RECENT DEVELOPMENTS IN KANSAS
CONTRACT LAW & PROPERTY LAW

By

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I. CONTRACT LAW DEVELOPMENTS


1. The essence of this case is whether “at the well” means something other than “at the well.”

2. The oil and gas leases provided the lessor would be paid a royalty based upon “1/8 of the proceeds from the sale of gas as such *at the mouth of the well*.” Other leases provided for payment of “one-eighth (1/8) of the proceeds if sold *at the well*.” Id. at 354, 352 P.3d at 1036.

3. The lessee, Oil Producers, Inc. of Kansas (OPIK), sold the gas – at the well – to various midstream purchasers that were in the business of buying gas from producers and then enhancing its value by transporting, treating, and processing the gas. The purchasers would then sell the resulting residue gas and liquid products at points downstream from the lessee’s production operations (not “at the well” but at points far removed from the well).

   a. The gas sales contract had a formula pricing provision that began with the downstream sales proceeds, subtracted specified charges made by the purchaser to transport, treat, and process the gas, and then paid the balance to the lessee.

   b. The lessee then used the amount it received from its purchaser to calculate the lessor’s royalty.
c. The lessor’s 1/8\textsuperscript{th} royalty was based upon the exact amount used to determine the lessee’s 7/8ths share: the “proceeds” from the sale paid by the purchaser.

4. The ultimate goal of the lessor plaintiff was to obtain a royalty equal to 1/8\textsuperscript{th} of the enhanced values obtained by OPIK’s purchasers, without any reduction to reflect what it cost to obtain the enhanced downstream values.

a. The lessor wanted a royalty based upon 1/8\textsuperscript{th} of the value of gas and gas products far removed from the wellhead.

b. The lessee paid royalty based upon 1/8\textsuperscript{th} of what it actually received under its gas sales contract with the gas purchaser.

5. The lessor sought to invoke the implied covenant to market to support its argument the lessee had a duty to produce a “marketable product.” The lessor contended that a “marketable product” could not exist until the gas was transported, treated, processed, and the residue gas and refined products taken to their respective downstream markets and sold.

a. Under the lessor’s theory a marketable product could not be created “at the well” because the gas “at the well” was not in a condition acceptable for sale to an interstate pipeline.

b. The effect of the lessor’s theory is to impose on the lessee a duty to market gas at locations far removed from the leased land and the “at the well” location.

6. The Court resolves the dispute by focusing on the terms of the governing contract: the oil and gas lease.

a. The implied covenant to market does not change the geographical point (the location) where the lessee can seek a market for its gas.

b. The terms of the lease identify the location where the lessee can seek a market for its gas; in this case “at the well.”
c. “OPIK satisfied its duty to market the gas when the gas was sold at the wellhead.” *Id.* at 365, 352 P.3d at 1042.

d. “We hold that when a lease provides for royalties based on a share of proceeds from the sale of gas at the well, and the gas is sold at the well, the operator’s duty to bear the expense of making the gas marketable does not, as a matter of law, extend beyond that geographical point to post-sale expenses.”

e. “At the well” does not mean some downstream location away from the well, nor does it mean at the interstate pipeline the well may ultimately be connected to through a pipeline network.

f. “At the well,” remarkably, means “at the well.”


1. Grazing contracts provided:

“GRAZER’S DUTIES: Grazer shall provide adequate grass and water for Owner’s cattle as nature shall provide. Grazer shall provide feed and mineral to Owner’s cattle according to the seasonal, nutritional needs of Owner’s livestock. Grazer shall send a copy of the monthly pasture log to Owner with the monthly billing.

Grazer agrees to routinely monitor the condition of Owner’s cattle and provide prudent veterinary care when necessary. Grazer agrees to maintain reasonable vigilance over Owner’s cattle and manage the grazing of said cattle so as to optimize the quality of grass available to them.”

2. Owner of cattle tendered them to Grazer under grazing contracts.

a. Owner alleged Grazer failed to care for Owner’s cattle resulting in a failure to breed, deteriorated body condition, bulls that died or were so deteriorated they
had to be sold for salvage, and stocker cattle that failed to gain the expected weight.

b. These losses were allegedly due to the Grazer’s failure to adequately feed, care for, and supervise the Owner’s cattle.

c. Owner sued for breach of contract.

3. Trial court awarded owner $240,416.90 in damages; Court of Appeals generally affirmed the finding of a breach and the award of damages but remanded for correction of errors in damage calculations. Both parties sought review.

4. The court notes these are “agistment contracts, the main object of which ‘is the furnishing of pasture land on which the cattle might graze and gain weight.’” Id. at 105, 349 P.3d at 1274.

5. Grazer’s defense: He was only obligated under the contract to provide “adequate grass and water for Owner’s cattle as nature shall provide.”

a. The Court rejected this argument noting the contracts expressly required the Grazer to provide “feed and mineral,” “prudent veterinary care,” “monitor” the health of the animals, and manage grazing “so as to optimize the quality of grass available . . . .”

b. The Court concluded these were duties “above and beyond simply allowing the cattle to forage for what they could find on Ferrell’s ranch.” Id. at 105, 349 P.3d at 1275.

6. Absent a contract on the matter, Kansas law is that:

“[A]n agistor is bound to exercise ordinary diligence in keeping, feeding, sheltering, and otherwise caring for animals committed to his custody, and is liable for loss or injury to the animals resulting from his breach of such duty; exercise of ordinary care satisfies the agistor’s obligations, he is not an insurer; and he may not be held responsible for loss or damage occurring without his fault.” Id. at 105, 349 P.3d at 1274.
7. Here there was a contract that the Court held was breached by the Grazer resulting in damages to the cattle Owner.

8. This case presented the Court with interesting damages issues. Three forms of damages were involved.

   a. The goal: “put the nonbreaching party in the position he or she would have been in had the breach never occurred.” *Id.* at 106, 349 P.3d at 1275.

   b. Measure of damages for loss in bred cows.

      (1) Normal conception rate: 92%. Using this percentage the Owner was awarded damages based upon the extent to which the conception rate was below 92%.

         (a) The number of cows represented by the percentage difference were multiplied by $600 which was the difference in value between an open cow and a bred cow.

         (b) For example, in a herd of 100 cows 92 should conceive. If only 60 in fact conceived, then damages would be 32 x $600 = $19,200.

      (2) The Owner also asserted he should be awarded damages for the value of the “lost crop” of calves (the never-conceived calves).

         (a) The Court of Appeals held (and the Supreme Court agreed) this would be putting the Owner in a better position than if the Grazer had not breached the contract.

         (b) The Court of Appeals observed that the Owner: “‘could never utilize the value of both bred cows and their calves because those things do not exist simultaneously.’” *Id.* at 108, 349 P.3d at 1276.
(c) The Supreme Court adopted this reasoning noting: “the difference in market value between a bred cow and an open cow is effectively the value of a market calf after applying a discount rate comprised of the risk factors and cost inputs associated with taking a calf in utero through calving, weaning, and raising to market.” Id.

c. Measure of damages for rehabilitating body condition of cows and bulls.

(1) To rehabilitate a cow required a 200-pound weight gain and for a bull a 300-pound weight gain.

(2) The trial court awarded damages using an $0.80/pound of weight gain figure.

(3) Although there was evidence to support the weight gain figure, the court remanded the case to the trial court to determine if evidence had been submitted to support the $0.80/pound figure.

d. Measure of damages for lost (dead and salvaged) bulls.

(1) The measure of damages used was the cost of virgin 2-year old bulls.

(2) Testimony supported that only the value of a virgin bull would be appropriate due to the risk of the spread of venereal disease in herds of cattle. There was no market for “used bulls.”

(3) To put Owner in the position he would have been in had a breach not occurred (serviceable bulls ready for breeding), replacement costs measured by virgin bulls were appropriate.

1. Portfolio sued Dixon to recover unpaid credit card debt. Dixon answered asserting she owed nothing and also included a class-action counterclaim.

2. After the suit had been pending for over 2 years Portfolio moved to compel arbitration of the counterclaim pursuant to an arbitration clause in the credit card agreement.

3. The district court denied the motion holding Portfolio waived its right to arbitrate by engaging in litigation.

4. The arbitration clause expressly authorized electing to arbitrate a claim “even if the Claim is part of a lawsuit . . . .”

   a. The arbitration clause stated: “The arbitration of any Claim must proceed on an individual basis, even if the Claim has been asserted in a court as a class action . . . .”

   b. The arbitration clause precluded waiver stating: “If you or we do not elect arbitration or otherwise enforce this Arbitration Provision in connection with any particular Claim, you or we will not waive any rights to required arbitration in connection with that or any other Claim.” *Id.* at 368, 366 P.3d at 249.

5. The court noted that the obligation to arbitrate is a matter of contract. However, once a right to arbitrate is established, the Federal Arbitration Act preempts state law concerning the enforcement of arbitration agreements involving interstate commerce. *Id.* at 370, 366 P.3d at 250.

6. Federal law provides that waiver of arbitration issues must be resolved by the arbitrator. *Id.*

7. Because the district court failed to determine whether the arbitration provision of the credit card agreement was binding on the parties, the court remanded the case to the district court. If the court concludes the parties are bound
by the arbitration provision, then the district court must allow the arbitrator to address the waiver and similar issues “about the meaning and application of particular procedural preconditions for the use of arbitration.”" Id.


1. The parties entered into a software licensing agreement with related services. A dispute arose over the number of authorized software users and the software purchaser brought suit.

2. A clause in the contract stated: "[I]f any dispute arises with respect to the subject matter of this Agreement . . . the parties shall first attempt to reach a mutually satisfactory resolution. If the parties are unable to resolve the dispute, each of the parties shall have a period of thirty (30) days to select a mediator which shall each have [sic] an additional period of thirty (30) to select a third mediator (the “Mediator”) to mediate the dispute. . . ."

3. The court is addressing a motion to dismiss the lawsuit because the parties failed to first pursue mediation.

4. The court concluded the contract contemplated mediation and the parties did not comply with the provision.

5. Because there was no entity to direct the mediation provisions, it became muddled regarding the posturing of the parties and their reluctance to participate in the process. This is one of the weaknesses of pre-suit mediation.

6. The court concludes, under the circumstances, the appropriate remedy is not to dismiss the lawsuit but rather to stay the lawsuit so the parties can pursue mediation.
II. PROPERTY LAW DEVELOPMENTS


1. In 1993 Keith and Sue deeded land where they resided to Polly (Sue’s daughter from a former marriage) because they were worried about it being claimed by the IRS or Keith’s ex-wife. Polly promptly recorded the deed. Keith and Sue remained on the land, paid the real estate taxes, and used and maintained the land. Keith and Sue divorced in 2006. Keith died in 2009.

2. In 2009 Keith’s daughter, Suzann Elliott, took possession of the land, maintained it, and paid taxes on it.

   a. The Court’s opinion indicates: “In April 2010, Suzann filed a caveat affidavit claiming ownership of the disputed tract through Keith’s adverse possession.”

   b. THIS WAS NOT PART OF THE CASE, BUT WORTH NOTING: K.S.A. §58-2254 states:

58-2254. Time for bringing actions to enforce claims and liens filed in register of deed’s office; exception. Except as provided further, whenever any person files in the office of register of deeds any affidavit, caveat or statement of any kind, signed by or on behalf of the claimant only, whether acknowledged or not, purporting to set forth any claim against, interest in or lien upon any real property belonging to another, if not based on a written instrument signed by the party to be charged, such claim, interest or lien shall, after expiration of 30 days from date of filing the same, no longer constitute any claim against, interest in or lien upon such real property, unless, within such time, the claimant shall begin an action in a court of competent jurisdiction to enforce such claim. This section shall not apply to such affidavit, caveat or statement which is a notice of nonpayment of dues or assessment filed by a residential subdivision.
homeowners' association pursuant to a previously recorded homeowners' association declaration that authorizes the filing of such notice and states a time limitation within which an action must be brought to foreclose the lien of the unpaid dues or assessment referenced in the notice.

History: L. 1935, ch. 244, § 1; L. 1992, ch. 122, § 1; July 1.

(1) If this really means what it appears to say, the moment Suzann filed the affidavit she created a new, self-imposed, 30-day statute of limitations to file a lawsuit to establish her rights to the property by adverse possession.

(2) It was not an issue in this case because Polly Ruhland filed suit to declare ownership to the land.

(3) Note, however, how this statute could eliminate the very claim the party filing the affidavit is seeking to preserve – by not following it up with a lawsuit within the new 30-day statute of limitations.

3. Later in 2010 Polly brought an interpleader action to determine whether she or Suzann owned the land.

4. The trial court held for Suzann, concluding Keith had obtained title to the land against Polly by adverse possession. On appeal the Court of Appeals held Polly owned the land because Keith’s possession had been permissive and not adverse.

5. The “adverse possession” statute, K.S.A. § 60-503, provides:

“No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years.”
a. Claimant must establish each element by clear and convincing evidence (facts as alleged are highly probable). No inference will operate in claimant’s favor.

b. Must rely on the strength of his or her own title, not any weakness in the adversary’s title.

c. “Parsing the elements in K.S.A. 60-503, it requires a party claiming ownership by adverse possession to have:

(1) possessed the property for a period of 15 years in a manner

(2) that is (a) open, (b) exclusive, and (c) continuous; and

(3) that is either (a) under a claim knowingly adverse or (b) under a belief of ownership.” Id. at 411, 353 P.3d at 1129.

d. Here the claim was based solely on Keith’s “knowingly adverse” possession and not “under a belief of ownership.” In hindsight, that was probably a bad idea.

e. No dispute that Keith’s possession was for “15 years” and “open” and “continuous.” The case focused on whether the possession was “exclusive” and “under a claim knowingly adverse.”

(1) Because the Court held Keith’s possession was not adverse, it did not address, or need to address, the “exclusive” element.

(2) The facts suggest Keith met the exclusive element in any event. The only person who shared the land with him was his wife until they divorced. Keith lived on the land from 1988 until his death in 2009.
f. An issue the Court did not have to address is whether the Dotson Doctrine must be applied to the “belief of ownership” basis for adverse possession.

(1) The permissive basis for the Doctrine suggests it may not.

(2) At the time the Doctrine was created, in 1910, Kansas did not recognize “belief of ownership” as an independent basis for adverse possession; that occurred in 1964 when the statute was amended.

6. Defining what is required to have a claim “knowingly adverse.”

a. The claimant’s possession must be “hostile” to the claim of the true owner.

b. “‘Hostile’ in this sense refers not to animosity, but merely to the fact that the possessor is knowingly claiming adversely to the title of the true owner.” Id. at 412, 353 P.3d at 1130.

c. “Correspondingly, we have consistently held that ‘[u]se by the owner’s permission will not ripen into adverse possession no matter how long [the land is] used.’” Id.

7. “This rule that possession by permission is never adverse within the meaning of K.S.A. 60-503 applies with special force when a grantor of land later attempts to reclaim title from the grantee via adverse possession.” Id.

a. This is the foundation of the Dotson Doctrine that arose from the holding in Dotson v. Railway Co., 81 Kan. 816, 106 P. 1045 (1910).

b. In Dotson the Court held:

“The possession of a grantor of land is not considered to be adverse to a grantee who has been vested with the entire title to the premises, and can not be so regarded until the grantor explicitly renounces the
title of his grantee or positively asserts a hostile claim of title in himself, which is brought to the attention of the grantee.” *Id.*

c. The doctrine creates a presumption that continuing possession by the grantor is with the permission of the grantee.

d. The presumption can be overcome only by “‘strong, clear evidence of a purpose to claim adversely to the grantee.’ Specifically, there must be evidence the grantor ‘explicitly renounces’ the title of the grantee by positively asserting ‘a hostile claim of title in himself, which is brought to the attention of the grantee.” *Id.* at 413, 353 P.3d at 1130.

e. The Court disapproved of a contrary position taken in *Freeman v. Funk*, 85 Kan. 473, 117 P. 1024 (1911), decided one year after *Dotson*.

f. The district court improperly placed the burden on the grantee to demonstrate the grantor’s possession was permissive.

(1) Instead, the court should have put the burden on the grantor to present evidence to overcome the *Dotson* Doctrine presumption that the grantor’s possession was permissive.

(2) Suzann, the claimant through Keith the grantor, offered no evidence that Keith explicitly renounced Polly’s title, claimed title adversely to Polly, and brought this to her attention.

8. The Court held Keith’s continuing possession of the land, from 1993 to 2009, was permissive and under the *Dotson* Doctrine no proof was offered to overcome the presumption of permissive use. Therefore, Keith’s possession had no effect on Suzann’s title.

1. This case demonstrates how the Court applies K.S.A. § 26-513 to a partial taking of agricultural land that is primarily valuable for future real estate development.

2. Affirming the jury award the Court explores, in detail, the evidence used to establish the development value of undeveloped agricultural land.


   1. The primary problem in this case is Hackett, a lawyer, represented the decedent in radically altering his estate plan to disinherit his children and benefit his third wife and her daughter who was romantically involved with Hackett.

   2. The district court felt that the underlying facts created the requisite suspicious circumstances to establish undue influence.

   3. The Court of Appeals disagreed but the Supreme Court held the Court of Appeals improperly reweighed evidence that was before the district court.


   1. 2010: Richard granted his home to Charles Sheils, his brother, using a transfer-on-death deed that was properly recorded.

   2. 2013: Richard signed a quitclaim deed for the same property granting it to himself and his nephew, Kevin Wright, as joint tenants with right of survivorship.

      a. The quitclaim deed was delivered to Richard’s attorney with directions to give it to Kevin at Richard’s death.

      b. Richard died on September 6, 2013 and the deed to Kevin was recorded on September 20, 2013.

4. District Court: held “because Richard had not revoked the transfer-on-death deed, the property became Charles’ on Richard’s death.”

5. Court of Appeals: reversed the district court because Charles takes the property “subject to all conveyances . . . made by the record owner . . . during [his] lifetime.” K.S.A. § 59-3504(b).

6. “The district court correctly ruled that the transfer-on-death deed had not been revoked. This is so even though Richard put a provision into the quitclaim deed saying that it revoked the transfer-on-death deed. Transfer-on-death deeds are authorized by statute, and they may be created – or terminated – only as provided by statute.” Id. at 816, 357 P.3d at 295.

   a. “The revocation of a transfer-on-death deed requires that the revocation be recorded with the register of deeds during the owner’s lifetime.” Id. K.S.A. § 59-3503(a).

   b. Since the quitclaim deed was not recorded prior to Richard’s death, the transfer-on-death deed remained in effect – but, what was that effect?

7. Even after a transfer-on-death deed is made the grantor has the continuing power to transfer the property to others without the consent or knowledge of the transfer-on-death deed grantee. This is stated in § 59-3504(b) as follows:

   “Grantee beneficiaries of a transfer-on-death deed take the record owner’s interest in the real estate at death subject to all conveyances, assignments, contracts, mortgages, liens and security pledges made by the record owner or to which the record owner was subject during the record owner’s lifetime including, but not limited to, any executory contract of sale, option to purchase, lease, license, easement, mortgage, deed of trust or lien, claims of the state of Kansas for medical assistance . . . , and to any interest conveyed by the record owner that is less than all of the record owner’s interest in the property.” (Emphasis by the court). Id. at 817, 357 P.3d at 296.
8. Charles would take whatever was left following the conveyance to Kevin. Because Richard died before Kevin, the joint tenancy grant meant there was nothing remaining for Charles to take under the transfer-on-death deed.


1. In January 1945 A obtained land burdened by an oil and gas lease. In April 1945 A sold the land to B with A excepting a one-half mineral interest for 20 years “or as long thereafter as oil, gas or other minerals is produced therefrom.”

   a. The lessee unitized the land with other lands, but at no time was a well physically located on the A/B land. No production was obtained from the land until 2009 when OXY USA, Inc. completed a well on the land as successor to the lease and unitized area.

   b. OXY brought an interpleader action to determine the rights to production from the land as between the successors to A and B.

2. The court concluded that under the applicable rule regarding the production required to perpetuate A’s one-half mineral interest, A’s interest terminated in 1972.

3. It was next argued by A that its interest continued in effect because B failed to take prompt action to assert its rights following termination of A’s defeasible interest.

   a. The trial court held that because A’s interest terminated in 1972, and B failed to do anything to assert its fee simple ownership, A’s interest continued in effect applying a 15-year statute of limitations to determine adverse claims to real property and applying estoppel and waiver.

   b. The Court of Appeals rejected the trial court’s analysis noting that A’s interest terminated automatically and A failed to take any action that would alert B that A was making an adverse claim so as to cause the statute of limitations to begin running against B.
(1) A had a fee simple determinable that would automatically end with A’s rights springing to B.

(2) This was not a fee simple subject to a condition subsequent where the event terminating A’s interest would merely entitle B to take timely action to re-enter the property.

c. Although the court incorrectly characterized A and B as cotenants (after A’s interest terminated), it correctly concluded that under these circumstances A must do more than passively wait for production to occur over 30 years later. The “ouster” requirement applied to cotenants is an appropriate analogy that imposes on A the obligation to take affirmative and clear action that informs B that a cause of action has accrued against A.

4. The final argument A makes is that because the A to B conveyance was “subject to” an existing oil and gas lease that contained a pooling clause, A should have the benefit of the lease pooling clause to extend its defeasible term mineral interest. The court rejected this argument noting the Kansas Supreme Court had rejected a similar argument in *Netahla v. Netahla*, 346 P.3d 1079 (Kan. 2015).

5. An argument not raised in this case, that had the potential to perpetually vest the interest in A, was the rule against perpetuities.

a. First, note that the defeasible interest is being retained by the grantor A. This means when A’s interest terminates, the interest will leave the grantor A and vest in grantee B.

b. Although the court refers to B’s interest throughout its opinion as a “reversion” and “possibility of reverter” (the Kansas Supreme Court has done this too), it is neither.

(1) Because the future interest in created in the grantee, and not the grantor, the future interest held by B must be an “executory interest.”
(2) More precisely, since it will potentially spring out of the grantor at some future date, it is a “springing executory interest.”

(3) Unlike a reversion or possibility of reverter, executory interests are subject to the rule against perpetuities.

c. At the time the grant was made, it was possible that it could be extended by production from the land for a period that exceeded a life or lives in being plus 21 years and therefore violates the common law rule against perpetuities. In this case the interest did not vest in B until 27 years (April 1945 to June 10, 1972) after its creation.

d. Because Kansas did not adopt its version of the Uniform Statutory Rule Against Perpetuities until July 1, 1993, only the reformation provisions of K.S.A. 59-3405(b) could possibly be used to save this 1945 conveyance.

e. Even the reformation provisions of 59-3405(b) may not be available because at least one commentator has argued the Kansas Uniform Statutory Rule Against Perpetuities is void because it was the product of legislative log-rolling prohibited by Article 2, Section 16 of the Kansas Constitution. See David E. Pierce, Void Enactments of the Kansas Legislature, 80 J. KAN. B. ASSN. 28 (2011). I bet you didn’t see that one coming.
Defeasible Interest Problems
And Ways to Avoid Them

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I. INTRODUCTION

The problem with defeasible interests is they are defeasible; they terminate unless something happens. That “something” is often beyond the control of the defeasible interest owner.

The post-drafting issue is whether events have occurred, or have failed to occur, that cause the interest to terminate and vest in the future interest owner. The pre-drafting issue is to address the contingencies that can terminate the interest to ensure they reflect the intent of the parties.

II. DEFEASIBLE INTERESTS

The first issue is to determine whether you really have a defeasible interest. In Kansas, for example, the conveyance stating the contingency can be either a condition, covenant, or desire (“precatory” language). In Roberts v. Rhodes, 231 Kan. 74, 643 P.2d 116 (1982), the 1902 deed provided: Grantors “. . . quitclaim unto . . . [School District] their heirs and assigns, all of the [land] . . . it being understood that this grant is made only for school or cemetery purposes.” The court held this granted to the School District a fee simple absolute “when the land has been accepted and used by the grantee for school purposes for more than sixty years,” and there is no provision in the grant for reversion or other language of limitation. The court noted: “[T]he mere expression that property is to be used for a particular purpose will not in and of itself suffice to turn a fee simple into a determinable fee.”

Contrast the approach taken in Thompson v. Godfrey, 191 Kan. 102, 379 P.2d 269 (1963), where the 1885 deed conveying one acre to a school district stated: “The premises herein conveyed is to revert to said Samuel T. Cherry [grantor] when it shall fail to be used for school purposes.” A school was constructed on the land and used as a school until 1959. Once use for “school purposes” ceased, the interest reverted to the successor in interest to Samuel T. Cherry.

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Language matters. For example, a mineral deed provided: "this mineral exception and reservation shall expire on October 25, 1958, unless at that time the above named minerals or either of them, is being produced from said premises in paying quantities." The court held the interest would vest in fee if on October 25, 1958 there was production in paying quantities. All production may cease forever on October 26, but that will not matter because it was producing on October 25, 1958. Browning v. Grigsby, 657 S.W.2d 821 (Tex. App. 1983).

These sorts of interpretive problems typically do not concern the oil and gas lawyer – except when trying to determine mineral ownership for leasing purposes. In the oil and gas context the defeasible nature of a grant is usually clear. Instead the issue is whether the clearly stated condition or special limitation has been satisfied. This usually means whether there is the requisite “production” to perpetuate the defeasible interest.

III. DEFEASIBLE TERM INTERESTS

We have lots of defeasible interests in Kansas, thanks largely to the Federal Land Bank of Wichita. The interests are defeasible term interests. Because they are granted for a term of years with the potential to be extended beyond the term for so long as oil or gas is produced from the land. Defeasible term royalty interests have also proliferated because of the unique application of the rule against perpetuities to nonparticipating royalty interests.

IV. THE PRODUCTION REQUIREMENT

The typical defeasible term interest is for a term of years, such as 20 years, and “as long thereafter as oil, gas or other minerals is produced therefrom.” The word “produced” means actual extraction and marketing of oil or gas. Dewell v. Federal Land Bank of Wichita, 380 P.2d 379, 383 (Kan. 1963). Kansas applies a temporary cessation doctrine to defeasible interests. Wilson v. Holm, 188 P.2d 899, (Kan. 1948).

The Wilson case also established the principle that the court would look to case law interpreting an oil and gas lease habendum clause for guidance in addressing issues under a defeasible interest habendum clause. The court noted Texas oil and gas lease cases were particularly helpful because in Texas the normal oil and gas lease is a conveyance of the minerals, in place, for the duration of the lease term. Id. at 906. After surveying Texas cases, the court stated: “[W]e see no sound reason why the general principles of law [in Texas] . . . governing the construction of oil and gas leases containing habendum clauses . . . should not be applicable to the construction of a mineral deed containing identical or similar provisions.” Id. Does that mean Kansas courts
should apply a Texas “paying quantities” analysis to defeasible interests? The Texas approach to paying quantities under an oil and gas lease is different from the approach Kansas uses for oil and gas leases. Compare Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959), with Reese Enterprises, Inc. v. Lawson, 553 P.2d 885 (Kan. 1976).

Another important principle noted by the Wilson court is: “a deed must be construed in accord with the intent and purpose of the parties after it has been examined in its entirety.” Id. at 907. Applying this to the temporary cessation issue, the court applied the oil and gas lease temporary cessation doctrine to a defeasible interest because that it what the parties intended. Id. at 905-06. Oklahoma would not. Ludwig v. William K. Warren Foundation, 809 P.2d 660, 663 (Okla. 1991) (noting that unlike the lessee the defeasible interest owner does not invest in the development of the lease).

In Texaco, Inc. v. Fox, 618 P.2d 844 (Kan. 1980), the “paying quantities” issue was addressed in interpreting a “commercial quantities” requirement in a defeasible interest habendum clause. The court equated “commercial” to “paying” and proceeded to apply Kansas oil and gas lease law to determine whether the well on the property was producing in paying quantities. Id. at 848.

The court in Netahla v. Netahla, 346 P.3d 1079 (Kan. 2015), refused to incorporate the terms of the oil and gas lease covering the defeasible interest where the defeasible interest stated: “it is understood and agreed that this sale is made subject to the terms of said lease [burdening the land at the time of the grant].” Id. at 1080. The court held the “subject to” language did not incorporate the lease shut-in royalty clause or other savings clauses into the defeasible interest. This rule was also applied by the court in OXY USA, Inc. v. Red Wing Oil, LLC, 360 P.3d 457, 466 (Kan. Ct. App. 2015).

As noted in Dewell the court will not supply the necessary link between the defeasible interest and an oil and gas lease. That must be done by the parties preparing the document that creates the defeasible interest. The court concluded its analysis in Dewell stating: “If the appellant desired such a result [incorporate the shut-in royalty clause from the lease] it should have inserted the language in the reservation.” Dewell, 380 P.2d at 382. As the court in Netahla noted: “'[t]he event which perpetuates the term of the mineral interest must be found in the instrument creating it.'” Netahla, 346 P.3d at 1081-82.
V. IMPACT OF POOLING AND UNITIZATION

The court in *OXY USA Inc. v. Red Wing Oil, LLC* does a nice job of working through the progression of the law of defeasible interest pooling. The defeasible interest primary term ended in 1965. At that time the interest was participating in production from a pooled area but no well was located on the defeasible interest tract. No well was completed on the defeasible interest part of the pool until 2009. The status of the defeasible interest must first be determined applying *Kneller v. Federal Land Bank of Wichita*, 799 P.2d 485 (Kan. 1990), which addressed the appropriate rules to apply, through time, to the pooling issue. The issue is whether production from a pooled area, by a well not located on the defeasible interest tract, nevertheless constitutes “production” to extend the defeasible interest when the tract shares in pooled production. The answer to that question from June 10, 1972 through October 7, 1980 is “no.” *Smith v. Home Royalty Association, Inc.*, 498 P.2d 98 (Kan. 1972). The answer after October 7, 1980 is “yes.” *Classen v. Federal Land Bank of Wichita*, 617 P.2d 1255 (Kan. 1980). The answer prior to June 10, 1972 is “yes” -- according to the analysis used in *Kneller*.

Therefore, the interest at issue in the *OXY* case would have been perpetuated from 1965 to June 10, 1972, at which point it terminated under the *Smith* rule. *Kneller* held that the *Classen* change in the *Smith* rule would not impact those interests that failed the *Smith* rule while it was in effect (June 10, 1972 through October 7, 1980). Note that if the well had been completed by OXY on the defeasible interest tract on June 9, 1972, and production continued from that tract through October 7, 1980, and then production returned solely to the off-tract well for the pool, the interest would not have terminated under the *Kneller* reasoning.

