In 2005 the Supreme Court held that the mandatory federal Sentencing Guidelines violated the Sixth Amendment as interpreted by the Court’s earlier decision in Blakely v. Washington. To avoid invalidating the guidelines completely, the Court excised certain provisions of the Sentencing Reform Act of 1984, making the guidelines “advisory.” In this revised system, Booker directs the courts of appeals to review federal sentences for “reasonableness.” Now in two companion cases the Court will consider the scope of that standard.

Hein et al. v. Freedom From Religion Foundation et al.

In 2001, President Bush fulfilled his “charitable choice” campaign promise by creating an executive office, called the Faith-Based and Community Initiative, that sought to increase the involvement of religious groups in helping to address social service problems. The program now faces an Establishment Clause challenge from taxpayers who argue that it encroaches on the constitutional principle of church-state separation. The government argues that the taxpayers lack standing to challenge such an executive branch program.
Monday
February 19
Legal Holiday

Tuesday
February 20
Rita v. United States

Wednesday
February 21
Microsoft Corporation v. AT&T Corporation

February 26
EC Term of Years Trust v. United States

February 27
Winkelman et al. v. Parma City School District

February 28
Hein et al. v. Freedom from Religion Foundation et al.

Scott v. Harris

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In 2005 the Supreme Court held that the mandatory federal Sentencing Guidelines violated the Sixth Amendment as interpreted by the Court’s earlier decision in Blakely v. Washington. To avoid invalidating the guidelines completely, the Court excised certain provisions of the Sentencing Reform Act of 1984, making the guidelines “advisory.” In this revised system, Booker directs the courts of appeals to review federal sentences for “reasonableness.” The Court now will consider the scope of that standard.

**ISSUES**

When an appellate court reviews a below-guidelines sentence for “reasonableness,” is it consistent with United States v. Booker, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

Is it consistent with Booker to accord a presumption of reasonableness to within-guidelines sentences? If yes, can that presumption justify a sentence imposed without an explicit analysis by the district court of the statutory sentencing factors set out by 18 U.S.C. § 3553(a) and any other factors that might justify a lesser sentence?

**FACTS**

Two provisions of the Sentencing Reform Act of 1984 (SRA) have particular significance in these cases. First, 18 U.S.C. § 3553(a)—known as the “parsimony provision”—requires sentencing courts to “impose a sentence sufficient, but not greater than necessary,” to vindicate four goals identified by the statute. Those goals include imposing a sentence that reflects the seriousness of the offense and provides “just punishment,” accomplishes deterrence of criminal conduct, protects the public from further crimes of the defendant, and provides the defendant with needed rehabilitative services and training. Section 3553(a) further states that in determining what sentence to impose, the district court “shall consider” seven additional factors.

In Rita, a federal jury convicted the defendant of five counts of perjury, making false statements, and obstruction of justice. The federal Sentencing Guidelines, based on facts found by the jury and by the judge, indicated a range of 33 to 41 months imprisonment. The govern-
ment asserted that a guidelines sentence was appropriate, but Rita—pointing to his military service, various medical conditions, and the fact that his prior service as a law enforcement officer would expose him to unfavorable treatment in prison—argued for a downward departure. The district court considered Rita’s arguments, but concluded that it was “unable to find that the sentencing guideline range [was] an inappropriate” one for the charges involved. Rita was sentenced to 33 months imprisonment; i.e., the bottom of the guidelines range.

The Fourth Circuit affirmed, in an unpublished per curiam opinion, applying its rule (which is followed by several circuits) that “a sentence imposed within the properly calculated guidelines range … is presumptively reasonable.” In this case, the court of appeals concluded, the district court properly calculated that range, “appropriately treated the guidelines as advisory” as required by Booker, and sentenced Rita “only after considering the [statutory sentencing] factors set out in [Section] 3553(a).”

In a separate case, Mario Claiborne pled guilty to possession and distribution of cocaine base. The statutory maximum for each count was 20 years imprisonment. The amount of cocaine base exceeded 5 grams, triggering a five-year “mandatory minimum” sentence with respect to the possession count. The district court found Claiborne eligible for statutorily provided “safety valve” exemption from that mandatory minimum, based on Claiborne’s lack of criminal history, his cooperation with the government, the fact that he did not lead or organize other criminal actors, and the fact that he neither used a weapon nor caused any injury. The guidelines range, again based on a combination of jury- and judge-found facts, was calculated as 37 to 46 months imprisonment.

The district court—considering the quantity of drugs involved, the fact that Claiborne qualified for the safety valve, Claiborne’s lack of a criminal history, and the (small) likelihood of Claiborne committing similar crimes in the future—decided the guideline range was too high. In the district court’s view, “a 37-month sentence would be tantamount to throwing [Claiborne] away.” Instead, the district court imposed concurrent 15-month sentences, followed by a 3-year supervised release term.

The Eighth Circuit reversed. According to the Eighth Circuit, “reasonableness” requires the district court to point to “appropriate justification,” under the Section 3553(a) sentencing factors, for sentences outside the guidelines range. Moreover, because “the guidelines were fashioned taking the [Section 3553(a)] factors into account,” the guidelines range is “presumed [to be] reasonable.” The 60 percent downward departure from the 37-month “low end” of the guideline range was an “extraordinary variance” not supported by commensurately “extraordinary facts.” The district court improperly relied on Claiborne’s lack of criminal history and the “small” amount of cocaine base he possessed, because those facts already factored into affording Claiborne safety valve relief and calculating the guideline range, respectively. Finally, the sentence was unreasonable because it was “a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions” for which he was charged.

**CASE ANALYSIS**

In *Rita*, the defendant characterizes “reasonableness review” under *Booker* as requiring the court of appeals to determine whether the district court “undertook reasoned consideration” of the factors enumerated in 18 U.S.C. § 3553(a). The guidelines range is “a single factor” to be considered (required explicitly by Section 3553(a)(4)). The defendant argues that it cannot displace consideration of the other factors, which range from “the nature and circumstances of the offense and the history and characteristics of the defendant” to “any pertinent policy statement … issued by the Sentencing Commission.” Rita argues that the court of appeals abdicates its duty under *Booker* when it presumes a sentence to be reasonable simply based on compliance with one of the statutory factors.

Rita also contends that a presumption of reasonableness for within-guidelines sentences eviscerates *Booker’s* substantive holding that mandatory federal guidelines violated the Sixth Amendment as interpreted in *Blakely v. Washington*. Not surprisingly, district courts imposing within-guidelines sentences rarely meet with reversal in circuits that presume such sentences to be reasonable. Rita argues that such a system of “de facto mandatory guidelines” is identical to the system of (de jure) mandatory guidelines struck down by *Booker*.

Finally, the defendant in *Rita* asserts that *Booker’s* standard of appellate review implies an obligation on the district court to affirmatively explain each sentence (an obligation Rita alleges the district court ignored in his case). Rita points to the SRAs’ direction that the sentencing court “shall consider” all the relevant factors, as well as Section 3553(c)’s requirement of a statement of reasons for each sentence, in support of his contention.

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that the district court must provide an explanation regardless of where the sentence lies (below, within, or above the guidelines range). In a related argument, the defendant argues that unless the district court provides some explanation, no basis exists for the appellate court to determine—as mandated by *Booker*—whether the district court’s sentence constituted an “abuse of discretion.”

Defending the Fourth Circuit’s decision in *Rita*, the solicitor general argues that a presumption of reasonableness for within-guidelines sentences is appropriate because such a sentence “will ordinarily represent a reasonable application of the statutory sentencing factors. The government’s argument emphasizes that the guidelines were crafted by an expert body (the United States Sentencing Commission), “with input from Congress and sentencing judges across the country,” for the very purpose of effectuating the statutory purposes enumerated by the SRA. Unsurprisingly, in most cases, then, the guidelines range—by definition—represents a reasonable application of the relevant purposes.

The solicitor general disputes Rita’s argument that a presumption of reasonableness creates a system of “de facto mandatory guidelines.” In the solicitor general’s view, presuming within-guidelines sentences to be reasonable “does not mean that a sentence outside the guidelines range is presumptively unreasonable, let alone mandate additional factfinding by the judge to justify a non-guidelines sentence.” This seems inconsistent with the solicitor general’s defense of the Eighth Circuit’s decision in *Claiborne*. It is difficult to see a meaningful difference between requiring “extraordinary justification” for “substantial” deviations from the guidelines range (as the Eighth Circuit did) and according a presumption of unreasonableness to such sentences. Nevertheless, the solicitor general maintains that the presumption of reasonableness employed by the Fourth Circuit maintains the “advisory” guidelines required by *Booker*; he argues that Rita and his amici “are simply wrong” to contend otherwise.

Additionally, while agreeing that the sentencing judge is required by statute to “state the reasons” for the sentence imposed, the solicitor general argues that—for a within-guidelines sentence—providing “general reasons” is sufficient. No exhaustive explanation is required, nor is the court “required to analyze explicitly the Section 3553(a) factors or all of the possible justifications for a lesser sentence.” In the end, according to the solicitor general, justifying a within-guidelines sentence requires “little explanation.” The courts of appeals may presume that the district court has exercised its discretion; instead of vacating a sentence for lack of explanation, the court of appeals should simply review “its substantive reasonableness.”

Turning to *Claiborne*, the main thrust of the defendant’s argument is that the Eighth Circuit’s standard of review effectively reinstates the mandatory guidelines the Court struck down in *Booker*. Post-*Booker*, Claiborne argues, the guidelines range no longer is an end in itself; instead, it represents one of many factors a district court must consider when deciding what sentence will be “sufficient, but not greater than necessary” to accommodate the Section 3553(a) sentencing factors.

