigation, the court transferred the case to the Northern District of California. Ernst & Young then moved to dismiss and to compel arbitration pursuant to the employment contract, contending that the plaintiffs had consented to the arbitration provision by signing their employment contracts. In response, the plaintiffs countered that the arbitration clause was unenforceable because collective-bargaining provisions of the National Labor Relations Act (NLRA) conferred a non-waivable right to collective litigation. 29 U.S.C. §§ 151–169.

The court granted Ernst & Young's motion to dismiss. The court concluded that it was required to enforce the employment contract according to its terms, because Congress in enacting the NLRA did not expressly provide that it was overriding any provisions in the Federal Arbitration Act. 9 U.S.C. § 2. The Arbitration Act embodied a strong policy choice in favor of enforcing arbitration agreements.

A divided panel of the Ninth Circuit reversed the district court's decision and remanded for further proceedings. Section 7 of the NLRA provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…."

The majority indicated that Section 7 established a substantive right for employees "to pursue work-related legal claims, and to do so together." Ernst & Young's employment contract prevented collective activity by its employees in arbitration proceedings and interfered with a protected Section 7 right. Consequently, the collective waiver provision in Ernst & Young's employment contract was unenforceable.

The court further held that the Arbitration Act did not dictate a contrary result. The Arbitration Act's savings clause provides that arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The court held that Ernst & Young's arbitration provision was prohibited by the NLRA and was therefore unenforceable.

Finally, the Ninth Circuit held that the Arbitration Act recognizes the contract defense of illegality. "Nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms… *AT&T Mobility LLC v. Concepcion* [563 U.S. 33 (2011)] support no such argument."

Holding that the NLRA was dispositive, the court did not address the plaintiffs' alternative arguments based on the Norris-LaGuardia Act. 28 U.S.C. § 101 et seq.

Judge Sandra Segal Ikuta dissented, indicating that the Ninth Circuit's decision was directly contrary to the Supreme Court's arbitration jurisprudence and to Congress's goals in enacting the Arbitration Act. She stated that the proper test required the court to consider whether the statute in question (in this case the NLRA) contains an express contrary command overriding the Arbitration Act. If not, then the statute could not displace the Arbitration Act. Judge Ikuta concluded that nothing in the NLRA was remotely close to a contrary Congressional command to override the Arbitration Act. She further concluded that the majority's reliance on the Act's savings clause was misplaced, because it did not apply to federal statutes.

CASE ANALYSIS

The Court's consideration of the *Ernst & Young* appeal continues its recent attention to arbitration clauses and class action waivers included in these provisions. See generally *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013); *CompuCredit Corp. v. Greenwood,* 565 U.S. 95 (2012); *AT&T Mobility LLC v. Concepcion; Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010); and *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79 (2000).

In revisiting the problems relating to arbitration clauses, the Court will address the specific issue of whether a federal statute by its terms overrides the Arbitration Act, thereby rendering a class action waiver unenforceable. In particular, the Court will for the first time take up the controversial question of class action waivers included in employment contracts that contain arbitration clauses.

Historically, arbitration clauses provided for alternative dispute resolution on an individual basis. In the late 1990s, plaintiffs subject to arbitration clauses began pursuing relief on a classwide basis in arbitration. In response, the Court developed an arbitration jurisprudence that required contracting parties to specifically indicate whether an arbitration clause permitted or prohibited classwide arbitration. If a contract forbade classwide arbitration, such provisions were deemed "class action waivers." Generally, the Supreme Court has upheld class action waivers as a matter of private contract law.

Congress enacted the Federal Arbitration Act in 1925. The primary underlying purpose of the Act was to reverse longstanding judicial hostility to arbitration. Section 2 of the Arbitration Act provides, in relevant part, that "a written provision in any…contract evidencing a transaction…to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract."

Courts consistently have indicated that the Arbitration Act reflects a liberal policy favoring arbitration and that arbitration is a matter of contract law. As recently as 2013, the Court in *Italian Colors* further stated that "courts must rigorously enforce arbitration agreements according to their terms." Although the Court's jurisprudence reflects a policy of enforcing arbitration agreements, the *Ernst & Young* appeal focuses on the issue of whether the Arbitration Act's mandate has been overridden by provisions of another federal statute—in this instance the NLRA.

Hence, the *Ernst & Young* appeal embodies a clash between the Arbitration Act and the NLRA. The controversy centers primarily on a question of statutory construction of the NLRA in relation to the Arbitration Act. Two provisions in the NLRA are relevant to the Court's assessment. Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed" by Section 7. 29 U.S.C. § 158(a).

The Court previously has considered questions relating to the primacy of the Arbitration Act when it comes into conflict with a federal statute. General jurisprudence counsels that when two federal statutes are allegedly in conflict, courts must attempt to harmonize the statutes unless there is a clearly expressed

Congressional intent to the contrary. Most recently in 2012, the *CompuCredit* Court held that the Arbitration Act applies to enforce arbitration agreements, unless the Act has been overridden by an express, contrary Congressional command.

In *CompuCredit,* the plaintiffs filed a class action against their credit card issuer under the Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679–1679j. The defendant moved to compel arbitration according to the credit card contract. In response, the plaintiffs contended that CROA provisions prohibited class action waivers in arbitration agreements and instead guaranteed a right to sue collectively in court. Construing CROA's statutory language, the Court found that the statute did not contain an express Congressional command prohibiting individual arbitration of CROA claims. Consequently, the arbitration clause was enforceable on its terms.

The Court indicated that if Congress intended to prohibit arbitration of CROA claims, "it would have done so in a manner less obtuse than what [the plaintiffs] suggested[ed]." The Court indicated that when Congress restricted the use of arbitration, it did so with "clarity that far exceeds the claimed indications in CROA."

Ernst & Young argues that the plaintiffs carry a heavy burden of proving that a federal statute displaces the Arbitration Act and that the plaintiffs in this case fail to satisfy that burden. Thus, the plaintiffs cannot carry their burden of showing that Congress, in enacting the NLRA, intended to override the Arbitration Act by precluding arbitration agreements requiring arbitration on an individual basis. Nothing in the NLRA statute demonstrates the requisite Congressional command contrary to agreements to arbitrate. Because the NLRA evinces no clear Congressional intent to supersede the Arbitration Act, Ernst & Young claims the Ninth Circuit's decision was erroneous and the arbitration provision should be enforced.

Ernst & Young contends that the text, legislative history, and purposes of the NLRA fail to manifest Congressional intent to override the Arbitration Act. Thus, no textual provision of the NLRA guarantees employees a judicial forum or a right to collective procedures in court. Nothing in the NLRA disavows arbitration for resolving employee disputes. In addition, the legislative history of the NLRA does not indicate Congressional intent to preclude arbitration agreements, or arbitration agreements that require individual arbitration. The NLRA, Ernst & Young notes, was adopted well before the enactment of the federal class action Rule 23 or the collective action procedure of the FLSA. Moreover, Ernst & Young contends that the purposes of the NLRA do not conflict with individual arbitration. The company points out that labor policy has long-favored and promoted arbitration in the collective bargaining process.

Ernst & Young further disputes that the savings clause of the Arbitration Act permits courts to decline enforcing arbitration agreements. That provision indicates that courts may withhold enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Ernst & Young argues that the savings clause applies generally to contract principles that are supplied by state law, not federal law. Thus, the savings clause does not apply where another federal statute allegedly discriminates against arbitration, as the plaintiffs contend. Moreover, Ernst & Young notes that if a state adopted a public policy prohibiting arbitration agreements requiring individual arbitration, such state law would be preempted by the Arbitration Act.

Finally, Ernst & Young stresses that there is no substantive right to collective procedures for the complaining employees, as the Ninth Circuit held. The only substantive rights at issue were the plaintiffs' claims for overtime pay under the FLSA and California state law. Ernst & Young points out that the right to class action or other collective procedures is a procedural right, not a substantive right. The NLRA's language supporting "concerted activities" does not embrace employees' rights to an opt-out class action. The litigation does not concern mutual rights, but only Morris and McDaniel's individual rights under the FLSA and California law. Lastly, even if the NLRA confers a right to collective procedures, it would be a waivable right.

In response, the plaintiff-respondents urge the Court to uphold the Ninth Circuit's decision. Their argument relies chiefly on an extended exposition of multiple canons of statutory construction. In addition to discussing the Arbitration Act and the NLRA, the respondents—unlike Ernst & Young—also repeatedly invoke the Norris-LaGuardia Act, which the Ninth Circuit did not address in its opinion.

The nub of the respondents' argument is that the plain meaning of the Norris-LaGuardia and NLRA's broad general term "other concerted activities" embraces any lawful concerted activities by which employees act together to improve their working conditions. This includes collective litigation in court, as well as classwide arbitration. Citing dictionary definitions, the respondents suggest that collective or class action proceedings fit comfortably within the ordinary understanding of "concerted activities."

The respondents contend that every federal circuit court that has addressed the "concerted activities" and "mutual aid or protection" language of NLRA Section 7 has concluded that this language protects collective or class action proceedings. They argue that the Court historically has given broad interpretations to the statute. The respondents assert that in enacting the Norris-LaGuardia Act, the NLRA, and the Arbitration Act, Congress manifested a legislative intent to preclude enforcement of agreements prohibiting concerted litigation. Congress rendered such agreements unenforceable under the Norris-LaGuardia Act and illegal under the NLRA.

The respondents contend that the Court consistently has rejected an interpretation of Section 7 that would limit the "concerted activities" language only to union-related activities. Thus, Congress did protect some forms of concerted activities, but not others. Section 7, then, protects all lawful means of collective action to resolve grievances relating to the terms and conditions of employment.

The respondents further claim that there is no ambiguity in the statutory text that would require a contrary interpretation, as the petitioners argue. In contrast to Ernst & Young's version of legislative history, the respondents suggest that the history of 20th-century labor legislation demonstrates an unmistakable Congressional intent to protect workers' rights to act collectively to resolve labor disputes.

The respondents also challenge Ernst & Young's argument that class action procedures only became established decades after enactment of the NLRA. To the contrary, the respondents point out that representative and class actions have existed since the beginning of the republic, and Equity Rule 38, amended in 1912, provided for class actions well before enactment of the NLRA. The respondents further contend that the FLSA and the NLRA must be read harmoniously and the two statutes provide further evidence of Congress's intent to protect collective judicial action.

Moreover, since shortly after Congress enacted the NLRA, the National Labor Relations Board consistently has construed the "concerted activities" language to include collective judicial and arbitral disputes. The NLRB's interpretation of the meaning of the NLRA is entitled to deference.

Invoking the "last-in-time" rule of statutory construction when statutes conflict, the respondents explain the general rule that a later statute expressly or impliedly repeals an earlier statute. Applying this rule, the respondents maintain that to the extent that the Arbitration Act conflicts with the later-enacted NLRA, the Arbitration Act was repealed by necessary implication.

The respondents assert that the right to "concerted" litigation is a substantive right. Employers may not lawfully interfere with this substantive right by coercing employees to waive that right through a mandatory arbitration clause in an employment contract. The Arbitration Act does not create an exception to the "concerted activities" right established in the NLRA.

Finally, the respondents reject Ernst & Young's contention that any federal statute impacting arbitration agreements must contain a "clear Congressional command" to that effect. Instead, neither *CompuCredit* nor any other authority requires an explicit reference to the Arbitration Act to outlaw contractual terms.

SIGNIFICANCE

The *Ernst & Young* appeal is significant because the Court will now weigh in regarding the enforceability of arbitration clauses contained in employment contracts, particularly such provisions that also contain class action waivers. If enforced, contractual arbitration clauses force employees to arbitrate their grievances with their employers and to forego litigation in court. The addition of class action waivers in arbitration clauses deprives employees of the ability to pursue class action litigation either in judicial forums or in arbitration.