The *Kneller* reasoning is revealed by the court’s response to the adverse possession argument with the court noting: “It was not until 1972 when the *Smith* decision was announced that plaintiff’s had a cause of action.” *Kneller* 799 P.2d at 490. Prior to *Smith*: “there was no existing Kansas case law stating that production from a well in the unit which was not physically situated on the tract in question would not extend the term.” *Id*. This suggests that prior to announcement of the *Smith* rule a *Classen*-like rule applied. This raises an interesting issue regarding retroactivity when a rule of property is changed: will the new “superior” rule be applied for those time periods prior to adoption of the “inferior” rule that was subsequently changed? Yes, at least in *Kneller*.

The *Classen* rule was extended in *Edmonston v. Home Stake Oil & Gas Corporation*, 762 P.2d 176 (Kan. 1988), to defeasible interest acreage that actually participates in a statutory field-wide unit. Recall that the *Classen* rule only applies to the defeasible interest that participates in pooled production.
It does not perpetuate acreage included in the defeasible interest grant that does not participate in pooled production. Application of the Classen rule to a Kansas statutory field-wide unit does not square with the express terms of the unitization statute declaring that production from anywhere within the unitized area is deemed production from individual tracts contributed to the unit. K.S.A. 55-1306(a). The court acknowledged 55-1306 in the Edmonston case but concluded it was negated by the terms of K.S.A. 55-1308. The court’s reasoning on that issue is unconvincing.

VI. RULE AGAINST PERPETUITIES

There has always been a lurking perpetuities issue regarding the future interest created by an exception of a defeasible term interest. I think the court in OXY may have recognized the potential issue, but avoided it by quoting language from Classen. The court noted that the grantor “actually created a defeasible estate by reservation rather than an affirmative grant.” OXY, 360 P.3d at 461. It then quoted Classen as follows: “‘Many courts and authorities describe the potential interest to be obtained by the fee owner upon termination of the term mineral interest as a reversion, regardless of the method of creation, and the owner thereof as the reversioner.’ As rules of law considered herein apply equally to either method of creation, we will not attempt to differentiate between the two types of interests and will use the more commonly understood terms relating to reversionary interests.” Id. (emphasis added). The court in Classen did not consider the rule against perpetuities as one of the rules of law.

Although the court in OXY, as in Classen, refers to the grantee’s interest throughout its opinion as a “reversion” and “possibility of reverter,” it is neither. Because the future interest in created in the grantee, and not the grantor, the future interest must be an “executory interest.” More precisely, since it will potentially spring out of the grantor at some future date, it is a “springing executory interest.” Unlike a reversion or possibility of reverter, executory interests are subject to the rule against perpetuities.

At the time the grant was made, it was possible that it could be extended by production from the land for a period that exceeded a life or lives in being plus 21 years and therefore violates the common law rule against perpetuities. In this case the interest did not vest until 27 years (April 1945 to June 10, 1972) after its creation. Because Kansas did not adopt its version of the Uniform Statutory Rule Against Perpetuities until July 1, 1993, only the reformation provisions of K.S.A. 59-3405(b) could possibly be used to save this 1945 conveyance. Even the reformation provisions of 59-3405(b) may be unavailable because at least one commentator has argued the Kansas Uniform Statutory Rule Against Perpetuities is void because it was the product of
legislative log-rolling prohibited by Article 2, Section 16 of the Kansas Constitution. See David E. Pierce, Void Enactments of the Kansas Legislature, 80 J. KAN. B. ASSN. 28 (2011).

In cases where this issue has been raised, the courts have been adept at avoiding the rule. See generally, John S. Lowe, et al., Cases and Materials on Oil and Gas Law 471 (6th ed. 2013). Courts have gone to great analytical lengths to find, or declare, a vested interest. E.g., Williams v. Watt, 668 P.2d 620, 633 (Wyo. 1983) (just call it a “vested remainder” and be done with it); Bagby v. Bredthauer, 627 S.W.2d 190 (Tex. App. 1981) (treating it as a grant of the fee simple absolute followed by a re-grant of the defeasible interest to the grantor). The issue has not been tested in Kansas. If the rule is applied, the future interest held by the grantee would be void and the grantor would own the fractional defeasible interest in fee.

VII. DRAFTING TO AVOID PROBLEMS

The courts provide the drafting guidance necessary to avoid defeasible term problems. The court in Netahla noted: “‘[t]he event which perpetuates the term of the mineral interest must be found in the instrument creating it.’” Netahla, 346 P.3d at 1081-82. So be it:

**DEFEASIBLE TERM MINERAL INTEREST.** This is a defeasible term mineral interest that will extend from the date of this grant through March 1, 2026 and so long thereafter as: (1) any of the Minerals is or can be produced from the Land or any other land that is pooled or unitized with all or part of the Land; or (2) all or part of the Land, or any other land that is pooled or unitized with all or part of the Land, is being explored, developed, or operated for any of the Minerals.

In the event any portion of the Land is part of a pooled unit, or a field-wide unit, pooled or unitized production attributable to any portion of the Land will be deemed production from all of the Land. In the event any mineral owner with an interest in the Land, including Grantee, enters into an oil and gas lease authorizing development of all or part of the Land, any savings clause contained in any lease intended to extend the lease duration without production, or otherwise, will also operate to extend the term of Grantee’s defeasible term mineral interest. This includes, for example, any substitutes for production created by a delay rental clause, shut-in royalty clause, force majeure clause, compensatory royalty clause, commencement clause, completion clause, dry hole clause, or operations clause.
Are you an Ethical Attorney Negotiator? -
A Live Exercise based on the
"American Pickers" Show!

This CLE session will blend an initial live negotiation exercise with discussion and application of ethical issues and related rules arising out of that exercise. The initial exercise is based on the negotiation style and examples found on the "American Pickers" show and seeks to get participants to evaluate their personal negotiation style and how that affected the outcome of the "negotiation" session as compared to other participants. Participants will be paired off for the first half of the session to negotiate and then a series of questions and related discussion will take the participants through the applicable legal ethical rules. Participants will be challenged to contemplate whether they feel they complied ethically or may need to adjust their style and negotiation tactics.

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Additional materials

The provided materials covering the ethical rules of negotiation are from a full hour long CLE entitled, "Attorney as Negotiator – The Ethical Rules as They Apply to Negotiation" and are intended as a long form review of the Kansas Ethical Rules as they apply to the attorney negotiator context. Following the initial negotiation exercise today we will apply some of these rules as they relate to the live experience, results, concepts and concerns that are raised in this negotiation exercise.
Initial Thoughts and Directions

As you approach the exercise try to adopt the role you are assigned and use the negotiation style or approach that you would routinely use in a legal negotiation. After the exercise, initial discussion will focus on whether you took a cooperative or competitive approach both in regards to style and content. We will also discuss whether being collaborative in working through the various options and solution scenarios affected the outcome of the negotiation. The common information is provided in these materials and the confidential information will be handed out at the session with partners randomly assigned.

Negotiation Skills and Assessment Problem
The Next "American Picker" Scenario
Common Information

This problem is based on the popular History Channel show "American Pickers." If you are not familiar with the show, it involves two gentlemen who travel around the country looking to buy old items that may have actual value, or value when repurposed or used for renovations of some sort. They travel extensively and negotiate to purchase those items that the owners are willing to part with. The seller's and buyer's motivation, costs and ultimate decision to sell/buy or not sell/buy within the offered prices and terms vary with each item.

For this exercise, assume the two "Pickers", Mike and Frank, are busy promoting their show, so one of you has been sent on the road to go on a pick that their store manager Danielle has arranged. The other person will play the role of the seller. The seller in this case has called Danielle to ask the "Pickers" to come look through multiple buildings of stuff that his/her father who passed away recently (after a long battle with cancer) acquired and accumulated over his lifetime. Some items have sentimental value and others are just taking up space.

The Pickers are working with a budget and particular goals based on what they can sell (or like to collect) and the seller is coming from the perspective of wanting to at least start parting with some of the stuff. Today's exercise will involve 2 potential items and an evaluation process after the negotiation is complete.
The Items That Are Available

- Item 1: Rusty old motorcycle with a few missing parts that has been stored in the barn for years.
- Item 2: Coffee can shaped piece of metal with brass rings around it.
- Item 3: Oak mantle clock that is on the fireplace in the farmhouse.
- Item 4: Vintage radio in a wood cabinet that sits in the living room of the farmhouse.
- Item 5: A cast iron bell that is pretty rusty and is attached to a post just in front of the front porch.

Let the Games Begin!

The negotiation will last for approximately 15 to 20 minutes. Be prepared to briefly respond with your approach, style and your results from the negotiation.

Negotiation Wrap Up

What were your negotiation results?
Negotiation Wrap Up

Did you get what you needed for your client?

Negotiation Wrap Up

Did you give up more than you wanted to?

Negotiation Wrap Up

Did your competitive lawyer come out?
Negotiation Wrap Up

Did you work to collaborate and develop a win/win negotiation process and result?

Negotiation Wrap Up

Are there parallels to your legal negotiation?

Negotiation Wrap Up

Did you mislead or hold back information or facts to get a better outcome?
The Preamble to the Rules continues,

3. In addition, there are Rules that apply to lawyers who are not active in the practice of law or for practicing lawyers even when they are acting in a non-professional capacity. For example, a lawyer who controls trust in the conduct of business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 6.4. (Emphasis added)

So even a lawyer engaged in a non-traditional practice of law in a business setting may have a heightened ethical obligation due to his or her status as a licensed attorney in Kansas. In essence all lawyers at all times are governed by an ethical duty to avoid "dishonesty, fraud, deceit or misrepresentation."

This higher standard for attorneys makes an evaluation of ethicalnegligence especially important and bears close contemplation of the remaining issues raised in this presentation and the broader materials provided.

What does the average Kansas lawyer understand to be his or her duty to "ethically" negotiate on behalf of his or her client?

When you ask most lawyers what their ethical duties are in general practice, they will immediately talk about the Kansas Rules of Professional Conduct in general, most often raising the duty to "zealously" represent the client, the duty to communicate and to let the client make appropriate decisions about the representation and the general duty to be honest and forthright with the Court and others involved in any particular representation.

When you ask about the ethical duties of a lawyer as they relate to negotiation, however, they generally have to pause for a bit and think about it. Not because they are by nature unethical when they serve in a role as negotiator, but more often because they think about ethical practice in the area of negotiation in the same way that past Courts had defined concepts of obscenity or pornography in the past, in essence, "Well, I know it when I see it."
“Puffing and Bluffing”

As a general rule most lawyers understand the general ethical rule to be that you cannot lie in a negotiation and that it is permissible to “puff” or “bluff” or generally only say or respond to what you are directly asked by opposing counsel.

With law students, this same basic ethical knowledge can be found as well, but law students very quickly get flustered when you ask them about the compelling issues of candor towards the court and the legal concepts in both civil and criminal law of “fraud” and “misrepresentation”.

The underlying conflict is that “advocacy” in the negotiation context would appear to be in conflict with the need to be honest and forthright in the exchange with the other party, whether through counsel or not, in the process of negotiating a settlement, plea or contract.

What rules apply to lawyers as they engage in the legal role of negotiator?

The central guideline or concept raised in this area is that you cannot engage in fraud. Under the Kansas Rules of Professional Conduct, Rule 1.0 Terminology, the definition of that “Fraud” standard that I have raised is found, the Rule provides,

“(e) “Fraud” or “Fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”

What do we mean by fraud and misrepresentation in the context of legal negotiation then?

Isn’t the very purpose and role of a negotiation to deceive at least to some degree? Don’t we try to closely guard just how much our client is willing to accept or what they might be willing to pay to settle the matter? Don’t we bluff a bit on what impact particular facts or issues really might have on subsequent litigation? Don’t we try to avoid answering fairly direct questions and instead shift the focus to issues or facts that are more advantageous to our client and his or her position? At a basic level however, by plain language, fraud is both that intent to deceive as well as conduct that is fraudulent as defined by the substantive and procedural law of our jurisdiction. That said, the generally accepted “puffing” and “bluffing” concepts are carved out of those substantive and procedural fraud provisions as they apply to negotiation for lawyers.
In the case of TRANSACTIONS WITH PERSONS OTHER THAN CLIENT, we find the core direction of truthfulness as it applies to negotiation.

This is the central “false statement of a material fact” evaluation. Rule 4.1 Truthfulness in Statements to Others, provides that, “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.”

Thus, the issues of misrepresentation and fraud are clearly a concern as lawyers “puff” and “bluff” in negotiation.

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Is there any particular guidance in regard to what disclosure is actually allowed in live negotiations?

Under K.R.G. Rule 226 1.6 Client-Lawyer Relationship: Confidentiality of Information, the general confidentiality provisions are found. Under the comments section and under the heading “Authorized Disclosure”, Comment 6 provides:

Authorized Disclosure

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client’s instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

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What if our client wants to move forward with something more than “puffing and bluffing”?

Under Rule 1.16 Declining or Terminating Representation, we find a very important provision that requires withdrawal of representation if the lawyer finds that the client continues to move forward with behavior that is fraudulent.

It provides in pertinent part: “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.” Emphasis added.

This gets at that initial basic concept that a lawyer may not engage in “fraud” either directly or as an agent of the client, in the process of negotiation and representation. Those ideas of “puffing” and “bluffing” become much more concerning when you have to continually think about where the line might be in regards to a material misrepresentation especially if the client is at the negotiation itself to provide any additional questionable information or representations in the process.
**Duty to Report Fraud or Misrepresentation?**

Maintaining the integrity of the profession under Rule 8.3.

Reporting Professional Misconduct. "(a) A lawyer having knowledge of any action, inaction, or conduct which in fact or appear constituted misconduct of an attorney under these rules shall inform the appropriate professional authority." And also in Rule 8.4 Misconduct, "It is professional misconduct for a lawyer to ... (b) engage in conduct that is prejudicial to the administration of justice; ... or (c) engage in any conduct that adversely reflects on the lawyer's fitness to practice law." Emphasis added.

Needless to say, all of those issues are raised when we come back to the question of at what point in negotiation "stalling" and "bluffing" move into misrepresentation and injure the plaintiff or plaintiff. The concepts and categories raised in the sections of Rule 8.4 could, I think, be interpreted to cover what would otherwise be expected to be "zealous advocacy" by a lawyer in a negotiation.

**Do why do collaborative or cooperative negotiations approaches make more sense than adopting a competitive or contentious negotiation style?**

A collaborative or cooperative approach to negotiation contemplates that the parties have a mutual interest in settling the matter and are often in the position that, as opposed to the traditional adversarial approach, there can be win-win scenarios. You may have heard of this approach in the civil arena of negotiations as "finding creative ways to increase the value of the pie."

While our clients may often be looking at the simple dollars and cents of the settlement, there is often a need to consider other factors, such as the overall impact on the client's well-being. For example, if a settlement agreement is reached, it may be necessary to consider the impact on the client's future, such as their ability to secure future employment or maintain their standard of living.

**Continued thoughts ...**

Beyond those more concrete considerations, a collaborative, mutually acceptable, negotiated settlement of a matter, or pie in a criminal case, serves multiple basic goals of the parties in having a simple and quicker resolution of the case, avoiding the protracted costs associated with moving forward to a trial, protecting the relationships of the parties as they move forward, and having a settled agreement that both parties are willing to actually sign off on and fulfill through on after the matter is done.

From a lawyer's perspective, clients that come out of the collaborative negotiations process are comfortable with the result. They do not see clients returning to get an unbalanced deal either enforced or rescinded in some manner of form. They do not see clients that routinely blame the attorney for not getting an agreement that was reasonable and the parties could actually comply with. They understand that they were part of solving the issues and have a vested interest in making the solution work long term.
Final Thoughts/Questions?

Most importantly, they may be willing to not raise the question of whether any of the " puffing and bluffing" engaged in the settlement process rose to the level of the contemplated misrepresentation or fraud! If the issue is not raised then the ethics complaint will not be made and you can avoid being the "seminal case" in regards to where the line in ethical negotiation in Kansas should be drawn.

Confidentiality Issues?

Under Rule 1.6 Confidentiality of Information, pertinent sections provide, "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary.

... (2) to comply with requirements of law or orders of any tribunal; ..."

Are we always fully aware of how much our client is willing to share and how far they are willing to go in the dynamic negotiation process to get to a settlement?

Organization as Client?

Under Rule 1.13 Organization as Client, we find even more potential issues for a regulator representing an organization. Rule 1.13 provides, "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer employed or retained by an organization represents the organization acting through the duly authorized constituents.

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the perilousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibilities in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."
Organization Client Continued

Such measures may include among others:
(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the circumstances of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(6) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. (Emphasis added)

Organizational Clients Concluded

In the realm of hostile contested negotiations, the lawyer may easily be tasked with making tactical decisions that the assigned representative of the organization may support as in their interests but that may be contrary to the best interests of the organization. The quiescent situation that comes to mind is any investigation or settlement of an employment law matter.

Often facts or allegations will come out in these initial conversations and negotiations that may well cause the lawyer to alter their perspective and cause them to decide to take new and better informed legal guidance to the organization, either through the designated agent or up the described higher or highest authority within the organization.

What is the ethical obligation of the attorney at that point with an organizational client? Do you negotiate for the best result for the entity and then answer to the "human" who has retained you to represent the "corporate person/ality"?

Judicially Moderated Settlement Processes?

- As an advocate under Rule 3.3 Candor Toward the Tribunal, a lawyer who engages with a judge in a settlement conference process may ask a narrow line. Rule 3.3 provides in pertinent part, "(a) A lawyer shall not knowingly,

  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; ... or

  (2) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
Obligations to the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Emphasis added.

Talking With The Judge?

Thus, the lawyer must take care even in a mediated settlement negotiation process with another judge, to be careful in regards to responses to settlement authority and pertinent and relevant facts to the matter as the judge mediates or moves between the parties to encourage settlement. The exception to the fraud standard I have discussed, in regards to allow "puffing" and "bluffing" that is not active misrepresentation of fact, does not apply when a judge is involved in the negotiation process.

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Aspirations

• "His integrity stands without blemish"
  Shakespeare, Measure for Measure
• "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."
  — Benjamin Cardozo, Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1926)
• Do unto others as you would have others do unto you.
Reality of Practice

- Volume of lawyers
  - 1878: 64,137
  - 1900: 114,460
  - 1945: 200,000
  - 1955: 250,000
  - 1966: 300,000
  - 1975: 404,772
  - 1985: 653,686
  - 1995: 896,140

Reality of Practice

- Specialization
- Federalization
- Nationalization
- Internationalization
- Alternative Dispute Resolution
- Technology
- Social media
Who are we?

- Boss?
- Humble servant?
- Dr. Phil?
- "There's a time to take a stand and a time to find a way. Good lawyering is knowing the difference."

Perceptions of Results

- Lawyers want to "win"
- Clients want "fair and equitable" settlement (less concerned with "number of assets")

Lawyers as Problem Solvers

- Listen
- Set realistic goals
- Involve clients
- Identify "real" interests
- Engage in creative problem solving
- Good faith negotiation
Sources of Guidance

- LAW – Constitution, Statutes, Cases
- Ethical Rules
- Standards of Practice
- Guidelines
- Best Practices
- Common sense

Lawyer is

- a member of a legal profession
- a representative of clients
- an officer of the legal system, and
- a public citizen having special responsibilities for the qualities of justice

- Can also be third-party neutral
  - Preamble, MRPC; KRPC (Ks. Sup. Ct. R. 226)

ABA Model Rules of Professional Conduct

- Kansas Rules of Professional Conduct
- Violation = grounds for disciplinary action
Additional Guidance

American Academy of Matrimonial Lawyers
Bounds of Advocacy – AAML members
ABA Family Law Section Civility Standards
Kansas – Pillars of Professionalism
  - higher aspirational goals
  - a profession – higher education, standards for admission, standards of conduct and self regulation

Additional Standards

- ABA Standards for Lawyer Mediators
- Representing Children in Custody (2003)
- Representing Parents in Abuse and Neglect
- Representing Agencies in Abuse and Neglect
- Case Management Rules

Scope of Representation

- Abide by client’s decisions
  - lawful objectives
  - settle
- Consult with client as to means
- Shall not counsel client to engage in criminal or fraudulent conduct
Scope of Representation

- Legal consequences of proposed course of conduct
- Counsel or assist client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Unbundling – A La Carte

- May limit scope of representation -1.2 (c)
  - If reasonable under circumstances
    - Competent and diligent representation (Cmt. 7)
    - Client gives informed consent
  - Agreement by a person to a proposed course of conduct after lawyer has communicated adequate information and explanation about risks and available alternatives (MRPC 1.0(g))

Lawyer as Advisor

... a lawyer shall exercise independent professional judgment and render candid advice. ... the lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. Rule 2.1
The BIG THREE

- Competence - KRPC 1.1
- Diligence - KRPC 1.3
- Communication - KRPC 1.4

Competence - Rule 1.1

- Legal knowledge
- Skill
- Thoroughness
- Preparation
- Reasonably necessary for the representation
  - Consider relative complexity and specialized nature of a matter. Cent.

Competence - 1.1

- Stay current on
  - Legislation
  - Supreme Court Rules
  - Cases
  - Ethical opinions
- GET SMART, GET HELP or GET OUT
  - In re Hawver, 339 P.3d 573 (Kan. 2014)
Technology & Advertising
- Websites
- Facebook fan pages
- Blogs
- Twitter

Advertising as Expert
- Certification/Specialties
  - Do not misrepresent qualifications on website
    • Bd. Prof. Resp. v. Reguli, 2015 WL 9464846 (Tenn. 2015)
  - Do not put false misleading statements on website
    • In re Delillo, 762 S.E.2d 552 (S.C. 2014)

Advertising bans
- Florida Bar rule precluding lawyers from advertising as specialists without board certification violated the First Am. - precludes even truthful claims.
Communication – KRPC 1.4

- (a) ... shall keep a client reasonably informed about the status of a matter and promptly comply with the reasonable requests for information.
- (b) ... shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions ... 

ABA Formal Op. 471

- Encourages lawyers to regularly provide clients with copies of documents and information as the matter is ongoing to keep them as informed as possible.

What causes trouble?

- Not returning phone calls
- Not being clear and confident
- Using legalese
- Telling client you have done something when you have not
- Not telling client the TRUTH (even bad)
- Fostering unrealistic expectations
Keep client informed

- Email – forward client a copy of what you send and what you receive.
- Notify client of need to attend parenting class
  - In re Nichols, 45 So. 3d 603 (La. 2010)
- Do not delay in communicating an order denying a motion to suppress evidence
  - In re Disciplinary Action against Coleman, 793 N.W.2d 296 (Minn. 2011).

Diligence Rule 1.3

- A lawyer shall use reasonable diligence and promptness in representing a client.
  - Have controllable workload
  - Do work for which retained
  - Covers inadequate preparation and investigation
    - More fact that judge says settlement is "fair and equitable" does not bar malpractice suit – Ziegelheim v. Apollo, 607 A.2d 1299, 1305 (N.J. 1992)
    - If scope limited, may not have to conduct discovery when reviewing mediated PSA

Lawyer Inactivity

- Not being prepared
- Not being clear and confident
- Not communicating with client
- Letting cases drift
- Ending up in court because did not review, evaluate and negotiate some matters or entire cases
Diligence Rule 1.3

- Failure to execute duties
  - In re Bowman, 310 P.3d 1064 (Kan. 2013) (failure to execute duties of GAL, causing undue delay in simple estate).
- Failure to act promptly
  - Take money — no action or not showing up in court
  - Not answering discovery
  - Not providing lists of witnesses
  - Not returning phone calls

Diligence Rule 1.3

- Avoid Procrastination with the "Cringe" file
- Failure to act promptly
  - In re Rittmaster, 336 P.3d 376 (Kan. 2014)
  - In re Meyer, 327 P.3d 407 (Kan. 2014)
  - In re Godber, 216 P.3d 762 (Kan. 2014)
  - In re Swanson, 200 P.3d 1205 (Kan. 2009)
  - Att'y Grievance Comm'n Mdl. V. Haley, 118 A.3d 816 (Md. 2015)

Diligence Practice Tips

- Utilize ticklers on both lawyer's and assistant's computerized calendars to avoid:
  - Missing filings
  - Missing discovery deadlines — In re Hasty, 311 P.3d 321 (Kan. 2014)
  - Allowing hearing settings and other events create need for last minute continuances.
Diligence Practice Tips

- Recognize time limitations when providing client with expectation for completion of task (also Murphy's Law)
- Make a list of post-divorce follow up items to complete no matter what:
  - Journal entry
  - QDRO - DO IT
  - Quitclaim deeds
  - Property and debt transfer

Diligence Practice Tips

- Inform client of future events that might affect them
  - Domicitory issues on Judgment –
  - Calculation of interest on past due judgments
  - Relocation notice and other requirements
  - Change beneficiaries on everything
  - Any other key issues

Confidentiality – Rule 1.6

- (a) not reveal information relating to representation unless client consents after consultation, except
  - disclosures impliedly authorized to carry out the representation, and
  - as stated in (b).
Confidentiality – 1.6(b)

(b) . . . may reveal information to the extent reasonably believes necessary:
• (1) To prevent the client from committing a crime; or
• (2) To comply with requirements of law or orders of any tribunal.

Confidentiality Comment

• Implied authorization to make disclosures appropriate to carry out representation, except
  • to the extent that client’s instructions or special circumstances limit authority.
  • In litigation, may disclose information by
    • admitting a fact that cannot properly be disputed, or
    • in negotiation by making a disclosure that facilitates a satisfactory conclusion.
  • Cannot disclose because clients complained about you on public media.

  In re Underhill 2015 WL 4844102 (Cali. Aug. 2015) (unpubd.)

Confidentiality & Social Media

• Internet is not secure
• High tech hacking possible
• Exposure of personal emails and information
• Password protection rules
  • Different for each use
  • Do not store on the computer
  • Choose false questions and false answers or make up obscure security questions
Computers & Privacy

- Constant challenge
- Keep computer clean – delete cookies, files, history
- Google Terms of Service – 11 pages – consumer solely responsible for all liability
- Social Networking – Facebook, Twitter, Instagram, Snapchat, LinkedIn, MySpace, Second Life, Meetup, Orkut, WAYN, Tinder.

Problems

- Posting inappropriate information/photos
  - Photos in bar
  - Information about location
  - Photos with significant other’s children
- Finding old filings – one law firm says 20% of divorces cite Facebook in petition
- Ethical
- Accidental invites to sites
- Second life? Is it real?

Advising Clients on Social Media

- Cheri Budzynski, Legal Ethics and Social Media: What Pre-Litigation Advice May An Attorney Provide to His or Her Client? AboveTheLaw.Com (Feb. 23, 2015)
- Service on social media? New York court allowed where H had dodged service for years with “no address”
- Protection Orders – pushing “like” button may violate
Spoilation issue

- Allied Concrete Co. v. Lester, 739 S.E.2d 699 (Va. 2013) (money award against lawyer and client)
- Adverse inference instruction, but no monetary sanctions, against P who deactivated social media account after D requested access.

Advising Clients

- Florida Adv. Opinion 14-1
  - Lawyer can advise client to increase privacy settings to conceal content from public eye and to remove information relevant to the foreseeable proceeding from social media accounts so long as an appropriate record was maintained...data preserved.
  - FRPC 4-3.4(a) Lawyer must not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or foreseeable proceeding.

Technology in Courtroom

- Emails between litigants
- Text messages saved to phones
- Voicemails left on cell phones
- Other
Personal Use of Social Media

- Dornville v. State, 103 So. 3d 184 (Fla. Dist. Ct. App. 2012) (disqualify judge who is Facebook friend with prosecutor)
- Chase v. Loisel, 170 So. 3d 802 (Fla. Dist. Ct. App. 2014) (judicial retaliation for not accepting friend request)
- N.C. judge who friended lawyer of one of parties and had communications received a public reprimand

Fees - Written Agreement

** "the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within reasonable time after start of case
Retainer agreements – usually refundable
AAML Bounds of Advocacy 4.1 requires written agreement
Reasonable Fee – 1.5

(1) time and labor, the novelty and difficulty of the questions, and the skill required;
(2) the likelihood, if apparent to the client, that the acceptance of employment will preclude other employment;
(3) the fee customarily charged in the locality;
(4) the amount involved & results obtained;
(5) the time limitations;
(6) nature and length of professional relationship;
(7) the experience, reputation, and ability of the lawyer; and

Fee issues

• Reasonable
• Return unearned portion
• Safeguarding – lawyer shall hold property of clients or third persons that is connection with a representation separate from the lawyer’s own property – R. 1.15

Contingency Fees

(8) whether the fee is fixed or contingent.*
* 1.5(d) prohibits fee agreements that are contingent upon securing a divorce, the amount of alimony or support, or property settlement. AAML 4.5
  – Does not apply to collection of arrearages, even if family law
Flat Fee
- Deposit in trust account
- Return unearned portion
- Accurate time records needed

Excessive fees
- Flat administrative fee for opening case may be arbitrary - Connecticut
- ABA Formal Op. 93-379 – only direct cost of services like photocopying + reasonable overhead directly related

Fee issues
- Cannot hold papers hostage for payment of fees
  - *In re* Vaughn, 368 P.3d 1088 (Kan. 2016)
Meritorious Claims – Rule 3.1

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Duty of Candor – Rule 3.3

(a) A lawyer shall not knowingly

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made . . .
(2) Fail to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed to opposing counsel; or

Duty of Candor

(3) Offer evidence that the lawyer knows to be false.
If the lawyer, client or a witness has offered material evidence and the lawyer comes to know of its falsity, lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the Tribunal...
Duty of Candor

Come forward
Correct Erroneous Statement
Even if believed true at time made
Obligation continues through close of case

Conflicts of Interest – Rules 1.7 & 1.9

- Cannot represent both parties
- Cannot be mediator and then represent one of parties
- Cannot be guardian ad litem for child and then represent a parent
- Avoid concurrent and subsequent conflicts

Conflicts – Prospective Clients

- Person talks to a lawyer about possibility of being a client
- Length of conference irrelevant
- Does not cover person who unilaterally discloses information without any reasonable expectation of forming relationship – Rule 1.18 Cmt 2
Prospective Clients – Rule 1.18

- Pivotal issues in disqualification are:
- Did lawyer consent to the communication?
- Was confidential information imparted that could be used against the prospective client?
- If No, lawyer can represent spouse
- Appearance of impropriety is not in rules

Disqualification?


