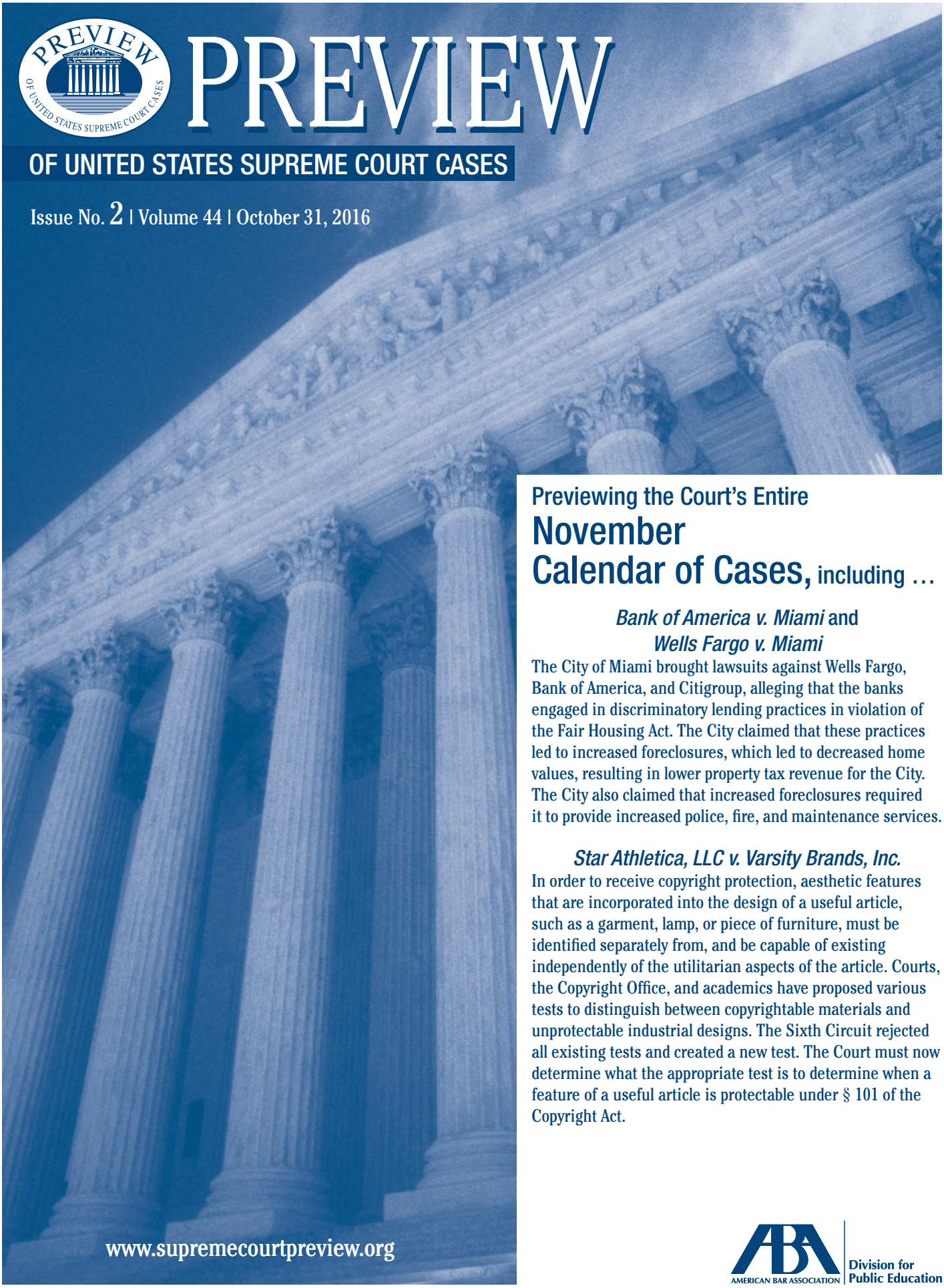

PREVIEW

OF UNITED STATES SUPREME COURT CASES

Issue No. 2 | Volume 44 | October 31, 2016

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

Bank of America v. Miami and *Wells Fargo v. Miami*

The City of Miami brought lawsuits against Wells Fargo, Bank of America, and Citigroup, alleging that the banks engaged in discriminatory lending practices in violation of the Fair Housing Act. The City claimed that these practices led to increased foreclosures, which led to decreased home values, resulting in lower property tax revenue for the City. The City also claimed that increased foreclosures required it to provide increased police, fire, and maintenance services.

Star Athletica, LLC v. Varsity Brands, Inc.

In order to receive copyright protection, aesthetic features that are incorporated into the design of a useful article, such as a garment, lamp, or piece of furniture, must be identified separately from, and be capable of existing independently of the utilitarian aspects of the article. Courts, the Copyright Office, and academics have proposed various tests to distinguish between copyrightable materials and unprotectable industrial designs. The Sixth Circuit rejected all existing tests and created a new test. The Court must now determine what the appropriate test is to determine when a feature of a useful article is protectable under § 101 of the Copyright Act.

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U.S. SUPREME COURT November 2016 CALENDAR

MONDAY

OCTOBER 31

Fry v. Napoleon Community Schools

Star Athletica, LLC v. Varsity Brands, Inc.

TUESDAY

NOVEMBER 1

State Farm Fire and Casualty Company v. United States, ex rel. Rigsby

SCA Hygiene Products v. First Quality Baby Products, LLC

WEDNESDAY

NOVEMBER 2

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.

NOVEMBER 7

National Labor Relations Board v. SW General, Inc.

NOVEMBER 8

Bank of America v. Miami and *Wells Fargo v. Miami*

Lightfoot et al. v. Cendant Mortgage Corp. et al.

NOVEMBER 9

Lynch v. Morales-Santana

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October 31, 2016

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

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- 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 November cases.

AMERICAN BAR ASSOCIATION | Division for Public Education

Is It Constitutional to Treat an Unwed U.S.-Citizen Father Differently from an Unwed U.S.-Citizen Mother for the Purpose of Transmitting Citizenship to His Foreign-Born Child?

CASE AT A GLANCE

Luis Ramon Morales-Santana was born in the Dominican Republic to an unwed U.S.-citizen father and a Dominican mother. After living as a lawful permanent resident in the United States for decades, Morales-Santana was convicted on felony charges, thus triggering deportation proceedings. Under immigration law at the time of Morales-Santana's birth, his father needed to have lived in the U.S. for at least 10 years—5 or more of which followed the father's fourteenth birthday—in order for Morales-Santana to be born a U.S. citizen. Because Morales-Santana's father left Puerto Rico 20 days before turning nineteen years old, he could not transmit citizenship at birth to his son. Under the same law, an unwed citizen mother could transmit citizenship to her child if she lived in the United States for a year at any time prior to the child's birth. Morales-Santana argued that his equal protection rights were violated by the law's gender distinction and that the rule applicable to unwed U.S.-citizen mothers should apply to unwed citizen fathers as well. The Second Circuit Court of Appeals agreed and overturned the deportation order, finding that applying the standard for unwed citizen mothers made Morales-Santana a U.S. citizen. The Supreme Court will determine whether the differential treatment of U.S.-citizen mothers and fathers violates the Fifth Amendment and whether the appellate court had the authority to grant Morales-Santana citizenship.

Lynch v. Morales-Santana
Docket No. 15-1191

Argument Date: November 9, 2016
From: The Second Circuit

by Alan Raphael and Grace Urban
Loyola University Chicago School of Law, Chicago, IL

ISSUES

Does the different treatment of unwed citizen fathers and unwed citizen mothers under § 1409(c) of the Immigration and Nationality Act of 1952 violate the Fifth Amendment's guarantee of equal protection under the laws?

Did the Second Circuit err in conferring United States citizenship on Morales-Santana, despite no express statutory authority to do so?

FACTS

In 1962, Luis Ramon Morales-Santana was born to an unwed United States citizen father and a Dominican mother. Morales-Santana's father resided in Puerto Rico until February 1919, when he moved to the Dominican Republic 20 days before his nineteenth birthday. In 1970, Morales-Santana became statutorily "legitimate[ed]" when his parents married. Five years later, in 1975, the United States admitted Morales-Santana as a lawful permanent resident. The following year, his father died. In 2000, he was ordered deported after he was convicted of several felonies. Morales-Santana objected, claiming that he had derivative citizenship through his father and thus was not deportable.

The Immigration and Nationality Act (INA) of 1952, codified as 8 U.S.C. § 1409, was the statute in effect at the time of Morales-Santana's birth, and thus governed whether he acquired derivative citizenship from his father at birth. Under § 1409(c), a child born outside of the United States to an unwed citizen father and a non-citizen mother only becomes a United States citizen at birth if the father (1) was physically present in the United States for a total of 10 years or more prior to the child's birth, and (2) at least 5 of those years occurred after the father turned fourteen years old. In contrast, a child born outside of the United States to an unwed citizen mother and a noncitizen father becomes a citizen at birth if the mother was physically present in the United States for a continuous period of at least one year at some point prior to the child's birth. Because Morales-Santana's father did not satisfy the statutory requirements for unwed citizen fathers, the immigration judge ruled that Morales-Santana was deportable.

In 2010, Morales-Santana filed a motion to reopen his application, arguing that the differential treatment of unwed U.S.-citizen mothers and fathers under immigration law violated equal protection. The Board of Immigration Appeals (BIA) found Morales-Santana's arguments for derivative citizenship unpersuasive and denied the motion.

Morales-Santana appealed to the United States Court of Appeals for the Second Circuit, which held that the gender distinction in § 1409(c) was unconstitutional. It applied to him the standard applicable to the child of an unwed U.S.-citizen mother, thus granting Morales-Santana citizenship. *Morales-Santana v. Lynch,* 792 F.3d 256 (2nd Cir. 2015). The court reasoned that because the different classification of unwed citizen mothers and fathers under § 1409(c) was not substantially related to the achievement of an important government objective, the distinction violated the Fifth Amendment's guarantee of equal protection under the law.

Notably, the Second Circuit distinguished the case from *Nguyen v. INS,* 533 U.S. 53 (2001), in which the Supreme Court applied intermediate scrutiny and held it was constitutional to require a U.S.-citizen father to take an affirmative step of either legitimating his child or obtaining a court order of paternity to confer derivative citizenship on his foreign-born child, but not to require mothers to do so. The Supreme Court reasoned that the law was constitutional because it served important objectives that were substantially related to the government's interest in facilitating a relationship between the citizen parent and his child. In addition, the law imposed minimal obligations on citizen fathers. In contrast, the Second Circuit reasoned, the differential treatment of unwed citizen fathers in § 1409(c) was not rooted in the important government interests of assuring that a biological parent-child relationship existed and ensuring that the child and citizen parent had the potential to develop a real, meaningful relationship. Therefore, it did not satisfy the intermediate scrutiny standard of review and was unconstitutional.

The Supreme Court granted a writ of certiorari to consider (1) whether Congress's imposition of different physical presence requirements for unwed citizen mothers and unwed citizen fathers of children born outside the United States violated equal protection, and (2) whether the Second Circuit erred in conferring United States citizenship on Morales-Santana, despite no express statutory authority to do so.

CASE ANALYSIS

This is the fourth case in 20 years in which the Supreme Court has grappled with the question of whether immigration law provisions regarding transmission of citizenship to a child born outside the United States and outside of marriage may place greater requirements on citizen fathers than on citizen mothers. Most recently, in *Flores-Villar v. United States,* 564 U.S. 210 (2011), the Court deadlocked on this question. Only eight justices voted in that case because Justice Kagan recused herself. Although the Court currently has only eight members because of the unfilled vacancy created by Justice Scalia's death, the lineup of justices is different than it was in *Flores-Villar* because Justice Kagan will be hearing the case and Justice Scalia is no longer on the Court.

First, there is disagreement about the standard of review the Court should apply. Normally, when a law that treats people differently based on their gender is challenged, courts utilize intermediate scrutiny to assess whether the law violates the Equal Protection Clause. In order for a law to pass the intermediate scrutiny standard of review: (1) the government classification must serve an important government objective and (2) the discriminatory means employed must be substantially related to the achievement of that objective. *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982). Moreover, the government's justification for treating people differently based on their gender must be genuine; it must have been the real reason the law was enacted and cannot be based on stereotypes about men and women. *United States v. Virginia,* 518 U.S. 515 (1996).

However, the United States asserts that the Court should apply the more deferential standard of rational basis review. To survive rational basis review, a law simply needs to be rationally related to a legitimate government interest. *United States v. Carolene Products,* 304 U.S. 144 (1938). The government argues this is the proper standard to apply because the U.S. Constitution gives Congress the power to make decisions about citizenship and naturalization. Therefore, deference should be given to Congress's determination of which foreign-born citizens should be considered U.S. citizens. Yet, even if the Court in the current case applies intermediate scrutiny instead of rational basis, the government argues § 1409(c) should be upheld because the different categories of foreign-born children at issue and their U.S.-citizen parents are not similarly situated to each other.

Second, the government argues that Congress's decision to impose stricter requirements on unmarried U.S.-citizen fathers is based on its legitimate interest in ensuring there is a sufficiently strong connection between the child and the United States. In *Nguyen,* the Supreme Court held that (1) assuring a biological parent-child relationship existed and (2) ensuring that the child and the citizen parent had a demonstrated opportunity to develop a relationship consisting of real, everyday ties, thus providing a connection between the parent and the child, and the child and the United States, are important government interests. Because the law's gender-based distinction was substantially related to the government's interests, it was held constitutional. In the current case, the United States contends that the different requirements for transmitting citizenship based on the nationalities of the child's parents embodies the government's interest in ensuring there is an established connection between a child born abroad and the United States. Because a child born abroad who has two U.S.-citizen parents is not subject to competing claims of national allegiance, Congress does not require as strong a connection to the United States as it does from a child born abroad to a U.S.-citizen parent and a noncitizen parent.

Third, the government argues it has an additional interest in preserving § 1409(c)'s gender distinctions: preventing statelessness. Unlike the United States, many countries determine a child's citizenship at birth through that child's blood relationship to his or her parent, rather than the child's place of birth. In nearly all these jus sanguinis countries, the only legally recognized parent at birth is the mother. If a child was born to an unwed U.S.-citizen mother in a jus sanguinis country, the country would refuse citizenship to the child because the mother was not a citizen of the country. Thus, if U.S. law did not allow the child to acquire U.S. citizenship from the mother at birth, the child would be at significant risk of being born stateless. The child would have no nationality until the father legally established paternity, which may never happen.

Lastly, the United States argues that unwed U.S.-citizen fathers and unwed U.S.-citizen mothers are not similarly situated in their relationship to a child born abroad out of wedlock, and therefore § 1409(c) does not violate the Equal Protection Clause. As the Court explained in *Nguyen,* "the fact of parenthood" is established for an unwed mother at the moment of her child's birth. She clearly knows of the child's existence and typically has immediate custody. However, an unwed father has no legal relationship to his child until he takes the affirmative step of legitimating that child, and may not even know the child exists when the child is born.

Regarding the appropriate remedy, the United States argues that if the Court finds § 1409(c)'s gender distinction unconstitutional, then it should not apply the standard applicable to unwed U.S.-citizen mothers to U.S.-citizen fathers because to do so would exceed the Court's authority. Only Congress has the authority to grant citizenship, the government asserts. The appropriate remedy is to apply the standard applicable to unwed U.S.-citizen fathers to unwed U.S.-citizen mothers. Therefore, even if § 1409(c) is found unconstitutional, Morales-Santana still is not a citizen and is deportable.

Morales-Santana asks the Court to affirm the Second Circuit decision. In his view, the appellate court was correct in using intermediate scrutiny to decide the case. Morales-Santana further argues that the lower court granted the appropriate remedy of applying the standard for U.S.-citizen mothers to Morales-Santana's father and thereby finding Morales-Santana was a citizen from birth and thus not subject to deportation. The gender distinctions in the statute, he contends, simply reflect outmoded gender stereotypes and assumptions of the closeness of the mother-child bond rather than being based on the goals asserted by the United States—of preventing statelessness and ensuring the existence of a connection between the child born outside the country and the United States. Further, he asserts that the discriminatory provision did not substantially advance those rationales and that there were available gender-neutral alternatives to accomplish those purposes. He argues that there is neither logic nor any explanation by the government as to why the child's connection to the United States would be established by the mother having lived in the United States for 1 year but would not be established by the father unless he had lived there for 10 years, including 4 years after attaining the age of fourteen.