The Court's ruling in *Ernst & Young* is tremendously important because of the prevalence of arbitration clauses embedded in employment contracts. Employers nationwide now routinely include arbitration provisions in their employment contracts. The Court's initial arbitration jurisprudence centered on arbitration provisions in consumer product contracts and warranties. Until now, the Court has not considered the enforceability and legality of arbitration clauses in employment contracts. The Court's decision potentially will affect millions of workers.

In the consumer arena, the Court's arbitration jurisprudence generally has not been sympathetic to plaintiffs' attempts to invalidate and render arbitration clauses unenforceable. Instead, the Court has defaulted to the policy favoring arbitration and the enforceability of arbitration clauses as a matter of contract law. Moreover, the Court has consistently deflected various challenges to class action waivers contained in arbitration clauses.

Although the Court has upheld the primacy of the Arbitration Act in a number of cases involving allegedly conflicting statutes, the purported clash of the Arbitration Act with the NLRA may present the Court with a closer call. The Court may focus on the NLRA's statutory language repeatedly referring to the protection of collective workers' rights under the law. The Court might well rely on this statutory language to find Congressional intent to override the Arbitration Act. On the contrary, if the Court resorts to a requirement of express Congressional intent to supersede the Arbitration Act, the plaintiffs' appeal may fail to gain support.

Recognizing the magnitude of the Court's decision relating to employer-employee rights, a large array of amicus briefs have been filed in support of the contending parties. Unsurprisingly, the business community and assorted defense organizations have supplied numerous briefs in furtherance of Ernst & Young's position on the primacy of the Arbitration Act over the NLRA. Countering this, a usual collection of liberal groups, labor organizations, and civil rights advocates have joined to urge the Court to uphold the Ninth Circuit's decision rendering Ernst & Young's arbitration provision unenforceable.

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PREVIEW of United States Supreme Court Cases, pages 13–17.

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Are Officers Liable for an Arrest in Violation of the Fourth Amendment When They Lacked Direct Evidence that the Suspects *Intended* to Violate the Law?

CASE AT A GLANCE

Police officers responded to a complaint of illegal activities taking place at a house party in the District of Columbia. Partygoers told the officers that they had the owner's permission to enter the house. But the owner of the house and the soon-to-be tenant of the house (who were not present at the house) both told the officers that they did not. The officers arrested the partygoers for unlawful entry. Many of the partygoers sued the officers and the District of Columbia for unlawful arrest in violation of the Fourth Amendment.

District of Columbia v. Wesby
Docket No. 15-1485

Argument Date: October 4, 2017
From: The D.C. Circuit

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

INTRODUCTION

In order to make a lawful, warrantless arrest, an officer must have probable cause to believe that the suspect has committed or is committing a crime. In this case, the officers had to have probable cause to believe that the partygoers committed an unlawful entry. And because a conviction for unlawful entry includes an intent requirement—that the suspects intended to enter unlawfully—the officers' probable-cause determination must also take into account the suspects' intent. The parties dispute whether the officers could establish probable cause without direct evidence of the suspects' intent, and, even if they could not, whether they enjoy qualified immunity from civil liability for the violation.

ISSUES

1. Did officers have probable cause to arrest partygoers for unlawful entry, where the partygoers believed that they had permission to be in the house, but the owner denied this?

2. Are the officers entitled to qualified immunity, even if they lacked probable cause to believe that the partygoers intended to trespass?

FACTS

In the early morning hours of March 16, 2008, D.C. police officers, including officers Anthony Campanale and Andre Parker, responded to a complaint of illegal activities taking place at a house party in Washington, D.C. As the officers approached the house, they heard loud music and, through a first-floor window, saw one occupant run upstairs. After the officers knocked and entered through the front door, some of the other occupants scattered into other rooms. The party goers dispute how fully the house was furnished, but officers saw at least some folding chairs and a mattress, and the electricity and plumbing were working.

Upon entry, officers saw some of the occupants behaving in a way that they viewed as consistent "with activity being conducted in strip clubs for profit." In particular, officers saw several scantily clad women with money tucked into their garter belts, and "spectators… drinking alcoholic beverages and holding currency in their hands." They also smelled marijuana, although they observed no drug-related activity.

Officers interviewed the partygoers to find out what they were doing at the house. The partygoers gave conflicting responses, some saying that they were there for a birthday party and others saying that they were there for a bachelor party. But nobody could identify the guest of honor. One occupant told Campanale that a woman named "Peaches" gave them permission to be in the house (although Peaches was not at the house herself, because she feared that she would be arrested). Others told officers that they had been invited by another guest.

Parker learned from one partygoer that Peaches "was renting the house from the grandson of the owner who had recently passed away and that [the grandson] had given permission for all individuals to be in the house." Parker then talked with Peaches on one of the partygoers' cell phones. Peaches told Parker that he could "confirm it with the grandson." Parker used the same cell phone to call the apparent owner, identified only as Mr. Hughes. Mr. Hughes told Parker that he was trying to work out a lease agreement with Peaches, but that the people in the house did not have his permission to be there.

Sergeant Andre Suber, a supervisor who was acting as the watch commander that night, arrived on the scene after the officers had begun their investigation. Suber also spoke with Peaches by phone. Peaches told Suber that "she was possibly renting the house from the owner who was fixing the house up for her" and that she "gave [permission to] the people who were inside the place, told them they could have the bachelor party." Peaches acknowledged, however, that she did not have permission to use the house. Upon hearing this, Sergeant Suber ordered the officers to arrest all 21 occupants of the house for unlawful entry.

Officers arrested and transported the partygoers to the police station. After speaking with a representative from the D.C. Attorney General's office, a lieutenant (who had taken over as watch commander) decided to change the charge from unlawful entry to disorderly conduct. (Suber disagreed with this decision, but the lieutenant overruled him.) The officers at the house testified that they had neither seen nor heard anything to justify a disorderly conduct charge.

Sixteen of the partygoers sued five officers for false arrest in violation of the Fourth Amendment, the officers and the District for false arrest under common law, and the District for negligent supervision. The district court granted summary judgment to the plaintiffs on their claims of false arrest against Campanale and Parker, and on the common law false arrest and negligent supervision claims against the District. The court entered a $680,000 judgment against Parker and Campanale, and jointly against the District for the common-law torts. The court separately ordered Parker and Campanale (but not the District) to pay attorneys' fees.

The United States Court of Appeals for the D.C. Circuit affirmed (with one judge dissenting), ruling that the officers violated the Fourth Amendment and that they were not entitled to qualified immunity. The D.C. Circuit later denied rehearing *en banc* (with four judges dissenting). This appeal followed.

CASE ANALYSIS

In order to make a lawful, warrantless arrest, an officer has to have probable cause to believe that the suspect has committed or is committing a crime. Probable cause is based on an objective standard; it looks to the beliefs of "a prudent [person]" based upon "the facts and circumstances within [the arresting officer's] knowledge" "at the moment the arrest was made." *Beck v. Ohio,* 379 U.S. 89 (1964). Probable cause "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams,* 470 U.S. 143 (1972). Instead, it only requires *some* evidence supporting each element.

In this case, the officers charged the plaintiffs with unlawful entry under District law. Unlawful entry requires the government to prove that the accused entered or attempted to enter public or private property without lawful authority and against the will of the lawful occupant or owner. Moreover, the government has to prove that the accused *intended* to so act—that is, that the accused *knew or should have known* that they entered the property against the will of the lawful owner. In other words, the government has to prove that the accused acted with the requisite mental state, or *mens rea.*

The parties dispute whether the Fourth Amendment required the officers to establish separate probable cause for the mental-state element of unlawful entry. The officers contend that the Fourth Amendment required only that they had probable cause based on the totality of the circumstances and for the crime as a whole. The plaintiffs, in contrast, assert that the Fourth Amendment required that the officers establish more particular probable cause for each separate element of the offense, including the mental-state element.

Irrespective of any *actual* violation of the Fourth Amendment, the parties further dispute whether the officers were entitled to qualified immunity for the arrests. An officer is entitled to qualified immunity, despite having violated the Constitution, if the officer did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The officers assert that any requirement to establish probable cause for the mental-state element was not clearly established at the time of the arrests, while the plaintiffs say that it was.

As to the Fourth Amendment claim, the officers argue that, viewed from the perspective of a reasonable officer at the scene, the facts established probable cause to arrest the plaintiffs for trespassing into a private home. They claim that they encountered an unauthorized, late-night party at an unfurnished home that was supposed to be vacant and looked unattended. They say that the party involved illegal activities that are associated with trespassing; that the partygoers fled and hid as they approached; and that the partygoers were evasive and inconsistent when they tried to explain their presence. Moreover, the officers assert that Peaches was also inconsistent in her story; that she refused to come to the scene; and that she lied that she had the owner's authority to invite the partygoers to the house before she admitted that she did not have authority. Based on all this evidence, the officers contend that "[a]n experienced officer using common sense could reasonably think [the partygoers] knew or should have known that they were trespassing," and that "there was a fair inference that [the partygoers and Peaches] had shared pertinent knowledge to further their common interest."

Against these facts, the officers argue that the D.C. Circuit wrongly required the officers to credit the plaintiffs' dubious claim that they believed that they had permission to be at the house. The officers say that the Fourth Amendment cannot require officers to believe suspects' claims about their mental state in the face of contradictory facts, or else suspects could easily avoid seizure by simply lying about their mental state. The officers also contend that the D.C. Circuit wrongly required them to assess probable cause separately for each element of the crime and to predict the way a court would rule. In fact, they say that the Fourth Amendment "requires just a fair probability of guilt on the offense as a whole."

As to qualified immunity, the officers argue that the arrests were not clearly unconstitutional. They claim that relevant court decisions under similar facts supported arrests and even convictions. And they point to the four dissenting judges from the motion for an *en banc* rehearing as evidence that "there was at least *arguable* probable cause."

(The government weighed in as *amicus curiae* in favor of the officers and made substantially similar arguments.)

The plaintiffs counter that the officers lacked probable cause to arrest them, because the officers could not reasonably have concluded that the plaintiffs had a culpable mental state, that is, that they knew that they were trespassing. The plaintiffs contend that under the probable-cause requirement, an officer has to have "at least some evidence supporting each element of a crime." They say that District law requires a *mens rea* element for the crime of unlawful entry and that the mental-state element is no different from any other element for the purpose of establishing probable cause. As a result, they say that the officers had to have "at least some evidence that [the plaintiffs] knew or should have known that they entered the house against the will of the lawful occupant or owner."

The plaintiffs claim that the officers cannot show this. They assert that, at most, the officers only knew that "they were invited guests at a standard, though debauched, house party in a cheaply furnished house in a poor neighborhood." The plaintiffs claim that this simply is not enough to establish probable cause that they committed a crime.

Because the officers "could not reasonably have concluded they had probable cause to arrest for unlawful entry," and because they in fact lacked probable cause, the plaintiffs argue that the officers were not entitled to qualified immunity, and that the lower courts properly granted and upheld their motion for summary judgment on the officers' liability. But "[a]t a minimum," they say, the Court should remand for a trial, because the officers' "cross-motion for summary judgment relies on a host of disputed facts that, when resolved in [the plaintiffs'] favor, preclude a finding of probable cause."

SIGNIFICANCE

This case tests the standard for probable cause as applied to the mental-state element of a suspected crime. In particular, it asks whether arresting officers must have separate and independent probable cause of a suspect's mental state based on direct evidence, or whether they can establish probable cause based only on circumstantial evidence, and, if the latter, whether they had probable cause in this case.