Written Consent – Rule 1.18

- Even if lawyer receives disqualifying information, can proceed if BOTH parties consent in writing.
- ABA Formal Op. 10-457 – if a lawyer’s website specifically requests or invites submission of information forming relationship, a discussion will result when the website visitor submits information. If visitor submits to website that did not request, lawyer’s response determines if discussion occurred.
KRPC Rule 8.4

- Suspended lawyer practicing
- Conduct -- fraud, deceit, misrepresentation
- Conduct prejudicial to administration of justice
- Imply ability to influence improperly gov't official
- Knowingly assist judicial officer in violating rules of judicial conduct
- Any other conduct that adversely reflects on the lawyer's fitness to practice law
- Pleading guilty to drug felonies

Commission of Criminal Act - reflects adversely on honesty – R. 8.4(b)

- Battery
- DUI
- Violating securities law
- Domestic violence
- Not paying child support
- Growing marijuana and possession of drug paraphernalia

• Let's be careful out there.
Income Taxation of Estates and Trusts

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I. Decedent’s Income

- In general, income received by a decedent prior to the date of death is reported on the decedent’s final individual income tax return, the same as if the decedent lived the entire year. IRC §6012 and Reg. §1.443-1(a)(2).

Who Files Decedent’s Tax Return?

Return for Deceased person shall be made by the executor, administrator, or other person charged with the property of the decedent. IRC §6012(b)(1)
When is Decedent’s Income Tax Return Due?

- April 15 of year following date of death – the same as for any other individual taxpayer.
- The deadline is the same as if the taxpayer lived the entire year. Reg. §1.6072-1(b)

Surviving Spouse?

- The surviving spouse may file a joint return with the deceased spouse for the year of death. IRC §6013.
- The joint return will include the decedent’s income during the year before the date of death.
- Usually advantageous as the exemption amounts and tax rates are the same as for any other married couple, but the decedent’s income is usually for only a part of the year.

Who Files Tax Return for an Estate or Trust?

- The “fiduciary” shall file a return (Form 1041) to report income of an Estate or Trust. IRC §6012.
What income is reported on the Estate and Trust Income tax returns?

- Income that would be income for an individual is generally income for an estate or trust. IRC §641.
- Income received by the Estate or earned from assets owned by the Estate generally reported on the Estate's income tax return.
- Income received by a Trust or earned from assets owned by a Trust generally reported on the Trust's income tax return.

Exception for Grantor Trusts

- If the Grantor of a Trust or another person is treated as the owner of any portion of a trust, the income, deductions and credits of the Trust "shall then be included in computing the taxable income and credits of the grantor or other person . . . ." IRC §671

Revocable Trust

- The Grantor shall be treated as the owner of any portion of a trust, where at any time the power to revest in the Grantor title to such portion is exercisable by the Grantor or a non-adverse party or both. IRC §676
- The Grantor shall be treated as the owner of any portion of a trust, if without the consent of a non-adverse party, income may be distributed to or held for the benefit of Grantor or Grantor's spouse. IRC §677
Another Person Treated as Owner

- A person other than the Grantor shall be treated as the owner of any portion of a trust with respect to which such person has the power to take ownership of the principal or income (unless the income is taxable to the owner). IRC §678

Grantor Trusts

- Income from Revocable Trusts may not be reported on the grantor's individual income tax return after the grantor's death.
- There is no individual income tax return for the grantor for any period after the death of the grantor.
- The grantor's powers over Trust principal and income ended upon the grantor's death, so the grantor is no longer treated as the owner.

Non-Grantor Trusts

- Remainder of presentation refers to trusts that are NOT Grantor trusts.
Taxable Year of Estate?

- The Estate may choose a short fiscal year for the first year—a fiscal year ending at the end of any month within one year of the decedent’s death. IRC §441 and IRC §443.
- The Estate income tax return is due on the 15th day of the fourth month after the end of the fiscal year selected. IRC §6072(a).
- An Estate income tax return is due annually thereafter.

Taxable Year of Trust?

- The Trust taxable year must be the calendar year. IRC §644, unless the executor and trustee both elect to treat the Trust as part of the Estate, IRC §645. Such election must be made by the due date of the first estate income tax return, is irrevocable, and continues until 2 years after the date of death (or if an estate tax return is required, 6 months after the final determination of the estate tax liability).
- The Trust’s income tax return is generally due on April 15 of the following year (the same deadline as for individual income tax returns).
- A Trust income tax return is due annually thereafter.

When is Fiduciary Return Required?

- An Estate with $600 or more of gross income for a taxable year is required to file an income tax return. IRC §6012(a)(3).
- A Trust is required to file an income tax return for every taxable year it has:
  - Gross income of $600 or more; or
  - Taxable income of any amount.
- An Estate or Trust beneficiary is a non-resident alien. IRC §6012(a)(3).
Compressed Income Tax Rates

- Unfortunately, Estates and Trusts are subject to the highest 39.6% income tax rate for 2016 on income in excess of $12,400. See IRC §1.
- Married persons filing joint returns are subject to the highest 39.6% income tax rate for 2016 on income in excess of $466,950. See IRC §1.

Other Additional Income Taxes

- Effective 1/1/13, 3.8% tax on undistributed Net Investment income of Estates and Non-Grantor Trusts in 39.6% bracket.
- Effective 1/1/13, capital gains and qualifying dividend tax rate increased from 15% to 20% for taxpayers in the 39.6% income tax bracket.
- Kansas income tax rate increases from 3% to 4.6% for Estate and Trust income in excess of $15,000/year.

Combined Income Tax Rates

- Combined 28.4% tax for Estate and non-Grantor Trust net investment income that is qualified dividends and capital gains in excess of $15,000/year.
- Combined 48% tax for other Estate and non-Grantor Trust ordinary net investment income in excess of $15,000/year.
Distributable Net Income ("DNI")

- Fortunately, Estates and Non-Grantor Trusts may deduct Distributable Net Income ("DNI").
- If taxable Income of a trust is required to be distributed currently, there are no other distributions, and no amount is paid, permanently set aside or used for charitable purposes (i.e., "Simple Trusts"), a deduction is allowed for the amount of income required to be distributed (not to exceed the amount of DNI). IRC §651.
- Estates and other Trusts (i.e., "Complex Trusts") may deduct income required to be distributed currently and other amounts "properly paid or credited or required to be distributed . . .", to the extent of DNI. IRC §661.

What is Distributable Net Income?

IRC §651
(a) Distributable net income. – For purposes of this part, the term "distributable net income" means, with respect to any taxable year, the taxable income of the estate or trust computed with the following modification:
• (3) Capital gains and losses. – Gains from the sale or exchange of capital assets shall be excluded to the extent that such gains are allocated to corpus and are not (A) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (B) paid, permanently set aside, or to be used for the purposes specified in section 642(c) [charitable purposes]. . . .

Accounting Income v. Taxable Income

- Trustee shall allocate to principal the proceeds from sale or exchange of a principal asset of the trust. Kansas Uniform Principal and Income Act, K.S.A. 58-9-104(2).
- If principal is not distributed, trust will pay tax on the capital gain realized from disposition of the principal asset.
Reg. § 1.643(a)-3(a)

- (a) *In general.* – Except as provided in §1.643(a)-6 (pertaining to income of a foreign trust) and subparagraph (b) of this section, gains from the sale or exchange of capital assets are ordinarily excluded from distributable net income and are not ordinarily considered as paid, credited, or required to be distributed to any beneficiary.

Reg. § 1.643(a)-3(b)

- To the extent allowed under the terms of the governing instrument and applicable local law, or pursuant to a permitted, reasonable and impartial exercise of discretion by the fiduciary in accordance with the power granted to the fiduciary by applicable local law or by the governing instrument if not prohibited by applicable local law:
  - 1. Allocated to income.
  - 2. Allocated to corpus but treated consistently by the fiduciary on the trust’s books, records, and tax returns as part of a distribution to a beneficiary.
  - 3. Allocated to corpus but actually distributed to the beneficiary.
  - 4. Allocated to corpus but utilized by the fiduciary in determining the amount that is distributed or required to be distributed to a beneficiary.

Provide Trustees Authority to Allocate Capital Gains to Distributions

- "To the extent that gains from the sale or exchange of capital assets are allocated to trust principal, the trustee may, in the trustee’s discretion, treat such gains as part of a distribution to a beneficiary, provided however, that such treatment is done consistently on the trust’s books, records, and tax return; and, provided further, that such exercise of discretion must be reasonable and impartial, all as contemplated by Treasury Regulation 1.643(a)-3(b)(2)."
65 Day Rule

- Estates and Complex Trusts may annually elect to treat any part of a distribution to beneficiaries made within the first 65 days following the end of a tax year as having been distributed during the prior year. IRC §663(b)
- Amount of election may not exceed the greater of taxable income or DNI (reduced by amount of prior DNI distributions for the year). IRC §663(b)

Charitable Deduction?

- Gifts payable to a charity under the terms of the governing instrument in not more than 3 installments are not included in the taxable income of the estate or trust. IRC §663(h)
- Estates and Complex Trusts may deduct (in lieu of IRC §170 deduction) "any amount of the gross income which pursuant to the terms of the governing instrument is, during the taxable year, paid for the purpose specified in section 170(c) ... [i.e., a charitable purpose]." IRC §642(c)(1) (Emphasis Supplied)

What About Income Tax Deferred Retirement Accounts payable to an Estate or Trust?

- Estates and Complex Trusts may deduct (in lieu of IRC §170 deduction) "any amount of the gross income which pursuant to the terms of the governing instrument is, during the taxable year, paid for the purpose specified in section 170(c) ... [i.e., a charitable purpose]." IRC §642(c)(1) (Emphasis Supplied)
Income in Respect of a Decedent ("IRD")

- IRC §641: Items of gross income in respect of a decedent which are not properly includable in the tax return of the decedent shall be included in the gross income, for the taxable year when received, of:
  - The estate of the decedent, if the right to receive the amounts is acquired by the decedent's estate from the decedent; or
  - The person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right is not received by the estate; or
  - The person who acquires from the decedent the right to receive the amount of the bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

Direct IRD to Charitable Beneficiaries

- Settlers direct the trustee that all charitable gifts, bequests and devises shall be made, to the extent possible, from property that constitutes "income in respect of a decedent" ("IRD") as that term is defined under the U.S. income tax laws, and to the extent such charitable gifts, bequests and devises exceed IRD, then from trust income, such that the transfer will qualify for the charitable income tax deduction under IRC §642(c), as hereafter amended, and any corresponding future Internal Revenue Code section.

Other Estate and Trust Income Tax Deductions

- In lieu of the personal exemptions in IRC §151, Estates and Trusts are allowed the following Personal Exemption deductions under IRC §642(d):
  - Estates: $600.
  - A Trust which, under its governing instrument, is required to distribute all of its income currently shall be allowed a deduction of $300.
  - Other Trusts shall be allowed a deduction of $100.
Other Estate and Income Tax Deductions?

- Net Operating Loss Deduction. IRC §642(d)
- Depreciation and Depletion (to the extent not allowable to beneficiaries). IRC §642(e)
- Amortization. IRC §642(f)
- May not also deduct on federal estate tax return. IRC §642(g)

Unused Carryovers upon Termination of Estate or Trust

- Unused operating loss carryover or capital loss carryover may be deductible by beneficiaries who succeed to the property or estate of the estate or trust. IRC §642(h)
- May warrant the filing of a tax return for the estate or trust, even when a tax return is not otherwise required.

How is taxable income allocated among Beneficiaries?

- Schedule K-1 provided to each beneficiary to whom taxable income is allocated (similar to partners and S-corp shareholders), which tells beneficiary tax items to include in personal income tax return of the beneficiary.
- If Trust receives $1,000 DNI deduction, beneficiaries are required to include $1,000 on individual income tax returns.
- How is taxable income allocated if multiple beneficiaries receive distributions?
Tier System

• If income is required to be distributed annually to a beneficiary, such income shall be included in the gross income of such beneficiary. IRC §652(a)
• If other amounts exceed DNI, pro rata amount shall be included in the gross income of the beneficiary. IRC §662(a)

Example

• If all distributions are discretionary, the trust has $10,000 of taxable income, DNI is $10,000 and two beneficiaries receive $25,000 apiece, each beneficiary is allocated $5,000 of taxable income.

Separate Share Rule

• For the sole purpose of allocating taxable income of a Complex Trust among beneficiaries, “substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts.” IRC §663(c).
• Similar rules shall apply to treat substantially separate and independent shares of different beneficiaries in an estate as separate estates. IRC §663(c).
• The separate share rule is mandatory. Reg. § 1.663(c)-1(d).
New Tax Basis for Inherited Assets

• In general, except for Income in Respect of a Decedent, and property acquired by gift within one year of death that is returned to the original donor, property inherited from a decedent at the time of the decedent’s death receives a new tax basis equal to the date of death value of the property. IRC §1014

No New Tax Basis for Assets gifted before Death

• In general, property received by gift while the donor is alive do NOT receive a new tax basis. IRC §1015
• Generally better to delay gifts of appreciated assets until time of death (unless gift will substantially reduce the federal estate tax).

½ Basis Increase if Decedent is ½ owner of Property

• In common law states, property owned jointly by married couple is deemed to be owned one-half by each spouse for estate tax purposes (if property acquired after 1976). IRC §2040.
• Thus, ½ step up in basis if surviving spouse inherits deceased spouse’s one-half interest in property that is not community property.
• In community property states, both halves of jointly owned property receive a tax basis increase to date of death fair market value. IRC §1014(b)(6).
ESTATE AND GIFT TAXATION
B. J. Hickert

I. Estate and Gift Tax

A. Unified Estate and Gift Tax

Since 1916 for the estate tax and since 1924 for the gift tax, the federal government has imposed a tax on a person’s transfers of assets to others. In general, the estate tax applies to gifts at death, and the gift tax applies to gifts during life. IRC §2001, et seq. and IRC §2501, et seq., respectively. There are deductions for gifts to a spouse and gifts to qualified charities, which render these gifts generally non-taxable. IRC §§2522 and 2523.

In 1976, the federal estate and federal gift tax were unified. In other words, the same rates of tax were applied regardless of whether the gift occurred before or at the time of death, and the same amount of gifts were excluded from the tax regardless of whether the gift occurred before or at the time of death. Every person could exclude an amount of transfers from the federal estate and gift tax, but this exclusion amount is for the person’s lifetime, not for a particular year. Thus, for example, if the exclusion amount is $5,000,000, and a person makes $2,000,000 of taxable transfers during a year, the person would only have $3,000,000 of the exclusion remaining to shelter future taxable transfers from the estate and gift tax.

The Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (referred to herein as the “2001 Tax Reduction Act”) reduced the top tax rates for a nine year period, from 2002 to 2010, inclusive. The top gift tax rate was gradually reduced until it reached 35% for 2010; the estate tax top rate was similarly reduced, but then the estate tax was totally eliminated for 2010.

The Tax Relief, Unemployment Insurance Reauthorization, and Jobs Creation Act of 2010, P.L. 111-312 (referred to herein as the “2010 Extension Act”) prevented the federal estate and gift taxes from reverting to the pre-2002 levels, by imposing a 35% top tax rate and a $5 million exclusion amount (adjusted annually for inflation) for a two year period (i.e., the 2011 and 2012 calendar years).

B. American Taxpayer Relief Act of 2012

The American Taxpayer Relief Act of 2012 (the “2012 Act”) was approved by the House and Senate on January 1, 2013 and signed into law on January 2, 2013. The 2012 Act repealed the estate tax sunset provisions of the 2001 Tax Reduction Act and the 2010 Extension Act and thereby makes “permanent” many provisions of the 2001 Tax Reduction Act and the 2010 Extension Act, including the $5,000,000 “applicable exemption amount” (adjusted for inflation in multiples of $10,000 for taxable years after 2011). Also, the 2012 Act amends IRC §2001(c) to revert to the tax rates that existed prior to 2010, except that the highest tax rate is 40% (for taxable estates in excess of $1,000,000). For 2016, a 40% tax is imposed on most transfers in excess of the $5,450,000 applicable exemption amount to persons who are not a spouse or qualified charity.

C. Portability

The 2010 Extension Act introduced a new concept, commonly referred to as “portability,” whereby a surviving spouse may use the unused exemption amount of the surviving spouse’s most recently deceased spouse. For example, if the Husband dies during 2011 with a $2,000,000 estate left to persons other than the surviving spouse and no prior taxable gifts, and the surviving wife

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does not remarry and dies later during 2011 without making any prior taxable gifts, the surviving spouse’s estate tax exemption amount may be increased by the $3,000,000 exemption amount that was not used by her husband’s estate. As a consequence, the surviving spouse could give up to $8,000,000 of assets to others at the time of her death without any federal estate tax liability.

Under the 2010 Act, portability was only available if the first spouse died after January 1, 2011, the second spouse died before the portability law expires (which was then at the end of 2012), and the surviving spouse did not remarry and outlive the new spouse (since portability only applies to the unused exemption amount of the most recent predeceased spouse). In addition, for a surviving spouse’s estate to use the deceased spousal unused exclusion amount, however, the deceased spouse’s executor must timely file an estate tax return computing the deceased spouse unused exclusion amount and file an irrevocable election allowing the surviving spouse’s estate to use the exclusion.

The 2012 Act made permanent the 2010 Portability provisions described above, including the IRC §2010(c)(5) requirement that the deceased spouse’s executor must timely file an estate tax return computing the deceased spouse unused exclusion amount and file an irrevocable election allowing the surviving spouse’s estate to use the exclusion. More specifically, the 2012 Act amends IRC §2010(c)(4)(B) to provide that the estate tax credit is calculated based on the “applicable exclusion amount” rather than the “basic exclusion amount.” For purposes of this section, the term “basic exclusion amount” is defined to be $5,000,000, adjusted for inflation for calendar years after 2011. The term “applicable exclusion amount” is the sum of the “basic exclusion amount” and the “deceased spousal unused exclusion amount.”

D. Taxable Gifts

The following are excluded from the IRC definition of “taxable gifts”: present interest gifts of less than $14,000 per recipient per calendar year; tuition payments for another to a qualified educational organization; medical payments for another for qualified medical care; and certain loans of qualified works of art. IRC §2503.

E. Special Valuation Options

*Use Valuation of Farm and Business Real Property.* If you meet certain qualification standards, your estate may elect to value the business real estate based on its use value, rather than its fair market value. If this election is made, the Federal Estate Tax is imposed based on the lower “use” valuation. IRC §2032A.

*Alternate Valuation.* If the Executor elects, and it will result in a lower gross estate and lower aggregate estate and GST tax, the estate tax may generally be determined based on the value of estate assets six months after the date of death, rather than on the values as of the date of death. IRC §2032.
G. Installment Payment of Estate Tax

If at least 35% of the gross estate consists of a closely held business, and there is federal estate tax due, the executor may be able to elect to pay a portion of the estate tax in installments over a period of 14 years with no principal payment due during the first four years. IRC §6166. The interest charged on the qualified portion of the balance due is only 2%. This provision is designed to ease the transfer of a family-owned business to beneficiaries.

H. Estate and Gift Tax Returns and Payment

A federal estate tax return (Form 706) is required if the taxable estate and prior taxable gifts exceed the exclusion amount, IRC §6018, and is due 9 months after the decedent’s death, IRC §6075. The Executor or any other person in possession of the decedent’s property is liable for payment of the estate tax, IRC §2002 and IRC §2203, which is due 9 months after the decedent’s death, IRC §6151. The federal gift tax return (Form 709) is due by April 15 of the year following the year of the gift, IRC §6075, and any gift tax due is payable with the return, IRC §6151.

II. Generation Skipping Transfer (“GST”) Tax

In 1976, an additional tax was imposed on most transfers that “skip” one or more generations. IRC §2601, et seq. Except for an exclusion amount which has generally been the same as the estate tax exclusion amount, the GST tax applies, for example, to gifts from a grandparent to grandchildren and great grandchildren (unless the member of the intervening generation is then deceased).

To use an example, if a grandparent made a $15,000,000 gift to a grandchild during 2011, when the GST exclusion amount was $5,000,000, and the grandchild’s parent who was the child of the grandparent was alive during 2011, there was a “skip” transfer subject to the GST tax. Thus, there would be a $3,500,000 federal gift tax imposed on the amount of the transfer in excess of the $5,000,000 exclusion amount (as described above), plus a $3,500,000 federal GST tax on the amount of the transfer in excess of the $5,000,000 exclusion amount at the highest estate tax rate (35% for 2011). Third, there is an additional gift tax for the amount of the GST tax owed by the grandparent (i.e., 35% of $3,500,000). IRC §2515.

In essence, the GST Tax causes the “skip” gift to be taxed the same as if the grandparent gave $15,000,000 to a child (i.e., the initial gift tax), the child thereafter gave the $15,000,000 to the grandchild (i.e., the GST tax), and then the grandparent paid the $3,500,000 GST tax owed by the child for the child’s gift to the grandchild (i.e., the gift tax on the amount of the GST tax).

Since the GST tax is imposed at the highest estate tax rate and since clients generally seek to delay payment of any tax, most estate plans are designed to avoid the payment of any GST tax. It is relatively common, however, for persons to make generation skipping gifts of amounts that are less than the exclusion amount. For example, if $5,000,000 was given by a grandparent to a grandchild,
rather than $15,000,000 in the example above, there would have been no gift or GST tax imposed during 2011.

Present interest gifts of less than $14,000 per recipient per calendar year and other transfers which are excluded from the statutory definition of "taxable gift" are generally not subject to the GST tax. IRC §2642(c).

The GST tax return (Form 709) and payment is generally due at the same time as the gift or estate tax return is due that reports the transfer subject to the GST tax. IRC §2662.

2012 Act: IRC Section 2631(c) provides that the GST exemption amount is "equal to the applicable exclusion amount under section 2010(c) for such calendar year." Consequently, the GST exemption amount will annually adjust to match the estate tax applicable exclusion amount. The 2012 Act makes permanent the 2010 Extension Act provision applying a 0% applicable rate for GST Transfers during 2010.

III. Kansas Estate Tax

The Kansas estate tax was repealed for the estates of persons who die after December 31, 2009.

IV. Income Taxation of Decedent's Estates

A. Income Prior to Date of Death

In general, income received by a decedent prior to the date of death is reported on the decedent's final individual income tax return, the same as if the decedent lived the entire year. IRC §6012 and Reg. §1.443-1(a)(2). The return shall be made by the executor, administrator or other person charged with the property of the decedent. IRC §6012(b)(1). If the decedent is survived by a surviving spouse, the surviving spouse may file a joint return with the deceased spouse for the year of death. IRC §6013.

B. Income of Estate after the Date of Death

The fiduciary must file a return (Form 1041) reporting Estate income after the date of death if the estate has income in excess of $600. IRC §6012 and IRC §642. Income that would be income for an individual is generally income for an estate. IRC §641. The estate income tax rates are compressed. Consequently, estates are subject to the highest 39.6% income tax rate for 2016 on income in excess of $12,400. See IRC §1. The estate may choose a fiscal year ending at the end of any month within one year of the decedent's death. The estate income tax return is due on the 15th day of the fourth month after the end of the fiscal year selected. IRC §6072(a).
A significant difference between individual and estate income tax returns is that estates get a deduction for “distributable net income.” IRC §651 and IRC §661. Simply stated, estate income that is distributed or required to be distributed to beneficiaries is passed out to the beneficiaries. Thus, the estate gets a deduction for the estate income passed out to beneficiaries and each beneficiary is required to report the portion of the estate income received by the beneficiary on his or her individual income tax return. IRC §652 and IRC §662. For these purposes, however, the distributable net income is the fiduciary accounting income, IRC §643(b), which typically excludes most capital gains. Thus, if estate income is distributed, the beneficiaries will be required to report the distributed fiduciary accounting income on their individual income tax returns, but the estate will generally be required to pay income tax on the estate’s capital gains.

C. Tax Basis for Capital Assets

Property received by inheritance from a decedent generally receives a new tax basis equal to the fair market value at the time of the decedent’s death (or the special use value or alternate valuation date, if elected). IRC §1014. Consequently, persons receiving property by inheritance may be able to sell property without paying any capital gains tax, even though the decedent would have been liable for substantial capital gains tax if the property had been sold by the decedent prior to his or her death.

The new basis only applies to capital assets received from the decedent, however, and does not apply to property for which the decedent never paid income tax (i.e., “income in respect of a decedent, such as retirement accounts, deferred annuity income and unpaid accrued interest and rent). Since there is no basis adjustment for income in respect of a decedent, the recipients of income in respect of a decedent are generally required to pay ordinary income tax upon the receipt of these amounts.
Review of United States Supreme Court Decisions 2015-16

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# Table of Contents

1. OBB Personenverkehr v. Sachs ................................................. 12/01/15  
2. Shapiro v. McManus ................................................................. 12/08/15  
3. DIRECTV, Inc. v. Imburgia ......................................................... 12/14/15  
4. Bruce v. Samuels ................................................................. 1/12/16  
5. Hurst v. Florida ................................................................. 1/12/16  
6. Kansas v. Carr ................................................................. 1/20/16  
7. Montanile v. Bd. of Trustees of Nat. Elevator Indus. ...................... 1/20/16  
8. Campbell-Ewald v. Gomez .......................................................... 1/20/16  
9. Montgomery v. Louisiana ......................................................... 1/25/16  
10. Musacchio v. United States ....................................................... 1/25/16  
11. Menominee Tribe of Wis. v. United States .................................. 1/25/16  
12. FERC v. Electric Power Supply Assn ........................................... 1/25/16  
14. Lockhart v. United States ......................................................... 3/01/16  
15. Americold Realty Trust v. ConAgra Foods, Inc. ............................ 3/07/16  
17. Sturgeon v. Frost ................................................................. 3/22/16  
18. Tyson Foods, Inc. v. Bouaphakeo .............................................. 3/22/16  
19. Nebraska v. Parker .............................................................. 3/22/16  
20. Luis v. United States .............................................................. 3/30/16  
22. Nichols v. United States ......................................................... 4/04/16  
23. Welch v. United States .......................................................... 4/18/16  
25. Franchise Tax Bd. of Cal. v. Hyatt ............................................. 4/19/16
26. Molina-Martinez v. United States ......................................................... 4/20/16
27. Bank Markazi v. Peterson ................................................................. 4/20/16
29. Heffernan v. City of Paterson ......................................................... 4/26/16
30. Ocasio v. United States ................................................................. 5/02/16
31. Sheriff v. Gillie .............................................................................. 5/16/16
32. Spokeo, Inc. v. Robins ................................................................. 5/16/16
33. Husky Int’l Electronics, Inc. v. Ritz .............................................. 5/16/16
34. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning .............. 5/16/16
35. CRST Van Expedited, Inc. v. EEOC ............................................ 5/19/16
36. Betterman v. Montana ................................................................. 5/19/16
37. Luna Torres v. Lynch ................................................................. 5/19/16
38. Foster v. Chatman ...................................................................... 5/23/16
41. Army Corps of Engineers v. Hawkes Co. ..................................... 5/31/16

Per Curiam Cases of Note (available at
www.supremecourt.gov/opinions/slipopinions.aspx)
42. Weary v. Cain ........................................................................... 3/07/16
43. V.L. v. E.L. .............................................................................. 3/07/16
44. Zubik v. Burwell ...................................................................... 5/16/16
45. Lynch v. Arizona ...................................................................... 5/31/16
Supreme Court of the United States

Syllabus

OBB Personenverkehr AG v. Sachs

Certiorari to the United States Court of Appeals for the Ninth Circuit


Respondent Carol Sachs, a California resident, purchased a Eurail pass over the Internet from a Massachusetts-based travel agent. While using that pass to board a train in Austria operated by petitioner OBB Personenverkehr AG (OBB), the Austrian state-owned railway, Sachs fell to the tracks and suffered traumatic personal injuries. She sued OBB in Federal District Court. OBB moved to dismiss, claiming that her suit was barred by the Foreign Sovereign Immunities Act, which shields foreign states and their agencies and instrumentalities from suit in United States courts, unless a specified exception applies. Sachs countered that her suit fell within the Act’s commercial activity exception, which abrogates sovereign immunity for suits “based upon a commercial activity carried on in the United States by [a] foreign state,” 28 U. S. C. §1605(a)(2), reasoning that her suit was “based upon” the Massachusetts-based travel agent’s sale of the Eurail pass in the United States, and that the travel agent’s sale of that pass could be attributed to OBB through common law principles of agency. The District Court held that Sachs’s suit did not fall within §1605(a)(2) and dismissed the suit, but the en banc Ninth Circuit reversed. The court first concluded that the Eurail pass sale by the travel agent could be attributed to OBB through common law principles of agency, and then determined that Sachs’s suit was “based upon” that Eurail pass sale because the sale established a single element necessary to recover under each cause of action brought by Sachs.

Held: Sachs’s suit falls outside the commercial activity exception and is therefore barred by sovereign immunity. Pp. 5–11.

(a) Sachs’s suit is not “based upon” the sale of the Eurail pass for purposes of §1605(a)(2). Therefore, the Court has no need to address...
whether the Act allows the travel agent's sale of the Eurail pass to be attributed to OBB through common law principles of agency. Pp. 5–9.

(1) Although the Act does not elaborate on the phrase "based upon," \textit{Saudi Arabia} v. \textit{Nelson}, 507 U. S. 349, provides sufficient guidance to resolve this case. There, the Court held that the "based upon" inquiry requires a court to determine the "particular conduct on which the action is based," \textit{id.}, at 356, and identified that conduct by looking to "the gravamen of the complaint," \textit{id.}, at 357. Pp. 5–6.

(2) The Ninth Circuit used a flawed approach when it found that the "based upon" inquiry would be satisfied if the sale of the Eurail pass provided "an element" of each of Sachs's claims. This Court's approach in Nelson is flatly incompatible with such a one-element approach, which necessarily requires a court to identify all the elements of each claim before finding that the claim falls outside \$1605(a)(2). The Nelson Court did not undertake such an exhaustive claim-by-claim, element-by-element analysis or engage in the choice-of-law analysis necessary to such an undertaking. See \textit{id.}, at 356–358. P. 7.

(3) As opposed to adopting a one-element test, the Nelson Court zeroed in on the core of the plaintiffs' suit—the conduct that actually injured the plaintiffs—to identify the conduct that the suit was "based upon." See \textit{id.}, at 358. All of Sachs's claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria. However, Sachs frames her suit, the incident in Innsbruck, Austria, remains at its foundation. Any other approach would allow plaintiffs to evade the Act's restrictions through artful pleading. See \textit{id.}, at 363. Pp. 7–9.

(b) Sachs now contends that her claims are "based upon" OBB's entire railway enterprise. Because that argument was never presented to any lower court, it is forfeited. See \textit{Taylor v. Freeland & Kronz}, 503 U. S. 638, 645–646. Pp. 9–10.

