Howes v. Fields
Randall Lee Fields, serving a prison sentence for sexual contact with a minor, sought a writ of habeas corpus on the ground that admissions he made to police officers who questioned him should not have been allowed into evidence because they violated his right against compelled self-incrimination. He claims that the failure of police interrogators to advise him, when he was in jail on an unrelated matter, of his rights under *Miranda v. Arizona*, made those statements inadmissible. The trial court granted the writ and the Sixth Circuit affirmed. Michigan asks the Supreme Court to reverse, asserting that the Sixth Circuit improperly applied precedent in determining that Fields was in custody for *Miranda* purposes.

Douglas v. Independent Living Center of Southern California
Douglas v. California Pharmacists Association
Douglas v. Santa Rosa Memorial Hospital
The plaintiffs, a group of Medicaid providers and recipients, sued California after the state enacted across-the-board cuts in its Medicaid reimbursement formula. The plaintiffs claimed that the cuts violated federal Medicaid requirements; the Ninth Circuit agreed. The state appealed to the Supreme Court, arguing that private plaintiffs cannot sue to enforce those federal requirements against the state.
U.S. SUPREME COURT October 2011 CALENDAR

MONDAY

OCTOBER 3

Douglas v. Independent Living Center of Southern California
Douglas v. California Pharmacists Association
Douglas v. Santa Rosa Memorial Hospital
Reynolds v. United States

OCTOBER 10

Legal Holiday

TUESDAY

OCTOBER 4

Maples v. Thomas
Martinez v. Ryan
Howes v. Fields

OCTOBER 11

Pacific Operators Offshore, LLP v. Valladolid
CompuCredit Corp. v. Greenwood
Greene v. Fisher

WEDNESDAY

OCTOBER 5

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC
Golan v. Holder

OCTOBER 12

Florence v. Board of Chosen Freeholders
Judulang v. Holder

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

- video highlights from our “On the Docket” panel at the Woodrow Wilson International Center for Scholars,
- a sign-up for our weekly e-blasts highlighting all the merits and amicus briefs submitted to the Court, and
- all the merits and amicus briefs for the October cases.
INTRODUCTION

The legal relationship between injured maritime employees and their employers is a complicated one. Under the General Maritime Law, injured seamen are entitled to “maintenance and cure,” which covers their medical and living costs. Port personnel usually collect through the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. Offshore oil workers look to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356a. Those who fall outside these federal regimes are relegated to state law, which is almost always less generous.

Categorizing a particular worker can be tricky; and whenever there is doubt, as in the present case, the employer invariably picks the least-costly alternative. As a result, many employees end up going to court with the hope of being reclassified.

ISSUE

What law applies to an offshore oil worker who is injured or killed on land?

FACTS

On June 2, 2004, Juan Valladolid, a roustabout employed by Pacific Operators Offshore, LLP (POO), was crushed to death by a forklift. At the time, Valladolid was working at POO’s oil-processing facility in Ventura, California (the La Conchita plant). Normally, however, he was stationed on a POO oil rig located off the Southern California coast in the Santa Barbara Channel (Platform Hogan).

As an unskilled laborer, Valladolid did a variety of odd jobs, including picking up litter, emptying trash cans, and washing decks. On the day of his death, Valladolid had been ordered by his supervisor to take a forklift and clean up the debris that had accumulated in the plant’s backyard. In the course of doing so, Valladolid spotted a plantain tree along a service road and sought to pick it. Unable to reach the fruit, he climbed on top of the forklift’s raised tines. This proved to be a mistake, for the machine lurched forward, threw Valladolid to the ground, and rolled over him.

Following the accident, POO arranged for Valladolid’s widow, Luisa, to receive death benefits under the California Workers’ Compensation Act (California Labor Code §§ 3200-6208). Based on Valladolid’s weekly salary of $928.22, POO’s insurance carrier calculated that Luisa was entitled to $41,999.88.

Dissatisfied with this amount, Luisa sought additional benefits under either the LHWCA or the OCSLA. On August 15, 2007, Administrative Law Judge William Dorsey rejected her claims. See L.V. v. Pacific Operations [sic] Offshore, LLP , 41 BRBS 795 (2007). In the course of his opinion, Judge Dorsey explained that Valladolid was not covered by the LHWCA because he had not been engaged in maritime work (thus failing the statute’s “status” prong) and the La Conchita plant was not a maritime facility (thus failing the statute’s “situs” prong). As for the OCSLA, Judge Dorsey concluded that while Valladolid met its status prong (both sides agreed he was an offshore oil worker), he did not meet its situs prong (because his accident occurred on land).


Luisa had better luck at the U.S. Court of Appeals for the Ninth Circuit. On May 13, 2010, in an opinion authored by District Judge James V. Selna (sitting by designation) and joined in by Circuit Judges Jay S. Bybee and Stephen Reinhardt, the panel found that while Valladolid was not covered by the LHWCA, he might be covered by the OCSLA.
from these two conflicting Court of Appeals decisions, there is little
In this opinion for the Ninth Circuit, Judge Selna noted that "[a] side
resources … to the outer Continental Shelf.'”
for the purpose of exploring for, [and] developing … the natural
involved in any 'operations conducted on the outer Continental Shelf
[it] impose[s] for securing … benefits is for injured employees to be
connection with outer continental shelf operations. … The only criterion
conducted on the outer Continental Shelf for the purpose of explor-
its benefits …are available for the "disability or death of an employee
accounting for any 'operations conducted on the outer Continental Shelf.
Whether the OCSLA follows an offshore worker onshore, thereby
placing state law, has proven contentious, due largely to Congress's
Supreme Court upheld this division.
In 1953, Congress passed both the OCSLA and the Submerged Lands
law to three miles off the coast; the OCSLA makes the area beyond
three miles (known as the Outer Continental Shelf [OCS]) subject
to federal law. In United States v. Maine, 420 U.S. 515 (1975), the U.S.
Supreme Court upheld this division.
Whether the OCSLA follows an offshore worker onshore, thereby
displacing state law, has proven contentious, due largely to Congress’s
convoluted phrasing. The act provides, see 43 U.S.C. § 1333(b), that
its benefits are available for the “disability or death of an employee
resulting from any injury occurring as the result of operations
conducted on the outer Continental Shelf for the purpose of exploring for,
developing, removing, or transporting by pipeline the natural resources, or
involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf.”
In Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (en banc), the
Fifth Circuit interpreted this language to mean that OCSLA benefits
are only available for deaths that actually occur on the OCS: “Congress enacted OCSLA in 1953 to establish the law governing conduct
on the Outer Continental Shelf, an area of intense activity that lacked
an established legal system because it lies beyond state boundaries. … One obvious void in the law governing the OCS was the lack of a
workers’ compensation scheme for thousands of workers employed in
the dangerous oilfield extraction industry. … Congress intended to
regulate the OCS, not those areas that already were governed by state
law.”
In contrast, the Third Circuit has adopted a “but for” approach. In Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805 (3d Cir.
1988), a well-logging operator was injured on the New Jersey turnpike
while driving from his employer’s headquarters in Rhode Island to
Atlantic City, where a helicopter was waiting to fly him to a semi-
submersible drilling rig. In holding that he was entitled to OCSLA
benefits, the court explained that § 1333(b) does “not place any
nexus, situs or geographic restrictions on claims for injuries in connection
with outer continental shelf operations. … The only criterion
[it] impose[s] for securing … benefits is for injured employees to be
involved in any 'operations conducted on the outer Continental Shelf
for the purpose of exploring for, [and] developing … the natural resources … of the outer Continental Shelf.”
In his opinion for the Ninth Circuit, Judge Selna noted that “[a] side
from [these] two conflicting Court of Appeals decisions, there is little
Having disposed of Tallentire, Judge Selna proceeded to examine
Mills and found its reliance on the act’s legislative history to be too
narrowing: “Considered as a whole, the legislative history is inconclusive on the situs issue.” By the same token, however, he found
Curtis’s approach to be too broad: “Injuries with a tenuous connection
to the outer continental shelf are not covered. … Thus, we do not
agree with, and decline to adopt, the Third Circuit’s decision in Curtis
to the extent that it requires only a 'but for' test of causation.”
Like Goldlocks, Judge Selna then opted for a middle-of-the-road
approach: “We hold that § 1333(b) may apply to injuries occurring
outside the situs of the outer continental shelf, so long as they occur ‘as the result of operations conducted on the outer continental shelf.’
… An injury sustained during employment on the outer continental
shelf itself would, by definition, meet this standard. However, an
accountant’s workplace injury would not be covered even if related to
outer continental shelf operations, while a roustabout’s injury in a
helicopter en route to the outer continental shelf likely would be. We
leave more precise line-drawing to the specific factual circumstances of
later cases.”
In its appeal papers, POO has asked the justices to follow Mills
(thereby limiting the OCSLA to injuries on the OCS). Luisa and the
U.S. Department of Labor, on the other hand, have urged the justices
to reject Mills, Curtis, and Valladolid and fashion a “status-based”
test. Under this approach, which borrows heavily from Chandris, Inc.
suing under the Jones Act, 46 U.S.C. § 30104), an employee who
spends a majority of his or her time on the OCS would be covered by
the OCSLA even when on land. As a fall-back position, Luisa and the
government suggest that the Ninth Circuit’s “substantial nexus” test
be adopted.
SIGNIFICANCE
With hundreds of rigs and thousands of workers, the OCS is, as Mills
recognized, a place of intense activity. Indeed, between 1954 and
2007, offshore drilling in U.S. territorial waters (principally along the
coasts of Alaska, California, Louisiana, and Texas) produced 16.8 bil-
lion barrels of oil and 173 trillion cubic feet of natural gas. During the
2008 presidential election, Sarah Palin called for even more activity
with her signature “Drill, Baby, Drill” chant. And while the 2010 BP oil
spill has temporarily idled some rigs (and led to the mocking refrain,
“Spill, Baby, Spill”), it seems clear that America’s energy future will
require continued exploitation of the OCS.
Given the foregoing, a decision by the U.S. Supreme Court clarifying
when OCSLA benefits are available will be welcomed by the offshore
drilling community and its insurers (even as it makes little difference
to the general public). And in answering the question, the justices
have a wealth of choices: the bright-line test of Mills, the anything-
goes approach of Curtis, or the fact-intensive inquiry of Valladolid.
Robert M. Jarvis is a professor of law at Nova Southeastern University Law Center and a past editor-in-chief of the *Journal of Maritime Law and Commerce*. He can be reached at jarvisb@nova.edu or 954.873.9173.


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For Respondent Luisa L. Valladolid (David C. Frederick, 202.326.7900)

For Federal Respondent (Donald B. Verrilli Jr., Solicitor General 202.514.2217)
Are Claims Arising Under the Credit Repair Organizations Act Subject to Arbitration Under a Predispute Arbitration Clause in a Consumer Contract?

CASE AT A GLANCE
Consumers brought an action against credit repair organizations claiming fees they were charged in connection with credit cards violated the Credit Repair Organizations Act. In this case, the Supreme Court is asked to determine whether the Credit Repair Organizations Act, providing a nonwaivable right to sue, makes an arbitration clause in the consumers’ agreement with an organization void.

CompuCredit Corp. v. Greenwood
Docket No. 10-948
Argument Date: October 11, 2011
From: The Ninth Circuit
by Jay E. Grenig
Marquette University Law School, Milwaukee, WI

ISSUE
Are claims arising under the Credit Repair Organizations Act subject to arbitration under a predispute arbitration clause where the act provides for the right to sue credit repair organizations and also states that any consumer waiver of any protection provided by or any right of the consumer under the act must be treated as void?

FACTS
Petitioner CompuCredit marketed a subprime credit card under the name Aspire Visa to consumers with low or weak credit scores through massive direct-mail solicitations and online. The respondent Wanda Greenwood and her fellow respondents, holders of the Aspire Visa, claim CompuCredit marketed the card as a tool to “rebuild your credit,” “rebuild poor credit,” and “improve your credit rating.” They allege the promotional materials noted there “was no deposit required,” and that consumers would immediately receive $300 in available credit when they received the card. The respondents claim CompuCredit charged a $29 finance charge, a monthly $6.50 account maintenance fee, and a $150 annual fee, assessed immediately against the $300 limit before the consumer received the card. In aggregate, the card had $257 in fees the first year. Although the promotional material mentioned the fees, it did so in small print amidst other information in the advertisement, and not in proximity to its representations that no deposit was required.

Before receiving the Aspire Visa credit card, each of the respondents received a mailing entitled “Pre-Approved Acceptance Certificate.” The Acceptance Certificate included the following paragraph:

By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in the Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to be bound by the “Summary of Credit Terms” and “Terms of Offer” printed on the enclosed insert, which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.

The “Terms of Offer” stated:

Important—The agreement you receive contains a binding arbitration provision. If a dispute is resolved by binding arbitration, you will not have the right to go to court or have the dispute heard by a jury, to engage in pre-arbitration discovery except as permitted under the code of procedure of the National Arbitration Forum (“NAF”), or to participate as part of a class of claimants relating to such dispute. Other rights available to you in court may be unavailable in arbitration.

The “Summary of Credit Terms” contained the following:

ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)

Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, “Claims”), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure (“NAF Rules”) of the National Arbitration Forum (“NAF”) in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.

Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including
a jury trial, or to engage in prearbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator’s decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The agreement also provided, “This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) ... are governed by and construed in accordance with applicable federal law and the laws of Georgia.”

The respondents each applied for and received an Aspire card, and were charged $257 in fees. The respondents claim these actions constitute violations of the Credit Repair Organizations Act and of California’s Unfair Competition Law.

Respondents brought an action in the U.S. District Court for the Northern District of California. Petitioners moved to compel arbitration of the respondents’ Credit Repair Organizations Act claims. The district court held the arbitration clause in the Credit Providers’ Aspire Visa credit card agreements was invalid and void under the act’s prohibition of the waiver of a consumer’s right to sue in court, and denied the motion to compel arbitration. The district court also denied the Credit Providers’ Motion for Leave to File Motion for Reconsideration. 617 F. Supp. 2d 980 (N.D. Cal. 2009).

Petitioners filed a timely appeal challenging the denial of the motion to compel arbitration. The U.S. Court of Appeals for the Ninth Circuit ruled the district court had concluded correctly that the arbitration agreement was void because the Credit Repair Organizations Act specifically prohibits provisions disallowing any waiver of a consumer’s right to sue in court for violations of the act. 615 F.3d 1204 (9th Cir. 2010).

The Supreme Court granted petitioner’s petition for review.

CASE ANALYSIS

The Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. While the FAA expresses a “liberal federal policy favoring arbitration agreements,” Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) (internal quotation marks omitted), federal law “directs courts to place arbitration agreements on equal footing with other contracts,” EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). The Supreme Court has declared that, if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

According to the Supreme Court, the congressional intent to preclude waiver of the right to a judicial forum will be discoverable in the text of the statute, its legislative history, or an inherent conflict between arbitration and the statute’s underlying purposes. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The party opposing arbitration bears the burden of demonstrating Congress’s intention to preclude a waiver.

A “credit repair organization” is any person who uses any instrumentality of interstate commerce or the mail to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of (i) improving any consumer’s credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i). The term does not include (i) any nonprofit organization which is exempt from taxation under 26 U.S.C. § 501(c)(3); (ii) any creditor (as defined in 15 U.S.C. § 1602), with respect to any consumer, to the extent the creditor is assisting the consumer to restructure any debt owed by the consumer to the creditor; or (iii) any depository institution (as that term is defined in 12 U.S.C. § 1813), or any Federal or State credit union (as those terms are defined in 12 U.S.C. § 1752), or any affiliate or subsidiary of such a depository institution or credit union. 15 U.S.C. § 1679a.

The Credit Repair Organizations Act identifies four consumer rights. See 15 U.S.C. § 1679c. The first two rights concern rights consumers have in relation to credit bureaus. The third and fourth rights concern rights consumers have in relation to credit repair organizations. The third right is the one at issue in this case and provides: “You have a right to sue a credit repair organization that violates the Credit Repair Organization[s] Act.” 15 U.S.C. § 1679c(a). Section 1679f of the act provides that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter ... shall be treated as void; and ... may not be enforced by any Federal or State court or any other person.”

The petitioners assert the Supreme Court’s cases establish that the Federal Arbitration Act was designed to promote arbitration. According to the petitioners’ reading, Congress will be found to have overridden that strong federal policy and to have precluded arbitration under a particular statute only if its intention is unmistakably clear. According to the petitioners, that burden rests on the respondents.

It is the petitioners’ position that there is no basis for concluding the act precludes enforcement of arbitration agreements, let alone that it does so with sufficient clarity to overcome the Federal Arbitration Act. The petitioners acknowledge the act contains a civil liability provision allowing private suits for violation of its substantive protections. However, they say neither that provision, nor any other provision of the act, refers to arbitration, much less expressly precludes it.

In that regard, the petitioners claim the act stands in stark contrast with numerous provisions in the United States Code in which Congress has expressly precluded arbitration in direct and unambiguous terms—for instance, by specifying that “no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.” 12 U.S.C. § 5567(d)(2) (Wall Street Reform and Consumer Protection Act). According to petitioners, those provisions demonstrate Congress’s full awareness of the presumption favoring arbitration and of the corresponding need to speak clearly to overcome that presumption. Petitioners argue Congress’s conspicuous failure here to include any comparable language compels the conclusion that claims under the act are subject to arbitration.

Even assuming the “right to sue” language in the act’s disclosure provision creates an exclusively judicial remedy, petitioners say
Petitioners claim that reading the nonwaiver provision to preclude waiver of the purported right to sue in court could lead to results that Congress would not have intended. They suggest the Ninth Circuit’s approach could mean that merely tendering a contract including an arbitration clause would constitute a violation of federal law, raising the prospect of private damages actions and Federal Trade Commission (FTC) enforcement actions. They further argue the Ninth Circuit’s reasoning could preclude enforcement of garden-variety settlement agreements under which plaintiffs waive their right to bring future suits under the act. The petitioners also argue that the Ninth Circuit’s reasoning would mean that an offer of settlement could constitute an attempt to obtain an illicit waiver, and hence a violation of federal law.

According to the petitioners, the text of the nonwaiver provision affirmatively contemplates arbitration—the provision specifically says that covered waivers “may not be enforced by any Federal or State court or any other person”—making clear Congress fully expected arbitrators to have a role in enforcing the act. If Congress counterintuitively sought to foreclose enforcement of arbitration agreements in a provision that affirmatively contemplates arbitration, they assert Congress would have addressed the issue explicitly and unambiguously.

The petitioners argue reading the nonwaiver provision to pertain solely to the act’s substantive rights would be consistent with the general structure of the act and with the prevailing construction of the analogous nonwaiver provision in the Age Discrimination in Employment Act. They claim there is no basis to construe the act’s nonwaiver provision any differently. Petitioners state that such a reading is consistent with the strong federal presumption in favor of arbitration.

The petitioners also argue that the “right to sue” language in the disclosure provision establishes an entitlement to an exclusively judicial forum. The petitioners assert the disclosure provision does not itself create any “right to sue,” but uses that language in reference to the act’s civil liability provision. They claim the latter provision is the appropriate place to look when determining the scope of the act’s “right to sue.”

The petitioners contend the civil liability provision does not create an exclusively judicial remedy, instead providing general liability for Act violations without regard to the forum. Even if the “right to sue” language were the appropriate focus of the inquiry, the petitioners argue that to “sue” is to initiate a legal process for resolving a claim, encompassing arbitration, particularly when considered in light of the need under the Federal Arbitration Act to construe the act to accommodate arbitration rather than to preclude it. They conclude the act’s silence concerning the forum for vindication of the act’s substantive rights dictates enforcing the parties’ election of an arbitral rather than a judicial forum.

In turn, the respondents stress that, although the Federal Arbitration Act provides generally for the enforceability of arbitration agreements, the Supreme Court has long acknowledged that Congress may provide that federal statutory claims are not subject to arbitration by expressly precluding a waiver of such rights. The respondents conclude that the plain language of the act expresses exactly such an intention.

According to the respondents, the act provides a statutory right allowing injured consumers to sue credit repair organizations for violations of the act, and it specifically designates that entitlement a “right to sue” under the act. The respondents assert the act expressly forbids waiver not only of the protection it offers consumers, but also of any right a consumer has under the act. They point out the act mentions two rights it gives consumers: the right to cancel a contract with a credit repair organization within three days of signing it, and the right to sue for violations of the act.

It is the respondents’ position that a contract under which a consumer agrees to arbitrate legal claims that may arise in the future—a predispute arbitration agreement—is a waiver of the right to sue. They reason that arbitrating and suing are two different things, in both common meaning and practical terms, and a consumer who waives the ability to proceed in court over future controversies and retains only the right to arbitrate such claims has given up the right to sue. The respondents state that the Supreme Court has long used the term “right to sue” to denote the ability to proceed in court rather than in arbitration or some other nonjudicial forum. In using the term “right to sue” to describe one of the nonwaivable rights under the act, the respondents contend Congress made manifest an intention to prevent credit repair organizations from depriving consumers of their ability to proceed in court.

Disagreeing with the petitioners’ invocation of the Federal Arbitration Act’s policy favoring arbitration, the respondents assert the Supreme Court has stated that the question of whether a federal statute exempts claims from arbitration is decided on the basis of ordinary methods of statutory construction, not by applying a policy favoring arbitration. The respondents argue that Congress’s use of language plainly foreclosing waivers of the right to sue (together with all other rights and protections under the act) must be given effect even if Congress could have written language more narrowly targeted to arbitration that would similarly have precluded enforcement of predispute arbitration agreements.

The respondents assert the petitioners’ contention that the act’s nonwaiver provision is limited to substantive rights cannot be squared with the statute’s broad proscription of waiver of “any right” and its explicit designation of the entitlement to bring an action in court as a “right.” They reason the act’s language explicitly brings the right to sue, “procedural” though it may be, within the scope of the nonwaiver provision, unlike the terms of other statutes whose nonwaiver provisions the Court has construed to apply only to substantive rights.