In particular, Claiborne argues that the Eighth Circuit exercised a stricter brand of appellate review than the Supreme Court had in mind in *Booker* when it instructed courts of appeals to review for “abuse of discretion.” In *Booker*, Claiborne asserts, the cases cited to illustrate the “abuse of discretion” standard “all evidence[d] a highly deferential appellate posture.” The record in *Claiborne* shows a careful, considered analysis by the district court of all the relevant factors; under a standard conception of “abuse of discretion” review, that court should have been affirmed. Reversal occurred in his case, argues Claiborne, only because the Eighth Circuit “substituted its judgment” for that of the district court by conducting something much closer to de novo review.

In *Claiborne*, the government argues that the “principle of proportionality” applied by the Eighth Circuit accords with the standard of “reasonableness review” required by *Booker*. Echoing one of its arguments in *Rita*, the government’s brief repeatedly emphasizes that Congress’s “central purpose” in enacting the SRA was to “reduce unwarranted disparities in sentencing.” The SRA sought to achieve those goals, says the solicitor general, in three principal ways: by creating an “expert agency” (the United States Sentencing Commission) to promulgate the guidelines, by statutorily defining “the purposes of sentencing,” and by establishing appellate review “to reduce disparate outcomes.” Although *Booker* struck down the mandatory guidelines, the solicitor general points out that the *Booker* Court remedied the guidelines’ problematic aspects in a way the Court believed would further Congress’s fundamental intent to achieve greater sentencing uniformity. The solicitor general argues that the fairly robust “proportionality review” that the Eighth Circuit applied in this case is necessary if the courts of appeals are to discharge their role of ensuring uniformity. Claiborne counters that the district court’s analysis addressed
the concern for uniformity, since the sentencing judge “compare[d] Claiborne’s case to others she had seen.”

Contrary to Claiborne’s assertion that the Eighth Circuit’s rule results in de facto mandatory guidelines, the solicitor general maintains that “proportionality review”—where appellate courts review for reasonableness using “objective, quantitative benchmarks”—does not run afoul of the Sixth Amendment as interpreted by Booker. This characterization of the Eighth Circuit’s standard highlights one disagreement, between the district court and the Court of Appeals in Claiborne, regarding which facts provide a permissible basis for departing from the guidelines range. The Eighth Circuit concluded that the district court erred by justifying its below-guidelines sentence based on facts such as the amount of drugs, and the defendant’s lack of criminal history. To the Eighth Circuit, and the solicitor general, the Sentencing Commission already considered those facts in setting the guidelines ranges in the first place; to rely on them for an even lower sentence would be to “double count” them, resulting in a sentence that is by definition “unreasonable.”

Highlighting the importance of these two cases, the United States Sentencing Commission (USSC) has filed an amicus brief urging the Court to affirm the Fourth and Eighth Circuits’ rulings. The USSC first defends Rita on the grounds that presuming a within-guidelines sentence to be reasonable is, by definition, correct. Since the USSC utilized a “transparent, collaborative process” to formulate the guidelines, in view of the congressionally mandated factors, imposing a (properly calculated) within-guidelines sentence necessarily produces a reasonable sentence. Only by accord-

ing this presumptive reasonableness to a within-guidelines sentence, argues the USSC, can the courts continue to effectuate Congress’s purported intent for the USSC “to play a continuing role in federal sentencing.”

The USSC uses a variant of that same argument in support of the Eighth Circuit’s ruling in Claiborne. Requiring “substantial justification” for a significant deviation from the guidelines range makes sense, the USSC asserts, because the guidelines ranges already incorporate the statutory factors that a district court must consider in imposing a sentence. By definition, then, a within-guidelines sentence is one that is “sufficient, but not greater than necessary” to effectuate the statutory purposes of sentencing. In the absence of some extraordinary factor(s) unique to a particular case, a district court should not be permitted simply to make its own determination of how to apply the statutory sentencing objectives.

Highlighting the legislative interest in the Court’s ongoing “revolution” of its sentencing jurisprudence, Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein filed an amicus brief urging the Court to affirm the Eighth Circuit in Claiborne. The three senators argue that the portions of the SRA that survived Booker still can provide “the framework for a cohesive and effective sentencing system” that advances the core congressional intent that prompted the SRA in the first place: “eliminate[ing] unwarranted disparity, achieve[ing] transparency in sentencing, and impos[ing] individualized sentences tailored to the offender and the crime.” Senators Kennedy, Hatch, and Feinstein recognize the “possibility” of greater disparities post-Booker; they argue that undue disparities should be avoided by direct-

ing district courts to use the guidelines range as a “benchmark for consideration of the other [Section 3553(a)] factors.” In making that determination, sentencing courts should give “an appropriate degree of deference to” the USSC’s views as expressed by the guidelines. Numerous organizations and individuals have filed amicus briefs supporting petitioners Rita and/or Claiborne.

**Significance**

Many have criticized Booker’s “remedial” opinion for, in effect, rendering meaningless the Court’s decision on the merits; this criticism has found some support in the relative reversal rates, following Booker, of within-guidelines sentences compared to above- or below-guidelines sentences. In short, the Court’s two opinions in Booker stand in inherent tension with one another. Going forward, the more committed the Court is to the Sixth Amendment principles of the Booker “merits” opinion, the more likely it is that the Court will direct the courts of appeals to allow sentencing judges substantial latitude to depart from the guidelines ranges. If that “trade-off” is a correct characterization of Booker, then the Court’s recent decision in Cunningham v. California, No. 05-6551 (2007), may have tipped its hand in Rita and Claiborne. In Cunningham, the Court applied Booker to California’s sentencing scheme and held that California’s “determinate” sentencing system violated the Sixth Amendment as interpreted by Blakely. Although the Court declined to address directly the issues soon to be argued in Rita and Claiborne, several portions of the Court’s opinion in Cunningham indicate a strong commitment to the Sixth Amendment principle upheld by the Booker “merits majority.” While professing not to

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Justice Alito, joined by Justices Kennedy and Breyer, dissented in Cunningham, arguing that California’s sentencing system did not violate the Sixth Amendment as construed by Blakely. Justice Alito believed California’s scheme to be “indistinguishable … from the advisory guidelines scheme that the Court approved in [Booker].” To the Cunningham majority, that argument “reads the remedial portion of the Court’s opinion in Booker to override Blakely, and to render academic the entire first part of Booker itself.” Although still professing “not [to] forecast the Court’s responses in Rita and Claiborne, the Court noted, “we affirm the continuing vitality of our prior decisions in point.” If pointed statements like these are any indication, the Court may agree with the defendants in these two cases that it is incompatible with Booker to presume within-guidelines sentences to be reasonable and to require extraordinary justification for departures from the guidelines range.

More fundamentally, Cunningham seems to demonstrate a commitment—now by six Justices—to continue the Court’s recent (since Apprendi and Blakely) invigoration of the Sixth Amendment. In Booker a bare 5-4 majority held that the federal guidelines violated the Sixth Amendment; late Chief Justice Rehnquist joining Justices Breyer, O’Connor, and Kennedy to argue, in dissent, that the Court’s Sixth Amendment analysis rested on a “historical mistake.” Cunningham makes clear that the new chief justice either does not share his predecessor’s views on this issue (or feels bound by stare decisis in this line of rulings). Additionally, by joining the majority, chief justice Roberts was able to assign the opinion in Cunningham. It is interesting to note that he assigned Justice Ginsburg—the only justice to join both majority opinions in Booker—to write for the Court.

In a sense, while previous cases like Blakely (and Booker itself) addressed the distribution of power between judges and juries, these cases present a very straightforward question of the appropriate balance of power between sentencing courts and reviewing courts: how should the courts of appeals determine whether a particular sentence constitutes an “abuse of discretion”? Under any conventional definition of that standard, the Eighth Circuit’s ruling in Claiborne seems much too strict. The district court went out of its way to provide a careful, considered explanation of the reasons for the sentence imposed; the court of appeals reversed simply because it reached a different conclusion. The defendant’s argument in Rita (that “abuse of discretion” review implies an obligation for the district court to state its reasons for the sentence imposed) also seems supported by traditional conceptions of the “abuse of discretion” standard. That standard is an established component of appellate review, well understood by judges. If the circuit courts erred in either of these two cases, however, it likely is due to their good-faith effort to implement an “abuse of discretion” standard of review without sacrificing the values the Court itself claimed could be achieved under “advisory” guidelines.

The solicitor general, the USSC, and other amici, highlight the most important such goal: uniformity. It is undisputed that the 1984 SRA intended—and Congress still desires—to eliminate “sentencing disparities.” These cases illustrate that, by definition, a choice must be made between “discretion” and “uniformity.” Booker made clear that the Sixth Amendment prohibits “no discretion” but, with the “advisory” guidelines, the Court tried to have its cake and eat it too. That route seems unavailable in these cases, but that simply begs the question of what additional guidance the Court should provide regarding how to apply Booker’s “reasonableness” review. The Court could try to harmonize “discretion” with “uniformity” by identifying a particular definition of uniformity/disparity. The solicitor general and others, in defending the rules applied by the circuit courts in these cases, seem to assume that the guidelines themselves define similarly situated defendants. That is, if two offenders fall within the same guidelines range, imposing a different sentence on either of them creates, by definition, the “unwarranted disparity” that Congress sought to eliminate. If, on the other hand, it is possible that two offenders might fall within the same guidelines range yet be “differently situated,” sentencing them differently does not threaten uniformity in the slightest.