737 F. 3d 584, reversed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SHAPIRO ET AL. v. McMANUS, CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS, ET AL.

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


Since 1976, federal law has mandated that a “district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ,” 28 U.S.C. §2284(a), and has provided that “the judge [presented with a request for a three-judge court] shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges” to serve, §2284(b)(1).

Petitioners requested that a three-judge court be convened to consider their claim that Maryland’s 2011 congressional redistricting plan burdens their First Amendment right of political association. Concluding that no relief could be granted for this claim, the District Judge dismissed the action instead of notifying the Chief Judge of the Circuit to convene a three-judge court. The Fourth Circuit affirmed. Held: Section 2284 entitles petitioners to make their case before a three-judge court. Pp. 3–8.

(a) Section 2284(a)'s prescription could not be clearer. Because the present suit is indisputably "an action . . . challenging the constitutionality of the apportionment of congressional districts," the District Judge was required to refer the case to a three-judge court. Section 2284(a) admits of no exception, and "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." Lex-econ Inc. v. Milberg Weiss Bershad Hybes & Lerach, 523 U.S. 26, 35. The subsequent provision of §2284(b)(1), that the district judge shall commence the process for appointment of a three-judge panel "unless he determines that three judges are not required," should be read not as a grant of discretion to the district judge to ignore §2284(a), but as
a compatible administrative detail requiring district judges to "determine[e]" only whether the "request for three judges" is made in a case covered by §2284(a). This conclusion is bolstered by §2284(b)(3)'s explicit command that "[a] single judge shall not . . . enter judgment on the merits." Pp. 3–5.

(b) Respondents' alternative argument, that the District Judge should have dismissed petitioners' claim as "constitutionally insubstantial" under Goosby v. Osber, 409 U. S. 512, is unpersuasive. This Court has long distinguished between failing to raise a substantial federal question for jurisdictional purposes—what Goosby addressed—and failing to state a claim for relief on the merits—what the District Judge found here; only "wholly insubstantial and frivolous" claims implicate the former. Bell v. Hood, 327 U. S. 678, 682–683. Absent such obvious frivolity, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." Id., at 682. Petitioners' pleas for relief, which was based on a legal theory put forward in Justice Kennedy's concurrence in Vieth v. Jubelirer, 541 U. S. 267, 315, and uncontradicted in subsequent majority opinions, easily clears Goosby's low bar. Pp. 5–7.


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

Syllabus

DIRECTV, INC. v. IMBURGIA ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE


Petitioner DIRECTV, Inc., and its customers entered into a service agreement that included a binding arbitration provision with a class-arbitration waiver. It specified that the entire arbitration provision was unenforceable if the “law of your state” made class-arbitration waivers unenforceable. The agreement also declared that the arbitration clause was governed by the Federal Arbitration Act. At the time that respondents, California residents, entered into that agreement with DIRECTV, California law made class-arbitration waivers unenforceable, see Discover Bank v. Superior Court, 36 Cal. 4th 148, 113 P. 3d 1100. This Court subsequently held in
AT&T Mobility LLC v. Concepcion, 563 U.S. 333, however, that California’s Discover Bank rule was pre-empted by the Federal Arbitration Act, 9 U.S.C. §2.

When respondents sued petitioner, the trial court denied DIRECTV’s request to order the matter to arbitration, and the California Court of Appeal affirmed. The court thought that California law would render class-arbitration waivers unenforceable, so it held the entire arbitration provision was unenforceable under the agreement. The fact that the Federal Arbitration Act pre-empted that California law did not change the result, the court said, because the parties were free to refer in the contract to California law as it would have been absent federal pre-emption. The court reasoned that the phrase “law of your state” was both a specific provision that should govern more general provisions and an ambiguous provision that should be construed against the drafter. Therefore, the court held, the parties had in fact included California law as it would have been without federal pre-emption.

Held: Because the California Court of Appeal’s interpretation is
emptied by the Federal Arbitration Act, that court must enforce the arbitration agreement. Pp. 5–11.

(a) No one denies that lower courts must follow Concepcion, but that elementary point of law does not resolve the case because the parties are free to choose the law governing an arbitration provision, including California law as it would have been if not pre-empted. The state court interpreted the contract to mean that the parties did so, and the interpretation of a contract is ordinarily a matter of state law to which this Court defers, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474. The issue here is not whether the court’s decision is a correct statement of California law but whether it is consistent with the Federal Arbitration Act. Pp. 5–6.

(b) The California court’s interpretation does not place arbitration contracts “on equal footing with all other contracts,” Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, because California courts would not interpret contracts other than arbitration contracts the same way. Several considerations lead to this conclusion.

First, the phrase “law of your state” is not ambiguous and taxes its ordinary meaning: valid state law. Second, California case law—that under “general contract principles,” references to California law incorporate the California Legislature’s power to change the law retroactively, Doe v. Harris, 57 Cal. 4th 64, 69–70, 302 P. 3d 598, 601–602—clarifies any doubt about how to interpret it. Third, because the court nowhere suggests that California courts would reach the same interpretation in any other context, its conclusion appears to reflect the subject matter, rather than a general principle that would include state statutes invalidated by other federal law. Fourth, the language the court uses to frame the issue focuses only on arbitration. Fifth, the view that state law retains independent force after being authoritatively invalidated is one courts are unlikely to apply in other contexts. Sixth, none of the principles of contract interpretation relied on by the California court suggests that other California courts would reach the same interpretation elsewhere. The court applied the canon that contracts are construed against the drafter, but the lack of any similar case interpreting similar language to include invalid laws indicates that the antidrafter canon would not lead California courts to reach a similar conclusion in cases not involving arbitration. Pp. 6–10.

225 Cal. App. 4th 338, 170 Cal. Rptr. 3d 190, reversed and remanded.

(Slip Opinion) OCTOBER TERM, 2015

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

BRUCE v. SAMUELS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


The Prison Litigation Reform Act of 1995 provides that prisoners qualified to proceed in forma pauperis (IFP) must nonetheless pay an initial partial filing fee, set as “20 percent of the greater of” the average monthly deposits in the prisoner’s account or the average monthly balance of the account over the preceding six months, 28 U.S.C. §1915(b)(1). They must then pay the remainder of the fee in monthly installments of “20 percent of the preceding month’s income credited to the prisoner’s account,” §1915(b)(2). The initial partial fee is assessed on a per-case basis, i.e., each time the prisoner files a lawsuit. The initial payment may not be exacted if the prisoner has no means to pay it, §1915(b)(4), and no monthly installments are required unless the prisoner has more than $10 in his account, §1915(b)(2). In contest here is the calculation of subsequent monthly installment payments when more than one fee is owed.

Petitioner Antoine Bruce, a federal inmate and a frequent litigant, argued that the monthly filing-fee payments do not become due until filing-fee obligations previously incurred in other cases are satisfied. The D. C. Circuit disagreed, holding that Bruce’s monthly payments were due simultaneously with monthly payments in the earlier cases.

Held: Section 1915(b)(2) calls for simultaneous, not sequential, recoupment of multiple monthly installment payments. Pp. 5–8.

(a) Bruce and the Government present competing interpretations of the IFP statute, which does not explicitly address how multiple filing fees should be paid. In urging a per-prisoner approach under which he would pay 20 percent of his monthly income regardless of the number of cases he has filed, Bruce relies principally on the contrast between the singular “clerk” and the plural “fees” as those nouns appear in §1915(b)(2), which requires payments to be forwarded “to the
Syllabus

clerk of the court... until the filing fees are paid." Even when more
than one filing fee is owed, Bruce contends, §1915(b)(2) instructs that
only one clerk will receive payment each month. In contrast, the
Government urges a per-case approach. Emphasizing that §1915 as
a whole has a single-case focus, providing instructions for each case,
the Government contends that it would be anomalous to treat para-
graph (b)(1)'s initial partial payment, admittedly directed at a single
case, differently than paragraph (b)(2)'s subsequent monthly pay-

(b) Section 1915's text and context support the per-case approach.
Just as §1915(b)(1) calls for assessment of "an initial partial filing
fee" each time a prisoner "brings a civil action or files an appeal" (emph.
asis added), so its allied provision, §1915(b)(2), calls for month-
ly 20 percent payments simultaneously for each action pursued. Sec-
tion 1915(b)(3), which imposes a ceiling on fees permitted "for the
commencement of a civil action or an appeal" (emphasis added), and
§1915(b)(4), which protects the right to bring "a civil action or ap-
peal[] a... judgment" (emphasis added), confirm that subsection (b)
as a whole is written from the perspective of a single case. Pp. 7–8.

761 F. 3d 1, affirmed.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

HURST v. FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA


Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” Fla. Stat. § 775.082(1). In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. § 921.141(1). Next, the jury, by majority vote, renders an “advisory sentence.” § 921.141(2). Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death. § 921.141(3).

A Florida jury convicted petitioner Timothy Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and the judge again found the facts necessary to sentence Hurst to death. The Florida Supreme Court affirmed, rejecting Hurst’s argument that his sentence violated the Sixth Amendment in light of Ring v. Arizona, 536 U. S. 554, in which this Court found unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death.

Held: Florida’s capital sentencing scheme violates the Sixth Amendment in light of Ring. Pp. 4–10.

(a) Any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” that must be submitted to a jury. Apprendi v. New Jersey, 530 U. S. 466, 494. Applying Apprendi to the capital punishment context, the Ring Court had little difficulty concluding that an Arizona judge’s inde-
Syllabus

pendent factfinding exposed Ring to a punishment greater than the jury’s guilty verdict authorized. 536 U. S., at 604. Ring’s analysis applies equally here. Florida requires not the jury but a judge to make the critical findings necessary to impose the death penalty. That Florida provides an advisory jury is immaterial. See Walton v. Arizona, 497 U. S. 639, 648. As with Ring, Hurst had the maximum authorized punishment he could receive increased by a judge’s own factfinding. Pp. 4–6.

(b) Florida’s counterarguments are rejected. Pp. 6–10.

(1) In arguing that the jury’s recommendation necessarily included an aggravating circumstance finding, Florida fails to appreciate the judge’s central and singular role under Florida law, which makes the court’s findings necessary to impose death and makes the jury’s function advisory only. The State cannot now treat the jury’s advisory recommendation as the necessary factual finding required by Ring. Pp. 6–7.

(2) Florida’s reliance on Blakely v. Washington, 542 U. S. 296, is misplaced. There, this Court stated that under Apprendi, a judge may impose any sentence authorized “on the basis of the facts . . . admitted by the defendant,” 542 U. S., at 303. Florida alleges that Hurst’s counsel admitted the existence of a robbery, but Blakely applied Apprendi to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial, while Florida has not explained how Hurst’s alleged admissions accomplished a similar waiver. In any event, Hurst never admitted to either aggravating circumstance alleged by the State. Pp. 7–8.

(3) That this Court upheld Florida’s capital sentencing scheme in Hildwin v. Florida, 490 U. S. 638, and Spaziano v. Florida, 468 U. S. 447, does not mean that stare decisis compels the Court to do so here, see Alleyne v. United States, 570 U. S. ___ (SOTOMAYOR, J., concurring). Time and subsequent cases have washed away the logic of Spaziano and Hildwin. Those decisions are thus overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty. Pp. 8–9.

(4) The State’s assertion that any error was harmless is not addressed here, where there is no reason to depart from the Court’s normal pattern of leaving such considerations to state courts. P. 10.

147 So. 3d 435, reversed and remanded.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

KANSAS v. CARR

CERTIORARI TO THE SUPREME COURT OF KANSAS


A Kansas jury sentenced respondent Sidney Gleason to death for killing a co-conspirator and her boyfriend to cover up the robbery of an elderly man.

A Kansas jury sentenced respondents Reginald and Jonathar Carr, brothers, to death after a joint sentencing proceeding. Respondents were convicted of various charges stemming from a notorious crime spree that culminated in the brutal rape, robbery, kidnapping, and execution-style shooting of five young men and women.

The Kansas Supreme Court vacated the death sentences in each case, holding that the sentencing instructions violated the Eighth Amendment by failing "to affirmatively inform the jury that mitigating circumstances need only be proved to the satisfaction of the individual juror in that juror's sentencing decision and not beyond a reasonable doubt." It also held that the Carrs' Eighth Amendment right "to an individualized capital sentencing determination" was violated by the trial court's failure to sever their sentencing proceedings.

Held:

1. The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. Pp. 8–13.

(a) Because the Kansas Supreme Court left no doubt that its ruling was based on the Federal Constitution, Gleason's initial argument—that this Court lacks jurisdiction to hear his case because the state court's decision rested on adequate and independent state-law grounds—is rejected. See Kansas v. Marsh, 548 U.S. 163, 169. Pp. 8–9.

*Together with No. 14–450, Kansas v. Carr, and No. 14–452, Kansas v. Gleason, also on certiorari to the same court.
Syllabus

(b) This Court's capital-sentencing case law does not support requiring a court to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. See, e.g., Buchanan v. Angelone, 522 U. S. 269, 275. Nor was such an instruction constitutionally necessary in these particular cases to avoid confusion. Ambiguity in capital-sentencing instructions gives rise to constitutional error only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U. S. 370, 380, a bar not cleared here. Even assuming that it would be unconstitutional to require the defense to prove mitigating circumstances beyond a reasonable doubt, the record belies the defendants' contention that the instructions caused jurors to apply such a standard of proof here. The instructions make clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt but that mitigating circumstances must merely be "found to exist," which does not suggest proof beyond a reasonable doubt. No juror would have reasonably speculated that "beyond a reasonable doubt" was the correct burden for mitigating circumstances. Pp. 9–13.

2. The Constitution did not require severance of the Carrs' joint sentencing proceedings. The Eighth Amendment is inapposite when a defendant's claim is, at bottom, that evidence was improperly admitted at a capital-sentencing proceeding. The question is whether the allegedly improper evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Romano v. Oklahoma, 512 U. S. 1, 12. In light of all the evidence presented at the guilt and penalty phases relevant to the jury's sentencing determination, the contention that the admission of mitigating evidence by one Carr brother could have "so infected" the jury's consideration of the other's sentence as to amount to a denial of due process is beyond the pale. The Court presumes that the jury followed its instructions to "give separate consideration to each defendant." Bruton v. United States, 391 U. S. 123, distinguished. Joint proceedings are permissible and often preferable when the joined defendants' criminal conduct arises out of a single chain of events. Buchanan v. Kentucky, 483 U. S. 402, 418. Limiting instructions, like those given in the Carrs' proceeding, "often will suffice to cure any risk of prejudice," Zafiro v. United States, 506 U. S. 534, 539, that might arise from codefendants' "antagonistic" mitigation theories, id., at 538. It is improper to vacate a death sentence based on pure "speculation" of fundamental unfairness, "rather than reasoned judgment." Romano, supra, at 13–14. Only the most extravagant speculation would lead to the conclusion that any sup-
posedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair when their acts of almost inconceivable cruelty and depravity were described in excruciating detail by the sole survivor, who, for two days, relived the Wichita Massacre with the jury. Pp. 13–17.


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

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SUPREME COURT OF THE UNITED STATES

Syllabus

MONTANILE v. BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN

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


Employee benefits plans regulated by the Employee Retirement Income Security Act of 1974 (ERISA or Act) often contain subrogation clauses requiring a plan participant to reimburse the plan for medical expenses if the participant later recovers money from a third party for his injuries. Here, petitioner Montanile was seriously injured by a drunk driver, and his ERISA plan paid more than $120,000 for his medical expenses. Montanile later sued the drunk driver, obtaining a $500,000 settlement. Pursuant to the plan's subrogation clause, respondent plan administrator (the Board of Trustees of the National Elevator Industry Health Benefit Plan, or Board), sought reimbursement from the settlement. Montanile's attorney refused that request and subsequently informed the Board that the fund would be transferred from a client trust account to Montanile unless the Board objected. The Board did not respond, and Montanile received the settlement.

Six months later, the Board sued Montanile in Federal District Court under §502(a)(3) of ERISA, which authorizes plan fiduciaries to file suit "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U. S. C. §1132(a)(3). The Board sought an equitable lien on any settlement funds or property in Montanile's possession and an order enjoining Montanile from dissipating any such funds. Montanile argued that because he had already spent almost all of the settlement, no identifiable fund existed against which to enforce the lien. The District Court rejected Montanile's argument, and the Eleventh Circuit affirmed, holding that even if Montanile had completely dissipated the fund, the plan was entitled to re-
imbursement from Montanile's general assets.

Held: When an ERISA-plan participant wholly dissipates a third-party settlement on nontraceable items, the plan fiduciary may not bring suit under §502(a)(3) to attach the participant's separate assets. Pp. 5–15.


(1) This Court's precedents establish that the basis for the Board's claim—the enforcement of a lien created by an agreement to convey a particular fund to another party—is equitable. See Sereboff, 547 U. S., at 363–364. The Court's precedents also establish that the nature of the Board's underlying remedy—enforcement of a lien against "specifically identifiable funds that were within [Montanile's] possession and control," id., at 362–363—would also have been equitable had the Board immediately sued to enforce the lien against the fund. But those propositions do not resolve the question here: whether a plan is still seeking an equitable remedy when the defendant has dissipated all of a separate settlement fund, and the plan then seeks to recover out of the defendant's general assets. Pp. 5–7.

(2) This Court holds today that a plan is not seeking equitable relief under those circumstances. In premerger equity courts, a plaintiff could ordinarily enforce an equitable lien, including, as here, an equitable lien by agreement, only against specifically identified funds that remained in the defendant's possession or against traceable items that the defendant purchased with the funds. See 4 S. Symons, Pomeroy's Equity Jurisprudence §1234, pp. 692–695. If a defendant dissipated the entire fund on nontraceable items, the lien was eliminated and the plaintiff could not attach the defendant's general assets instead. See Restatement of Restitution, §215(1), p. 866. Pp. 8–9.

(b) The Board's arguments in favor of the enforcement of an equitable lien against Montanile's general assets are unsuccessful. Sereboff does not contain an exception to the general asset-tracing requirement for equitable liens by agreement. See 547 U. S., at 365. Nor does historical equity practice support the enforcement of an equitable lien against general assets. And the Board's claim that ERISA's objectives are best served by allowing plans to enforce such liens is a "vague notion[n] of [the] statute's 'basic purpose' . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Mertens v. Hewitt Associates, 508 U. S. 248, 261. Pp. 9–14.
Syllabus

(c) The case is remanded for the District Court to determine, in the first instance, whether Montanile kept his settlement fund separate from his general assets and whether he dissipated the entire fund on nontraceable assets. P. 14.
593 Fed. Appx. 903, reversed and remanded.

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

CAMPBELL-EWALD CO. v. GOMEZ

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


The United States Navy contracted with petitioner Campbell-Ewald Company (Campbell) to develop a multimedia recruiting campaign that included the sending of text messages to young adults, but only if those individuals had "opted in" to receipt of marketing solicitations on topics that included Navy service. Campbell's subcontractor Mindmatics LLC generated a list of cellular phone numbers for consenting 18- to 24-year-old users and then transmitted the Navy's message to over 100,000 recipients, including respondent Jose Gomez, who alleges that he did not consent to receive text messages and, at age 40, was not in the Navy's targeted age group. Gomez filed a nationwide class action, alleging that Campbell violated the Telephone Consumer Protection Act (TCPA), 47 U. S. C. §227(b)(1)(A)(iii), which prohibits "using any automatic dialing system" to send a text message to a cellular telephone, absent the recipient's prior express consent. He sought treble statutory damages for a willful and knowing TCPA violation and an injunction against Campbell's involvement in unsolicited messaging.

Before the deadline for Gomez to file a motion for class certification, Campbell proposed to settle Gomez's individual claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Gomez did not accept the offer and allowed the Rule 68 submission to lapse on expiration of the time (14 days) specified in the Rule. Campbell then moved to dismiss the case pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. Campbell argued first that its offer mooted Gomez's individual claim by providing him with complete relief. Next, Campbell urged that Gomez's failure to move for class certification before his individual claim became moot caused the putative class claims to become moot as well. The District Court de-
nied the motion. After limited discovery, the District Court granted Campbell’s motion for summary judgment. Relying on Yearsley v. W. A. Ross Constr. Co., 309 U. S. 18, the court held that Campbell, as a contractor acting on the Navy’s behalf, acquired the Navy’s sovereign immunity from suit under the TCPA. The Ninth Circuit reversed. It agreed that Gomez’s case remained live but concluded that Campbell was not entitled to “derivative sovereign immunity” under Yearsley or on any other basis.

Held:

1. An unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case, so the District Court retained jurisdiction to adjudicate Gomez’s complaint.

   Article III’s “cases” and “controversies” limitation requires that “an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed,” Arizonans for Official English v. Arizona, 520 U. S. 43, 67 (internal quotation marks omitted), but a case does not become moot as “long as the parties have a concrete interest, however small,” in the litigation’s outcome, Chafin v. Chafin, 568 U. S. ___, ___ (internal quotation marks omitted).

   Gomez’s complaint was not effaced by Campbell’s unaccepted offer to satisfy his individual claim. Under basic principles of contract law, Campbell’s settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy. With no settlement offer operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset. Neither Rule 68 nor the 19th-century railroad tax cases California v. San Pablo & Tulare R. Co., 149 U. S. 308, Little v. Bowers, 134 U. S. 547, and San Mateo County v. Southern Pacific R. Co., 116 U. S. 138, support the argument that an unaccepted settlement offer can moot a complaint. Pp. 6–12.

2. Campbell’s status as a federal contractor does not entitle it to immunity from suit for its violation of the TCPA. Unlike the United States and its agencies, federal contractors do not enjoy absolute immunity. A federal contractor who simply performs as directed by the Government may be shielded from liability for injuries caused by its conduct. See Yearsley, 309 U. S., at 20–21. But no “derivative immunity” exists when the contractor has “exceeded [its] authority” or its authority “was not validly conferred.” Id., at 21. The summary judgment record includes evidence that the Navy authorized Campbell to send text messages only to individuals who had “opted in” to receive solicitations, as required by the TCPA. When a contractor violates both federal law and the Government’s explicit instructions, as alleged here, no immunity shields the contractor from suit. Pp. 12–14.
Syllabus

768 F. 3d 871, affirmed and remanded.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

MONTGOMERY v. LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA


Petitioner Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years after Montgomery was taken into custody, this Court decided that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Miller v. Alabama, 567 U. S. ___—___. Montgomery sought state collateral relief, arguing that Miller rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that Miller does not have retroactive effect in cases on state collateral review.

Held:

1. This Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to Miller. Pp. 5–14.

   (a) Teague v. Lane, 489 U. S. 288, a federal habeas case, set forth a framework for the retroactive application of a new constitutional rule to convictions that were final when the new rule was announced. While the Court held that new constitutional rules of criminal procedure are generally not retroactive, it recognized that courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," Penry v. Lynaugh, 492 U. S. 302, 330. Court-appointed amicus contends that because Teague was an interpretation of the federal habeas statute,
not a constitutional command, its retroactivity holding has no application in state collateral review proceedings. However, neither *Teague v. Danforth* v. *Minnesota*, 552 U.S. 264—which concerned only *Teague’s* general retroactivity bar for new constitutional rules of criminal procedure—had occasion to address whether States are required as a constitutional matter to give retroactive effect to new substantive rules. Pp. 5–8.

(b) When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. This conclusion is established by precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application. As *Teague, supra*, at 292, 312, and *Penry, supra*, at 330, indicate, substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. In contrast, where procedural error has infected a trial, a conviction or sentence may still be accurate and the defendant’s continued confinement may still be lawful, see *Schriro v. Summerlin*, 542 U.S. 348, 352–353; for this reason, a trial conducted under a procedure found unconstitutional in a later case does not automatically validate a defendant’s conviction or sentence. The same possibility of a valid result does not exist where a substantive rule has eliminated a State’s power to prescribe the defendant’s conduct or impose a given punishment. See *United States v. United States Coin & Currency*, 401 U.S. 715, 724. By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of recognizing that substantive rules must have retroactive effect regardless of when the defendant’s conviction became final; for a conviction under an unconstitutional law “is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment,” *Ex parte Siebold*, 100 U.S. 371, 376–377. The same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose, *Penry, supra*, at 330. It follows that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. This Court’s precedents may not directly control the question here, but they bear on the necessary analysis, for a State that may not constitutionally insist that a prisoner remain in jail on federal habeas review may not constitutionally insist on the same result in its own postconviction proceedings. Pp. 8–14.

2. *Miller’s* prohibition on mandatory life without parole for juvenile
offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review. The “foundation stone” for Miller’s analysis was the line of precedent holding certain punishments disproportionate when applied to juveniles, 567 U. S., at ___, n. 4. Relying on Roper v. Simmons, 543 U. S. 551, and Graham v. Florida, 560 U. S. 48, Miller recognized that children differ from adults in their “diminished culpability and greater prospects for reform,” 567 U. S., at ___, and that these distinctions “diminish the penological justifications” for imposing life without parole on juvenile offenders, id., at ___. Because Miller determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” id., at ___, it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—i.e., juvenile offenders whose crimes reflect the transient immaturity of youth, Penny, 492 U. S., at 330. Miller therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it “necessarily carry[es] a significant risk that a defendant”—here, the vast majority of juvenile offenders—“faces a punishment that the law cannot impose upon him.” Schriro, supra, at 352.

A State may remedy a Miller violation by extending parole eligibility to juvenile offenders. This would neither impose an onerous burden on the States nor disturb the finality of state convictions. And it would afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of Miller’s central intuition—that children who commit even heinous crimes are capable of change. Pp. 14–21.

2013–1163 (La. 6/20/14), 141 So. 3d 264, reversed and remanded.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

MONTGOMERY v. LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA


Petitioner Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years after Montgomery was taken into custody, this Court decided that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Miller v. Alabama, 567 U. S. ___.

Montgomery sought state collateral relief, arguing that Miller rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that Miller does not have retroactive effect in cases on state collateral review.

Held:

1. This Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to Miller. Pp. 5–14.

(a) Teague v. Lane, 489 U. S. 288, a federal habeas case, set forth a framework for the retroactive application of a new constitutional rule to convictions that were final when the new rule was announced. While the Court held that new constitutional rules of criminal procedure are generally not retroactive, it recognized that courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," Peary v. Lynaugh, 492 U. S. 302, 330. Court-appointed amicus contends that because Teague was an interpretation of the federal habeas statute,
not a constitutional command, its retroactivity holding has no application in state collateral review proceedings. However, neither *Teague v. Danforth* nor *Teague v. Minnesota*, 552 U. S. 264—which concerned only *Teague*’s general retroactivity bar for new constitutional rules of criminal procedure—had occasion to address whether States are required as a constitutional matter to give retroactive effect to new substantive rules. Pp. 5–8.

(b) When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. This conclusion is established by precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application. As *Teague*, *supra*, at 292, 312, and *Perry*, *supra*, at 330, indicate, substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. In contrast, where procedural error has infected a trial, a conviction or sentence may still be accurate and the defendant’s continued confinement may still be lawful, see *Schriro v. Summerlin*, 542 U. S. 348, 352–353; for this reason, a trial conducted under a procedure found unconstitutional in a later case does not automatically invalidate a defendant’s conviction or sentence. The same possibility of a valid result does not exist where a substantive rule has eliminated a State’s power to proscribe the defendant’s conduct or impose a given punishment. See *United States v. United States Coin & Currency*, 401 U. S. 715, 734. By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of recognizing that substantive rules must have retroactive effect regardless of when the defendant’s conviction became final; for a conviction under an unconstitutional law “is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment,” *Ex parte Siebold*, 100 U. S. 371, 376–377. The same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose, *Perry*, *supra*, at 330. It follows that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. This Court’s precedents may not directly control the question here, but they bear on the necessary analysis, for a State that may not constitutionally insist that a prisoner remain in jail on federal habeas review may not constitutionally insist on the same result in its own postconviction proceedings. Pp. 8–14.

2. *Miller*’s prohibition on mandatory life without parole for juvenile
offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review. The "foundation stone" for Miller's analysis was the line of precedent holding certain punishments disproportionate when applied to juveniles, 567 U. S., at ___, n. 4. Relying on Roper v. Simmons, 543 U. S. 551, and Graham v. Florida, 560 U. S. 48, Miller recognized that children differ from adults in their "diminished culpability and greater prospects for reform," 567 U. S., at ___, and that these distinctions "diminish the penological justifications" for imposing life without parole on juvenile offenders, id., at ___. Because Miller determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irrepairable corruption," id., at ___, it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—i.e., juvenile offenders whose crimes reflect the transient immaturity of youth,彭尼, 492 U. S., at 330. Miller therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it "necessarily carries a significant risk that a defendant."—here, the vast majority of juvenile offenders—"faces a punishment that the law cannot impose upon him." Schriro, supra, at 352.

A State may remedy a Miller violation by extending parole eligibility to juvenile offenders. This would neither impose an onerous burden on the States nor disturb the finality of state convictions. And it would afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change. Pp. 14–21.

2013–1163 (La. 6/20/14), 141 So. 3d 264, reversed and remanded.

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

MUSACCHIO v. UNITED STATES

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


Petitioner Musacchio resigned as president of Exel Transportation Services (ETS) in 2004, but with help from the former head of ETS’s information-technology department, he accessed ETS’s computer system without ETS’s authorization through early 2006. In November 2010, Musacchio was indicted under 18 U. S. C. §1030(a)(2)(C), which makes it a crime if a person “intentionally accesses a computer without authorization or exceeds authorized access” and thereby “obtains ... information from any protected computer.” (Emphasis added.) He was charged in count 1 with conspiring to commit both types of improper access and in count 23 with making unauthorized access “[o]n or about” November 24, 2005. In a 2012 superseding indictment, count 1 dropped the charge of conspiracy to exceed authorized access, and count 2 changed count 23’s date to “[o]n or about” November 23–25, 2005. Musacchio never argued in the trial court that his prosecution violated the 5-year statute of limitations applicable to count 2. See §3282(a). At trial, the Government did not object when the District Court instructed the jury that §1030(a)(2)(C) “makes it a crime ... to intentionally access a computer without authorization and exceed authorized access” (emphasis added), even though the conjunction “and” added an additional element. The jury found Musacchio guilty on counts 1 and 2. On appeal, he challenged the sufficiency of the evidence supporting his conspiracy conviction and argued, for the first time, that his prosecution on count 2 was barred by §3282(a)’s statute of limitations. In affirming his conviction, the Fifth Circuit assessed Musacchio’s sufficiency challenge against the charged elements of the conspiracy count rather than against the heightened jury instruction, and it concluded that he had waived his statute-of-limitations defense by failing to raise it at trial.
Syllabus

Held:

1. A sufficiency challenge should be assessed against the elements of the charged crime, not against the elements set forth in an erroneous jury instruction. Sufficiency review essentially addresses whether the Government’s case was strong enough to reach the jury. A reviewing court conducts a limited inquiry tailored to ensuring that a defendant receives the minimum required by due process: a “meaningful opportunity to defend” against the charge against him and a jury finding of guilt “beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 314–315. It does this by considering only the “legal” question “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id., at 319. A reviewing court’s determination thus does not rest on how the jury was instructed. The Government’s failure to introduce evidence of an additional element does not implicate these principles, and its failure to object to a heightened jury instruction does not affect sufficiency review. Because Musacchio does not dispute that he was properly charged with conspiracy to obtain unauthorized access or that the evidence was sufficient to convict him of the charged crime, the Fifth Circuit correctly rejected his sufficiency challenge. Pp. 5–8.