Regarding the appropriate remedy for the equal protection violation, Morales-Santana argues that the appellate court correctly extended the more lenient physical presence requirement to him because precedent favors "leveling up rather than leveling down." Second, he argues that the government's purported rationales for the residency requirements would be better accomplished by applying the more lenient terms applicable to mothers rather than the more demanding rules applicable to fathers.

SIGNIFICANCE

The major impact of applying a high level of scrutiny to gender distinctions in laws and government programs is that few such distinctions have survived that scrutiny, particularly if the distinction is held to reflect stereotypes about women and their roles in the economy or in families. This standard, embodied in *Mississippi University of Women v. Hogan* and *United States v. Virginia,* is highly suspicious of gender distinctions in laws and requires the government to show "an exceedingly persuasive justification for their actions." However, the Court has upheld some gender distinctions as constitutional, either without referring to the general standard or by holding that they satisfy the standard of intermediate scrutiny. This case addresses only one provision of naturalization law and applies only to children born at a time when the statute made the gender distinction applicable in this case, but the decision may have the effect of narrowing, perhaps substantially, the situations in which the Court will find that real biological differences between the genders justify differential treatment.

Nguyen is one of the rare cases in which the Court has allowed men and women to be treated differently under the law, and its rationale is that such differences in treatment by the INA reflects biological differences between the genders. The *Nguyen* conclusion that a mother can be assumed to be a child's parent may well reflect a biological difference that the law may take into account, but the Court's determination that giving birth establishes that the mother has a greater opportunity to establish a relationship with the child than does the father appears to reflect stereotypes normally unacceptable under equal protection analysis.

Neither the appellate court opinion nor the respondent ask the Court to overturn *Nguyen,* but rather they assert that *Nguyen* can be distinguished because the present case does not involve the biological question of identifying a child's paternity. Instead, it deals with the ability of a citizen parent having a child with a noncitizen outside the United States to transmit citizenship to a child upon birth. The Court may determine whether this situation involves biological differences as in *Nguyen* or whether instead it deals with a nonbiological issue so the gender distinction was properly struck down by the Second Circuit opinion.

There has been substantial scholarly criticism of *Nguyen* as watering down the intermediate scrutiny standard even when the government interests could have been met by a gender-neutral statute. Almost certainly this case will show divisions in the approaches of the justices. Some may hold that substantial deference should be given to Congress in crafting the terms of immigration and naturalization law, and possibly that rational basis should be the standard for evaluating the constitutionality of the law rather than the more rigorous intermediate review. Some may see the result dictated by *Nguyen,* while others likely will hold that Morales-Santana's equal protection rights were violated.

The second important issue, reached only if the Court finds an equal protection violation, is the proper remedy. In *Miller v. Albright,* 523 U.S. 420 (1998), Justices Scalia and Thomas asserted that the Court could not grant citizenship to an individual, so applying the less demanding standard applicable to citizen mothers to citizen fathers would be inappropriate. Whether that view is held by any justice currently on the Court other than Justice Thomas is unknown. Equal protection requires equal treatment but does not specify the nature of the treatment, which is a judgment left to Congress. Given that the Constitution vests plenary power in Congress to make laws regarding naturalization, the Court may be reluctant to extend citizenship to the respondent even if it finds that his due process

rights were violated. The key issue for the Court will be to determine the congressional intent, which may be difficult to ascertain. On the other hand, most findings of equal protection violations in the past have led to the extension of the more inclusive or generous provision to those whose rights were violated. This discussion, if reached by the Court, may have important consequences regarding the fashioning of remedies in many future equal protection cases in areas far beyond the narrow question presented in this case.

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PREVIEW of United States Supreme Court Cases, pages 40–43.

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AMICUS BRIEFS

In Support of Respondent Luis Ramon Morales-Santana

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Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars (Meir Feder, 212.326.3939)

Equality Now, Human Rights Watch, and Other Human Rights Organizations (Martha F. Davis, 617.373.8921)

National Immigrant Justice Center, the American Immigration Lawyers Association, and the Northwest Immigrant Rights Project (Charles Roth, 312.660.1613)

Population and Family Scholars (Suzanne B. Goldberg, 212.854.0411)

Professors of History, Political Science, and Law (Catherine E. Stetson, 202.637.5491)

Scholars on Statelessness (Max Gitter, 212.225.2610)

Tracking the Term*

8 – Number of oral arguments

0 – Number of cases (granted full review and oral argument) decided

34 – Days of oral argument remaining

40 – Number of cases granted to date

*As of October 17, 2016

What Standard Governs the Dismissal of a Relator's Claim for Violation of the False Claims Act's Seal Requirement in an Action Over Hurricane Katrina-Related Insurance Payments?

CASE AT A GLANCE

In the aftermath of the destruction caused by Hurricane Katrina in 2005, Cori and Kerri Rigsby accused State Farm Fire and Casualty Company of falsely misclassifying wind damage as flood damage, among other misdeeds, leaving a federal government-backed flood insurance policy to unnecessarily pay wind damage as flood damage out of United States Government funds. In 2006, the Rigsbys brought suit against State Farm under the federal False Claims Act (FCA). The FCA imposes civil liability on any person who submits false or fraudulent claims to the federal government for payment or approval. "Relators," like the Rigsbys, may bring actions under the FCA for themselves and for the government. If a lawsuit initiated by a relator under the FCA results in civil penalties or the recovery of damages, the award is typically divided between the government and the relator. In 2011, a federal district court in Mississippi awarded the Rigsbys the maximum possible share under the FCA for proving a false claim upon the federal government of $250,000. The court also awarded the Rigsbys over $2.9 million in attorney's fees and expenses. State Farm's appeal from the award seeks to undermine the result based on disclosure violations that the company attributes to the Rigsbys, including violations by the attorneys who initially represented the Rigsbys, of an FCA requirement that claims first be filed "under seal," and not disclosed until allowed under the FCA. This case calls upon the Supreme Court to address how a relator's seal violation affects a relator's right to prosecute and recover for FCA claims and what discretion judges have to police such violations. Relators play a significant role in the instigation of FCA cases. Relator cases are reported to have led to $2.9 billion in FCA recoveries in 2015.

State Farm Fire and Casualty Company v. United States, ex rel. Rigsby
Docket No. 15-513

Argument Date: November 1, 2016
From: The Fifth Circuit

by Michael Kurs
Pullman & Comley, LLC, Hartford, CT

ISSUE

What standard governs the dismissal of a relator's claim for violation of the False Claims Act's seal requirement, 31 U.S.C. § 3730(b)(2)?

FACTS

Hurricane Katrina hit the Gulf Coast on August 29, 2005. More than 1,800 people died as severe winds and floods wracked Gulf communities. Many of the homeowners who lost homes or experienced damage had insurance coverage under at least two policies, often issued by the same insurance company. One policy covered flood-caused damage and excluded wind damage. The other covered wind-caused damage and excluded flood damage. A private insurance company frequently administered both policies, with wind damages paid from the insurance company's assets and flood policies paid with government funds through a Federal Emergency Management Agency (FEMA) program. The insurers took a fee for administering the FEMA program policy.

Cori and Kerri Rigsby, both certified and experienced adjusters, and sisters, worked as claims adjusters on Katrina-related claims for a contractor of the State Farm Fire and Casualty Company. The Rigsbys came to believe that State Farm, and others, deliberately overpaid flood insurance claims in order to reduce their own exposure for wind damage. According to Kerri Rigsby, after Katrina, State Farm trainers told its adjusters that they would see "water damage." "The wind wasn't that strong. You are not going to see a lot of wind damage. If you see substantial damage, it will be from water." The Rigsbys also alleged State Farm trainers told adjusters that Katrina was a "water storm" and that "all major damage to homes was caused by flooding." State Farm additionally allegedly told the adjusters to "hit the limits" of flood policies and "to manipulate the totals" to ensure that policy limits were reached.

A few weeks after Katrina, Kerri Rigsby and another adjuster for State Farm inspected a home in Biloxi, Mississippi, covered by two State Farm insurance policies—a FEMA-backed policy that excluded

wind damage and a State Farm policy excluding flood damage. The two adjusters assumed that flooding caused the primary damage to the house and did not do a line-by-line estimate of the damage. The State Farm supervisor approved a maximum flood damage payout. State Farm subsequently retained an engineering company to analyze the damage. The engineering company's report concluded the damage to have been primarily caused by wind.

State Farm refused to pay for the report and withheld the report from the FEMA insurance program file. A State Farm supervisor put a note on the report indicating the bill should not be paid and the report should not be discussed. State Farm arranged for a second report. The second report determined that, although wind damage had occurred, water caused the primary damage to the house. There was evidence that the State Farm supervisor pressured the engineering company to issue reports finding flood damage at the risk of losing contracts with State Farm. The engineer who had concluded wind had caused the damage to the home lost his job.

Kerri Rigsby maintained that she never before saw instructions similar to those she found on the engineer's report. In her experience it was unprecedented to have two engineering reports on a single property, and it was also unusual to see an engineering report prepared just two days after the engineer inspected the property, as was the case with the second report.

These events, among others, led the Rigsbys to believe that State Farm unlawfully had sought to maximize its policyholders flood claims to minimize wind claims at the federal government's expense. The United States reimbursed State Farm for Katrina claim payments made to settle flood policy claims. The payments State Farm had to make to cover wind payments under its homeowner policies fell to State Farm to pay from its own accounts.

The Rigsbys supplied copies of documents to state and federal law enforcement about the claim settlement practices that concerned them. When they disclosed to their employer what they had done, the employer terminated them. The employer also sued them for taking the documents.

The Rigsbys undertook a lawsuit under the federal False Claims Act, often referred to as the FCA. The FCA provides a mechanism for the federal government to recover for false or fraudulent claims presented to the government for payment or approval. The FCA allows the United States Attorney General to bring lawsuits to enforce the FCA. Individuals may also bring suits "for the United States Government" with some limitations, and receive a percentage of the recovery. The suits are commonly called qui tam suits—actions brought by "an informer," under a statute that establishes a penalty for the commission or omission of a certain act.

The Rigsbys' lawyers abided by the FCA's requirement at 31 U.S.C. § 3730(b) that requires the filing of the complaint with the court, in camera, and under seal (unavailable to the public or any defendant), for at least 60 days, and not served on any defendant until the court so orders. They filed the complaint on April 26, 2006, with the case name becoming *United States ex rel. Cori Rigsby and Kerri Rigsby v. State Farm Fire and Casualty Company, et al.* The United States moved to extend the sealing period to allow the government additional time to decide whether to intervene in the action. The federal district court granted the request and issued subsequent orders further extending the sealing period. The court partially lifted the seal in January 2007 to allow the Rigsbys to make certain disclosures in another case in Alabama and fully lifted the seal on August 1, 2007. The government did not intervene, leaving the Rigsbys to pursue the case on their own through their lawyers.

Between April 2006 and January 2007, the Rigsbys and the attorneys who also represented them in other litigation against State Farm, made many public statements against State Farm in which they alleged company misconduct in its claims adjustment practices. The attorneys (Richard Scruggs, and other lawyers associated with the Scruggs Law Firm and the participants in the Scruggs Katrina Group, a joint venture of a number of Mississippi attorneys) also served as the attorneys for a large number of individual property owners making claims against State Farm and other insurers named in the Rigsbys' original FCA complaint, so they did not speak just on the Rigsbys' behalf.

The ABC news magazine 20/20 subsequently included a segment containing excerpts of interviews with the Rigsbys. In the interviews, the Rigsbys discussed their accusation that State Farm had mischaracterized wind damage as water damage to avoid paying legitimate policyholder claims. But the program did not specifically disclose the existence of the FCA suit.

State Farm brought three instances to the federal trial court's attention that had occurred prior to the date of the partial unsealing when the attorneys for the Rigsbys, who no longer represent them, revealed the facts alleged in and the existence of the pending FCA case. The instances all involved disclosure of the document entitled "Relators Evidentiary Disclosures Pursuant to 31 U.S.C. § 3130." Senior District Judge L.T. Senter Jr. of the United States District Court for the Southern District of Mississippi, Southern Division, found the other disclosures identified by State Farm, that he considered relevant, to "reflect, to one degree or another, disclosures and discussions of the underlying facts, but they contain no disclosure of the existence of the FCA action." The judge focused on the 3 disclosures, out of 49 claimed by State Farm, since he concluded that the court mooted the original seal of the qui tam case by partially lifting the seal on January 1, 2007, to allow disclosures in the Alabama case, without specifying that the Alabama disclosures be made under seal.

Judge Senter noted that Attorney Richard Scruggs's assistant had sent a pleading from the FCA case to an ABC News representative on July 28, 2006 (three months after the filing of the FCA case). In August 2006, Attorney Scruggs sent what appeared to be another copy of the FCA evidentiary disclosures to an AP employee. (Judge Senter's opinion does not specify whether "AP" refers to the Associated Press). Scruggs's assistant also sent a copy of the evidentiary disclosures to the *New York Times* in September 2006.

The judge commented: "It is abundantly clear that Richard Scruggs and the SKG [the joint venture of Mississippi attorneys who represented the Rigsbys as well] used formidable public relations resources … in an effort to control the public perception of the case at the heart of this qui tam action. …" He also concluded that the attorneys were not free to disclose the existence of the qui tam case. But he distinguished between the attorneys' efforts to publicize the

claim that State Farm deliberately mischaracterized wind damage as flood damage in assessing claims under the insurance policies it was adjusting and the "improper disclosures" of the Rigsbys qui tam action. According to Judge Senter, "[a]s far as the wind damage claims are concerned, these attorneys were acting well within their rights as advocates for their clients who had home owner policy claims."

But Judge Senter ruled that the record of the case before him did not show that the government's ability to investigate the Rigsbys' allegations had been compromised. He also noted that, although the government declined to intervene in the case, it did not disclose the reasons for its decision and the government had not filed any pleadings that he could use to determine the extent of the damage, if any, that the government believes it sustained. Judge Senter additionally found no evidence that the prepartial unsealing disclosures made by the attorneys to the media had led to a public disclosure by the media that the action had been filed.

The judge determined, too, that the Rigsbys personal role in making the disclosures "was not an active one." Judge Senter ruled that while a client is "responsible for the actions taken by his attorney," there was no showing that the Rigsbys initiated the three improper disclosures and no basis to conclude that the Rigsbys had acted willfully or in bad faith.

The judge did not find any cases decided by the Fifth Circuit Court of Appeals, the circuit that handles appeals from the federal court in which the case was litigated, dealing directly with the issue State Farm had raised. He cited a Ninth Circuit case that says a violation of the sealing requirements does not require dismissal of a qui tam complaint in all circumstances. He acknowledged the Sixth Circuit employs a per se rule that failure to abide by the FCA sealing requirements requires dismissal of the complaint, "but no other circuit court has adopted this per se rule." Judge Senter noted other cases, as well, including a Second Circuit case, for the proposition that failure to file an FCA complaint under seal and to observe other procedural requirements of the FCA may support a district court's exercise of discretion "to impose the sanction of dismissal."

On appeal, the Fifth Circuit affirmed Judge Senter's decision to employ his discretion to reject State Farm's arguments that the court should dismiss the Rigsbys' FCA case. The Fifth Circuit's decision contains other rulings favorable to the Rigsbys including rulings on State Farm's motions for a new trial and judgment notwithstanding the verdict. The lower court had granted the Rigsbys a 30 percent share of the $758,250 award against State Farm and $2,913,228.69 in attorneys' fees and expenses. The Fifth Circuit's decision reversed a ruling that would have deprived the Rigsbys of obtaining other information through further proceedings to support additional FCA claims against State Farm.

The Fifth Circuit in reviewing the case noted the jury's conclusion that the government had suffered damages under the FCA as a result of State Farm's submission of false flood claims and of a "false record." It reasoned that whether a violation of the FCA's seal requirement of 31 U.S.C. § 3730(b)(2) "compels dismissal," presents a statutory interpretation question.

The circuit court ruled: "While cognizant of the justification for and the merits of a per se rule, we conclude that a seal violation does not automatically mandate dismissal." As the Ninth Circuit recognized in *Lujan v. Hughes Aircraft Co.,* 67 F.3d 242 (9th Cir. 1995) "and the government stated as amicus in this case, nothing in the text of § 3730(b)(2) explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement" (Internal quotations omitted). Also, "the 1986 amendments [that added the seal provision] to the FCA were intended to encourage more, not fewer private FCA actions."