This issue may require the Court to grapple with the question of what its recent Sixth Amendment jurisprudence means for the continuing role of the Sentencing Commission. In characterizing the guidelines as, by definition, having already performed all the necessary sorting between similarly and differently situated defendants, the solicitor general and the USSC emphasize the Sentencing Commission’s role as an “expert” agency charged with implementing Congress’s policy objectives in sen-
tencing. This “expertise” argument may not find much traction with some members of the Court’s Booker (merits) majority. Justice Scalia in particular, who has played a large role in driving the Court’s recent Sixth Amendment jurisprudence, has not concealed his hostility toward agencies like the USSC. Indeed, if his view had prevailed in Mistretta v. United States, 488 U.S. 361 (1989), the Court would have completely invalidated the Sentencing Commission on separation of powers grounds.

Ultimately, as the Court seeks to provide much-needed guidance in this area, the closest observers likely will be Congress and state legislatures around the country. Although, following Blakely and Booker, various legislative “fixes” were proposed, Congress thus far has declined to act. If the Court holds that “advisory” guidelines truly give sentencing judges the degree of discretion that term seems to connote, look for Congress to try to find new ways—compatible with the Court’s recent Sixth Amendment work—to cabin that discretion.

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Can Shipping a Master Version of Software Abroad for Copying Infringe a United States Patent?

by David George

Under United States patent law, it is patent infringement to send a patented invention’s components abroad for assembly in a foreign country. Microsoft sends a master disk with its Windows operating system—which infringes an AT&T patent—abroad. That master disk is then copied and installed in computers overseas. This case examines whether shipping a master disk abroad for copying is supplying a component of a patented invention from the United States.

Facts

AT&T has a patent for a digital speech coder. This invention, which compresses a digital speech signal so that it can be transmitted and stored more easily, is widely used in mobile phones and personal computers.

Microsoft supplies Windows to United States and foreign computer manufacturers on disks—called “golden master disks”—or in electronic transmissions. The manufacturer then makes copies of the Windows software from these golden master disks or electronic transmissions. It is those copies that are

Issues

Can software be a component of a patented invention?

Is a copy that is made in a foreign country supplied from the United States?
installed on the computer that is sold. The golden master disks and electronic transmissions are not themselves installed on a computer that is sold.

Microsoft stipulated at trial that it induced infringement of AT&T’s patent when it supplied golden master disks and electronic transmissions containing Windows software to United States computer manufacturers. But Microsoft contended that it did not induce infringement of AT&T’s patent when it supplied golden master disks and electronic transmissions containing Windows software to foreign computer manufacturers.

The district court disagreed with Microsoft and held that it was liable under § 271(f) for all foreign sales of computers using Windows. In reaching its conclusion, the court held that software can be a component of a patented invention. The court then held that Windows copies that are made and installed onto computers overseas should be deemed supplied from the United States because the software code was originally manufactured in this country and supplied to foreign companies with the intent to incorporate the software into foreign-assembled computers. Following the district court’s opinion, Microsoft entered into a stipulated judgment on liability and damages while reserving its right to appeal the ruling that it was liable under § 271(f) for foreign sales.

Microsoft appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the district court in a divided decision. AT&T Corp. v. Microsoft Corp., 414 F.3d 1366 (Fed. Cir. 2005). Relying on its recent decision in Eolas Technologies Inc. v. Microsoft Corp., 399 F.3d 1325, cert. denied, 126 S. Ct. 568 (2005), the Federal Circuit unanimously held that software code can be a component of a patented invention under § 271(f).

The court reasoned that “software code alone qualifies as an invention eligible for patenting, and that § 271(f) is not limited to ‘patented ‘machines’ or patented ‘physical structures.’” The panel majority further held that copies of software that are created abroad by copying a master version exported from the United States have, under § 271(f), “essentially been supplied from the United States.” The majority held that copying “is part and parcel of software distribution,” and that “for software ‘components,’ the act of copying is subsumed in the act of ‘supplying,’ such that sending a single copy abroad with the intent that it be replicated invokes § 271(f) liability for those foreign-made copies.” The majority was concerned that ruling in favor of Microsoft would “emasculate § 271(f) for software inventions” because it “is inherent in the nature of software that one can supply only a single disk that may be replicated … instead of supplying a separate disk for each copy of the software to be sold abroad.”

Judge Randall Rader dissented. He agreed with the majority that software code can be a component of a patented machine, but he disagreed with the majority’s conclusion that copying software is the same as supplying it. He argued that the plain meaning of the word “supply” does not include later copying of the component. Judge Rader argued that while software must be copied to be distributed, that is also true for physical components of other patented machines.

Judge Rader noted that while AT&T might not have a remedy under United States law for patent infringement in foreign countries, it could sue for infringement in those countries, assuming it had obtained patents there. The majority said that while obtaining foreign patents might help patent holders in the absence of § 271(f) liability, it “must construe our statutes irrespective of the existence or nonexistence of foreign patents.” Microsoft petitioned the Supreme Court for writ of certiorari, which was granted on October 27, 2006. All appeals in patent cases go to the Federal Circuit instead of the circuits in which the district courts handling the cases are located. Because the Federal Circuit hears all patent appeals, there was no split in opinions among the federal circuits on this issue.

**Case Analysis**

AT&T’s merits brief—and amicus briefs supporting AT&T—had not been filed when this PREVIEW was written, but aspects of AT&T’s position can be gleaned from its briefs in opposition of certiorari.

Can software be a component? Microsoft contends that software code is not a component under § 271(f). Microsoft agrees that software that is contained in a disk that is actually installed in a computer is a component. But, it argues that the software code itself—the binary zeros and ones—is not a component when it is not contained on computer-readable physical media, like a disk or hard drive.

A basic understanding of how computer software works is needed to understand this issue. Computer programs tell the computer to open and close certain switches on its microprocessor. These opened-and-closed switches are represented in binary as zeros and ones. The way that the switches are opened and closed determines what the program will do—whether it will play a video-golf game or run a spreadsheet, for example. In essence, com-

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puter programs tell the computer to rewire itself in a certain way. When Windows is installed on a computer, the computer rewrites itself—by opening and closing switches—in a way that violates AT&T’s digital-speech-coding patent. Because the rewired computer is the device that infringes AT&T’s patent, Windows on a disk does not infringe the patent.

People write computer code in computer programming languages such as BASIC, FORTRAN, or C++. This is called source code. The computer programmers themselves cannot understand the programming languages that people use, however. In other words, a command written in BASIC does not tell the computer which switches to open and close. The programming languages have to be translated into a language that the computer understands. That language—called object code—tells the computer, in a way that it can understand, which switches to open and close. It is, therefore, the object code that—when installed on a computer—makes the computer rewire itself to perform a particular task. And, it is when the Windows object code is installed on a computer that the computer actually infringes AT&T’s patent.

Under patent law, instructions do not infringe patents. For example, if someone patented a cake, then the recipe would not infringe the patent, but the cake that a baker bakes using the recipe would infringe the recipe—and other instructions, like software—can be copyrighted, however. So, there is intellectual-property protection for them. But, there is no patent protection in general, nor § 271(f) protection in particular.

Microsoft contends that its Windows code—before it is installed on a computer—is just a set of instructions, because it only tells the computer what to do. Microsoft contends that unless the code is contained in computer-readable form, it cannot actually make the computer do anything, so it cannot be a component. For example, if somebody wrote the Windows object code out in longhand on paper, the computer would not be able to read it. Only when the Windows object code is contained on a computer-readable disk or installed on a computer’s hard drive can the computer understand the instructions about which switches to open and close. Thus, Microsoft contends, it is the Windows object code contained on a computer-readable disk actually installed in the foreign computer—not the Windows code in the abstract—that is a component of AT&T’s patented invention.

AT&T contends that courts had consistently held that software can be a component of a patented invention long before Congress enacted § 271(f) in 1984. AT&T says that relying on the statutory-interpretation rule that Congress is presumed to know about existing case law when it passes a statute, this means that software can be a component under § 271(f).

AT&T also argues that because “component” is not defined in § 271(f), courts should interpret the word using its ordinary meaning. Nothing in the ordinary meaning of “component,” AT&T argues, excludes software. AT&T notes that Microsoft itself has obtained many patents that include software as a “component” of the invention.

Are software copies made in a foreign country from United States-supplied master disk components supplied from the United States? Microsoft contends that because only a computer-readable physical copy of the software that is actually loaded on a computer is a component under § 271(f), it never supplied a component from the United States. Instead, the disks containing the software that were installed on the computers were copied in foreign countries from golden master disks shipped from the United States. If the golden master disk had been installed on a computer, then that would have been § 271(f) infringement, but the golden master disk was never installed on any computers. The United States supports Microsoft on this issue.

Microsoft says that to properly interpret § 271(f), the Supreme Court must view it in context. All parties agree that § 271(f) was enacted in response to the Supreme Court’s 1972 Deepsouth opinion. Deepsouth involved a shrimp-deveining machine that infringed a patent. An American company—rather than manufacturing the machine in the United States and shipping it abroad for sale—manufactured the machine’s components and shipped them abroad, unassembled. The machine was then assembled overseas and sold in foreign markets. The Supreme Court held that because the machine was not completely assembled in the United States, the company did not violate American patent law. Many saw this as a loophole in patent law, and in 1984, Congress responded to the Deepsouth opinion by passing § 271(f). The statute closed the loophole by saying that a person infringed a patent if he shipped the patented invention’s components abroad with the intent that they be assembled.

Microsoft contends that what it does is not the equivalent of supplying the components for the shrimp-deveining machine for assembly overseas. Instead, Microsoft likens what it does to shipping the machine’s components abroad and
then having them duplicated, with the duplicated components being assembled into the infringing machine. That, Microsoft argues, would not violate American patent law.

