Previsuing the Court’s Entire December Calendar of Cases, including...

**Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission**

Charlie Craig and David Mullins asked Jack C. Phillips, owner of Masterpiece Cakeshop outside of Denver, Colorado, and self-described “cake artist,” to design and create a cake for their wedding celebration. Phillips declined, saying that he objected to same-sex weddings, but that he would provide any other baked goods for the couple. Craig and Mullins brought a complaint under Colorado’s anti-discrimination law and won. Phillips argued that the law violated his rights to free speech and free exercise of religion under the First Amendment.

**Digital Realty Trust, Inc. v. Somers**

Paul Somers reported alleged securities violations to senior management of his then-employer, Digital Realty Trust, Inc. (DRT). Before Somers could report to the United States Securities and Exchange Commission (SEC), DRT fired Somers. Somers sued DRT, claiming a violation of the anti-retaliation protection of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). DRT filed a motion to dismiss and asserted Somers did not qualify as a whistleblower since he failed to report his concerns to the SEC. The district court denied DRT’s motion to dismiss. The Ninth Circuit affirmed. There is a circuit split on the issue. The Ninth Circuit joined the Second Circuit in interpreting the statute as ambiguous, applying Chevron deference to the SEC’s interpretation, and expanding whistleblower protection. The Fifth Circuit strictly interpreted the statute.
### Standing Committee on Public Education

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|                                            |                                  | Mark S. Weiner                          |
|                                            |                                  | Newark, NJ                              |
This month, the PREVIEW website (www.supremecourtpreview.org) features:

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

In 1992, Congress passed PASPA at the urging of Senator Bill Bradley (D-N.J.), a former star basketball player. According to Bradley, “State-sanctioned sports betting…conveys the message that sports are more about money than personal achievement and sportsmanship. In these days of scandal and disillusionment, it is important that our youngsters not receive this message.”

PASPA, however, did not impose a total ban on sports betting. First, it left untouched the country’s numerous dog tracks, horse tracks, and jai alai frontons (the “pari-mutuels”). Second, it “grandfathered” in the sports lotteries in Delaware, Montana, and Oregon, as well as the sports books in Nevada. Third, and most importantly, it gave the rest of the country a one-year window to initiate sports betting. Although this provision was specifically inserted for the benefit of Atlantic City’s casinos, the New Jersey legislature refused to bite. See In the Matter of the Petition of Casino Licensees for Approval of a New Game, Rulermaking, and Authorization of a Test, 633 A.2d 1050 (N.J. App. Div.), cert. granted, 636 A.2d 526 (N.J.), aff’d, 647 A.2d 454 (N.J. 1993).

The New Jersey legislature did not jump to add sports betting in part because Atlantic City’s casinos were doing fine without it. In 1976, a statewide referendum had authorized casino gambling exclusively in Atlantic City to help rejuvenate the faded beach town’s fortunes. In 1978, the first casino (Resorts International) opened. By 1993, the city was home to a dozen casinos, which collectively generated $3.3 billion in annual gambling revenue.

By 2006, Atlantic City’s annual gambling revenue had climbed to $5.2 billion. But in that year, Pennsylvania (an important feeder market) legalized casinos. This blow soon was followed by the Great Recession (in 2008) and Hurricane Sandy (in 2012). As a result, in 2014 Atlantic City began to experience a rash of casino closings. Today, just 7 casinos remain from a peak of 12, and annual gambling revenue has shrunk to $2.6 billion. Adjusted for inflation, this is about the same as in 1981.

In November 2011, in yet another effort to revive Atlantic City, New Jersey voters approved sports betting by a 64 percent to 36 percent margin. As a result, in January 2012, Governor Chris Christie signed a law giving casinos sports books. The law also gave sports books to the state’s horse tracks, which had been waging their own battle for such betting since 2009. When asked if he was worried about PASPA, Christie dared the federal government to “try to stop us” and continued, “I don’t believe that the federal government has the right to decide that only certain states can have sports gambling, and it does not acknowledge that there is illegal sports gambling going on in every state in America as we speak.”

ISSUE

Does PASPA violate the Tenth Amendment by forcing states to outlaw sports betting?

FACTS

In August 2012, the National Collegiate Athletic Association (NCAA) and the country’s four major professional sports leagues—Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL)—filed a federal lawsuit against New Jersey to prevent its sports betting law from taking effect. After finding that the plaintiffs had standing to sue, see NCAA v. Christie, 2012 WL 6698684 (D.N.J. 2012), the court held that PASPA was constitutional. See NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J.), aff’d, 730 F.3d 208 (3d Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014) (Christie I).
In affirming the district court, the Third Circuit noted in passing that while New Jersey could not authorize sports betting, nothing in PASPA prohibited it from decriminalizing sports betting. Seizing on this suggestion, in 2014 New Jersey passed a new sports betting law that repealed the state’s previous criminal penalties, thereby setting off a second round of litigation.