On the one hand, the officers and the government tell us that officers frequently establish probable cause of a mental state based only on circumstantial evidence and by viewing the evidence in its totality. That's because suspects rarely confess, upon arrest, to having a guilty mind, and because they can easily lie about it. As a result, if officers had to rely only on direct evidence of a mental state to establish probable cause, officers could have a much harder time doing their job.

On the other hand, the mental-state requirement for any crime is an essential element, just like any other element of the crime. And just as officers must have some evidence of each element in order to establish probable cause, they should have some evidence of the mental-state element, too. Relaxing this requirement by permitting officers to use only circumstantial evidence could allow officers a freer hand in arresting suspects who legitimately do not intend to commit a crime and who, therefore, cannot be convicted. The plaintiffs in this case are a perfect example, if, indeed, they legitimately thought they had permission to be at the house.

Given that the lower courts resolved this fact-intensive case on summary judgment, without the benefit of a trial, it seems likely that the Court will issue instructions on how officers can assess probable cause for the mental-state element of a crime and remand the case for further proceedings.

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PREVIEW of United States Supreme Court Cases, pages 18–20.

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In Support of Respondent Theodore Wesby

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Does a Notice of Appeal Filed Within an Extension Granted by the District Court Vest the Court of Appeals with Jurisdiction if the Extension Exceeds Limits Imposed by the Federal Rules of Appellate Procedure?

CASE AT A GLANCE

Petitioner Charmaine Hamer filed suit alleging that respondents Neighborhood Housing Services of Chicago and Fannie Mae's Mortgage Help Center discriminated against her on the basis of age when they terminated her employment. After entering summary judgment for respondents, the district court granted petitioner a 60-day extension of time to file a notice of appeal. Although petitioner appealed within the extended deadline, the Seventh Circuit dismissed her appeal as untimely, holding: (1) the limits imposed by Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure on extensions of time for filing a notice of appeal are mandatory and jurisdictional; (2) the 60-day extension granted by the district court exceeded those limits; (3) petitioner's notice of appeal was therefore untimely; and (4) the Seventh Circuit had "no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." This appeal asks the Supreme Court to decide: (1) whether the limits imposed on extensions under Rule 4(a)(5)(C) are jurisdictional, even though no such limits are imposed by statute; and (2) if not jurisdictional, whether forfeiture, waiver, or other equitable considerations permit the appellate court to address the merits of the appeal despite the violation of Rule 4(a)(5)(C).

Hamer v. Neighborhood Housing Services of Chicago
Docket No. 16-658

Argument Date: October 10, 2017
From: The Seventh Circuit

by Kimberly A. Jansen
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ISSUE

Can Federal Rule of Appellate Procedure 4(a)(5)(C) deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the Second, Fourth, Seventh, and Tenth Circuits have concluded, or is Federal Rule of Appellate Procedure 4(a)(5)(C) instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the Ninth and D.C. Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the "unique-circumstances doctrine"?

FACTS

Petitioner, Charmaine Hamer, was fired from her job with respondents, Neighborhood Housing Services of Chicago and Fannie Mae's Mortgage Help Center. Petitioner then sued respondents under both the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, alleging that her termination was based on age discrimination. The district court granted summary judgment in favor of respondents.

After summary judgment was entered, petitioner's attorney sought leave to withdraw as counsel, citing disagreement about whether to proceed with an appeal. So that petitioner would have adequate time to secure appellate counsel, petitioner's attorney requested a 60-day extension of time in which to file the notice of appeal. The district court granted the motion, allowing counsel to withdraw and extending the deadline for filing a notice of appeal from October 14, 2015, to December 14, 2015. Respondents did not object.

On December 11, 2015—within the extended deadline—petitioner filed her notice of appeal. Once the appeal had been docketed, the Seventh Circuit *sua sponte* directed respondents to brief the timeliness of the appeal. Specifically, the Seventh Circuit's order observed that Rule 4(a)(5)(C) provides that "no extension of time to appeal 'may exceed 30 days after the prescribed time [to appeal]'" and that it appeared that the district court lacked authority to extend the deadline for filing the notice of appeal beyond November 13, 2015.

The professionalism and candor of respondents' brief in answer to the Seventh Circuit's order is commendable. First, respondents candidly acknowledged their belief that, under existing Seventh Circuit precedent, the limitations imposed by Rule 4(a)(5)(C) did not appear to be jurisdictional because the applicable statutory authority, 28 U.S.C. § 2107(c), does not limit extensions to 30 days from the original deadline.

Respondents argued instead that the limit on the length of extensions imposed by Rule 4(a)(5)(C) is a mandatory "claim-processing rule." Again, respondents candidly acknowledged that such rules are subject to forfeiture if not timely raised by the party seeking to enforce the rule. Nevertheless, respondents argued that they did not forfeit enforcement of the rule because they raised the issue prior to a decision on the merits of the appeal—namely, in the brief they filed in compliance with the Seventh Circuit's order.

Respondents further acknowledged that the "unique-circumstances doctrine" may permit an appeal to be heard, notwithstanding violation of a mandatory claim-processing rule, if the party seeking to appeal relied on a district court's ruling extending the time to appeal. Respondents argued that the doctrine would only apply, however, if a genuine ambiguity had existed in Rule 4(a)(5)(C) and the district court had resolved the ambiguity (albeit incorrectly) in favor of granting the extension. Respondents argued that no such ambiguity in the rule exists here and, so, this equitable doctrine does not afford relief.

Finally, respondents volunteered that the appeal might arguably be timely if the Seventh Circuit were to treat the motion for an extension of time as the "functional equivalent" of a notice of appeal. Respondents noted, however, that the Seventh Circuit had treated a motion for an extension of time as the "functional equivalent" of a notice of appeal only in cases where a definitive intent to appeal was clear from the motion itself. They argued that petitioner's prior counsel's motion was not so definitive.

The Seventh Circuit then ordered petitioner (now proceeding *pro se*) to file a response to respondents' brief. Although petitioner requested the appointment of counsel, the Seventh Circuit did not grant the request.

Petitioner agreed with respondents that the time limits imposed by Rule 4(a)(5)(C) are not jurisdictional. Petitioner argued that if the rule is merely a claim-processing rule subject to forfeiture, it cannot be considered "mandatory." Respondents' failure to raise the issue prior to the Seventh Circuit's prompting, petitioner argued, amounted to forfeiture. Petitioner argued that the disparity between Rule 4(a)(5)(C) and § 2107(c) created sufficient ambiguity to invoke the "unique-circumstances doctrine." Finally, petitioner argued that the motion for extension reflected a definitive intent to appeal sufficient to justify treating it as the functional equivalent of a notice of appeal given that it was combined with counsel's request for leave to withdraw based on his disagreement with petitioner regarding the filing of the appeal.

The Seventh Circuit took the jurisdictional issue with the case. After full briefing on the merits, the Seventh Circuit dismissed the appeal for lack of jurisdiction without addressing the parties' arguments on the merits.

CASE ANALYSIS

The filing of a notice of appeal marks the beginning of every appeal from a final judgment. Given the jurisdictional importance of the notice of appeal, however, an *untimely* notice may also effectively mark the end of an appeal. Accurately interpreting and following the rules that govern the proper filing of a notice of appeal is thus critical to effective appellate practice.

The proper filing of a notice of appeal is governed both by statute (§ 2107) and by the Federal Rule of Appellate Procedure (Rule 4). In many respects, the requirements of the statute and of the rule are identical. Under both § 2107(a) and Rule 4(b)(1), for example, the notice of appeal in a civil case must generally be filed within 30 days after entry of the judgment or order being appealed. In addition, both § 2107(c) and Rule 4(a)(5)(A) allow a district court to extend the time for filing the notice of appeal if a motion for an extension is filed within 30 days after expiration of the initial 30-day deadline.

But the statute and rule differ in one crucial respect. So long as a motion for extension is filed within the initial 30-day deadline for appeal, § 2107(c) imposes no limit on the length of the extension the district court may grant. Under Rule 4(a)(5)(C), in contrast, a district court's extension of time may not exceed the greater of: (1) 30 days from the initial 30-day deadline; or (2) 14 days from entry of the order granting the extension.

In this case, there is no question that petitioner's notice of appeal was filed within the district court's extension. There is also no question that the district court's extension exceeded the limits imposed by Rule 4(a)(5)(C) on the length of the extension a district court may grant. The ultimate question for the Supreme Court is whether, under these circumstances, the appellate court had authority to hear the appeal.

In an effort to address that question, the parties have focused on three questions. This article tackles each question in order.

Is the time limit imposed by Rule 4(a)(5)(C) jurisdictional?

The first question the parties addressed is whether the Rule 4(a)(5)(C) limitations on extension length are jurisdictional. The parties agree that resolution of this issue turns on whether there is a statutory basis for those limitations. After all, Congress is vested with the Constitutional authority to "decide[ ] what cases the federal courts have jurisdiction to consider" and to "determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205 (2007).

Petitioner observes that, at the time the extension was granted in this case, § 2107(c) imposed no limits on the length of the extension a district court may grant where a motion is filed prior to the expiration of the initial deadline for filing the notice of appeal. In petitioner's view, then, the time limits imposed by Rule 4(a)(5)(C) lack a statutory basis and may not properly be viewed as jurisdictional.

Respondents concede that the current version of § 2107(c) imposes no limitation on the length of extensions a district court may grant. At the time Rule 4(a)(5)(C) was first adopted, however, the 30-day limit on extensions *was* a part of the statute. The 1991

amendment of § 2107(c), respondents insist, was intended to make only technical corrections to conform the statute to Rule 4(a), so the omission of the 30-day limit on extensions should be viewed as a mere oversight. Although the 30-day limit was omitted from the statute when § 2107(c) was amended in 1991, respondents contend that this omission should not be construed as stripping the limits imposed by Rule 4(a)(5)(C) of jurisdictional significance.

Respondents additionally argue that the nature of the limits imposed by Rule 4(a)(5)(C) additionally compels a finding that the rule is jurisdictional. In this context, respondents note the Supreme Court's admonition that courts and litigants should avoid using the term "jurisdictional" to refer to mere claim-processing rules, but instead should reserve the term "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443 (2004).

In respondents' view, time limits such as those imposed by Rule 4(a)(5)(C) are "quintessentially jurisdictional" because they define where one court's authority ends and another court's authority begins. And, indeed, time limits for filing a notice of appeal have long been treated as jurisdictional.

Professor Scott Dodson, writing as an *amicus curiae* supporting neither party, similarly urges that Rule 4(a)(5)(C) should be viewed as jurisdictional because it "is part of the boundary dividing authority between the district courts and the courts of appeals." But this does not, Dodson hastens to add, answer the ultimate question of whether an extension exceeding the rule's limits precluded the Seventh Circuit from addressing petitioner's appeal on the merits.

Even jurisdictional rules, Dodson argues, may yield in an appropriate case to equitable principles. Both Rule 4(a)(5)(C) and § 2107(c), after all, explicitly provide that the jurisdictional deadline for filing a notice of appeal may be relaxed based on equitable principles—namely, good cause and excusable neglect. Whether the jurisdictional prescription limiting extensions of the time to appeal should be relaxed in this case, Dodson argues, should be decided based on a direct construction and application of the rule and not solely on the characterization of that rule as jurisdictional.

The Academy of Appellate Lawyers (the Academy), writing as *amicus curiae* in support of petitioner, in contrast, argues that construing Rule 4(a)(5)(C) as jurisdictional would set a dangerous precedent. The Academy's analysis begins with the principle that "only Congress can limit the subject-matter jurisdiction Congress granted to the courts of appeals." To construe a judge-made rule like Rule 4(a)(5)(C) as limiting the jurisdiction of the courts of appeals would, in the Academy's view, amount to a wholesale refusal by the courts to exercise jurisdiction over justiciable disputes within their federal subject-matter jurisdiction. The Academy finds no precedent that would justify "forfeiting statutory appellate jurisdiction…by making appellate jurisdiction depend on a party's compliance with a court rule."