Microsoft contends that the Federal Circuit recognized that Microsoft did not supply components from the United States when it said that the “copies have essentially been supplied from the United States.” AT&T Corp., 414 F.3d at 1370 (emphasis added). If Microsoft had actually supplied components from the United States, it argues, then the Federal Circuit would not have used the modifier essentially. Microsoft says that because § 271(f) makes it illegal to supply components from the United States—not to essentially supply components from the United States—it did not infringe AT&T’s patent.

AT&T contends that, while the software actually installed on the foreign computers is copied overseas, the software is supplied from the United States. AT&T says that the ordinary meaning of supplying software includes providing the software for installation on computers. AT&T notes that Windows is written, debugged, tested, and manufactured entirely within the United States. Microsoft admitted that it exports the golden master disk containing Windows intending that the foreign manufacturers install the exact copy of Windows on the foreign-assembled computers. AT&T contends that, because the “very same zeros and ones” created in the United States by Microsoft programmers are installed on the foreign computers, Microsoft supplies from the United States software installed on foreign computers.

The United States argues that AT&T is wrong to say that the very same zeros and ones created in the United States are installed on foreign computers. Instead, the United States says, the same pattern of zeros and ones are reflected on the foreign computers, but a different copy of that pattern is installed on each computer. The United States notes that even though two copies of a book are identical, supplying the first copy is not the same as supplying the second. The United States argues that under AT&T’s theory, when Microsoft supplied a single golden master disk from the United States, it also supplied from the United States every copy of Windows that would ever be made in the future from that golden master disk. The United States contends that § 271(f) cannot be read that broadly.

Microsoft also contends that the Federal Circuit’s interpretation of § 271(f) violates the statutory-interpretation rule that courts should not interpret United States laws to apply to conduct in foreign countries unless it is absolutely clear from the statute’s language that this is what Congress intended. Both Microsoft and AT&T agree that American laws do not prohibit conduct in foreign countries unless it is absolutely clear from the statute’s language that this is what Congress intended. Both Microsoft and AT&T agree that American laws do not prohibit conduct in foreign countries unless they clearly say so. But, they disagree on whether Microsoft is being held liable for conduct in the United States or in a foreign country. Microsoft says—and the United States agrees—that the infringing act is supplying the Windows-containing disks that will actually be installed on the foreign computers. Since those disks were copied in foreign countries, that act happened abroad. But, AT&T argues, the infringing act was when Microsoft shipped the golden master disk from the United States intending that copies of that disk be installed on foreign computers. Because the infringing act happened in the United States, AT&T says, Microsoft is not being held liable for conduct in foreign countries.

**SIGNIFICANCE**

Many of the largest computer-related companies—including Amazon, Yahoo, and Intel—and computer-industry trade groups have filed amicus briefs supporting Microsoft. Microsoft and many of its amici contend that a Supreme Court ruling in favor of AT&T will put American companies at a competitive disadvantage to foreign companies and could drive the American software industry overseas.

Half of American software companies’ revenues come from abroad. Companies often design software in this country and then ship the master version overseas. The master version is then copied overseas and installed on foreign-sold computers or sold abroad. If that software infringes American patents, then the companies could be liable in American courts for the copies made in foreign countries. But, if the software is designed abroad—so that it is never shipped from the United States—then the companies would not be liable under American law for patent infringement. Microsoft’s amici contend that this will encourage companies to design their software abroad so that no master copies are shipped from the United States.

AT&T contends that the Supreme Court’s decision in this case will not be as significant as Microsoft and its amici claim. Instead, AT&T argues, a decision in its favor will only affect software companies that are infringing patents. If a company is not infringing a patent, then it does not have to worry about a broad interpretation of § 271(f). Microsoft’s amici contend that it is much more difficult to avoid infringing patents than AT&T suggests. They argue that although software companies should try to avoid infringing patents, that is difficult to do given
the dense thicket of software-related patents. So, even if software companies do not intend to infringe patents, they may still do so.

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The plaintiff in this case was rendered quadriplegic by a crash that ended a high-speed police chase. Claiming a violation of his constitutional right to be free of unreasonable seizure, he sued the deputy sheriff who had deliberately crashed into his vehicle. The lower courts have denied the deputy’s defense that he was acting in a reasonable manner during the pursuit and that even if he wasn’t, he should be granted immunity from suit.

FOURTH AMENDMENT

When Are Police Subject to Civil Liability for Injuring a Suspect in a High-Speed Chase?

by Barbara L. Jones

ISSUES
Is it “objectively reasonable” under the Fourth Amendment for a deputy sheriff to terminate a high-speed chase by making contact with the suspect’s car with his push bumper?

At the time of the incident was it clearly established law that such an action would violate the suspect’s Fourth Amendment rights?

FACTS
This case’s journey began with a car chase. According to the Eleventh Circuit’s recitation of the facts, put forth in the light most favorable to the plaintiff Victor Harris, the chase covered about nine miles and lasted six minutes.

Harris, who was 19 at the time, was originally clocked driving 73 miles per hour in a 55 mile per hour zone. Although a Coweta County Deputy Sheriff flashed his blue lights and activated his siren, Harris continued driving. In attempting to evade law enforcement, Harris drove at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes and ran through two red lights. He used his blinkers when passing or turning.

The deputy reported the chase and another deputy, defendant Timothy Scott, joined in the pursuit. Harris eventually turned into a parking lot that was apparently basically empty and then hit Scott’s car before going back onto the highway.

Back on the highway, Scott requested permission to use a “Precision Intervention Technique” (PIT) to stop the car but then decided the car was going too fast to use the technique. Instead, he drove his car directly into Harris’s vehicle, causing Harris to run down an embankment and crash. Harris was rendered a quadriplegic.

According to Scott’s brief, he was working undercover on a drug buy and assumed the pursuit was in connection with the undercover operation.

Harris filed suit under 42 U.S.C. § 1983 alleging violation of his federal constitutional rights and

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Georgia state law. The county and all other officials originally named in the suit have been dismissed out of the case.

The only remaining claim is against Scott in his individual capacity. As to that claim, the Eleventh Circuit ruled that Scott used deadly force, that such force was impermissible because he did not have probable cause to believe that Harris had committed a crime involving the infliction of or threatened infliction of serious physical harm nor did he, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

The Eleventh Circuit also said that it was clearly established law that such a use of force was unreasonable and thus unconstitutional. It ruled that therefore Scott was not entitled to qualified immunity as a matter of law.

Scott asserted in his petition for certiorari that the Eleventh Circuit ruling created a split in the circuits in view of disparate rulings in the Sixth and Eighth Circuits. He also asserted that as to the immunity issue, the Eleventh Circuit rule contradicts Supreme Court opinions that recognize a "hazy border" between excessive and acceptable force.

### Case Analysis

A jurisdictional wrinkle has been folded into the arguments by virtue of Harris's request that the Supreme Court dismiss Scott’s petition for certiorari as improvidently granted, a ruling known as a DIG. Scholars report that in the past 50 years the Court has DIGged an average of two to three cases per term. Thus it is possible, but statistically unlikely, that the arguments in this case will focus on the request for a DIG.

Harris argues that the lower courts’ denial of qualified immunity rested on the determination that there were fact issues for trial and thus the case did not qualify for immediate review at all. The Eleventh Circuit Court of Appeals had rejected this argument with a footnote, “We reject first Harris' argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision.”

In his brief, however, Harris argues that Scott is raising the evidentiary sufficiency of the record on interlocutory appeal (an appeal taken before the trial has actually ended) which is improper. Thus the respondent requests that Scott's certiorari petition be DIGged.

Assuming the Supreme Court gets to the merits of the case, it will address two issues: whether the police were justified in their use of force, and whether the deputy should have known that he was violating the plaintiff's constitutional rights.

The use of deadly force is justified if it is reasonable under a balancing test that has evolved through case law. Reasonableness factors that have been set out by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), included the severity of the underlying crime at issue, the immediate threat posed by the suspect, and whether he is actively evading arrest. Under this test the reasonableness standard is objective: the deputy's underlying intent is irrelevant.

The deputy likely cannot prevail unless he successfully distinguishes his case from *Tennessee v. Garner*, 471 U.S. 1, a 1985 Supreme Court decision in which police killed a boy who was fleeing on foot after stealing a purse. *Garner* says that deadly force may be used when the suspect threatens the deputy with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm. It also cautions that a warning should be given when feasible.

But the police deputy argues that *Garner* should not apply in vehicle-contact cases. He asks the court to limit *Garner* to situations in which the deputy is certain that the use of force will be deadly. Vehicle contact is not necessarily deadly force. Therefore applying *Garner* in police chase cases does not give any guidance about stopping a vehicle because the line between force and deadly force is unclear, says Scott.

Instead he proposes that vehicle-chase cases call for a balancing test focusing on “a reasonable deputy's perception of what steps will lessen the risk of serious injury or death.” He argues that the fleeing suspect does not pose a choice between flight and injury to others: the suspect chooses both.

The deputy argues that police should not be expected to make “delicate and complex judgments” in the field. “A general balancing of interests captures reasonableness in the context of an automobile chase far better than *Garner*. Each case is different and depends on the totality of the circumstances, and officers are well equipped to make fact-sensitive decisions as to how to minimize the harms.”

According to Scott, his actions were constitutionally reasonable. Conceding that bumping the driver's car resulted in a tragedy, the question is whether the deputy's actions were reasonable at the time he made contact. Scott argues in detail that a reasonable deputy in his position would not allow the public-safety risks posed by the driver to go unaddressed.
The deputy again distinguishes Garner, arguing that vehicle contact was not deadly force at the moment of its application. But he says that if the court does apply Garner, the “probable cause of danger to the public” test is met when the facts are viewed from the perspective of a reasonable deputy on the scene.