In applying, the *Lujan* analysis of the appropriate sanction for violations, the Fifth Circuit reviewed the factors of (1) the harm to the government from the violations; (2) the nature of the violations; and (3) whether the violations were made willfully or in bad faith. The court agreed with the district court's assessment that none of the disclosures looked to have resulted in the publication of the existence of the lawsuit before the court partially lifted the seal. "If State Farm was not tipped off about the existence of the suit from the Rigsbys' disclosures, a fundamental purpose of the seal requirement—allowing the government to determine whether to join the suit without tipping off a defendant—was not imperiled."

The court commented that there was, "no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews. Were we to impute their former attorneys' disclosures to them, however, we would conclude that they acted in bad faith." But "[e]ven presuming bad faith, the *Lujan* factors favor the Rigsbys. Although they violated the seal requirement, the Rigsbys' breaches do not merit dismissal."

State Farm now seeks to convince the Supreme Court that the Rigsbys repeatedly and willfully violated the seal requirement and that the matter presents "an unprecedented, flagrant disregard for the seal provision—all aimed at generating hostile media coverage as a litigation tactic against petitioner State Farm."

CASE ANALYSIS

State Farm asserts that "the text, structure, history and purpose of the FCA's seal provision support a bright-line rule that a seal violation merits dismissal of a private relator from an FCA case." It maintains that a relator's involvement in a case is conditioned upon "a series of mandatory statutory perquisites, including compliance with the seal requirement." Also, even if the Court rejects a rule of mandatory dismissal, the Court should reverse or vacate the decision below in light of the "egregious conduct" involved in the case. State Farm argues that the considerations supporting this result include "the avalanche of unfavorable publicity that was undeniably damaging to State Farm's reputation."

As factual background, State Farm notes that Richard Scruggs withdrew as the Rigsbys' attorney "after he was indicted in November 2007 for conspiring to bribe a Mississippi state judge." Also, Scruggs paid the Rigsbys annual salaries of $150,000 a year as consultants. State Farm quotes a District Court of Alabama finding that: "Scruggs was the alter ego of the Rigsbys, and the Rigsbys were the alter egos of Scruggs. They could not have been any more closely 'identified' without obtaining a marriage license." State Farm also draws the Court's attention to "video, photographs

and other evidence … that Hurricane Katrina had inundated" the McIntosh house [the home that was the subject of the Rigsbys' misclassified claims case] with approximately five feet of flood water."

The Rigsbys' response to State Farm's position is that the FCA does not specify a consequence if a relator or her attorney violates a seal order. They indicate "the ordinary rule—embraced by the vast majority of courts that have considered the question—is that district courts have discretion to fashion an appropriate sanction." They submit that dismissal ought to be the last resort because it impairs the government's interest in recovering damages for fraud upon the government.

They emphasize that the fraud they discovered was proven before a jury. The attorneys who violated the seal order did so without the Rigsbys knowledge or consent and that those attorneys have been disqualified from the case. The Rigsbys assert the government now stands to "recover billions." (The district court trial addressed the fraud claims for one property leaving open the opportunity for further proceedings on other claims). The Rigsbys argue, "dismissal would award a proven fraudster while punishing the government and the innocent relators—even though the violations prejudiced nobody, and even though the actual violators will suffer no consequence." "Because dismissal would be unjust, unwise and inconsistent with Congress's design in enacting the FCA, this Court should affirm."

The United States has filed a brief as amicus curiae supporting the Rigsbys. It notes: nothing in the FCA suggests that Congress intended to punish every seal violation through the extreme sanction of dismissal of the relator's suit. The text reflects the opposite expectation. "Congress expressly mandated dismissal in particular circumstances, but it declined to do so in the seal provision." The United States supports the application of the standards applied by the court of appeals. It urges the Court to affirm the court of appeals for reasons including that the district court did not abuse its discretion in deciding the case. There is reason to anticipate that the government's reasoning and its support of the Rigsbys' positions and the positions of the district court and circuit court who have considered the Rigsbys' case may be enough to tip the scales in favor of the affirmance.

SIGNIFICANCE

The FCA's reach extends to "any person." The Rigsbys report that the vast majority of FCA cases are filed by relators who have facilitated enforcement of the statute since its enactment in 1863. Changes to the act have encouraged more private enforcement suits. The Rigsbys cite to United States Justice Department Fraud Statistics that indicate the government recovered over $3.5 billion under the statute in 2015, with $2.9 billion coming from whistleblower/relator lawsuits.

As with the Rigsbys case, which is now in its eleventh year, charges of government fraud can engender long and burdensomely expensive litigation for all parties involved, sometimes under the spotlight of national media attention. The landscape of obligations concerning speaking or otherwise communicating about cases under seal is complicated by case law that protects disclosures of underlying allegations but not the existence of an FCA lawsuit while it is under seal. See *American Civil Liberties Union v. Holder,* 673 F. 3d 245 (4th Cir. 2011). The prospects of a partial unsealing mooting a sealing order, as the trial and court of appeals found to have occurred in this case, means the government and parties faced with partial unsealing orders should consider the parameters of such orders carefully when proposed and once adopted.

The Supreme Court's decision, at the least, should resolve the split in the circuits about whether dismissals for seal violations are mandatory. (State Farm refers to the split as a three-way split with the Second and Fourth, the Sixth, and the Ninth Circuits being the circuit courts that have addressed the issue.) Of course, Congress is free to address the question itself, if dissatisfied with the Court's ruling. Battling fraud against the government tends to be a priority regardless of which party controls.

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PREVIEW of United States Supreme Court Cases, pages 44–47.

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Does a Public School Student with an Individualized Education Program Under the Individuals with Disabilities Education Act Have to Exhaust Administrative Remedies Under That Act Before Bringing a Suit in Federal Court Under the Americans with Disabilities Act and the Rehabilitation Act?

CASE AT A GLANCE

E.F. was born with cerebral palsy. She had an Individualized Education Program under the Individuals with Disabilities Education Act, and she had an independent prescription for a service dog to help increase her mobility. E.F.'s school refused to allow her to bring her service dog to school, however, and she sued in federal court for monetary damages under the Americans with Disabilities Act and the Rehabilitation Act.

Fry v. Napoleon Community Schools
Docket No. 15-497

Argument Date: October 31, 2016
From: The Sixth Circuit

by Steven D. Schwinn
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INTRODUCTION

The Individuals with Disabilities Education Act requires a person who wishes to complain about an Individualized Education Program to exhaust administrative remedies before filing a case in federal court if they seek relief that is "also available under the [Individuals with Disabilities Education Act]." Here, E.F.'s suit sought monetary damages for the school's refusal to allow her to bring her service dog to school. The parties disagree over whether this kind of relief is "also available under the [Individuals with Disabilities Education Act]," and therefore whether E.F. had to exhaust administrative remedies before filing her suit in federal court.

ISSUE

Did E.F. have to exhaust administrative remedies under the Individuals with Disabilities Education Act before she filed her suit in federal court for damages under the Americans with Disabilities Act and the Rehabilitation Act?

FACTS

E.F., the daughter of Stacy and Brent Fry, was born with cerebral palsy. The condition significantly limits E.F.'s motor skills and mobility, but it imposes no cognitive impairment.

In 2009, when E.F. was five years old, her physician prescribed a service dog to increase her physical mobility. E.F. obtained a Goldendoodle named Wonder. Wonder was trained and certified to help E.F. with a variety of functions, including retrieving dropped items, helping E.F. balance when she used her walker, opening and closing doors, turning on and off lights, removing her coat, and helping E.F. transfer to and from the toilet.

In October 2009, when Wonder's training was complete, the Napoleon Community Schools and the Jackson County Intermediate School District (together, the District) refused to allow E.F. to bring Wonder to school. The District said that E.F. already had an Individualized Education Program (IEP) under the Individuals with Disabilities Education Act (IDEA) that included a human aide to provide one-on-one support for E.F. during the school day. The District said that because E.F. already had a human aide at school, she was receiving the required "free and appropriate education" (FAPE) under the IDEA, and did not need Wonder. As a result, E.F. attended school without Wonder from October 2009 to April 2010.

After mediation between E.F.'s attorneys and the District, the District changed course slightly and allowed E.F. to bring Wonder to school for a 30-day trial period, starting on April 12, 2010, and "extend[ing] through the end of the school year." But the District refused to allow E.F. to use Wonder as a service dog. Instead, Wonder had to remain at the back of the room during classes and "was forbidden from assisting [E.F.] with many tasks he had been specifically trained to do." The District similarly refused to allow E.F. to use Wonder at recess, during lunch, during computer lab, and in the library; and the District refused to allow Wonder to accompany E.F. to major school activities, such as field day and the school play.

After this trial period, the District readopted its previous position and refused to let Wonder attend school at all. The Fry family then pulled E.F. from the District and homeschooled her for the next two years.

In July 2010, the Frys filed a complaint with the U.S. Department of Education Office of Civil Rights (OCR), alleging that the District violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act by refusing to allow E.F. to use Wonder at school. The OCR investigated the complaint and, in May 2012, issued a decision concluding that the District violated the ADA and Rehabilitation Act. The OCR noted that the District's obligations under the ADA and Rehabilitation Act are broader than merely providing a FAPE under the IDEA. In particular, the OCR said that the antidiscrimination provisions in the ADA and Rehabilitation Act required the District to allow E.F. to use Wonder in order to allow her to function independently at school, irrespective of the FAPE calculation under the IDEA. The OCR explained that "a school district would violate the antidiscrimination requirements if it required a student who used a wheelchair to be carried or if it required a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane."

In response to the OCR report, the District agreed to allow E.F. to attend school with Wonder starting in the fall of 2012. (The District continued to deny liability, however, and refused to provide compensation for the period when it did not allow Wonder to attend school.) But after E.F.'s father discussed arrangements with the school principal, E.F.'s parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." The Frys then removed E.F. from the District and placed her in a neighboring school district.

In December 2012, the Frys filed suit in federal court, arguing that the District violated the ADA and the Rehabilitation Act. The suit sought monetary damages for the District's refusal to allow Wonder to attend school and assist E.F. between fall 2009 and spring 2012; it also sought declaratory relief and attorneys' fees. The district court dismissed the suit for failure to exhaust administrative remedies under the IDEA. A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed, and this appeal followed.

CASE ANALYSIS

Under the IDEA, a person who wishes to complain about an IEP has to exhaust an administrative complaint process before filing a suit in federal court, if they "seek[] relief that is also available" under the IDEA. This process includes a complaint to the local education agency, a "preliminary meeting" with parents and members of the IEP team, a "due process hearing" with a local education agency, and an appeal to a state education agency. The process gives the local experts the first crack at the complaint and a chance to resolve it. If they cannot resolve the complaint, the process allows the parties to develop a record before the case goes to a (less expert) federal court.

In this case, E.F. filed an antidiscrimination claim in federal court under the ADA and the Rehabilitation Act. The parties agree that E.F. failed to exhaust the IDEA administrative process before filing suit. But they disagree whether she had to—that is, whether her federal court case "seek[s] relief that was also available" under the IDEA.

E.F. argues that her federal court case does not "seek[] relief that was also available" under the IDEA. (E.F. points out that Congress added this language to the IDEA in 1983 in Handicapped Children's Protection Act (HCPA).) She claims that her federal court case seeks monetary damages for the time when the District refused to allow her to take Wonder to school, declaratory relief, and attorneys' fees. But she says that the IDEA does not authorize any of these forms of relief. She claims that the IDEA only authorizes a challenge to the terms of the IEP itself, and that her federal court case does not seek a change to her IEP. Moreover, E.F. says that her federal court case is based on the District's refusal to allow Wonder to help her to function independently at school with activities such as going to the bathroom (which sounds in the ADA and Rehabilitation Act), not to achieve a free and appropriate education (which would sound in the IDEA). (Indeed, E.F. does not contest the District's claim that E.F. could learn just as well with a human aide. She says that this is irrelevant to her federal court case that challenges the District's actions that restricted her from functioning independently.) E.F. contends that the Sixth Circuit erred in concluding otherwise by wrongly hypothesizing the relief that she could have sought, not the relief that she *actually* sought, in federal court.

E.F. argues next that she did not have to complain through the IDEA administrative process, because her complaint would have been futile. She says that the HCPA reaffirmed the rule in administrative law that exhaustion is not required when administrative proceedings cannot provide the relief that the plaintiff seeks. In particular, she says that the text, legislative history, and purpose of the HCPA all say that a person need not exhaust the IDEA's administrative procedures when they would be futile. She contends that this principle applies here, because, again, she could not have received the relief she seeks in her federal court case through the IDEA administrative process.

Third, E.F. argues that her position would protect disabled children from having to exhaust burdensome and time-consuming processes under the IDEA in order to vindicate different statutory and constitutional rights. She says that the IDEA administrative process works well to allow children and parents an opportunity to challenge an IEP before local experts. But when children and parents seek to vindicate rights protected by other statutes, the IDEA administrative process serves only to delay their lawsuits. E.F. contends that Congress could, and did, conclude that the burdens of delay outweighed the benefits of the IDEA administrative process for cases like hers, which seek to vindicate other statutory rights.

(The government weighed in as amicus in support of E.F. and makes substantially similar arguments.)

The District argues that the IDEA requires E.F. to exhaust administrative remedies, because E.F. seeks damages that "in substance" are available under the IDEA. The District claims that statutory text, precedent, and context all show that the IDEA's exhaustion requirement "turns on the substance and not the form of a plaintiff's request for relief." The District says that any other result would turn the exhaustion requirement into an empty formality, and that a plaintiff could dodge exhaustion simply by labeling a claim as one for "damages" (which are unavailable under the IDEA). The District contends that this would undermine Congress's intent to ensure that parents and local experts, not the courts, have the first crack at resolving a dispute over an IEP. The District claims moreover that every court of appeals that has

addressed the question "has agreed that the form of a plaintiff's prayer for relief is immaterial."

The District argues next that E.F. gives no reason for supporting a formalist reading of the IDEA's exhaustion requirement. The District says that the cases that E.F. cites support the opposite conclusion, and that the government itself took the opposite position in a case five years ago at the Ninth Circuit. The District contends that "the sole purpose of [the IDEA's exhaustion requirement] … is to require plaintiffs to exhaust claims brought under statutes *other than* the IDEA," and that E.F. is wrong to say that she is exempt from exhaustion so long as a complaint does not allege an IDEA violation. The District claims that E.F. cannot avoid this result simply by conceding that the school did not violate the IDEA, because that conclusion "does not alter what relief the IDEA process could in fact provide [her]."

The District argues that E.F.'s claimed relief was available "in substance" under the IDEA, and that she therefore had to exhaust the IDEA administrative process. The District claims that IDEA administrators could order retroactive reimbursement for educational services that should have been rendered during the period when the District refused to permit E.F. to bring Wonder to school. The District says that IDEA administrators could similarly order declaratory relief that certain services (like Wonder) must be included in the IEP. And the District contends that E.F.'s request for "any other relief" seeks relief that is available under the IDEA. The District says that because all the forms of relief that E.F. requested are available "in substance" under the IDEA, she had to exhaust the IDEA's administrative process before filing suit.

Finally, the District argues that E.F. waived her argument that exhaustion would be futile, because she failed to raise it in the lower courts. But in any event, the District says that there is no basis to excuse E.F.'s failure to exhaust administrative remedies, because IDEA administrators could award "in substance" the relief that E.F. seeks.

SIGNIFICANCE

This case comes down to a very simple question: How pliable is the IDEA's phrase "seeking relief that is also available under [the IDEA]"? A ruling that the phrase is narrow and rigid (or, in the District's words, "formalistic") would mean that E.F. would likely win, because her claim for monetary damages is not "also available" under the IDEA. It would also mean that other individuals who seek to lodge a distinct statutory or constitutional claim while receiving an IEP could likely bypass the IDEA's administrative exhaustion requirement and file directly in federal court. In short, a ruling that the phrase is narrow and rigid would make it easier for a person receiving an IEP to bring a distinct statutory or constitutional claim in federal court.

On the other hand, a ruling that the phrase is broad and elastic (or, in the District's words, that it refers to relief that is "in substance" with the IDEA) would mean that E.F. could lose, because her claim for monetary damages might well be "in substance" with the IDEA. This kind of ruling would also mean that E.F. and other individuals who seek to lodge a distinct statutory or constitutional claim while receiving an IEP would have to exhaust the IDEA's administrative process before bringing those claims in federal court.