Unimpressed by the state’s sleight of hand, the courts again ruled that New Jersey was violating PASPA. See NCAA v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014), aff’d, 799 F.3d 259 (3d Cir. 2015), panel opinion vacated and aff’d on rehearing en banc, 832 F.3d 389 (3d Cir. 2016) (Christie II).

In June 2017, the Supreme Court granted certiorari. See Christie v. NCAA, 137 S. Ct. 2327 (2017). It also granted certiorari in a companion case brought by the New Jersey Thoroughbred Horsemen’s Association, Inc. (NJTHA). See NJTHA v. NCAA, 137 S. Ct. 2326 (2017). The cases have been consolidated for oral argument.

As explained in New Jersey’s opening brief, the question facing the Court is: “Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of New York v. United States, 505 U.S. 144 (1992)?”

CASE ANALYSIS

The Tenth Amendment provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” While open to interpretation, this language generally is understood as meaning that states are sovereign within their own borders.

In New York, the Court heard a Tenth Amendment challenge to the Low Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA), 42 U.S.C. § 2021. To address the country’s lack of radioactive waste storage sites, Congress had directed the states to make provisions for storing their waste. To encourage action, the law contained both carrots and sticks. As a result, states could: 1) increase the prices they charged for accepting other states’ waste, 2) reject other states’ waste, or 3) “take-title” to their own waste and assume liability for it.

Although she upheld its first two provisions, Justice Sandra Day O’Connor struck down the LLRWPA’s take-title provision as an improper encroachment on state sovereignty: “The Federal Government may not compel the States to enact or administer a federal regulatory program….The Constitution enables the Federal Government to preempt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.”

As New Jersey views matters, PASPA is unconstitutional for the same reason that the LLRWPA was unconstitutional—namely, it “commandeers” states to participate in a federal regulatory scheme. And according to Justice O’Connor, commandeering is impermissible under the Tenth Amendment: “While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”

Why is commandeering so objectionable? The answer, Justice O’Connor explained, has to do with accountability: “[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”

Unsurprisingly, the plaintiffs do not agree with New Jersey’s reading of PASPA or its reliance on New York. To them, the statute “does not compel states (or state officials) to do anything.” Instead, it simply prohibits states from authorizing sports betting. The Third Circuit found this argument to be decisive, writing in its en banc opinion in Christie II: “First, unlike the take-title provision included in the statute at issue in New York, PASPA’s text does not present states with a coercive choice to adopt a federal program….Second, PASPA is further distinguishable from the law at issue in New York because [ , as ] we previously concluded in Christie I, PASPA does not command states to take any affirmative steps.”

The plaintiffs also point out that when PASPA was first passed, New Jersey (like every other state) was given the opportunity to have sports betting and decided to take a pass. This argument, of course, is weakened by the fact that times change and the leaders who made the 1993 choice are no longer in office.

SIGNIFICANCE

Americans bet $150 billion a year on sporting events. Because only Nevada has legalized sports books, 97 percent of sports bets are placed with illegal operators (in 2016, Nevada’s sports books handled $4.5 billion in bets). Moreover, sports betting has continued to grow despite PASPA. At the time of the statute’s enactment, sports betting was a $25 billion a year industry, meaning that during the past 25 years sports betting has outpaced inflation by roughly 400 percent.

Given the foregoing, many observers have called on Congress to repeal PASPA so that cash-strapped states can benefit from sports betting. These observers also believe that if sports betting is legalized, it will put a dent in organized crime and ensure a fairer playing field for bettors.

In its effort to free itself from PASPA, New Jersey has attracted the support of 18 other states, many of which, it is assumed, would add sports betting if they could. Indeed, Eilers & Krejcik Gaming, LLC, a company that tracks the gambling industry, has predicted...
that if PASPA is struck down, as many as 32 states could have legalized sports betting by 2025, including California, Florida, and Massachusetts. (See http://ekgamingllc.com/downloads/regulated-sports-betting-defining-the-u-s-opportunity/.) New Jersey also has received the backing of the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National League of Cities, and the International Municipal Lawyers Association.

Oddly enough, New Jersey can even claim the tacit support of most of the plaintiffs. In November 2014, NBA commissioner Adam Silver published an op-ed calling for PASPA’s repeal. (See Adam Silver, “Legalize Sports Betting,” New York Times, Nov. 14, 2014, A27.) In October 2017, the NHL became the first major sports league to place a team in Las Vegas when the Golden Knights began their inaugural season with a 2–1 victory over the Dallas Stars. Similarly, the NFL has granted the Oakland Raiders permission to relocate to Las Vegas in 2020. Meanwhile, MLB has been an investor in DraftKings, a daily fantasy sports (DFS) betting website, since 2013. (It is unclear whether DFS are subject to PASPA; for their part, DraftKings and other DFS operators insist they are authorized by a different federal statute known as the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5366, a claim that has not yet been tested in court.)