Scott argues that the fact that he could have terminated the chase and allowed the suspect to escape does not make his use of force unreasonable. “The key question is whether the deputy reasonably believes that the vehicle contact is needed to avoid a greater harm of bodily injury or death.”

Respondent Harris argues that the case must be analyzed under the factual record from the proceedings below, which established that genuine issues of material fact exist. In fact the record “demands” a finding that the deputy used excessive force in violation of his constitutional rights. He also points out that his only underlying offense was speeding and that the police could have arrested him at a later time. He also argues that he did not pose a danger to the public until the police made contact with his vehicle.

Harris argues that the Garner balancing test should apply in this case. Garner allows the use of deadly force when three criteria are met: an immediate threat of material fact exist. In fact the record “demands” a finding that the deputy used excessive force in violation of his constitutional rights. He also points out that his only underlying offense was speeding and that the police could have arrested him at a later time. He also argues that he did not pose a danger to the public until the police made contact with his vehicle.

(1989), it said that stopping a vehicle by force is a seizure and a suspect’s decision to flee does not make the seizure reasonable.

Harris then returns to the jurisdictional argument. “As reasonable minds can differ as to whether [the deputy’s] use of force was objectively reasonable, this matter is left to the sole province of the jury.”

The second question only arises if the court finds the deputy’s actions unreasonable. The deputy is not entitled to qualified immunity from suit if he was on notice that his conduct was unreasonable. Other circuits have held that police may use deadly force when a fleeing suspect appears likely to drive in a manner that places the police and others at risk. Therefore, the deputy argues, he did not have fair and clear warning that he could be violating the law when he hit Harris’ car and that he did not violate “clearly established law.” To deny him immunity from Harris’s lawsuit would mean that a deputy is entitled to no warning at all of what is unconstitutional.

“This Court’s precedents on excessive force are cast at a high level of generality, and how they apply to many specific cases remains uncertain. Further, the lower court precedents relating to vehicle contacts are both sparse and uncertain. The most relevant cases on the books at the time suggested that Scott’s conduct was legal.”

At the time of this incident no case held that vehicle-to-vehicle contact used to end an automobile chase violated the Fourth Amendment, argues the deputy. He cites several decisions in which the court granted immunity to the police after high-speed cases and shootings.

Harris argues the opposite, of course. He says that the Garner/Graham/Brower cases demonstrate that the unlawfulness of the deputy’s conduct was apparent at the time of the incident. He contends that the Court’s rulings in the trilogy of cases clearly and succinctly define the limits of force allowable under the Fourth Amendment.

The precise conduct at issue need not have been held unconstitutional in an earlier case in order for the Court to deny a police officer’s request for qualified immunity. Its unlawfulness need only be apparent “in light of pre-existing law.”

“Given the limitations on the use of deadly force that arise under the rule of Garner and its progeny—a rule which applies with obvious clarity to the case at bar—the law was sufficiently developed to provide Scott with more than ‘fair warning’ that his conduct violated Harris’s constitutional rights. While Scott appears to be arguing that he is entitled to qualified immunity unless the exact conduct he engaged in was previously held unlawful, that approach was specifically rejected in [earlier cases],” argues the respondent. Any police officer would have known in light of pre-existing law that the contact with the plaintiff’s vehicle was only justified in circumstances justifying deadly force.

Thus the respondent asks that his case be remanded back to district court so that he can have the opportunity to prove his case.

**Significance**

High-speed pursuits are a national controversy. They become more controversial when the pursuit is disconnected from any other serious crime. The conflicting decisions in
the circuits demonstrate the disparate views on the use of force in high-speed chases.

The police are worried about the chilling effect of the Eleventh Circuit's decision. They obviously are concerned that split-second law enforcement decisions are being subjected to scrutiny in the “peace of a judge’s chambers.” They do not want to be handicapped in their ability to pursue suspects and they do not want to have to wait until someone actually gets hurt before they can stop a fleeing suspect. They do not want a public policy that errs on the side of allowing dangerous drivers to escape when the only underlying conduct is their unlawful driving.

But the respondent in this case maintains that the Court should not return to the pre-Garner days. Since in Harris’s view any reasonable deputy would have known that his actions in stopping his car were unconstitutional, it is fair that the deputy be required to defend himself in court. “To hold otherwise would immunize from constitutional liability all law enforcement officers who knowingly apply deadly force in circumstances when no life is in immediate danger in order to seize a fleeing traffic offender.”

If the Court does not apply Garner, it likely will draw some new lines for governing high-speed chases. The Court may or may not believe that the balancing test proposed by the deputy is a bright enough line. The question of judges second-guessing police after the fact has bedeviled judges for decades, and it is uncertain whether this case will put an end to the question even for high-speed chases.
May Nonlawyer Parents Litigate IDEA Cases in Federal Court on Behalf of Their Children?

by Jay E. Grenig


The parties agreed that Achievement Center was an appropriate placement for the 2001–02 and 2002–03 school years.

In June 2003 the parties met to discuss Jacob’s IEP for the 2003–04 school year. The 2003–04 IEP proposed educating Jacob in a special education classroom at Pleasant Valley Elementary School. Pleasant Valley is a public school offering speech and occupational therapy. The educators at Pleasant Valley are trained to educate children with autism.

The Winkelmans were unhappy with the proposed 2003–04 IEP. Specifically, they complained that the proposed 2003–04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy or one-on-one interaction, and did not contain any specific plan to address their son’s need for occupational therapy. Moreover, they preferred placing Jacob at Monarch School—a private school

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specializing only in autism and
emphasizing one-on-one interaction
between students and educators
with limited peer interaction.
Nonetheless, the Winkelmans signed
the proposed 2003–04 IEP. Although
they objected to his placement, they
consented to the initiation services.

In June 2003 the Winkelmans filed
a request for a due process hearing,
alleging that Parma had not provided
Jacob with a free appropriate public education (FAPE). On
August 27, 2003, the hearing officer
issued an interim order designating
Achievement Center as Jacob’s stay-
put placement. Despite this, the
Winkelmans unilaterally pulled
Jacob from that program and placed
him at Monarch School. Jacob per-
formed well at Monarch School dur-
ing the 2003–04 school year.
However, because of the expense of
private education, the Winkelmans
did not enroll Jacob in Monarch
School for the 2004–05 school year.
Presently, Jacob is not enrolled at
any school but does participate in a
1–2 hour per week outreach pro-
gram at Monarch School.

On February 25, 2004, the hearing
officer issued a 56-page decision
finding that Parma provided Jacob
with a FAPE and, thus, did not vi-
olate the mandates of the Individuals
with Disabilities Education Act
(IDEA). The Winkelmans appealed
to a state level review officer, who
on June 2, 2004, issued a 44-page
opinion affirming the hearing
officer’s decision.

The Winkelmans represented
themselves in the district court
proceedings. On March 2, 2005,
they filed a Motion for Judgment
on the Pleadings Based on the
Administrative Record. Two weeks
later, Parma filed a Motion for
 Judgment on the Pleadings Based on the
Administrative Record.

The Winkelmans argued that the
hearing officer had violated IDEA
procedures by allowing another per-
to “co-perside” over their due
process hearing. The district court
rejected this argument, stating that
nothing in the record suggested the
hearing officer’s research assistant
had co-presided over the proceed-
ings. It also rejected the
Winkelmans’ argument that Parma
had predetermined to place Jacob in
its own program before it had devel-
oped his 2003–2004 IEP.

Given that Jacob was entering a
completely new school setting and
given the overall consensus that a
one-month reassessment was in
Jacob’s best interest, the district
court ruled that the lack of goals
and objectives in the IEP for occup-
utional therapy only constituted a
technical, procedural violation of
the IDEA and was not reversible
error. The court also found that the
reduction of speech therapy from 90
minutes to 60 minutes and the lack
of one-on-one academic instruction
did not constitute a substantive vi-
olation of the IDEA. Acknowledging
that Jacob loves and responds well
to music, the court nevertheless
found that the record did not sup-
port the notion that Jacob needed
music therapy in order to receive
educational benefits. The district
court granted Parma’s motion for
judgment on the pleadings and
ordered each party to bear its own
costs. Winkelman v. Parma City
School District, 411 F. Supp. 2d 722
(N.D. Ohio 2005).

The Winkelmans filed two appeals
pro se representing themselves
without the help of a lawyer. The
first appeal challenged the district
court’s denial of a preliminary
injunction regarding Jacob’s stay-
put placement. The Sixth Circuit
ordered dismissal of that appeal
unless petitioners retained counsel
within 30 days. The court relied on
Cavacno v. Cardinal Local
School Dist., 409 F.3d 753 (6th Cir.
2005), a case that held the IDEA
does not grant parents the right to
represent their child pro se in feder-
al court and that “parents cannot
pursue their own substantive IDEA
claim pro se.” The Winkelmans also
filed a pro se appeal from the dis-
trict court’s merits decision. The
court of appeals ordered dismissal of
that appeal unless the Winkelmans
retained counsel within 30 days.