This matters, because the administrative process can be burdensome and time-consuming. It can thus delay and even deter later federal court litigation. The process also shapes the administrative record that a federal court would rely upon if and when an individual brings the case to federal court—and thus shapes the litigation in federal court, and possibly the result. But at the same time, the administrative process can also give local experts a first chance to resolve an IEP conflict or issue in a less formal way, before it goes to (a less local, less expert, but more formal) federal court.

Finally, this case will resolve a conflict in the circuits. At least six other courts of appeals align with the Sixth Circuit in reading the IDEA's exhaustion requirement relatively broadly, and thus requiring exhaustion for children such as E.F. The Ninth Circuit alone has gone the other way and read the exhaustion requirement relatively narrowly. As E.F. wrote in her certiorari petition, "Had [she] brought this case in the Ninth Circuit, the court would not have dismissed it for failure to exhaust."

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PREVIEW of United States Supreme Court Cases, pages 48–50.

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Does the Federal Vacancies Reform Act of 1998 Prohibit a Person Serving as an Acting Officer from Continued Service as an Acting Officer Upon the President's Nomination of That Person to the Permanent Office, When That Person Has Not Served as a First Assistant?

CASE AT A GLANCE

The Federal Vacancies Reform Act of 1998 says that the President may temporarily fill a vacancy in an office with an acting officer in one of three ways. First, by default, the vacancy may be filled by the first assistant to the office. Alternatively, the President may appoint a senior officer from another agency to the office. Alternatively, the President may appoint a senior officer from within the agency to the office. But at the same time, the Act says that a person cannot serve as an acting officer and the permanent nominee unless that person served as the first assistant to the office for at least 90 of the last 365 days. This provision means that a person serving as an acting officer loses his or her authority upon nomination by the President to the permanent office, unless that person satisfies this condition. It also means that a President cannot simultaneously appoint a person as an acting officer and nominate that same person to the permanent office, again unless that person satisfies this condition.

National Labor Relations Board v. SW General, Inc.
Docket No. 15-1251

Argument Date: November 7, 2016
From: The District of Columbia Circuit

by Steven D. Schwinn
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INTRODUCTION

In June 2010, President Obama appointed Lafe Solomon as Acting General Counsel of the National Labor Relations Board (NLRB). Solomon previously served for 10 years as the Director of the National Labor Relations Board's Office of Representation Appeals, but he had not served as first assistant to the General Counsel. President Obama nominated Solomon to the permanent office on January 5, 2011, but the Senate returned the nomination without confirming Solomon.

In January 2013, while Solomon was serving as Acting General Counsel, an NLRB regional director, under authority delegated by the General Counsel, issued an unfair labor practice complaint against SW General, Inc. The company argued that the complaint was void, however, because Solomon lost his authority as Acting General Counsel when President Obama nominated him to the permanent office, in January 2011.

ISSUE

Does the restriction in the Federal Vacancies Reform Act of 1998, which prohibits a person from serving as an acting officer and the permanent nominee unless that person meets certain conditions, apply when the President appoints a senior agency officer as the acting officer?

FACTS

In June 2010, President Obama appointed Lafe Solomon as Acting General Counsel of the National Labor Relations Board. President Obama appointed Solomon, who by then had served for 10 years as the Director of the NLRB's Office of Representation Appeals, pursuant to his authority under the Federal Vacancies Reform Act of 1998 (the FVRA).

Solomon served continuously as Acting General Counsel for over three years, until November 4, 2013. During that time, President Obama twice nominated Solomon to be General Counsel, first on January 5, 2011, and then again on May 24, 2013. The Senate returned the first nomination, and President Obama withdrew the second nomination. President Obama ultimately nominated Richard Griffin to the post, and the Senate confirmed Griffin on October 29, 2013.

In January 2013, while Solomon was serving as Acting General Counsel, the International Association of Fire Fighters, Local I-60, AFL-CIO (the Union) brought an unfair labor practice (ULP) charge

against SW General, Inc. (Southwest) for violating a "Longevity Pay" provision in the collective bargaining agreement that guaranteed annual bonuses to Southwest employees who had been with the company for at least 10 years. After a hearing, an administrative law judge (ALJ) issued recommendations that Southwest committed a ULP. Southwest then filed exceptions to the ALJ's recommendations, including a challenge arguing that the ULP complaint was invalid, because under the FVRA, Acting General Counsel Solomon could not legally perform the duties of the office after being nominated to fill that position permanently. In May 2014, the NLRB adopted the ALJ's recommendation with minor changes, but the NLRB did not address Southwest's FVRA argument.

Southwest appealed to the United States Court of Appeals for the D.C. Circuit. The court agreed with Southwest that the FVRA prohibited Solomon from serving as Acting General Counsel from January 5, 2011, the first date that President Obama nominated him to the permanent position, and that Solomon therefore lacked authority to issue the ULP charge against Southwest. The court also ruled that neither the harmless-error doctrine nor the de facto officer doctrine rendered the ULP charge valid, regardless of whether Solomon's appointment violated the FVRA. The court vacated the NLRB's order. This appeal followed.

CASE ANALYSIS

The FVRA is a federal act (not to be confused with the Appointments Clause in the Constitution) that provides for immediately filling a vacancy with an acting officer in a position that, over the longer term, requires presidential nomination and Senate confirmation (a so-called PAS position). The Act provides for three ways to temporarily fill this kind of vacancy. First, § 3345(a)(1) of the FVRA says that by default the "first assistant" to the position automatically takes over in an acting capacity. Next, as an alternative, § 3345(a)(2) says that the President can appoint a PAS officer from another agency to serve as the acting officer. Third, again as an alternative, § 3345(a)(3) says that the President can appoint a senior employee from the same agency.

But while these provisions give the President some flexibility in temporary appointments, the FVRA also contains some restrictions. In particular, § 3345(b)(1) says that "[n]otwithstanding [Section 3345(a)(1)]," a person cannot serve as an acting officer and the permanent nominee unless that person served as the first assistant to the office for at least 90 of the last 365 days. (A separate provision, § 3345(b)(2), provides another exception for a person serving as a first assistant who was approved by the Senate. This separate provision, however, is not relevant to this case.) In other words, a person's permanent nomination invalidates his or her appointment as an acting officer, unless the person meets this first-assistant condition. This provision is designed to prevent a president from gaming appointments by using last-minute first-assistant designations to make individuals eligible for acting service.

The FVRA has other restrictions, too. For example, the acting officer can only serve for 210 days and cannot become the permanent nominee for the position. Moreover, any action by an acting officer who serves in violation of the FVRA has no force or effect and may not be ratified by later valid action. In all these ways, the FVRA balances the President's immediate need to cover vacancies in important positions in the short term with the Senate's role in confirming a permanent officer over the long term.

This case involves the FVRA's application to the NLRB's General Counsel, so we need to understand the basic nature of that office. Under the National Labor Relations Act, the General Counsel of the NLRB must be appointed by the President, with the advice and consent of the Senate. The incumbent officer is primarily responsible for prosecuting ULP cases before the NLRB; indeed, the NLRB cannot adjudicate a ULP dispute until the General Counsel decides that a charge has merit and issues a formal complaint. In order to manage the caseload, the General Counsel has delegated the authority to investigate charges and issue complaints to 32 regional directors. But the General Counsel retains final authority over charges and complaints and exercises general supervision of the regional directors.

Against this backdrop, the parties disagree over whether Solomon was serving as Acting General Counsel in violation of the FVRA when the Union lodged its ULP claim. In particular, they argue over whether the condition in § 3345(b)(1) (that a person served as first assistant to the office for at least 90 days during the prior year) applies only to vacancies filled under § 3345(a)(1) (so that Solomon's continued service as Acting General Counsel, beyond January 2011, was valid, as the government would have it), or whether they also apply to vacancies filled under §§ 3345(a)(2) and (3) (so that Solomon's service was invalid after President Obama nominated him for the permanent office in January 2011, as Southwest would have it).

The government argues that the text, structure, purposes, history, and application of the FVRA support its reading that the condition in § 3345(b)(1) applies only to first assistants who automatically fill a vacancy under § 3345(a)(1), and not to appointments under §§ 3345(a)(2) and (3). As to text, the government says that the plain language of § 3345(b)(1)—"[n]otwithstanding [Section 3345(a)(1)]"—means that the condition in § 3345(b)(1) applies only to individuals appointed under § 3345(a)(1). As to structure, the government claims that its reading "sensibly reads a restriction tied to first-assistant status and length of service as first assistant to pertain only to officials who are themselves first assistants." As to purposes and history, the government contends that its reading best serves the dual purposes of the Act and the intent of Congress by preventing the President from gaming appointments under § 3345(a)(1) while at the same time giving the President flexibility to appoint under §§ 3345(a)(2) and (3). As to application, the government claims that its reading is supported by the Executive Branch's long-standing interpretation and practice, with "Presidents of both parties making more than 100 nominations and designations premised on that understanding," and with the acquiescence of Congress.

Southwest counters that the text, structure, and purpose support its reading that § 3345(b)(1) applies to all three ways that an acting officer may be appointed under the FVRA. As to text, Southwest points to the language of § 3345(b)(1), which says that "a *person* may not serve as an acting officer for an officer under *this section*" unless that person can satisfy the conditions. Southwest claims that

this applies to all persons serving under § 3345, including those serving under §§ 3345(a)(2) and (3). As to structure, Southwest contends that the introductory clause—"notwithstanding [Section 3345(a)(1)]"—means only that § 3345(b)(1) applies *without respect* to the automatic, default provision of § 3345(a)(1), and not that it does not apply to §§ 3345(a)(2) and (3). As to purpose, Southwest claims that § 3345(b)(1)'s application to all acting officers is consistent with the purpose of the FVRA, to give the President flexibility in making temporary appointments, but also to restrict the President from choosing a permanent nominee to begin work under the guise of an acting appointment without Senate confirmation.

Southwest argues next that the government's arguments are wrong. Southwest says that "notwithstanding" in § 3345(b)(1) means "without respect to," and not that § 3345(b)(1) applies only to § 3345(a)(1) appointments, and therefore that § 3345(b)(1) also applies to §§ 3345(a)(2) and (3). Southwest claims that this makes sense, because § 3345(b)(1) says that first assistants "may not serve as an acting officer" under certain circumstances; and only § 3345(a)(1) says that the first assistant "shall" serve (while in contrast §§ 3345(a)(2) and (3) appointments are permissive). Southwest contends that § 3345(b)(1) is most sensibly read to single out § 3345(a)(1), the only one of the three subsections that directly conflicts with § 3345(b)(1). Southwest claims that the government's support for its FVRA history is weak, and contradicted by other history. And it contends that the Executive Branch's consistent practice only means that the Executive Branch has improperly interpreted the Act, not that it has validly amended the Act.

SIGNIFICANCE

As the government points out, the Executive Branch has a long-standing practice—dating back to the time nearly immediately after the FVRA's passage—of appointing a PAS officer from another agency or a senior agency employee as an acting officer while also nominating that individual as the permanent officer. The D.C. Circuit's approach would halt this practice and force a President to either choose someone else as the acting officer, choose someone else as the permanent nominee, or have the acting officer give up the duties of the office when that person is nominated. This approach would hamstring any President, but it could particularly restrict a new President in January 2017, who will likely staff agencies with acting officers until the President's nominees can gain Senate confirmation. (Southwest disputes most of this. It claims that the government can only identify 14 acting officials "whose conduct even arguably is affected by the decision below." It also claims that the D.C. Circuit's approach would not restrict a new President, because the President would simply have to follow the D.C. Circuit's rule.)

Moreover, this approach could call into question current senior officers' decisions and past senior officers' decisions going back three Presidents. Under the FVRA, these decisions would "have no force and effect" and "may not be ratified," thus rendering them entirely null and void. (Southwest disputes this, too. It says that the D.C. Circuit said nothing about these provisions, and that they do not apply to the NLRB General Counsel, anyway.)

This case shares these characteristics—challenging a long-standing Executive Branch practice, and challenging current and prior officer decisions—with another relatively recent appointments challenge to the NLRB, *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014). In *Noel Canning,* the Court ruled that President Obama exceeded his authority in appointing a member of the NLRB during a break, but not a recess, of the Senate. But *Noel Canning* involved a challenge to the President's exercise of his power under the Recess Appointments Clause of the Constitution. This case, in contrast, deals only with the FVRA, not the Recess Appointments Clause, the Appointments Clause, or any other provision in the Constitution. While this case may share some characteristics with *Noel Canning,* nothing about *Noel Canning* foreshadows an outcome here.

One final note: A split decision by the Supreme Court (4-4) would leave the D.C. Circuit ruling on the books, while saying nothing else about the state of the law. But this could still have a dramatic impact, given that most litigation over the actions of Executive Branch officials goes through the D.C. Circuit. (Only one other circuit court, the Ninth Circuit, has ruled on the question, and it agreed with the D.C. Circuit.)

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PREVIEW of United States Supreme Court Cases, pages 51–54.

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In October, the Court heard a number of interesting cases. Below we highlight some of the more engaging exchanges between the justices and the advocates during *Shaw v. United States.* This case asked the Court to consider whether a "scheme to defraud a financial institution," as articulated in the Bank Fraud Statute, requires proof that the defendant intended to expose the bank to a financial loss or risk of loss.

Ms. Koren Bell (on behalf of the petitioner): Your Honor, the statute turns on intent, and were the government to prove the defendant's intent to deprive of you of your possessory right, and that would be sufficient. And where that comes from is from this Court's settled fraud precedent. Going back a hundred years, the Court has interpreted the term "defraud" to mean property lost to the victim. And we see that …

Justice Stephen Breyer: So if you're insured and the—or at least the defendant believes he's insured, it isn't theft?

Ms. Bell: If the defendant believes that the bank is insured and therefore that another party will bear the loss?

Justice Breyer: Even Kardashian's thief, if there is one, believes that all that jewelry is insured. Indeed over insured. So it's not theft?

Ms. Bell: Well, so it would depend on the language of the statute.

Justice Breyer: No, it says defraud. She lied. He says I'm knocking on the door—you know, I'll go as far as you want. But I don't see that that has anything to do with it. You mean if he—if he defrauds him out of the money, he defrauds her out of the jewelry, says, here I am, your local jewelry cleaner. Gets the jewelry. Wouldn't you think that was fraud? Even if she's insured. Even if he thinks she's triple insured. Even if he thinks that, in fact, this isn't even her jewelry, that it was just loaned her on the occasion by a good friend, the necklace.

Ms. Bell: It would depend on whether the statute in that case required the intent to defraud …

Justice Breyer: What the statute says is defraud.

Ms. Bell: Defraud. In that case it's much like the mail and wire fraud statutes which do not specify a required victim for the fraud scheme, and therefore provided the government could prove the two undisputed components of the term "defraud" which come from …

Justice Breyer: I'm not asking you to repeat it. I'm asking you, if the local person comes to the door and says, dear Miss Kardashian, I am your local jewelry cleaner. Please give me your jewelry. She does. And that's not fraud. He wanted to get the jewelry. He tried to get the—he also believed that the friend had just loaned it for the evening, that she's triple insured, that she won't even lose any money because the publicity will be worth it. Okay?

Ms. Bell: Right. And that …

Justice Breyer: Now, my question is: There's the statute. I would have always thought from first year of law school, criminal law, that that was fraud, but perhaps I was wrong. So I would like you to explain it.

Ms. Bell: Yes, Your Honor. That would be a scheme to defraud the insurer. ■

When a Patent "Laches" on to Doctrine: Should There Be a Patent-Specific Approach to the Defense of Laches?

CASE AT A GLANCE

The Supreme Court decided in 2014 that the doctrine of laches could not be invoked to shorten the three-year statutory limit for obtaining legal relief in a copyright-infringement lawsuit. In a subsequent case, the United States Court of Appeals for the Federal Circuit decided that the Patent Act's six-year statutory damages period presented different circumstances, and the Federal Circuit held en banc that laches could shorten the time for legal relief in a patent-infringement lawsuit. The Supreme Court will now decide whether this different result is warranted in patent law.

SCA Hygiene Products v. First Quality Baby Products, LLC
Docket No. 15-927

Argument Date: November 1, 2016
From: The Federal Circuit

by Kelly Casey Mullally
Taylor English Duma LLP, Atlanta, GA

ISSUE

Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286.