As attorneys have occasionally discovered to their dismay, the rules governing appellate procedure can present pitfalls for those who do not specialize in appellate practice (and sometimes even for those who do). District court judges faced with unopposed motions seeking relief that the court has statutory authority to grant are unlikely to conduct original research before granting that relief, the Academy argues—and lawyers, their clients, and self-represented parties, in turn—reasonably rely on the procedural directions contained in a district court's orders. To categorize as jurisdictional a deadline established by rule but not authorized by statute, the Academy contends, would create a "classic trap for the unwary," likely to disproportionately ensnare *pro se* litigants such as petitioner.

Such a procedural trap is particularly problematic in the context of Rule 4(a)(5)(C), the Academy warns, because it "encourages morally reprehensible behavior." If the limitations imposed by Rule 4(a)(5)(C) are jurisdictional—and thus not subject to waiver, forfeiture, or equitable remedy—then a prospective appellee will have incentive to remain silent when confronted by a motion seeking an extension of time greater than the rule permits. Worse still, the prospective appellee might even encourage the granting of such an extension in hopes that the unwary appellant will thereby lose the opportunity to appeal.

Particularly given these concerns, the Academy argues that treating Rule 4(a)(5)(C) as jurisdictional is unnecessary. The rule, after all, is rarely invoked. And when it is, district courts typically grant extensions within the rule's limits. Where an extension is requested or granted in excess of the rule's limits, an appellee can easily object. Thus, the Academy argues, the rule's purpose is adequately served by treating it as a mandatory claim-processing rule.

If Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, did respondents forfeit any claim of untimeliness based on that rule?

Mandatory claim-processing rules, the parties agree, are subject to forfeiture if the issue is not timely raised by the party asserting the rule. By failing to object to the 60-day extension before the district court, petitioner argues, respondents forfeited the argument that her appeal was untimely under Rule 4(a)(5)(C).

As a general rule, the federal courts of appeals will not consider an issue that was not raised before the district court. A timely objection before the district court provides the court an opportunity to consider and correct potential errors, eliminating the need to correct such errors on appeal.

Had respondents raised a timely objection in the district court, petitioner argues, the district court could have granted an extension within the limits of Rule 4(a)(5)(C) and petitioner's compliance with such an extension would have eliminated any claim that her appeal was untimely. Indeed, even if a district court were to disregard a timely objection and grant an extension in excess of what the rule allows, the Academy observes, the timely objection would put appellants on notice of the risk that an appeal filed in reliance on the over-long extension will likely be dismissed.

Respondents argue that their failure to challenge the 60-day extension before the district court did not forfeit their right to challenge the timeliness of petitioner's appeal. The district court granted the motion filed by petitioner's counsel seeking both the 60-day extension and leave to withdraw the same day that the motion seeking that relief was filed, without awaiting any response

from respondents. Further, respondents claim that the district court's local rule (N.D. Ill. R. 78.3) provides that failure to respond does not waive any objection to a motion.

Petitioner contends that respondents also forfeited their challenge to the 60-day extension by failing to file a cross-appeal challenging that order. An appellee that fails to file a cross-appeal is not permitted to seek relief from the appellate court either enlarging the appellee's own rights under the district court's judgment or diminishing the appellant's rights. Challenging the district court's extension of the time for appeal, petitioner argues, sought to lessen the petitioner's rights—indeed, sought to strip her of the right to appeal at all. A cross-appeal was thus required.

Two circuit courts of appeals—the Third and Sixth—have agreed with petitioner on this point. *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000); *United States v. Burch*, 781 F.3d 342 (6th Cir. 2015). The Tenth Circuit, however, has taken the opposite position. *United States v. Madrid*, 633 F.3d 1222 (10th Cir. 2011). As respondents note, the *Madrid* Court held that no cross-appeal was necessary to challenge an improper extension of the time to appeal because, "[i]n moving for dismissal of the appeal, the [appellee] was not seeking alteration of the judgment below in its favor."

Respondents maintain that they were not required to cross-appeal the order granting a 60-day extension because they were not aggrieved by the extension itself. Any confusion created by the improper request for (and granting of) the too-long extension, they contend, was "a problem for Petitioner and her counsel, not for Respondents." They did not attack the district court's decision granting summary judgment in their favor in any respect, and so no cross-appeal was required.

If Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, does the "unique-circumstances doctrine" permit the appellate court to hear the appeal?

Finally, petitioner argues that if Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, then the "unique-circumstances doctrine" permitted the Seventh Circuit to consider her appeal on the merits notwithstanding the district court's violation of Rule 4(a)(5)(C).

The "unique-circumstances doctrine" originated with the Supreme Court's decision in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Under the version of both the statute and rule applicable at that time, a district court was permitted to extend the time for appeal if a party did not receive notice and could demonstrate excusable neglect. The district court granted a 30-day extension to appeal, even though the plaintiff's attorney of record had indeed received notice. As in this case, the Seventh Circuit in *Harris Truck Lines* dismissed the appeal for lack of jurisdiction, holding that the extension granted by the district court was improper and the notice of appeal filed in reliance on that extension was untimely.

The Supreme Court reversed, noting "the obvious great hardship" to an appellant who relies on an extension granted by the district court only to suffer dismissal of an appeal upon a finding that the extension was improper. The Supreme Court found these "unique-circumstances" sufficient to permit the appeal to proceed despite the improper extension of the time to appeal.

More recently, in *Bowles*, the Supreme Court overruled *Harris Truck Lines* and a similar decision "to the extent they purport to authorize an exception to a jurisdictional rule." In petitioner's view, this leaves the "unique-circumstances doctrine" intact as an exception to *nonjurisdictional* rules. Because she relied in good faith on the 60-day extension granted by the district court and because dismissal of her appeal as untimely would be an "obvious great hardship," petitioner argues the "unique-circumstances doctrine" should permit the consideration of her appeal on the merits.

Respondents argue that, even if the "unique-circumstances doctrine" remains viable, it would not apply here. In respondents' view, that doctrine could only afford relief if Rule 4(a)(5)(C) were ambiguous. Because the rule is clear on its face, they argue, petitioner's reliance on the 60-day extension was not reasonable.

Respondents also question the continued viability of the "unique-circumstances doctrine." Citing the Supreme Court's recent decision in *Manrique v. United States*, 137 S. Ct. 1266 (2017), respondents argue that even nonjurisdictional rules relating to notices of appeal are mandatory and unalterable.

In *Manrique*, the district court entered a judgment sentencing a criminal defendant, but deferred the determination of a mandatory restitution award to a future date. After the defendant filed his notice of appeal from that judgment, the district court entered a second judgment specifying the amount of restitution the defendant would be required to pay. Because defendant did not file a second or amended notice of appeal, the Eleventh Circuit held that it lacked jurisdiction to consider his challenge to the later-entered restitution order.

In affirming the Eleventh Circuit's judgment, the Supreme Court rejected the defendant's argument that the court could overlook any defect in his notice of appeal as harmless. But Rule 3(a)(2) provides that the courts of appeals may overlook any defect in a notice of appeal *except* for the failure to timely file a notice. The defendant's failure to file a notice of appeal after (and directed at) the restitution judgment fell within this exception and could not be overlooked.

Respondents take the position that filing a notice of appeal in compliance with an invalid extension amounts to a failure to timely file the notice of appeal and, as such, the defect may not be overlooked as harmless.

SIGNIFICANCE

This case is likely to be of little interest to the general public, most of whom will never be directly affected by the Supreme Court's determination as to how this rule of appellate procedure should be applied. Even those who may at some point be involved in federal litigation will be unlikely to face extensions of time that exceed the limits of Rule 4(a)(5)(C)—as the Academy notes, the rule is rarely invoked, and when it is, extensions usually fall within the rule's limits.

As is illustrated by the two *amici,* the case is likely to be of greater interest to two groups: (1) legal scholars (like Professor Dodson) with an academic interest in the intricacies of federal jurisdiction; and (2) appellate specialists (as ably represented by the Academy) who routinely wrestle with the intricacies of appellate jurisdiction and who thus have a vested interest in preserving institutional values and enhancing standards of practice.

The Supreme Court could well avoid tackling the jurisdictional question head-on, as it did in *Manrique,* by holding that petitioner's appeal was properly dismissed even if Rule 4(a)(5)(C) is construed as a mere claim-processing rule. Such a result would undoubtedly be important to appellate practitioners because it will provide guidance about the circumstances (if any) that will support relaxation of claim-processing rules.

The Supreme Court might, however, instead hold that the limits imposed on extensions under Rule 4(a)(5)(C) are jurisdictional, even though such limits are not incorporated in § 2107(c). Such a holding, as the Academy points out, would represent a significant (albeit subtle) shift in the respective roles of the legislature and the judiciary in defining the boundaries of the federal appellate courts' jurisdiction. Constitutionally, Congress is given the responsibility of establishing and regulating the lower federal courts. A holding that Rule 4(a)(5)(C) is jurisdictional would mean that even where Congress has vested the courts of appeals with jurisdiction over a matter, the Supreme Court can narrow that grant of jurisdiction by rule. According to the Academy, such a holding "would set a precedent of unknowable hazard to the Judicial Branch."

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PREVIEW of United States Supreme Court Cases, pages 21–25.

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Does the Constitution Prohibit a State from Engaging in Extreme Partisan Gerrymandering in Drawing Its Legislative Districts?

CASE AT A GLANCE

The Wisconsin legislature redrew its state Assembly districts in the wake of the 2010 Census. The legislature took into account traditional redistricting criteria; it also considered politics. The resulting Assembly map was an extreme partisan gerrymander that resulted in significant overrepresentation for the majority party (as compared with the statewide vote) and effectively locked in majority-party control of the Assembly. Voters from 11 Assembly districts sued, arguing that the map violated the First and Fourteenth Amendments.

Gill v. Whitford
Docket No. 16-1161

Argument Date: October 3, 2017
From: The Western District of Wisconsin

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

INTRODUCTION

Up to now, the Supreme Court has declined to rule on cases alleging partisan gerrymandering, because the Court lacks a sufficiently determinate test to judge when a partisan redistricting plan goes too far. In other words, these cases raise a nonjusticiable political question. This case presents the Court with a test, however, and an example of extreme partisan gerrymandering. As a result, the case gives the Court an opportunity to reconsider whether it will hear partisan gerrymandering claims and, if so, how it will judge them.

ISSUES

1. Do voters from just 11 state legislative districts have standing to challenge the entire Wisconsin Assembly map?

2. Does the case raise a nonjusticiable political question?

3. Did the plaintiffs articulate a sufficiently "limited and precise" standard for judging political gerrymanders?

4. Does the plaintiffs' partisan-gerrymandering claim fail because the map complies with traditional redistricting principles?

5. Does it matter that the map locks in majority control of the Assembly, and, if so, should the Court remand the case to allow the parties to argue this point?

FACTS

In January 2011, the Wisconsin legislature began the task of drawing new state legislative boundaries based on results of the 2010 Census. Wisconsin Senate Majority Leader Scott Fitzgerald and Speaker of the Wisconsin Assembly Jeff Fitzgerald retained attorney Eric McLeod and a private law firm to assist with the effort. In April 2011, after they received Census data from the Legislative Technology Services Bureau, staff members from the Majority Leader's and Speaker's offices worked with a consultant and a political science professor to begin drafting the new map in a law firm office they called the "map room."