According to the respondents, the petitioners’ argument—that the nonwaiver provision’s statement that a purported waiver may not be enforced by a court or “any other person” must mean that Congress contemplated arbitration of act claims—is meritless. The respondents explain that “any other person” does not necessarily mean an arbitrator, and even if it did, there are many ways that an arbitrator might have occasion to consider whether a right under the act had been waived other than as a result of the enforcement of a mandatory predispute arbitration agreement. The respondents declare that the Supreme Court need not distort the clear meaning of the nonwaiver provision to give effect to the phrase “any other person.”
The respondents claim the ability to arbitrate does not satisfy the right to sue. According to the respondents, treating the right to sue as including the right to arbitrate ignores the substantial differences between litigation and arbitration that the Supreme Court’s recent decisions have described.

The respondents assert that the petitioners’ argument that enforcing the act’s nonwaiver provision will outlaw postdispute settlement or arbitration agreements involving claims under the act (or even offers to enter into such agreements) is unfounded. The respondents reason that, although the application of the provision to postdispute arbitration agreements is a question not presented by this case, distinguishing such agreements from predispute agreements would be consistent with the Court’s longstanding recognition that postdispute agreements stand on a different footing from agreements that purport to waive statutory rights before a controversy has arisen.

Suggesting such a distinction would be fully consistent with the act’s focus on the protection of consumers against predatory practices by credit repair organizations, the respondents say that concern is far less pressing when a consumer who has asserted a statutory claim against a credit repair organization (and is represented by counsel to pursue that claim) agrees to settle or arbitrate it rather than go forward with a suit in court. The respondents explain that such agreements, unlike predispute arbitration agreements, presuppose the existence of the right to sue rather than negate it. The respondents conclude the Supreme Court should not do violence to the language of act’s nonwaiver provision by reading it not to apply to the right to sue merely out of concern for the possible effect of its decision on postdispute agreements to arbitrate.

SIGNIFICANCE

If the Supreme Court holds the Credit Repair Organizations Act does not foreclose enforcement of predispute arbitration clauses in consumer contracts, consumers seeking vindication of their rights under the act will not be able to have trial by jury, will have severely limited rights of appeal, and will have limited prehearing discovery. However, the appeal of the speed, finality, and lower costs of arbitration may result in many if not all consumer repair organizations inserting arbitration clauses in their consumer contracts.

The Credit Repair Organizations Act recognizes that consumers can bring class actions. See 15 U.S.C. § 1679g(a)(2)(B). In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the Supreme Court held the Federal Arbitration Act preempts a California’s court’s holding that a class arbitration waiver is unconscionable under California law if it is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and if it is alleged the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. The Supreme Court reasoned that the California decision stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Federal Arbitration Act, including ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.

Should the Supreme Court hold the Credit Repair Organizations Act does not foreclose enforcement of predispute arbitration clauses in consumer contracts, the next question will be whether, under Concepcion, the arbitration clause can preclude class actions. If the Supreme Court rules in favor of the petitioners, it is possible credit repair organizations may include class action waivers in their arbitration clauses.

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When Are *Miranda* Warnings Required for Questioning of a Prisoner?

**CASE AT A GLANCE**

Randall Lee Fields, serving a prison sentence for sexual contact with a minor, sought a writ of habeas corpus on the ground that admissions he made to police officers who questioned him should not have been allowed into evidence because they violated his right against compelled self-incrimination. He claims that the failure of police interrogators to advise him, when he was in jail on an unrelated matter, of his rights under *Miranda v. Arizona* made those statements inadmissible. The trial court granted the writ and the Sixth Circuit affirmed. Michigan asks the Supreme Court to reverse, asserting that the Sixth Circuit improperly applied precedent in determining that Fields was in custody for *Miranda* purposes.

**Howes v. Fields**  
Docket No. 10-680

**Argument Date: October 4, 2011**  
From: The Sixth Circuit

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

**ISSUE**

Is a prisoner always “in custody” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), when the prisoner is isolated from the general prison population for questioning about conduct that occurred outside the prison?

**FACTS**

In 2002, Randall Lee Fields was convicted in a Michigan criminal trial of two counts of third degree sexual conduct and sentenced to a term of ten to fifteen years in prison. Prior to trial, Fields had moved to suppress an incriminating statement he made under police questioning while locked up in a county jail on an unrelated charge. The trial court denied the motion and admitted the statement in evidence.

In the jail serving a sentence for disorderly conduct, Fields was taken from his cell by a corrections official to a conference room in another part of the sheriff's department. The officer gave Fields no choice but to accompany him and did not tell Fields the purpose of his removal. Fields was dressed in a prison uniform but was not handcuffed or shackled. Once he was inside the room, its door was locked. Two armed sheriff's deputies, who did not work at the jail, questioned Fields about his relationship with a minor named Travis Bice. The officers did not inform Fields of his rights under *Miranda v. Arizona* to remain silent or to have counsel present at any interrogation. The session began at 7:00 p.m. and lasted seven hours, many hours beyond the normal bedtime for prisoners. Despite Fields having serious health problems that required an array of medications, including drugs to prevent rejection of an organ transplant, Fields was not given his regular evening medication until the next morning.

During the questioning, the officers several times told Fields that he could end the interview anytime he chose, but that it might take twenty minutes until he could return to his cell because a corrections officer would have to be summoned to escort him. Fields testified that he was told he could leave but that he felt he had to answer the questions. Fields never requested an attorney nor asked to be returned to his cell. One of the officers testified that Fields yelled at him, after which he told Fields not to behave that way and that he could return to his cell if he persisted in doing so. Fields claimed that an officer shouted at him. Asked if he engaged in sexual conduct with Bice, Fields initially denied doing so but subsequently admitted three instances of masturbation or oral sex with the youth.

On appeal Fields challenged the denial of his motion to suppress the statements and raised other issues, but the Michigan Court of Appeals affirmed the conviction. The court reasoned that compliance with *Miranda* was not required because its protections only apply to custodial interrogation; according to the court, Fields was not in custody as defined by *Miranda* and cases applying its rule. The Michigan Supreme Court denied Fields leave to appeal that decision. Next, Fields sought a writ of habeas corpus in federal district court, alleging that prison warden Carol Howes was incarcerating him in violation of the United States Constitution as a result of the ruling on the suppression motion. The district court granted the writ, reasoning that the state court unreasonably applied the United States Supreme Court decision in *Mathis v. United States*, 391 U.S. 1 (1968), and that the error was harmless. The United States Court of Appeals for the Sixth Circuit affirmed the district court ruling, holding that the state court decision was contrary to *Mathis* rather than an unreasonable application of that decision.
The Sixth Circuit rationale was that *Mathis* created a rule that “a Miranda warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e., questioned in a matter likely to lead to self-incrimination, about conduct occurring outside the prison.” The appellate court found support for its analysis in last year’s United States Supreme Court decision in *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010). According to the Sixth Circuit, *Shatzer* demonstrates that “faced with a factual scenario of an inmate being removed from his cell and being interrogated about an unrelated crime, the Supreme Court expressed no doubt that a Miranda warning was required.” In addition, it noted that “in finding that the defendant in *Shatzer* was in custody, the Supreme Court did not address the physical circumstances of the interrogation.”

**CASE ANALYSIS**

*Miranda v. Arizona* is one of the most important Supreme Court decisions spelling out constitutional requirements applicable to criminal cases. It implements the provision of the Fifth Amendment prohibiting the government from compelling a defendant to provide self-incriminating testimony. *Miranda* does so by limiting the admissibility in criminal trials of statements made to police or other governmental representatives. Although the Fifth Amendment had long been held to prohibit the admission of statements resulting from government use of actual force or threats of force, *Miranda* further restricted admissibility of some statements that were voluntary. It concluded that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals,” creating an inherently compulsive atmosphere that overpowers the will of the person being questioned in the same way that is done by actual compulsion.

According to *Miranda*, upon a timely pretrial motion no statement obtained during custodial interrogation is admissible “unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings. …” The police must advise a person before questioning of certain constitutional rights and obtain waivers of those rights before any statements are made, in order for those statements to be admissible in the government’s case against the person. *Miranda* requires that an individual undergoing custodial police questioning be told of his or her right to remain silent, and that any statement can be used against him or her in a court of law; of the right to have an attorney present at any questioning; and that the state will appoint an attorney for any person who wishes and is unable to afford counsel. These protections are required in all instances of questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

*Miranda* applies only to questioning of a person in custody. Custody occurs when there is a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest” such that a reasonable person would not have felt free to terminate the interrogation and leave. A court considering whether a person is in custody for *Miranda* purposes must look at the circumstances surrounding the questioning and make an objective determination of “how a reasonable man in the suspect’s position would have understood his situation.” This requires a careful assessment of matters such as the location of the interrogation, the number of police officers involved, whether the officers are armed or made a show of force, the use of any physical restraints, the nature and length of the questioning, whether the suspect came on his own in response to a police request or order, and whether he has been told that he may terminate the session or leave.

Among the circumstances to be considered in determining if there is custody for *Miranda* purposes is whether the place of the interrogation is one that is comfortable, familiar to, or controlled by the person being questioned. A suspect’s living room or private office is less likely to be found to be custodial than a police interrogation room or a prison, but the location is merely a factor to be considered and is not determinative of the question of custody. In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Supreme Court found that a parolee was not in custody in a police station when he responded to a police note asking him to contact them, came by himself to the station, was told that he was not under arrest but would be questioned about a burglary, and was informed that his fingerprints had been found at the scene of the crime.

Last year the Supreme Court decided a *Miranda* custody issue in *J.D.B. v. North Carolina*, 564 U.S. ___ (2010). In *J.D.B.*, the Court concluded that the age of a juvenile is a relevant factor in determining whether he was in custody in order to decide if his statements made pursuant to police questioning at his elementary school should have been admitted against him in juvenile delinquency proceedings. The *J.D.B.* Court quoted prior decisions as requiring a two-part test for custody under *Miranda*: “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.” The Court made clear that the subjective views of the interrogating officer or the suspect are irrelevant to the determination of custody. *J.D.B.* cautions against limiting the inquiry to specific matters, choosing instead to “examine all of the circumstances surrounding the interrogation.”

In the present case, the Sixth Circuit held that the trial court had failed to follow *Mathis v. United States*, which held *Miranda* applicable to questioning of a prison inmate about tax fraud, conduct occurring outside the prison. The appellate court viewed *Mathis* as establishing that *Miranda* warnings are required for the admission of a statement made by an incarcerated person removed from the general prison population and questioned about conduct outside the prison. The Court of Appeals reasoned that those circumstances create the impression that “the inmate has no choice but to cooperate.”

*Mathis* was serving a state sentence when federal government agents came to his prison to question him about possible tax fraud and elicited responses used as evidence against him on criminal tax fraud charges. The Court rejected the government’s arguments that *Miranda* was inapplicable because *Mathis* was in custody on another charge and because these matters much more frequently led to civil lawsuits rather than criminal charges. The Supreme Court found that the reason for being in custody was irrelevant to *Miranda* analysis and that the questioning was about matters that could lead to a criminal trial. The *Mathis* Court never discussed the circumstances surrounding the questioning but simply determined that the statement was inadmissible because of noncompliance with *Miranda*. Although *Mathis* appears to assume that any person incarcerated is in custody under *Miranda*, Michigan argues that custody was assumed by the parties in the case and the Supreme Court never decided the issue. By restricting the finding of custody
to questioning of incarcerated persons removed from the general population and questioned by officers from outside the jail or prison, Fields seeks a narrower rule than what the Court appeared to have created in Mathis.

Because this case arises from a habeas petition rather than on direct appeal, it is not enough for Fields to show that the Michigan court’s decision was wrong. Under the federal statute governing habeas petitions, the petitioner must show that the court’s decision causing his incarceration is based on a state court holding that is contrary to or an unreasonable application of clearly established United States Supreme Court precedent.

Michigan argues that the Sixth Circuit decision erroneously created an absolute rule that custody always exists if an incarcerated person is questioned about conduct occurring outside the institution and the individual has been removed from the general prison population for the interrogation. According to Michigan, such a rule is inconsistent with Supreme Court precedent because it fails to consider all the circumstances surrounding the making of a statement. Michigan relies on Maryland v. Shatzer, in which the Supreme Court held that a prisoner returned from interrogation to the general prison population for over two weeks is not in custody for Miranda purposes and that the inherently compulsive atmosphere which Miranda warnings are meant to dissipate would no longer exist under those circumstances.

Shatzer was serving a prison sentence when police officers came to his institution, once in 2003 and twice in 2006, removed him each time to a private room for questioning, and asked about his involvement in a crime unrelated to the conviction that caused him to be in prison. All three times, the officers complied with Miranda. In 2003, Shatzer invoked his right to counsel and the questioning ceased. In 2006, he did not invoke his rights to counsel or silence. Instead, Shatzer waived his rights and made statements, which incriminated him. The Supreme Court limited prior law that held that a valid waiver of Miranda could not be shown after an invocation of the right to counsel if the police restarted questioning by creating a two-week limit to the preclusion on restarting questioning after a person invokes his right to counsel subsequent to being read his Miranda rights. As the Shatzer Court observed: “[L]awful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda. … Interrogated suspects previously convicted of crime live in prison. When they are released to the general prison population, they return to their accustomed surroundings and daily routine. They retain the degree of control they had over their lives prior to the interrogation. [They] are not isolated with their accusers.” Miranda custody does not exist just because the suspect is incarcerated and subject to the types of restrictions on freedom of movement that are common incidents of being prisoners.

Michigan contends that having Fields accompanied from his cell to the conference room and back, and the locking of the conference room door, were common attributes of prison management and thus did not create the police-dominated atmosphere that Miranda deemed necessary to counter. Further, the undisputed testimony that the deputies told Fields that he was free to return to his cell when he wished demonstrated that a reasonable person in Fields’ situation would feel free to terminate the interrogation, so that Miranda warnings were not required. Finally, Michigan argues that the nature or location of the conduct about which the officers question a suspect is irrelevant to the determination of whether he was in custody when interrogated.

Fields asserts that the Sixth Circuit decision was correct and should be affirmed. He claims that Supreme Court precedent from several decisions, taken together, clearly establish that he was in custody when interrogated and thus his statements should have been suppressed because they did not comply with Miranda. In addition to relying on Miranda, Mathis, and Mathiason, Fields also relies on Illinois v. Perkins, 496 U.S. 292 (1990). In that case the Court held that the questioning in a prison cell of an inmate by an undercover informant whom the inmate did not know was acting on behalf of the state did not require Miranda warnings for admission of the inmate’s admissions. In contrast to the situation in Perkins, Fields points out that he was removed from his cell to be interrogated by persons he knew to be government agents, differences that he claims require compliance with Miranda before admitting any statements. Fields states that the Sixth Circuit has applied clearly established Supreme Court precedent and enunciated a clear and easily applied rule to determine when prison questioning is custodial and requires Miranda warnings and a showing of waiver.

SIGNIFICANCE

Frequently, police question individuals who are in jail or prison about crimes other than those responsible for their current deprivation of liberty. In many instances, people serving time may have knowledge of or been involved in other crimes or have information about other people’s criminal behavior. The rule adopted by the Sixth Circuit bars admission of any self-incriminating statement made during the interrogation of the incarcerated person, without compliance with Miranda, if the officers come from outside the jail or prison and the prisoner is questioned in isolation about conduct occurring outside the institution. Because common interrogation techniques call for conducting questioning in private, the appellate court’s rule would almost always require compliance with Miranda when police go to a correctional institution to question an inmate, except if the subject of the interrogation related to possible crimes at the institution. Thus a decision clarifying when police interrogation of an incarcerated person qualifies as “custody” would affect many trials and would provide guidance to police regarding when they need to comply with Miranda when questioning suspects in jails or prisons.

The Supreme Court could decide this case without reaching the merits of the appellate court’s decision by determining that the result was not required by clearly established precedent and thus that habeas relief was inappropriate. If the Court does reach the merits, the result is likely to be a reversal of the ruling granting Fields the writ of habeas corpus. The Sixth Circuit rule is clear and would be easy to carry out and would provide clear guidance to police agents questioning incarcerated people. However, such a rule ignores the repeated Supreme Court precedent, recently reiterated in J.D.B. and Shatzer, that custody is determined not by any specific facts alone but instead by a consideration of all the circumstances surrounding an interrogation. The likely reasoning of the Court would be that being removed from the general prison population and being questioned in private do not by themselves demonstrate custody but rather are among the factors that should be evaluated in determining if the inmate was in custody so that compliance with Miranda was required before admitting his statements.

The Mathis decision provides strong support for Field’s argument because that decision did not consider any surrounding facts regarding the questioning in determining that Mathis was in custody while
incarcerated, but it never explicitly stated that a jail or prison inmate is always in custody for Miranda purposes. The other cases relied upon by Fields do not support the per se rule he advocates. Mathiason clearly stands for the proposition that custody is determined by a totality analysis rather than solely on the location of the questioning. Perkins demonstrates that in some instances an incarcerated person will be found not to be in custody, although that decision could be limited to situations where the suspect does not know he is speaking to a police agent and thus cannot perceive any governmental compulsion. Shatzer determined that a prisoner was not in custody when in the general prison population, but the decision never held that being removed from the general prison population for questioning always puts the inmate being questioned in custody.

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When, if Ever, Will Attorney Error Excuse a State Court Procedural Default?

CASE AT A GLANCE

Cory R. Maples is a death-sentenced Alabama prisoner who claims that his trial lawyers rendered ineffective assistance. Maples tried to present these claims in his state postconviction petition, but the petition was dismissed. Copies of the dismissal order were sent to Maples's lawyers in New York but were returned undelivered because the lawyers had moved to new jobs. As a result, Maples's appeal was untimely filed in the state courts, and the federal courts ruled that his claims were procedurally defaulted. Maples now claims that his attorneys abandoned him, and that the abandonment constitutes cause to excuse his procedural default.

Maples v. Thomas
Docket No. 10-63

Argument Date: October 4, 2011
From: The Eleventh Circuit

by Kathy Swedlow
Thomas M. Cooley Law School, Lansing, MI

ISSUE

Did the Eleventh Circuit properly hold that there was no “cause” to excuse any procedural default where an Alabama capital prisoner was blameless for the default, the state’s own conduct contributed to the default, and the prisoner’s attorneys of record were no longer functioning as his agents at the time of any default?

FACTS

Cory R. Maples is an Alabama capital prisoner, sentenced to death for the July 1995 murders of his two friends, Stacy Alan Terry and Barry Dewayne Robinson II.

At trial, Maples was represented by two appointed lawyers with minimal experience, who Maples claims mounted an “incoherent and inconsistent defense.” For example, despite the fact that a successful voluntary intoxication defense could have resulted in a conviction less than capital murder and that although the state presented evidence that Maples had been drinking heavily and using drugs on the night of the murders, trial counsel presented no evidence in support of that defense. Instead, counsel argued at the beginning of trial that Maples might not have committed the crime at all and might have confessed “to protect someone”; by the end of the trial, counsel conceded that Maples had intentionally killed the victims. At the penalty phase, counsel admitted to the jury that he was “stumbling around in the dark” and failed to present a complete picture of Maples’s history of drug and alcohol use. By a 10-2 vote, the jury recommended a death sentence; under Alabama law, Maples would have been spared the death penalty had one more juror voted in his favor. After reviewing the jury’s recommendation, the judge sentenced Maples to death.


Maples then commenced his state postconviction proceedings, represented pro bono by two New York-based attorneys, Clara Ingen-Housz and Jaasi Munanka. Both attorneys worked for Sullivan & Cromwell, a New York firm; neither attorney was licensed to practice law in Alabama, but both were admitted pro hac vice for the purposes of litigating Maples’s postconviction petition. As required by the then-extant rule governing Alabama pro hac vice admissions, Ingen-Housz and Munanka associated themselves with an Alabama-licensed attorney, John Butler. While the admission rule required Butler to accept “joint and several responsibility” for the case, Butler’s only role in the case was to help Ingen-Housz and Munanka with their initial admission. Thereafter, Ingen-Housz and Munanka assumed sole responsibility for Maples’s case.

On August 1, 2001, all three attorneys filed a state postconviction petition on Maples’s behalf, raising claims of ineffective assistance of counsel and requesting discovery. The state responded with a motion to dismiss, which was denied. For the next year and a half, Maples’s petition remained pending in the trial court. Then, by order dated May 22, 2003, the trial judge dismissed the petition in its entirety.

The clerk of court sent copies of the trial court’s dismissal order to Ingen-Housz and Munanka in New York, and to Butler in Alabama. However, Ingen-Housz and Munanka had both left Sullivan & Cromwell by that time, and neither attorney continued to represent Maples. Neither Ingen-Housz nor Munanka had formally withdrawn from the case, nor had either attorney ensured that Marc De Leeuw—a Sullivan & Cromwell partner who worked with Ingen-Housz and Munanka on the case, but who had not sought pro hac vice admission in Alabama—would file a substitution of counsel form. In contravention...
of Sullivan & Cromwell’s internal policy, the clerk’s mailing was not sent along to De Leeuw, but was instead returned to the clerk. Both envelopes were marked “return to sender” and Ingen-Housz’s envelope additionally was marked with a notation indicating that she had left the firm. Upon receipt of the returned mailing, the clerk of court did not take any additional action, despite the fact that both Ingen-Housz’s and Munanka’s pro hac vice applications listed additional contact information, i.e., home addresses and personal telephone numbers. Butler, for his part, did nothing with the order, thinking that Ingen-Housz and Munanka would handle the appeal.

Under Alabama law, Maples would have had until July 7, 2003, to file his notice of appeal. That date passed. In mid-August, the state’s attorney sent a letter to Maples, informing him of the dismissal of his state postconviction petition, and alerting him that the time to file a federal habeas corpus petition would soon expire. Maples immediately contacted his stepmother, who in turn contacted Sullivan & Cromwell. De Leeuw and Butler then moved the trial court to reissue its order denying the postconviction petition so that a timely notice of appeal could be filed, but the motion was denied. The two attorneys then filed a petition for a writ of mandamus in the Court of Criminal Appeals, requesting that the appellate court grant permission to appeal. That request was also denied. Ex parte Maples, 885 So. 2d 845 (Ala. Crim. App. 2004).