FACTS

Petitioners SCA Hygiene Products Aktiebolag and SCA Personal Care, Inc. (collectively SCA) sell adult incontinence products and own United States Patent No. 6,375,646 (the '646 patent) directed to such products. The '646 patent issued with 28 claims in 2002. Respondents First Quality Baby Products and three related entities (collectively First Quality) produce and sell a disposable version of an adult incontinence product that competes with SCA's product and that SCA believes infringes the '646 patent.

On October 31, 2003, SCA contacted First Quality, asserting infringement of the '646 patent. In response, on November 21, 2003, First Quality advised SCA that it believed SCA's patent to be invalid in light of a patent that was filed before SCA's, U.S. Patent No. 5,415,649 (the '649 patent). After First Quality's response, SCA and First Quality did not communicate further about the alleged infringement.

SCA later sought review from the United States Patent and Trademark Office (PTO) as to the validity of its '646 patent. On July 7, 2004, SCA filed a request for reexamination of the '646 patent in light of the'649 patent. Reexamination, or "reexam," is an administrative proceeding within the PTO whereby a requesting party, including the patentee, may seek review of an issued patent in light of one or more specific patents or printed publications cited in the reexamination request. If the PTO grants the request for reexamination and the patent survives reexamination, the PTO issues a certificate confirming patentability. If the PTO determines that any claim of the patent is unpatentable over the cited reference or references, it issues a certificate cancelling any invalid claims. During reexam, a patentee may also amend the existing claims or add new claims to the patent, which the PTO will allow to issue if they are deemed patentable.

In this case, the PTO granted SCA's request for reexamination and, on March 27, 2007, confirmed the patentability of all of the original claims. The PTO also issued several new claims that SCA had added during reexam. SCA did not notify First Quality of the reexamination request because reexam proceedings are available to the public and, in SCA's view, First Quality therefore could monitor the proceedings itself. First Quality, however, believed that SCA had dropped its infringement allegations against First Quality after the November 21st letter. Starting in 2006, First Quality made significant investments in its adult-incontinence business, expanding its product line and acquiring other capital assets to do so.

SCA was aware of First Quality's activities but did not contact First Quality about the '646 patent again until August 2, 2010, when SCA filed the instant patent-infringement lawsuit against First Quality in the United States District Court for the Western District of Kentucky. After discovery and an order construing the claims of the '646 patent, First Quality filed a motion for summary judgment. Among other things, First Quality sought to limit its liability based on the doctrine of laches, a judicially created, equitable doctrine that can restrict a right-holder who "sits on her hands" rather than acting in later asserting her rights against an adverse party. First Quality noted that service of the complaint had occurred over three

years after the reexam concluded and was the first time in nearly seven years that SCA had communicated with First Quality about the '646 patent. Laches can generally bar claims for certain equitable remedies, but First Quality also sought to use the doctrine to restrict SCA's ability to recover legal relief, specifically back damages for the infringement, relying on precedent of the United States Court of Appeals for the Federal Circuit.

SCA argued in response that the doctrine of laches did not apply to prevent legal relief for infringement that falls within the Patent Act's six-year damages recovery period. To support its argument, SCA relied on the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.,* 134 S. Ct. 1962 (2014), which had recently held that the doctrine of laches could not bar legal relief within the Copyright Act's three-year statute of limitations. The district court disagreed with SCA, however, holding that the doctrine of laches can apply to bar legal relief in patent suits and that SCA failed to raise a genuine issue of material fact regarding the reasonableness of its delay or First Quality's presumed economic prejudice. The court granted summary judgment on the issue of laches in First Quality's favor.

On appeal to the Federal Circuit, the panel affirmed the district court's judgment, holding that an unreasonable delay in suing for patent infringement can result in the loss of the right to seek legal relief. The court rejected SCA's argument that the *Petrella* decision effectively abolished the doctrine of laches in patent law. SCA sought rehearing en banc, which the Federal Circuit granted "to resolve whether, in light of the Supreme Court's recent decision in *Petrella* [,] … laches remains a defense to legal relief in a patent infringement suit."

In a close 6-5 split decision, the Court of Appeals adhered to the panel's view. Chief Judge Prost wrote the majority opinion that relied heavily upon § 282(b)(1) of the Patent Act. That provision provides: "Defenses.—The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: (1) Noninfringement, absence of liability for infringement or unenforceability." En banc precedent of the Federal Circuit in *A.C. Auckerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020 (Fed. Cir. 1992) (en banc), had held that laches as a defense to legal relief was codified in that general language of 35 U.S.C. § 282, based on the well-established existence of the defense at the time the patent laws were recodified in 1952, the legislative history, and commentary from one of the principal drafters of the legislation. The SCA court conducted its own analysis and review of the precedents and other authorities and reaffirmed the *A.C. Auckerman* court's interpretation of § 282(b)(1). Chief Judge Prost then explained that the court had no authority to question the statute's propriety. She concluded, "If … Congress decides that the § 286 damages limitation and the § 282 laches defense are incompatible, it can change the law. As a court, however, we must apply the law as enacted, which means that the § 286 damages limitation and the § 282 laches defense must continue to coexist."

As a final point in reaching its conclusion, the majority reasoned that differences between copyright law and patent law also justified the outcome. Specifically, the court noted that defendants accused of copyright infringement had a greater ability to insulate themselves from damages through evidence of independent creation, whereas independent invention is no defense to patent infringement. Thus, the court found persuasive the arguments of many industry groups that retaining laches in patent law was necessary to provide a safeguard against stale claims brought long after companies have lost the ability to choose an alternative technology to avoid infringement.

The court determined that the *Petrella* decision did not alter the foregoing outcome: "Whether Congress considered the quandary in *Petrella* is irrelevant—in the 1952 Patent Act, Congress settled that laches and a time limitation on the recovery of damages can coexist in patent law." The court held that *Petrella* and other Supreme Court precedent did, however, require modification of the laches defense. In particular, the Court's precedent made clear the importance of maintaining the distinction between equitable estoppel, which can bar a patentee's claim completely and is tantamount to a patentee granting a license to an accused infringer based on misleading actions by a patentee and resultant loss to an accused infringer, and laches. The Federal Circuit majority accordingly held that laches can "only foreclose an ongoing royalty in extraordinary circumstances." Otherwise, if laches bars legal relief, as the court held it can, and all equitable relief, the outcome would be the same as that reached through equitable estoppel, a result against which *Petrella* cautioned.

The five judges concurring in part and dissenting in part agreed, in an opinion written by Judge Hughes, that laches continues to be a defense to equitable relief such as an injunction or ongoing royalties, when warranted by the circumstances. They disagreed, however, with the majority's holding that Congress had codified the defense of laches as to legal relief in § 282. Instead, they reasoned that, to the extent that § 282 codified the common law, that common law derived from Supreme Court precedent relating to the doctrine of laches generally, not the common law of laches in the limited context of patent law. That Supreme Court precedent held that laches was only a defense to equitable actions and therefore, the five judges in the minority concluded, laches could not serve to bar legal relief in patent-infringement actions. They rejected a patent-specific approach to laches, emphasizing that "[p]atent law is governed by the same common-law principles, methods of statutory interpretation, and procedural rules as other areas of civil litigation."

CASE ANALYSIS

In 35 U.S.C. § 286, entitled "Time limitation on damages," the Patent Act limits the recovery of damages for patent infringement to the six years preceding the filing of the claim of infringement, stating: "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." The Court will now decide whether laches is a defense to patent infringement occurring within the six-year recovery period of § 286.

In addressing that issue, *Petrella* looms large, as the lower courts' decisions and the parties' positions focused on that precedent, and the Court will certainly take into account its reasoning and holding in *Petrella*. That case involved a dispute regarding rights to Martin

Scorsese's 1980 film *Raging Bull,* owned by Metro-Goldwyn-Mayer (MGM). The plaintiff, Petrella, alleged that the film infringed a 1963 screenplay written by her late father. Petrella renewed the copyright to the screenplay in 1991, but did not contact MGM about her infringement contentions until seven years later. Then, over the course of two years, Petrella and MGM exchanged letters about the alleged copyright infringement. MGM subsequently heard nothing further from Petrella until she filed suit in 2009, about nine years after her last contact with MGM. In response, MGM moved for summary judgment on the theory of laches.

The Supreme Court, however, held that laches could not be used as a defense to legal relief for copyright infringement. In reaching its result, the Court relied on § 507 of the Copyright Act, entitled, "Limitations on Actions," and which provides in part that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." That statute of limitations, the Court reasoned, "itself takes account of delay." In contrast, the Court explained, "laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable case for which the Legislature has provided no fixed time limitation." Laches "originally served as a guide when no statute of limitations controlled the claim." Noting separation-of-powers concerns, the *Petrella* Court emphasized that laches is a "gap-filling, not legislation-overriding" doctrine. "To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period … courts are not at liberty to jettison Congress' judgment on the timeliness of suit." The Court accordingly held, "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." The *Petrella* Court noted that laches can nevertheless impact the equitable relief available to a right-holder, explaining, "the consequences of a delay in commencing suit may be of such sufficient magnitude to warrant … curtailment of the relief equitably awarded" during the remedial stage of a case or even at the outset of the litigation, and depending on the circumstances.

The *Petrella* opinion also touched on the related areas of trademark and patent law. In reaching its conclusion, the Court reasoned that Congress could provide for a laches defense in copyright law, noting that it had done so in the Lanham Act for trademark-infringement actions. Regarding patent suits, the Court expressly took no position on whether its decision would extend to that area of law, stating that "based in part on § 282 and commentary thereon, legislative history, and historical practice, the Federal Circuit has held that laches can bar damages incurred prior to the commencement of suit. … We have not had occasion to review the Federal Circuit's position." In *SCA Hygiene,* the Federal Circuit reaffirmed that position, concluding that the different circumstances in the patent context compelled a different result from that in *Petrella*.

SCA argues that the Federal Circuit erred in doing so. In SCA's view, § 286 is a statute of limitations, just as in *Petrella*. Therefore, the Supreme Court's analysis in *Petrella* forecloses the use of laches to abridge § 286. SCA also argues that the Federal Circuit's unique approach to laches in patent law conflicts with the Supreme Court's "equity jurisprudence," which mandates a flexible approach to laches, rather than the inflexible scheme SCA contends that the Federal Circuit applies in presuming the reliance and prejudice aspects of the laches defense as to all infringement occurring within the six-year time period when the first act of infringement occurs more than six years before suit.

SCA further argues that, to be consistent with the purpose of § 286, § 282 cannot be interpreted as incorporating a defense of laches that bars legal relief that is otherwise allowed by § 286. Turning to the legislative history, SCA argues that nothing in the statutes preceding the 1952 Patent Act when § 282 was codified suggests that Congress intended laches to bar legal damages arising within the statutory limitations period. Instead, SCA argues, § 286 sets forth Congress's judgment as to the timeliness of a claim for damages, and laches should not be available to further limit those damages. SCA counsels that the Court should follow the separation-of-powers principles at issue in *Petrella* and respect Congress's choice to use § 286 to address the timeliness of patent infringement suit.

Invoking policies of clarity, predictability, notice, and sound dispute resolution, SCA further urges reversal of the Federal Circuit decision. Among other things, SCA argues that laches promotes needless, expensive litigation rather than settlement because clear rules as to timeliness aid patentees in assessing when the benefits of suing will outweigh the costs. SCA explains that an ambiguous limitations standard created by the inherent uncertainty of laches would incentivize patent holders to quickly file lawsuits to avoid losing their rights, thus increasing patent litigation that could otherwise be avoided if patentees are given time to assess possible infringement.

First Quality argues that Congress intended to incorporate laches as a defense to legal damages in § 282. First Quality cites decisions from before the passages of the 1952 Patent Act to argue that federal courts uniformly recognized that laches could bar recovery of legal relief for patent infringement, in both actions brought at law and equity, and that Congress incorporated this common law into 35 U.S.C. § 282. First Quality notes that the Federal Circuit, and other circuit courts before the creation of the Federal Circuit, have continued to apply laches in this fashion and that Congress has not altered that practice, despite repeated opportunities to do so. First Quality agrees that the separation-of-powers concerns expressed in *Petrella* apply to this case, but essentially argues that those concerns counsel in favor of not ignoring Congress's codification of laches as a defense to legal relief in § 282.

First Quality further urges that permitting laches as a defense to legal relief is not unique to patent law, citing an example from employment law and a case arising under the Multiemployer Pension Plan Amendments Act. At the same time, patent law does present differences from copyright law that, First Quality argues, justify a different outcome in the patent context. In particular, First Quality argues that § 286 is not a statute of limitations, unlike § 507(b) of the Copyright Act at issue in *Petrella*. In addition, First Quality notes that the *Petrella* Court's reasoning that Congress must have been aware that some copyright infringement actions would be brought after long periods of delay did not apply in patent law, because the term of patent protection is considerably shorter than the term of copyright protection.

First Quality also asserts SCA's position would unfairly allow a patentee to sit silently on its rights while an innocent infringer

expends substantial time and other resources to develop and commercialize a product independently, only to have a patentee thwart its efforts with a tardy claim at the peak of the competitor's profitability. This is particularly problematic because, First Quality argues, patent law is subject to concerns not found in copyright law, such as "lock-in" issues, whereby a business might explore several possible technologies but ultimately become "locked in" to one, making significant investments, whereby substitution of an alternative, noninfringing technology ex post is no longer feasible.

Commercial and nonprofit amici from a variety of fields filed briefs in the case. For example, nonprofit organizations Electronic Frontier Foundation and Public Knowledge in support of affirmance, emphasizing that delay is particularly pernicious in patent law due to the acute susceptibility to loss of invalidity evidence over time. On the other side, a brief filed on behalf of law professors who teach and write in the areas of remedies and patent law supports SCA and argues that laches is an equitable doctrine that should not bar claims for legal relief.

SIGNIFICANCE

This case presents the Supreme Court with the "occasion to review the Federal Circuit's position" regarding laches that the Court noted in *Petrella* that it had not yet had. It also gives the Court another opportunity to continue its abatement of patent-law exceptionalism, as the Court must determine if it should depart from its reasoning in *Petrella* based on the different circumstances in the patent context cited by the Federal Circuit majority. Relatedly, the Court must decide whether the common law codified in § 282 of the Patent Act was specific to the application of laches in patent law, or whether it related to the doctrine of laches, which applies throughout the law, more generally. A steady stream of Supreme Court decisions in patent cases for more than a decade have course-corrected patent law to be more aligned with universally applicable legal principles.

If the Court departs from that trend and instead determines that laches does apply in a unique way in the patent context to also bar legal relief, this will limit accused infringers' exposure to retroactive damages. Patent-infringement defendants will be able to rely on laches as a defense to legal relief when a patentee unreasonably delays in bringing an infringement claim. A contrary ruling will benefit patentees, because laches could only be used to limit patent holders' equitable relief. Patentees would not be prevented by laches from waiting to bring suit until a strategically advantageous time, such as shortly after a competitor's most profitable six years of revenues, or at a time more economically feasible for a patentee to invest in expensive litigation. Patent owners often have compelling reasons for waiting to bring suit. For example, a patent may be subjected, at the election of the patentee or by request of a third party, to a variety of post-issuance proceedings, such as the reexamination procedure that occurred with the '646 patent here, or the newer inter partes review process being utilized in an increasing number of patent cases following passage of the America Invents Act.

The number of cases that will be affected by the Court's decision, regardless of the substantive outcome, is not insignificant. The term of patent protection begins at issuance and runs for twenty years from the earliest effective filing date of the patent application. A typical term for a mechanical invention, for example, is about seventeen years. Because patent infringement is an ongoing offense, with each copy of an infringing product constituting a new act of infringement, the six-year statutory limit can restart continually throughout the life of a patent if an infringer continues to practice the patented technology. Patentees will accordingly often seek damages going back six years. Thus, if an infringer has been making a patented product for fifteen years, a patentee will rely on § 286 to reach back to the six years prior to filing the complaint for damages. This six-year damages period in patent law is generous compared to the time limits applicable to many other types of civil lawsuits. These lengthy periods of time also increase the potential for periods of delay on the part of patentees in asserting their rights, and this case will determine whether accused infringers can use those time lapses, when they are unreasonable, to bar a patentee's collection of back damages that would otherwise be recoverable under § 286.

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PREVIEW of United States Supreme Court Cases, pages 55–59.