(a) A time bar is jurisdictional only if Congress has “clearly state[d]” that it is. Sebelius v. Auburn Regional Medical Center, 568 U. S. ___, ___. Here, the “text, context, and relevant historical treatment” of §3282(a), Reed Elsevier, Inc. v. Muchnick, 559 U. S. 154, 166, establish that it imposes a nonjurisdictional defense that becomes part of a case only if a defendant raises it in the district court. The provision does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms. It thus stands in marked contrast to §3231, which speaks squarely to federal courts’ general criminal subject-matter “jurisdiction” and does not “condition[n] its jurisdictional grant on” compliance with §3282(a)’s statute of limitations. Id., at 165. The history of §3282(a)’s limitations bar further confirms that the provision does not impose a jurisdictional limit. See United States v. Cook, 17 Wall. 168, 181; Smith v. United States, 568 U. S. ___, ___. Pp. 8–10.

(b) Because §3282(a) does not impose a jurisdictional limit, the failure to raise the defense at or before trial is reviewable on appeal—if at all—only for plain error. A district court’s failure to enforce an unraised limitations defense under §3282(a) cannot be a plain error, however, because if a defendant fails to press the defense, it does not
Syllabus

become part of the case and, thus, there is no error for an appellate court to correct. Pp. 10–11.
590 Fed. Appx. 359, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.
(Slip Opinion) OCTOBER TERM, 2015

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

MENOMINEE INDIAN TRIBE OF WISCONSIN v.
UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


Pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), petitioner Menominee Indian Tribe of Wisconsin contracted with the Indian Health Service (IHS) to operate what would otherwise have been a federal program and to receive an amount of money equal to what the Government would have spent on operating the program itself, including reimbursement for reasonable contract support costs. 25 U. S. C. §§450f, 450j–1(a). After other tribal enti-
ties successfully litigated complaints against the Federal Government for failing to honor its obligation to pay contract support costs, the Menominee Tribe presented its own contract support claims to the IHS in accordance with the Contract Disputes Act of 1978 (CDA), which requires contractors to present each claim to a contracting offi-
cer for decision, 41 U. S. C. §7103(a)(1). The contracting officer de-
nied some of the Tribe's claims because they were not presented within the CDA's 6-year limitations period. See §7103(a)(4)(A).

The Tribe challenged the denials in Federal District Court, arguing that the limitations period should be tolled for the nearly two years in which a putative class action, brought by tribes with parallel complaints, was pending. As relevant here, the District Court eventually denied the Tribe's equitable-tolling claim, and the Court of Appeals affirmed, holding that no extraordinary circumstances beyond the Tribe's control caused the delay.

Held: Equitable tolling does not apply to the presentment of petitioner's claims. Pp. 5–9.

(a) To be entitled to equitable tolling of a statute of limitations, a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
way and prevented timely filing." *Holland v. Florida*, 560 U. S. 631, 649. The Tribe argues that diligence and extraordinary circumstances should be considered together as factors in a unitary test, and it faults the Court of Appeals for declining to consider the Tribe's diligence in connection with its finding that no extraordinary circumstances existed. But this Court has expressly characterized these two components as "elements," not merely factors of indeterminate or commensurable weight, *Pace v. DiGuglielmo*, 544 U. S. 408, 418, and has treated them as such in practice, see *Lawrence v. Florida*, 549 U. S. 327, 336–337. The Tribe also objects to the Court of Appeals' interpretation of the "extraordinary circumstances" prong as requiring the showing of an "external obstacle" to timely filing. This Court reaffirms that this prong is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control. Pp. 5–7.

(b) None of the Tribe's excuses satisfy the "extraordinary circumstances" prong of the test. The Tribe had unilateral authority to present its claims in a timely manner. Its claimed obstacles, namely, a mistaken reliance on a putative class action and a belief that presentation was futile, were not outside the Tribe's control. And the significant risk and expense associated with presenting and litigating its claims are far from extraordinary. Finally, the special relationship between the United States and Indian tribes, as articulated in the ISDA, does not override clear statutory language. Pp. 7–8.

764 F. 3d 51, affirmed.

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

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

SUPREME COURT OF THE UNITED STATES

Syllabus

FEDERAL ENERGY REGULATORY COMMISSION v. ELECTRIC POWER SUPPLY ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*


The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate “the sale of electric energy at wholesale in interstate commerce,” including both wholesale electricity rates and any rule or practice “affecting” such rates. 16 U. S. C. §§824(b), 824d(a), 824e(a). But it places beyond FERC’s power, leaving to the States alone, the regulation of “any other sale”—i.e., any retail sale—of electricity. §824(b).

In an increasingly competitive interstate electricity market, FERC has undertaken to ensure “just and reasonable” wholesale rates, §824d(a), by encouraging the creation of nonprofit entities to manage regions of the nationwide electricity grid. These wholesale market operators administer their portions of the grid to ensure that the network conducts electricity reliably, and each holds competitive auctions to set wholesale prices. These auctions balance supply and demand continuously by matching bids to provide electricity from generators with orders from utilities and other “load-serving entities” (LSEs) that buy power at wholesale for resale to users. All bids to supply electricity are stacked from lowest to highest, and accepted in that order until all requests for power have been met. Every electricity supplier is paid the price of the highest-accepted bid, known as the locational marginal price (LMP).

In periods of high electricity demand, prices can reach extremely

*Together with No. 14–841, EnerNOC, Inc., et al. v. Electric Power Supply Association et al., also on certiorari to the same court.
high levels as the least efficient generators have their supply bids accepted in the wholesale market auctions. Not only do rates rise dramatically during these peak periods, but the increased flow of electricity threatens to overload the grid and cause substantial service problems. Faced with these challenges, wholesale market operators devised wholesale demand response programs, which pay consumers for commitments to reduce their use of power during these peak periods. Just like bids to supply electricity, offers from aggregators of multiple users of electricity or large individual consumers to reduce consumption can be bid into the wholesale market auctions. When it costs less to pay consumers to refrain from using power than it does to pay producers to supply more of it, demand response can lower these wholesale prices and increase grid reliability. Wholesale operators began integrating these programs into their markets some 15 years ago and FERC authorized their use. Congress subsequently encouraged further development of demand response.

Spurred on by Congress, FERC issued Order No. 719, which, among other things, requires wholesale market operators to receive demand response bids from aggregators of electricity consumers, except when the state regulatory authority overseeing those users' retail purchases bars demand response participation. 18 CFR §35.28(g)(1). Concerned that the order had not gone far enough, FERC then issued the rule under review here, Order No 745. §35.28(g)(1)(v) (Rule). It requires market operators to pay the same price to demand response providers for conserving energy as to generators for producing it, so long as a "net benefits test," which ensures that accepted bids actually save consumers money, is met. The Rule rejected an alternative compensation scheme that would have subtracted from LMP the savings consumers receive from not buying electricity in the retail market, a formula known as LMP-G. The Rule also rejected claims that FERC lacked statutory authority to regulate the compensation operators pay for demand response bids.

The Court of Appeals for the District of Columbia Circuit vacated the Rule, holding that FERC lacked authority to issue the order because it directly regulates the retail electricity market, and holding in the alternative that the Rule's compensation scheme is arbitrary and capricious under the Administrative Procedure Act.

Held:

1. The FPA provides FERC with the authority to regulate wholesale market operators' compensation of demand response bids. The Court's analysis proceeds in three parts. First, the practices at issue directly affect wholesale rates. Second, FERC has not regulated retail sales. Taken together, these conclusions establish that the Rule complies with the FPA's plain terms. Third, the contrary view would

(a) The practices at issue directly affect wholesale rates. The FPA has delegated to FERC the authority—and, indeed, the duty—to ensure that rules or practices “affecting” wholesale rates are just and reasonable. §§824d(a), 824e(a). To prevent the statute from assuming near-infinite breadth, see e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, this Court adopts the D. C. Circuit’s common-sense construction limiting FERC’s “affecting” jurisdiction to rules or practices that “directly affect the [wholesale] rate,” California Independent System Operator Corp. v. FERC, 372 F. 3d 395, 403 (emphasis added). That standard is easily met here. Wholesale demand response is all about reducing wholesale rates; so too the rules and practices that determine how those programs operate. That is particularly true here, as the formula for compensating demand response necessarily lowers wholesale electricity prices by displacing higher-priced generation bids. Pp. 14–17.

(b) The Rule also does not regulate retail electricity sales in violation of §824(b). A FERC regulation does not run afoul of §824(b)’s prescription just because it affects the quantity or terms of retail sales. Transactions occurring on the wholesale market have natural consequences at the retail level, and so too, of necessity, will FERC’s regulation of those wholesale matters. That is of no legal consequence. See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 365, 370–373. When FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, §824(b) imposes no bar. Here, every aspect of FERC’s regulatory plan happens exclusively on the wholesale market and governs exclusively that market’s rules. The Commission’s justifications for regulating demand response are likewise only about improving the wholesale market. Cf. Oneok, Inc. v. Learjet, Inc., 575 U. S. __, __. Pp. 17–25.

(c) In addition, EPSA’s position would subvert the FPA. EPSA’s arguments suggest that the entire practice of wholesale demand response falls outside what FERC can regulate, and EPSA concedes that States also lack that authority. But under the FPA, wholesale demand response programs could not go forward if no entity had jurisdiction to regulate them. That outcome would flout the FPA’s core purposes of protecting “against excessive prices” and ensuring effective transmission of electric power. Pennsylvania Water & Power Co. v. FPC, 343 U. S. 414, 418; see Gulf States Util. Co. v. FPC, 411 U. S. 747, 758. The FPA should not be read, against its clear terms, to halt a practice that so evidently enables FERC to fulfill its statutory du-

2. FERC's decision to compensate demand response providers at LMP—the same price paid to generators—instead of at LMP-G, is not arbitrary and capricious. Under the narrow scope of review in Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43, this Court's important but limited role is to ensure that FERC engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that decision. Here, FERC provided a detailed explanation of its choice of LMP and responded at length to contrary views. FERC's serious and careful discussion of the issue satisfies the arbitrary and capricious standard. Pp. 29–33.

753 F. 3d 216, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J. filed a dissenting opinion, in which THOMAS, J., joined. ALITO, J., took no part in the consideration or decision of the cases.
SUPREME COURT OF THE UNITED STATES

Syllabus

GOBEILLE, CHAIR OF THE VERMONT GREEN MOUNTAIN CARE BOARD v. LIBERTY MUTUAL INSURANCE CO.

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


Vermont law requires certain entities, including health insurers, to report payments relating to health care claims and other information relating to health care services to a state agency for compilation in an all-inclusive health care database. Respondent Liberty Mutual Insurance Company’s health plan (Plan), which provides benefits in all 50 States, is an “employee welfare benefit plan” under the Employee Retirement Income Security Act of 1974 (ERISA). The Plan’s third-party administrator, Blue Cross Blue Shield of Massachusetts, Inc. (Blue Cross), which is subject to Vermont’s disclosure statute, was ordered to transmit its files on eligibility, medical claims, and pharmacy claims for the Plan’s Vermont members. Respondent, concerned that the disclosure of such confidential information might violate its fiduciary duties, instructed Blue Cross not to comply and filed suit, seeking a declaration that ERISA pre-empts application of Vermont’s statute and regulation to the Plan and an injunction prohibiting Vermont from trying to acquire data about the Plan or its members. The District Court granted summary judgment to Vermont, but the Second Circuit reversed, concluding that Vermont’s reporting scheme is pre-empted by ERISA.


(a) ERISA expressly pre-empts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U. S. C. §1144(a). As relevant here, the clause pre-empts a state law that has an impermissible “connection with” ERISA plans, i.e., a law
Syllabus


(b) The considerations relevant to the determination whether an impermissible connection exists—ERISA's objectives "as a guide to the scope of the state law that Congress understood would survive," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 646, 656, and "the nature of" the state law's "effect . . . on ERISA plans," *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325—lead to the conclusion that Vermont's regime, as applied to ERISA plans, is pre-empted. Pp. 6–12.

(1) ERISA seeks to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures, *Travelers*, 514 U. S., at 651, and those systems and procedures are intended to be uniform, id., at 656. ERISA's extensive reporting, disclosure, and recordkeeping requirements are central to, and an essential part of, this uniform plan administration system. Vermont's law and regulation, however, also govern plan reporting, disclosure, and recordkeeping. Pre-emption is necessary in order to prevent multiple jurisdictions from imposing differing, or even parallel, regulations, creating wasteful administrative costs and threatening subject plans to wide-ranging liability. ERISA's uniform rule design also makes clear that it is the Secretary of Labor, not the separate States, that is authorized to decide whether to exempt plans from ERISA reporting requirements or to require ERISA plans to report data such as that sought by Vermont. Pp. 7–10.

(2) Vermont's counterarguments are unpersuasive. Vermont argues that respondent has not shown that the State scheme has caused it to suffer economic costs, but respondent need not wait to bring its pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs. In addition, the fact that ERISA and the state reporting scheme have different objectives does not transform Vermont's direct regulation of a fundamental ERISA function into an innocuous and peripheral set of additional rules. Vermont's regime also cannot be saved by invoking the State's traditional power to regulate in the area of public health. Pp. 10–12.

(c) ERISA's pre-existing reporting, disclosure, and recordkeeping provisions maintain their pre-emptive force regardless of whether the new Patient Protection and Affordable Care Act's reporting obligations also pre-empt state law. Pp. 12–13.

746 F. 3d 497, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS,
Cite as: 577 U. S. ____ (2016)

Syllabus

C. J., and THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., and BREYER, J., filed concurring opinions. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

LOCKHART v. UNITED STATES

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


Petitioner Avondale Lockhart pleaded guilty to possessing child pornography in violation of 18 U. S. C. §2252(a)(4). Because Lockhart had a prior state-court conviction for first-degree sexual abuse involving his adult girlfriend, his presentence report concluded that he was subject to the 10-year mandatory minimum sentence enhancement provided in §2252(b)(2), which is triggered by, inter alia, prior state convictions for crimes “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” Lockhart argued that the limiting phrase “involving a minor or ward” applied to all three state crimes, so his prior conviction did not trigger the enhancement. Disagreeing, the District Court applied the mandatory minimum. The Second Circuit affirmed.

Held: Lockhart’s prior conviction is encompassed by §2252(b)(2). Pp. 2–15.

(a) A natural reading of the text supports that conclusion. The “rule of the last antecedent,” a canon of statutory interpretation stating that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows,” Barnhart v. Thomas, 540 U. S. 20, 26, clarifies that the phrase “involving a minor or ward” modifies only the immediately preceding noun phrase “abusive sexual conduct” and that the phrases “aggravated sexual abuse” and “sexual abuse” are not so restricted. The rule “can . . . be overcome by other indicia of meaning,” ibid., but §2252(b)(2)’s context reinforces its application in this case. Pp. 2–5.

(b) Section 2252(b)(2)’s enhancement can also be triggered by, inter alia, a prior federal sexual abuse offense enumerated in Chapter 109A of the Federal Criminal Code. Interpreting §2252(b)(2) using the “rule of the last antecedent,” the headings in Chapter 109A mir-
ror precisely the order, precisely the divisions, and nearly precisely the words used to describe the state sexual-abuse predicates. Applying the modifier "involving a minor or ward" to all three items in §2252(b)(2)'s list, by contrast, would require this Court to interpret the state predicates in a way that departs from the federal template. If Congress had intended that result, it is doubtful that Congress would have followed so closely the structure and language of Chapter 108A. Pp. 5–7.

(c) Lockhart's counterarguments are rejected. Pp. 7–14.

(1) Porto Rico Railway, Light & Power Co. v. Mor, 253 U. S. 345, United States v. Bass, 404 U. S. 336, and Jama v. Immigration and Customs Enforcement, 543 U. S. 335, do not require this Court to apply Lockhart's counternulling series-qualifier principle. In those cases, the Court simply observed that the last-antecedent rule may be overcome by contextual indicia of meaning. Lockhart's attempts to identify such indicia are unavailing. He claims that the state predicates are so similar that a limiting phrase could apply equally to all three. But by transforming a list of separate predicates into a set of near-synonyms, Lockhart's reading results in too much redundancy and risks running headlong into the rule against superfluous. Pp. 7–10.

(2) Lockhart contends that the existence of other disparities between §2252(b)(2)'s state and federal sexual-abuse predicates indicate that parity was not Congress' concern. However, this Court's construction relies on contextual cues particular to the sexual-abuse predicates, not on a general assumption that Congress sought full parity between all state and federal predicates. Pp. 10–11.

(3) The provision's legislative history "hardly speaks with [a] clarity of purpose," Universal Camera Corp. v. NLRB, 340 U. S. 474, 483, and does nothing to explain why Congress would have wanted to structure §2252(b)(2) to treat state and federal predicates differently. Pp. 11–14.

(4) Finally, Lockhart suggests the rule of lenity is triggered here, where applying his series-qualifier principle would lead to an alternative construction of §2252(b)(2). The rule of lenity is used to resolve ambiguity only when the ordinary canons have revealed no satisfactory construction. Here, however, the rule of the last antecedent is well supported by context, and Lockhart's alternative is not. Pp. 14.

749 F. 3d 148, affirmed.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

AMERICOLD REALTY TRUST v. CONAGRA FOODS,
INC., ET AL.

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


Respondents, corporate citizens of Delaware, Nebraska, and Illinois, sued petitioner Americold Realty Trust, a “real estate investment trust” organized under Maryland law, in a Kansas court. Americold removed the suit to Federal District Court based on diversity-of-citizenship jurisdiction. See 28 U. S. C. §§1332(a)(1), 1441(b). The District Court accepted jurisdiction and ruled in Americold’s favor. On appeal, the Tenth Circuit held that the District Court lacked jurisdiction to hear the suit. Since Americold was not a corporation, the court reasoned, its citizenship for diversity jurisdiction purposes should be based on the citizenship of its members, which included its shareholders. Because no record of those shareholders’ citizenship existed, diversity was not proved.

Held: For purposes of diversity jurisdiction, Americold’s citizenship is based on the citizenship of its members, which include its shareholders. Pp. 2–6.

(a) Historically, the relevant citizens for jurisdictional purposes in a suit involving a “mere legal entity” were that entity’s “members,” or the “real persons who come into court” in the entity’s name. Bank of United States v. Deveaux, 5 Cranch 61, 86, 91. But for the limited exception of jurisdictional citizenship for corporations, see Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 658, this Court continues to “adhere to [the] oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all [its] members,’” Carden v. Arkoma Associates, 494 U. S. 185, 195. Applying the rule here, Americold possesses the citizenship of all its members, who, under Maryland law, include its shareholders. See, e.g., Md. Corp. & Assns. Code Ann. §8–101(c). Pp. 2–4.
(b) Americold argues that anything called a “trust” possesses the citizenship of its trustees alone. Traditionally, a trust was considered a “fiduciary relationship” between multiple people and could not be haled into court; hence, legal proceedings involving a trust were brought by or against the trustees in their own name, Deveaux, 5 Cranch, at 91. Americold confuses the traditional trust with the variety of unincorporated entities that many States have given the “trust” label. Under Maryland law, the real estate investment trust at issue is treated as a “separate legal entity” that can sue or be sued. §§8–102(2), 8–301(2). Despite what such an entity calls itself, so long as it is unincorporated, this Court will apply the “oft-repeated rule” that it possesses the citizenship of all its members. Pp. 4–6.

776 F. 3d 1175, affirmed.

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

Syllabus

STURGEON v. FROST, ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

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


The Alaska National Interest Lands Conservation Act (ANILCA) set aside 104 million acres of land in Alaska for preservation purposes. Under ANILCA, those lands were placed into “conservation system units,” which were defined to include “any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument.” 16 U. S. C. §3102(4). In addition to federal land, over 18 million acres of state, Native Corporation, and private land were also included within the boundaries of those conservation system units.

In 2007, John Sturgeon was piloting his hovercraft over a stretch of the Nation River that flows through the Yukon-Charley Rivers National Preserve, a conservation system unit in Alaska that is managed by the National Park Service. Alaska law permits the use of hovercraft. National Park Service regulations do not. See 36 CFR §2.17(e). Park Service rangers approached Sturgeon, informing him that hovercraft were prohibited within the preserve under Park Service regulations. Sturgeon protested that Park Service regulations did not apply because the river was owned by the State of Alaska. The rangers ordered Sturgeon to remove his hovercraft from the preserve, and he complied. Sturgeon later filed suit against the Park Service in the United States District Court for the District of Alaska, seeking declaratory and injunctive relief permitting him to operate his hovercraft within the boundaries of the Yukon-Charley. Alaska intervened in support of Sturgeon.

The Secretary of the Interior has authority to “prescribe regulations” concerning “boating and other activities on or relating to water
located within System units." 54 U. S. C. §100751(b). The Park Service’s hovercraft regulation was adopted pursuant to Section 100751(b). The hovercraft ban is not limited to Alaska, but instead has effect in federally managed preservation areas across the country. Section 103(c) of ANILCA, in contrast, addresses the scope of the Park Service’s authority over lands within the boundaries of conservation system units in Alaska. The first sentence of Section 103(c) specifies the property included as a portion of those units. It states: “Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit.” 16 U. S. C. §3103(c). ANILCA defines the word “land” to include “lands, waters, and interests therein,” and the term “public lands” to include lands to which the United States has “title,” with certain exceptions. §3102.

The second sentence of Section 103(c) concerns the Park Service’s authority to regulate “non-public” lands in Alaska, which include state, Native Corporation, and private property. It provides: “No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.” §3103(c). The third sentence of Section 103(c) explains how new lands become part of conservation system units: “If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.” Ibid.

Interpreting Section 103(c) of ANILCA, the District Court granted summary judgment to the Park Service, and the Ninth Circuit affirmed in pertinent part. According to the Ninth Circuit, because the hovercraft regulation “applies to all federal-owned lands and waters administered by [the Park Service] nationwide, as well as all navigable waters lying within national parks,” the hovercraft ban does not apply “solely” within conservation system units in Alaska. 768 F. 3d 1066, 1077. The Ninth Circuit concluded that the Park Service therefore has authority to enforce its hovercraft regulation on the Nation River. The Ninth Circuit did not address whether the Nation River counts as “public land” for purposes of ANILCA.

Held: The Ninth Circuit’s interpretation of Section 103(c) is inconsistent with both the text and context of ANILCA. Pp. 12–16.

(a) The Ninth Circuit’s interpretation of Section 103(c) violates “a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” Roberts v. Sea-Land Services, Inc., 566 U. S. ___, ___. ANILCA repeatedly recognizes that Alaska is differ-
ent, and ANILCA itself accordingly carves out numerous Alaska-
specific exceptions to the Park Service’s general authority over federally
managed preservation areas. Those Alaska-specific provisions
reflect the simple truth that Alaska is often the exception, not the
rule. Yet the reading below would prevent the Park Service from rec-
ognizing Alaska’s unique conditions. Under that reading, the Park
Service could regulate “non-public” lands in Alaska only through
rules applicable outside Alaska as well. The Court concludes that,
whatever the reach of the Park Service’s authority under ANILCA,
Section 103(c) did not adopt such a “topsy-turvy” approach. Pp. 12–
14.

(b) Moreover, it is clear that Section 103(c) draws a distinction
between “public” and “non-public” lands within the boundaries of
conservation system units in Alaska. And yet, according to the court
below, if the Park Service wanted to differentiate between that “pub-
lic” and “non-public” land in an Alaska-specific way, it would have to
regulate the “non-public” land pursuant to rules applicable outside
Alaska, and the “public” land pursuant to Alaska-specific provisions.
Assuming the Park Service has authority over “non-public” land in
Alaska (an issue the Court does not decide), the Court concludes that
this is an implausible reading of the statute. The Court therefore re-
jects the interpretation of Section 103(c) adopted by the court below.

(c) The Court does not reach the remainder of the parties’ argu-
ments. In particular, it does not decide whether the Nation River
qualifies as “public land” for purposes of ANILCA. It also does not
decide whether the Park Service has authority under Section
100751(b) to regulate Sturgeon’s activities on the Nation River; even
if the river is not “public” land, or whether—as Sturgeon argues—any
such authority is limited by ANILCA. Finally, the Court does not
consider whether the Park Service has authority under ANILCA over
both “public” and “non-public” lands within the boundaries of conserva-
tion system units in Alaska, to the extent a regulation is written to
apply specifically to both types of land. The Court leaves those argu-
ments to the lower courts for consideration as necessary. Pp. 15–
16.

768 F. 3d 1066, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

TYSON FOODS, INC. v. BOUAPHAKEO ET AL.,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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


Respondents, employees of petitioner Tyson Foods, work in the kill, cut, and retrim departments of a pork processing plant in Iowa. Respondents’ work requires them to wear protective gear, but the exact composition of the gear depends on the tasks a worker performs on a given day. Petitioner compensated some, but not all, employees for this donning and doffing, and did not record the time each employee spent on those activities. Respondents filed suit, alleging that the donning and doffing were integral and indispensable to their hazardous work and that petitioner’s policy not to pay for those activities denied them overtime compensation required by the Fair Labor Standards Act of 1938 (FLSA). Respondents also raised a claim under an Iowa wage law. They sought certification of their state claims as a class action under Federal Rule of Civil Procedure 23 and certification of their FLSA claims as a “collective action.” See 29 U. S. C. §216. Petitioner objected to certification of both classes, arguing that, because of the variance in protective gear each employee wore, the employees’ claims were not sufficiently similar to be resolved on a classwide basis. The District Court concluded that common questions, such as whether donning and doffing protective gear was compensable under the FLSA, were susceptible to classwide resolution even if not all of the workers wore the same gear. To recover for a violation of the FLSA’s overtime provision, the employees had to show that they each worked more than 40 hours a week, inclusive of the time spent donning and doffing. Because petitioner failed to keep records of this time, the employees primarily relied on a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mer-
icle conducted videotaped observations analyzing how long various donning and doffing activities took, and then averaged the time taken to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department. These estimates were then added to the timesheets of each employee to ascertain which class members worked more than 40 hours a week and the value of classwide recovery. Petitioner argued that the varying amounts of time it took employees to don and doff different protective gear made reliance on Mericle’s sample improper, and that its use would lead to recovery for individuals who, in fact, had not worked the requisite 40 hours. The jury awarded the class about $2.9 million in unpaid wages. The award has not yet been disbursed to individual employees. The Eighth Circuit affirmed the judgment and the award.

*Held:* The District Court did not err in certifying and maintaining the class. Pp. 8–17.

(a) Before certifying a class under Rule 23(b)(3), a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The parties agree that the most significant question common to the class is whether donning and doffing protective gear is compensable under the FLSA. Petitioner claims, however, that individual inquiries into the time each worker spent donning and doffing predominate over this common question. Respondents argue that individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle’s sample.

Whether and when statistical evidence such as Mericle’s sample can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on “the elements of the underlying cause of action,” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809. Because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. Respondents can show that Mericle’s sample is a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action.

*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, shows why Mericle’s sample was permissible in the circumstances of this case. There, where an employer violated its statutory duty to keep proper records, the Court concluded the employees could meet their burden by proving that they in fact “performed work for which [they were] improperly compensated and . . . produc[ing] sufficient evidence to
show the amount and extent of that work as a matter of just and reasonable inference.” *Id.*, at 687. Here, similarly, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer’s failure to keep adequate records. Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce Mericle’s study to prove the hours he or she worked. The representative evidence was a permissible means of showing individual hours worked.

This holding is in accord with *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced Mericle’s study in a series of individual suits.

This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle’s has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens, supra*, at 687. Pp. 8–15.

(b) Petitioner contends that respondents are required to demonstrate that uninjured class members will not recover damages here. That question is not yet fairly presented by this case, because the damages award has not yet been disbursed and the record does not indicate how it will be disbursed. Petitioner may raise a challenge to the allocation method when the case returns to the District Court for disbursement of the award. Pp. 15–17.

765 F. 3d 791, affirmed and remanded.

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

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

SUPREME COURT OF THE UNITED STATES

Syllabus

NEBRASKA ET AL. v. PARKER ET AL.

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


In 1854, the Omaha Tribe entered into a treaty with the United States agreeing to establish a 300,000-acre reservation and to “cede” and “forever relinquish all right and title to” its remaining land in present-day Nebraska for a fixed sum of money. In 1865, the Omaha Tribe again entered into a treaty with the United States agreeing to “cede, sell, and convey” land for a fixed sum. When, in 1872, the Tribe sought to sell more of its land to the United States, Congress took a different tack. In lieu of a fixed-sum purchase, Congress authorized the Secretary of the Interior to survey, appraise, and sell tracts of reservation land to western settlers and to deposit any proceeds from the land sales in the U. S. Treasury for the Tribe’s benefit. Congress took the same approach in 1882 when it passed the Act in question. That Act authorized the Secretary of the Interior to survey, appraise, and sell roughly 50,000 acres of reservation land lying west of a railroad right-of-way. W. E. Peebles purchased a tract under the terms of the 1882 Act and established the village of Pender.

In 2006, the Tribe amended its Bevarege Control Ordinance and sought to subject Pender retailers to the amended ordinance. See 18 U. S. C. §1161 (permitting tribes to regulate liquor sales on reservation land and in “Indian country”). Pender and its retailers brought a suit against the Tribe in Federal District Court to challenge the ordinance, and the State intervened on their behalf. They alleged that they were not within the reservation boundaries or in Indian country and therefore could not be subject to the ordinance. They sought declaratory relief and a permanent injunction prohibiting the Tribe from asserting its jurisdiction over the disputed land. Concluding that the 1882 Act did not diminish the Omaha Reservation, the District Court denied relief, and the Eighth Circuit affirmed.
Held: The 1882 Act did not diminish the Omaha Indian Reservation. Pp. 5–12.