In the meantime, Maples filed a petition for a writ of habeas corpus in the federal court, raising his ineffectiveness claims and requesting that they be reviewed on the merits. In an unpublished opinion, the district court denied the petition, finding that Maples’s claims were procedurally defaulted and that he could not show cause and prejudice for his default. The Eleventh Circuit affirmed. Maples v. Allen, 586 F.3d 879 (11th Cir. 2009). Specifically, the court explained that while the Alabama state courts had, in the past, permitted out-of-time appeals in the state postconviction context, those appeals were only permitted where the court had specifically assumed a duty to notify a petitioner of the dismissal of his petition and had then neglected that duty. Ex parte Marshall, 884 So. 2d 900 (Ala. 2003).

In dissent, Judge Barkett argued that Maples’s claims should have been reviewed on the merits because they were not barred by an “adequate” state law rule. Specifically, Judge Barkett explained that Marshall—the same case cited by the majority in its analysis as to why the state rule was adequate—only purported to require a court to assume a duty to notify a petitioner of a dismissal and then neglect that duty. “That may be the rule that Marshall suggested; but it is not the rule that Marshall applied.” Instead, Judge Barkett explained, the state courts had permitted the appeal in Marshall on facts “indistinguishable” from those in Maples’s case, with the only distinction being that “the Marshall court granted an out-of-time appeal, and the Maples court did not.”

The Supreme Court granted certiorari on March 21, 2011.

CASE ANALYSIS

Under long-standing habeas law, a federal court is barred from reviewing a habeas petitioner’s claim when that claim has been procedurally defaulted in the state courts. Coleman v. Thompson, 501 U.S. 722 (1991). To assess whether the claim has been defaulted, a federal court will look to see whether the state’s procedural rule is both “adequate” and “independent.” To be considered adequate, the state rule must be “firmly established and regularly followed” by the state courts. E.g., James v. Kentucky, 466 U.S. 341 (1984). To be considered independent, the rule must be independent of federal law. E.g., Kansas v. Marsh, 548 U.S. 163 (2006). If the bar is both adequate and independent, the petitioner must show cause and prejudice for his default, or a miscarriage of justice.

“The cause inquiry … turns on events or circumstances external to the defense.” Banks v. Dretke, 540 U.S. 668 (2004) (citations omitted). Thus, “interference by officials” constitutes cause, as does ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478 (1986). However, since “there is no constitutional right to an attorney in state post-conviction proceedings … a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” Coleman (citations omitted). In other words, a habeas petitioner “must bear the risk of [an] attorney error [during state post-conviction] that results in a procedural default.”

Maples does not take argument with this basic framework, nor does he argue—as did the dissent in the Court of Appeals below—that the state law rule applied in his case was not “adequate.” Instead, Maples makes two basic arguments to try to establish cause in order to set aside his default.

First, Maples argues that the state’s “mishandling” of the dismissal notice is the sort of “interference” that will meet the cause standard, insofar as the court clerk failed to make any attempt to try to find Ingen-Housz and Munanka after the dismissal notices were returned by Sullivan & Cromwell. In support, Maples relies on an unusual source: Jones v. Flowers, 547 U.S. 220 (2006). Jones was a civil case involving a tax sale of private property, where the state had twice sent notice to the property owner to inform him that his taxes were delinquent and that his property was subject to sale. Both notices were returned undelivered, and notice of the sale was subsequently placed in the newspaper; the property was eventually sold. The original homeowner then sued the state and the new homeowner, alleging that the state’s failure to provide him with adequate notice deprived him of his due process rights.

On its review, the Court reiterated that due process does not demand actual notice and that notice will be deemed “constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent.” However, the Court also acknowledged that sufficiency of notice “will vary with the circumstances and conditions,” and that “it [was] not too much to insist that the State do a bit more to attempt to let [Jones] know about [the sale] when the notice letter addressed to him [was] returned unclaimed.” Thus, the Court concluded that the state should have taken other “reasonable steps” to ensure adequate notice to the original homeowner.

Maples asserts that the state’s treatment of the returned mail in his case is even more egregious than that in Jones, given his individual interest in pursuing his claims relative to the state’s interest in not taking additional steps to try to get the dismissal notice to its intended recipient. In addition, Maples notes that the homeowner in Jones received more notice than he did, because in Jones, the state sent the two mailings through certified mail (thus guaranteeing six different attempts at delivery, three for each individual mailing) and published a notice in the local newspaper. Maples thus suggests that, following Jones, the “reasonable steps” that could’ve been taken in
his case included trying to contact Ingen-Housz and Munanka using the additional contact information on their respective pro hac vice applications—or even contacting Maples himself.

Second, Maples argues that his “abandonment” by Ingen-Housz and Munanka constitutes cause, seeking, as he must, to distinguish his case from Coleman v. Thompson. In Coleman, state postconviction counsel had filed a state court notice of appeal three days late, which had the effect of barring any later federal review of the substantive habeas claims. Because Coleman’s claims had been defaulted pursuant to an adequate and independent state law rule (one requiring timely filing of notices of appeal) and because Coleman could not show cause, or “circumstances external to the defense” for his default (Coleman’s attorneys were squarely at fault for the late filing), the Court held that the federal courts were barred from reviewing Coleman’s claims.

Instead, Maples compares his case to Holland v. Florida, 130 S. Ct. 2549 (2010). Holland involved a request by a Florida capital prisoner to equitably toll the statute of limitations for the late filing of a federal habeas petition, where appointed state postconviction counsel failed to respond to the prisoner’s many requests to keep him informed of the status of the state court case, failed to tell the prisoner that he had lost his case in the state courts, and then failed to file a habeas petition. The prisoner argued to the federal courts that he had been diligent in trying to pursue his case in the state and federal courts, but the federal court of appeals held regardless of the prisoner’s diligence, absent a showing of “bad faith, dishonesty, divided loyalty, mental impairment, or the like” on the part of counsel, equitable tolling was not warranted. The Supreme Court rejected that reasoning, and explained that “[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” Thus, the Court remanded for determination as to whether the prisoner demonstrated the sort of “exceptional circumstances” required for equitable tolling.

Comparing Coleman and Holland, Maples argues that “not all attorney misconduct is equal.” Specifically, Maples contends that when an attorney is no longer functioning as an agent of his client, then the attorney’s conduct cannot be attributed to the client. And, as Maples does note, by the time his state court petition was dismissed, both Ingen-Housz and Munanka had left Sullivan & Cromwell and were employed in jobs that specifically precluded them from working on his—or most any other—case. The prime difficulty with this argument is that Maples was represented by two other attorneys during the critical time frame: Alabama local counsel John Butler and Sullivan & Cromwell partner Marc De Leeuw. And, although De Leeuw had not yet been admitted pro hac vice in Alabama, Butler was licensed in Alabama. Maples’s only response to this issue is to request a remand for an evidentiary hearing to definitively resolve the question of which attorneys had developed a relationship with Maples, and when.

For its part, the state begins its brief by comparing the facts of Maples’s case to the facts of Coleman. Indeed, on the surface, the cases appear to be quite similar. But a simple citation to Coleman doesn’t cleanly resolve the issues here, nor do the state’s assertions that Maples is “unquestionably guilty” and that “[h]e has received some form of judicial review of every claim he has made.” The core problem is that it is difficult to compare the acts of attorneys who miscalculate the time for a particular filing (as was the case in Coleman) to attorneys who leave their firm and seemingly abandon their capital client (as Maples argues happened here). The state seems to recognize as much, and throughout the remainder of its brief, argues that in spite of Ingen-Housz and Munanka leaving Sullivan & Cromwell, Maples was ably and consistently represented by both Butler and De Leeuw.

Turning to Maples’s claim that the clerk’s conduct constitutes cause, the state first contends that the claim is waived because it was not argued below. Second, the state claims that Ingen-Housz and Munanka never receiving the notice is irrelevant, because Butler did. In the state’s view, all the Alabama rules require is that “counsel of record” be served with a copy of the court’s order. While there is no question that Ingen-Housz and Munanka never received the order, the state argues that Butler’s admitted receipt of the order satisfies the relevant court rule, and renders Jones “irrelevant.” As the state correctly notes, Jones involved a situation where all of the mailed notices were returned to the court clerk, and so the clerk would have been “reasonably certain” that no notice had been given to the homeowner. In contrast, only two of the three notices issued in Maples’s case were returned, placing the clerk in a very different position.

Next, the state turns to Maples’s claim that his attorneys abandoned him, arguing that Maples was represented throughout his postconviction litigation by a “team of lawyers,” and that the fact that two of those lawyers left the team does not excuse his procedural default. Specifically, the state points to the following text from Maples’s habeas corpus petition in support of its contention that Maples was represented the entire time:

Sullivan & Cromwell attorneys continued in the pro bono representation of Mr. Maples. Several additional attorneys from Sullivan & Cromwell, including undersigned attorney Marc De Leeuw, assumed responsibility for the matter. Since Judge Thompson had ruled that the matter had been sufficiently pled, Mr. De Leeuw and other attorneys at Sullivan & Cromwell continued to prepare for the anticipated evidentiary hearing.

Accordingly, the state argues that a remand is unnecessary because it is clear, from Maples’s own submissions, that he was consistently represented throughout the state court proceedings.

SIGNIFICANCE

In 1992, Justice O’Connor—writing for the Coleman majority—began by declaring that “this is a case about federalism.” She then went on to explain that if the federal courts did not properly defer to the state courts and therefore demonstrate the proper respect for federalism, federal habeas would provide an “end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws.”

This case is also about federalism, but it is also about the “perfect storm” of what can happen in a capital case. Alabama’s scheme for the appointment of counsel for capital prisoners—at trial, on appeal, and in postconviction proceedings—is woeful. Amici paint a stark picture of Alabama’s indigent defense system, variously describing it as “deeply flawed,” “broken,” and “inadequate at every stage of the process.” At the time of Maples’s capital trial, fees for capital trial counsel
were capped at $1,000 for all out-of-court work. There was, and is, no requirement in Alabama that capital trial counsel have specific training, beyond five years of generic criminal practice experience. There was, and is, no statewide oversight for the indigent defense system, resulting in different standards and rules being applied in courtrooms. (For additional details, readers are directed to Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report (2006), prepared by the American Bar Association and available on the ABA’s website.)

Historically, the state’s solution for these many deficiencies has been to rely on out-of-state attorneys like Ingen-Housz, Munanka, and De Leeuw. According to the state, the vast majority of Alabama’s capital prisoners are represented by lawyers from outside the state (such as those in this case, or those who work with The Innocence Project) and lawyers from Alabama’s Equal Justice Initiative (a private nonprofit within Alabama). In the state’s view, the involvement of these non-Alabama attorneys is a net positive, because it means that Alabama’s indigent capital prisoners receive adequate representation. In Maples’s view—and the view of his amici—the abdication of the state’s responsibility to ensure adequate representation of indigent capital prisoners creates necessarily a situation ripe for the kind of error that happened here. And, given the bleak state of Alabama’s indigent defense system, it’s a wonder that these errors don’t happen more often.

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FOURTH AMENDMENT

Does the Fourth Amendment Permit a Jail to Strip Search All Inmates, Including Inmates Arrested for Minor Offenses?

CASE AT A GLANCE

Albert W. Florence was arrested on a warrant for failure to pay an outstanding fine. After the arrest, Florence was taken to two different jails while he waited for a judge to review the warrant. Each jail strip-searched Florence during intake. After a judge dismissed the warrant, Florence sued both jails. Florence claims that the jails violated his Fourth Amendment right against unreasonable searches and seizures when they strip-searched him following his arrest for a minor offense without reasonable suspicion that he presented a security risk to the jails.

Florence v. Board of Chosen Freeholders
Docket No. 10-945

Argument Date: October 12, 2011
From: The Third Circuit

by Brooks Holland, Gonzaga University School of Law, Spokane, WA
and Michelle Trombley, Rodriguez & Associates, P.S., Kennewick, WA

ISSUE

Does the Fourth Amendment require a jail to articulate a reasonable suspicion of a security risk to strip search a person arrested for a minor offense, or may the jail adopt a policy of strip searching all arrestees?

FACTS

A New Jersey state trooper stopped a vehicle driven by petitioner Albert Florence’s wife, in which Florence was a passenger. After a roadside investigation, the trooper arrested Florence on a bench warrant from Essex County. The warrant charged Florence with a nonindictable form of contempt for failure to pay a fine in a case where Florence had pleaded guilty to hindering prosecution. Florence protested to the trooper that he had paid the fine, but the trooper transported Florence to respondent Burlington County Jail (“Burlington”).

According to Florence, officers at Burlington subjected him to a strip and visual body-cavity search during the intake process. This search, Florence asserted, required Florence to remove all of his clothing, open his mouth and lift his tongue, lift his genitals, and shower. Florence remained at Burlington for six days, until he was transferred to respondent Essex County Jail (“Essex”).

Florence averred that Essex subjected him to another strip and visual body-cavity search. This search resembled the strip search at Burlington, but it allegedly occurred in the presence of four other inmates and required Florence to squat and cough while facing away from the inspecting officers. The search ended with Florence having to shower while two officers watched. After one day at Essex, Florence was released when the contempt charge was dismissed.

Florence sued Burlington and Essex, along with various individuals and municipal entities, under 18 U.S.C. § 1983. Florence claimed that the strip search procedures at both jails violated the Fourth Amendment, because neither jail reasonably suspected that Florence presented a security threat. The district court granted class certification on Florence’s strip search claim and concluded that “blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional.” The district court therefore granted Florence’s motion for summary judgment.

Burlington and Essex appealed to the U.S. Court of Appeals for the Third Circuit. See Florence v. Board of Chosen Freeholders, 621 F.3d 296 (3rd Cir. 2010). The Third Circuit “assume[d] detainees maintain some Fourth Amendment rights against searches of their persons upon entry to a detention facility.” Yet, the Third Circuit also observed that “privacy is greatly curtailed by the nature of the prison environment,” and “[p]rison administrators … should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and security.”

Balancing concern for jail security against the nature of the strip searches challenged by Florence, the Third Circuit upheld the jails’ strip search practice, accepting the jails’ judgment that recent arrestees present a security risk. Moreover, the Third Circuit emphasized that the jails’ blanket policy “removes officer discretion in selecting which arrestees to [strip] search,” and thus avoids potential equal protection or abuse concerns. The Third Circuit therefore reversed the district court’s grant of summary judgment.
Florence petitioned the U.S. Supreme Court for a writ of certiorari. The Supreme Court granted the petition on April 4, 2011.

CASE ANALYSIS

This case involves a civil lawsuit challenging the authority of jails under the Fourth Amendment to strip search all entering inmates, including persons arrested for minor offenses. The Fourth Amendment to the U.S. Constitution provides in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Florence claims that Burlington and Essex unreasonably searched his person by strip-searching him without any individualized suspicion that he presented a security risk.

Florence begins his challenge of the strip search practice by asserting that the secure jail setting where the strip searches occurred did not exempt respondents from “ordinary Fourth Amendment principles.” On the contrary, Florence was a recent arrestee, had not appeared before a judge on the arrest, and was not confined as a convicted prisoner subject to lawful punishment. Florence accordingly claims that he retained a Fourth Amendment right against unreasonable searches of his person.

Burlington and Essex respond that detained individuals can assert no Fourth Amendment rights against institutional security measures in a jail facility. Founding-era practices, Essex observes, demonstrate that “before and after the Amendment was adopted, it was well-established that inmates entering prisons or jails enjoyed no claim of privacy against intake searches.” Essex offers this history as relevant to the “applicability [of the Fourth Amendment] in a particular case.”

Under modern case law, the Fourth Amendment applies to searches only of places where a person’s expectation of privacy is objectively reasonable. Respondents argue that the Supreme Court, recognizing the paramount security concerns in jail and prison facilities, has circumscribed constitutional rights of inmates that prove inconsistent with penological needs. Thus, Burlington advocates, “[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.”

Respondents ask the Supreme Court to limit challenges of strip search practices to alternative legal options that would interfere less with the local judgment of jail officials. For example, Essex suggests that Florence could bring a false arrest claim asserting the strip search as damages. Florence also “may challenge searches inconsistent with ‘substantive due process,’” such as “‘arbitrary and purposeless’ searches for ‘the purpose of punishment.’” Finally, states or localities may protect against strip search practices more robustly than federal law provides, or exempt minor offenses from arrest altogether.

Florence counters that his admission to a local jail facility did not vitiate his essential Fourth Amendment right to privacy in his own body, which includes a basic level of “dignity.” Rather, any reduced expectation of privacy Florence experienced in this jail setting related to the reasonableness of this strip search practice, not to whether Florence had a right against unreasonable searches in the first place.

Addressing this substantive Fourth Amendment argument, Florence asserts that even in jail, a strip search proves unreasonable absent individualized suspicion of a security risk, which Florence did not present. These searches, Florence explains, “intrude on the very core of the personal dignity protected by the Fourth Amendment.” Florence cites studies identifying the emotional trauma of strip searches, particularly for individuals such as sex offense and domestic violence victims and persons with medical conditions.

Florence also highlights the “astonishing” number of “trivial offenses” for which individuals could be strip-searched under respondent’s position. Examples from the certified class include car equipment violations, moving violations, parking violations, and bicycle violations. Florence cites examples from other jurisdictions, such as arrests for eating a sandwich on the D.C. Metro, missing a child support hearing, and trespassing at an anti-war protest. According to Florence, a blanket strip search practice constitutes an “invasion of privacy of the first magnitude.”

Florence contends that respondent’s security interests in uniform strip searches do not outweigh this individual privacy interest. Jail officials already have substantial authority to search inmates and their property. Additional measures short of a blanket strip search policy, Florence adds, readily can identify potential security risks justifying the greater intrusion of a strip search. For example, jail officials may consider the nature of the arrest charge or evidence, and the arrestee’s conduct or associations. Advancing technology, such as metal detectors and body orifice-scanning chairs, further can ensure jail officials’ ability to identify security risks.

In Florence’s view, respondents’ generalized concern that any arrestee plausibly could smuggle contraband into jail exaggerates the security threat, and cannot outweigh the severe privacy intrusion of a strip search. Florence claims that “every relevant division of the U.S. Department of Justice concurs,” along with eighteen state legislatures and a majority of the lower courts that have addressed the issue.

Burlington and Essex both acknowledge that a strip search implicates important personal autonomy interests. Burlington, however, challenges Florence’s “overgeneralization of ‘strip searches,’” and alleges that Florence “fails to distinguish the actual practice at issue here from the more intrusive, more public, or apparently gratuitous procedures” that his argument invokes. Florence, Burlington argues, only was “kwelled,” which Burlington characterizes as a “visual observation” for hygienic and security purposes.

Respondents also emphasize that traditional privacy interests are reduced substantially in a jail or prison. In this context, respondents contend that the Supreme Court’s decision in Turner v. Safely, 482 U.S. 78 (1987), requires Florence to prove that respondents’ strip search practice does not “reasonably relate to legitimate penological interests.” This test, respondents argue, appropriately defers to jail officials’ judgment about institutional security. Respondents continue that the Turner test does not turn on the state’s authority to punish, and thus it applies equally to pretrial detention.

Reviewing case law, institutional experience, and evidence from Essex’s own expert witness, respondents deduce that “requiring reasonable suspicion before searching incoming inmates prevents jails from detecting contraband.” Respondents therefore argue that “[u]nder Turner, the searches at issue are constitutional because they are rationally related to [Respondents’] important penological goals of securing the health, safety, and security of inmates and staff.”
Burlington and Essex argue alternatively that the strip searches proved lawful under *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell*, the Supreme Court upheld a policy at a federal detention center that required all inmates to be strip-searched following contact visits. According to the *Bell* Court, jail officials reasonably concluded that strip searches of all inmates were necessary to prevent visitors from introducing contraband, and that this interest outweighed inmates’ privacy interests.

Respondents reason that the strip search practices challenged by Florence sufficiently resemble *Bell* in scope, manner, place, and justification to be upheld under the same rationale. Respondents particularly challenge the credibility of Florence’s minimization of the security risks. “These arguments,” Essex alleges, “fly in the face of the unrebutted showings … that contraband is recovered on admission, that misdemeanants present no lesser risk, that intermingling between inmates before intake heightens the risks, that misdemeanants would be recruited to smuggle if not subject to search, and that searching all new inmates is necessary effectively to stop the flow of contraband.” Respondents thus argue that “the privacy intrusion occasioned by the intake searches at issue is outweighed by the jails’ institutional interests.”

Essex adds its own argument for affirmance. When Florence arrived at Essex for intake, he arrived as a transfer from Burlington, another jail facility. “Transferees,” Essex argues, “have greater opportunity to smuggle contraband than individuals confined immediately after arrest.” Essex argues that its strip search of Florence therefore satisfied *Turner* and *Bell* on this independent ground.

Florence attempts to distinguish both *Bell* and *Turner*. First, Florence argues that the inmates in *Bell* “had a lessened expectation of privacy because they had no constitutional right to engage in contact visits.” Second, “the government’s interest in conducting the search was far greater in *Bell* than in this case because the policy in *Bell* addressed a far greater risk of smuggling” following planned contact visits with outsiders. In “stark contrast” to *Bell*, Florence emphasizes in his reply brief, respondents’ interest in jail security “is advanced only trivially by strip searching minor offenders.” This “hypothetical” interest “does not remotely justify the government subjecting every single person to the unique, dehumanizing degradation of a strip search.” Florence adds, “suspcionless strip searches are unconstitutional even under the deferential standard of *Turner*.” “[D]ereference,” Florence’s reply brief notes, “is not abdication.”

The numerous amicus briefs highlight the gravity of the security and privacy issues argued by Florence and respondents. These briefs cover a wide range of interested amici supporting both sides, including social science experts, medical experts, governments, corrections officials, and legal associations.