The Winkelmans sought review of
the Sixth Circuit’s decision by the
U.S. Supreme Court. The Supreme
Court granted the Winkelmans’ peti-
tion for a writ of certiorari. 126

**CASE ANALYSIS**
The IDEA (20 U.S.C. § 1400) pro-
vides federal grants to states for
assistance in the education of chil-
dren with disabilities. The IDEA
seeks to ensure that all disabled
children have available to them a
free appropriate public education.
(The IDEA was amended by the
Individuals with Disabilities
Education Improvement Act of 2004
effective July 1, 2005.) Under the
IDEA, a state participating in the
grant program must ensure that
each child with a disability receives
a “free appropriate public educa-
tion” (FAPE), which includes special
education and related services nec-
essary to meet the child’s particular
needs.

Under the IDEA, school districts
must create an IEP for each dis-
abled child. If parents believe their
child’s IEP is inappropriate, they
may request an impartial due
process hearing. A party dissatisfied
at the conclusion of an impartial
due process hearing may seek fur-
ther administrative review of the
dispute by the state educational
agency. If still dissatisfied, a party
may pursue a civil action in either
state or federal court. The IDEA uses the phrase “[a]ny party aggrieved by the findings and decisions” to define those entitled to bring a civil action under the IDEA. 20 U.S.C. § 1415(i)(2)(A).

The Winkelmans argue that parents of a child with a disability may proceed pro se when they bring a civil action in a federal court either to enforce procedural rights under the IDEA or to seek relief for a substantive violation of the right to a free appropriate public education. They reason that parents are the real parties in interest in such cases.

Parma rejects the Winkelmans’ argument, asserting that the common law prohibits lay parents from representing their children in court. Parma contends that the common law rule furthers several important policy objectives. First, it says pro se representation carries with it risks that are not present when a party is represented by counsel. Second, Parma states that attorneys inject a measure of objectivity often lacking in an area punctuated by emotion. According to Parma, Congress has not abrogated the common law rule.

Parma stresses that while Congress provided substantive rights to children with disabilities, it did not grant their parents any judicially enforceable rights. Parma declares that parental safeguards under the IDEA are collateral, not independent substantive, rights.

According to the Winkelmans, however, Congress viewed parents as parties aggrieved by adverse administrative decisions and therefore the real parties in interest to IDEA suits. They note that parents are the real parties in interest to the administrative-level proceedings that must be completed prior to filing a law suit and are also the real parties in interest to the administrative appeals from due process hearings in those systems that have two tiers of administrative hearings.

According to the Winkelmans, because Congress used the same “parties aggrieved” language in granting the right to administrative appeal under both 20 U.S.C. § 1415(g)(1) and 20 U.S.C. § 1415(i)(2)(A), the term should be given a consistent meaning. The Winkelmans suggest that Congress had no need to single out parents from the collective group of “parties aggrieved” referenced in § 1415(i)(2)(A).

Parma argues that the IDEA says nothing about the right of parents to proceed in pro se in federal court. While Congress has expressly allowed non-attorneys to prosecute and defend administrative due process hearings, Parma says it is difficult to imagine that Congress meant to instill greater rights in federal proceedings through its silence on this issue. According to Parma, the dispute resolution mechanisms under the IDEA underscore the conclusion that parents are not real parties in interest. The school district says the purpose of the due process hearing is to settle disagreements regarding a child’s educational program, not to create a fountain of rights for parents. For that reason, Parma contends the references to “parents” relied upon by the Winkelmans in the context of administrative proceedings effectively treat the parent as the child’s “next friend.” Asserting the administrative proceedings are by nature designed to be a less formal and more expedient method of dispute resolution, Parma says that, once the matter arrives in court, the IDEA and procedural rules present a maze of requirements that pro se litigants will often have trouble navigating.

According to the Winkelmans, parents are real parties in interest regardless of whether they are bringing claims alleging violations of IDEA’s substantive right to a FAPE or violations of IDEA’s procedural safeguards. They stress that parents have their own right to ensure that their child receives IDEA’s statutorily guaranteed FAPE. The Winkelmans assert that neither IDEA’s right-to-administrative appeals provision (20 U.S.C. § 1415(g)(1)) nor its right-to-sue provision (20 U.S.C. § 1415(i)(2)(A)) precludes “parties aggrieved” from suing for a substantive violation.

Even if only the child possesses the substantive statutory right to a FAPE, the Winkelmans argue, his or her parents should be able to bring that claim pro se. They say that lay (non-lawyer) representation has been permitted frequently in cases in which the real party in interest lacks the ability to represent him or herself and otherwise might go without adequate representation.

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such as cases involving children from families too poor to afford a lawyer.

Parma responds that, lacking any clear language to abrogate the common law rule, the Winkelmans now seek to carve a novel exception to it by relying on Supplemental Security Income (SSI) cases, among others. According to Parma, IDEA claims and SSI claims are sufficiently dissimilar to justify different results. Parma says children’s rights are protected both by Congress and the Federal Rules of Civil Procedure. It points out that the IDEA permits an award of attorneys’ fees in order to encourage participation of counsel. Parma also states that Congress permits grants to “parent organizations,” which would, among other things, provide guidance to parents involved in disputes under the IDEA.

The Winkelmans acknowledge that in 2004 Congress refused to enact a provision allowing parental pro se representation but claim the failed amendment lacks persuasive significance.

It is Parma’s position that Congress’s recent rejection of amendments that would have permitted parents to represent their child pro se is indeed persuasive. It also argues that the failed Senate amendment provides a stark contrast with the language in the present statute by demonstrating what would be necessary for Congress to “speak directly” to the question presented in this case. In order to abrogate the common law or impose obligations of the states under the Spending Clause, Parma asserts that Congress must speak clearly and with precision.

Parma concludes that Congress must provide clear notice to the states before subjecting them to conditions, obligations, or liabilities. Parma argues that particularly in Spending Clause cases, the Supreme Court has exhibited reluctance to allow implied rights of action. Parma declares that the Winkelmans’ proposed rule would inflict conditions, obligations, and liabilities for which states did not receive clear notice.

**SIGNIFICANCE**

Six circuits—the Second, Third, Fourth, Sixth, Seventh, and Eleventh—have held that parents cannot proceed pro se on behalf of their child or that the parents lacked substantive rights. See Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2d Cir. 1998); Collinsgru v. Palmyra Bd. Of Educ., 161 F.3d 225 (3d Cir. 1998); Doe v. Board of Educ., 165 F.3d 260 (4th Cir. 1998); Cavanaugh v. Cardinal Local School Dist., 409 F.3d 753 (6th Cir. 2005); Mosely v. Board of Educ., 434 F.3d 527 (7th Cir. 2006); and Descine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997). One circuit—the First—has reached a contrary result. Maroni v. Pemi-Baker Regional Sch. Dist., 346 F.3d 247 (1st Cir. 2003).

In Arlington Central School District v. Murphy, 126 S.Ct. 2455 (2006), a case decided last term, the Supreme Court relied on the principle that, when Congress attaches conditions to a state’s acceptance of federal funds in legislation enacted pursuant to the Spending Clause, the conditions must be set out unambiguously. That is, the legislation must provide clear notice of the conditions Congress seeks to place on the states in order for a state to knowingly accept and be bound by them. A divided Supreme Court ruled in that case that non-attorney expert’s fees for services rendered to prevailing in an IDEA action are not “costs” recoverable from the state under IDEA’s fee-shifting provision.

The Supreme Court’s decision in this case should resolve the conflict among the circuits regarding pro se representation in IDEA cases. A decision in favor of the Winkelmans will make it easier for parents who are unable or unwilling to obtain legal counsel to challenge decisions under the IDEA in court. A decision affirming the Sixth Circuit could possibly save school districts money by discouraging some parents from bringing lawsuits against them under the IDEA.

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Congress created a remedy in 26 U.S.C. §7426 for innocent third parties whose property is subject to a wrongful levy by the IRS. The petitioner sought a refund under 28 U.S.C. §1346 after it was time barred from proceeding by the nine-month statute of limitations for a wrongful levy action. The Fifth Circuit held 26 U.S.C. §7426 provides an exclusive remedy for wrongful levy.

Does 28 U.S.C. § 7426 Provide an Exclusive Remedy for Third Parties Subject to a Wrongful Levy?

by Catherine Ross Dunham

TAXATION

I

SSUE

Is a third party able to seek a refund for monies seized by the IRS under a wrongful levy pursuant to 28 U.S.C. §1346, the refund statute, when the time permitted to pursue a remedy from wrongful levy under 26 U.S.C. §7426, the wrongful levy statute, has expired, or did Congress intend for 26 U.S.C. §7426 to provide an exclusive remedy for third parties?

F

ACTS

In 1991, Elmer and Dorothy Cullers created the EC Term of Years Trust as part of an estate tax plan. Two years later, in 1993, the Internal Revenue Service assessed additional federal income tax against the Cullers for the tax years 1981 through 1984, based on Tax Court litigation that determined a partnership the Cullers had invested in was an abusive tax shelter. In 1999, the Internal Revenue Service filed transferee tax liens against the EC Term of Years Trust for the tax liability owed by the Cullers, claiming the Cullers created the Trust to avoid paying federal income taxes. The Internal Revenue Service then threatened to take legal action against the trust to seize and sell trust property to satisfy the $3,389,426.37 lien, which represented the total amount of taxes, penalties and interest owed by Elmer and Dorothy Cullers.

The trust disagreed with the IRS's position. However, in August 1999, the trust opened a bank account and deposited the amount owed by the Cullers into the account. The IRS then levied on that account, and the bank issued a check for $3,389,426.37 on October 5, 1999, to satisfy the IRS levy against the Cullers.