(The courts drew the then-existing map, based on the 2000 Census, and the immediately preceding map, based on the 1990 Census, because the politically divided state government was unable to pass redistricting plans of its own. But in 2010, for the first time in over 40 years, Republicans controlled both houses of the state legislature and the governor's office. This gave promise that the government could pass a plan without the involvement of the courts.)

In fashioning the new legislative districts, the map-drawers endeavored to comply with the "one-person, one-vote" principle and the Voting Rights Act; they also considered traditional districting principles like compactness and contiguity. Politics was another factor. In particular, the map-drawers drew legislative districts such that Republicans could win a disproportionate number of seats in the Assembly as compared to their portion of the overall, statewide vote.

The legislature passed the map-drawers' plan, and the governor signed it. The map was published as Wisconsin Act 43 on August 23, 2011.

In the first election under Act 43, in 2012, Republicans won 60 out of 99 seats in the Assembly with just 48.6 percent of the statewide vote. In the next election, in 2014, Republicans won 63 of the 99 seats with just 52 percent of the vote.

Twelve Wisconsin voters, who resided in 11 legislative districts throughout the state, sued state officials in a three-judge federal district court, arguing that the Assembly map was an excessive political gerrymander in violation of the First and Fourteenth Amendments. The plaintiffs argued that the map-drawers used two gerrymandering techniques to ensure that Republicans would win a disproportionate number of Assembly seats. First, they claimed that the map-drawers "packed" a small number of districts by concentrating Democrats in those districts; this would ensure that Democrats would win in those few districts with an overwhelming majority. Next, they claimed that the map-drawers "cracked" Democratic populations among many other districts, so that Democrats would fall just short of a majority in each one of those many districts. The plaintiffs argued that these techniques resulted in "wasted" votes—those excess votes for a winning candidate in a packed district, and those votes for a losing candidate in a cracked district—and that the wasted votes for Democrats significantly outnumbered the wasted votes for Republicans. (The plaintiffs call the difference between Republican wasted votes and Democratic wasted votes the "efficiency gap.")

The plaintiffs incorporated the efficiency gap into a proposed three-part test to determine when a partisan gerrymander is unconstitutional. First, plaintiffs would have to show that a state had an intent to gerrymander for partisan advantage. Second, plaintiffs would have to prove a partisan effect. (The plaintiffs here proposed that an efficiency gap greater than 7 percent should be presumptively unconstitutional.) Third, if the plaintiffs carried their burdens at the first and second steps, the state would have to show that the plan resulted from "legitimate state policy" or "the state's underlying political geography" in order to avoid a conclusion that the map was unconstitutional.

The court adopted the basic framework of this test, but modified the second step slightly: it looked to both the efficiency gap and other evidence (including social science evidence) for the partisan effect. Applying the test, the court ruled that (1) the map was designed with discriminatory intent, (2) the map caused a "large and durable" discriminatory effect, and (3) there was no neutral way to explain this effect. The court enjoined the state from using Act 43 and ordered that it adopt a new plan by November 1, 2017.

The Supreme Court stayed this order, however, and agreed to hear the case on the merits.

CASE ANALYSIS

There are four issues in the case. Let's take them one at a time.

Do the Plaintiffs Have Standing to Sue?

The state argues that the plaintiffs lack standing and that the case should be dismissed. It says that the plaintiffs, who are individual voters in only 11 Assembly districts, have standing to challenge only the districts where they vote and not the entire Assembly map. The state claims that the plaintiffs have suffered a concrete and particularized harm (required for standing) only in the district where they live or vote and that they have not suffered a harm in other Assembly districts "on the theory that [they] want[] more Democrats for [their] Assembly or House member to caucus with." The state says that this is consistent with standing requirements for plaintiffs who bring racial gerrymandering claims and that granting the plaintiffs' standing in this case would perversely favor challenges to political gerrymandering over challenges to racial gerrymandering.

The plaintiffs counter that every partisan gerrymandering case before the Court has been a statewide challenge, and the Court has never suggested that the plaintiffs lacked standing in those earlier cases. Moreover, the plaintiffs say that their claim (and thus their harm) is "unquestionably statewide: the intentional, severe, durable, and unjustified dilution of Democratic votes throughout Wisconsin." The plaintiffs contend that racial gerrymandering claims are different, because they allege that race was used in a district-specific way—in drawing one or more particular legislative districts—and because the harm in those cases involves racial classification (and not, as here, statewide voter dilution).

Does the Case Raise a Nonjusticiable Political Question?

The state argues that the case raises a nonjusticiable political question and that the case should be dismissed. The state says that a majority of justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), "definitively concluded that such claims were nonjusticiable…or could eventually prove to be so." The state claims that the courts have not been able to identify determinate legal standards for judging political gerrymanders and so should stay out of it (and instead leave it to the state legislatures). The state contends that the district court's test is not sufficiently "comprehensive and neutral" and has no support in the history or practice of redistricting.

In response, the plaintiffs argue that the district court's test is sufficiently "discernible and manageable" for the Court to hear the case. As to discernibility, the plaintiffs say that the test well identifies when partisan gerrymandering dilutes the electoral influence of a group of voters (in violation of the Equal Protection Clause) and when it penalizes voters because of their political beliefs (in violation of the First Amendment). The plaintiffs claim further that the test is symmetrical with regard to partisan politics; that it is comprehensive, in that it can apply to any district plan; and that it is neutral insofar as it treats the political parties alike in converting their votes to legislative seats. The plaintiffs add that the district court's test is "rooted in the Court's partisan gerrymandering case law."

As to manageability, the plaintiffs say that the test's intent and justification prongs have already been applied in other redistricting situations, "without any apparent difficulty." They claim that the effect prong is manageable, because courts can measure a gerrymander's partisan effects with readily available social scientific techniques. The plaintiffs assert that the district court's test will only ban "both parties' most egregious gerrymanders," so it will not overreach and will act as "a stalking horse for partisan interests."

Did the Plaintiffs Articulate a Sufficiently "Limited and Precise" Standard?

The state argues that even if the plaintiffs have standing and even if the case is justiciable, the Court should dismiss the plaintiffs'

challenge because they have not stated a "limited and precise" legal standard. The state says that the plaintiffs' proposed test for measuring unconstitutional partisan gerrymandering is a hodge-podge of unreliable social scientific measures that a plurality of the Court previously said "failed to articulate a 'reliable measure of fairness.'"

The state claims that the plaintiffs' first-proposed test (giving greater weight to the efficiency gap) fares no better. The state says that this approach requires a nearly exact proportional increase in legislative seats for each increase in the vote—a "hyperproportionalism" that fails to account for other features of a state's political landscape. In addition, it asserts that this approach "would find that one out of every three legislative maps drawn in the last 45 years has impermissible partisan effect" and would disproportionately "overlook[]" plans drawn by Democrats.

The plaintiffs retort that the district court test is sufficiently limited and precise for the same reasons it argues that the test is judicially manageable and that the case therefore does not raise a political question.

Is Act 43 Valid Because It Complies with Traditional Redistricting Principles?

The state argues that the Court should uphold Act 43 because it complies with traditional redistricting principles, even if it also considered politics. The state says that a majority of justices in *Vieth* who would have heard a partisan gerrymandering claim would have required a plaintiff to show that the legislature did not comply with traditional neutral redistricting principles. The state says that the plaintiffs' claim here should fail for that reason alone—because the state *did* incorporate traditional principles. As proof, the state notes that "Act 43's results are generally comparable to those that obtained under the immediately prior court-drawn map."

The plaintiffs argue that under *Vieth* noncompliance with traditional redistricting criteria is not an element of a partisan gerrymandering claim. Quoting the *Vieth* plurality, they say that "it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution."

Should the Court Remand the Case?

Finally, the state argues that the district court wrongly concluded that Act 43 had an impermissible partisan effect because it locked in a Republican majority. The state says that this "entrenchment" approach is foreclosed by *Vieth* and that they did not have a sufficient opportunity to litigate the issue below. The state urges the Court to remand the case for further proceedings if it adopts an entrenchment approach.

The plaintiffs respond that the Court should not remand for further proceedings on entrenchment, because the parties already had an opportunity to argue the issue. "[F]rom the very beginning of the case, both Appellees and the district court made clear their emphasis on the durability of a party's advantage."

SIGNIFICANCE

It's hard to overstate the potential significance of this case, especially given today's political climate. That's because states are responsible for drawing their own legislative maps and the boundaries for their congressional districts (usually every ten years, after the Decennial Census results come out), and most states draw those lines based at least in part on politics. (Thirty-seven states draw their districts in the state legislature; the others use some form of an independent or political commission.) Up until now, the Court has declined to intervene. But if the Court changes it tack, this could substantially alter the states' political calculus and even upend their practices, depending on how the Court would rule.

The plaintiffs certainly recognize the potential significance of the case and have worked to narrow it in order to assuage any concerns of judicial overreach. In particular, they have crafted a novel approach to measuring when a political gerrymander goes too far, the efficiency gap. As they argue, it is a determinate, even precise, approach and, taken with other social science evidence, comes as close to measuring the partisan effects of a gerrymander as any approach that we have seen. Moreover, the plaintiffs have found a state legislative map that represents an extreme form of political gerrymandering that should, among any districting map, at least raise the Court's constitutional eyebrow as to its partisan effects. Together, the relatively determinate test and the stark political effects of the Assembly map make for perhaps the strongest argument that the Court can safely weigh in on political gerrymandering. In short, all this allows the plaintiffs to say that the Court can come to the merits in this dramatic case without undoing every other political gerrymander throughout the country. (Indeed, the plaintiffs point out in their principal brief that their test "actually would have allowed plaintiffs to challenge, at most, one-tenth to one-fifth of [over two hundred state house maps between 1972 and 2014].")

It is important to remember that, over the long term and everything else being equal, judicial intervention in political gerrymandering claims does not necessarily favor either major political party. Because both parties engage in political gerrymandering, and because either party could control a state legislature, judicial intervention could frustrate either party's political map-drawing. As a result, this case is not necessarily political. Nevertheless, if the Court decides that it can intervene, depending on how it rules, that intervention may be seen as a victory for Democrats, given that Republicans have the current edge in state legislatures (and, in particular, in Wisconsin).

Aside from justiciability, the state has given the Court other ways to rule in its favor. Thus, the Court could rule that the plaintiffs lack standing, that they failed to articulate a sufficiently "limited and precise" standard, that the map withstands judicial scrutiny because it is based on traditional redistricting criteria (even if it is also based on politics), and that the state did not have a sufficient opportunity to argue the "entrenchment" issue below. The Court could dodge the core gerrymandering question by dismissing or remanding the case on any one of these grounds. If so, this potentially path-breaking case could simply fizzle out, and we could face extreme partisan gerrymandering like that in Wisconsin (or even more) in the next round of redistricting, just a few short years away.

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PREVIEW of United States Supreme Court Cases, pages 26–29.

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What Due-Process Procedural Safeguards Should Immigration Detainees Receive?

CASE AT A GLANCE

Immigrants can be detained under a number of federal statutes. Some are detained after serving a criminal sentence, at which time removal proceedings begin. Others are detained at the border. This case concerns what due-process procedural safeguards are afforded to these individuals, some of whom allegedly have been detained for more than a year. The Supreme Court could determine whether federal law should be interpreted to mandate individualized bond hearings and other procedural safeguards.

Jennings v. Rodriguez
Docket No. 15-1204

Argument Date: October 3, 2017
From: The Ninth Circuit

by David L. Hudson Jr.
Vanderbilt Law School and the Nashville School of Law, Nashville, TN

Editor's Note: An earlier version of this article appeared in *Preview* Issue 3, Volume 44, when the case was originally argued on November 30, 2016. The Court is now hearing a reargument of the case. No additional briefing was requested between the original argument and this new session.