The United States, for instance, submitted an amicus brief in support of respondents expressing concern that Florence’s proposed standard for strip searches will prove unworkable in reality and inadequate to address the security and health risks in jail. Similar concerns regarding the practicality of Florence’s position appear in almost every amicus brief supporting respondents. For example, amicus briefs supporting respondents filed by governmental entities argue that the reasonable suspicion policy urged by Florence will result in unending litigation. Corrections officials assert that Florence’s position will result in increased contraband entering jails, which will compromise staff and inmate safety. Yet, this concern is not universal among jail officials, as a brief filed in support of Florence authored by corrections professionals indicates that suspicionless strip searches for minor offenses are not necessary to ensure security or health in jails.

Florence’s amici, for the most part, rebut respondents’ proffered justifications for a reasonable suspicion standard on a more detailed level, according to each of the amici’s area of expertise. For instance, respondents, along with many of their amici, insist that gang identification is a legitimate governmental interest served by a blanket strip search policy. The amicus brief filed by the Academics on Gang Behavior on behalf of Florence seeks to undermine this rationale by elucidating the purpose of gang tattoos as a readily visible communication of gang affiliation. This purpose conflicts with respondents’ assertion that gang tattoos would be found only during a strip search. Other amici attempt to buttress Florence’s argument that strip searches can severely traumatize certain individuals.

Amicus briefs from several legal associations filed in support of Florence argue that *Bell* was very fact specific, involving planned contact visits with outsiders, and recent arrestees for minor offenses do not present the same security risks. These amici also seek to dispel respondents’ assertion that a reasonable suspicion standard is unworkable, pointing to the ease with which it is applied in other contexts. These amici also cite to the American Bar Association’s proposed standards, current law in New Jersey, American Correctional Association policy, Federal Bureau of Prisons policy, and Immigration and Customs Enforcement policy, which all require individualized suspicion for certain strip searches. Some of respondents’ amici take issue with this characterization, however, and argue that these laws and policies are either misinterpreted, taken out of context, or simply should not be considered.

**SIGNIFICANCE**

Florence does not contend that a jail strip search requires a warrant or even probable cause to prove reasonable. Rather, Florence argues that individualized “reasonable suspicion,” a lower standard than probable cause, must justify a strip search. Several lower courts have required this individualized reasonable suspicion before jails may strip-search arrestees. But, the Third Circuit in this case, as well as the Ninth and Eleventh Circuits, all have upheld suspicionless strip search practices in jails. The Supreme Court is being asked to resolve this conflict.

The Supreme Court could decide the case along several different lines. In the broadest win for respondents, the Supreme Court could rule that jail inmates enjoy no legitimate expectation of privacy protected by the Fourth Amendment. This decision would likely end Florence’s Fourth Amendment claim against respondents, and also would significantly limit future Fourth Amendment claims concerning jail searches of inmates. Inmates would be left to alternative legal remedies governing strip searches, such as due process claims for abusive searches, or state or local law.

If the Supreme Court instead concludes, as the Third Circuit did, that a jail inmate retains Fourth Amendment privacy rights in his or her own body, the Court will need to analyze the reasonableness of respondents’ strip search practice. Even still, the Supreme Court could rule broadly for respondents if it decides that courts should
defer to jail officials’ judgment about institutional security risks, and that these risks outweigh inmates’ privacy expectations while in jail. This decision would permit, but not require, jails to adopt blanket strip search policies that do not require any individualized proof that an inmate presents a security risk.

By contrast, Florence may prevail if he persuades the Supreme Court that a strip search implicates core privacy interests and that individualized evaluation of inmates will not unduly interfere with jail security. This decision could result in the Supreme Court affirming summary judgment for Florence, unless the Court concludes that disputed questions of fact necessitate a trial on whether respondents reasonably suspected that Florence presented a security risk. A decision for Florence, however, still may authorize strip searches of most inmates, because even under Florence’s own standard, jails generally may infer a security risk from persons arrested for violent or dangerous crimes or crimes involving contraband risks, such as drug offenses.

The Supreme Court also could decide this case more narrowly. Burlington does not appear to agree that it subjected Florence to an unrestrained strip search, but rather a type of intake “observation.” If the Supreme Court agrees, it could decide only that a limited suspicionless strip search, involving visual inspection of an undressed inmate, proves reasonable under the Fourth Amendment. The Supreme Court thus would leave for another day the question of whether more intrusive strip searches of inmates, such as body-cavity searches, require individualized suspicion.

No matter what the outcome, the Supreme Court may clarify or even revise its Fourth Amendment jurisprudence concerning the privacy interests of detainees held in secure environments. Oral argument may reveal how broadly or narrowly the justices may plan to rule on Florence’s claim.

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What Is the Cutoff Date for Determining When Supreme Court Cases Qualify as Clearly Established Federal Law in Federal Habeas Corpus Proceedings?

CASE AT A GLANCE

Petitioner Eric Greene is a state prisoner who sought federal habeas relief for a Confrontation Clause violation that occurred when his codefendants’ redacted statements were introduced against him at trial. After the last non-discretionary state court decision affirming his direct appeal on the merits, but before Greene’s conviction became final on direct appeal, the Supreme Court decided Gray v. Maryland, 523 U.S. 185 (1998), which arguably established that Greene’s right to confrontation was violated. The Third Circuit declined to apply Gray because it construed 28 U.S.C. § 2254(d)—which precludes habeas relief based upon claims adjudicated on the merits in state court unless the adjudication resulted in a decision that was “contrary to” or an “unreasonable application of clearly established Federal law, as determined by the Supreme Court”—to hold that a case is not “clearly established Federal law” unless it is announced by the Court before the last nondiscretionary state court decision on the merits. The Supreme Court must now decide the temporal cutoff date for when its cases are considered clearly established to support habeas relief.

Greene v. Fisher
Docket No. 10-637

Argument Date: October 11, 2011
From: The Third Circuit

by George A. Couture and Joshua N. Friedman
Atlanta, GA

ISSUE

For purposes of adjudicating a state prisoner’s petition for federal habeas relief, what is the temporal cutoff for whether a decision from the Supreme Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d)?

FACTS

In 1993, a group of men robbed a grocery store in Philadelphia. One of the robbers shot and killed the store owner. One of the robbers took the store’s cash register.

Eventually, the police questioned petitioner Greene and a number of other men, including Atil Finney, Gregory Womack, and Demond Jackson about the grocery store robbery. Greene denied any involvement, but the other men confessed. All three identified Julius Jenkins as the shooter and claimed that Greene participated in the robbery. Beyond that, their stories diverged. According to Jackson, Greene was involved in the robbery but remained in the car. Finney initially told police Greene carried the cash register out of the store and that five people were involved in the robbery. Finney later said that six individuals were involved. The third man, Womack, implicated Greene in the robbery but did not describe his role. Greene maintained his innocence.

Pennsylvania subsequently charged Greene and three other men with second-degree murder, three counts of robbery, and conspiracy. Julius Jenkins was charged with first-degree murder. Pennsylvania sought a joint trial for all five defendants. Greene moved to sever his trial from his codefendants, arguing that the Confrontation Clause, as explained in Bruton v. United States, 391 U.S. 123 (1968), prohibits the introduction in a joint trial of a nontestifying codefendant’s extrajudicial confession that incriminates the defendant. Rather than severing the trials, the trial court directed the Commonwealth to redact the co-defendants’ statement to remove the prejudicial references to Greene.

The Commonwealth redacted the statements by replacing Greene’s name and those of the other defendants, in some places, with pronouns and phrases like “this guy” and “these guys.” In other places, the redacted version either deleted or replaced Greene’s name with the word “blank” or “similar symbols,” suggesting that redactions had occurred. The trial court determined that these redactions cured the Bruton problem, and the redacted confessions were then introduced at trial against the nontestifying codefendants. The jury found Greene guilty and sentenced him to life imprisonment.

Greene pursued his Confrontation Clause claim on direct appeal to the Pennsylvania Superior Court, arguing that Bruton is violated when “redaction would destroy the narrative integrity of the codefendants’ statements, and prejudice the appellant in the case at bar.” In December 1997, relying on a prior Pennsylvania Supreme Court decision holding that “the substitution of the letter ‘X’ for a defendant’s name does not violate that defendant’s Bruton rights,” the Superior Court affirmed Greene’s conviction.
Greene then petitioned for discretionary review with the Pennsylvania Supreme Court, again raising his Confrontation Clause claim. In March 1998, while Greene’s petition was pending, the U.S. Supreme Court decided Gray v. Maryland, 523 U.S. 185 (1998). Gray held that Bruton prohibits introduction during a joint trial of redacted confessions in which the name of the defendant is replaced with obvious indication of deletion. Since Gray was decided before Greene’s conviction became final on direct review, it applied to his case. See Griffith v. Kentucky, 479 U.S. 314 (1987).

After Gray was decided, the Pennsylvania Supreme Court granted Greene’s petition for allowance of appeal on direct review limited to the Confrontation Clause issue, but later dismissed Greene’s appeal “as having been improvidently granted.” Pursuant to Pennsylvania law, the dismissal ended Greene’s counsel’s court appointment and he did not seek certiorari review in the Supreme Court. Thus, ninety days after the dismissal, Greene’s conviction became final when the time expired for him to seek certiorari review.

Following unsuccessful state postconviction proceedings, Greene timely filed a petition for habeas relief pursuant to 28 U.S.C. § 2254(d) in the district court for the Eastern District of Pennsylvania. He raised several different grounds for relief, including his Confrontation Clause claim. The district court acknowledged that “[d]etermination of the appropriate Supreme Court precedent is key to assessing the merits of” Greene’s Confrontation claim. Greene v. Palakovich, 482 F.Supp.2d 624 (E.D.Pa. 2007). The court explained, “[i]f Gray applies to Petitioner’s claim, then it may bolster the merit of his claim because blank spaces and similar symbols of deletion were used in the redactions of his co-defendants’ confessions.” However, the district court declined to factor Gray into its analysis and denied petitioner’s claim because Gray had not yet been decided when the Pennsylvania Superior Court affirmed Greene’s conviction. It also rejected the remainder of Greene’s claims but granted a certificate of appealability on the Confrontation Clause claim because “reasonable jurists could disagree as to the appropriate point in time upon which to identify ‘the clearly established law.’”

A divided panel of the Third Circuit affirmed. Greene v. Palakovich, 606 F.3d 85 (3d Cir. 2010). The majority did acknowledge that “Greene’s petition turns on whether he may invoke Gray” and that the Antiterrorism and Effective Death Penalty Act (AEDPA)—which substantively amended the federal habeas corpus statutes in 1996 for state and federal prisoners—contains “no clear answer” to that retroactivity issue. Nevertheless, the majority held that “the date of the relevant state-court decision is [now] the controlling date” for determining what constitutes “clearly established Federal law.” The majority reasoned that the “most straightforward” reading of the “clearly established” language in § 2254(d) is that it “contemplates that the law or precedent existed at the time of the state court’s substantive resolution of the petitioner’s claim.” The majority supported its reasoning by citing Justice O’Connor’s statement in Williams v. Taylor, 529 U.S. 362 (2000), that “clearly established Federal law” “refers to the holdings, as opposed to the dicta, of the Supreme Court’s decisions as of the time of the relevant state-court decision.” Although the majority acknowledged that two other passages in Williams “direct[ly]” state that the cutoff date is the time a “state court conviction became final,” it asserted “[a]s an inferior federal court, [it was] not free to ignore” several Supreme Court opinions repeating Justice O’Connor’s Williams statement. Moreover, based upon this reasoning, the Third Circuit distinguished the First Circuit’s contrary holding Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2010) (adhering to the date that the state court conviction became final).

Judge Ambro dissented, noting that passages in Williams are “conflicting,” and that “[i]n none of the [post-Williams] cases cited by the majority … was the Supreme Court required to determine the cutoff date.” Thus, in the absence of any other “clear” directive in AEDPA to abandon the Supreme Court’s pre-AEDPA retroactivity doctrine, that doctrine controls, not AEDPA. Further, Judge Ambro warned that the majority’s new temporal cutoff would create a “twilight zone between the cutoff set by the majority here and the retroactivity analysis of the Supreme Court’s decisions in Griffith v. Kentucky and Teague v. Lane, 489 U.S. 288 (1989).” In this twilight zone, “a criminal defendant who is denied the right under Griffith to apply a new constitutional rule to his … case on direct appeal is left without later recourse to federal habeas review to correct that error.” The Third Circuit denied Greene’s petition for rehearing en banc, with Judge Ambro noting that he would have granted rehearing.

**CASE ANALYSIS**

In this case, the Court must decide whether AEDPA changed preexisting retroactivity law. Before AEDPA, the Supreme Court established a system regarding the retroactivity of new rules of constitutional law to criminal defendants convicted in state court. In Griffith v. Kentucky, the Court held that “basic norms of constitutional adjudication” require courts to apply “a new rule for the conduct of criminal proceedings … retroactively to all cases, state or federal, pending on direct review or not yet final.” “[F]inally,” meant “a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” Similarly, under the retroactivity doctrine established in Teague v. Lane, the Court clarified that a state prisoner seeking federal habeas relief is entitled to the benefit of any decision that applied to him under Griffith, plus a limited class of watershed rules of constitutional criminal procedure.

As is relevant to this case, AEDPA amended 28 U.S.C. § 2254(d) to modify the standard of review applicable to federal courts reviewing constitutional claims attacking a state court judgment. Pre-AEDPA, federal courts applied de novo review (meaning that federal courts would independently review questions of federal law without any deference to state courts). But as amended § 2254(d) prevents a state prisoner from obtaining habeas relief “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Thus, the question presented by Greene is whether this provision altered the retroactivity law of Griffith and Teague such that state prisoners are no longer entitled to obtain habeas relief based on Supreme Court decisions announced before their cases became final but after the last state court decision on the merits.

Relying on principles of statutory interpretation, Greene argues that AEDPA did not supplant Teague’s finality cutoff, so any Supreme Court decision that predates finality qualifies as “clearly established Federal law” for purposes of § 2254(d). Specifically, Greene relies upon the “presumption of continuity” to argue that AEDPA’s amendments did
not change the Court’s prior case law regarding retroactivity.


Applying this presumption to his case, Greene argues that AEDPA did not alter retroactivity law because the *Teague* Court “squarely construed the habeas statute before AEDPA to set finality as the cutoff, and nothing in AEDPA clearly indicates that Congress intended to alter that rule.” Greene cites to pre-AEDPA law, which established finality as the retroactivity cutoff, see, e.g., *Teague*, and *Cuspari v. Bohlen*, 510 U.S. 383, 389 (1994), and emphasizes that retroactivity law is distinct from the standard-of-review issue Congress later specifically addressed in AEDPA’s amendment to § 2254(d). He further asserts *Teague*’s cutoff at “finality” was carefully conceived and that at the point of “finality,” but not before, a state’s interest in “leaving concluded litigation in a state of repose” overrides a defendant’s competing interest in obtaining a trial that comports with constitutional requirements.

Although Greene acknowledges that AEDPA clearly sought to revise the standard of review applicable on federal habeas, he argues there is “no clear indication in the text, structure, or legislative history of AEDPA that Congress meant to alter *Teague*’s finality rule in any way.” With respect to the text, Greene notes AEDPA did not amend 28 U.S.C. § 2243, from which the *Teague* retroactivity rule is derived, and argues that Congress left this provision “intact” following a “comprehensive reexamination and significant amendment” of the federal habeas law. To Greene, this suggests that Congress “affirmatively intended to preserve” *Teague*. See *Merrill Lynch v. Curran*, 456 U.S. 353 (1982). Greene claims nothing about § 2254(d)(1)’s text clearly indicates otherwise.

Further, to the extent that § 2254(d)(1) indicates that Congress contemplated retroactivity law at all, Greene asserts “the new provision suggests that Congress envisioned maintaining a cutoff of finality.” To this end, Green points to *Horn v. Banks*, 536 U.S. 266 (2002), to argue that § 2254(d) neither displaced nor altered *Teague*’s retroactivity. In *Horn*, the Court reversed the Third Circuit’s grant of habeas relief to a state prisoner based on a new Supreme Court decision which postdated the finality of that defendant’s conviction but had been rejected by a state court, on postconviction review, on the merits. *Horn* rejected the Third Circuit’s view that § 2254(d) “has changed the relevant legal principles” of retroactivity doctrine, *Horn*, 536 U.S. at 272, shifting the cutoff from finality to “the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized.” *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001). In rejecting this reasoning, Greene argues *Horn* establishes that “when a state prisoner seeks habeas relief based on a decision that postdates finality, § 2254(d) establishes the proper standard of review, while *Teague*’s finality cutoff continues to determine retroactivity.”

Structurally, Greene argues that two aspects of the federal habeas statute’s post-AEDPA codification reinforce that Congress did not intend AEDPA to alter the retroactivity rules for federal habeas. First, Greene notes that 28 U.S.C. §§ 2244(b)(2) and 2254(e)(2)(A)(ii) allow habeas petitioners to file successive petitions if the claims rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” Because the Court has applied *Teague* to determine whether a new rule applies retroactively in a successive petition context under § 2242(b)(2), see *Tyler v. Cain*, 533 U.S. 656 (2001), Greene argues, absent a strong indication to the contrary, *Teague* “controls other post-AEDPA retroactivity determinations as well.” Second, Greene asserts that AEDPA’s one-year statute of limitations, which runs from the later of four different triggering events, including the “date on which the judgment became final,” confirms that *Teague*’s finality cutoff continues to determine the body of law applicable to habeas claims.

With respect to legislative history, Greene argues that “Congress’s sole objective in amending § 2254(d) was to change the standard of review courts must apply when considering state prisoners’ petitions for federal habeas relief,” not the Court’s retroactivity jurisprudence.

Greene also emphasizes the numerous practical and constitutional problems that advancing the cutoff date to the last state court decision on the merits might create. First, it would result in the “selective application of new rules” announced on direct review, in contravention of *Griffith*’s “principle of treating similarly situated defendants the same.” Second, a prefinality cutoff would increase constitutional pressure on the Supreme Court’s grant, vacate, and remand practice on direct review and require the Court to extend the right to counsel to include preparation of certiorari petitions, which is not presently required.

Alternatively, Greene argues that even if § 2254(d)’s phrase “clearly established Federal law” does contain a new retroactivity rule that is keyed to when the state courts decided the prisoner’s claim, that rule should be satisfied when the Supreme Court decision the prisoner seeks to rely upon was announced before the state high court disposed of his case on direct review. In support, Greene contends the comity interests underlying AEDPA require only that state court’s have a fair opportunity on direct review to apply Supreme Court decisions. Thus, where, as here, a prisoner actually sought discretionary review in state court based upon a newly announced Supreme Court decision and the state court elected to forego review, such a “fair opportunity” requirement is satisfied.

Respondent counters that Greene’s interpretation of § 2254(d) would upset AEDPA’s deference to state court judges because it would “blindside” them with rules that were not before them at the time they rendered their decisions. Respondent argues that Greene’s *Teague* arguments are nothing more than a diversion and that § 2254(d) is not merely a standard of review. Rather, respondent contends § 2254(d) must be viewed as a “modified form of res judicata” that generally bars relief on claims that have been adjudicated on the merits in state court. See *Harrington v. Richter*, 131 S. Ct. 770 (2011) (stating § 2254(d) is a “relitigation bar”—a “modified form of res judicata”). Respondent notes *Harrington* stated AEDPA stops just “short of imposing a complete bar to federal court relitigation of claims already rejected in state court proceedings.” Review is prohibited “unless one of the exceptions to § 2254(d) applies.”

Furthermore, respondent argues that there was no need for Congress to explicitly target *Teague* in order to give “temporal” effect to § 2254(d). Because § 2254(d) is a res judicata rule, respondent contends it necessarily operates as a temporal cutoff. However, that does not make it subservient to retroactivity rules. Rather, even when new law is given “full” retroactivity, respondent argues, “once suit is
barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.” James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).

In respondent’s view, once attached, res judicata imposes a “temporal limit” on the availability of new law that would otherwise be applicable but for the res judicata bar. Thus, respondent contends, res judicata supersedes otherwise applicable rules of retroactivity like Teague. Moreover, respondent asserts that the res judicata rule embodied in § 2254(d) will limit the impact of Teague in some cases in which there are merits decisions, but not in cases in which there is no merits decision.

With respect to the plain language of § 2254(d)(1), respondent notes AEDPA requires rejection of habeas claims unless the state court ruling was “unreasonable.” Respondent argues that reasonableness must be measured under the circumstances as they were at the time the state court rendered its decision, not as they might become at some future point. Further, respondent contends the requirement that federal law be “clearly established” is used in the past tense, “and the past to which the phrase must refer is the past at the time the state court was attempting to ascertain the law it was supposed to follow.”

In addition to its plain meaning argument, respondent contends Greene’s arguments are inconsistent with Supreme Court precedents interpreting AEDPA. For example, respondent cites Cullen v. Pinholster, which recently held that § 2254(d)(1) is “backward-looking,” and that evidence not available to the state court therefore cannot be considered in applying the deference rule. 131 S. Ct. 1388 (2011). Respondent concludes that under Cullen, all of § 2254(d)(1) is backward-looking, not only as to facts developed in state court, but also as to the law as it existed at the time of the state court decision. In respondent’s view, Cullen’s rationale applies even more strongly to the law, rather than the facts, because § 2254(d)(1) is about the law.

Respondent acknowledges that advancing the temporal cutoff to the time of the state court decision may preclude relief for some habeas petitioner’s, but counters that any kind of temporal cutoff excludes someone and here the class of defendants is small. According to respondent, its suggested temporal cutoff will not result in unfairness to similarly situated defendants because the only relevant class of similarly situated defendants is the one defined by § 2254(d)(1): those who had state court merits review under the same set of legal rules.

SIGNIFICANCE
The Supreme Court’s resolution of the proper temporal cutoff for when its decisions qualify as “clearly established Federal law” under § 2254(d)(1) will likely decide whether Greene is entitled to habeas relief on the merits for the reasons discussed above. The Court’s decision will also settle an intractable split which now exists between the Third Circuit’s opinion in Greene and three other circuits. See, e.g., Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) (adhering to the date of “finality” rather than adopting the date of the relevant state court decision); Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2010) (same); Thompson v. Runnel, 621 F.3d 1007 (9th Cir. 2010) (assuming that § 2254(d)(1)’s cutoff date is “finality” where the state does not contest the issue).