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In October, the Court heard a number of interesting cases. Below we highlight some of the more engaging exchanges between the justices and the advocates during *Peña-Rodriguez v. Colorado.* This case asked the Court to determine whether a rule that a court may not consider evidence of the content of jury deliberations could bar evidence of a juror's racial bias against the criminal defendant.

Justice Sonia Sotomayor: I always thought the most pernicious and odious discrimination in our law is based on race.

Mr. Jeffrey L. Fisher (on behalf of petitioner): I agree with that.

Justice Sotomayor: All right. So why is a rule that says, given the exceptions we've recognized since the 1800s that have said that race is the most pernicious thing in our justice system, why can't we limit this just to race using principles of the Fourteenth Amendment as well?

Mr. Fisher: I'm not denying that you can. And of course, the Constitution needs to be read structurally. So not only …

Chief Justice John Roberts: You think it's odious to have the same sort of discrimination against someone because he's a Muslim or practices Islamic faith? You're saying, he's a Muslim. Of course, you know, given this, I know how Muslims behave; he committed this crime. Is that not sufficiently like racial discrimination that it should be carved out?

Mr. Fisher: It may well be, Your Honor. It certainly is odious.

Chief Justice Roberts: What about sexual orientation? Somebody gives, you know, a bigoted speech in the jury room about sexual orientation and how particular types of people are more likely to commit crimes like the one before them? Is that sufficiently odious?

Mr. Fisher: It's quite odious. But whether it would satisfy the balancing test we're setting forth today would be needed to decide …

Justice Stephen Breyer: You have to have an answer for this reason. No one on the other side thinks anything but this is terrible jury misbehavior. That's a given across the case. It is not a question of the validity of the behavior. It's invalid. The question is the timing of when somebody has to object.

* * * *

Mr. Frederick Yager (on behalf of respondents): I think it would be difficult in the context of the Sixth Amendment in the same courthouse in Colorado to tell one defendant that that defendant gets to impeach the verdict because the error that happened to occur during deliberations is racial, whereas across the hall it was religious, or it was simply the jurors disrespecting the jury system enough to flip a coin. And—and that's the problem. In all of these cases in which Rule 606(b) is going to apply, you're going to be putting the individual defendant's Sixth Amendment right, which Petitioner acknowledges can be implicated in a wide range of cases, versus the interests that, Justice Kagan, I think you acknowledge are weighty and important, and precisely why Rule 606(b) has survived for so many years.

Justice Anthony Kennedy: Suppose this were a capital case. Would the government of the United States come and make this argument, that the person can be executed despite what we know happened in the jury room?

Mr. Yarger: Well, Your Honor, I think … certainly, this isn't a capital case, and that might raise different issues. There are cases set in the briefing that are capital cases in which the …

continued on page 69

What Is the Pleading Standard for Claims Against Foreign Sovereigns Based on Takings in Violation of International Law?

CASE AT A GLANCE

Respondents are a U.S. company and its Venezuelan subsidiary in the oil-drilling business. After Venezuela expropriated the subsidiary's oil rigs, respondents sued Venezuela and two state-owned companies, basing jurisdiction of the U.S. court on the Foreign Sovereign Immunities Act's "expropriation" exception. The Court will decide whether a plaintiff must merely overcome the "exceptionally low bar" of a "non-frivolous" pleading, or whether a plaintiff must plead more in order to show that "rights in property taken in violation of international law are in issue."

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.
Docket No. 15-423

Argument Date: November 2, 2016
From: The D.C. Circuit

by Birgit Kurtz
Gibbons P.C., New York, NY

INTRODUCTION

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the FSIA's "expropriation" exception, in pertinent part, "[a] foreign state shall not be immune … in any case … in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

ISSUE

Is the pleading standard for alleging that a case falls within the FSIA's expropriation exception more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous?

FACTS

Petitioners are the Bolivarian Republic of Venezuela (Venezuela) and two state-owned companies (Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A., together PDVSA).

Respondents are Helmerich & Payne International Drilling Company (H&P-IDC), an Oklahoma-based company, and Helmerich & Payne de Venezuela, C.A. (H&P-V), a company incorporated under Venezuelan law and a wholly owned subsidiary of H&P-IDC.

In the 1970s, Venezuela nationalized its oil industry, and Venezuela now controls the production and exportation of oil through PDVSA. Respondents allege that, for several decades, H&P-IDC provided oil-drilling services to petitioners through H&P-V and its predecessors. In 2007, H&P-V entered into certain contracts with PDVSA for drilling services over a period of time using specialized drilling rigs, which H&P-IDC purchased and then transferred to H&P-V. Respondents allege that, by 2009, Venezuela and PDVSA had failed to pay approximately $100 million owed to H&P-V under the contracts. They allege that, in response, H&P-V fulfilled its existing contractual obligations and announced that it would not renew the contracts until it was paid; it also disassembled its drilling rigs.

Respondents allege that, in June 2010, petitioners blocked H&P-V's properties where the disassembled rigs were maintained. Shortly thereafter, upon the recommendation of the Venezuelan National Assembly, then-President Hugo Chavez issued a decree expropriating H&P-V's property. Respondents allege that petitioners now use H&P-V's rigs and other assets in their state-owned drilling business.

In 2011, respondents commenced a lawsuit in the U.S. District Court for the District of Columbia, alleging that (1) PDVSA and Venezuela took their property in violation of international law and (2) PDVSA breached the contracts with H&P-V. Regarding the first count, respondents assert that the court has jurisdiction under 28 U.S.C. § 1605(a)(3)—the "expropriation" exception.

Petitioners moved to dismiss respondents' expropriation claims, arguing that they did not fall within the scope of the expropriation exception to immunity. The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela, holding that "generally, a foreign sovereign's expropriation of its own national's property does not violate international law." The court did not, however, dismiss H&P-IDC's

expropriation claim, reasoning that, although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern.

The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's expropriation-related rulings in part and reversed in part; Judge Sentelle dissented in part.

The Court of Appeals held that the pleading standard concerning the expropriation exception provides an "exceptionally low bar." The court relied on *Bell v. Hood,* 327 U.S. 678 (1946) (and D.C. Circuit precedent relying on *Bell*), and held that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." The court concluded instead that it would dismiss a complaint for lack of jurisdiction under the FSIA "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property … in issue' *only if the claims are 'wholly insubstantial or frivolous.*'" (Emphasis added.)

The Court of Appeals held that H&P-V had "asserted a nonfrivolous international expropriation claim." The court acknowledged that, under the so-called domestic-takings rule, a foreign state's expropriation of its own national's property does not violate international law. But the court held that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. In the absence of "any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *inescapably* render the claim[ ] frivolous and *completely* devoid of merit," the court held that H&P-V's claim "has satisfied this Circuit's forgiving standard."

The Court of Appeals also held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. The court explained that a "shareholder may have rights in corporate property" not derivative of the corporation's rights, and that H&P-IDC alleged that it had suffered "a total loss of control over its subsidiary." Thus, without resolving the question of whether H&P-IDC had properly alleged "rights in property" under § 1605(a)(3), the court held that "H&P-IDC has 'put its rights in property in issue in a non-frivolous way.'"

In his dissenting opinion, Judge Sentelle stated that he would have held both H&P-V and H&P-IDC had "failed to plead a taking in *violation of international law.*"

CASE ANALYSIS

Foreign sovereigns have been generally immune from suit in U.S. courts for more than two centuries. As early as 1812, U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice based in a sense of "grace and comity" between the United States and other nations. Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.

In 1952, U.S. courts' jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called Tate Letter, which announced the Department's adoption of a new "restrictive theory" of foreign sovereign immunity to guide courts in invoking jurisdiction over foreign sovereigns. The Tate Letter directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or "public," acts. But acts taken in a commercial or "private" capacity would no longer be protected from U.S. court review. But even with this new guidance, courts continued to seek the Executive Branch's views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistency and susceptibility to "diplomatic pressures rather than to the rule of law."

In 1976, Congress addressed this problem by enacting the FSIA, essentially codifying the "restrictive theory" of immunity and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch. Today, the FSIA provides the "sole basis" for obtaining jurisdiction over a foreign state in U.S. courts. The FSIA provides that "foreign states"—including their "political subdivisions" and "agencies or instrumentalities"—shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in the statute applies. The FSIA includes several provisions that define the scope of a foreign state's immunity and establishes detailed procedural requirements for bringing claims against a sovereign defendant.

The exceptions to immunity are set forth in §§ 1605 and 1605A of the FSIA. These exceptions include, inter alia, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities. In most instances, where a claim falls under one of the FSIA exceptions, the FSIA provides that the foreign state shall be subject to jurisdiction in the same manner and to the same extent as a private individual. The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment, in aid of execution of a judgment against a foreign state or its agencies or instrumentalities, of property located in the United States. Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, e.g., special rules for service of process, default judgments, and appeals.

Once a court decides that an entity must be viewed as a foreign state or an agency or instrumentality of a foreign state and possibly entitled to immunity, it must then decide if one of the exceptions set forth in the FSIA applies. The expropriation exception (also known as the takings exception) of the FSIA is set forth in 28 U.S.C. § 1605(a)(3) and provides as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of

> the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; …

Petitioners argue that the FSIA exceptions must be applied narrowly and that therefore the pleading standard must be higher than the "non-frivolousness" standard set forth in *Bell v. Hood.*

Petitioners argue that the FSIA creates an express statutory presumption of foreign sovereign immunity and that this presumption can be overcome only if the substantive requirements for revoking immunity set forth in 28 U.S.C. §§ 1605–1607 are met. Because the FSIA carefully "carves out" these exceptions to the general grant of immunity, courts must be careful to ensure that the requirements are met, as an overly expansive standard may upset the careful balance Congress struck.

Petitioners contend that, when evaluating the legal sufficiency of the pleadings under the FSIA's exceptions, the Court has consistently applied a single standard: A plaintiff must plead facts which, if true, establish the existence of all the elements set out in the relevant statutory exception. Petitioners argue that the expropriation exception is no different. While they concede that the requirements of the expropriation exception might overlap with the elements of the underlying claim for relief, they argue that that is no reason to depart from the usual analysis. Petitioners point out that, in other cases involving the FSIA's exceptions, the Court did not hesitate to decide jurisdictional questions that happen to overlap with issues affecting the merits. Petitioners contend that the text, history, and purpose of the FSIA, as well as the Court's precedents, demand that the same standard apply to the expropriation exception that applies to other exceptions. Under that standard, a court evaluating the legal sufficiency of the jurisdictional pleadings should decide whether the rights claimed to be "in issue" in the complaint *are in fact* "rights in property taken in violation of international law."

Petitioners disagree with the Court of Appeals' holding that a complaint survives jurisdictional dismissal so long as its allegations that "rights in property taken in violation of international law are in issue" are not "wholly insubstantial or frivolous." Petitioners argue that the Court in *Bell v. Hood* interpreted only 28 U.S.C. § 1331 and did not create a general rule applicable to all jurisdictional statutes. Petitioners argue that there are a number of reasons why the federal-question pleading standard should not be applied to the FSIA's expropriation exception. First, the text of the federal question statute is not comparable to the text of the expropriation exception. Section 1331 imposes no substantive prerequisites to jurisdiction; it broadly confers jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." The expropriation exception, on the other hand, is one of the FSIA's substantive prerequisites, and it is much more specific.

Petitioners reason that the histories, policies, and purposes of the two statutes are also different. The federal-question statute is intended to determine whether a case is properly brought in *federal* court, or whether it instead should be litigated in *state* court. The FSIA, by contrast, regulates whether a foreign state may be sued in *any* court in the United States.

Respondents contend that the *Bell v. Hood* pleading standard should be applied to the FSIA's expropriation exception and that only frivolous and wholly insubstantial claims must be dismissed at the jurisdictional stage.

Respondents point out that the Court has time and time again held that "jurisdiction is not defeated by the possibility that the averments in a complaint might fail to state a cause of action on which the plaintiff could actually recover." They argue that the "non-frivolousness" rule was not specially "created" in *Bell* for use only in cases under § 1331, but rather that the Court has followed that rule in evaluating jurisdiction under a wide range of statutes, regardless of variations in their text or policies.

Respondents argue that the expropriation exception requires that the plaintiff put "in issue" a claim that rights in property have been taken in violation of international law; the FSIA's use of the phrase "in issue" simply asks what assertions are "in dispute" or "under discussion." The low pleading standard is compelled by the FSIA's history, which confirms that Congress enacted the expropriation exception to provide a U.S. forum to decide the merits of claims seeking a remedy for the unlawful taking of property by a foreign state. Respondents claim that nothing in the FSIA displaces the long-standing, widespread practice that the possibility a claim might fail on its merits does not defeat the court's jurisdiction to decide the merits, at least where the claim is not "clearly immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous."

Respondents assert that petitioners are conflating the merits question with the standard defining the court's jurisdiction to decide. Respondents insist that it makes no sense to require courts to decide the merits question in order to determine their authority to decide it—such a requirement would, in effect, front-end the merits analysis.

The United States, as amicus in support of petitioners, asserts that the Court of Appeals erred in holding that nonfrivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as "exceptionally low." The United States argues, instead, that § 1605(a)(3) of the FSIA creates a narrow exception to foreign sovereign immunity in certain cases "in which rights in property taken in violation of international law are in issue." Like the FSIA's other exceptions to immunity, the expropriation exception "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," and "whether statutory subject-matter jurisdiction exists under the FSIA entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies."

The United States reasons that the FSIA calls for courts to decide a foreign state's "entitlement" to immunity, not to theorize about what the outcome of that analysis could conceivably be. Section 1605(a)(3) requires that "rights in property taken in violation of international law *are* in issue" —not that such rights *may be* in issue, or that there *may have been* a taking that international law *might* proscribe. The United States asserts that requiring a legal determination of immunity at the "threshold" of the action is necessary in order to ensure that the foreign state actually receives

the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts.

The two former State Department attorneys (John Norton Moore and Edwin D. Williamson), as amicus supporting respondents, argue that the FSIA was designed to confer jurisdiction in some cases and preclude it in others; it was not intended to create a "presumption" of sovereign immunity that must be overcome before a court may exercise jurisdiction over the merits of any claim against a foreign state. The main purpose of the FSIA is to remove discretionary and policy-driven considerations from the sovereign immunity determination and replace them with concrete statutory rules for application by the courts. The former State Department attorneys argue that courts should not add additional requirements where the FSIA creates none; there is no indication in the FSIA's text, structure, or legislative history that the expressly enumerated exceptions were meant to be limited by additional judicially implied presumptions. The attorneys argue that the principles of "international comity" and the dignity of foreign sovereigns are not relevant to the Court's task to identify the appropriate pleading standard applicable to claims brought under the expropriation exception.

The former State Department attorneys explain that the expropriation exception was the product of a joint effort of the Executive Branch and Congress to respond to the widespread expropriation by foreign sovereigns of U.S.-owned assets, especially in communist countries such as Cuba after Fidel Castro's ascent to power. The year before the FSIA was drafted, the White House had announced a series of retaliatory measures against foreign sovereigns that expropriated property owned by American citizens. Congress included the expropriation exception in the FSIA to expand on these measures by giving expropriation victims a remedy against foreign sovereigns in U.S. courts. The former State Department attorneys argue that a heightened standard for pleading jurisdiction over expropriation claims would depart from the text, structure, and history of the exception and frustrate its purpose.

SIGNIFICANCE

At first glance, the case presents a disagreement on a seemingly base procedural requirement—the pleading standard for certain complaints. But that pleading standard could potentially have a significant impact on U.S. diplomatic relations with numerous foreign countries.

If the Court decides that the proper pleading standard for the FSIA's expropriation exception is the "exceptionally low bar" promulgated in *Bell v. Hood,* then foreign nations thus haled into a U.S. court could view the proceeding as an affront to their sovereign dignity, and the United States' relations with that country may well suffer damage. This may result in reduced cooperation in various areas, including diplomatic and economic relations. In addition, because some countries require reciprocity in order to grant foreign countries sovereign immunity from proceedings in their own courts, the United States may well be denied sovereign immunity from suit in foreign countries' courts.

If, on the other hand, the Court adopts a heightened pleading standard, then, in theory, rogue foreign countries might feel emboldened to expropriate property owned by U.S. citizens or companies, believing that they can act with impunity. In contrast, a lower pleading standard might theoretically prevent takings due to the threat of a U.S. court proceeding. Realistically, however, the foreign governments that tend to take property in violation of international law will most likely not be influenced—one way or the other—by an esoteric procedural rule applicable in U.S. courts.