Approximately one year later, on September 7, 2000, the trust filed an action against the United States pursuant to both 26 U.S.C. § 7426 (a)(1) and 28 U.S.C. § 1346(a)(1) seeking a remedy for the IRS's wrongful levy and the return of the

(Continued on Page 260)
The trust dismissed its appeal from the district court’s decision. Then, on September 2, 2001, the trust filed an administrative claim for a refund of the monies levied by the IRS. The administrative refund claim was denied, the trust filed a second action seeking a refund under 26 U.S.C. § 1346(a)(1). The district court dismissed the trust’s action; again holding 26 U.S.C. § 7426 provides an exclusive remedy for wrongful levy against an innocent third party.

The trust appealed the district court’s ruling to the Fifth Circuit Court of Appeals, which affirmed the district court decision dismissing the trust’s action for refund. The trust argued on appeal that the United States Supreme Court decision in United States v. Williams, 514 U.S. 527 (1995), allowed the trust to pursue a refund under § 1346 even though the trust could have proceeded under § 7426, if not time barred. The trust also relied on the Ninth Circuit Court of Appeals decision in WWSM Investors v. United States, 64 F.3d 456 (9th Cir. 1995). In affirming the district court, the Fifth Circuit held that “if § 7426 is available, then it is the sole and exclusive remedy” and that Williams should not be read to suggest a refund action under § 1346 is also available when the third party could have filed a wrongful levy action under § 7426.

CASE ANALYSIS
The single issue in this case is whether 26 U.S.C. § 7426 provides an exclusive remedy for innocent third parties when the IRS seizes property under a wrongful levy. The two statutory provisions in conflict, 26 U.S.C. §§ 7426 and 28 U.S.C. § 1346, both provide a means for the third party to seek return of wrongfully seized property.

Section § 7426 (a)(1) provides when a wrongful levy has been made against property, any person who claims an interest in the property subject to the wrongful levy may bring a civil action against the United States in a district court. An innocent third party seeking a remedy for wrongful levy under § 7426 must file his claim within nine months from the date of the levy. 26 U.S.C. § 6532(c)(1).

Section § 1346 provides the district courts shall have jurisdiction over any civil action against the United States “for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected.” A tax refund suit under § 1346 may be brought up to two years after the IRS disallows a refund claim. 26 U.S.C. § 6511(a). In addition, § 6511(a) allows a person to file an administrative refund claim with the IRS up to two years after the tax is paid or three years after a return is filed, whichever is later. Combining the time periods for filing the administrative refund claim and the refund claim in district court provides third parties at least four years to file a claim for a refund under § 1346.

Petitioner argues Congress intended § 7246 and § 1346 to co-exist as alternative remedies. The petitioner first relies on the history of pre-§ 7426 difficulties of wrongful levy actions form the basis of the Fifth Circuit’s reasoning in this case and in the prior cases interpreting the wrongful levy statute. In holding that § 7426 was an exclusive remedy, the Fifth Circuit relied on its earlier decision in United Sand & Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). In that case the Fifth Circuit had held that § 7426 was the exclusive remedy available to a subcontractor who asserted a claim against funds due a general contractor but which had been seized by the IRS. That opinion in turn relied on a pre-§ 7426 Supreme Court case, United States v. A.S. Kreider Co., 313 U.S. 443 (1941), which held that a third-party refund action filed under 28 U.S.C. § 2401, the predecessor statute to § 7426, was time barred because it was not filed within the time period set by the Revenue Act of 1926—even though the action was filed within the six-year statute of limitations under § 2401. The Kreider court held that since the limitations language in § 2401 was stated in the negative (i.e., providing that “[n]o suit … shall be allowed” unless brought within six years of accrual), nothing in the statutory language precluded the application of a shorter period of limitations. Petitioner argues the
Fifth Circuit improperly incorporated this aspect of Kreider into its 1980 opinion in United Sand & Gravel, specifically determining that the Supreme Court’s holding in Kreider (that failure to give effect to the shorter limitations period under the Revenue Act of 1926 would render the § 2401 statutory period meaningless) established § 7426 as an exclusive remedy for third parties.

The petitioner argues the circuit court’s reliance on Kreider was misplaced since Kreider was a pre-§ 7426 decision and the Supreme Court’s reasoning in that case had been based, in part, on the fact that under the statutory law at that time, the United States could not be sued directly by a third party whose property had been seized.

Petitioner also argues that United States v. Williams, 514 U.S. 527 (1995), stands for the proposition that Congress did not intend § 7426 to provide an exclusive remedy. In Williams, the issue was whether Williams could pursue a tax refund under 28 U.S.C. § 1346 when she, under duress, paid taxes owed by her former husband in order to remove a lien on her property. The government argued that Williams was not a taxpayer and that tax refund suits were only available to taxpayers against whom the taxes had originally been assessed. The Court rejected this argument, which would limit remedies under § 1346 to persons meeting the government’s narrow definition of a taxpayer. The Court found when § 1346 is read with other sections of the code, the definition of “taxpayer” is broad enough to include a third party in Williams’s position. The Williams Court further held that 26 U.S.C. § 7426 was essentially a codification of the common law action third parties historically brought against the tax collector individually to recover money erroneously collected. Petitioner argues the Williams case rejected the Fifth Circuit’s reasoning of United Sand & Gravel by rejecting the government’s contention that allowing third parties to proceed as taxpayers under § 1346 would render wrongful levy actions by third parties under § 7426 superfluous.

The government argues Williams should be narrowly read. The Court in Williams concluded Williams was in a particularly difficult situation since none of the other remedies available to third parties were available to her. Williams was not able to file a wrongful levy action under § 7426 because her property was subject to a tax lien, not a tax levy. Therefore, she had no other alternative to remove the lien except through payment of her ex-husband’s tax liability. The government argues Williams does not resolve whether a third party can proceed under 28 U.S.C. § 1346 when she has an opportunity to seek a relief under a separate statutory scheme specifically created to address a wrongful levy by the IRS. Therefore, Williams should not be read as putting to rest the issue of whether § 1346 provides an alternative remedy.

The petitioner also relies on the Ninth Circuit’s decision in WWSM Investors v. United States, 64 F.3d 456 (9th Cir. 1995). WWSM, like the petitioner in the present case, did not file an action under § 7426 within the nine-month statute of limitations and sought a refund under § 1346. The Ninth Circuit held § 7426 was not an exclusive remedy for third parties, even if the third party could have filed a wrongful levy action under § 7426.

The government argues the Ninth Circuit decision in WWSM Investors is an outlier that both the Fifth Circuit and the Tenth Circuit have declined to follow. Also, the government contends the WWSM Investors dissenters correctly reasoned that the majority’s decision did not follow Williams since the Court in Williams had relied on the critical difference between tax liens and tax levies. The dissent also stated the majority opinion should not be read as a determination of whether § 1346 was available as an alternative remedy when the third party had a wrongful levy action available under § 7426.

Petitioner makes a three-prong congressional intent argument. First, petitioner argues that the plain language of § 7426 demonstrates that Congress did not intend for § 7426 to preempt or exclude remedies under § 1346. Specifically, § 7426(a)(1) provides that a third party who is subject to a wrongful levy “may” bring a civil action against the United States and the action “may” be brought without regard to whether the levied property has been surrendered to or sold by the IRS. Petitioner argues if Congress had intended § 7426 to preempt § 1346, it would have used the mandatory language “shall” rather than “may” to indicate § 7426 provided the exclusive remedy.

Petitioner also argues the legislative history of § 7426 demonstrates that Congress’s intent in passing the wrongful levy statute was to clarify that third parties could proceed directly against the United States, eliminating the disparities caused by the common law action against the individual tax collector. Also, petitioner’s examination of the legislative history did not discover any discussion of § 7426 as preempting other statutes or providing an exclusive remedy to innocent third parties. Petitioner also argues there is nothing in the structure of § 7426 to

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indicate the statute was intended to be anything other than a clarification of the third party’s right to sue the government directly.

Finally, petitioner suggests the government is asking the Court to rule § 1346 is preempted by § 7426; however “preemptive intent cannot be lightly inferred.” The government argues the shorter statute of limitations in § 7426 suggests Congress intended to provide a shorter statutory filing limit for wrongful levy claims to allow for the quick resolution of tax claims. If § 1346 is an alternative remedy to § 7426, the longer filing period under § 1346 essentially defeats congressional intent by making the nine-month filing limit meaningless. However, the petitioner cautions against the Court selecting between competing statutory provisions when congressional intent to preempt is not clearly expressed in the statute or the history.

The government rests its statutory construction argument on the long recognized tenet of construction that the availability of a precisely drawn, specific remedy precludes resort to a general remedy. Congress’s creation of a shorter filing period in § 7426 creates a specific remedy and precludes other potentially available remedies with longer limitations periods, such as § 1346. Also, the government argues § 7426 itself demonstrates congressional intent to create an expeditious resolution for wrongful levy claims. Congress was aware of the longer statute of limitations period for refund actions under § 1346 when it passed the nine-month limit in § 7426. Congress was also aware that § 1346 rested the time for filing on the filing of an administrative claim for a refund, which indicates Congress intended to create a distinct, not parallel, action under § 7426 which allows innocent third parties quick resolution in an action directly against the United States.

The government also argues that § 7426 is part of a larger statutory scheme developed to provide the sole remedy for wrongful levies on the property of third parties. On its face, § 7426 delineates the only forms of relief a district court can provide and restricts the issues a third party can litigate. Also, Congress created distinct jurisdictional and venue provisions for actions brought under § 7426, and it created 26 U.S.C. § 6503(f)(1), which suspends the running of the 10-year collection period when a wrongful levy action is filed. The government argues these specific functional provisions of § 7426 demonstrate Congress’s intent to create an exclusive and comprehensive remedy for third parties subject to a wrongful levy.