If the Court reverses the Third Circuit and endorses the traditional finality rule of Teague, the date of a state court’s decision on direct review or its decision to forego discretionary review will not significantly affect the playing field for federal habeas petitioners. But a decision affirming the Third Circuit’s view would make the date of state court decision on direct review critical to determining the body of relevant Supreme Court precedent and give state discretionary appeal practices new importance for vindicating constitutional rights. A state court’s decision to forego discretionary review would freeze the available body of Supreme Court law to an earlier date, oftentimes, as in Greene’s case, by more than a year. Although a difference of several months or even a year or two may not seem significant, in the realm of constantly evolving constitutional criminal procedure, it can mean the difference between life and death for a capital habeas petitioner. Additionally, as previously mentioned, advancing the cutoff date to the last state court decision on direct appeal will likely increase the number of defendants who seek certiorari review from the Supreme Court on direct review.

The number of cases impacted by the Court’s Greene decision is unclear and the parties dispute whether significant numbers of cases will be affected. However, there are approximately 20,000 federal habeas petitions filed in federal court every year, the majority of them by state prisoners challenging their convictions and/or sentences under § 2254(d). It is inevitable that a not insignificant number of those filings will involve defendants who raise claims based upon Supreme Court decisions announced before their cases became final but after state court decisions on the merits of their direct appeals.

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IMMIGRATION LAW

To What Extent Does Former Section 212(c) of the Immigration and Nationality Act Apply to Aliens Who Are Deportable for an Aggravated Felony Conviction?

CASE AT A GLANCE

Joel Judulang, a legal permanent resident of the United States who is deportable for his conviction of an aggravated felony, asserts that he is eligible for relief from removal under former § 212(c) of the Immigration and Nationality Act. Section 212(c) provides discretionary relief from removal for certain legal permanent residents who are found inadmissible to the United States upon their return from a temporary absence. Even though § 212(c), by its terms, provides relief only to an alien facing removal under a ground of inadmissibility, Judulang argues that § 212(c) also applies to an alien who is deportable based on a conviction that would have rendered him inadmissible if he had left and attempted to reenter the United States.

Judulang v. Holder
Docket No. 10-694

Argument Date: October 12, 2011
From: The Ninth Circuit

by D. Carolina Núñez
J. Reuben Clark Law School, Brigham Young University, Provo, UT

INTRODUCTION

The Immigration and Nationality Act (INA) provides several grounds of inadmissibility for which an alien seeking authorization to be present in the United States may be denied admission and therefore removed from the United States. For example, an alien who has committed a “crime involving moral turpitude” is inadmissible under INA § 212(a)(2)(A)(i)(I). See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006). The INA also lists grounds of deportability for which an alien who is present within the United States after being admitted may be removed from the United States. Under INA § 237(a)(2)(B)(i), for example, an alien who has been convicted of violating a controlled substance law is deportable. See 8 U.S.C. § 1227(a)(2)(B)(i). Deportability and inadmissibility both result in “removal” from the United States. During a removal proceeding, an immigration judge will consider an alien’s inadmissibility or deportability, as well as any requests for relief from removal. See 8 U.S.C. § 1229b.

Former § 212(c) of the INA provides one such form of relief. Under § 212(c), aliens “lawfully admitted for permanent residence who temporarily proceed abroad voluntarily … and who are returning to a lawful unrelinquished domicile of seven consecutive years[,] may be admitted in the discretion of the Attorney General” despite being found inadmissible under certain enumerated grounds of inadmissibility. See 8 U.S.C. § 1182(c) (1952), repealed by Pub. L. No. 104-208, 110 Stat. 3009-597. Though § 212(c)’s text provides relief to a legal permanent resident (LPR) who might be inadmissible to the United States, the Board of Immigration Appeals (the Board), which hears appeals from the decisions of immigration judges, has granted § 212(c) relief to certain classes of deportable aliens. It is § 212(c)’s applicability to deportable aliens that is at issue in this case.

In the 1990s, Congress amended and ultimately repealed § 212(c) relief. However, the Supreme Court ruled in INS v. St. Cyr that § 212(c) relief remained available to aliens who pled guilty to an offense that renders them removable if they would have been eligible for § 212(c) relief at the time of their pleas. 533 U.S. 289 (2001). Thus, § 212(c) remains a potential avenue for relief from removal for individuals who pled guilty to qualifying offenses before Congress repealed § 212(c) in 1996.

ISSUE

Is a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and inadmissible under differently phrased statutory subsections, and who did not depart and reenter the United States between the conviction and the commencement of removal proceedings, categorically foreclosed from seeking discretionary relief from removal under former § 212(c) of the Immigration and Nationality Act?

FACTS

Joel Judulang, a citizen and native of the Philippines, immigrated to the United States as a legal permanent resident in 1974 when he was eight years old. In 1989, Judulang pled guilty to voluntary manslaughter in connection with his participation in a fight that resulted in another’s death. Judulang received a suspended sentence of six years of imprisonment and four years of probation conditioned on his spending 684 days in county jail.
In 1988, Congress added a new ground of deportability to the INA. Congress provided that an alien who had been convicted of an “aggravated felony” was deportable. See 8 U.S.C. § 1251(a)(4)(B) (1988). “Aggravated felony” was defined to include murder, certain drug- and weapons-trafficking offenses, and related attempts and conspiracies. See 8 U.S.C. § 1101(a)(43). In the 1990s, subsequent to Judulang’s guilty plea, Congress expanded the definition of “aggravated felony” to include “crimes of violence” for which the term of imprisonment is at least one year. See 8 U.S.C. § 1101(a)(43)(F) (2000). Congress specifically applied the new definition of “aggravated felony” retroactively to convictions entered prior to Congress’s expansion of the “aggravated felony” ground of deportability. See 8 U.S.C. § 1101(a)(43).

In 2005, the Department of Homeland Security initiated removal proceedings against Judulang. The immigration judge found Judulang deportable based, in part, on the 1989 voluntary manslaughter conviction. The immigration judge found that Judulang’s 1989 guilty plea to voluntary manslaughter amounted to a conviction for a crime of violence which rendered Judulang deportable under the aggravated felony ground of deportability. In addition, the immigration judge found that Judulang was not eligible for relief from removal under former § 212(c) and ordered Judulang removed to the Philippines.

Judulang appealed. The Board of Immigration Appeals dismissed Judulang’s appeal, finding that the 1989 voluntary manslaughter conviction rendered Judulang removable and that Judulang was not eligible for discretionary relief from removal under former § 212(c) because “the ‘crime of violence’ aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act.” In re Joel Judulang, 2006 WL 557842 (B.I.A. 2006). The Board cited its prior opinion in In re Brieva-Perez, in which the Board denied § 212(c) relief to a deportable alien because the INA did not include a ground of inadmissibility substantially similar to the crime-of-violence aggravated felony ground of deportability for which the alien faced removal. 23 I. & N. Dec. 766, 773 (B.I.A. 2005). The decision in Brieva-Perez was, in turn, based on In re Blake, in which the Board had ruled that “whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses.” 23 I. & N. Dec. 722, 728 (B.I.A. 2005).

Judulang sought judicial review of the Board’s decision, and the Ninth Circuit denied his petition for review, observing that Judulang’s conviction was “not substantially similar to any ground for exclusion” and that Judulang was therefore precluded from obtaining § 212(c) relief. See Judulang v. Gonzales, 249 F. App’x 499, 501 (9th Cir. 2007). The U.S. Supreme Court granted Judulang’s petition for a writ of certiorari on April 18, 2011.

CASE ANALYSIS

Petitioner Judulang does not challenge the Board’s ruling regarding his deportability for a crime-of-violence aggravated felony conviction. However, Judulang challenges the Board’s ruling regarding his eligibility for relief under § 212(c). Section 212(c) allows an LPR returning to the United States after a temporary trip abroad to be admitted to the United States despite being inadmissible under the INA. See 8 U.S.C. § 1182(c) (1952). Judulang and the government agree that although § 212(c) is, on its face, limited to inadmissible aliens, it also applies to certain deportable aliens. The parties, however, disagree about the extent to which § 212(c) applies to deportable aliens.

Judulang asserts that a deportable alien is eligible for § 212(c) relief when the conviction that triggered deportability could have also rendered the alien inadmissible if he were returning to the United States and seeking admission. Under this approach, an alien that is found deportable for a crime-of-violence aggravated felony conviction would be eligible for § 212(c) relief if the conviction itself would also render the alien inadmissible under one of the grounds of inadmissibility covered by § 212(c). Thus, if the specific crime at issue also amounted to a crime involving moral turpitude, which is a covered ground of inadmissibility, then the alien would be eligible for § 212(c) relief despite the fact that removal proceedings were based on a ground of deportability rather than a ground of inadmissibility. The Second Circuit has adopted this conviction-specific approach to § 212(c) relief for deportable aliens. See Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007).

The government asserts that § 212(c) relief is available to deportable aliens only when the ground of deportability under which the alien is found deportable is textually similar to an existing ground of inadmissibility. In the case of an alien found deportable for a crime-of-violence aggravated felony, the government’s approach renders the deportable alien categorically ineligible for § 212(c) relief because there is no ground of inadmissibility focusing on crimes of violence. All circuits that have considered this issue, with the exception of the Second Circuit, have adopted a version of the Board’s statute-specific approach to § 212(c). See De la Rosa v. U.S. Att’y Gen., 579 F.3d 1327 (11th Cir. 2009); Koussan v. Holder, 556 F.3d 403 (6th Cir. 2009); Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007); Abebe v. Gonzales, 493 F.3d 1092 (9th Cir. 2007) (categorically denying relief to deportable aliens); Dalombo Fontes v. Gonzales, 483 F.3d 115 (1st Cir. 2007); Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007); Caroleo v. Gonzales, 476 F.3d 158 (3d Cir. 2007).

The parties’ approaches to § 212(c)’s application to deportable aliens rely heavily on the history of § 212(c)’s development. Section 212(c) is the descendant of a provision contained in the Immigration Act of 1917. The “Seventh Proviso” of § 3 of the act provided,

[A]liens returning after a temporary absence to an unrelin-
quished United States domicile of seven consecutive years
may be admitted in the discretion of the Secretary of Labor,
and under such conditions as he may prescribe.

8 U.S.C. § 136(p) (1925). On its face, that provision only applied to aliens seeking admission to the United States. Nonetheless, the Immigration and Nationality Service extended Seventh Proviso relief to aliens in deportation proceedings who had departed and returned to the United States after the ground for deportation arose. Absent such an extension of the Seventh Proviso, the label of the proceeding under which the alien faced removal—whether a deportation or an exclusion proceeding—would dictate whether the alien was eligible for Seventh Proviso relief.

In 1952, Congress passed the Immigration and Nationality Act. Section 212(c) mirrored the language of the Seventh Proviso. Consistent with the practice surrounding the Seventh Proviso, the Board repeatedly granted § 212(c) relief to aliens who had managed to leave and
Judulang concludes that the Board’s abandonment of a conviction-
gible for Section 212(c) relief.

..." retroactive limitation of relief. Specifically, Judulang argues that at § 212(c) relief is a change in the law that results in an impermissible retroactive effect. Based on the Second Circuit’s holding, the Board thereafter concluded that § 212(c) relief could be granted to an LPR “in a deportation proceeding regardless of whether he departs the United States following the act of acts which render him deportable.” See In re Silva, 16 I. & N. Dec. 26 (B.I.A. 1976).

In 1976, the Second Circuit held that the Board’s practice of offering § 212(c) relief to deportable aliens who had departed and reentered the United States while denying it to deportable aliens who had not departed the United States constituted a violation of equal protection principles. See Francis v. INS, 532 F.2d 268 (2nd Cir. 1976). The court found that there was no rational basis on which to distinguish between “two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable.” Based on the Second Circuit’s holding, the Board thereafter concluded that § 212(c) relief could be granted to an LPR “in a deportation proceeding regardless of whether he departs the United States following the act of acts which render him deportable.” See In re Silva, 16 I. & N. Dec. 26 (B.I.A. 1976).

Judulang and the government disagree about the fate of the nunc pro tunc relief that had sprung from the Seventh Provisos and early § 212(c) litigation. Judulang argues that nunc pro tunc relief remains intact. Thus, under Judulang’s view, an alien who is convicted of a crime that renders him inadmissible and subsequently departs and successfully reenters the United States is eligible for § 212(c) relief on a nunc pro tunc basis if he later faces deportation based on the same conviction that would have rendered him inadmissible. In essence, the alien has retroactively requested an adjudication of his admissibility at the time of entry into the United States. The government, however, contends that the Board abandoned the nunc pro tunc form of relief that focuses on whether the conviction underlying the alien’s deportability also might render the alien inadmissible. Rather, the government argues, the Board applies the statute-specific approach to § 212(c) to every case in which a deportable alien seeks Section 212(c) relief, regardless of whether the alien departed and returned to the United States between the relevant conviction and the removal proceedings.

Judulang raises three main arguments in support of his assertion that the Board’s approach to § 212(c) applicability in deportation proceedings is unlawful.

Impermissible Retroactive Effect
First, Judulang asserts that the Board’s statute-specific approach to § 212(c) relief is a change in the law that results in an impermissible retroactive limitation of relief. Specifically, Judulang argues that at the time of Judulang’s guilty plea, the Board had consistently made § 212(c) available to deportable aliens whose deportability-triggering conviction would have also rendered them inadmissible. Judulang asserts that it was not until the Board’s 2005 ruling in Blake that the Board began limiting § 212(c) relief. Under the Board’s approach in Blake, Judulang argues, “the inquiry could not be met by any LPR convicted of a ‘crime of violence’ aggravated felony. This was plainly a change that made many previously eligible LPRs permanently ineligible for Section 212(c) relief. …”

Judulang concludes that the Board’s abandonment of a conviction-specific approach in favor of a statute-specific approach to § 212(c) relief amounts to a retroactive change in law that “unduly intrude[s] upon reasonable reliance interests.” See Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51 (1984). Judulang argues that, among other factors, his reliance on the conviction-based approach existing at the time of his plea agreement weighs in favor of invalidating the Board’s approach.

In response, the government argues that, contrary to Judulang’s assertions, there was no established pre-2005 practice of making § 212(c) relief available to aliens facing removal based on the crime-of-violence aggravated felony grounds of deportability. Furthermore, the government argues that Blake merely “crystallized” the practice of extending § 212(c) relief to aliens who were removable under a ground of deportability that had a statutory counterpart in the grounds of inadmissibility.

The government contends that, in any event, any assumed change in the law does not result in an impermissible retroactive effect. Specifically, the government notes that Judulang could not have reasonably relied on a conviction-specific approach to § 212(c) at the time of his plea agreement because Judulang could not have known that he might need § 212(c) relief in connection with that plea. The government explains that because the crime to which Judulang pled guilty was not a ground of deportability at the time of the plea, he could not have relied on the availability of relief from removal for that conviction when he made the plea.

Arbitrary and Capricious in Violation of the APA
Second, Judulang argues that the Board’s interpretation of § 212(c) is invalid under the Administrative Procedures Act (APA). The APA governs all federal agency action, including that of the Executive Office for Immigration Review, of which the Board is a part. The APA provides that “agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” are unlawful. 5 U.S.C. § 706(2)(A) (2006). Among other arguments, Judulang claims that the Board’s statute-specific approach “recreates the arbitrary distinction based on travel abroad that the [Board] abandoned years ago.”

Judulang contends, as detailed above, that an alien who has been convicted of a crime that renders him inadmissible and thereafter leaves the United States and successfully reenters is eligible for § 212(c) relief on a nunc pro tunc basis in a later deportation proceeding based on the same conviction. Thus, if § 212(c) relief is denied to an alien in deportation proceedings who did not leave and reenter the United States between the relevant conviction and the deportation proceedings, then the outcome of the case arbitrarily turns on the alien’s travel record.

The government argues that nunc pro tunc relief is no longer available based solely on the alien’s specific conviction falling under a ground of inadmissibility: “Petitioner’s assumption … about the interaction of nunc-pro-tunc relief and comparable-grounds analysis was nullified more than 25 years ago.” See In re Wadud, 19 I. & N. Dec. 182 (B.I.A. 1984). Rather, “the same statutory-counterpart requirement applies to the LPR who traveled abroad and subsequently re-entered as to the LPR who never traveled.” The government further argues that the Board’s § 212(c) approach is entitled to Chevron deference. Under Chevron U.S.A. Inc. v. NRDC, an agency’s “permissible” interpretation of a statute will be upheld where Congress has not specifically spoken to the relevant issue. 467 U.S. 837 (1984).
The government explains that §212(c), in failing to mention deportable aliens at all, is ambiguous as to its applicability to deportable aliens and that a statute-focused approach is supported in the text of §212(c). The government thus submits that “the Board is entitled to deference in applying the statutory-counterpart rule.”

**Violation of Equal Protection**

Finally, Judulang argues that the Board’s interpretation of § 212(c) effectively distinguishes between removable legal permanent residents based on their travel history in violation of the “Fourteenth Amendment’s guarantee of equal protection, applicable to the federal government through the Due Process Clause of the Fifth Amendment.”

Here, Judulang reprises his assertion that nunc pro tunc relief under § 212(c) remains available to an alien who left the United States and reentered despite being inadmissible and then later faces deportation based on the very conviction that would have rendered that alien inadmissible. Thus, an alien who departed and returned to the United States would be eligible for nunc pro tunc relief under § 212(c), but an alien who had not departed the United States would be foreclosed from receiving § 212(c) relief under the Board’s statute-specific approach unless the alien faces removal under a ground of deportability that is textually similar to an existing ground of inadmissibility. Judulang argues that such a distinction is “irrational and unrelated to any legitimate governmental interest.”

The government dismisses Judulang’s equal protection argument as “rooted in an obsolete understanding of the interaction between the nunc-pro-tunc practice and comparable-grounds analysis.” The government asserts that all deportable aliens, whether they have traveled abroad or not, are subject to the statutory counterpart analysis. Thus, an alien who has traveled abroad and one who has not would be equally positioned for § 212(c) eligibility.

**SIGNIFICANCE**

Despite Congress’s 1996 repeal of § 212(c) of the INA, § 212(c) relief still plays an important role in removal proceedings due to the Supreme Court’s St. Cyr decision.

The sheer number of pending and potential removal proceedings based on pre-1996 guilty pleas guarantees a continued role for § 212(c) litigation. Because removal proceedings are not limited by the passage of time—that is, an alien may face removal proceedings for convictions entered any number of years ago—and given the significant backlog of removal cases pending in immigration court, the applicability of § 212(c) will continue to plague immigration courts and federal circuit courts hearing immigration court appeals for many years to come. The Court’s ruling in Judulang serves as an opportunity to clarify what has become a complicated and perplexing area of immigration law.

Perhaps more importantly, a decision in this case will determine whether relief from removal is available at all to certain aliens. For many aliens facing removal, § 212(c) offers the only potential relief from removal. With the repeal of § 212(c), Congress replaced § 212(c) relief with another form of relief called cancellation of removal. However, cancellation of removal is only available in very limited circumstances. In the context of removal proceedings centering on the aggravated felony ground of deportability, § 212(c) takes on added importance because all other forms of relief from removal, including cancellation of removal, are now statutorily unavailable to aliens facing removal for an aggravated felony conviction. Thus, aliens who, prior to 1996, pled guilty to a charge that, at the time, did not constitute a basis for removal but is one that Congress subsequently retroactively included in the definition of “aggravated felony” will find that former § 212(c) is the only relief available. A decision approving the Board’s interpretation of the “statutory counterpart” rule would effectively deny most aliens facing removal for an aggravated felony conviction, whether or not the conviction constituted an aggravated felony at the time it was entered, relief from removal.

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Can Private Parties Sue Under the Supremacy Clause to Force a State to Comply with Federal Medicaid Program Requirements?

CASE AT A GLANCE
The plaintiffs, a group of Medicaid providers and recipients, sued California after the state enacted across-the-board cuts in its Medicaid reimbursement formula. The plaintiffs claimed that the cuts violated federal Medicaid requirements; the Ninth Circuit agreed. The state appealed to the Supreme Court, arguing that private plaintiffs cannot sue to enforce those federal requirements against the state.

Douglas v. Independent Living Center of Southern California
Douglas v. California Pharmacists Association
Douglas v. Santa Rosa Memorial Hospital
Docket Nos. 09-958, 09-1158, and 10-283

Argument Date: October 3, 2011
From: The Ninth Circuit

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

INTRODUCTION
Traditionally, private plaintiffs have been able to sue to enjoin operation of a state law as preempted by federal law when the federal law contains a private right of action, or when the federal law confers an individual right.

Here, California state law conflicts with federal Medicaid requirements. But the Medicaid Act on its face contains no private right of action and confers no individual right. Moreover, Medicaid is not a conventional regulatory scheme. Medicaid is a Spending Clause program based on cooperative federalism principles. This means that state participation is voluntary, not compulsory. But if a state participates, it must comply with federal requirements. In short, states have a choice: to comply with federal program requirements and thus to qualify for federal funds, or to conflict with federal program requirements and thus to forgo federal funds. But to be clear: nothing requires a state to participate in Medicaid.

Because Medicaid is a voluntary program, the conflict between California law and federal Medicaid requirements creates a singular problem for these plaintiffs: California’s conflict operates ultimately to forfeit its federal Medicaid funds. This forfeiture is, indeed, a grave harm to the plaintiffs. But it may be a harm of a different type than the more immediate harm in a more typical preemption case.

Against this backdrop, the question here is whether private plaintiffs who are affected by the Medicaid program can sue under the Supremacy Clause to force California to comply with federal Medicaid requirements. California’s compliance with federal Medicaid requirements is not at issue.

ISSUE
Can private Medicaid providers and recipients sue under the Supremacy Clause to force a state to comply with federal Medicaid program requirements?

FACTS
The federal Medicaid Act created a cooperative federal-state program through which the federal government and participating states provide medical assistance for poor, elderly, and disabled individuals. A state’s participation in Medicaid is voluntary, but if a state participates (and accepts federal funding), it must comply with federal Medicaid requirements. One of those requirements, under § 30(A), is that a participating state must ensure that state Medicaid payments “are consistent with efficiency, economy, and quality of care” and “sufficient to enlist enough providers so that care and services are available … to the general population in the geographic area.” In order to maintain compliance with § 30(A), states must study the impact of any proposed rate reductions on health care services and submit them to the Centers for Medicare and Medicaid Services, or CMS, the federal agency responsible for the Medicaid program, for approval prior to their enactment.