(a) Only Congress may diminish the boundaries of an Indian reservation, and its intent to do so must be clear. *Solem v. Bartlett*, 465 U. S. 463, 470. This Court’s framework for determining whether an Indian reservation has been diminished is well settled and starts with the statutory text. *Hagen v. Utah*, 510 U. S. 399, 411. Here, the 1882 Act bears none of the common textual indications that express such clear intent, e.g., “[e]xPLICIT reference to cession or other language evidencing the present and total surrender of all tribal interests” or “an unconditional commitment from Congress to compensate the Indian tribe for its opened land,” *Solem, supra*, at 470. The Act’s language opening the land “for settlement under such rules and regulations as [the Secretary] may prescribe,” 22 Stat. 341, falls into a category of surplus land acts that “merely opened reservation land to settlement,” *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 448. A comparison of the text of the 1854 and 1865 treaties, which unequivocally terminated the Tribe’s jurisdiction over its land, with the 1882 Act confirms this conclusion. Pp. 5–8.

(b) In diminishment cases, this Court has also examined “all the circumstances surrounding the opening of a reservation.” *Hagen, supra*, at 412, including the contemporaneous understanding of the Act’s effect on the reservation. Here, such historical evidence cannot overcome the text of the 1882 Act, which lacks any indication that Congress intended to diminish the reservation. Dueling remarks by legislators about the 1882 Act are far from the unequivocal evidence required in diminishment cases. Pp. 8–10.

(c) Finally, and to a lesser extent, the Court may look to subsequent demographic history and subsequent treatment of the land by government officials. See *Solem, supra*, at 471–472. This Court has never relied solely on this third consideration to find diminishment, and the mixed record of subsequent treatment of the disputed land in this case cannot overcome the statutory text. Petitioners point to the Tribe’s absence from the disputed territory for more than 120 years, but this subsequent demographic history is the “least compelling” evidence in the diminishment analysis. *South Dakota v. Yankton Sioux Tribe*, 522 U. S. 329, 356. Likewise, evidence of the subsequent treatment of the disputed land by government officials has similarly limited value. And, while compelling, the justifiable expectations of the non-Indians living on the land cannot alone diminish reservation boundaries. Pp. 10–12.

(d) Because the parties have raised only the single question of diminishment, the Court expresses no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s
Syllabus

774 F. 3d 1166, affirmed.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

LUIS v. UNITED STATES

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


A federal statute provides that a court may freeze before trial certain assets belonging to a defendant accused of violations of federal health care or banking laws. Those assets include (1) property "obtained as a result of" the crime, (2) property "traceable" to the crime, and (3), as being done in connection with this case, at the time the opinion is issued.
18 U. S. C. §1345(a)(2). The Government has charged petitioner Luis with fraudulently obtaining nearly $45 million through crimes related to health care. In order to preserve the $2 million remaining in Luis' possession for payment of restitution and other criminal penalties, the Government secured a pretrial order prohibiting Luis from dissipating her assets, including assets unrelated to her alleged crimes. Though the District Court recognized that the order might prevent Luis from obtaining counsel of her choice, it held that the Sixth Amendment did not give her the right to use her own untainted funds for that purpose. The Eleventh Circuit affirmed.

Held: The judgment is vacated, and the case is remanded.


Justice Breyer, joined by The Chief Justice, Justice Ginsburg, and Justice Sotomayor, concluded that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead to this conclusion. Pp. 3–16.

(a) The Sixth Amendment right to counsel grants a defendant "a fair opportunity to secure counsel of his own choice," Powell v. Alabama, 287 U. S. 45, 53, that he "can afford to hire," Caplin & Drysdale, Chartered v. United States, 491 U. S. 617, 624. This Court has
consistently referred to the right to counsel of choice as "fundamental." Pp. 3–5.

(b) While the Government does not deny Luis' fundamental right to be represented by a qualified attorney whom she chooses and can afford to hire, it would nonetheless undermine the value of that right by taking from Luis the ability to use funds she needs to pay for her chosen attorney. The Government attempts to justify this consequence by pointing out that there are important interests on the other side of the legal equation. It wishes to guarantee that funds will be available later to help pay for statutory penalties and restitution, for example. The Government further argues that two previous cases from this Court, Caplin & Drysdale, supra, at 619, and United States v. Monsanto, 491 U.S. 600, 615, support the issuance of a restraining order in this case. However, the nature of the assets at issue here differs from the assets at issue in those earlier cases. And that distinction makes a difference. Pp. 5–16.

(1) Here, the property is untainted, i.e., it belongs to Luis. As described in Caplin & Drysdale and Monsanto, the Government may well be able to freeze before trial "tainted" assets—e.g., loot, contraband, or property otherwise associated with the planning, implementing, or concealing of a crime. As a matter of property law, the defendant's ownership interest in such property is imperfect. For example, a different federal statute provides that title to property used to commit a crime (or otherwise "traceable" to a crime) passes to the Government at the instant the crime is planned or committed. See 21 U.S.C. §853(c). But here, the Government seeks to impose restrictions upon Luis' untainted property without any showing of any equivalent governmental interest in that property. Pp. 5–10.

(2) This distinction does not by itself answer the constitutional question because the law of property may allow a person without a present interest in a piece of property to impose restrictions upon a current owner, say, to prevent waste. However, insofar as innocent funds are needed to obtain counsel of choice, the Sixth Amendment prohibits the court order sought here.

Three basic considerations lead to this conclusion. First, the nature of the competing interests argues against this kind of court order. On the one side is a fundamental Sixth Amendment right to assistance of counsel. On the other side is the Government's interest in securing its punishment of choice, as well as the victim's interest in securing restitution. These latter interests are important, but—compared to the right to counsel—they seem to lie somewhat further from the heart of a fair, effective criminal justice system. Second, relevant, common-law legal tradition offers virtually no significant support for the Government's position and in fact argues to the con-
Syllabus

trary. Indeed, there appears to be no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own "innocent" property. Third, as a practical matter, accepting the Government's position could erode the right to counsel considerably. It would, in fact, unleash a principle of constitutional law with no obvious stopping place, as Congress could write more statutes authorizing restraints in other cases involving illegal behavior that come with steep financial consequences. These defendants, often rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. The upshot is a substantial risk that accepting the Government's views would render less effective the basic right the Sixth Amendment seeks to protect. Pp. 11–15.

(3) The constitutional line between a criminal defendant's tainted funds and innocent funds needed to pay for counsel should prove workable. Money may be fungible, but courts, which use tracing rules in cases of, e.g., fraud and pension rights, have experience separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer. Pp. 15–16.

Justice Thomas concluded that the rule that a pretrial freeze of untainted assets violates a defendant's Sixth Amendment right to counsel of choice rests strictly on the Sixth Amendment's text and common-law backdrop. Pp. 1–12.

(a) The Sixth Amendment abolished the common-law rule that generally prohibited representation in felony cases. "The right to select counsel of one's choice" is thus "the root meaning" of the Sixth Amendment right to counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 147–148. Constitutional rights protect the necessary prerequisites for their exercise. As a result, the Sixth Amendment denies the Government unchecked power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction. Unless the right to counsel protects the right to use lawfully owned property to pay for an attorney, the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless. Without pretrial protection for at least some of a defendant's assets, the Government could nullify the right to counsel of choice, eviscerating the Sixth Amendment's original meaning and purpose. The modern, judicially created right to government-appointed counsel does not obviate these concerns. Pp. 1–5.

(b) History confirms this textual understanding. The common-law forfeiture tradition provides an administrable rule for the Sixth Amendment's protection: A criminal defendant's untainted assets are protected from government interference before trial and judgment, but his tainted assets may be seized before trial as contraband or
Syllabus

through a separate in rem proceeding. Reading the Sixth Amendment to track the historical line between tainted and untainted assets avoids case-by-case adjudication and ensures that the original meaning of the right to counsel does real work. Here, the incursion of the pretrial asset freeze into untainted assets, for which there is no historical tradition, violates the Sixth Amendment. Pp. 5–9.

(c) This conclusion leaves no room for an atextual balancing analysis. Pp. 9–12.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and GINSBURG and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

EVENWEL ET AL. v. ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS


Under the one-person, one-vote principle, jurisdictions must design legislative districts with equal populations. See Wesberry v. Sanders, 376 U. S. 1, 7–8; Reynolds v. Sims, 377 U. S. 533, 568. In the context of state and local legislative districting, States may deviate somewhat from perfect population equality to accommodate traditional districting objectives. Where the maximum population deviation between the largest and smallest district is less than 10%, a state or local legislative map presumptively complies with the one-person, one-vote rule.

Texas, like all other States, uses total-population numbers from the decennial census when drawing legislative districts. After the 2010 census, Texas adopted a State Senate map that has a maximum total-population deviation of 8.04%, safely within the presumptively permissible 10% range. However, measured by a voter-population baseline—eligible voters or registered voters—the map’s maximum population deviation exceeds 40%. Appellants, who live in Texas Senate districts with particularly large eligible- and registered-voter populations, filed suit against the Texas Governor and Secretary of State. Basing apportionment on total population, appellants contended, dilutes their votes in relation to voters in other Senate districts, in violation of the one-person, one-vote principle of the Equal Protection Clause. Appellants sought an injunction barring use of the existing Senate map in favor of a map that would equalize the voter population in each district. A three-judge District Court dismissed the complaint for failure to state a claim on which relief could be granted.

Held: As constitutional history, precedent, and practice demonstrate, a
Syllabus

State or locality may draw its legislative districts based on total population. Pp. 7–19.

(a) Constitutional history shows that, at the time of the founding, the Framers endorsed allocating House seats to States based on total population. Debating what would become the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Retaining the total-population rule, Congress rejected proposals to allocate House seats to States on the basis of voter population. See U.S. Const., Amdt. 14, §2. The Framers recognized that use of a total-population baseline served the principle of representational equality. Appellants’ voter-population rule is inconsistent with the “theory of the Constitution,” Cong. Globe, 39th Cong., 1st Sess., 2766–2767, this Court recognized in Wesberry as underlying not just the method of allocating House seats to States but also the method of apportioning legislative seats within States. Pp. 8–15.

(b) This Court’s past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. Appellants assert that language in this Court’s precedent supports their view that States should equalize the voter-eligible population of districts. But for every sentence appellants quote, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation. See, e.g., Reynolds, 377 U.S., at 560–561. Moreover, from Reynolds on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality. Pp. 15–18.

(c) Settled practice confirms what constitutional history and prior decisions strongly suggest. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have long followed. As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible to vote. Nonvoters have an important stake in many policy debates and in receiving constituent services. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation. Pp. 18–19.

(d) Because constitutional history, precedent, and practice reveal the infirmity of appellants’ claim, this Court need not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population. P. 19.

Affirmed.
Syllabus

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined except as to Part III–B.
Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

NICHOLS v. UNITED STATES

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

No. 15–5238. Argued March 1, 2016—Decided April 4, 2016

The Sex Offender Registration and Notification Act (SORNA) makes it a federal crime for certain sex offenders to “knowingly fail[] to register or update a registration,” 18 U. S. C. §2250(a)(3), and requires that offenders who move to a different State “shall, not later than 3 business days after each change of name, residence, employment, or student status,” inform in person “at least 1 jurisdiction involved pursuant to §16913(a), . . . of all changes” to required information, §16913(c). A §16913(a) jurisdiction is “each jurisdiction where the offender resides, . . . is an employee, and . . . is a student.”

Petitioner Nichols, a registered sex offender who moved from Kansas to the Philippines without updating his registration, was arrested, escorted to the United States, and charged with violating SORNA. After conditionally pleading guilty, Nichols argued on appeal that SORNA did not require him to update his registration in Kansas. The Tenth Circuit affirmed his conviction, holding that though Nichols left Kansas, the State remained a “jurisdiction involved” for SORNA purposes.

Held: SORNA did not require Nichols to update his registration in Kansas once he departed the State. Pp. 4–8.

(a) SORNA’s plain text dictates this holding. Critical here is §16913(a)’s use of the present tense. Nichols once resided in Kansas, but after moving, he “resides” in the Philippines. It follows that once Nichols moved, he was no longer required to appear in Kansas because it was no longer a “jurisdiction involved.” Nor was he required to appear in the Philippines, which is not a SORNA “jurisdiction.” §16911(10). Section 16913(c)’s requirements point to the same conclusion: Nichols could not have appeared in person in Kansas “after” leaving the State. SORNA’s drafters could have required sex offend-
Syllabus

ers to deregister in their departure jurisdiction before leaving the country had that been their intent. Pp. 4–6.

(b) The Government resists this straightforward reading. It argues that a jurisdiction where an offender registers remains “involved” even after the offender leaves, but that would require adding the extra clause “where the offender appears on a registry” to §16913(a). Also unconvincing is the claim that §16914(a)(3)’s requiring the offender to provide each address where he “will reside” shows that SORNA contemplates the possibility of an offender’s updating his registration before he actually moves. That provision merely lists the pieces of information to be updated; it says nothing about an obligation to update in the first place. Finally, the Government’s argument that Nichols actually experienced two “changes” of residence—first, when he turned in his apartment keys in Kansas, and second, when he checked into his Manila hotel—is inconsistent with ordinary English usage. Pp. 6–7.

(c) Although “the most formidable argument concerning the statute’s purposes [cannot] overcome the clarity [found] in the statute’s text,” Kloeckner v. Solis, 568 U. S. ___, ___ n. 4, the Court is mindful of those purposes and notes that its interpretation is not likely to create deficiencies in SORNA’s scheme. Recent legislation by Congress, as well as existing state-law registration requirements, offers reassurance that sex offenders will not be able to escape punishment for leaving the United States without notifying their departure jurisdictions. Pp. 7–8.

775 F. 3d 1225, reversed.

ALITO, J., delivered the opinion for a unanimous Court.
Federal law makes the possession of a firearm by a felon a crime punishable by a prison term of up to 10 years, 18 U. S. C. §§922(g), 924(a)(2), but the Armed Career Criminal Act of 1984 increases that sentence to a mandatory 15 years to life if the offender has three or more prior convictions for a “serious drug offense” or a “violent felony,” §§924(e)(1). The definition of “violent felony” includes the so-called residual clause, covering any felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” §§924(e)(2)(B)(i). In Johnson v. United States, 576 U. S. ___, this Court held that clause unconstitutional under the void-for-vagueness doctrine.

Petitioner Welch was sentenced under the Armed Career Criminal Act before Johnson was decided. On direct review, the Eleventh Circuit affirmed his sentence, holding that Welch’s prior Florida conviction for robbery qualified as a “violent felony” under the residual clause. After his conviction became final, Welch sought collateral relief under 28 U. S. C. §2255, which the District Court denied. The Eleventh Circuit then denied Welch a certificate of appealability. Three weeks later, this Court decided Johnson. Welch now seeks the retroactive application of Johnson to his case.

 Held: Johnson announced a new substantive rule that has retroactive effect in cases on collateral review. Pp. 6–15.  

(a) An applicant seeking a certificate of appealability in a §2255 proceeding must make “a substantial showing of the denial of a constitutional right.” §2253(c)(2). That standard is met when “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.” Slack v. McDaniel, 529 U. S. 473, 484. The question whether Welch met that standard implicates a broader
Syllabus

legal issue: whether Johnson is a substantive decision with retroactive effect in cases on collateral review. If so, then on the present record reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence. Pp. 6–7.

(b) New constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review, but new substantive rules do apply retroactively. Teague v. Lane, 489 U. S. 288, 310; Schriro v. Summerlin, 542 U. S. 348, 351. Substantive rules alter “the range of conduct or the class of persons that the law punishes,” id., at 353. Procedural rules, by contrast, “regulate only the manner of determining the defendant’s culpability.” Ibid. Under this framework, Johnson is substantive. Before Johnson, the residual clause could cause an offender to face a prison sentence of at least 15 years instead of at most 10. Since Johnson made the clause invalid, it can no longer mandate or authorize any sentence. By the same logic, Johnson is not procedural, since it had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Act, see Schriro, supra, at 353. Pp. 7–9.

(c) The counterarguments made by Court-appointed amicus are unpersuasive. She contends that Johnson is a procedural decision because the void-for-vagueness doctrine is based on procedural due process. But the Teague framework turns on whether the function of the rule is substantive or procedural, not on the rule’s underlying constitutional source. Amicus’ approach would lead to results that cannot be squared with prior precedent. Precedent also does not support amicus’ claim that a rule must limit Congress’ power to be substantive, see, e.g., Bousley v. United States, 523 U. S. 614, or her claim that statutory construction cases are an ad hoc exception to that principle and are substantive only because they implement the intent of Congress. The separation-of-powers argument raised by amicus is also misplaced, for regardless of whether a decision involves statutory interpretation or statutory invalidation, a court lacks the power to exact a penalty that has not been authorized by any valid criminal statute. Pp. 10–15.

Vacated and remanded.

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

HUGHES, CHAIRMAN, MARYLAND PUBLIC SERVICE COMMISION, ET AL. v. TALEN ENERGY MARKETING, LLC, FKA PPL ENERGYPLUS, LLC, ET AL.

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

No. 14–614. Argued February 24, 2016—Decided April 19, 2016*

The Federal Power Act (FPA) vests in the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sales of electricity in the interstate market, but “leaves to the States alone, the regulation of [retail electricity sales].” FERC v. Electric Power Supply Assn., 577 U. S. ___. In Maryland and other States that have deregulated their energy markets, “load serving entities” (LSEs) purchase electricity at wholesale from independent power generators for delivery to retail consumers. Interstate wholesale transactions in deregulated markets typically occur through (1) bilateral contracting, where LSEs agree to purchase a certain amount of electricity from generators at a certain rate over a certain period of time; and (2) competitive wholesale auctions administered by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), nonprofit entities that manage certain segments of the electricity grid.

PJM Interconnection (PJM), an RTO overseeing a multistate grid, operates a capacity auction. The capacity auction is designed to identify need for new generation and to accommodate long-term bilateral contracts for capacity. PJM predicts demand three years into the future and assigns a share of that demand to each participating LSE. Owners of capacity to produce electricity in three years’ time then bid

*Together with No. 14–623, CPV Maryland, LLC v. Talen Energy Marketing, LLC, fka PPL EnergyPlus, LLC, et al., also on certiorari to the same court
that capacity into the auction for sale to PJM at rates the sellers set in their bids. PJM accepts bids until it has purchased enough capacity to satisfy anticipated demand. All accepted capacity sellers receive the highest accepted rate, called the "clearing price." LSEs then must purchase, from PJM, enough electricity to satisfy their assigned share of overall projected demand. FERC extensively regulates the structure of the capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price.

Concerned that the PJM capacity auction was failing to encourage development of sufficient new in-state generation, Maryland enacted its own regulatory program. Maryland selected, through a proposal process, petitioner CPV Maryland, LLC (CPV), to construct a new power plant and required LSEs to enter into a 20-year pricing contract (called a contract for differences) with CPV at a rate CPV specified in its proposal. Under the terms of the contract, CPV sells its capacity to PJM through the auction, but—through mandated payments from or to LSEs—receives the contract price rather than the clearing price for these sales to PJM. In a suit filed by incumbent generators (respondents here) against members of the Maryland Public Service Commission—CPV intervened as a defendant—the District Court issued a declaratory judgment holding that Maryland's program improperly sets the rate CPV receives for interstate wholesale capacity sales to PJM. The Fourth Circuit affirmed.

*Held:* Maryland's program is preempted because it disregards the interstate wholesale rate FERC requires. A state law is preempted where "Congress has legislated comprehensively to occupy an entire field of regulation," *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509, as well as "where, under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373. Exercising its exclusive authority over interstate wholesale sales, see 16 U.S.C. §824(b)(1), FERC has approved PJM's capacity auction as the sole ratesetting mechanism for capacity sales to PJM, and has deemed the clearing price *per se* just and reasonable. However, Maryland—through the contract for differences—guarantees CPV a rate distinct from the clearing price for its interstate capacity sales to PJM. By adjusting an interstate wholesale rate, Maryland's program contravenes the FPA's division of authority between state and federal regulators.

That Maryland was attempting to encourage construction of new in-state generation does not save its program. States may regulate within their assigned domain even when their laws incidentally affect areas within FERC's domain. But they may not seek to achieve
Syllabus

ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here. See Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 373; Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966. Maryland and CPV analogize the contract for differences to traditional bilateral contracts for capacity. Unlike traditional bilateral contracts, however, the contract for differences does not transfer ownership of capacity from one party to another outside the auction. Instead, Maryland's program operates within the auction, mandating LSEs and CPV to exchange money based on the cost of CPV's capacity sales to PJM.

Maryland's program is rejected only because it disregards an interstate wholesale rate required by FERC. Neither Maryland nor other States are foreclosed from encouraging production of new or clean generation through measures that do not condition payment of funds on capacity clearing the auction. Pp. 11–15.

753 P. 3d 467, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is
being done in connection with this case, at the time the opinion is issued.
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prepared by the Reporter of Decisions for the convenience of the reader.

SUPREME COURT OF THE UNITED STATES

Syllabus

FRANCHISE TAX BOARD OF CALIFORNIA v. HYATT

CERTIORARI TO THE SUPREME COURT OF NEVADA


Respondent Hyatt claims that he moved from California to Nevada in
1991, but petitioner Franchise Tax Board of California, a state agen-
cy, claims that he actually moved in 1992 and thus owes California
millions in taxes, penalties, and interest. Hyatt filed suit in Nevada
state court, which had jurisdiction over California under Nevada v.
Hall, 440 U. S. 410, seeking damages for California’s alleged abusive
audit and investigation practices. After this Court affirmed the Ne-
veda Supreme Court’s ruling that Nevada courts, as a matter of com-
ity, would immunize California to the same extent that Nevada law
would immunize its own agencies and officials, see Franchise Tax Bd.
of Cal. v. Hyatt, 538 U. S. 488, 499, the case went to trial, where Hy-
att was awarded almost $500 million in damages and fees. On ap-
peal, California argued that the Constitution’s Full Faith and Credit
Clause, Art. IV, §1, required Nevada to limit damages to $50,000, the
maximum that Nevada law would permit in a similar suit against its
own officials. The Nevada Supreme Court, however, affirmed $1 mil-
lion of the award and ordered a retrial on another damages issue,
stating that the $50,000 maximum would not apply on remand.

Held:

1. The Court is equally divided on the question whether Nevada v.
Hall should be overruled and thus affirms the Nevada courts’ exer-
cise of jurisdiction over California’s state agency. P. 4.

2. The Constitution does not permit Nevada to apply a rule of Ne-
veda law that awards damages against California that are greater
than it could award against Nevada in similar circumstances. This
Conclusion is consistent with this Court’s precedents. A statute is a
“public Act” within the meaning of the Full Faith and Credit Cause.
While a State is not required “to substitute for its own statute . . . the
statute of another State reflecting a conflicting and opposed policy,”
Syllabus

*Carroll v. Lanza*, 349 U. S. 408, 412, a State's decision to decline to apply another State's statute on this ground must not embody a "policy of hostility to the public Acts" of that other State, *id.*, at 413. Using this approach, the Court found no violation of the Clause in *Carroll v. Lanza* or in *Franchise Tax Bd.*, the first time this litigation was considered. By contrast, the rule of unlimited damages applied here is not only "opposed" to California's law of complete immunity; it is also inconsistent with the general principles of Nevada immunity law, which limit damages awards to $50,000. Nevada explained its departure from those general principles by describing California's own system of controlling its agencies as an inadequate remedy for Nevada's citizens. A State that disregards its own ordinary legal principles on this ground employs a constitutionally impermissible "'policy of hostility to the public Acts' of a sister State." 538 U. S., at 499. The Nevada Supreme Court's decision thereby lacks the "healthy regard for California's sovereign status" that was the hallmark of its earlier decision. *Ibid.* This holding does not indicate a return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Id.*, at 496. Rather, Nevada's hostility toward California is clearly evident in its decision to devise a special, discriminatory damages rule that applies only to a sister State. Pp. 4–9.

130 Nev. ___, 385 P. 3d 125, vacated and remanded.

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

MOLINA-MARTINEZ v. UNITED STATES

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


The Federal Sentencing Guidelines first enter the sentencing process when the United States Probation Office prepares a presentence report containing, as relevant here, an advisory Guidelines range based on the seriousness of a defendant's offense and the extent of his criminal history. A district court may depart from the Guidelines, but it "must consult [them] and take them into account when sentencing." United States v. Booker, 543 U. S. 220, 264. Given the Guidelines' complexity, a District Court's use of an incorrect Guidelines range may go unnoticed. That error can be remedied on appeal pursuant to Federal Rule of Criminal Procedure 52(b), provided that (1) there is an error that was not intentionally relinquished or abandoned, United States v. Olano, 507 U. S. 725, 732–733; (2) the error is plain, i.e., clear or obvious, id., at 734; and (3) the error affected the defendant's substantial rights, ibid., which in the ordinary case means he or she must "show a reasonable probability that, but for the error," the outcome of the proceeding would have been different, United States v. Dominguez Bonitez, 542 U. S. 74, 82. Once these three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U. S., at 736 (brackets omitted).

Petitioner Molina-Martinez pleaded guilty to being unlawfully present in the United States after having been deported following an aggravated felony conviction. The Guidelines range in his presentence report was 77 to 96 months. He requested, and the Probation Office recommended, a 77-month sentence, while the Government requested 96 months. The District Court, with little explanation, sentenced him to the lowest end of what it believed to be the applicable Guide-
lines range—77 months. On appeal, Molina-Martinez argued for the first time that the Probation Office and the District Court miscalculated his Guidelines range, which should have been 70 to 87 months, and noted that his 77-month sentence would have been in the middle of the correct range, not at the bottom. The Fifth Circuit agreed that the District Court used an incorrect Guidelines range but found that Molina-Martinez could not satisfy Rule 52(b)'s requirement that the error affect his substantial rights. It reasoned that a defendant whose sentence falls within what would have been the correct Guidelines range must, on appeal, identify "additional evidence" showing that use of the incorrect Guidelines range in fact affected his sentence.

Held: Courts reviewing Guidelines errors cannot apply a categorical "additional evidence" rule in cases, like this one, where a district court applies an incorrect range but sentences the defendant within the correct range. Pp. 8–16.

(a) The Guidelines establish the essential framework for sentencing proceedings. Sentencing courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." Peugh v. United States, 569 U. S. ___ (2013). Sentencing Commission statistics confirm that the Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, the systemic function of the selected Guidelines range will affect a defendant's sentence. As a result, a defendant who shows that the district court mistakenly deemed applicable an incorrect, higher range will, in the ordinary case, have demonstrated a reasonable probability of a different outcome. That showing will suffice for relief if Rule 52(b)'s other requirements are met. Pp. 9–12.

(b) The unworkable nature of the Fifth Circuit's "additional evidence" rule is evident here, where the record shows that the District Court gave little explanation for the sentence it selected, rejected the Government's request for a sentence at the top of the erroneous Guidelines range, and chose the sentence requested by the defendant and recommended by the Probation Office—a sentence at the bottom of the erroneous Guidelines range. This demonstrates that the Guidelines served as the starting point for the sentencing and were the focal point for the proceedings that followed. Given the sentence the District Court chose, and because the court said nothing to suggest that it would have imposed the same sentence regardless of the Guidelines range, there is at least a reasonable probability that the court would have imposed a different sentence had it known that 70 months was the lowest sentence the Commission deemed appropriate. Pp. 12–13.

(c) Rejection of the Fifth Circuit's rule means only that a defendant
Syllabus

can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights, not that the Government will have to prove that every Guidelines error was harmless. And the Government’s concern over the judicial resources needed for the resentencing proceedings that might result from today’s holding is unfounded because the holding is consistent with the approach taken by most Courts of Appeals and because remanding for resentencing is less costly than remanding for retrial. Pp. 13–15.


KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined.
SYNOPSIS OF THE UNITED STATES

SYLLABUS

BANK MARKAZI, AKA CENTRAL BANK OF IRAN v.
PETERSON ET AL.

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


American nationals may seek money damages from state sponsors of terrorism in the courts of the United States. See 28 U. S. C. §1605A. Prevailing plaintiffs, however, often face practical and legal difficulties enforcing their judgments. To place beyond dispute the availability of certain assets for satisfaction of judgments rendered in terrorism cases against Iran, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012. As relevant here, the Act makes a designated set of assets available to satisfy the judgments underlying a consolidated enforcement proceeding which the statute identifies by the District Court’s docket number. 22 U. S. C. §8772.

Section 8772(a)(2) requires a court, before allowing execution against these assets, to determine, inter alia, “whether Iran holds equitable title to, or the beneficial interest in, the assets.”

Respondents—more than 1,000 victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members—rank within 16 discrete groups, each of which brought suit against Iran. To enforce judgments they obtained by default, the 16 groups moved for turnover of about $1.75 billion in bond assets held in a New York bank account—assets that, respondents alleged, were owned by Bank Markazi, the Central Bank of Iran. The turnover proceeding began in 2008. In 2012, the judgment holders updated their motions to include execution claims under §8772. Bank Markazi maintained that §8772 could not withstand inspection under the separation-of-powers doctrine, contending that Congress had usurped the judicial role by directing a particular result in the pending enforcement proceeding. The District Court disagreed, concluding that §8772 permissibly changed the law applicable in a pending litigation.
The Second Circuit affirmed.

_Held:_ Section 8772 does not violate the separation of powers. Pp. 12–24.

(a) Article III of the Constitution establishes an independent judiciary with the “province and duty . . . to say what the law is” in particular cases and controversies. _Marbury v. Madison_, 1 Cranch 137, 177. Necessarily, that endowment of authority blocks Congress from “requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.” _Plaut v. Spendthrift Farm, Inc._, 514 U. S. 211, 218. Although Article III bars Congress from telling a court how to apply pre-existing law to particular circumstances, _Robertson v. Seattle Audubon Soc._, 503 U. S. 429, 438–439, Congress may amend a law and make the amended prescription retroactively applicable in pending cases, _Landgraf v. USI Film Products_, 511 U. S. 244, 267–268; _United States v. Schooner Peggy_, 1 Cranch 103, 110. In _United States v. Klein_, 13 Wall. 128, 146, this Court enigmatically observed that Congress may not “prescribe rules of decision to the Judicial Department . . . in [pending] cases.” More recent decisions have clarified that _Klein_ does not inhibit Congress from “amend[ing] applicable law.” _Robertson_, 503 U. S., at 441; _Plaut_, 514 U. S., at 218. Section 8772 does just that: It requires a court to apply a new legal standard in a pending postjudgment enforcement proceeding. No different result obtains because, as Bank Markazi argues, the outcome of applying §8772 to the facts in the proceeding below was a “foregone conclusion.” Brief for Petitioner 47. A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. See _Pope v. United States_, 323 U. S. 1, 11. Pp. 12–19.