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PREVIEW of United States Supreme Court Cases, pages 60–63.

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Does a Sue-and-Be-Sued Provision in Fannie Mae's Charter Confer Federal Jurisdiction?

CASE AT A GLANCE

The Federal National Mortgage Association (Fannie Mae) was created in 1938 through the Federal Housing Act to assist in making mortgages, and thereby lenders, more liquid. By 1974, it was a private corporation and the government owed none of its stock. Petitioners brought state law claims against Cendant Mortgage Corporation and Fannie Mae in connection with their mortgage foreclosures. They brought the case in state court after the federal court in the Central District of California dismissed it. Fannie Mae removed the case to federal court, which then dismissed the case on res judicata and collateral estoppel grounds because the claims had been dealt with in prior litigation. This is one of four federal lawsuits filed by the petitioners, each of which was dismissed either on the merits or on res judicata grounds. The Ninth Circuit affirmed the dismissal but later sua sponte withdrew its disposition and appointed counsel for the pro se petitioners. It directed briefing on the issue of subject-matter jurisdiction. The Court of Appeals then said that the sue-and-be-sued clause, which says the agency can sue and be sued in any court of competent jurisdiction, state or federal, conferred federal jurisdiction. It denied en banc review.

Lightfoot et al. v. Cendant Mortgage Corp. et al.
Docket No. 14-1055

Argument Date: November 8, 2016
From: The Ninth Circuit

by Barbara L. Jones
Minnesota Lawyer, Minneapolis, MN

ISSUES

Does Fannie Mae's charter confer federal subject-matter jurisdiction?

Is *American National Red Cross v. S.G.* controlling or should it be overruled?

FACTS

At this stage, this case has nothing to do with the mortgage foreclosure. Cendant is not even involved in the appeal. Neither the parties' briefs nor the Ninth Circuit opinion discuss the petitioners' underlying claims. In its response to the certiorari petition, Fannie Mae stated that the petitioners filed at least five lawsuits trying to stop the foreclosure, for the most part based on allegations that they were fraudulently induced to acquire a mortgage for which they were not qualified.

The Supreme Court is asked only to decide whether the case belongs in federal court. The statute at issue, 12 U.S.C. § 1723(a), is the charter that created Fannie Mae and said that it could sue and be sued in any court of competent jurisdiction, state or federal. The present language reflects a 1954 amendment that replaced the original phrase "court of law or equity" with the phrase "court of competent jurisdiction." So the ultimate question is what the words "court of competent jurisdiction" mean.

The Ninth Circuit said that a specific reference to the federal courts, as found in § 1723(a), is necessary and sufficient to confer jurisdiction. It believed that the 1992 case of *American National Red Cross v. S.G.,* 505 U.S. 247, adopted this clear rule. It said of its ruling in *Lightfoot,* "we do not write on a clean slate."

CASE ANALYSIS

Each of the parties has the benefit of some broad doctrines. The petitioners have the policies that the federal courts have limited jurisdiction and that statutes mean what their plan language says. The respondents have case law history for both its precedential value and because Congress legislates against a backdrop of prior decisions.

"Let us begin with plain English," the petitioners say. To them, the phrase "competent jurisdiction" clearly and plainly signifies a court with an independent basis for federal jurisdiction. In a long list of standard corporate powers, the sue-and-be sued clause grants capacity, not jurisdiction, they assert. In contrast, they continue, the Ninth Circuit says that a court of competent jurisdiction means any federal court if there is a specific reference in the law to federal courts.

But the Ninth Circuit certainly didn't mean to say that any state court would be a court of competent jurisdiction, petitioners continue, because clearly a state court would have to have other

subject-matter jurisdiction. Petitioners claim even Fannie Mae agrees with that assertion. Additionally, other statutes have sue-and-be-sued provisions along with express federal jurisdictional provisions, illustrating that the jurisdictional grant is necessary. The lower court should have ruled under *Califano v. Sanders,* 430 U.S. 99 (1977), and other cases, that an independent basis for jurisdiction is required, petitioners assert.

Petitioners argue that the history of Fannie Mae and its charter show that Congress did not mean to open the jurisdictional doors as wide as the respondents would prefer. Here we must detour into another statute, 28 U.S.C. § 1349, which does extend federal jurisdiction to federally chartered corporations more than 50 percent government owned. That law was passed specifically to take cases out of federal court, they say.

At one time, § 1349 did apply to Fannie Mae. Congress began to privatize Fannie Mae in 1954, amending the charter to include the competent jurisdiction language. This Court had already said in *Shoshone Mining Co. v. Rutter,* 177 U.S. 505 (1900), and other cases that competent jurisdiction meant a court whose jurisdiction depends on other provisions of law. So it is reasonable to conclude that Congress meant the same thing.

Then, in 1974, Congress again amended the law to establish Fannie Mae's residence as the District of Columbia for jurisdictional purposes. That change meant that Fannie Mae would have an entry into federal court by means of diversity jurisdiction; such a change would have been unnecessary if the charter gave it automatic federal jurisdiction, as the Ninth Circuit read the law, petitioners argue.

The Ninth Circuit relied on *American National Red Cross v. S.G.,* which states that a charter may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts. As the petitioners phrase it, the Ninth Circuit said that *Red Cross* created a "talismanic rule" that revolves around the word "federal," saying that the word is necessary and sufficient to confer jurisdiction. In contrast, the correct reading of *Red Cross* is that the word "federal" is necessary but not sufficient to confer jurisdiction, petitioners argue.

Petitioners urge the Court to distinguish *Red Cross* because Fannie Mae's charter is different and does not refer to competent jurisdiction. *Red Cross* concerned an amended sue-and-be-sued clause that granted authority to courts of law and equity, state and federal. The *Red Cross* Court read that amendment as granting federal jurisdiction because it would otherwise be forced to conclude that there was no reason for the change, petitioners say. The principles of statutory construction required the court to find federal jurisdiction. The same principles mandate that the term "of competent jurisdiction" in Fannie Mae's charter be treated as more than mere surplusage.

And if the Court believes that *Red Cross* created what the petitioners call an "if federal, then jurisdiction" rule, it should overrule the case, petitioners say. That reading of *Red Cross* is at odds with the Court's interpretation of other statutes and preexisting case law, they argue.

Finally, the petitioners urge the Court to avoid confronting a constitutional question about Congress's reach under Article III of the Constitution. It is debatable whether Congress has the power to confer federal jurisdiction on all Fannie Mae suits. That question can be avoided by giving the charter its plain and natural meaning, and the Court has consistently attached importance to interpreting statutes to avoid deciding difficult constitutional problems when possible.

Respondents' argument is essentially to say "no" to every point that petitioners make, although they also have a long line of cases they say support their positions. Petitioners distinguish those cases based on the language of the sue-and-be-sued clause and/or the subject of the litigation.

Respondents argue that since 1809, the Court has recognized that language authorizing suits in federal court suffices to confer federal jurisdiction. Respondents cite cases starting with *Bank of the United States v. Deveaux,* 9 U.S. 61 (1809), and ending with *Red Cross* claiming they stand for the proposition that Congress has conferred federal jurisdiction over suits by and against federally chartered entities. (Of course, there are also cases that say that an independent source of jurisdiction is required.)

In *Deveaux,* the Court said that the words "in courts of record, or any place whatsoever" did not confer independent federal jurisdiction. The Court reached a similar conclusion in *Bankers Trust Col. v. Texas & Pacific Railway Co.,* 241 U.S. 295 (1916). In *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.,* 315 U.S. 447 (1942), the Court held that the federal courts had jurisdiction because the FDIC was authorized to sue and be sued "in any court of law or equity, State or Federal." In *Osborn v. Bank of the United States,* 22 U.S. 738 (1824), jurisdiction was found via a bank charter that authorized suit "in any Circuit Court of the United States."

Then came *Red Cross*—there, the Court held that the earlier line of cases put Congress on notice of how to confer federal jurisdiction, which it did by authorizing the Red Cross to sue and be sued in federal courts. The express authorization to sue in federal court means more than authorizing a general capacity to sue, the *Red Cross* Court said.

What respondents term the *Deveaux-Osborn-Red Cross* rule is "amply justified by its own long pedigree," they assert. Such a rule, according to respondents, is also consistent with recognized principles of statutory construction for two reasons. The first is that the Court previously has given full meaning to every word in a sue-and-be-sued clause. Second, Congress legislates against a backdrop of prior cases and would recognize that, per the case law, an authorization to sue in federal courts would suffice to establish federal jurisdiction.

Under the *Deveaux-Osborn-Red Cross* rule, Fannie Mae's sue-and-be-sued clause specifically authorizes suit in federal courts of competent jurisdiction, respondents continue. "Competent" jurisdiction does not necessarily refer to "independent" jurisdiction, respondents conclude.

This reading gives meaning to every term in the provision and does not render the words "State or Federal" superfluous. (Recall that petitioners made the same argument—that laws should not be read in a way that renders language surplus, but refers to competent jurisdiction.) If Congress meant to confer general capacity, why refer to state or federal courts?

Continuing, the respondents say that the term "court of competent jurisdiction" is common in jurisdiction-conferring provisions, and prior to 1954 (when Fannie Mae's charter was amended), courts routinely interpreted the phrase as conferring jurisdiction without another independent basis for subject-matter jurisdiction. Congress used the "competent jurisdiction" language after 1954 as well, respondents continued.

The term is not superfluous because it can refer to personal jurisdiction, respondents pointed out. The appellate courts had construed the same language as jurisdiction-conferring in cases involving the FHA, and so it would have been possible for Congress to import the words into the Fannie Mae amendments.

Continuing, the respondents argue that in passing the 1954 amendment, Congress did not intend to divest Fannie Mae of access to federal courts and put it in the position of a private entity. That law also deemed Fannie Mae a federal agency and asserted that it had governmental functions. So it was not Congress's intent to take Fannie Mae out of § 1349's provisions, conclude respondents, because Fannie Mae was not in the same position as private entities.

Furthermore, when Congress created Freddie Mac in 1970 as a private organization, Congress allowed it entry into federal courts. Since Freddie Mac was created to compete with Fannie Mae, respondents conclude, Congress must have wanted the two mortgage firms to have the same court access.

Finally, respondents wave off petitioners' other arguments concerning § 1349, the 1974 amendment establishing that Fannie Mae was a District of Columbia corporation and the canon of constitutional avoidance as meritless.

SIGNIFICANCE

Fannie Mae is no stranger to litigation, and so the Court's ruling in this case will have a wide impact just for that reason. But there are other reasons to watch this case.

First, the U.S. Solicitor General, at the invitation of the Court, has filed an amicus brief in support of the petitioners. That likely was not an encouraging sign for respondents. The United States asserts simply that Fannie Mae's charter does not confer original federal jurisdiction. The words "court of competent jurisdiction" mean that another basis for jurisdiction is required, according to the federal government. The government goes on to provide a close reading of the statute that aligns with that of the petitioners.

The United States also notes that the Department of Housing and Urban Development and the Department of Veterans Affairs' sue-and-be-sued provisions are virtually identical. That's a lot of lawsuits. And although those departments are authorized by statute to sue in federal court, resolution in *Lightfoot* would determine whether private litigants could sue them in federal court based on state-law causes of action.

The American Association of Justice (AAJ), generally all plaintiffs' lawyers, wants its members' clients to be able to sue in state court without being overridden by federally chartered defendants. Removal to federal court makes the cases more difficult and expensive, the AAJ contends.

Such removal also consumes federal court resources that could be put to better use on cases that must be heard in federal court, and moves federal courts from being courts of limited jurisdiction to courts of general jurisdiction, the AAJ warns.

And federal judges are not experts in state law, the AAJ continues. Principles of federalism mean that state courts have an essential role that should not be overtaken by federal courts. "Even assuming that the federal court correctly applies state law, the outcome is one decided by judges not selected under the state's system, who are not accountable to the state court's constituency and who do not speak with the authority of the sovereign state on a matter of state law," the AAJ points out. It urges the Court to follow the "clear statement doctrine" and require Congress to make its intention to alter the balance between state and federal governments unmistakably clear in a statute.

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PREVIEW of United States Supreme Court Cases, pages 64–66.

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Form Over Function: Are the Designs of Uniforms Ineligible for Copyright Protection Because of Their Identifying Function?

CASE AT A GLANCE

In order to receive copyright protection, aesthetic features that are incorporated into the design of a useful article, such as a garment, lamp, or piece of furniture, must be identified separately from, and be capable of existing independently of the utilitarian aspects of the article. Courts, the Copyright Office, and academics have proposed various tests to distinguish between copyrightable materials and unprotectable industrial designs. The Sixth Circuit rejected all existing tests and created a new test. The Court must now determine what the appropriate test is to determine when a feature of a useful article is protectable under § 101 of the Copyright Act.

Star Athletica, LLC v. Varsity Brands, Inc.
Docket No. 15-866

Argument Date: Monday, October 31, 2016
From: The Sixth Circuit

by Ben Depoorter
University of California, Hastings College of the Law, San Francisco, CA

ISSUES

What is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?

Are copyright registrations entitled to extra-statutory *Skidmore* deference?

FACTS

Varsity is a major manufacturer and distributor of cheerleading and dance-team uniforms and accessories. Varsity has registered hundreds of copyrights of two-dimensional drawings and photographs of uniforms.

Star Athletica is a new entrant in the cheerleading-uniform market. Upon publication of Star's first catalogue, Varsity sued, alleging that Star's cheerleader uniforms infringed Varsity's copyright in its two-dimensional cheerleader-uniform drawings and photos.

The district court held that Varsity's copyrights in two-dimensional drawings and photographs could not be used to prohibit Star from manufacturing and distributing cheerleading uniforms. The stripes, chevrons, zigzags, and color blocking imprinted on cheerleader uniforms were not copyrightable because these design elements could not be disaggregated from the cheerleader dress design, which were otherwise utilitarian.

The district court framed the issue as whether "a cheerleading uniform can be conceived without any ornamentation or design, yet retain its utilitarian function as a cheerleading uniform." The district court's premise was that the function of a cheerleading uniform "is not merely to clothe the body; it is to clothe the body in a way that evokes the concept of cheerleading." In other words, a cheerleading uniform without stripes, patterns, and chevrons, is not a cheerleading uniform.

On appeal, the Sixth Circuit first deferred to the registrations that had been issued to Varsity by the Copyright Office, finding that a "comparison between the designs at issue in this case and the other Varsity registered designs confirms that the Copyright Office consistently found the arrangements of stripes, chevrons, and color blocking to be original and separable from the utilitarian aspects of the articles on which they appear, and therefore copyrightable." Second, the panel majority acknowledged and rejected nine different tests to identify ornamental features that are separate from the utilitarian aspects of a useful article, rejecting all of these tests in favor of its own new, hybrid test. In applying its own test, the Sixth Circuit emphasized that Varsity's graphic designs add decorative value that is unrelated to the functionality of the cheerleading uniforms as items of clothing. Rather, in the Sixth Circuit's perspective, the graphic features of Varsity's designs—the arrangement of stripes, chevrons, zigzags, and color blocking—exist separate from the utilitarian aspects of the cheerleading-uniform design, namely to cover the body, permit free movement, and wick moisture.

The Sixth Circuit denied rehearing en banc but stayed its order pending the petition of certiorari.

CASE ANALYSIS

The Court is asked to address two legal issues.

First, the Court is asked to clarify the level of appropriate judicial deference with regard to copyright registrations. The Sixth Circuit in *Varsity* determined that a copyright registration is entitled to *Skidmore* deference (*Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)). Under *Skidmore,* the weight of an agency interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The petitioner points out that the Sixth Circuit's decision is unprecedented since no court has ever accorded *Skidmore* deference to the Copyright Office's decision to register a copyright. A copyright is presumptively valid if it is filed not less than five years after the work is first published. 17 U.S.C. § 410(c). In an infringement action, this presumption validity shifts to the defendant the burden of proving the registration's invalidity. This can be accomplished by demonstrating that the Copyright Office erred in registering the copyright. According to the petitioner, Congress has thus determined the "deference" owed to the Copyright Office's registration decision. In the petitioner's viewpoint, where Congress has expressly defined a copyright registration's effect in a legal proceeding regarding validity, courts should not accord greater weight to the registration via some form of judicial deference to the decision. Although courts generally accord some deference to agency determinations (*United States v. Mead Corp.,* 533 U.S. 218 (2001); *Skidmore*), deferring to the Copyright Office in a case challenging the validity of a registration places more weight in favor of a registration's validity than Congress intended, according to the petitioner. The respondent points out that (1) the Sixth Circuit discussed *Skidmore* deference mainly to reject the higher level of deference that applies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and (2) the issue of the appropriate judicial level of deference did not affect the outcome of the case.