ISSUES

1. Must aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months?

2. Must criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) be afforded bond hearings, with the possibility of release, if detention lasts six months?

3. In bond hearings for aliens detained for six months under Sections 1225(b), 1226 (c), or 1226(a), is the alien entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community? Must the length of the alien's detention be weighed in favor of release? And must new bond hearings be afforded automatically every six months?

FACTS

Respondent Alejandro Rodriguez was a lawful permanent resident who came to the United States as an infant. He was working as a dental assistant when the Department of Homeland Security (DHS) instituted removal proceedings against him in response to a conviction for drug possession and an earlier conviction for joyriding.

DHS detained Rodriguez for three years before he challenged his confinement in the Board of Immigration Appeals. Rodriguez is far from alone. There are hundreds of others who have been detained for long periods of time before removal proceedings were brought.

Rodriguez and others filed a class-action lawsuit in 2007, challenging the government's detention statutes for immigrants held for crimes, often minor criminal offenses. Respondents contended that three immigration statutes were at issue, creating three classes of respondents: 8 U.S.C. § 1226(a), § 1225(b), and § 1226(c).

Section 1226(a) creates a subclass of aliens who are arrested and detained pending a determination on whether the alien should be removed (the Mandatory Subclass). Another group of the class, the Section 1225(b) group or the "Arriving Subclass", includes those aliens who come to the United States and are detained upon entry. Finally, Section 1226(c) applies to aliens who can be removed for criminal offenses after the aliens are released from criminal custody.

The average detention of the members was 13 months. The individuals are detained in jail-like facilities with only "no contact" visits from family members. DHS released Rodriguez from custody after he sought class certification, but the case lives on and, to date, has been appealed three times. The first time, the proceedings focused on whether the plaintiffs qualified for class certification. The Ninth U.S. Circuit Court of Appeals ruled that there could be class certification.

The second appeal examined whether the Mandatory and Arriving Subclasses deserved individualized bond hearings. The Ninth Circuit affirmed a lower court injunction, ruling that they were entitled to such hearings.

On the third appeal, the Ninth Circuit ruled that once the class members were subject to prolonged detention, the immigration statutes no longer authorize detention. The Ninth Circuit determined that detention becomes prolonged after an immigrant has been detained for six months without a hearing.

The Ninth Circuit also ruled that certain procedural safeguards must be instituted to provide due process. These include requiring DHS to prove danger and flight risk by clear and convincing evidence and that periodic hearings must take place every six months. The government filed a petition for writ of *certiorari*, challenging the imposition of a six-month requirement for bond hearings and additional bond hearings after every subsequent six months of detention. In its *certiorari* petition, the government accused the Ninth Circuit of creating these six-month requirements "out of whole cloth."

The Court granted review.

CASE ANALYSIS

A key question is whether the class members are entitled to individualized custody hearings when they have been detained for at least six months. The Court has previously declared that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678 (2001).

However, in *Denmore v. Kim*, 538 U.S. 510 (2003), the Court approved of the detention of aliens under § 1226(c) when the detentions were brief and the detainees had conceded their deportability. Government officials (the petitioners before the Court) rely on *Denmore* for the proposition that individualized hearings are not required.

Respondents distinguish *Denmore,* however, on two grounds. First, respondents point out that many of the class members have been detained for more than a year. Amici American Immigration Council argue that recent data shows that many immigrants have been detained for far longer than the Court realized when it decided *Denmore*. Second, respondents assert that many of the class members assert substantial defenses to removal. Justice Anthony Kennedy wrote in his *Denmore* concurrence: "the ultimate purpose behind the detention is premised on the alien's deportability."

Petitioners emphasize the government's plenary power over immigration and border control. Plenary power in this context means that the legislative and executive branches of government traditionally have the power to control immigration matters without judicial oversight. Petitioners also contend that, while some detentions may be too long or even unreasonable, the available remedy is a *habeas corpus* petition. Petitioners also assert that, for the Arriving Subclass, there is no requirement of due process since they were detained at the border.

Respondents counter that due process requires an individualized custody hearing. Respondents analogize to civil commitment proceedings and criminal law proceedings, both of which require individualized hearings before neutral decisionmakers.

Respondents also point out that many of the class members are *pro se*, indigent, and not proficient in English. According to respondents, these factors will lead to class members being unable to comply with the procedural quagmires of *habeas* law.

The parties also disagree over a safety rationale. Petitioners contend that mandating individualized custody hearings threatens public safety. For example, petitioners argue that requiring these individualized hearings for the Arriving Subclass will threaten border security.

However, respondents counter that many of the class members have minor criminal histories and longstanding ties to the community. They emphasize that DHS has the capability under its Intensive Supervision Assistance Program to determine which detainees are high flight risks.

SIGNIFICANCE

This case is significant in part because the federal circuits are not uniform in how they interpret the immigration detention statutes under review. The Ninth and Second Circuits have interpreted the statutes to mandate more procedural safeguards than other circuits.

This case is also significant because the Court could explain the contours of the constitutional avoidance doctrine as applied to immigration law. Under the doctrine of constitutional avoidance, a court will interpret a statute in a way so as to avoid constitutional problems. Respondents and some of their amici assert the doctrine should be applied to provide necessary procedural safeguards. Otherwise, according to respondents and their amici, the statutes flagrantly violate due-process rights. However, there is an argument to be made that such changes should come from Congress, not the Court.

The Court's ruling in this case also has the potential to determine the fate of thousands of people, many of whom have been detained for long periods of time with seemingly little recourse or ability to redress their situation. On the other hand, the government has important security interests that also come into play in this case.

The Court could avoid most of the constitutional challenge by interpreting § 1226(c) to limit it to only those aliens who lack a substantial challenge to their removability. Justice Stephen Breyer advocated this approach in his separate (concurring and dissenting) opinion in *Denmore*.

The Court could address the relevancy of the plenary power doctrine to the immigration detention statutes. The amicus Asian Americans for Justice asserts that the Court should relegate the plenary power doctrine to the "ashheap of history." The group asserts that the doctrine has racist origins and can be used to advance xenophobia.

The case was originally heard by the Supreme Court in November 2016. However, at that time, the unexpected death of Justice Antonin Scalia opened up the possibility of this case ending in a 4–4 split. Consequently, the Court held it over to this term, and it is now being reargued before a panel of nine justices, instead of eight. The presence of Justice Neil Gorsuch presumably will avoid the possibility of a deadlock.

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PREVIEW of United States Supreme Court Cases, pages 30–32.

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Does Incorporating a Federal Criminal Law on Crimes with "Significant Risk" into Immigration Law for Deportation Purposes Lead to Unconstitutional Vagueness?

CASE AT A GLANCE

Aliens convicted of an aggravated felony can be removed from the country in deportation proceedings. Federal law allows such deportations if aliens have engaged in a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The problem is in determining when an offense entails such "significant risk." Take the crime of burglary. Some burglaries involve physical force, but many burglaries involve no physical force or are committed when the owners are not present. The key question for the Court is whether this law is unconstitutionally vague.

Sessions v. Dimaya
Docket No. 15-1498

Argument Date: October 2, 2017
From: The Ninth Circuit

by David L. Hudson Jr.
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Editor's Note: This article originally appeared in *Preview* Issue 3, Volume 44, when the case was originally argued on January 17, 2017. The Court is now hearing a reargument of the case. No additional briefing was requested between the original argument and this new session.

ISSUE

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

FACTS

Respondent James Garcia Dimaya, a citizen of the Philippines, was admitted to the United States as a lawful permanent resident in 1992 at 13 years old. He attended high school in California and eventually earned a G.E.D. He maintained employment at times but ran into criminal trouble.

In 2007 and 2009, respondent pleaded no contest to charges of residential burglary. In 2010, the Department of Homeland Security instituted removal proceedings against respondent under the Immigration and Nationality Act (INA). Homeland Security contended that respondent should be removed because his convictions qualified as crimes of violence and, thus, were aggravated felonies.

An immigration judge agreed with the government and ordered respondent removed. The Board of Immigration Appeals agreed that respondent was removable because at least one of the burglary convictions qualified as an aggravated felony.

Respondent filed a petition for review in the Ninth U.S. Circuit Court of Appeals. The Ninth Circuit determined that the definition of "crime of violence" from Section 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. This provision provides that a crime of violence means:

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

The Ninth Circuit reasoned that the provision suffered from the same indefiniteness as a similar provision in the Armed Career Criminal Act (ACCA). The Court had ruled in *Johnson v. United States*, 576 U.S. (2015), that the clause was too vague.

The government petitioned for a writ of *certiorari*, which the Court granted.

ANALYSIS

The Impact of *Johnson v. United States*

In *Johnson*, the Court invalidated a part of the ACCA known as the residual clause. This residual clause allowed for enhanced sentences of defendants who engaged in "conduct that presents a serious potential risk of physical injury to another."

Writing for the Court, Justice Antonin Scalia explained that this residual clause was too vague:

> Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves?…
>
> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.

The ACCA's residual clause created vagueness problems because it was impossible to know whether a particular crime would create a serious potential risk.

The key question in this case is whether Section 16(b)—also termed a residual clause—suffers from the same constitutional problems or if it is distinguishable.

The government acknowledges that "Section 16(b), like the ACCA's residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense." But the government asserts that there are three key differences.

First, the government contends that Section 16(b)'s risk analysis is limited to risks that occur during the commission of the actual offense, rather than speculating about future risk. Second, the government emphasizes that Section 16(b) focuses on the use of physical force against person or property while committing the offense. Third, the government says that Section 16(b) does not contain a list of exemplar offenses, like the ACCA's residual clause does.

Respondent says that *Johnson* squarely controls this case and that Section 16(b) is void for vagueness just like the ACCA's residual clause. The problem is in trying to determine how much "substantial risk" of "physical force" an ordinary case will entail. Take respondent's offense of burglary. Some burglaries involve a substantial risk of physical force. However, notes respondent, many burglaries take place when the owners are not on the premises and there is no accompanying physical harm.

"Because the § (Section) 16 residual clause provides no greater clue how a court is supposed to identify the 'ordinary case,' it yields the same constitutionally impermissible level of arbitrariness and unpredictability as its ACCA counterpart," respondent writes. Respondent also points out that Section 16(b) arguably is even vaguer than its ACCA counterpart, because it does not list exemplar offenses and instead is more open-ended.

Criminal Law Versus Removal Proceeding

The essence of a vagueness challenge is that a criminal law must provide fair notice to defendants as to when their conduct violates the law. The legal system's concerns over vague laws pertain not only to fair notice, but also to arbitrary or selective enforcement of the laws.

The government asserts that the vagueness question differs from criminal laws to immigration removal laws, which are considered civil. According to the Court, "[r]emoval is a civil, not criminal matter." The government contends that the Court's jurisprudence often emphasizes that the core due process vagueness principally limits criminal, or penal, statutes.

The government asserts that an unintelligibility test would properly determine whether this civil law, an immigration removal statute, is unconstitutionally vague. This test asks whether a law or policy was so unintelligible that it was "not a rule at all." The government explains that this unintelligibility test "would ensure that an alien is not subject to a proceeding governed by an incomprehensible legal standard" and "would also ensure immigration officials and courts are not obligated to enforce legal provisions from which it is impossible to discern any meaning, preserving the integrity of the immigration system."

The government also concludes that under this standard of basic intelligibility, respondent was not denied due process. Section 16(b) has been applied by courts for decades, including by a unanimous Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Respondent counters that the same standard for vagueness used to evaluate criminal laws applies to immigration statutes because of the "grave nature of deportation." Respondent agrees with the Sixth Circuit which wrote that "[t]he criminal versus civil distinction is…ill-suited to evaluating a vagueness challenge regarding the specific risk of deportation." Deportation laws are punitive and carry severe consequences.