(b) Nor is §8772 invalid because, as Bank Markazi further objects, it prescribes a rule for a single, pending case identified by caption and docket number. The amended law upheld in _Robertson_ also applied to cases identified in the statute by caption and docket number. 503 U. S., at 440. Moreover, §8772 is not an instruction governing one case only: It facilitates execution of judgments in 16 suits. While consolidated for administrative purposes at the execution stage, the judgment-execution claims were not independent of the original actions for damages and each retained its separate character. In any event, the Bank’s argument rests on the flawed assumption that legislation must be generally applicable. See _Plaut_, 514 U. S., at 239, n. 9. This Court and lower courts have upheld as a valid exercise of Congress’ legislative power laws governing one or a very small number of specific subjects. Pp. 19–21.

(c) Adding weight to this decision, §8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the con-
Syllabus

trolling role of the political branches is both necessary and proper. Measures taken by the political branches to control the disposition of foreign-state property, including blocking specific foreign-state assets or making them available for attachment, have never been rejected as invasions upon the Article III judicial power. Cf. *Dames & Moore v. Regan*, 453 U. S. 654, 674. Notably, before enactment of the Foreign Sovereign Immunities Act, the Executive regularly made case-specific determinations whether sovereign immunity should be recognized, and courts accepted those determinations as binding. See, *e.g.*, *Republic of Austria v. Altman*, 541 U. S. 677, 689–691. This practice, too, was never perceived as an encroachment on the federal courts' jurisdiction. *Dames & Moore*, 453 U. S., at 684–685. Pp. 21–23.

758 F. 3d 185, affirmed.

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

HARRIS ET AL. v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA


After the 2010 census, Arizona’s independent redistricting commission (Commission), comprising two Republicans, two Democrats, and one Independent, redrew Arizona’s legislative districts, with guidance from legal counsel, mapping specialists, a statistician, and a Voting Rights Act specialist. The initial plan had a maximum population deviation from absolute equality of districts of 4.07%, but the Commission adopted a revised plan with an 8.8% deviation on a 3-to-2 vote, with the Republican members dissenting. After the Department of Justice approved the revised plan as consistent with the Voting Rights Act, appellants filed suit, claiming that the plan’s population variations were inconsistent with the Fourteenth Amendment. A three-judge Federal District Court entered judgment for the Commission, concluding that the “deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role.”

Held. The District Court did not err in upholding Arizona’s redistricting plan. Pp. 3–11.

(a) The Fourteenth Amendment’s Equal Protection Clause requires States to “make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable,” Reynolds v. Sims, 377 U. S. 533, 577, but mathematical perfection is not required. Deviations may be justified by “legitimate considerations,” id., at 579, including “traditional districting principles such as compactness [and] contiguity,” Shaw v. Reno, 509 U. S. 630, 647, as well as a state interest in maintaining the integrity of political subdivisions, Mahan v. Howell, 410 U. S. 315, 328, a competitive balance among political parties, Gaffney v. Cummings, 412 U. S. 735, 752,
and, before *Shelby County v. Holder*, 570 U. S. ___, compliance with §5 of the Voting Rights Act. It was proper for the Commission to proceed on the last basis here. In addition, "minor deviations from mathematical equality"—*i.e.*, deviations "under 10%," *Brown v. Thomson*, 462 U. S. 835, 842—do not, by themselves, "make out a prima facie case of invidious discrimination under the Fourteenth Amendment [requiring] justification by the State," *Gaffney, supra*, at 745. Because the deviation here is under 10%, appellants cannot rely upon the numbers to show a constitutional violation. Instead, they must show that it is more probable than not that the deviation reflects the predominance of illegitimate reapportionment factors rather than "legitimate considerations." *Pp. 3–5.*

(b) Appellants have failed to meet that burden here, where the record supports the District Court's conclusion that the deviations predominantly reflected Commission efforts to achieve compliance with the Voting Rights Act, not to secure political advantage for the Democratic Party. To meet the Voting Rights Act's nonretrogression requirement, a new plan, when compared to the current plan (benchmark plan), must not diminish the number of districts in which minority groups can "elect their preferred candidates of choice" (ability-to-elect districts). A State can obtain legal assurance that it has satisfied this requirement if it submits its proposed plan to the Justice Department and the Department does not object to the plan. The record shows that the Commission redrew the initial map to ensure that the plan had 10 ability-to-elect districts, the same number as the benchmark plan. But after a statistician reported that the Justice Department still might not agree with the plan, the Commission changed additional boundaries, causing District 8, a Republican leaning district, to become more politically competitive. Because this record well supports the District Court's finding that the Commission was trying to comply with the Voting Rights Act, appellants have not shown that it is more probable than not that illegitimate considerations were the predominant motivation for the deviations. They have thus failed to show that the plan violates the Equal Protection Clause. *Pp. 5–9.*

(c) Appellants' additional arguments are unpersuasive. While Arizona's Democratic-leaning districts may be somewhat underpopulated and its Republican-leaning districts somewhat overpopulated, these variations may reflect only the tendency of Arizona's 2010 minority populations to vote disproportionately for Democrat and thus can be explained by the Commission's efforts to maintain at least 10 ability-to-elect districts. *Cox v. Larios*, 542 U. S. 947, in which the Court affirmed a District Court's conclusion that a Georgia reapportionment plan violated the Equal Protection Clause where its devia-
Syllabus

tion, though less than 10%, resulted from the use of illegitimate factors, is inapposite because appellants have not carried their burden of showing the use of illegitimate factors here. And because Shelby County was decided after Arizona’s plan was created, it has no bearing on the issue whether the State’s attempt to comply with the Voting Rights Act is a legitimate state interest. Pp. 9–11.

993 F. Supp. 2d 1042, affirmed.

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

Syllabus

HEFFERNAN v. CITY OF PATerson, NEW JERSEy, ET AL.

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


Petitioner Heffernan was a police officer working in the office of Paterson, New Jersey’s chief of police. Both the chief of police and Heffernan’s supervisor had been appointed by Paterson’s incumbent mayor, who was running for re-election against Lawrence Spagnola, a good friend of Heffernan’s. Heffernan was not involved in Spagnola’s campaign in any capacity. As a favor to his bedridden mother, Heffernan agreed to pick up and deliver to her a Spagnola campaign yard sign. Other police officers observed Heffernan speaking to staff at a Spagnola distribution point while holding the yard sign. Word quickly spread throughout the force. The next day, Heffernan’s supervisors demoted him from detective to patrol officer as punishment for his “overt involvement” in Spagnola’s campaign. Heffernan filed suit, claiming that the police chief and the other respondents had demoted him because, in their mistaken view, he had engaged in conduct that constituted protected speech. They had thereby “depriv[ed]” him of a “right . . . secured by the Constitution.” 42 U.S.C. §1983. The District Court, however, found that Heffernan had not been deprived of any constitutionally protected right because he had not engaged in any First Amendment conduct. Affirming the Third Circuit concluded that Heffernan’s claim was actionable under §1983 only if his employer’s action was prompted by Heffernan’s actual, rather than his perceived, exercise of his free-speech rights.

Held:

1. When an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment and §1983 even if, as here, the employer’s actions are
based on a factual mistake about the employee's behavior. To answer the question whether an official's factual mistake makes a critical legal difference, the Court assumes that the activities that Heffernan's supervisors mistakenly thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish. Section 1983 does not say whether the "right" protected primarily focuses on the employee's actual activity or on the supervisor's motive. Neither does precedent directly answer the question. In Connick v. Myers, 461 U. S. 138, Garcia v. Ceballos, 547 U. S. 410, and Pickering v. Board of Ed. of Township High School Dist. 203, Will Ct., 391 U. S. 563, there were no factual mistakes: The only question was whether the undisputed reason for the adverse action was in fact protected by the First Amendment. However, in Waters v. Churchill, 511 U. S. 661, a government employer's adverse action was based on a mistaken belief that an employee had not engaged in protected speech. There, this Court determined that the employer's motive, and particularly the facts as the employer reasonably understood them, mattered in determining that the employer had not violated the First Amendment. The government's motive likewise matters here, where respondents denoted Heffernan on the mistaken belief that he had engaged in protected speech. A rule of law finding liability in these circumstances tracks the First Amendment's language, which focuses upon the Government's activity. Moreover, the constitutional harm—discouraging employees from engaging in protected speech or association—is the same whether or not the employer's action rests upon a factual mistake. Finally, a rule of law imposing liability despite the employer's factual mistake is not likely to impose significant extra costs upon the employer, for the employee bears the burden of proving an improper employer motive. Pp. 3–8.

For the purposes of this opinion, the Court has assumed that Heffernan's employer demoted him out of an improper motive. However, the lower courts should decide in the first instance whether respondents may have acted under a neutral policy prohibiting police officers from overt involvement in any political campaign and whether such a policy, if it exists, complies with constitutional standards. P. 8.

777 F. 3d 147, reversed and remanded.

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

OCASIO v. UNITED STATES

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


Petitioner Samuel Ocasio, a former police officer, participated in a kickback scheme in which he and other officers routed damaged vehicles from accident scenes to an auto repair shop in exchange for payments from the shopowners. Petitioner was charged with obtaining money from the shopowners under color of official right, in violation of the Hobbs Act, 18 U. S. C. §1951, and of conspiring to violate the Hobbs Act, in violation of 18 U. S. C. §871. At trial, the District Court rejected petitioner’s argument that—because the Hobbs Act prohibits the obtaining of property “from another”—a Hobbs Act conspiracy requires proof that the alleged conspirators agreed to obtain property from someone outside the conspiracy. Petitioner was convicted on all counts, and the Fourth Circuit affirmed. Petitioner now challenges his conspiracy conviction, contending that he cannot be convicted of conspiring with the shopowners to obtain money from them under color of official right.

Held: A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right. Pp. 5–18.

(a) The general federal conspiracy statute, under which petitioner was convicted, makes it a crime to “conspire. . . . to commit any offense against the United States.” 18 U. S. C. §371. Section 371’s use of the term “conspire” incorporates age-old principles of conspiracy law. And under established case law, the fundamental characteristic of a conspiracy is a joint commitment to an “endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense.” Salinas v. United States, 522 U. S. 52, 65. A conspirator need not agree to commit the substantive offense—or
Syllabus

even be capable of committing it—in order to be convicted. It is sufficient that the conspirator agreed that the underlying crime be committed by a member of the conspiracy capable of committing it. See id., at 63–65; United States v. Holte, 236 U. S. 140; Gebardi v. United States, 287 U. S. 112. Pp. 5–10.

(b) These basic principles of conspiracy law resolve this case. To establish the alleged Hobbs Act conspiracy, the Government only needed to prove an agreement that some conspirator commit each element of the substantive offense. Petitioner and the shopowners reached just such an agreement: They shared a common purpose that petitioner and other police officers would obtain property “from another”—that is, from the shopowners—under color of official right. Pp. 10–14.

(c) Contrary to petitioner’s claims, this decision does not dissolve the distinction between extortion and conspiracy to commit extortion. Nor does it transform every bribe of a public official into a conspiracy to commit extortion. And while petitioner exaggerates the impact of this decision, his argument would create serious practical problems. Under his approach, the validity of a charge of Hobbs Act conspiracy would often depend on difficult property-law questions having little to do with culpability. Pp. 14–18.

750 F. 3d 399, affirmed.

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

Syllabus

SHERIFF ET AL. v. GILLIE ET AL.,

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


The Fair Debt Collection Practices Act (FDCPA or Act) aims to eliminate “abusive debt collection practices,” 15 U. S. C. §1692a–4d, by, as relevant here, barring “false, deceptive, or misleading representation[s] . . . in connection with the collection of any debt,” §1692e. Governing “debt collectors,” the Act excludes from the definition of that term “any officer . . . of . . . any State to the extent that collecting . . . any debt is in the performance of his official duties.” §1692a(6)(C).

Under Ohio law, overdue debts owed to state-owned agencies and instrumentalities are certified to the State’s Attorney General for collection or disposition. Carrying out this responsibility, the Attorney General appoints, as independent contractors, private attorneys, naming them “special counsel” to act on the Attorney General’s behalf. The Attorney General requires special counsel to use the Attorney General’s letterhead in communicating with debtors. Among the special counsel appointed by the Attorney General in 2012 were petitioners Mark Sheriff and Eric Jones. Consistent with the Attorney General’s direction, Sheriff’s law firm and Jones sent debt collection letters on the Attorney General’s letterhead to respondents Hazel Meadows and Pamela Gillie, respectively. The signature block of each letter contained the name and address of the signatory as well as the designation “special” or “outside” counsel to the State Attorney General. Each letter also identified the sender as a debt collector seeking payment for debts to a state institution. Meadows and Gillie filed a putative class action in Federal District Court, alleging that defendants had, by using the Attorney General’s letterhead, employed deceptive and misleading means to attempt to collect consumer debts, in violation of the FDCPA. The Ohio Attorney General in-
Syllabus

tervened, seeking a declaratory judgment that special counsel’s use of
the Attorney General’s letterhead is neither false nor misleading, and
urging that special counsel be deemed officers of the State exempted
from the Act. The District Court granted summary judgment for de-
fendants, holding that special counsel are “officers” of the State and,
in any event, their use of the Attorney General’s letterhead is not
false or misleading. The Sixth Circuit vacated that judgment, con-
cluding that special counsel, as independent contractors, are not enti-
tled to the FDCPA’s state-officer exemption. The appeals court re-
manded for trial the question whether use of the Attorney General’s
letterhead would mislead a debtor into believing that it is the Attor-
ney General who is collecting the debt.

Held: Assuming, arguendo, that special counsel do not rank as “state
officers” within the meaning of the Act, petitioners’ use of the Attorney
General’s letterhead, nevertheless, does not offend §1692e.

Special counsel’s use of the Attorney General’s letterhead at the
Attorney General’s direction does not offend §1692e’s general prohibi-
tion against “false ... or misleading representation[s].” The letter-
head identifies the principal—Ohio’s Attorney General—and the sig-
nature block names the agent—a private lawyer hired as outside
counsel to the Attorney General. The character of the relationship
between special counsel and the Attorney General bolsters the
Court’s determination. Special counsel work closely with attorneys
in the Attorney General’s Office, providing legal services on the At-
torney General’s behalf in furtherance of the Attorney General’s debt
collection responsibilities for the State. A debtor’s impression that a
letter from special counsel is a letter from the Attorney General’s Of-
fice is thus scarcely inaccurate.

Special counsel’s use of the Attorney General’s letterhead is also
consistent with §1692e(9)’s specific prohibition against “falsely repre-
sent[ing]” that a communication is “authorized, issued, or approved”
by a State. Because the Attorney General authorized—indeed re-
quired—special counsel to use his letterhead, special counsel create
no false impression in doing just that. Nor did special counsel use an
untrue name in their letters, in violation of §1692e(14). Special
counsel do not employ a false name when they use the Attorney Gen-
eral’s letterhead at his instruction, for special counsel act as the At-
torney General’s agents in debt-related matters. The Court sees no
reason, furthermore, to construe the FDCPA in a manner that would
interfere with the Attorney General’s chosen method of fulfilling his
statutory obligation to collect the State’s debts.

The Sixth Circuit raises the specter of consumer confusion and the
risk of intimidation from special counsel’s use of the Attorney Gen-
eral’s letterhead, but its exposition is unconvincing. Pp. 6–11.
Syllabus

785 F. 3d 1091, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.
SYNOPSIS

SPOKEO, INC. v. ROBINS

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


The Fair Credit Reporting Act of 1970 (FCRA) requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports, 15 U. S. C. §1681e(b), and imposes liability on “[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any” individual, §1681n(a).

Petitioner Spokeo, Inc., an alleged consumer reporting agency, operates a “people search engine,” which searches a wide spectrum of databases to gather and provide personal information about individuals to a variety of users, including employers wanting to evaluate prospective employees. After respondent Thomas Robins discovered that his Spokeo-generated profile contained inaccurate information, he filed a federal class-action complaint against Spokeo, alleging that the company willfully failed to comply with the FCRA’s requirements.

The District Court dismissed Robins’ complaint, holding that he had not properly pleaded injury in fact as required by Article III. The Ninth Circuit reversed. Based on Robins’ allegation that “Spokeo violated his statutory rights” and the fact that Robins’ “personal interests in the handling of his credit information are individualized,” the court held that Robins had adequately alleged an injury in fact.

Held: Because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirement, its Article III standing analysis was incomplete. Pp. 5–11.

(a) A plaintiff invoking federal jurisdiction bears the burden of establishing the “irreducible constitutional minimum” of standing by demonstrating (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a
Syllabus


(b) As relevant here, the injury-in-fact requirement requires a plaintiff to show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan, supra*, at 560. Pp. 7–11.

(i) The Ninth Circuit's injury-in-fact analysis elided the independent "concreteness" requirement. Both observations it made concerned only "particularization," *i.e.*, the requirement that an injury "affect the plaintiff in a personal and individual way," *Lujan, supra*, at 560, n. 1, but an injury in fact must be both concrete and particularized, *see, e.g., Susan B. Anthony List v. Driehaus*, 573 U. S. ___. Concreteness is quite different from particularization and requires an injury to be "de facto," that is, to actually exist. Pp. 7–8.

(2) The Ninth Circuit also failed to address whether the alleged procedural violations entail a degree of risk sufficient to meet the concreteness requirement. A "concrete" injury need not be a "tangible" injury. *See, e.g., Pleasant Grove City v. Sammam*, 555 U. S. 460. To determine whether an intangible harm constitutes injury in fact, both history and the judgment of Congress are instructive. Congress is well positioned to identify intangible harms that meet minimum Article III requirements, but a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it. Article III standing requires a concrete injury even in the context of a statutory violation. This does not mean, however, that the risk of real harm cannot satisfy that requirement. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U. S. ___. The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact; in such a case, a plaintiff need not allege any additional harm beyond the one identified by Congress, see *Federal Election Comm'n v. Akins*, 524 U. S. 11, 20–25. This Court takes no position on the correctness of the Ninth Circuit's ultimate conclusion, but these general principles demonstrate two things: that Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk and that Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. Pp. 8–11.

742 F. 3d 409, vacated and remanded.

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

HUSKY INTERNATIONAL ELECTRONICS, INC. v. RITZ

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

No. 15–145. Argued March 1, 2016—Decided May 16, 2016

Chrysalis Manufacturing Corp. incurred a debt to petitioner Husky International Electronics, Inc., of nearly $164,000. Respondent Daniel Lee Ritz, Jr., Chrysalis’ director and part owner at the time, drained Chrysalis of assets available to pay the debt by transferring large sums of money to other entities Ritz controlled. Husky sued Ritz to recover on the debt. Ritz then filed for Chapter 7 bankruptcy, prompting Husky to file a complaint in Ritz’ bankruptcy case, seeking to hold him personally liable and contending that the debt was not dischargeable because Ritz’ intercompany-transfer scheme constituted “actual fraud” under the Bankruptcy Code’s discharge exceptions. 11 U. S. C. §523(a)(2)(A).

The District Court held that Ritz was personally liable under state law but also held that the debt was not “obtained by . . . actual fraud” under §523(a)(2)(A) and thus could be discharged in bankruptcy. The Fifth Circuit affirmed, holding that a misrepresentation from a debtor to a creditor is a necessary element of “actual fraud” and was lacking in this case, because Ritz made no false representations to Husky regarding the transfer of Chrysalis’ assets.

Held: The term “actual fraud” in §523(a)(2)(A) encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation. Pp. 3–11.

(a) It is sensible to presume that when Congress amended the Bankruptcy Code in 1978 and added to debts obtained by “false pretenses or false representations” an additional bankruptcy discharge exception for debts obtained by “actual fraud,” it did not intend the term “actual fraud” to mean the same thing as the already-existing term “false representations.” See United States v. Quality Stores,
Syllabus

*In re.* 572 U. S. __. Even stronger evidence that "actual fraud" encompasses the kind of conduct alleged to have occurred here is found in the phrase's historical meaning. At common law, "actual fraud" meant fraud committed with wrongful intent, *Neal v. Clark*, 95 U. S. 704, 709. And the term "fraud" has, since the beginnings of bankruptcy practice, been used to describe asset transfers that, like Ritz' scheme, impair a creditor's ability to collect a debt.

One of the first bankruptcy Acts, the Fraudulent Conveyances Act of 1571, 13 Eliz., ch. 5, identified as "fraud" conveyances made with "[i]ntent to delay hynder or defraude [c]reditors." The degree to which that statute remains embedded in fraud-related laws today, see, e.g., *BFP v. Resolution Trust Corporation*, 511 U. S. 531, 540, clarifies that the common-law term "actual fraud" is broad enough to incorporate fraudulent conveyances. The common law also indicates that fraudulent conveyances do not require a misrepresentation from a debtor to a creditor, see *id.*, at 541, as they lie not in dishonestly inducing a creditor to extend a debt but in the acts of concealment and hindrance. Pp. 3–6.

(b) Interpreting "actual fraud" in §523(a)(2)(A) to encompass fraudulent conveyances would not, as Ritz contends, render duplicative two of §523's other discharge exceptions, §§523(a)(4), (6), given that "actual fraud" captures much conduct not covered by those other provisions. Nor does this interpretation create a redundancy in §727(a)(2), which is meaningfully different from §523(a)(2)(A). It is also not incompatible with §523(a)(2)(A)'s "obtained by" requirement. Even though the transferor of a fraudulent conveyance does not obtain assets or debts through the fraudulent conveyance, the transferee—who, with the requisite intent, also commits fraud—does. At minimum, those debts would not be dischargeable under §523(a)(2)(A). Finally, reading the phrase "actual fraud" to restrict, rather than expand, the discharge exception's reach would untensely require reading the disjunctive "or" in the phrase "false pretenses, a false representation, or actual fraud" to mean "by." Pp. 7–10.

787 F. 3d 312, reversed and remanded.

*SOTOMAYOR,* J., delivered the opinion of the Court, in which *ROBERTS,* C. J., and *KENNEDY,* *GINSBURG,* *Breyer,* *ALITO,* and *KAGAN,* JJ., joined. *THOMAS,* J., filed a dissenting opinion.
NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. v. MANNING ET AL.

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


Respondent Greg Manning held over two million shares of stock in Escala Group, Inc. He claims that he lost most of his investment when the share price plummeted after petitioners, Merrill Lynch and other financial institutions (collectively, Merrill Lynch), devalued Escala through “naked short sales” of its stock. Unlike a typical short sale, where a person borrows stock from a broker, sells it to a buyer on the open market, and later purchases the same number of shares to return to the broker, the seller in a “naked” short sale does not borrow the stock he puts on the market, and so never delivers the promised shares to the buyer. This practice, which can injure shareholders by driving down a stock’s price, is regulated by the Securities and Exchange Commission’s Regulation SHO, which prohibits short-sellers from intentionally failing to deliver securities, thereby curbing market manipulation.

Manning and other former Escala shareholders (collectively, Manning) filed suit in New Jersey state court, alleging that Merrill Lynch’s actions violated New Jersey law. Though Manning chose not to bring any claims under federal securities laws or rules, his complaint referred explicitly to Regulation SHO, cataloging past accusations against Merrill Lynch for flouting its requirements and suggesting that the transactions at issue had again violated the regulation. Merrill Lynch removed the case to Federal District Court, asserting federal jurisdiction on two grounds. First, it invoked the general federal question statute, 28 U. S. C. §1331, which grants district courts jurisdiction of “all civil actions arising under” federal law. It also invoked §27 the Securities Exchange Act of 1934 (Exchange Act), which grants federal district courts exclusive jurisdiction “of all suits in eq-
uity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder.” 15 U. S. C. §78aa(a). Manning moved to remand the case to state court, arguing that neither statute gave the federal court authority to adjudicate his state-law claims. The District Court denied his motion, but the Third Circuit reversed. The court first decided that §1331 did not confer jurisdiction, because Manning’s claims all arose under state law and did not necessarily raise any federal issues. Nor was the District Court the appropriate forum under §27 of the Exchange Act, which, the court held, covers only those cases that would satisfy §1331’s “arising under” test for general federal jurisdiction.

HeId: The jurisdictional test established by §27 is the same as §1331’s test for deciding if a case “arises under” a federal law. Pp. 4–18.

(a) Section 27’s text more readily supports this meaning than it does the parties’ two alternatives. Merrill Lynch argues that §27’s plain language requires an expansive rule: Any suit that either explicitly or implicitly asserts a breach of an Exchange Act duty is “brought to enforce” that duty even if the plaintiff seeks relief solely under state law. Under the natural reading of that text, however, §27 confers federal jurisdiction when an action is commenced in order to give effect to an Exchange Act requirement. The “brought to enforce” language thus stops short of embracing any complaint that happens to mention a duty established by the Exchange Act. Meanwhile, Manning’s far more restrictive interpretation—that a suit is “brought to enforce” only if it is brought directly under that statute—veers too far in the opposite direction. Instead, §27’s language is best read to capture both suits brought under the Exchange Act and the rare suit in which a state-law claim arises and falls on the plaintiff’s ability to prove the violation of a federal duty. An existing jurisdictional test well captures both of these classes of suits “brought to enforce” such a duty: 28 U. S. C. §1331’s provision of federal jurisdiction of all civil actions “arising under” federal law. Federal jurisdiction most often attaches when federal law creates the cause of action asserted, but it may also attach when the state-law claim “necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance” of federal and state power. Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U. S. 308, 314. Pp. 5–10.

(b) This Court’s precedents interpreting the term “brought to enforce” have likewise interpreted §27’s jurisdictional grant as coextensive with the Court’s construction of §1331’s “arising under” standard. See Pan American, 366 U. S. 656; Matsushita Elec. Industrial Co. v. Epstein, 516 U. S. 367. Pp. 10–14.
Syllabus

(c) Construing §27, consistent with both text and precedent, to cover suits that arise under the Exchange Act serves the goals the Court has consistently underscored in interpreting jurisdictional statutes. It gives due deference to the important role of state courts. And it promotes "administrative simplicity[, which] is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U. S. 77, 94. Both judges and litigants are familiar with the "arising under" standard and how it works, and that test generally provides ready answers to jurisdictional questions. Pp. 14–18.

772 F. 3d 158, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, J., joined.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

CRST VAN EXPEDITED, INC. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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


Petitioner CRST, a trucking company using a system under which two employees share driving duties on a single truck, requires its drivers to graduate from the company’s training program before becoming a certified driver. In 2005, new driver Monika Starke filed a charge with the Equal Employment Opportunity Commission (Commission), alleging that she was sexually harassed by two male trainers during the road-trip portion of her training. Following the procedures set out in Title VII of the Civil Rights Act of 1964, see 42 U.S.C. §2000e–5(b), the Commission informed CRST about the charge and investigated the allegation, ultimately informing CRST that it had found reasonable cause to believe that CRST subjected Starke and “a class of employees and prospective employees to sexual harassment” and offering to conciliate. In 2007, having determined that conciliation had failed, the Commission, in its own name, filed suit against CRST under §706 of Title VII. During discovery, the Commission identified over 250 allegedly aggrieved women. The District Court, however, dismissed all of the claims, including those on behalf of 67 women, which, the court found, were barred on the ground that the Commission had not adequately investigated or attempted to conciliate its claims on their behalf before filing suit. The District Court then dismissed the suit, held that CRST is a prevailing party, and invited CRST to apply for attorney’s fees. CRST filed a motion for attorney’s fees. The District Court awarded the company over $4 million in fees. The Eighth Circuit reversed the dismissal of only two claims—on behalf of Starke and one other employee—but that led it to vacate, without prejudice, the attorney’s fees award. On remand, the Commission settled the claim on behalf of Starke and withdrew
the other. CRST again sought attorney’s fees, and the District Court again awarded it more than $4 million, finding that CRST had prevailed on the claims for over 150 of the allegedly aggrieved women, including the 67 claims dismissed because of the Commission’s failure to satisfy its presuit requirements. The Eighth Circuit reversed and remanded once more. It held that a Title VII defendant can be a “prevailing party” only by obtaining a “ruling on the merits,” and that the District Court’s dismissal of the claims was not a ruling on the merits.

**Held:** A favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party. Pp. 11–16.

(a) Common sense undermines the notion that a defendant cannot “prevail” unless the relevant disposition is on the merits. A plaintiff seeks a material alteration in the legal relationship between the parties. But a defendant seeks to prevent an alteration in the plaintiff’s favor, and that objective is fulfilled whenever the plaintiff’s challenge is rebuffed, irrespective of the precise reason for the court’s decision, i.e., even if the court’s final judgment rejects the plaintiff’s claim for a nonmerits reason. There is no indication that Congress intended that defendants should be eligible to recover attorney’s fees only when courts dispose of claims on the merits. Title VII’s fee-shifting statute allows prevailing defendants to recover whenever the plaintiff’s “claim was frivolous, unreasonable, or groundless.” Christiansburg Garment Co. v. EEOC, 434 U. S. 412, 422. Congress thus must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant’s favor, whether on the merits or not. Christiansburg itself involved a defendant’s request for attorney’s fees in a case where the District Court had rejected the plaintiff’s claim for a nonmerits reason. Various Courts of Appeals likewise have applied the Christiansburg standard when claims were dismissed for nonmerits reasons. Pp. 11–14.

(b) The Court declines to decide the argument, raised by the Commission for the first time during the merits stage of this case, whether a defendant must obtain a preclusive judgment in order to prevail. The Commission’s failure to articulate its preclusion theory earlier has resulted in inadequate briefing on the issue, and the parties dispute whether the District Court’s judgment was in fact preclusive. The Commission also submits that the Court should affirm on the alternative ground that, even if CRST is a prevailing party, the Commission’s position that it had satisfied its presuit obligations was not frivolous, unreasonable, or groundless. These matters are left for the Eighth Circuit to consider in the first instance. It is not this Court’s usual practice to adjudicate either legal or predicate factual questions
Syllabus

in the first instance, see Adarand Constructors, Inc. v. Mineta, 534 U. S. 103, 110, and that is the proper course here, given the extensive record in this case and the Commission’s change of position between the certiorari and merits stages. Pp. 14–16.

774 F. 3d 1169, vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.
Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

BETTERMAN v. MONTANA

CERTIORARI TO THE SUPREME COURT OF MONTANA


Petitioner Brandon Betterman pleaded guilty to bail jumping after failing to appear in court on domestic assault charges. He was then jailed for over 14 months awaiting sentence, in large part due to institutional delay. He was eventually sentenced to seven years' imprisonment, with four of the years suspended. Arguing that the 14-month gap between conviction and sentencing violated his speedy trial right, Betterman appealed, but the Montana Supreme Court affirmed the conviction and sentence, ruling that the Sixth Amendment's Speedy Trial Clause does not apply to postconviction, resentencing delay.