A state that fails to comply with these and other requirements under the act may lose its federal Medicaid funding. Before such a loss, however, the state is entitled to a hearing before a federal Medicaid official to determine whether it, in fact, failed to comply with Medicaid requirements. Medicaid providers and beneficiaries may intervene in these hearings, but they may not initiate them. If the hearing reveals that the state failed to comply with the act’s requirements—
and subject to administrative and judicial review of the hearing—the state will lose its federal Medicaid funds until the state shows that it is in compliance.

California participates in the Medicaid program and receives federal funds to administer it within the state. The California Department of Health Care Services, or DHCS, operates the state program, dubbed “Medi-Cal.”

In 2008 and 2009, the California legislature slashed Medi-Cal reimbursement rates for medical providers in order to help deal with the state’s budget deficit. The legislature imposed an across-the-board ten percent reduction on payments and reimbursement rates for hospitals, physicians, pharmacies, and other health care providers; reduced future reimbursement rates by one percent from their pre-2008 levels; and reduced the maximum contribution paid by Medi-Cal for wages and benefits relating to in-home supportive services. The state did not study the impact of these changes or submit them to CMS before implementing them, although DHCS later notified CMS of the reductions.

CMS eventually disapproved the cuts because, among other reasons, “California has not demonstrated that it would meet the conditions set out in [Section 30(A)],” in particular the condition “that State plans assure that ‘payments [to providers] . . . are sufficient to enlist enough providers so that care and services are available to the general population in the geographic area.’” California requested reconsideration, thus triggering the administrative hearing process described above. (Some of the appellants in this case also intervened in this administrative hearing.) This process is pending.

At the same time, Medicaid providers, beneficiaries, and others adversely affected by the rate cuts brought five independent cases in state and federal courts seeking to stop the cuts. In a series of appeals, the Ninth Circuit ruled that the plaintiffs qualified for a preliminary injunction against the state, thus halting the cuts. The state then brought this appeal to the Supreme Court, arguing that the plaintiffs, as private parties, cannot use the Supremacy Clause to enforce § 30(A).

CASE ANALYSIS

Typically, private plaintiffs can sue to enjoin a state law as preempted by a federal law when the federal law provides an individual right of action, or when the federal law confers an individual right enforceable by a federal law when the federal law provides an individual right of action. The federal Medicaid Act on its face does neither. Moreover, the Medicaid program presents unique Supremacy Clause issues. Under the federal Medicaid program, a program that Congress enacted under its Spending Clause authority, states can elect to participate, or not. If a state elects and accepts federal funds, then it also must comply with federal Medicaid requirements. On the other hand, if a participating state fails to comply with federal requirements, or if a state otherwise declines to comply with federal requirements, it forfeits its federal funds. Either way, participation is a state choice.

California’s cuts in Medicaid reimbursements may have violated § 30(A). That issue is not before the Court.) If so, the cuts seem to violate the Supremacy Clause: California’s cuts would be inconsistent with federal law, preempted by federal law, and therefore unconstitutional. But because Medicaid is a voluntary program, leaving states with a choice to participate and receive federal funds, California’s cuts also seem merely to trigger California’s forfeiture of federal funds. By this reckoning, California’s cut may be consistent with federal law, but the cut would mean that California could no longer receive federal Medicaid funds.

Against this backdrop, the private plaintiffs seek to nullify California’s cuts by suing the state under the Supremacy Clause. California defends by claiming that the private plaintiffs have no individual right of action to sue under the Supremacy Clause. The parties seem to agree that the plaintiffs have no explicit statutory right of action. But they disagree about whether the plaintiffs can nevertheless sue to enforce the Supremacy Clause.

California proffers two principal arguments. First, California argues that private parties cannot enforce § 30(A), because Congress has not created a private right of action, either expressly or impliedly, for them to enforce this federal statute. California points out all parties agree that § 30(A) itself contains no express private right of action. Moreover, California says that private parties cannot enforce § 30(A) through § 1983, because § 30(A) confers no individual rights. Finally, California argues that an implied cause of action, or a court-created cause of action, would frustrate congressional intent. According to the state, an implied cause of action, and the variety of cases that might be brought across the country and the variety of results they would spawn, would undermine Congress’s effort to create a centralized enforcement mechanism for Medicaid compliance in the CMS administrative hearing process. Moreover, California says that the legislative history of the Medicaid Act suggests that Congress intended to create no private right of action. In particular, in 1997 Congress revoked the “Boren Amendment” to the act. The Supreme Court previously ruled that the Boren Amendment created a private right of action; this ruling sparked an explosion of lawsuits challenging the adequacy of state Medicaid rates under § 1983. California argues that Congress’s revocation of the Boren Amendment suggests that any court-created private right of action now would frustrate congressional purposes.

Second, California argues that the Supremacy Clause gives the plaintiffs no private right of action. California says that the Supremacy Clause is not a source of rights; instead, it is a decision rule for parties already properly before the courts. According to California, this understanding of the Supremacy Clause is consistent with the Framers’ purpose and understanding, and it is consistent with the Supreme Court’s preemption cases. California contends that cases involving Spending Clause legislation, such as Medicaid, are particularly inappropriate under the Supremacy Clause. This is because state law cannot conflict, for Supremacy Clause purposes, with conditions on federal spending programs; instead, when state law fails to harmonize with federal conditions, the state simply forfeits its federal funds. This is a state choice—to comply with the conditions, or to forfeit the funds—not a conflict between state and federal law that the Supremacy Clause can resolve. Finally, California argues that the plaintiffs lack prudential standing to bring this case. California claims that the plaintiffs seek to vindicate the rights of the federal government, not their own rights; that Congress did not intend § 30(A) to protect the plaintiffs’ interests; and that the plaintiffs’ claims are just the type of “generalized grievance” that the Supreme Court has rejected.

The federal government, as amicus supporting California, echoes and elaborates on some of the state’s arguments and emphasizes its
own significant point—that the Court need not answer the broader question whether private plaintiffs can bring a nonstatutory cause of action for equitable relief against state officials under the Supremacy Clause. The government argues that the Court can dodge this thornier issue because this is a special case: this case, the government says, is different from the mine run of preemption cases because it involves state compliance with federal conditions in a cooperative federalism program operated under Congress’s Spending Clause authority. The more typical preemption case arises from directly conflicting state and federal requirements on a private party that is regulated under both schemes. In contrast, here, the conflict between California’s rate cut and § 30(A) bears differently on the private plaintiffs: they are not the subject of conflicting regulations, as in the typical case; instead, they are the beneficiaries of a voluntary state program that must harmonize with federal requirements as a condition of state participation. Moreover, the program’s statutory scheme itself answers the question: there is no private right of action. According to the government, the Court therefore need not answer the broader and more difficult question.

The plaintiffs respond with three principal arguments. They argue first that the Supremacy Clause supports their private right of action. They say that the Framers crafted the Supremacy Clause to ensure that states could be compelled to follow federal law, and their private right of action to ensure that California complies with § 30(A) falls squarely within the Framers’ understanding and practices at the time. Moreover, the plaintiffs argue that the Supreme Court, and every federal circuit that considered the issue, ruled consistently through-out history that a plaintiff could seek declaratory and equitable relief against a state under the Supremacy Clause. Finally, the plaintiffs argue that statutory authorization is not required. They say that constitutional claims for equitable relief do not require statutory authorization, as evidenced by a line of Court rulings that recognize a private right of action for claims based on the structural provisions of the Constitution (as opposed to the individual rights provisions). And they argue that while claims under § 1983 and claims implied under federal statutes require language that creates individual rights, their Supremacy Clause claim is a constitutional claim; it must exist as a necessary incident of the Constitution’s structure.

Second, the plaintiffs argue that the Supremacy Clause supports preemption claims based on federal Spending Clause legislation. They say that a preemption claim such as theirs cannot be limited based on the source of constitutional authority for the federal law. They argue that there is no basis for distinguishing between preemption claims based on Spending Clause legislation, such as theirs, and more typical preemption claims based on, say, Commerce Clause legislation. The Court’s jurisprudence is consistent with this. Moreover, they argue that there is nothing inherent in the structure of Spending Clause legislation that would preclude preemption claims such as theirs. They claim that states themselves can avoid a conflict with federal law in Spending Clause programs by either complying with federal requirements or declining federal funds, and therefore their claim is necessary to hold their state to federal requirements. They also explain that their claims do not seek to enforce § 30(A); instead, they seek to prevent injury caused by preempted state law. They therefore need no private right of action in the Medicaid Act; their case under the Supremacy Clause is appropriate. Finally, they argue that neither federal withdrawal of funding nor the CMS administrative process displaces their private right of action challenging state law as preempted by federal law.

Third, the plaintiffs argue that Congress did not bar their claim, and that principles of prudential standing cannot deny their access to the courts. The plaintiffs say that Congress did not explicitly preclude claims such as theirs in the Medicaid Act, and that their claim is not in tension with the act. In particular, they contend that the CMS administrative process is limited and not sufficiently comprehensive to demonstrate that Congress intended to preclude a private right of action. Moreover, this case, they say, is a perfect example of the inadequacies of the CMS administrative process: the state stymied the process, leaving the plaintiffs with the judiciary as their only avenue of relief. Finally, the plaintiffs argue that principles of prudential standing do not bar their case. They contend that the state waived this argument, and that they have asserted the requisite personal injuries—and not injuries to the federal government—to satisfy prudential standing requirements.

SIGNIFICANCE

This case pits two weighty and especially timely interests against each other. On one hand, the case involves the interest of Medicaid providers and recipients in ensuring that their states comply with federal Medicaid requirements. As the plaintiffs here demonstrate, a judicial remedy may be particularly important. After all, the plaintiffs here showed that California could both violate federal law and manipulate the CMS administrative process, leaving the plaintiffs without an effective way to hold their state to the federal Medicaid requirements. An individual right of action is the only effective way for them to achieve this goal.

But on the other hand, the case involves the interest of the states in avoiding massive amounts of litigation each time they move to change their Medicaid reimbursement formula (or any other feature of their Medicaid program). A ruling for the plaintiffs would open the door to private enforcement of the federal Medicaid requirements against the states—exactly the kind of burden the states would like to avoid.

These interests are only magnified in these tough economic times, when states are looking to slash their budgets, often by cutting social programs such as Medicaid. They are also magnified by the federal expansion of Medicaid eligibility as part of federal health insurance reform in the Affordable Care Act. These factors make the issues in the case all the more important.

Amici have recognized this. In addition to the federal government, 31 states filed a brief in support of California, and the National Governors Association (joined by the National Conference of State Legislatures, the Council of State Governments, and others) filed a brief in support of the state. On the other side, Members of Congress (including House Minority Leader Nancy Pelosi and Senator Majority Leader Harry Reid), the Chamber of Commerce, the American Medical Association, the ACLU, and AARP, among others, filed briefs in support of the plaintiffs. It is perhaps notable that the federal government and states—more commonly opponents in Supremacy Clause cases—lined up together against such strange bedfellows as congressional Democrats and the ACLU and the Chamber of Commerce.
In addition to the weighty immediate interests on both sides, the case is also important because it tests the ability of private plaintiffs to enforce structural features of our Constitution (as opposed to individual rights-protecting features of our Constitution, to the extent that there is a real difference) in court. Just last term, the Supreme Court ruled in Bond v. U.S., 564 U.S. ___, that a private individual, a criminal defendant, had prudential standing to challenge a federal criminal statute as violating the Tenth Amendment, potentially paving the way for more structural suits by private parties. But Bond is distinguishable for a variety of reasons; it does not presage a ruling in this case. Moreover, Bond cuts against the recent trend to, if anything, restrict access to the courts, not to expand it. In the wake of Bond, however, this case will provide one more important data point to help us plot the Court’s approach to private judicial enforcement of the structural features of our Constitution.

One final point: If the Court rules against the plaintiffs here, Congress could probably undo the ruling. As unlikely as it seems, Congress could create a statutory right of action for individual plaintiffs affected by state Medicaid changes that violate federal law. While the possibility seems remote, Congress could have the last word.

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STANDING

Can a Sex Offender Convicted Before the Enactment of the Federal Sex Offender Registration and Notification Act Challenge the Attorney General’s Interim Rule Requiring Preenactment Offenders to Register?

CASE AT A GLANCE
Billy Joe Reynolds is a convicted sex offender. But his conviction, prison sentence, and release all preceded the federal Sex Offender Registration and Notification Act. That act requires sex offenders to register and makes failure to register a crime. Using his authority under the act, the attorney general promulgated a rule specifying the applicability of the act’s notification requirements to preenactment sex offenders. Reynolds was subsequently convicted of failing to register. Reynolds appealed, arguing that the attorney general’s rule violated the Constitution and federal law. In response, the government argues that Reynolds lacks standing to challenge the rule, because it was the act, not the rule, that required him to register.

Reynolds v. United States
Docket No. 10-6549

Argument Date: October 3, 2011
From: The Third Circuit
by Steven D. Schwinn
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INTRODUCTION
In general, a litigant can only challenge a law in federal court if the litigant has standing, that is, if the litigant has been directly affected by the law or has some direct stake in the law. Here, Reynolds argues that he was convicted and sentenced for failing to register under the attorney general’s rule requiring preenactment sex offenders to register, and that he therefore has standing to challenge the rule. The government argues that Reynolds was convicted and sentenced for failing to register under the act’s registration requirements operating on their own force, not the attorney general’s interpretive rule, and that he therefore lacks standing to challenge the rule.

ISSUE
Can a preenactment sex offender challenge the attorney general’s rule, enacted under authority of the Sex Offender Registration and Notification Act, that the act’s registration requirements apply to preenactment offenders?

FACTS
On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act, or SORNA. Congress designed SORNA to strengthen and increase sex offender registration and notification requirements. In particular, Congress sought to address loopholes and deficiencies in the various registration and notification statutes around the country that, according to one House report, left as many as 100,000 convicted sex offenders unaccounted for. Thus, SORNA established a comprehensive national system for sex offender registration to unify and tighten registration requirements.

SORNA requires every sex offender to register, and to keep the registration current, in each jurisdiction where the offender lives, works, or studies. SORNA requires a sex offender to “initially register” either before the end of his or her prison sentence for the sex crime or, if the offender is not sentenced to a term of imprisonment, within three business days after being sentenced. SORNA also requires a sex offender to update his or her registration by reporting any changes to residence, employment, or student status.

Under SORNA, a sex offender’s failure to register, or his or her failure to keep his or her registration current, may itself constitute a federal crime. Thus, a sex offender who is required to register, knowingly fails to register or to update his or her registration, and “travels across state lines” may be punished by up to ten years of imprisonment.

Congress delegated to the attorney general the responsibility to issue guidelines and regulations to implement SORNA. One delegation, § 16913(d), the provision at issue here, gives the attorney general the authority to say whether and how SORNA’s registration requirements apply to sex offenders who were convicted before SORNA’s enactment. That section reads:

Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter.
or its implementation in a particular jurisdiction, and to
describe rules for the registration of any such sex offenders
and for other categories of sex offenders who are unable to
comply with subsection (b).

Notwithstanding this provision, the attorney general took the position
that SORNA’s registration requirements applied by their own force
to preenactment sex offenders—that no additional regulations were
required. Nevertheless, the attorney general exercised the authority
under § 16913(d) on February 28, 2007, about seven months after
SORNA was enacted, and issued an interim regulation saying that
SORNA’s registration requirements applied to preenactment sex
offenders. The attorney general invoked the “good cause” exception
to ordinary notice-and-comment procedures under the Administrative
Procedures Act, or the APA, and made the interim rule effective
immediately.

Billy Joe Reynolds is a preenactment sex offender. He was convicted
of a sex crime in Missouri in 2001, about five years before SORNA
was enacted. He was released from prison in 2005 and, under Mis-
souri law, registered as a sex offender in Missouri. He updated and
verified his registration on several occasions as required by state law.

In September 2007, over a year after SORNA was enacted, and about
seven months after the attorney general issued the interim rule,
Reynolds moved to Pennsylvania without notifying his parole officer
and without updating his sex offender registration in either Missouri
or Pennsylvania. In November 2007, a federal grand jury returned
an indictment charging that Reynolds was required to update his
registration under SORNA, that he knowingly failed to update his
registration, and that he travelled across state lines in violation of the
criminal provision in SORNA.

Reynolds moved to dismiss the indictment, arguing, among other
things, that the attorney general’s interim rule violated the APA.
The district court denied Reynolds’s motion. Reynolds then entered
a conditional guilty plea, reserving the right to appeal the denial of
his motion to dismiss. The district court sentenced Reynolds to 18
months in prison and three years of supervised release.

Reynolds appealed the district court’s denial of his motion to dismiss,
but the United States Court of Appeals for the Third Circuit affirmed.
The court relied on its decision in United States v. Shenandoah, decid-
ed while Reynolds’s case was pending on appeal. 595 F.3d 151 (2010).
Shenandoah held that SORNA’s registration requirements applied to
pre-enactment sex offenders by their own force, without the need for
additional regulations by the attorney general. Applying Shenandoah,
the court ruled that because SORNA required Reynolds to register
even without the attorney general’s interim rule—and therefore
that Reynolds was not affected by the interim rule—Reynolds lacked
standing to challenge the interim rule.

Reynolds brought this appeal to the United States Supreme Court.
The Court likely agreed to hear the case in order to resolve a circuit
split over whether SORNA’s registration requirements apply by their
own force to preenactment sex offenders and therefore whether
offenders such as Reynolds have standing to challenge the attorney
general’s rule.

**CASE ANALYSIS**

In order to challenge a law in federal court, a litigant must have
standing. This means that the litigant must have been adversely
affected by the law—that the litigant has a personal stake in the law.
The Supreme Court tells us that Article III of the Constitution imposes
certain specific standing requirements. But here, we are probably using
“standing” in its more colloquial sense. Either way, the question
in this case is whether Reynolds can show that he has been adversely
affected by, and therefore has a personal stake in, the law he seeks to
challenge, the attorney general’s interim rule.

If the interim rule required Reynolds to register, as Reynolds con-
tends, then he quite clearly has been affected by it. If so, he has a
personal stake in the rule, and he therefore has standing to challenge
it. But if, instead, SORNA, by its own force, required Reynolds to
register, as the government contends, then Reynolds was not affected
by the interim rule, because the rule did not require him to register
(SORNA did). By this understanding, the attorney general’s rule was
an unnecessary set of suspenders over SORNA’s belt. Reynolds may
well have standing to challenge SORNA—a question not before the
Court—but he does not have standing to challenge the interim rule.

This issue, whether SORNA required registration by its own force,
turns on the construction of SORNA’s language, in particular, the
language in § 16913(d). Thus, the parties’ arguments center on the
proper construction of this provision.

Reynolds proffers three principal arguments. First, Reynolds argues
that the plain language of § 16913(d) delegates to the attorney
general the authority to determine both whether and how SORNA’s
registration requirements apply to preenactment sex offenders. The
conjunctive between “whether” and “how” is important. If the lan-
guage requires the attorney general to determine whether (and not
just how) SORNA’s registration requirements apply to preenactment
sex offenders, this would suggest that they do not apply by their own
force. If the language requires the attorney general only to determine
how they apply, this would suggest that SORNA’s requirements apply
by their own force (and the only job for the attorney general is to
determine how they apply). Reynolds argues that § 16913(d) tasks the
attorney general with two responsibilities: to “specify the applica-
bility” of SORNA’s registration requirements to preenactment sex
offenders; and “to prescribe rules for the registration of any such sex
offenders and for other categories of sex offenders” who are unable to
comply with the initial registration requirements of subsection (b).
Reynolds says that the first clause by its plain terms—in particular,
the phrase “to specify the applicability”—means that the attorney
general must determine whether SORNA’s registration requirements
apply to preenactment sex offenders. He contends that the language
in the attorney general’s interim rule and the stated reasons for that
rule are consistent with this interpretation. Reynolds claims that
this interpretation of the first clause is supported by the different
language in the second clause, which requires the attorney general to
determine how the registration requirements apply. Finally, Reynolds
argues that the government’s position—that SORNA requires regis-
tration by its own force—would render this delegation superfluous,
violating the cardinal rule of statutory construction that courts must
give meaning to every word in a statute.

Second, Reynolds argues that a contrary reading, one given by some
circuit courts, is unsupportable. Reynolds says that some courts have
erroneously concluded that the last phrase of the provision—“and for other categories of sex offenders who are unable to comply with subsection (b)”—suggests that preenactment sex offenders fall within these “other categories.” This understanding, taken with the title of the provision, says Reynolds, has led some courts to give the provision a very narrow scope, applying only to currently unregistered sex offenders literally unable to comply with subsection (b) because of the age of their convictions. This, in turn, led courts to apply SORNA’s registration requirements to all sex offenders who, like Reynolds, were not unable to register.

Reynolds contends that these courts are wrong. According to Reynolds, the last clause of the provision does not modify all preceding clauses; instead, the plain language contains two distinct clauses (as described above). Moreover, this understanding assumes that the phrase “unable to comply with subsection (b)” means “unable to register, prior to SORNA, in the jurisdiction where convicted.” Reynolds says that this interpretation is belied by the plain language of the provision (because a sex offender could not comply with subsection (b) until subsection (b) existed, suggesting that subsection (b) refers to post-SORNA registration, not preenactment state registration), and that it is inconsistent with the Court’s approach in *Carr v. United States*, 560 U.S. ___ (2010) (holding that SORNA’s criminal provision does not apply to sex offenders whose interstate travel occurred before enactment, because that provision states elements in the present, not past, tense). Finally, Reynolds argues that some courts wrongly ruled that interpreting § 16913(d) as a delegation to the attorney general to determine whether the registration requirements apply to preenactment offenders would contravene SORNA’s legislative purpose. This approach, says Reynolds, wrongly prioritizes the broader legislative purpose of SORNA (to require universal registration) over the specific legislative purpose of § 16913(d) (to require the attorney general to determine whether the registration requirements apply to preenactment offenders).