Respondent also points out that Section 16 is a criminal statute. Respondent notes that stringent vagueness inquiries apply to civil laws implicating First Amendment freedoms. Respondent emphasizes that "punitive laws and those with otherwise severe consequences—including deportation laws and laws implicating First Amendment rights—are subject to the same vagueness scrutiny as criminal laws."

Respondent further rejects the "basic intelligibility" standard as not adequately protecting individuals from vague laws with severe consequences.

SIGNIFICANCE

The case is significant in part because it will resolve a circuit split on the constitutionality of Section 16(b) in the deportation context and will determine whether the reasoning of the Court's decision in *Johnson* extends to the field of immigration. The lower courts have disagreed in immigration removal cases on whether certain crimes entailed a significant risk of physical violence.

The decision will be important in determining whether there is indeed any difference at all in the vagueness standards for criminal versus civil laws. Both parties have spent a significant amount of time parsing different phrases from different cases in arguing this key point.

The government argues that the Court's invalidation of Section 16(b) "would have deleterious consequences for the immigration laws and the federal criminal code." The government writes that Section 16(b) is important to the enforcement and punishment of money laundering, racketeering, domestic violence, and crimes against children.

Respondent counters that these concerns are overblown. Respondent points out that in the immigration removal context, the government could still rely on Section 16(a), which looks to the actual elements of an offense rather than divining about substantial risk. Respondent contends that striking down Section 16(b) would have a "limited" impact on the government's enforcement of immigration laws.

Finally, the case is significant because many Court observer eyes will be on the newest Justice, Neil Gorsuch, who has written on these issues while a judge on the Tenth Circuit. As immigration law professor Michael Kagan explains in his article "What 2016 Gorsuch Opinions Could Mean for 2017 Re-Argument in *Sessions v. Dimaya*" for *Notice & Comment* (a blog of the *Yale Journal on Regulation*), Justice Gorsuch wrote two opinions (the majority opinion and a concurring opinion) in *Gutierrez-Brizuela v. Lynch* (2016), a case dealing with similar issues. (See http://yalejreg.com/nc/what-2016-gorsuch-opinions-could-mean-for-2017-re-argument-in-sessions-v-dimaya/.) It is not often that a jurist writes two opinions in the same case.

The justices could have been divided 4–4 after the first round of arguments, and presumably, with the addition of a new colleague, the tie will be broken.

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PREVIEW of United States Supreme Court Cases, pages 33–35.

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WOTUS at the SCOTUS: Which Court Has Jurisdiction to Review Federal Agency Rulemaking Under the Clean Water Act?

CASE AT A GLANCE

Challenges to federal statutes (or agency action pursuant to federal statutes) typically begin in the federal district courts. The Clean Water Act (33 U.S.C. § 1251 *et seq.*) contains a judicial review provision—33 U.S.C. § 1369(b)(1)—stating that seven types of specific actions taken by a federal agency under the Clean Water Act are directly reviewable in the federal *circuit courts of appeal*, rather than in the federal district courts, thus cutting out one layer of litigation. The question in this case is whether challenges to the "WOTUS Rule" (waters of the United States)—jointly promulgated by the EPA and the Department of the Army (on behalf of the Army Corps of Engineers) (80 Fed. Reg. 37,054, June 29, 2015)—meet the requirements of Section 1369(b)(1). If the Court determines the Section 1369(b)(1) criteria are met, original and exclusive jurisdiction will lie in the federal circuit courts; otherwise, jurisdiction will lie initially in the federal district courts, with the potential for appellate review in the federal circuit courts.

National Association of Manufacturers v. U.S. Department of Defense, Department of the Army Corps of Engineers, and U.S. Environmental Protection Agency, et al.
Docket No. 16-299

Argument Date: October 11, 2017
From: The Sixth Circuit

by Amy Kullenberg
Ann Arbor, MI

ISSUE

Does the court of appeals have original jurisdiction under 33 U.S.C. § 1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act?

FACTS

Whether and when the Clean Water Act (CWA) applies to a given situation has been the subject of copious litigation. For example, *Rapanos v. United States,* 547 U.S. 715 (2006), addressed in great detail the meaning of the phrases "navigable waters" and "the waters of the United States" for purposes of determining what types of activities the CWA governs.

Following *Rapanos,* the Environmental Protection Agency (EPA) and the Department of the Army (on behalf of the Army Corps of Engineers, which partners with EPA to administer Clean Water Act permitting programs) engaged in rulemaking to develop a revised definition of the statutory term "waters of the United States" (WOTUS).

The proposed WOTUS Rule was initially published in April of 2014 (79 Fed. Reg. 22,188, April 21, 2014) but, following extensive political debate and controversy, was ultimately changed and reissued 14 months later as the Final Clean Water Rule: Definition of "Waters of the United States" (80 Fed. Reg. 37,054, June 29, 2015).

Hordes of suits challenging the Final WOTUS Rule were quickly filed in various federal district courts under the Administrative Procedures Act (APA)(5 U.S.C. § 500 *et seq.*). These suits challenged the WOTUS Rule from a multitude of perspectives—business and industry, state governments, and environmental advocates included. However, some litigants *also* filed "protective" suits challenging the Final WOTUS Rule in federal *circuit* courts, as well, invoking 33 U.S.C. § 1369(b)(1), which grants the circuit courts original and exclusive jurisdiction in specific situations. These various circuit court actions (from the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits) were consolidated in the U.S. Court of Appeals for the Sixth Circuit by the Judicial Panel on Multi-District Litigation. However, the various district court suits, which had been (or would later be) filed, were *not* consolidated, leading to a chaotic situation where multiple district court suits were proceeding concurrently with the consolidated litigation in the Sixth Circuit.

The National Association of Manufacturers (NAM), petitioner in the current case before the Supreme Court, had joined in a coalition suit challenging the WOTUS Rule in federal *district court* under the APA; however, NAM purposefully did not join its coalition members in filing a protective suit in federal *circuit court* under Section 1369(b)(1). Instead, NAM successfully motioned to intervene in the Sixth Circuit consolidated action and then filed a motion to dismiss the circuit court actions based on lack of subject-matter jurisdiction. Many other litigants supported the dismissal of the circuit court actions, including several strange-bedfellow

environmental organizations who had themselves taken this same two-pronged approach of filing suits in both district and circuit courts simultaneously.

The WOTUS Rule became effective on August 28, 2015; however, the Sixth Circuit issued a nationwide stay of the WOTUS Rule on October 9, 2015, pending resolution of the jurisdictional question.

In briefing and in oral argument, the parties agreed that there were only two possible bases for circuit court jurisdiction under Section 1369(b)(1): Sections 1369(b)(1)(E) or 1369(b)(1)(F).

After oral argument (held December 8, 2015) and considerable briefing, the Sixth Circuit issued its opinion on February 22, 2016, holding that the circuit court did have jurisdiction under Section 1369(b)(1)(F). See *In re* United States Department of Defense and United States Environmental Protection Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), 817 F. 3d 261 (2016), rehearing *en banc* denied April 21, 2016.

Although the Sixth Circuit held that the circuit courts do have jurisdiction to hear the various challenges to the WOTUS Rule, the three judges on the panel disagreed in their reasoning. Judge David McKeague found that circuit court jurisdiction existed under both Sections 1369(b)(1)(E) and 1369(b)(1)(F). Judge Richard Allen Griffin found that the criteria for circuit court jurisdiction under Section 1369(b)(1)(E) had *not* been met, but that, under the binding Sixth Circuit precedent of *National Cotton Council of America v. U.S. E.P.A.,* 553 F.3d 927 (6th Cir. 2009), he was compelled to concur in Judge McKeague's determination that circuit court jurisdiction was warranted under Section 1369(b)(1)(F). Judge Damon Keith, writing in dissent, found that neither (E) nor (F) conferred jurisdiction, agreeing with Judge Griffin's analysis regarding (E) but stating that *National Cotton* was misinterpreted by Judge Griffin and therefore not binding in the present situation.

On July 1, 2016, Justice Elena Kagan extended the time to file petitions for *certiorari* to September 2, 2016; *certiorari* was granted on January 13, 2017. Although the Sixth Circuit had found jurisdiction under only Section 1369(b)(1)(F), the parties briefed jurisdiction under both Sections 1369(b)(1)(E) and 1369(b)(1)(F); therefore, the issue currently on appeal is whether either sub-section of Section 1369(b)(1) provides the circuit courts with jurisdiction to hear challenges to the WOTUS Rule.

CASE ANALYSIS

Section 1369(b)(1) identifies seven particular types of EPA actions that are directly reviewable in the United States Courts of Appeals: Sections 1369(b)(1)(A)–(G). This jurisdiction is treated as both original and exclusive. *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326 (2013). Challenges to other types of agency action not specifically enumerated in Section 1369(b)(1) are typically brought in district court under the APA and may be brought within six years of the challenged agency action. 5 U.S.C. § 702, 5 U.S.C. § 704, 28 U.S.C. § 2401(a).

Of these seven categories delineated in Section 1369(b)(1), only two are relevant here: Sections 1369(b)(1)(E) and 1369(b)(1)(F).

33 U.S.C. § 1369(b)(1)(E) provides:

> "Review of Administrator's action…(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title… may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day."

33 U.S.C. § 1369(b)(1)(F) provides:

> "Review of the Administrator's action….(F) in issuing or denying any permit under section 1342 of this title… may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day."

The parties all acknowledge Section 1369(b)(1)'s 120-day application deadline as the impetus for the two-pronged filing approach taken by the majority of the litigants in these challenges. As the case law interpreting Section 1369(b)(1) contains some ambiguity, no party wanted to be in the unfortunate position of having filed a challenge to the WOTUS Rule in the wrong forum.

The jurisdiction conferred under Section 1369(b)(1)(E) is tied to the "effluent limitation" provisions found in 33 U.S.C. § 1311, § 1312, § 1316, and § 1345, which are commonly known as the "water quality" and "point source" provisions.

The jurisdiction conferred under Section 1369(b)(1)(F) is tied to the permitting processes described in 33 U.S.C. § 1342 (commonly known as the National Pollutant Discharge Elimination System (NPDES) program).

Although neither Section 1369(b)(1)(E) nor Section 1369(b)(1)(F) specifically identifies the *promulgation of a rule* as a basis for conferring circuit court jurisdiction, both invoke other statutory sections of the CWA, which, in turn, rely upon definitions of "navigable waters" and "waters of the United States." Thus, one of the primary disputes in this case is whether to treat the statutory language found in Section 1369(b)(1)(E) and (F) on its "plain face," or whether to interpret this language in a larger context.

Petitioner NAM argues that circuit court jurisdiction cannot lie under either (E) or (F) because, under a plain-language reading, the mere *promulgation of a rule* does not *approve or promulgate a limitation* under Sections 1311, 1312, 1316, or 1345, nor does it *issue or deny a permit* under Section 1342. NAM argues that the seven

specific situations delineated in Section 1369(b)(1) should be treated as narrow exceptions to the general rule that judicial review of agency action begins in district court. NAM advocates for a close and restrained reading of Section 1369(b)(1), to preserve Congressional intent for limited direct circuit court review, provide jurisdictional clarity, and promote the benefits of multilateral judicial review in the district and circuit courts. NAM acknowledges that the WOTUS Rule applies to the scope of the CWA as a whole; however, NAM insists that the WOTUS Rule itself is not self-executing and must be applied in conjunction with some other portion(s) of the CWA. Therefore, the WOTUS Rule, on its own, cannot be properly classified—for jurisdictional purposes—as either a "limitation" or a "permit."

The Federal Governmental Agency Respondents (the respondents) submit that federal circuit court jurisdiction applies in this case under both Section 1369(b)(1)(E) and Section 1369(b)(1)(F).