Held: The Sixth Amendment’s speedy trial guarantee does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. Pp. 3–11.

(a) Criminal proceedings generally unfold in three discrete phases. First, the State investigates to determine whether to arrest and charge a suspect. Once charged, the suspect is presumed innocent until conviction upon trial or guilty plea. After conviction, the court imposes sentence. There are checks against delay geared to each particular phase. P. 3.

(b) Statutes of limitations provide the primary protection against delay in the first stage, when the suspect remains at liberty, with the Due Process Clause safeguarding against fundamentally unfair prosecutorial conduct. United States v. Lovasco, 431 U. S. 783, 789. P. 3.

(c) The Speedy Trial Clause right attaches when the second phase begins, that is, upon a defendant’s arrest or formal accusation. United States v. Marion, 404 U. S. 307, 320–321. The right detaches upon conviction, when this second stage ends. Before conviction, the accused is shielded by the presumption of innocence, Reed v. Ross, 468 U. S. 1, 4, which the Speedy Trial Clause implements by minimizing
the likelihood of lengthy incarceration before trial, lessening the anxiety and concern associated with a public accusation, and limiting the effects of long delay on the accused's ability to mount a defense. Marion, 404 U. S., at 320. The Speedy Trial Clause thus loses force upon conviction.

This reading comports with the historical understanding of the speedy trial right. It "has its roots at the very foundation of our English law heritage," Klopfer v. North Carolina, 386 U. S. 213, 223, and it was the contemporaneous understanding of the Sixth Amendment's language that "accused" described a status preceding "convicted" and "trial" meant a discrete episode after which judgment (i.e., sentencing) would follow. The Court's precedent aligns with the text and history of the Speedy Trial Clause. See Barker v. Wingo, 407 U. S. 514, 532–533. Just as the right to speedy trial does not arise prearrest, Marion, 404 U. S., at 320–322, adverse consequences of postconviction delay are outside the purview of the Speedy Trial Clause. The sole remedy for a violation of the speedy trial right—dismissal of the charges—fits the preconviction focus of the Clause, for it would be an unjustified windfall to remedy sentencing delay by vacating validly obtained convictions. This reading also finds support in the federal Speedy Trial Act of 1974 and numerous state analogs, which impose time limits for charging and trial but say nothing about sentencing. The prevalence of guilty pleas and the resulting scarcity of trials in today's justice system do not bear on the presumption-of-innocence protection at the heart of the Speedy Trial Clause. Moreover, a central feature of contemporary sentencing—the preparation and review of a presentence investigation report—requires some amount of wholly reasonable presentencing delay. Pp. 3–9.

(d) Although the Constitution's presumption-of-innocence-protective speedy trial right is not engaged in the sentencing phase, statutes and rules offer defendants recourse. Federal Rule of Criminal Procedure 32(b)(1), for example, directs courts to "impose sentence without unnecessary delay." Further, at the prearrest stage, due process serves as a backstop against exorbitant delay. Because Betterman advanced no due process claim here, however, the Court expresses no opinion on how he might fare under that more pliable standard. Pp. 9–11.

378 Mont. 182, 342 P. 3d 971, affirmed.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

LUNA TORRES v. LYNCH, ATTORNEY GENERAL

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


Any alien convicted of an “aggravated felony” after entering the United States is deportable, ineligible for several forms of discretionary relief, and subject to expedited removal. 8 U. S. C. §§1227(a)(2)(A)(iii), (3). An “aggravated felony” is defined as any of numerous offenses listed in §1101(a)(43), each of which is typically identified either as an offense “described in” a specific federal statute or by a generic label (e.g., “murder”). Section 1101(a)(43)’s penultimate sentence states that each enumerated crime is an aggravated felony irrespective of whether it violates federal, state, or foreign law.

Petitioner Jorge Luna Torres (Luna), a lawful permanent resident, pleaded guilty in a New York court to attempted third-degree arson. When immigration officials discovered his conviction, they initiated removal proceedings. The Immigration Judge determined that Luna’s arson conviction was for an “aggravated felony” and held that Luna was therefore ineligible for discretionary relief. The Board of Immigration Appeals affirmed. It found the federal and New York arson offenses to be identical except for the former’s requirement that the crime have a connection to interstate or foreign commerce. Because the federal statute’s commerce element serves only a jurisdictional function, the Board held, New York’s arson offense is “described in” the federal statute, 18 U. S. C. §844(i), for purposes of determining whether an alien has been convicted of an aggravated felony. The Second Circuit denied review.

Held: A state offense counts as a §1101(a)(43) “aggravated felony” when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce.

Because Congress lacks general constitutional authority to punish crimes, most federal offenses include a jurisdictional element to tie
the substantive crime to one of Congress's enumerated powers. State legislatures are not similarly constrained, and so state crimes do not need such a jurisdictional hook. That discrepancy creates the issue here—whether a state offense lacking a jurisdictional element but otherwise mirroring a particular federal offense can be said to be "described" by that offense. Dictionary definitions of the word "described" do not clearly resolve this question one way or the other. Rather, two contextual considerations decide this case: §1101(a)(43)'s penultimate sentence and a well-established background principle that distinguishes between substantive and jurisdictional elements in criminal statutes. Pp. 4–21.

(a) Section §1101(a)(43)'s penultimate sentence shows that Congress meant the term "aggravated felony" to capture serious crimes regardless of whether they are made illegal by the Federal Government, a State, or a foreign country. But Luna's view would substantially undercut that function by excluding from the Act's coverage all state and foreign versions of any enumerated federal offense containing an interstate commerce element. And it would do so in a particularly perverse fashion—excluding state and foreign convictions for many of §1101(a)(43)'s gravest crimes (e.g., most child pornography offenses), while reaching convictions for far less harmful offenses (e.g., operating an unlawful gambling business). Luna theorizes that such haphazard coverage might reflect Congress's belief that crimes with an interstate connection are generally more serious than those without. But it is implausible that Congress viewed the presence of an interstate commerce element as separating serious from non-serious conduct. Luna's theory misconceives the function of interstate commerce elements and runs counter to the penultimate sentence's central message—that the state, federal, or foreign nature of a crime is irrelevant. And his claim that many serious crimes excluded for want of an interstate commerce element would nonetheless count as §1101(a)(43)(F) "crime[e] of violence" provides little comfort. That alternative would not include nearly all such offenses, nor even the worst ones. Pp. 7–14.

(b) The settled practice of distinguishing between substantive and jurisdictional elements in federal criminal statutes also supports reading §1101(a)(43) to include state analogues that lack only an interstate commerce requirement. Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical treatment. See, e.g., United States v. Yermian, 468 U. S. 93, 98. And that is true where, as here, the judicial task is to compare federal and state offenses. See Lewis v. United States, 523 U. S. 155, 165. Pp. 14–19.

764 F. 3d 152, affirmed.
Syllabus

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

FOSTER v. CHATMAN, WARDEN

CERTIORARI TO THE SUPREME COURT OF GEORGIA


Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Foster argued that the State’s use of those strikes was racially motivated, in violation of Batson v. Kentucky, 476 U. S. 79. The trial court rejected that claim, and the Georgia Supreme Court affirmed. Foster then renewed his Batson claim in a state habeas proceeding. While that proceeding was pending, Foster, through the Georgia Open Records Act, obtained from the State copies of the file used by the prosecution during his trial. Among other documents, the file contained (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting “represents Blacks”; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, “If it comes down to having to pick one of the black jurors, [this one] might be okay”; (3) notes identifying black prospective jurors as “B#1,” “B#2,” and “B#3”; (4) notes with “N” (for “no”) appearing next to the names of all black prospective jurors; (5) a list titled “[Definite NO’s]” containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated “NO. No Black Church”; and (7) the questionnaires filled out by five prospective black jurors, on which each juror’s response indicating his or her race had been circled.

The state habeas court denied relief. It noted that Foster’s Batson claim had been adjudicated on direct appeal. Because Foster’s renewed Batson claim “failed to demonstrate purposeful discrimination,” the court concluded that he had failed to show “any change in the facts sufficient to overcome” the state law doctrine of res judicata.
SYLLABUS

The Georgia Supreme Court denied Foster the Certificate of Probable Cause necessary to file an appeal.

HELD:

1. This Court has jurisdiction to review the judgment of the Georgia Supreme Court denying Foster a Certificate of Probable Cause on his Batson claim. Although this Court cannot ascertain the grounds for that unelaborated judgment, there is no indication that it rested on a state law ground that is both “independent of the merits” of Foster’s Batson claim and an “adequate basis” for that decision, so as to preclude jurisdiction. Harris v. Reed, 489 U.S. 255, 260. The state habeas court held that the state law doctrine of res judicata barred Foster’s claim only by examining the entire record and determining that Foster had not alleged a change in facts sufficient to overcome the bar. Based on this lengthy “Batson analysis,” the state habeas court concluded that Foster’s renewed Batson claim was “without merit.” Because the state court’s application of res judicata thus “depend[ed] on a federal constitutional ruling, [that] prong of the court’s holding is not independent of federal law, and [this Court’s] jurisdiction is not precluded.” Ake v. Oklahoma, 470 U.S. 68, 75; see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C., 467 U.S. 138, 152. Pp. 6–9.

2. The decision that Foster failed to show purposeful discrimination was clearly erroneous. Pp. 9–25.

(a) Batson provides a three-step process for adjudicating claims such as Foster’s. “First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.” Snyder v. Louisiana, 552 U.S. 472, 477 (internal quotation marks and brackets omitted). Only Batson’s third step is on issue here. That step turns on factual findings made by the lower courts, and this Court will defer to those findings unless they are clearly erroneous. See ibid. Pp. 9–10.

(b) Foster established purposeful discrimination in the State’s strikes of two black prospective jurors: Marilyn Garrett and Eddie Hood. Though the trial court accepted the prosecution’s justifications for both strikes, the record belies much of the prosecution’s reasoning. Pp. 10–22.

(g) The prosecution explained to the trial court that it made a last-minute decision to strike Garrett only after another juror, Shirley Powell, was excused for cause on the morning that the strikes were exercised. That explanation is flatly contradicted by evidence
Syllabus

showing that Garrett's name appeared on the prosecution's list of "[D]efinite NO's"—the six prospective jurors whom the prosecution was intent on striking from the outset. The record also refutes several of the reasons the prosecution gave for striking Garrett instead of Arlene Blackmon, a white prospective juror. For example, while the State told the trial court that it struck Garrett because the defense did not ask her for her thoughts about such pertinent trial issues as insanity, alcohol, or pre-trial publicity, the record reveals that the defense asked Garrett multiple questions on each topic. And though the State gave other facially reasonable justifications for striking Garrett, those are difficult to credit because of the State's willingness to accept white jurors with the same characteristics. For example, the prosecution claims that it struck Garrett because she was divorced and, at age 34, too young, but three out of four divorced white prospective jurors and eight white prospective jurors under age 36 were allowed to serve. Pp. 11–17.

(ii) With regard to prospective juror Hood, the record similarly undermines the justifications proffered by the State to the trial court for the strike. For example, the prosecution alleged in response to Foster's pretrial Batson challenge that its only concern with Hood was the fact that his son was the same age as the defendant. But then, at a subsequent hearing, the State told the court that its chief concern was with Hood's membership in the Church of Christ. In the end, neither of those reasons for striking Hood withstands scrutiny. As to the age of Hood's son, the prosecution allowed white prospective jurors with sons of similar age to serve, including one who, in contrast to Hood, equivocated when asked whether Foster's age would be a factor at sentencing. And as to Hood's religion, the prosecution erroneously claimed that three white Church of Christ members were excused for cause because of their opposition to the death penalty, when in fact the record shows that those jurors were excused for reasons unrelated to their views on the death penalty. Moreover, a document acquired from the State's file contains a handwritten note stating, "NO. NO Black Church," while asserting that the Church of Christ does not take a stand on the death penalty. Other justifications for striking Hood fail to withstand scrutiny because no concerns were expressed with regard to similar white prospective jurors. Pp. 17–23.

(c) Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination. Miller-El v. Dretke, 545 U. S. 231, 241. Such evidence is compelling with respect to Garrett and Hood and, along with the prosecution's shifting explanations, misrepresentations of the record,
and persistent focus on race, leads to the conclusion that the striking
of those prospective jurors was "motivated in substantial part by dis-
(d) Because Batson was decided only months before Foster's trial,
the State asserts that the focus on black prospective jurors in the
prosecution's file was an effort to develop and maintain a detailed ac-
count should the prosecution need a defense against any suggestion
that its reasons were pretextual. That argument, having never be-
fore been raised in the 30 years since Foster's trial, "reeks of after-
thought." Miller-El, 545 U. S., at 246. And the focus on race in the
prosecution's file plainly demonstrates a concerted effort to keep
black prospective jurors off the jury. Pp. 23–25.
Reversed and remanded.

Roberts, C. J., delivered the opinion of the Court, in which Kennedy,
an opinion concurring in the judgment. Thomas, J., filed a dissenting
opinion.
Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

WITTMAN ET AL. v. PERSONHUBALLAH ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA


Appellee voters from Virginia’s Congressional District 3 filed suit challenging the Commonwealth’s 2013 congressional redistricting plan on the ground that the legislature’s redrawing of their district was an unconstitutional racial gerrymander. Appellant Members of Congress from Virginia, including, as relevant here, Representatives Randy Forbes, Robert Wittman, and David Brat, intervened to help defend the Commonwealth’s plan. The District Court struck down the plan, and the intervenors appealed to this Court, which vacated the judgment below and remanded the case in light of one of the Court’s recent decisions. Again, the District Court held that the redistricting plan was unconstitutional, and again, the intervenors appealed. This time, the Court directed the parties to address whether appellants lack standing, since none reside in or represent Congressional District 3.

Held: Appellants lack standing to pursue this appeal. Pp. 3–6.

(a) A party invoking a federal court’s jurisdiction can establish Article III standing only by showing that he has suffered an “injury in fact,” that the injury is “fairly traceable” to the challenged conduct, and that the injury is likely to be “redressed” by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561. The need to satisfy these requirements persists throughout the life of the suit. Arizona v. Official English v. Arizona, 520 U. S. 43, 67. Pp. 3–4.

(b) In light of the District Court’s decision striking down the redistricting plan, Representative Forbes, the Republican incumbent in District 4, decided to run in District 2. Originally, Representative Forbes argued that he would abandon his campaign in District 2 and run in District 4 if this Court ruled in his favor. Now, however, he has informed the Court that he will continue to seek election in Dis-
Syllabus

District 2 regardless of this appeal's outcome. Given this change, this Court does not see how any injury that Forbes might have suffered is “likely to be redressed by a favorable judicial decision.” *Holllingsworth v. Perry*, 570 U. S. ___, ___. Regardless of whether Forbes had standing at the time he first intervened, he does not have standing now.

Representatives Wittman and Brat, the incumbents in Congressional Districts 1 and 7, respectively, have not identified any record evidence to support their allegation that the redistricting plan has harmed their prospects of reelection. The allegation of an injury, without more, is not sufficient to satisfy Article III. See *Lujan, supra*, at 561. Given the complete lack of evidence of any injury in this case, the Court need not decide when, or whether, evidence of the kind of injury the Representatives allege would prove sufficient for Article III purposes. Pp. 4–6.

Appeal dismissed.

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

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SUPREME COURT OF THE UNITED STATES

Syllabus

GREEN v. BRENNAN, POSTMASTER GENERAL

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


After petitioner Marvin Green complained to his employer, the United States Postal Service, that he was denied a promotion because he was black, his supervisors accused him of the crime of intentionally delaying the mail. In an agreement signed December 16, 2009, the Postal Service agreed not to pursue criminal charges, and Green agreed either to retire or to accept another position in a remote location for much less money. Green chose to retire and submitted his resignation paperwork on February 9, 2010, effective March 31.

On March 22—41 days after resigning and 96 days after signing the agreement—Green reported an unlawful constructive discharge to an Equal Employment Opportunity counselor, an administrative prerequisite to filing a complaint alleging discrimination or retaliation in violation of Title VII of the Civil Rights Act of 1964. See 29 CFR §1614.105(a)(1). Green eventually filed suit in Federal District Court, which dismissed his complaint as untimely because he had not contacted the counselor within 45 days of the “matter alleged to be discriminatory,” ibid. The Tenth Circuit affirmed, holding that the 45-day limitations period began to run on December 16, the date Green signed the agreement.

Held:

1. Because part of the “matter alleged to be discriminatory” in a constructive-discharge claim is an employee’s resignation, the 45-day limitations period for such action begins running only after an employee resigns. Pp. 4–15.

(a) Where, as here, the regulatory text itself is not unambiguously clear, the Court relies on the standard rule for limitations periods, which provides that a limitations period ordinarily begins to run “when the plaintiff has a complete and present cause of action,”
Syllabus

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 418. Applied here, that rule offers three persuasive reasons to include the employee's resignation in the limitations period. Pp. 4–10.

(i) First, resignation is part of the “complete and present cause of action” in a constructive-discharge claim, which comprises two basic elements: discriminatory conduct such that a reasonable employee would have felt compelled to resign and actual resignation, Pennsylvania State Police v. Suders, 542 U.S. 129, 148. Until he resigns, an employee does not have a “complete and present cause of action” for constructive discharge. Under the standard rule, only after the employee has a complete and present cause of action does that trigger the limitations period. In this respect, a constructive-discharge claim is no different from an ordinary wrongful-discharge claim, which accrues only after the employee is fired. Pp. 6–8.

(ii) Second, although the standard rule may be subject to exception where clearly indicated by the text creating the limitations period, nothing in Title VII or the regulation suggests such displacement. To the contrary, it is natural to read “matter alleged to be discriminatory” as including the allegation forming the basis of the claim, which confirms the standard rule's applicability. Pp. 8–9.

(iii) Third, practical considerations also confirm the merit of applying the standard rule. Starting the clock ticking before a plaintiff can actually file suit does little to further the limitations period's goals and actively negates Title VII's remedial structure. A “limitations period[d] should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes.” Delaware State College v. Ricks, 449 U.S. 250, 362, n. 16.

Nothing in the regulation suggests a two-step process in which an employee would have to file a complaint after an employer's discriminatory conduct, only to be forced to amend that complaint to allege constructive discharge after resigning. Requiring that a complaint be filed before resignation occurs would also, e.g., ignore that an employee may not be in a position to leave his job immediately. Pp. 9–10.

(b) Arguments against applying the standard rule here are rejected. Suders stands not for the proposition that a constructive discharge is tantamount to a formal discharge for remedial purposes only, but for the rule that constructive discharge is a claim distinct from the underlying discriminatory act, 542 U.S., at 149. Nor was Green's resignation the mere inevitable consequence of the Postal Service's discriminatory conduct. Ricks, 449 U.S. 250, distinguished. Finally, the important goal of promoting conciliation through early, informal contact with a counselor does not warrant treating a constructive dis-
charge different from an actual discharge for purposes of the limitations period. Pp. 10-15.

2. A constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date thereof. The Tenth Circuit is left to determine, in the first instance, the date that Green in fact gave notice. P. 16.

760 F. 3d 1135, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion.
Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES ARMY CORPS OF ENGINEERS v.
HAWKES CO., INC., ET AL.

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


The Clean Water Act regulates “the discharge of any pollutant” into “the waters of the United States.” 33 U. S. C. §§1311(a), 1362(7), (12). When property contains such waters, landowners who discharge pollutants without a permit from the Army Corps of Engineers risk substantial criminal and civil penalties, §§1319(c), (d), while those who do apply for a permit face a process that is often arduous, expensive, and long. It can be difficult to determine in the first place, however, whether “waters of the United States” are present. During the time period relevant to this case, for example, the Corps defined that term to include all wetlands, the “use, degradation or destruction of which could affect interstate or foreign commerce.” 33 CFR §328.3(a)(3). Because of that difficulty, the Corps allows property owners to obtain a standalone “jurisdictional determination” (JD) specifying whether a particular property contains “waters of the United States.” §331.2. A JD may be either “preliminary,” advising a property owner that such waters “may” be present, or “approved,” definitively “stating the presence or absence” of such waters. Ibid. An “approved” JD is considered an administratively appealable “final agency action,” §§320.1(a)(6), 331.2, and is binding for five years on both the Corps and the Environmental Protection Agency, 33 CFR pt. 331. App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A.

Respondents, three companies engaged in mining peat, sought a permit from the Corps to discharge material onto wetlands located on property that respondents own and hope to mine. In connection with the permitting process, respondents obtained an approved JD from the Corps stating that the property contained “waters of the United...
Syllabus

States" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away. After exhausting administrative remedies, respondents sought review of the approved JD in Federal District Court under the Administrative Procedure Act (APA), but the District Court dismissed for want of jurisdiction, holding that the revised JD was not a "final agency action for which there is no other adequate remedy in a court," 5 U. S. C. §704. The Eighth Circuit reversed.

Held: The Corps’ approved JD is a final agency action judicially reviewable under the APA. Pp. 5–10.

(a) In general, two conditions must be satisfied for an agency action to be "final" under the APA: "First, the action must mark the consummation of the agency’s decisionmaking process," and "second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U. S. 154, 177–178. Pp. 5–8.

(1) An approved JD satisfies Bennett’s first condition. It clearly “mark[s] the consummation” of the Corps’ decisionmaking on the question whether a particular property does or does not contain “waters of the United States.” It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, see U. S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47–60, and typically remains valid for a period of five years, see 33 CFR pt. 331, App. C. The Corps itself describes approved JDs as “final agency action.” Id. §320.1(a)(6). Pp. 5–6.

(2) The definitive nature of approved JDs also gives rise to “direct and appreciable legal consequences,” thereby satisfying Bennett’s second condition as well. 520 U. S., at 178. A “negative” JD—i.e., an approved JD stating that property does not contain jurisdictional waters—creates a five-year safe harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the Clean Water Act. See 33 U. S. C. §§1319, 1365(a). Each of those effects is a legal consequence. It follows that an “affirmative” JD, like the one issued here, also has legal consequences: It deprives property owners of the five-year safe harbor that “negative” JDs afford. This conclusion tracks the "pragmatic" approach the Court has long taken to finality. Abbott Laboratories v. Gardner, 387 U. S. 136, 149. Pp. 6–8.

(b) A “final” agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contends that respondents have two such alternatives: They may proceed without a permit and argue in a Government enforcement action that a permit was not required, or they may complete the
Syllabus

permit process and then seek judicial review, which, the Corps suggests, is what Congress envisioned. Neither alternative is adequate. Parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." *Abbott*, 387 U.S., at 153. And the permitting process is not only costly and lengthy, but also irrelevant to the finality of the approved JD and its suitability for judicial review. Furthermore, because the Clean Water Act makes no reference to standalone jurisdictional determinations, there is little basis for inferring anything from it concerning their reviewability. Given "the APA’s presumption of reviewability for all final agency action," *Sackett v. EPA*, 566 U. S. ___, ___, "[t]he mere fact" that permitting decisions are reviewable is insufficient to imply "exclusion as to other[]" agency actions, such as approved JDS, *Abbott*, 387 U. S., at 141. Pp. 8–10.

782 F. 3d 994, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a concurring opinion, in which THOMAS and ALITO, JJ., joined. KAGAN, J., filed a concurring opinion. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment.
Mentoring New Legal Writers

By Tonya Kowalski, Washburn University School of Law, Topeka, tonya.kowalski@washburn.edu

Welcome to Substance & Style, a new feature in the KBA Journal. The column's purpose is to promote better research, analysis, ethics, professionalism, and style in legal writing. We also hope to foster more effective strategy, storytelling, and communication, not just for litigation documents, but for everything from letters to legislation to oral argument. The column will be authored by faculty members from Kansas' two law schools, Washburn University School of Law and University of Kansas School of Law. We welcome your suggestions for future topics.

As members of the bench and bar, one of our greatest services can be to mentor new colleagues in legal writing. As all practitioners know, a lawyer's nearly vertical learning curve merely begins in law school and continues for several years before settling into lifelong growth. Students graduate with novice proficiency in many core skills, and then depend on their colleagues and on their own trials and failures to guide them toward mastery.

Writing — even expository writing — is very sensitive and personal to the author. With planning and patience, mentoring and feedback can provide great satisfaction to both parties. But when done in haste and frustration, it can impede learning by igniting profound anxiety in the novice. Mentors can become good teachers by (1) understanding that adult learners often do not recognize when to "transfer" their previous training to a pending assignment; (2) teaching professional expectations; and (3) learning simple triage and feedback techniques.

New Legal Writers and the "Transfer" Barrier

Do you ever marvel that novices sometimes forget basic document sections or even to identify the governing rule? It is easy to assume that the problem lies with youth or with legal education. While even the most skills-friendly law schools must continue evolving to produce truly "practice-ready" lawyers, contemporary graduates do learn fundamental research, analysis, and citation. Moreover, at Washburn, students also take an average of nine upper-level skills credits. If that is the case, why do novices struggle to apply those skills?

Surprisingly, some answers lie in a field of cognitive psychology and educational theory called "transfer of learning." Novices tend to readily apply their skills only when a new assignment looks almost identical to those from past experiences. When the assignment appears even marginally unfamiliar, the novice's cognitive problem-solving systems tend to reject prior experiences as irrelevant, and he may flounder. For example, a student trained to write an appellate brief in law school may not — without prompting — recognize that most of his persuasive brief-writing skills can also apply to a motion brief on summary judgment. By making the connection explicit, mentors can help to "bridge" the transfer gap. Providing exemplars and a practical litigation writing text like Thomas A. Mauet's "Pretrial" can also work wonders, as can recommending a favorite practice manual or transactional drafting guide.

New Legal Writers and the Professionalism Gap

In addition to style and content, mentors should also teach professional expectations for planning and delivering work product. To an experienced attorney, it can be frustrating — even alarming — to have an associate arrive for an assignment meeting without prepared questions and possibly even without pen and paper. Many of us worked our way through school and came to our first internships with a developing sense of professional standards. While today many students are the same, more are coming to law school with laudable public service credentials but less traditional business experience. While such service develops important collaborative and organizational skills, it does not necessarily inculcate the norms of business culture.

For those with less traditional experience, a mentor can illuminate unwritten professional expectations by making them explicit. Although it may sound like "coddling," new hires may need coaching to clarify the scope of the assignment, deadline, form of work product, delivery method, electronic research charges, and billing practices. By teaching the norms of a foreign organizational culture, supervisors can encourage better work product and more efficient production.

Effective Triage and Feedback Techniques

To become an effective writing mentor, one must practice diagnosing and discussing problems of organization, proof, and style. As expert legal analysts, we naturally may struggle to articulate to another person what to us seems so instinctive. Even more disorienting is that recent graduates speak a new jargon for legal writing that has emerged since the later 1990s. Fortunately, most novice errors and legal writing jargon concern the same recurring themes:

- Stating a clear thesis that presages both the operative legal test and determinative facts;
- Fully proving and illustrating all rules before applying them to the client's facts;
- Addressing the stronger countervailing rules or arguments;
- Keeping elements and other discrete units of analysis in separate "proofs" — think IRAC or the increasingly popular "CREAC" (conclusion-rule-explanation-application-conclusion);
- Accurately comprehending and describing the primary authorities;
- Using effective paragraph topic sentences to state or apply rules or to introduce additional examples;
- Discussing only one rule or part of a rule at a time, particularly within a single paragraph;
- Describing a sufficient "bandwidth" of authorities to prove or apply a rule;
- Locating binding law from each of the three branches of government, as appropriate;

(Con't. on Page 14)
• Persuading through the client's story (“narrative”) and not just through linear, rule-based logic;
• Simplifying convoluted sentences by putting them into basic subject-verb-object order.

After triage, mentors should try to provide written and oral feedback. Generally, it is best not to redline a mentee's work, but rather to identify examples and instruct her to find others. Further, one should motivate by identifying strengths as well as weaknesses, for example: “Although this paragraph needs to include the facts of the case under discussion, it contains a clear, accurate rule as the topic sentence.” Finally, rather than merely labeling a passage as “wordy,” “weak,” or “awkward,” try to give a reason and some advice for devising a solution.

In conclusion, becoming a good mentor is much like becoming a good lawyer: it takes time, practice, and patience, but yields untold rewards.

Further Reading:

About the Author
Tonya Kowalski is an associate professor at Washburn University School of Law. She teaches in Washburn’s nationally ranked Legal Analysis, Research & Writing program, which is one of only a handful of truly tenure-track legal writing programs in the nation. Prof. Kowalski also teaches in Washburn’s Indigenous Legal Studies program and is a contributing faculty member and advisory board member in the Institute for Law Teaching and Learning, which is co-hosted at Washburn. She received her juris doctorate from Duke University School of Law in 1995 and has been teaching at Washburn since 2006.

Found Email Treasure
(Con’t. from Page 10)

but further held that the remainder were privileged, because the husband and his lawyer had taken reasonable steps to maintain the confidentiality of his email account. The appellate court did not condone the participation of the wife's attorney, but did order that he should not be disqualified, since the better solution was to preclude use of the privileged documents.

5. Terraphase Engineering Inc. v. Arcadis U.S. Inc. In this case, a party's lawyer inadvertently sent a privileged email to his client's email address at work. The employer retrieved the email (which contained a chain of prior messages) and attempted to use it in the case. In a sweeping protective order, the Court disqualified the employer's outside counsel and in-house counsel, and required new counsel to certify that she had not reviewed the privileged communication.

6. Rules of Civil Procedure. Rule 26(b)(5)(B), FRCP and K.S.A. 60-226(b)(7)(B) provide that, if a party is notified that an opposing party has produced privileged or work product information, the notified party "must" promptly return, sequester, or destroy" the information, "must not use or disclose" it until the privilege issue is resolved, and "must take reasonable steps to retrieve" the information if it were disclosed before the notification was given. (Emphasis added.)

Thus, it is clear that an employer's policy must be clear in order for the court to find that employees have no expectation of privacy in emails sent to the employer's computer. Even then, employers (and their counsel) who receive such emails should be careful to review case authorities beyond the ethics rules before using those emails.

About the Author
J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park. He is chairman of the KBA Ethics Advisory Opinion Committee, Johnson County (Kan.) Ethics and Grievance Committee, and Kansas Judicial Council Civil Code Advisory Committee; and a member of the Kansas State Board of Discipline for Attorneys, KBA Joint Commission on Professionalism, and Kansas Judicial Council.