Third, Reynolds argues that his reading is supported by SORNA’s structure and legislative history. Reynolds says that congressional delegation to the attorney general of the responsibility to determine whether SORNA’s registration requirements apply is fully consistent with congressional delegation to the attorney general of other significant enforcement responsibilities in SORNA. According to Reynolds, this was all an effort to draw on the attorney general’s expertise. Moreover, Reynolds argues that his reading is supported by the fact that the Senate considered legislation in 2005 that closely tracked the final language now in § 16913(d), but that was even more explicit in delegating to the attorney general the authority to determine whether SORNA’s registration requirements applied to preenactment sex offenders. Reynolds says that this is good evidence that Congress intended this result. For all these reasons, Reynolds contends that he was affected by the attorney general’s rule, and he therefore has standing to challenge it.

The government responds with three principal arguments. First, the government argues that the plain language of SORNA’s registration requirements means that all sex offenders, including preenactment sex offenders, must register. The registration requirements, says the government, do not distinguish between preenactment and post-enactment offenders; they apply equally to them all. Moreover, these registration requirements became active on the date of SORNA’s enactment, July 27, 2006. For these reasons, the government contends, SORNA’s registration requirements applied to Reynolds by their own force.

Second, the government argues that § 16913(d) does not change this. The government starts by examining the plain language of the provision. It argues that § 16913(d) authorizes the attorney general to “specify the applicability” of SORNA’s requirements to preenactment offenders (not to determine whether those requirements apply), suggesting that the requirements already apply under SORNA itself. Moreover, the government says that nothing in § 16913(d) requires the attorney general to act within a particular period of time, or even to act at all. This permissive authority gives the attorney general flexibility to reaffirm or even to adjust SORNA’s registration requirements, if necessary, but it says nothing to suggest that those requirements do not exist by their own force.

The government argues further that SORNA’s structure, context, and purpose all support its reading of the provision. The government says that § 16913(d) permits, but does not require, the attorney general to narrow SORNA’s sweep. This reading gives the attorney general the flexibility to meet congressional concerns that certain applications of the registration requirements may have unintended consequences. Moreover, SORNA’s structure suggests that its registration requirements apply by their own force; Reynolds’s contrary position would mean that Congress was indifferent about when and even if the registration requirements would ever apply to preenactment offenders. This, says the government, is implausible, especially in light of Congress’s concern in enacting SORNA about the then-estimated 100,000 unaccounted-for sex offenders and its purpose in SORNA to unify and to tighten sex offender registration requirements. The government contends that Reynolds cannot square his reading of § 16913(d) with these concerns and purposes.

Third, the government argues that five circuit courts of appeals agree that § 16913(d) does not exempt preenactment sex offenders from SORNA’s registration, even if they adopted slightly different approaches. But whatever their approach, the government claims, they all agree that § 16913(d) cannot be read as both encompassing and exempting preenactment offenders. The government argues that the clearest path is to read the provision as covering all preenactment offenders, but also recognizing that it does not exempt preenactment offenders from SORNA’s other registration requirements. For these reasons, the government says that SORNA required Reynolds to register by its own force, and that Reynolds therefore lacks standing to challenge the attorney general’s rule.

**SIGNIFICANCE**

This is the latest in a spate of cases in the lower courts, and the second case in as many years before the Supreme Court, challenging some aspect of SORNA. But while many of the challenges seek to overturn SORNA, this case is much narrower: it merely involves a first step, standing, to challenge SORNA.

This narrow issue turns on whether SORNA requires registration for preenactment offenders by its own force, or only through the attorney general’s rule. Every court of appeals, save one, the Sixth Circuit, had ruled that SORNA’s registration requirements applied to preenactment sex offenders by February 28, 2007, the date of the attorney general’s interim rule, suggesting that SORNA required registration by its own force. But after Reynolds sought review in the Supreme Court,
the Ninth Circuit deepened the split by agreeing with the Sixth Circuit and ruling that the registration requirements applied to preenactment sex offenders only on August 1, 2008, well after SORNA’s enactment, the attorney general’s interim rule, and only when the attorney general subsequently issued a valid rule. (The Ninth Circuit ruled that the attorney general’s February 28, 2007, interim rule violated the APA and therefore did not validly apply the registration requirements to preenactment offenders.)

The Supreme Court almost certainly accepted this case merely to resolve this split. If the Court rules for Reynolds, preenactment offenders who have been convicted of failing to register may lodge challenges to the attorney general’s interim rule. The courts of appeals are split on the validity of the rule, but the Supreme Court notably denied review of this issue in Reynolds’s original petition. All together, this would mean that the Court would allow the validity of the attorney general’s interim rule to percolate longer in the lower courts.

If, on the other hand, the Court rules for the government, the ruling will foreclose further challenges to the attorney general’s interim rule. (Such a ruling would not say anything about the validity of the rule. Remember that the Court denied review of this issue.)

In the end, though, the government is almost certainly correct when it said, in arguing against Supreme Court review, that the issue here is “narrow, transitory, and of diminishing importance.” After all, it applies to a small and shrinking class of people—at most, those preenactment offenders who were convicted of failing to register between February 28, 2007, the date of the allegedly flawed interim rule, and August 1, 2008, the latest date that a court of appeals has said that the attorney general issued a valid final rule. (An offender convicted before February 28, 2007, would not have been affected by the interim rule, because it had not yet been issued, and would therefore lack standing. An offender convicted after August 1, 2008, would be subject to the valid final rule, not the interim rule, and would therefore lack standing.) Moreover, offenders both within and outside this class will be able to lodge claims against SORNA’s registration requirements one way or another, regardless of the outcome of this case, even if those claims ultimately prove unsuccessful. (Reynolds himself originally lodged a broader array of constitutional claims against SORNA, but he lost on the merits.)

Given the narrowness of the issue here—and the fact that the Court declined to review a broader issue posed by Reynolds—this ruling and its effects are likely to be quite limited, dealing only with a preenactment offender’s standing to challenge the attorney general’s rule, and avoiding even a hint on the weightier constitutional questions around SORNA.

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FIRST AMENDMENT

Does the Ministerial Exception Apply to a Religious-School Teacher’s Employment Discrimination Claim?

CASE AT A GLANCE
The ministerial exception generally prohibits courts from intervening in employment discrimination suits involving ministers and priests. The courts recognize that the exception—rooted in the First Amendment religious liberty clauses—prohibits an entanglement between government and religion, keeping the government from interfering with ecclesiastical matters. But does the ministerial exception extend so far as to apply to a teacher at a religious school who primarily teaches secular subjects?

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC
Docket No. 10-553

Argument Date: October 5, 2011
From: The Sixth Circuit
by David L. Hudson Jr.
First Amendment Center, Nashville, TN

ISSUE
Does the ministerial exception bar a suit under the Americans with Disabilities Act brought by a former teacher at a religious school who taught primarily secular subjects but also performed some religious functions?

FACTS
Hosanna-Tabor, an ecclesiastical corporation affiliated with the Lutheran Church, hired Cheryl Perich as a contract teacher to teach kindergarten on a one-year contract from August 1999 to June 2000. Contract, or “lay”, teachers are hired by the Redford, Michigan-based school on one-year renewable terms. If the contract teacher performs well and meets expectations—from a teaching and religious point of view—the school may hire the teacher as a “called” teacher. Called teachers are hired on an open-ended basis and can only be dismissed for cause.

After completing some religious classes, Perich qualified as a called teacher. Hosanna-Tabor hired her as a called teacher in March 2000. She taught kindergarten until the end of the 2002–2003 school year. She then worked as a fourth-grade teacher.

Perich taught various secular subjects, including math, language arts, social studies, science, gym, and music. She also taught a religion class four days a week. She also occasionally led the chapel service.

In June 2004, Perich became ill. She applied for a disability leave of absence for the 2004–2005 school year. Eventually doctors diagnosed her with narcolepsy. After Perich’s leave extended for an additional five months, Hosanna-Tabor informed her of a change in the employee handbook that asked called teachers taking leave for more than six months to resign their called position to allow for the hiring of a replacement.

Perich wrote a letter to the principal of Hosanna-Tabor, Stacy Hoeft, indicating that she would be able to return to work in February 2005. Hoeft and the school board asked Perich to resign her position. Perich refused, contending that she was fit to return to work. Perich reported to work on February 22, 2005, but the school did not have a job for her.

Later that day Hoeft informed Perich that she would likely be terminated. Perich responded that such action violated the Americans with Disabilities Act (ADA). The school board contended that Perich engaged in disruptive behavior by coming to work without prior approval. In March 2005, Hosanna-Tabor sent Perich a letter, indicating that she would be terminated at the next school board meeting for insubordination.

In April 2005, the congregation voted to rescind Perich’s call, effectively terminating her employment. In May 2005, Perich filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC). In September 2007, the EEOC filed a complaint against Hosanna-Tabor in a federal district court in Michigan for ADA violations.

In October 2008, the federal district court granted summary judgment in favor of the school, reasoning that Perich fell within the “ministerial exception” to the ADA. The ministerial exception to the ADA allows religious groups to give “preference in employment to individuals of a particular religion” and to “require that all applicants and employees conform to the religious tenets of such organization.” The district court reasoned that Perich was a ministerial employee and the court refused to interfere with the religious school’s hiring and firing decisions when it came to such employees.
The EEOC and Perich appealed to the Sixth U.S. Circuit Court of Appeals. In March 2010, a unanimous three-judge panel of the Sixth Circuit reversed in Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church, 397 F.3d 769 (6th Cir. 2010). The majority reasoned that the ministerial exception did not apply because Perich’s primary duties were secular in nature. The majority wrote that “Perich’s primary function was teaching secular subjects,” not spreading the church’s religious doctrines.

After the Sixth Circuit denied en banc review in June 2010, Hosanna-Tabor appealed to the U.S. Supreme Court, which granted review in March 2011.

CASE ANALYSIS

The Americans with Disabilities Act (ADA) prohibits public and private employers with 15 or more employees from discriminating against qualified individuals with disabilities in the workplace. The ADA also prohibits covered employers from retaliating against employees who complain about disability discrimination.

The ADA contains a “ministerial exception” which gives religious groups the right to hire people of a particular faith. More broadly construed, the ministerial exception provides that courts will not intervene in church matters related to the hiring and firing of ministers and other so-called ministerial employees involving in religious activities. The ministerial exception has roots in both religious-liberty clauses of the First Amendment: the Free Exercise Clause and the Establishment Clause. Petitioner, Hosanna-Tabor, contends that the ministerial exception has roots in both religious-liberty clauses of the First Amendment: the Free Exercise Clause and the Establishment Clause. Respondent, Perich, counters that “Nothing in the right of free association—or, indeed, in any right under the Religion Clauses—grants religious organizations such a sweeping exemption from neutral and generally applicable antidiscrimination laws.” Respondent explains that the government has a compelling governmental interest in eradicating employment discrimination and providing protection to employees at religious institutions. Respondent frames the question as whether “the ADA’s retaliation provision—a neutral law of general application—is unconstitutional as applied to a religious association’s retaliatory firing of a teacher of secular subjects in a commercially operated school.”

The Supreme Court might address whether application of the ADA and its retaliation provision to a religious school would involve excessive entanglement between church and state—a key part of Establishment Clause analysis in the Lemon v. Kurtzman, 403 U.S. 171 (1971), decision that created the Lemon test. Under the Lemon test, a government regulation violates the Establishment Clause if the primary purpose is religious not secular, or the regulation has a primary effect that advances or denigrates religion or the regulation excessively entangles church and state.

Respondent argues that application of the ADA does not involve a detailed inquiry or intrusion into religious doctrine—it simply asks whether the religious employer treated the employee poorly because of her narcolepsy. This might be classified as a routine, regulatory interaction between church and state that does not rise to the level of an excessive entanglement under the Establishment Clause.

With respect to freedom of association, respondent contends that just like a secular school, “a religious school such as Hosanna-Tabor possesses no greater rights of expressive association than a secular school.”

The Court might move from the alleged constitutional problems of applying an antidiscrimination law to a teacher at a religious school to a more focused analysis of the proper application of the “ministerial exception” that takes into account the importance of both enforcing generally applicable discrimination laws and the constitutional concerns of religious schools.

The lower courts dealing with this issue have disagreed over the application of the ministerial exception. The majority of the courts to apply the exception provide that two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee. There is no question that Hosanna-Tabor qualifies (or did qualify—it later merged with another institution) as a religious institution. The operative questions becomes whether Cheryl Perich is a ministerial employee.

Some courts apply a “primary function” or “primary duties” test which asks whether the primary functions of the employee are religious or secular. Hosanna-Tabor contends that Perich is a ministerial employee: “She was important to the religious mission of the Church because she taught religion classes, led worship, and led prayer,” the petitioner writes in its brief. “Perich performed religious functions that were important to the mission of the church.” Perich counters that the vast majority of her duties were teaching secular subjects.

There are other tests that are used and proposed for the ministerial exception. The American Jewish Committee and the Union for Reform Judaism, in their amicus brief in support of petitioner, contend that the test should be whether religion comprises a “qualitatively significant function” of an employee’s job. The Rutherford Institute, in its amicus brief in support of petitioner, argues that there should be a presumption that any clerical personnel are covered by the ministerial exception to protect the autonomy of religious institutions.

The Anti-Defamation League, in its amicus brief in support of respondents, contends that the best way for the Court to balance the religious liberty freedoms and the interests in antidiscrimination laws is to require religious employers to advance the ministerial exception as an affirmative defense. “In that way, courts can strike a proper balance between the compelling interest of eradicating discrimination and guaranteeing First Amendment protections,” the group writes.

The Court likely will determine whether the ministerial exception serves as a proper way of accommodating these competing constitutional and statutory concerns. But, the Court may also provide even more guidance and articulate a test for application of the ministerial exception.

SIGNIFICANCE

The sheer number of amicus briefs filed in the case indicates its importance to religious groups, employment lawyers, and civil liberty
groups. Even a group of antitrust lawyers weighed in with an amicus brief.

On the one hand, petitioner and its amici assert that the decision is vital for the independence of religious groups that need to be able to operate free from governmental restraints. These groups vigorously contend that the exception should be applied broadly to protect religious freedom.

On the other hand, the decision has enormous significance for the many employees who work for religious organizations. A group of law and religion professors, in their amicus brief in support of respondents, write: “The ministerial exception has breathtaking consequences for the civil rights of thousands of men and women who work for religious organizations.”

The case gives the Court a pristine opportunity to articulate a test for determining when the ministerial exception applies—or whether it is constitutionally required. The federal circuits apply different tests to determine whether an employee qualifies as a ministerial employee. The Third, Fourth, Sixth, and D.C. Circuits apply a “primary duties” test—which the Sixth Circuit did below in the instant case—asking whether the primary duties of the employee are religious or secular. The Fifth, Seventh, and Ninth apply a different test that looks at whether a substantial portion of the employee’s duties are religious.

The case could have an impact beyond ADA and other antidiscrimination claims. It could have an impact on whether a similar-type exception shields churches from cases involving tort liability against churches for harmful actions committed by religious figures.

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National Employment Lawyers Association (Eric Schappner, 206.616.3167)

Neil H. Cogan (Neil H. Cogan, 714.444.4141)

People for the American Way Foundation (David Bederman, 404.727.6822)
Can a Criminal Defendant’s Failure to Raise a Claim of Ineffective Assistance of Trial Counsel on Postconviction Review Be Excused, Where the Failure Was Caused by Ineffective Assistance of His Postconviction Attorney?

**CASE AT A GLANCE**

Luis Mariano Martinez filed a federal habeas corpus petition arguing that the state postconviction courts wrongly rejected his claim that his attorney in his original trial was ineffective. Those postconviction courts ruled that Martinez defaulted his claim after his first postconviction attorney effectively waived it. Martinez argues that this violated his fundamental right to effective assistance of counsel in his postconviction case, thus excusing any default and allowing the federal courts to hear his claim.

Martinez v. Ryan  
Docket No. 10-1001

Argument Date: October 4, 2011  
From: The Ninth Circuit

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

**INTRODUCTION**

Ordinarily, a criminal defendant cannot raise claims in his federal habeas corpus petition that he has forfeited, or defaulted, in the state postconviction process. But courts have carved out exceptions where the petitioner can show cause for the default and actual prejudice as a result of the violation, or where the petitioner can demonstrate that failure to consider his or her claim will result in a fundamental miscarriage of justice, or where the application of a state procedural rule frustrates a fundamental right.

The question here is whether any of these exceptions apply, in particular, whether the default may be excused because Martinez did not have effective assistance of counsel in his postconviction case.

**ISSUE**

Can a criminal defendant file a federal habeas corpus petition, where his postconviction attorney effectively waived his underlying claim for effective assistance of counsel at trial in violation of his claimed right to effective assistance of counsel in his postconviction case?

**FACTS**

Luis Mariano Martinez was charged in an Arizona trial court with two counts of sexual conduct with a person under the age of fifteen. The state argued that Martinez had sexual intercourse two times with his stepdaughter, Lacey, during the morning of July 10, 1999.

The state presented evidence at trial that Lacey made statements prior to trial suggesting that Martinez had sex with her. But she later recanted. (She testified at trial that she did not remember much of what happened that morning, and that Martinez did not try to have sex with her.) The state nevertheless argued that her initial statements were true, and that Lacey only recanted because her mother failed to support her initial accusations. In support of this theory, the state presented expert testimony suggesting that recantations by children of true accusations were most commonly caused by a “lack of support from the mother of the victim.”

The state also presented evidence that a nightgown Lacey was wearing when the police arrived at the Martinez residence on July 10, 1999, contained semen stains that matched Martinez’s DNA.

Martinez’s attorney failed to adequately rebut the state’s evidence. While he presented some evidence that Lacey recanted her initial accusation, he neglected to present other, more persuasive evidence. He did not research the basis for the state’s expert’s opinions, and he neglected to present readily available evidence that would have refuted her opinions. And he failed to uncover and present other evidence and theories as to why Lacey’s nightgown was contaminated.

(Other evidence in the case revealed that it was not possible to determine when the semen contacted Lacey’s nightgown, and that the low sperm count on the nightgown suggested that it could have been contaminated in another way. Moreover, a sexual assault examination on July 10, 1999, did not show any evidence of injury or trauma to Lacey’s body, including her vaginal area; and vaginal swabs collected during this examination did not contain semen.)

Martinez was convicted on both counts and sentenced to consecutive terms of 35 years to life. He appealed, but the Arizona Court of Appeals affirmed, and the Arizona Supreme Court declined to review the case. Martinez did not argue on direct appeal that his trial attorney...
was ineffective, because Arizona law prohibits appellate courts from considering ineffective-assistance-of-trial-counsel claims on direct appeal. (Arizona law requires these claims to be brought in a postconviction challenge.)

While Martinez’s direct appeal was pending, his court-appointed appellate attorney filed a Notice of Post-conviction Relief in the state trial court, thus initiating Martinez’s postconviction case. Martinez’s appellate attorney then also filed a statement that she could find no colorable claims for postconviction relief and asking the court to grant Martinez 45 days to file a pro se petition for postconviction relief. Under Arizona law, this statement effectively removed her from the postconviction case and left Martinez alone to bring a postconviction challenge.

Martinez’s appellate attorney filed these papers without consulting with Martinez, without consulting with Martinez’s trial counsel, and (other than reviewing the court records) without investigating a possible ineffective-assistance-of-trial-counsel claim. She wrote to Martinez that he needed to file his own postconviction petition, but the letter was in English, even though Martinez had told her that he did not read English and did not “understand anything of what [was] happening.”

Martinez did not file a pro se petition, and the state trial court dismissed the postconviction case—still one year before the conclusion of Martinez’s direct appeal.

Then, in 2004, represented by a pro bono attorney, Martinez filed a new Petition for Post-conviction Relief, alleging that his trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments. He also argued that this second postconviction claim was not precluded, because his first postconviction claim violated his Fourteenth Amendment right to effective assistance of counsel. In other words, he said that he should be able to file a second postconviction claim, not ordinarily permitted, because his first postconviction claim violated his federal constitutional right to counsel and therefore prevented him from airing his underlying ineffective-assistance-of-trial claim. The trial court rejected this claim and dismissed the case, ruling that Martinez’s ineffective-assistance-of-trial-counsel claim was precluded from review, or procedurally defaulted, because, under Arizona law, it was not raised in the first (and aborted) postconviction case. (Arizona Rule of Criminal Procedure 32.2 says that a defendant is precluded from postconviction relief on any issue that “has been waived … in any previous collateral proceeding.”) The Arizona Court of Appeals affirmed, and the Arizona Supreme Court declined to hear the case.

Martinez next filed a Petition for a Writ of Habeas Corpus in federal court, again raising his underlying ineffective-assistance-of-trial-counsel claim. Martinez also echoed his argument in his second postconviction case that his underlying claim should not be precluded, because his first postconviction case violated his right to effective assistance of postconviction counsel. The district court denied relief, ruling that Rule 32.2 was an “adequate and independent” basis to bar federal habeas corpus relief and that there was not cause and prejudice to excuse the default. The U.S. Court of Appeals for the Ninth Circuit affirmed. This appeal followed.

CASE ANALYSIS

In general, the federal courts will reject a federal habeas corpus petition where the petitioner “has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule.” Coleman v. Thompson, 501 U.S. 722 (1991). But courts have carved out exceptions where the petitioner can show cause for the default and actual prejudice as a result of the violation, or where the petitioner can demonstrate that failure to consider his or her claim will result in a fundamental miscarriage of justice. Moreover, a state procedural rule, such as Arizona Rule 32.2, may be “inadequate,” thus allowing federal court review, if it frustrates a fundamental right.

All this means that the federal courts would deny Martinez’s habeas corpus petition on his defaulted claim unless the first postconviction process, along with its ineffective assistance of postconviction counsel, constituted cause for the default and prejudice in the proceeding, constituted a fundamental miscarriage of justice, or frustrated a fundamental right. These questions, in turn, depend on whether Martinez had a right to effective assistance of postconviction counsel in the first place.