Regarding Section 1369(b)(1)(E), the respondents claim the WOTUS Rule was promulgated specifically with Sections 1311, 1312, 1316, and 1345 criteria in mind and that these sections cannot be implemented without reference to the definition of "navigable waters" provided by the WOTUS Rule. Therefore, the WOTUS Rule is a general parameter that guides the implementation of these specific discharge provisions and, therefore, constitutes the imposition of a type of "other limitation," which can be challenged directly in the federal circuit courts. Furthermore, respondents maintain that the use of the word "any" in Section 1369(b)(1)(E) indicates Congressional intent to interpret the phrase "other limitation" broadly and that, where Congress has authorized direct court of appeals review of federal agency action, ambiguities as to the scope of that authorization should be resolved in favor of broader circuit court coverage.

Regarding Section 1369(b)(1)(F), the respondents acknowledge that promulgation of the WOTUS Rule is distinct from the issuance or denial of a particular permit. However, respondents submit that the WOTUS Rule governs the scope of the entire CWA and therefore controls whether a permit is required in the first instance. Relying on *Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193 (1980), for the proposition that actions that are "functionally similar" to the denial of a permit may be reviewed in circuit courts, the respondents here argue that since no permit can be issued or denied without reference to the WOTUS Rule, all challenges to the WOTUS Rule should be resolved comprehensively in the consolidated circuit court action, rather than piecemeal in disparate district court actions.

A consortium of nonprofit advocacy groups representing agricultural and commercial interests filed a respondent's brief in support of petitioners (the Agrowstar respondents). The Agrowstar respondents advocate for a "plain meaning" approach to statutory interpretation and deny that any Supreme Court precedent has, to date, authorized a departure from this plain-meaning approach. In *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112 (1977), the Court decided that the EPA's promulgation of industrywide regulations setting effluent limitations on both new and existing chemical manufacturers was cognizable in the federal circuit courts under Section 1369(b)(1)(E). The Agrowstar respondents seek to distinguish this ruling from the present facts by contrasting regulations that set effluent standards from rules that merely provide definitional scope. In *Crown Simpson,* the EPA had delegated NPDES permitting authority to California but retained and exercised the power to veto any permit that the EPA determined had been improperly issued. On direct challenge to the Ninth Circuit, the case was dismissed for lack of jurisdiction under both Section 1369(b)(1)(E) and (F). However, the Supreme Court held that the EPA's veto was so "functionally similar" to a permit denial that jurisdiction under Section 1369(b)(1)(F) was cognizable. The Agrowstar respondents distinguish *Crown Simpson* on the basis that the EPA's action in promulgating the WOTUS has not yet affected the issuance or denial of any actual permit.

In support of petitioner NAM, the Chamber of Commerce of the United States of America and several other business-related groups (the Chamber) filed an amicus brief. The Chamber argues that time-honored canons of statutory construction—such as *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other)—mandate that the seven specific provisions enumerated in Section 1369(b)(1) should be narrowly read and that suits challenging agency action should remain in district court unless one of the express provisions of Section 1369(b)(1) can be met.

Thirty states filed a brief as respondents in support of petitioner. The states echo the plain-language arguments provided by Agrowstar and the Chamber of Commerce concerning both Sections 1369(b)(1)(E) and (F). The states also advocate for a bright-line rule which easily distinguishes between cases that must be heard first in the federal district courts and those that may proceed directly to circuit court review. The states argue that courts and litigants alike would benefit from clear rules that would easily identify the proper forum in the first instance. The states warn that if Section 1369(b)(1) is interpreted in the manner proposed by the federal agencies, then there will be no end to confusing litigation, as exemplified by this case—where nearly all of the more than 100 litigants filed suits in both the federal district and the federal circuit courts simultaneously. Finally, the states suggest that the federal district courts provide the superior forum, in most instances, for the initial review of agency action and that the decision making in the circuit courts necessarily improves as competing perspectives percolate upward through the district court system.

The Utility Water Act Group (UWAG) filed a respondent's brief in support of petitioner NAM, on behalf of a group of individual electric utilities and trade associations representing electric utilities. UWAG addresses harm that could be suffered by potentially regulated parties, if the WOTUS rule were to be categorized as eligible for direct circuit court review under Section 1369(b)(1). Specifically, UWAG cites the 120-day filing period (for applications to circuit court review under Section 1369(b)(1)) and contrasts this with the six-year filing period allowed for review in the federal district courts under the APA. UWAG argues that as circuit court jurisdiction under Section 1369(b)(1) is both original and exclusive, parties who may be regulated under WOTUS could unknowingly forfeit their right to judicial review of the Rule.

Perhaps the most interesting brief yet filed in support of petitioner NAM is by a consortium of respondent environmental groups, including Waterkeeper Alliance and the Sierra Club (the

Waterkeeper group). The Waterkeeper group of respondents had, like many others, filed petitions objecting to the WOTUS Rule in both federal district and federal circuit court, seeking to preserve their ability to go forward in the appropriate forum, once that forum was determined by this litigation. However, while the Waterkeeper group and NAM challenge the substance of the WOTUS Rule itself on completely different grounds, the Waterkeeper group joins with NAM in locating review of the WOTUS Rule in the district courts. The Waterkeeper group discourages an interpretation of Section 1369(b)(1)(E) that would allow the WOTUS Rule to be treated as an "other limitation" under Sections 1311, 1312, 1316, or 1345. The group states that the WOTUS was promulgated pursuant to 33 U.S.C. §1361(a), which provides the EPA with its general rulemaking authority under the CWA and that Congress did not intend that rulemaking under Section 1361 could invoke direct circuit court jurisdiction under Section 1369(b)(1). Furthermore, the Waterkeeper group denies that jurisdiction applies under Section 1369(b)(1)(F), insisting that the promulgation of a rule does not constitute action taken on a permit under the NPDES. The group rejects the respondents' "functionally similar" definitional scope argument, stating that Section 1369(b)(1)(F) references only Section 1342 and excludes Section 1362(7), which defines the term "navigable waters" as "the waters of the United States." The Waterkeeper group also cites legislative history showing that various options for expanding circuit court jurisdiction under Section 1369(b)(1) (including adding a "catch-all" provision for any "final action taken" by the Administrator) had been proposed and debated but never implemented by Congress.

As yet, only one brief, by the Natural Resources Defense Council and the National Wildlife Federation (NRDC), has been filed in support of the government respondents. NRDC supports both the Sixth Circuit result below and the result requested by the government respondents (EPA and Corps) in the current phase of litigation. NRDC criticizes NAM's position as internally inconsistent—at the district court level NAM alleges sufficient harm to warrant a lawsuit; however, at the circuit court level NAM alleges that the WOTUS Rule is not a limitation within the court's jurisdiction and has no direct effects on regulated entities at all. NRDC submits that the very arguments which NAM makes now to deny circuit court jurisdiction under Section 1369(b)(1) critically compromise the ability of NAM's simultaneous claims to be decided in the federal district court.

SIGNIFICANCE

This case is significant in two respects. First, it provides the Supreme Court with an opportunity to modify important precedent in this area. Second, the case will influence how the Clean Water Act is implemented going forward.

Regarding the first point, the outcome in the Sixth Circuit relied heavily on *National Cotton Council of America v. EPA,* 553 F.3d 927 (6th Cir. 2009). The Sixth Circuit's decision was, effectively, a 1–1–1 split. Judge McKeague found circuit court jurisdiction under both Sections 1369(b)(1)(E) and 1369(b)(1)(F). Judge Griffin rejected circuit court jurisdiction under Section 1369(b)(1)(E) but begrudgingly acknowledged *National Cotton* as binding Sixth Circuit precedent and agreed that, under *National Cotton*, circuit court jurisdiction applied under Section 1369(b)(1)(F). In *National Cotton,* the Sixth Circuit held that Section 1369(b)(1)(F) authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits. Under this rubric, challenges to the WOTUS Rule are eligible for direct circuit court review, because the WOTUS Rule determines where the CWA applies for permitting purposes. Although he acknowledged *National Cotton* as binding Sixth Circuit precedent, Judge Griffin steadfastly characterized *National Cotton* as wrongly decided, and he not-so-obliquely invites the Supreme Court to weigh in. Whether the *National Cotton* rule stands or falls may determine the fate of the actual WOTUS Rule being challenged here. This, in turn, will affect how the Clean Water Act applies to various activities in the real world.

Secondly, the determination of which court—federal circuit or federal district—has jurisdiction to resolve the current challenges to the WOTUS Rule will have a very practical influence on how quickly and effectively Clean Water Act rules and regulations can be implemented in the future. Although challenges to environmental regulation are typically complex, the litigious weight of this case is extremely noteworthy. More than 100 different entities have filed more than two dozen different actions challenging the WOTUS Rule, on several and various grounds, in a multitude of different forums. At best, a determination on the merits of these challenges will not be made for months, if not years. A finding that jurisdiction for these challenges lies first with the district courts will necessarily add a layer of litigation and extend the time required for a final determination on the merits. A finding that jurisdiction lies with the Sixth Circuit should condense this time-frame considerably but may eclipse some opportunity for diverse and thorough advocacy. Either disposition will influence how the EPA and the Corps go forward with managing the practical implementation of the CWA.

CONCLUSION

Geography is a shadow advocate in this case. Neither the federal circuit court nor the federal district court boundaries correspond with watershed delineations, and there is a tension in this case between the desire for local control and the desire for region-wide water policy.

All parties obliquely admit some preference for litigation in the district courts on CWA and environmental matters, as these courts are more closely situated with respect to local political pressure and to the realities of watershed hydrology. On the other hand, circuit-wide rulings are easier to manage, by both the regulator and the regulated party. This tension has contributed to the litigation strategies employed by all sides and may influence the Court's decision in some fashion.

The fact that the current administration has issued an *Intention to Review and Rescind or Revise the Clean Water Rule* (82 Fed. Reg. 12,532, March 6, 2017) and a newly proposed Rule defining the "Waters of the United States" (82 Fed. Reg. 34,899, July 27, 2017) is also notable, in terms of CWA efficacy. The Trump Administration had requested the Court place a hold on the current litigation to allow it an opportunity to review and revise the WOTUS Rule. This request was summarily denied by the Court. This may signal that the Court, once again fully constituted, is prepared to take the reins with regard to Clean Water Act jurisprudence.

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PREVIEW of United States Supreme Court Cases, pages 36–40.

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AMICUS BRIEFS

In Support of Petitioner

Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association (William S. Consovoy, 703.243.9423)

Respondents in Support of Petitioner

Agrowstar, LLC; American Exploration & Mining Association; California Cattlemen's Association; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.; Hawkes Company, Inc.; LPF Properties, LLC; New Mexico Cattlegrowers Association; New Mexico Federal Lands Council; New Mexico Wool Growers, Inc.; Oregon Cattlemen's Association; Pierce Investment Company; R. W. Griffin Feed, Seed & Fertilizer, Inc.; Southeastern Legal Foundation, Inc.; and Washington Cattlemen's Association (M. Reed Hopper, 916.419.7111)

State Respondents Ohio, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, the New Mexico State Engineer, the New Mexico Environment Department, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming (Eric E. Murphy, 614.466.8980)

Utility Water Act Group (Kristy A. Niehaus Bulleit, 202.955.1500)

Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., Turtle Island Restoration Network, Inc., Sierra Club; and Puget Soundkeeper Alliance (Allison M. LaPlante, 503.768.6894)

In Support of Affirmance

Natural Resources Defense Council and National Wildlife Federation (Eric F. Citron, 202.362.0636)

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IMMIGRATION LAW
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IMMIGRATION LAW
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ENVIRONMENTAL LAW
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