SIGNIFICANCE

The crux of this case is whether a third party can circumvent the shorter period of limitations under the wrongful levy statute by filing an action under the refund statute. The result may create new strategies for taxpayers and third parties. If similarly situated third parties can proceed under either statute, the third parties can essentially select between a longer limitations period and an expeditious remedy. In essence, the shorter time period of § 7426 would serve the third party’s needs for expediency, not the IRS’s need to resolve controversies and collect taxes, thus reflecting the expressed and implied intent of Congress in creating the wrongful levy statute.

However, the longer limitations period of the tax refund action is not subject to 26 U.S.C. § 6503(f)(1), which suspends the running of the applicable 10-year collection period when a wrongful levy action is filed. There is no parallel provision suspending the collection period during refund actions brought under § 1346. The 10-year collection period continues to run during the time a third party files an administrative claim for a refund and then files a refund action under § 1346. If the collection period is not suspended during a refund action, the IRS could find itself in a situation wherein the time period for collecting taxes owed has expired by the time the refund action is resolved. Thus, in situations in which the third party and the liable taxpayer have a business or other relationship, pursuing the wrongful levy through a refund action may derive another benefit to the liable taxpayer.

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In 2001, President Bush fulfilled his “charitable choice” campaign promise by creating an executive office, called the Faith-Based and Community Initiative, that sought to increase the involvement of religious groups in helping address social service problems. The program now faces an Establishment Clause challenge from taxpayers who argue that it encroaches on the constitutional principle of church-state separation.

When do Taxpayers Have Standing to Allege Violations of the Establishment Clause?

by David L. Hudson Jr.

I SSUE

Do taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of executive branch officials pursuant to an executive order, where the plaintiffs challenge no act of Congress, the executive branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government?

F ACTS

In January 2001, President George W. Bush created the White House Office of Faith-Based and Community Initiatives to ensure that “private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field in the field of providing social services.” The president also created “Executive Department Centers for Faith-Based and Community Initiatives” in numerous federal agencies. These centers are supposed to reduce bureaucratic hurdles preventing faith-based and charitable groups from participating in the federal grant process and provision of social services.

In June 2004, the Freedom from Religion Foundation and several of its members filed suit in federal court, contending that the president’s faith-based plan violated the Establishment Clause of the First Amendment. The Establishment Clause is designed to ensure a degree of separation between church and state, although the degree of separation is a matter of huge historical and constitutional controversy.

A federal district court in Wisconsin dismissed the claims for lack of “standing,” a legal doctrine that establishes whether a litigant has the right to appear in court and pursue his or her claims. The district

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court determined that the plaintiffs did not have standing to file their Establishment Clause claims because the challenged executive branch activities were not “examples of congressional power under the taxing and spending clauses of Article I, Section 8” of the United States Constitution. According to the district court, the challenged actions were “not exercises of congressional power.”

The plaintiffs successfully appealed to a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit, which reinstated the lawsuit in its January 2006 ruling in Freedom from Religion Foundation v. Chao, 433 F.3d 989 (7th Cir. 2006). The panel majority, in an opinion by Judge Richard Posner, wrote: “Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order.”

In dissent, Judge Kenneth Ripple warned that the panel majority opinion represented a “dramatic expansion of current standing doctrine.” He reasoned that a plaintiff does not have standing unless he or she can show that the spending of public funds was made pursuant to Congress’s taxing and spending power. To Ripple, the lawsuit challenged executive branch decisions, not congressional spending.

Jay F. Hein, director of the White House Office of Faith-Based and Community Initiatives sought en banc review, which the Court denied by a divided vote in May 2006. Hein and others then filed a petition for writ of certiorari, which was granted in December 2006.

**Case Analysis**

Article III, section 2 of the U.S. Constitution provides: “The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority … [and] to Controversies to which the United States shall be a Party.” This “Case and Controversy” requirement means that the judicial power of the federal courts is restricted to actual “cases” and “controversies.” Standing refers to whether the challenging litigant has a stake in the particular controversy that is personal to warrant review of the litigant’s constitutional (or other legal) claims.

The U.S. Supreme Court established a general rule against taxpayer standing in Frothingham v. Mellon, 262 U.S. 447 (1923). The Court reasoned that an individual taxpayer’s interest in federal monies “is shared with millions of others, is comparatively minute and indeterminable. …”

However, the Warren Court created an exception to this rule in Flast v. Cohen, 392 U.S. 93 (1968), ruling that a federal taxpayer had standing to bring an Establishment Clause challenge to a federal statute that provided federal funding for the purchase of textbooks for parochial schools. The Court wrote that a taxpayer must assert “a logical nexus between the status asserted and the claim sought to be adjudicated.” The Court explained that “a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, Section 8 of the Constitution.”

In Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982), the Court ruled that taxpayers did not have standing to challenge a decision by the Secretary of Health, Education, and Welfare to dispose of certain property pursuant to federal law. The Court reasoned that the source of the complaint was not an act of Congress but a decision by an administrative agency.

In Boos v. Kendrick, 487 U.S. 589 (1988), the Court ruled that taxpayers had standing to challenge the constitutionality of the Adolescent Family Life Act on Establishment Clause grounds. Chief Justice William Rehnquist wrote: “In this litigation there is … a sufficient nexus between the taxpayer’s standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute.”

The petitioners assert that the Seventh Circuit decision in the present case, however, “would transform the doctrine of taxpayer standing into a roving license for any one of the more than 180 million taxpayers in the United States to challenge any action of the Executive Branch that offends that individual’s own view of the Establishment Clause’s proscription.” To the petitioners, the lower court’s decision threatens separation of powers principles by allowing the judicial branch to intrude into the executive branch’s Article II powers.

Petitioners emphasize that the Flast exception applies only to exercises of congressional power under the Taxing and Spending Clause, not executive branch actions. They cite the Court’s language in Flast that taxpayer standing would not extend to the executive branch’s “incidental expenditure of tax funds in the administration of an essentially regulatory statute.”
Petitioners explain that the present case involves a general appropriations law passed by Congress that then gives the executive branch discretion to fund its own operations. They write that “when Congress provides funds to the Executive Branch to be used in the Executive’s discretion and outside of a congressional spending program, Congress’s taxing and spending roles end when the funds are appropriated—that is when the funds are delivered into the control of the Executive Branch.”

The respondents counter that this case should be controlled by *Flast* and *Bowen*—decisions in which the Court found taxpayer standing to litigate Establishment Clause claims. They note that *Flast* involved expenditures made by the Department of Health, Education and Welfare—an executive branch agency: “*Flast v. Cohen* did not present a challenge to congressional action; rather, it involved a dispute over a discretionary decision by the executive branch regarding funds appropriated by Congress.” They also point to the Court’s statement in *Bowen*: “We do not think … that appellees’ claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary.” To the respondents, “*Flast* requires a congressional appropriation, not a congressional program.”

Respondents also make historical arguments based on the founders’ fears that the executive branch—perhaps much more so than Congress—could violate Establishment Clause principles: “Given their knowledge of English history, moreover, the Framers were well aware of the potential for abuse of executive power, especially in the area of religion.”

In their amicus brief, the American Civil Liberties Union, Americans United for Separation of Church and State, and other civil liberties groups contend that “for purposes of Article III standing analysis, the touchstone event is when the appropriation is used, by any branch of government, to fund religious activity.”

**SIGNIFICANCE**

The Court’s decision in this case carries tremendous significance because it could limit the number of Establishment Clause challenges by taxpayers. While not the most exciting of constitutional law cases, standing cases are profoundly important, as they affect whether the court will even reach the underlying substantive issues, such as whether the Bush program at issue in the present case violates the Establishment Clause.

Both the Clinton and Bush Administrations have sought to expand the role religious institutions can play in providing social services. But now each side in the present case can point to its own parade of horribles. Judge Posner reasoned in his panel decision for the Seventh Circuit that a limitation on the *Flast* exception to executive branch action could allow severe violations of the Establishment Clause “because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause.”

On the other hand, petitioners and their supporters contend that there will be great harm if the Court fails to cabin the *Flast* exception. In its amicus brief, for example, the Christian Legal Society warns that “if all such executive branch actions were reviewable by the Judicial Branch with an eye to church-state transgressions, that would hazard the Article III Branch superintending the day-to-day work of the Article II Branch.”

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- American Jewish Congress and American Jewish Committee (Marc Stern (212) 360-1545)

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Burdens/standards of proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable-doubt standard, the prosecution must present such evidence of the defendant’s guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

Class action lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff’s and the defendant’s side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law’s fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant’s trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but, in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court’s decision in the appropriate intermediate federal appeals court and, if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of compensatory damages is a sum of money intended to make the injured party whole, insofar as this is possible. An award of punitive damages is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court’s disposition of his or her case — including issues of law, issues of fact, and issues concerning the trial judge’s use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant’s initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts
decline to hear the defendant's case or hear the case but decide against the defendant, or if the defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant's conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review, defined above.

Discovery — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

Diversity — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

En banc — The term literally means “full bench.” Cases in the federal circuit courts of appeals are typically heard and decided by panels of three judges who are drawn from all the judges in that circuit. In rare instances, the court may subsequently agree to have the case reargued, this time in front of more or all of the judges from that circuit.

Habeas corpus — Under the federal habeas corpus statute, 28 U.S.C. §2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

Per curiam opinion — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court's opinion, there is no indication of which justice/judge wrote it.

Plurality opinion — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court's action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court's opinion can be a partial plurality opinion. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see Hubbard v. United States, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

Preemption — Under the Supremacy Clause, U.S. Const. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

Qualified immunity — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

Strict scrutiny — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

Summary judgment — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.
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