Martinez argues that he had such a right, that the violation of this right in his first postconviction process excuses the default, and that the federal courts should entertain his habeas corpus petition. The government, in contrast, argues that Martinez had no such right, that Martinez therefore had no excuse for the default, and that the federal courts should not entertain his petition.

The Supreme Court has not ruled directly on this question. But it has ruled on related and similar questions. Thus, the Supreme Court ruled in 1963 in Douglas v. California that indigent criminal appellants have a fundamental right to counsel on their first-tier direct appeal—an appeal as of right to an intermediate state appellate court. 372 U.S. 353. But the Court later ruled in 1974 in Ross v. Moffitt that indigent criminal appellants have no fundamental right to counsel on their second-tier direct appeal—a discretionary appeal to a state supreme court. 417 U.S. 600. The Court in Ross noted the differences between a first-tier appeal and a second-tier appeal: the former is required while the latter is not, and the two serve different purposes. The Ross Court concluded that counsel is not fundamental to an indigent appellant’s second-tier appeal. Finally, the Court ruled in 2005 in Halbert v. Michigan that indigent criminal appellants have a fundamental right to counsel on their second-tier, discretionary appeal when the state does not offer a first-tier appeal to a class of defendants, and thus when the second-tier appeal is all that the state offers to those defendants. 545 U.S. 605. In other words, the Court in Halbert said that under principles established in Douglas, a criminal appellant has a right to counsel on the first direct appeal that the state provides, even if that appeal is ordinarily a second-tier appeal.

Here, Arizona does not allow criminal defendants to bring an ineffective-assistance-of-counsel claim on direct appeal; it only allows such claims on postconviction review. Thus, this case sits between Ross and Halbert: Arizona’s postconviction process looks a little like second-tier, discretionary appellate review (as in Ross); but it also looks like the first opportunity for a criminal appellant to raise a particular kind of claim (as in Halbert). If the Court aligns Martinez’s postconviction case more with the second-tier, discretionary appeal in Ross, as the Ninth Circuit did, the Court will almost surely rule
that Martinez had no fundamental right to counsel and no cause for default, and therefore no viable federal habeas corpus petition. But if the Court aligns Martinez’s case more with the appeals process in Halbert, the Court will almost surely rule that Martinez had a fundamental right to counsel and a good cause for default, and therefore a viable federal habeas corpus petition.

At the same time, based upon the line in Ross, the Court has rejected claims for a right to counsel on collateral review. Thus, the Court has ruled that because there is no right to counsel on discretionary appeal, a fortiori, there is “no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.” Pennsylvania v. Finley, 481 U.S. 551 (1987). Still, this case is different: the postconviction case is the first time Martinez could raise his claim.

Against this landscape, Martinez proffers three principal arguments. First, Martinez argues that his ineffective-assistance-of-trial-counsel claim was not subject to default. Martinez argues that the state’s procedural ruling—that Martinez’s claim was precluded because his first postconviction attorney failed to raise it—interferes with his fundamental rights to both effective assistance of trial counsel and effective assistance of first-tier postconviction counsel. (Martinez does not argue that he has a fundamental right to effective assistance of counsel at trial. That right is well established.) As to his claimed right of effective assistance of counsel in his first-tier postconviction case, Martinez points out that while the Supreme Court ruled in Coleman v. Thompson that there is no general right to counsel in state collateral proceedings, the Court also recognized in that case that there might be an exception when “state collateral review is the first place a prisoner can present a challenge to his conviction.” Martinez argues that this is precisely the case here, and that Douglas and Halbert show that he has a fundamental right to first-tier postconviction counsel when, as was the case here, state law prevented him from raising his claim on direct appeal. In short, Martinez argues that Arizona’s rule preventing him from raising his effective-assistance-of-trial-counsel prior to his first-tier postconviction case operates just like Michigan’s rule in Halbert that prevented a certain class of criminal appellants from appealing their conviction as of right to the first-tier appeals court. Martinez says that his first-tier postconviction appeal is exactly like the first-tier discretionary appeal at issue in Halbert for all purposes related to the right to counsel. Martinez concludes that he has a fundamental right to counsel in his first-tier postconviction case, and that this right comes with the ancillary right to effective counsel. He argues that his denial of this right constituted cause and prejudice to excuse the procedural default.

Next, Martinez argues that the Ninth Circuit erred in distinguishing Douglas and Halbert and in aligning his case with Ross. Martinez says that his case is unlike Ross because the appellant in that case sought counsel for a discretionary appeal, where he had already litigated his claims, with the help of counsel, below. Martinez argues that his first-tier postconviction review, in contrast, was his first opportunity to raise his claim. Moreover, Martinez contends that his first-tier postconviction case serves a different purpose than the discretionary appeal at issue in Ross, and that counsel, too, serves a different purpose: Martinez’s first-tier postconviction court was not a gatekeeper that could review the holding below on the record alone (like a second-tier discretionary appellate court), because it was the first to evaluate Martinez’s claim. Martinez’s first-tier postconviction court looked more like a first-tier mandatory appellate court on his ineffective-assistance-of-trial-counsel claim—more like the intermediate appellate court in Douglas. Finally, Martinez argues that recognizing his claimed right would not lead to an “infinite continuum of litigation,” with the right working its way into subsequent postconviction cases, as the Ninth Circuit worried, for a variety of theoretical and practical reasons based on the nature of the claims and Arizona law.

Third, Martinez argues that he did not default his claim. He says that it is “an absurd Catch-22” that he could have defaulted on his first-tier postconviction claim of ineffective assistance of trial counsel even after his postconviction attorney effectively backed out of the case, leaving him with no attorney. In short, Martinez contends that default cannot possibly apply when he is trying to lodge an initial claim of ineffective assistance of counsel without counsel.

The state responds with four principal arguments. First, the state argues that there is no constitutional right to counsel on collateral review. The state says that the Supreme Court ruled categorically in Pennsylvania v. Finley that the right to counsel does not extend to collateral-review proceedings and that the Court declined to create an exception in Coleman. The state contends that Halbert is distinguishable because Halbert involved a direct appeal, not collateral review; and the Supreme Court has “attached great significance” to the difference between the two. (The United States, as amicus in support of the state, vigorously argued this distinction in its brief.) Finally, the state claims that Arizona’s rule that a defendant may raise an ineffective-assistance-of-trial-counsel claim only in a postconviction process is not unduly harsh, or even unusual. The state says that such claims belong in the postconviction courts, suggesting that the rule here did not work an injustice.

Second, the state argues that any right to counsel that might exist in collateral proceedings does not also encompass a right to effective assistance of counsel. In short, the state argues that any right to counsel is a state-created right only, and that nothing in the Sixth and Fourteenth Amendments says that it also includes the right to effective assistance of counsel. The state argues that states have wide discretion in crafting their postconvicting processes—that nothing requires them even to have postconviction processes—and that Arizona’s postconviction processes fail well within constitutional bounds. Moreover, the state argues, the Court should look at Arizona’s fair postconviction procedures as a whole, and not at any particular result (such as Martinez’s case), in evaluating Arizona’s procedures. The state says that recognizing Martinez’s claimed right cuts against the principles of curtailing “intrusive post-trial inquiry” and applying familiar preconviction rights to the postconviction process. Finally, the state argues that recognizing Martinez’s claimed right would spawn new postconviction litigation, thus undermining the state’s interest in finality, while yielding little positive return.

Third, the state argues that treating the ineffectiveness of postconviction counsel as cause to overcome default would defeat congressional intent behind the Antiterrorism and Effective Death Penalty Act, or AEDPA. That act provides that “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a [federal habeas corpus proceeding].” The state says that even if this language does not preclude Martinez’s argument (because Martinez’s argument really goes to cause for default, not underlying relief from the federal habeas corpus
court), Martinez’s claim would still thwart congressional purposes in curtailing ineffective-assistance-of-counsel claims in federal habeas corpus proceedings.

Finally, the state argues that even if Martinez could establish a new right to counsel in first-tier postconviction proceedings, this would not be enough to establish cause under the Supreme Court’s 1989 ruling in *Teague v. Lane*. 489 U.S. 288. In that case, the Court ruled that a “new rule” only applies retroactively in collateral proceedings if the rule changes the scope of conduct previously held criminal or if the rule is a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” The state argues that neither exception applies to Martinez’s claimed new right, even though Martinez seeks to apply the right only to cause, and not to enforce it independently.

**SIGNIFICANCE**

By one reckoning, this case is only the latest in a line of cases testing whether the right to counsel and its adjunct, the right to effective assistance of counsel, extend under new and different circumstances in the criminal process. By this understanding, the problem for the Court is merely to situate this case along the Douglas-Halbert-Ross continuum and to decide whether this case looks more like Douglas and Halbert, or more like Ross. Halbert, the last of these cases, in 2005, produced a 6-3 majority on the Court, with former Justices Stevens, O’Connor, and Kennedy joining Justices Ginsburg, Souter, and Breyer in the majority. Justice Thomas wrote a dissent, joined by Chief Justice Roberts and Justice Scalia.

By another reckoning, this case is about the competing values of cost, efficient administration of justice, and finality, on the one hand, and fairness, on the other, in our criminal justice system. Amici weighed in on both sides of this balance. Thus the United States filed a brief, and 25 states filed a brief, in support of Arizona, arguing, among other things, that recognizing Martinez’s claimed right would trade on cost, efficient administration, and finality. On the other side, the American Bar Association, former state supreme court justices, the Innocence Network, and the Criminal Justice Legal Foundation all pressed a fairness argument, among others, in support of Martinez.

Finally, it is worth noting that this case comes on the heels of the Court’s ruling just last term in *Turner v. Rogers*, 564 U.S. ___ (2011), another right-to-counsel case. In that case, a 5-4 majority ruled that a father’s incarceration for failing to pay child support arrears violated due process, where the state failed either to provide him with an attorney or to provide adequate alternative protections for him in his contempt proceeding. Although Turner, the father, argued that he had a constitutional right to counsel at a contempt proceeding, putting the right to counsel squarely before the Court, the Court ruled that either an attorney or alternative protections could have satisfied due process. Because the state provided neither, the incarceration violated due process.

The ruling suggests that five members of the Court are concerned as much or more about fair process in a particular case than a claimed right, such as the right to counsel. And it may suggest that the Court will be more concerned about fairness here. If so, the particulars of this case—the Arizona rule about when a defendant may raise an effective-assistance-of-trial-counsel claim, and the actions of Martinez’s first postconviction attorney—may be especially important, and the Court may be less interested in the fine comparisons between this case and Halbert and Ross. In short, Turner may suggest that broader concerns—fairness concerns based on broader due process principles, and not the narrower and particular right to counsel—may be in play here.

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Copyright Versus the Public Domain: Does the Constitution Allow Congress to Take Works from the Public Domain and Replace Those with Private Exclusive Rights?

CASE AT A GLANCE
This case arose out of U.S. treaty obligations to restore copyright to foreign authors who had failed to comply with the pre-1989 formalities in the law. Section 514 of the Uruguay Round Agreement Act (URAA) restores those copyrights and, in doing so, allowed thousands of widely disseminated works to be removed from the public domain. Petitioners challenge the law—arguing that the law overreaches constitutional authority and violates speech rights protected by the First Amendment.

Golan v. Holder
Docket No. 10-545
Argument Date: October 5, 2011
From: The Tenth Circuit
by Dennis Crouch and Ted Wright
University of Missouri School of Law, Columbia, MO

ISSUES
Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the Public Domain?

In Section 514 of the Uruguay Round Agreement Act of 1994, Congress revived copyright protection for millions of works that had fallen into the public domain. Does Section 514 violate the First Amendment of the United States Constitution?

FACTS
Statutes and Treaties at Issue
The Berne Convention for the Protection of Literary and Artistic Works is an international treaty originally signed in 1886. However, it was not until 1989 that the United States joined the Convention. In the preceding years, Congress had taken several steps to substantially conform US law to the Berne Convention requirements. These steps included elimination of the requirement to register a copyright in order to receive protection (1976) and elimination of the requirement to place a copyright notice on published works (such as the © symbol) to avoid copyright forfeiture (1988).

As the final step in complying with the Berne Convention, the United States was required to revive the copyright of works by foreign authors that had entered the public domain due to failure to comply with formalities, such as registration or notice. That step was further required as part of the negotiated 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) that was agreed to by members of the World Trade Organization (WTO). TRIPS also allowed WTO members to challenge other member’s implementation failures through the WTO dispute settlement procedure. In the Uruguay Round Agreement Act (URAA), Congress implemented the requirements of the TRIPS agreement. In particular, § 514 of the URAA, at issue in this case, enacted the copyright restoration required by the Berne Convention.

Section 514 restored the copyright to numerous culturally and commercially important works that had been considered within public domain for decades. These works include Pablo Picasso’s Guernica, Fritz Lang’s film Metropolis, the works of Igor Stravinsky, Prokofiev’s Peter and the Wolf, as well as works by C. S. Lewis, Virginia Woolf, H. G. Wells, Federico Fellini, Alfred Hitchcock, Jean Renoir, and M. C. Escher.

There are several caveats to the copyright restoration that somewhat soften its impact. No damages are available for unlicensed copies made while the work was in the public domain; a limited grace period was made available for individuals who had previously relied on the public domain works; and previously created derivative works can continue to be used upon payment of a compulsory licensing fee. In addition, fair use principles continue to apply as they do with all uses of copyrighted works in the United States.

Parties
“Petitioners are orchestra conductors, educators, performers, film archivists, and motion picture distributors who depend upon the public domain for their livelihood.” (Petitioners merits brief, pg. 10.) In particular, Lawrence Golan is an educator at the University of Denver and professional orchestra conductor. Other parties include Richard Kapp, an orchestra conductor (since deceased), and Ron Hall and John McDonough, who distribute public domain films.

The respondent, the attorney general of the United States, was sued by the petitioners in his official capacity.
In addition to the parties, two dozen others filed nonparty briefs as friends of the court. These include Google, ACLU, and Creative Commons (all in support of the petitioners) and the ABA, MPAA, and the Intellectual Property Owners Association (all in support of respondent). None of the authors whose copyrights have been restored directly filed briefs in the case.

Case History
Petitioners filed this suit originally in 2001 in the federal district court for the District of Colorado. Petitioners claimed that § 514 exceeded the power of Congress under the Copyright Clause, and violated their First Amendment rights. The district court granted summary judgment for the government on both claims and dismissed the suit.

The petitioners appealed the decision of the district court. While the case was on appeal before the Tenth Circuit Court of Appeals, the Supreme Court decided another copyright case, *Eldred v. Ashcroft*, 537 U.S. 186 (2003). *Eldred* involved a challenge to the Sonny Bono Copyright Term Extension Act (CTEA). The plaintiffs in that case claimed that the CTEA, which extended the copyright term an additional 20 years, violated the Copyright Clause and the First Amendment. The Supreme Court rejected those claims and held that First Amendment scrutiny of changes in the copyright law is unnecessary when “Congress has not altered the traditional contours of copyright protection.”

Following *Eldred*, the Tenth Circuit agreed with the district court that § 514 did not violate the Copyright Clause. However, the Tenth Circuit reversed and remanded the case with regard to the First Amendment. The court found that in light of *Eldred*, § 514 must be subjected to further First Amendment scrutiny because it altered the traditional contours of copyright protection by removing works from the public domain.

On remand, the district court reversed its prior holding and instead found that § 514 violated the First Amendment because it was not sufficiently narrowly tailored to achieve the government’s interest in enacting it, that being compliance with article 18 of the Berne Convention. The case was appealed again to the Tenth Circuit. The Tenth Circuit reversed the district court, finding that while § 514 is subject to First Amendment scrutiny, it passes that scrutiny as sufficiently narrowly tailored.

The petitioners appealed the Tenth Circuit’s decision to the Supreme Court, and the Supreme Court granted certiorari to determine whether § 514 violates either the Copyright Clause or the First Amendment.

CASE ANALYSIS
There are three competing legal interests that come to a head in this case: the value of strong copyright protection; the value of an open public domain; and the value of international cooperation and harmonization. The Constitution empowers Congress to create a copyright system based upon the notion that the promise of exclusive rights provides authors with a powerful incentive to create those works. The Constitution also guarantees the freedom of speech and freedom of the press, and these freedoms include the notion that ideas and works within the public domain are free for all to use. Finally, the Constitution recognizes the importance of cooperation amongst nations and gives power to Congress to ratify and implement international treaties.

Prior to § 514, the leading treatise on U.S. copyright law was clear: “neither the copyright clause nor the First Amendment would permit the granting of copyright to works which have theretofore entered the public domain.”

First Amendment Threshold Inquiry
A first hurdle for petitioners is based upon the Supreme Court’s analysis in *Eldred v. Ashcroft*. In that case, the Court recognized the conflict between copyright and free-speech law, but refused a complete First-Amendment analysis because the 20-year term extension at issue did not alter the traditional contours of copyright protection. Petitioners argue that the copyright restoration at issue here is different because it fundamentally alters the “integrity of the public domain.” The government responds by pointing to a number of prior instances Congress removed works from public domain. Petitioners argue the constitutionality of those limited prior instances “remains questionable.”

Passing the first hurdle opens the door for a full-fledged First Amendment challenge that would consider whether the copyright restoration passes a heightened level of scrutiny.

Important Government Interest
Petitioners argue that an intermediate level of scrutiny is appropriate in this case and that the court should query whether the challenged copyright restoration “furthers an important government interest in a way that is substantially related to that interest.” The government argues that “Section 514 furthers at least three important government interests.”

Taking these in turn, the government first argues that the copyright restoration ensures compliance with international obligations. Petitioners respond that compliance with an international treaty cannot justify violation of the U.S. Constitution and that there was no threat of the U.S. benefits being jeopardized. The government counters that the restoration requirement is now enforceable under the World Trade Organization’s “formal and binding dispute resolution proceedings, which can result in (among other things) the imposition of trade sanctions.”

The government’s second identified interest is in securing “greater protections for American authors abroad.” The basis for this argument is that U.S. compliance with the treaty in granting rights to foreign authors will lead other countries to grant rights to U.S. authors. Petitioners respond that this “potential” of securing rights abroad for private individuals should be given only little weight as compared with the actual and identifiable deprivation of vested interests in the public domain. “Congress was giving away vested public speech rights on the bare possibility that it might someday create private economic benefits for U.S. authors.”

The government’s third identified interest is in “correcting historical inequalities facing foreign authors.” Petitioners respond that “there is no inequity to correct, because U.S. authors were subject to the same formalities” as foreign authors. Further, petitioners argue, “the government cannot claim any legitimate interest in sacrificing the speech rights of the American public to benefit foreign authors”—especially by providing “windfalls to authors of existing works that entered the public domain long ago.”
However, the significant interest step is not the only burden for the government under a First Amendment analysis. If the government is successful in identifying a significant government interest for implementing § 514, the law may still be held to violate free speech rights if the law is not sufficiently tailored to satisfy that interest. Petitioners point to the fact that the copyright restoration goes beyond what was required by the international treaties and argue that it is not narrowly tailored to achieve the stated government interests. In particular, petitioners point to the fact that the Berne Convention permits: (1) negotiated exceptions to the restoration requirement; (2) permanent protection for individuals who have relied upon the works being in the public domain; and (3) shorter copyright terms for certain restored works.

**Copyright Clause**

As a separate justification for invalidity, petitioners argue that the copyright restoration invalidates the Constitution’s Copyright Clause. Article I of the U.S. Constitution bestows Congress with the power to “promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings.” Petitioners argue that both this text and its associated tradition of interpretation confirm a constitutionally protected public domain which is both “permanent and stable.” In particular, the Constitution only allows the grant of copyright for “limited times”—a term that petitioners interpret as a “fixed and predictable period.” In that light, the ability of Congress to, at its own discretion, remove works from the public domain means that the associated copyrights would not be so limited. Petitioners write, “[r]emoving works from the public domain violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at anytime, even after it expires.” The government argues that a better interpretation of “limited times” is simply “confined within certain bounds” or “restrained.” Focusing on the law being challenged, the government argues that the restoration is still for a limited time because the restored copyrights will expire on a date certain. This response parallels the government’s successful defense of the copyright term extension at issue in *Eldred*.

**SIGNIFICANCE**

Cases involving the public domain may be more important than ever because the marketplace is ready to use, distribute, and repurpose available content at a level never before seen. As Google wrote in its amicus brief:

"Uncertainty about the stability of public domain status is especially harmful today, because it undercuts ongoing efforts, spurred by new technology and the widespread public use of the internet, to make creative and productive use of public domain materials. For a small company, or a university or other nonprofit institution, the risk that public domain materials may in the future be the subject of new copyright claims deters investment in public domain resources. Even for a large company like Google, the possibility that works in the public domain will be legislatively deemed copyrighted in the future is a daunting and complicating prospect. A newly recognized congressional power to withdraw materials from the public domain—decades after the fact—will reduce incentives to make public domain works available to the public, efforts that often require large upfront investments (scanning entire libraries of old, oddly shaped books is expensive)."

Google’s concern is primarily related to future congressional action that would further narrow the public domain. In an interesting brief, cinema professor Peter Decherney discussed the long history of Hollywood’s reliance on the public domain in films such as *Snow White, Pinocchio*, and *The Ten Commandments*.

Several amicus briefs focused on the narrow issue of the copyrights at issue in this case. The Conductors Guild and Music Library Association both conducted surveys and reported that the majority of their members now avoid using works that were previously in the public domain. The brief includes a narrative from a university orchestra conductor who “noted that his student ensemble no longer can perform Prokofiev’s *Peter and the Wolf* or Stravinsky’s *Soldier’s Tale,* among other titles. The loss of *Soldier’s Tale* is particularly troubling, as it is considered an essential piece for conductors training to become professionals.”

Although it is can be difficult to guess how the justices may vote, Justice Breyer in particular has taken a special interest in copyright law and dissented in *Eldred*. Further complicating the situation, Justice Kagan has recused herself and therefore the case will be decided by only eight members of the court; the petitioners will lose in the case of a 4-4 tie.

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Douglas v. Santa Rosa Memorial Hospital
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