Second, the Court is asked to provide guidance on the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act. The Court can formulate a new test or select one from the assortment of tests developed by circuit courts, the Copyright Office, and academic commentators. Although these tests sometimes overlap, significant differences exist as to their outcomes. For instance, while some tests are primarily focused on whether a product is the result of the type of creative decision-making unrestrained by utilitarian motivations, other tests solely inquire whether the final product can be perceived as creative, separately from its utilitarian aspects.

The petitioner emphasizes that the test developed by the Sixth Circuit conflicts with decisions of the Second and Fifth Circuits. According to the petitioner, the latter circuits apply tests that are more consistent with Congress's long-standing policy not to extend copyright protection to garment designs. In these circuits, leading cases have denied copyright protection to casino uniforms and prom dress designs because the decorative elements are intrinsically linked to its utilitarian function. In *Jovani Fashion, Ltd. v. Fiesta Fashions,* 500 F. App'x 42 (2d Cir. 2012), the Second Circuit concluded that the function of a prom dress was to clothe the body "in an attractive way for a special occasion" because this "clothing, in addition to covering the body, serves a 'decorative function.'" The Fifth Circuit in *Galiano v. Harrah's Operating Co.,* 416 F.3d 411 (5th Cir. 2005), explained that a casino uniform's function is to identify its wearer as a member of a group. Along these lines, the function of cheerleading uniforms in the case at hand is to identify the wearer as a cheerleader, associating the wearer with a certain team, and enhancing the wearer's attractiveness. As a result, the stripes, braids, and chevrons on a cheerleading uniform are integral to its identifying function, rendering Varsity's design ineligible for copyright protection in the Second and Fifth Circuit.

Respondent instead points to the distinction between fabric and dress designs. Fabric designs include patterns or artistic features that are imprinted onto a fabric. Dress or garment designs involve the shape, style, cut, and a dimension of a garment that are converted from fabric into a finished dress or other clothing garment. While fabric designs are eligible for copyright protection as two-dimensional graphic works (regardless of whether the design is used on clothing, rugs, or some other surface), courts treat the three-dimensional designs of garments themselves as unprotectable dress designs. Respondent accuses the petitioner of manufacturing a circuit split by comparing the Sixth Circuit's decision involving fabric designs with decisions from the Fifth and Second Circuit that involve dress designs.

Respondent maintains that the Sixth Circuit correctly applied the distinction between fabric and dress designs when it concluded that Varsity's graphic designs were "like" fabric designs. According to the respondent, Star's contention that the designs cannot be copyrighted because the "braid[s], chevrons, and color blocks" are what make cheerleading uniforms actual cheerleading uniforms is a flawed, fact-bound assertion that does not warrant review.

SIGNIFICANCE

Courts across the country have struggled to agree on one single test to draw the line between copyright-eligible subject matter and unprotected industrial design. The case provides an opportunity for the Court to provide guidance on the appropriate test for courts to determine whether creative features that are incorporated into the design of a useful article can be identified separately from, and are capable of existing independently of, its utilitarian aspects. Given the different outcomes under the various existing tests, uniformity offers the benefit of improving predictability in this challenging area of copyright law.

The outcome of the case is of particular relevance to the fashion industry. First, the outcome might help further clarify the line between copyright-eligible fabric designs and unprotectable dress designs. Second, the Court must determine if and how identifying features of decorative designs affect the scope of copyright protection for fashion items. If the Court follows the Sixth Circuit's narrow interpretation of functionality with regard to garments, the outcome likely broadens design rights, enabling designers to increasingly enforce copyright in two-dimensional sketches and photographs against garments that feature substantially similar decorative features. If the Court instead follows the logic of applications to prom dresses and casino uniforms from the Second

and Fifth Circuit, copyright protection remains elusive to fashion designs that include identifying decorative features. In the case at hand, for instance, this approach would render decorations commonly associated with cheerleading, such as stripes and chevrons, ineligible for copyright protection.

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Justice Kennedy: Well, it doesn't follow from your position.

Mr. Yarger: And it does. And our position is it should apply there. If the jury system is so important to be protected in these other contexts, and is—and this rule is necessary to allow them to fully and fairly deliberate the issues, it ought to apply in that context as well. But, again, I don't think that question needs to be confronted or answered in this case.

* * * *

Chief Justice Roberts: But what other types of questions would—what types of questions would you propound if you were trying to elicit whether there was bias on the part of a prospective juror?

Mr. Yager: I would propound the same types of questions that Petitioner's counsel used below as to other issues: People's experiences on the subject, whether they believe racial issues still persist in this country, and what their attitudes are.

Justice Ruth Bader Ginsburg: But … isn't it so that many lawyers won't ask that question even if they could? Because just by asking the question, you're putting race in the minds of the jurors, and you'd rather not do that.

Mr. Yager: That's certainly the argument the Petitioner makes here. But what experience has shown is that a careful and mature voir dire on race is not likely to infuse racism into jurors. In fact, quite the opposite has been observed to happen. When jurors are respectfully confronted with racial issues at the outset of a trial, they tend to counter any racial bias, whether explicit or implicit, that might come up during the thought process. ■

Can the City of Miami Bring a Fair Housing Case Against Private Banks for Lending Practices That Led to Increased Foreclosures, Lower Home Values, and Lower Property Tax Revenue and Increased Maintenance Costs for the City?

CASE AT A GLANCE

The City of Miami brought lawsuits against Wells Fargo, Bank of America, and Citigroup, alleging that the banks engaged in discriminatory lending practices in violation of the Fair Housing Act. The City claimed that these practices led to increased foreclosures, which led to decreased home values, resulting in lower property tax revenue for the City. The City also claimed that increased foreclosures required it to provide increased police, fire, and maintenance services.

Bank of America v. Miami* and *Wells Fargo v. Miami
Docket Nos. 15-1111 and 15-1112

Argument Date: November 8, 2016
From: The Eleventh Circuit

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

INTRODUCTION

The Fair Housing Act permits only an "aggrieved person" to sue to enforce its antidiscrimination provisions. The Act also requires a plaintiff to show that the defendant's discrimination was the proximate cause of the plaintiff's injuries. If a plaintiff is not an "aggrieved person" under the Act, or if a plaintiff cannot show that the defendant's discrimination was the proximate cause of the plaintiff's injuries, the courts will dismiss the case.

ISSUES

Is the City of Miami an "aggrieved person," within the zone of interests protected by the Fair Housing Act?

Did the City of Miami sufficiently show that the banks' discriminatory practices were the proximate cause of its decreased property tax revenue and increased services to foreclosed properties?

FACTS

On December 13, 2011, the City of Miami brought three separate fair housing lawsuits in federal court against Wells Fargo, Bank of America, and Citigroup. Each of these suits alleged that the defendant banks engaged in a decades-long pattern of racially discriminatory lending practices. In particular, Miami claimed that the defendants refused to extend mortgage credit to black and Latino borrowers as compared to white borrowers, and that, when they did extend credit to black and Latino borrowers, they provided loans with more burdensome terms—higher risks, steeper fees, and higher costs—than the terms for equally qualified white borrowers. Miami also claimed that the banks created internal incentive structures that encouraged bank employees to provide these more burdensome loans.

Miami alleged that these practices violated the Fair Housing Act (FHA) by intentionally discriminating against minority borrowers and by creating a racially disparate impact on minority borrowers (because of a disproportionate rate of foreclosures on minority-owned properties and a disproportionate number of exploitative loans in minority neighborhoods). The City claimed monetary damages based on lost property-tax revenue, which was caused by decreased home values, which was caused by unnecessary and premature foreclosures (which were caused by the illegal lending practices). The City also sought damages for increased city services—police, fire, building inspection, and the like—that attended foreclosed properties.

The district courts dismissed the cases, holding that Miami lacked standing to bring a case under the FHA and that the City had failed to allege that the banks' lending practices were the "proximate cause" of its alleged harms. In three separate opinions, the United States Court of Appeals for the Eleventh Circuit reversed. Wells Fargo and Bank of America appealed to the Supreme Court (Citigroup did not), and the Court consolidated the cases.

CASE ANALYSIS

This case involves two distinct issues: whether the City can sue under the FHA, and whether the banks' practices were the proximate cause of the City's alleged harms. The City has to prevail on both in order to win the case. Let's take them one at a time.

Can the City sue under the FHA?
As a general matter, a person can bring a statutory cause of action only if that person falls within the "zone of interests" protected by the statute. The FHA itself defines the zone of interest: It authorizes only an "aggrieved person" to sue, and defines an "aggrieved person" as anyone who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur." This clearly covers an individual who was subject to housing discrimination. But the question here is whether it also covers the City of Miami.

The Eleventh Circuit held that "aggrieved person" covers Miami. The court based its conclusion on three Supreme Court cases from the 1970s and 1980s that held that "aggrieved person" under the FHA extends as far as the standing principles under Article III of the Constitution permit. This case tests the continued viability of those cases.

The banks argue that the City falls outside the zone of interests protected by the Act. They say that the Supreme Court ruled in a unanimous opinion just five years ago that the term "aggrieved" in Title VII of the Civil Rights Act of 1964 authorizes a suit by a "plaintiff with an interest arguably sought to be protected by the statute, while excluding plaintiffs * * * whose interests are unrelated to the statutory prohibitions in Title VII." *Thompson v. N. Am. Stainless, LP,* 562 U.S. 170 (2011). The banks say that, given the similarities between Title VII and the FHA, the same interpretation should govern the FHA. The banks contend that *Thompson,* which defines Title VII's zone of interests more narrowly than Article III standing, effectively abrogated the Court's statements in earlier cases suggesting that "aggrieved person" extends as far as Article III standing.

The banks argue that under the appropriate test, the City does not fall within the FHA's zone of interests. They say that the FHA protects against discriminatory practices. But they claim that the City's complaint pleaded only financial injuries that depend only on increased foreclosures—not discriminatory practices. "Indeed, they are indifferent to whether those foreclosures were the result of discrimination at all." The banks contend that because the City's complaint falls outside the discrimination zone of interest that the FHA protects, the City's complaint should be dismissed.

The City counters that it does fall within the FHA's zone of interests. The City says that it has a "strong and inherent interest in the benefits of an integrated community," that it was "harmed in its fair housing efforts," and that it suffered "further injuries in the form of lowered property tax revenues and remediation costs." Miami claims that these interests and harms fall squarely within the zone of interests protected by the FHA, and that the Supreme Court itself said so in *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979), one of those cases from the 1970s. Moreover, the City contends that its position is supported by the history and purposes of the FHA. It says that the FHA was enacted, and later amended, to eradicate housing discrimination with a "special emphasis on the problems discrimination caused for cities." Miami claims that Congress amended the FHA with full knowledge of the Court's rulings from the 1970s and 1980s. It says that Congress therefore "endorsed" the Court's holding that the FHA zone of interests extends as far as Article III standing. Finally, Miami contends that the Court's ruling in *Thompson* does not abrogate its holding in *Gladstone,* because *Thompson* dealt with Title VII, and the FHA is different.

Are the banks' practices the "proximate cause" of Miami's injuries?
In addition to falling within the zone of interests in order to bring a case under the FHA, a plaintiff also has to plead that the defendant's discriminatory practices were the proximate cause of the plaintiff's injuries. Proximate cause requires a sufficiently close connection between the discriminatory behavior and the plaintiff's alleged harms that resulted from that behavior. Here, the parties dispute whether the banks' practices were the proximate cause of Miami's reduced tax revenue and its increased services to foreclosed properties.

The banks argue that Miami's alleged harms are too remote from the banks' practices. They say that the harms are "several steps removed from any such discrimination," if, indeed, they derive from the discrimination at all. "In that sense, the City is no different from the innumerable other individuals and entities that suffered economic losses after the collapse of the American housing market." In other words, the banks say that the foreclosures (which are the immediate cause of the City's harm) were caused by many factors—at best, several steps removed from any discrimination, but quite possibly caused by factors having nothing to do with the banks' discrimination. Because the City cannot trace its alleged harms more directly to the banks' practices, the banks claim that the City has failed sufficiently to plead proximate cause.

The City, for its part, argues that it has sufficiently pleaded that the banks' practices were the proximate cause of its harms. The City claims that it only has to demonstrate "proximate cause substantial enough and close enough to the harm to effectuate the law's purposes." Miami says it easily meets this test. The City contends that its regression analysis separated out the effects of other causes on foreclosures "so that its claims were limited to the discriminatory loans and the harms they caused." Moreover, the City claims that the banks' analytical tools showed which of their loans were likely to go into foreclosure even before they were issued. Miami says that "countless studies demonstrate foreclosures' impact on cities," thus establishing a chain of causation between the banks' practices and the City's harms that comfortably meets the proximate cause requirement.

(The government, as amicus, supports Miami on both issues and makes substantially similar arguments.)

SIGNIFICANCE

Miami's lawsuit is innovative—or "ambitious," in the words of the Eleventh Circuit—exactly because it tests the outer edges of the FHA, as to both the "aggrieved person" requirement and the proximate cause requirement. (For reference, the typical case under the FHA involves an individual or group that has been directly harmed by a discrete and discriminatory housing-related practice by a bank, property owner, landlord, or someone else involved in the housing market.) The Court's ruling will tell us just how flexible these requirements are, and, by extension, whether and how other cities might bring their own FHA lawsuits against banks and other players in the housing market.

But nothing about this case will affect the more ordinary FHA lawsuit, brought by individuals or groups. Those lawsuits will continue as long as there are FHA violations. Those lawsuits seek damages for the immediate victims of housing discrimination, based upon the victims' injuries that resulted from that discrimination. This is an important form of relief for victims of housing discrimination, and an important deterrent against discriminatory housing practices by those in the housing market.

But this case is different in kind. That's because Miami seeks damages for entirely different types of harms—harms unique to Miami as a city, which collects tax revenues and provides certain services. Thus, Miami's theory comes at the FHA from a different angle, with a different type of claim for relief, which may be much larger than an aggregation of relief by individual victims of discrimination. In that way, this lawsuit, if successful, would set a precedent for a kind of relief that is complementary to the relief in a more ordinary FHA case and an additional deterrent against housing discrimination. In other words, this lawsuit, if successful, will invite other cities and municipalities to lodge their own FHA complaints that will complement the individual complaints of their citizens. (By the time the banks filed their petitions for certiorari, at least twelve other cities and local governments filed similar suits, most of them, like Miami's, against multiple banks.)

This is the second time in as many Terms that the Supreme Court will rule on a significant fair housing case. The Court just last Term handed an important victory to fair housing advocates by ruling that the FHA bans disparate impact discrimination (in addition to disparate treatment discrimination). While the Court's ruling in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015), may not necessarily telegraph a likely result in this case (because the issues are very different), it may predict the Court's approach. In particular, the Court in *Texas Department* looked to Title VII and the Age Discrimination in Employment Act to help determine whether the FHA protected against disparate-impact discrimination. If the Court similarly looks to Title VII in this case, it may also look to the holding in *Thompson* and (as the banks argue) rule that the zone of interests in the FHA is narrower than Article III standing and does not include the City. But at the same time, Miami and the government give good reasons why the Court should not look to Title VII. In particular, they argue that the FHA specifically defines "aggrieved person," while Title VII does not, and that the Court has construed "aggrieved person" under the FHA in the opinions in the 1970s and 1980s and that Congress ratified those opinions.

Finally, remember that a 4-4 tie on the Court—a possibility here—would leave the lower court's ruling in place, without establishing any Supreme Court precedent. That would be a victory for Miami.

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PREVIEW of United States Supreme Court Cases, pages 70–72.

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In This Issue

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FALSE CLAIMS ACT
State Farm Fire and Casualty Company v. United States, ex rel. Rigsby
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FOREIGN SOVEREIGN IMMUNITY
Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.
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IMMIGRATION LAW
Lynch v. Morales-Santana
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PATENT LAW
SCA Hygiene Products v. First Quality Baby Products, LLC
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SEPARATION OF POWERS
National Labor Relations Board v. SW General, Inc.
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