Although obviously of great importance to the gambling industry, New Jersey’s challenge is even more significant for what it could portend for future federal-state relations. When asked for the government’s view, Acting Solicitor General Jeffrey B. Wall recommended that the Court not take the case. Likewise, there was no split of authority among the circuits that required the Court’s intervention. Thus, the fact that at least four justices voted to hear the case suggests the Court is eager to continue its recent retrenchment of federal power.

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PREVIEW of United States Supreme Court Cases, pages 72–74. © 2017 American Bar Association

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Does 28 U.S.C. § 1610(g) Provide a Freestanding Attachment Immunity Exception for Terror Victim Judgment Creditors?

CASE AT A GLANCE

Victims of a terror attack obtained a default judgment against Iran and tried to attach certain artifacts loaned by Iran to the University of Chicago. The lower court determined that the artifacts were immune from attachment because no exception to the general grant of immunity under the Foreign Sovereign Immunities Act of 1976 applies. The Court will decide whether 28 U.S.C. § 1610(g) not only eases attachment of certain property, but provides a separate exception to attachment immunity, independent of the exceptions in Section 1610(a) and (b).

Docket No. 16-534

Argument Date: December 4, 2017
From: The Seventh Circuit

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

INTRODUCTION

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 et seq. (FSIA), provides foreign states with two types of immunity. “Jurisdictional immunity” generally protects foreign sovereigns from the jurisdiction of courts in the United States, with the exceptions to immunity found in Sections 1605 and 1605A. “Executional immunity” generally shields U.S. property of foreign states from attachment and execution, “except as provided in sections 1610 and 1611.” Section 1610(a) provides that such property “used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution” if one of the conditions enumerated in Section 1610(a) (1)–(7) is met. Number 7 in that list concerns judgments relating to acts of terrorism under Section 1605A. Section 1610(g) provides that “the property of a foreign state against which a judgment is entered under section 1605A…is subject to attachment in aid of execution,…regardless of” certain characteristics of the property.

ISSUE

Does 28 U.S.C. § 1610(g) provide a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610?

FACTS

Petitioners are American victims of a suicide-bomb attack carried out by Hamas in Jerusalem in 1997, with material support from the Islamic Republic of Iran (Iran).

In 2003, petitioners commenced a lawsuit against Iran in the D.C. District Court, invoking the terrorism exception to foreign sovereign immunity, then codified in Section 1605(a)(7). (This exception was later repealed, and a new terrorism exception was enacted as Section 1605A.) Iran did not appear in the district court proceeding, and the court issued a default judgment in the amount of $71.5 million. Soon thereafter, petitioners commenced enforcement actions around the United States, including actions relating to the artifacts at issue here.

Respondents are Iran, the Field Museum of Natural History in Chicago, Illinois (Museum), and the Oriental Institute of the University of Chicago (University).

The artifacts targeted by petitioners are held in four collections. The Persepolis Collection contains about 30,000 clay tablets and fragments that Iran loaned to the University in 1937 for research, translation, and cataloging. The Herzfeld Collection is comprised of about 1,200 prehistoric artifacts from Persia, which the Museum bought from an archeologist in 1945. The Chogha Mish Collection holds clay seal impressions that Iran loaned to the University in 1960 for academic study. And the Oriental Institute Collection is made up of Persian artifacts the University received from Iran and other donors in the 1980s and 1990s.

As part of their efforts to enforce the default judgment, petitioners registered the judgment in the Northern District of Illinois and commenced attachment proceedings against the four collections. After a series of procedural disputes as well as pretrial discovery regarding the four collections, respondents moved for summary judgment, which was granted by the district court. The court
rejected petitioners’ argument that the artifacts were subject to execution under Section 1610(a), holding that this exception is “limited to property used for a commercial activity by the foreign state itself.” The district court also found that execution under the Terrorism Risk Insurance Act of 2002 (TRIA) was not available because the artifacts were not blocked by any then-current executive order, as required by TRIA. Finally, the district court rejected petitioners’ argument that Section 1610(g) provided a freestanding exception to the execution immunity for terrorism victims.

Petitioners appealed this decision, but the Seventh Circuit Court of Appeals affirmed. First, the court determined that, because the Chogha Mish Collection was no longer located within the territorial jurisdiction of Illinois, and Iran disclaimed ownership of the Herzfeld and Oriental Institute collections, only the Persepolis Collection was still subject to potential attachment and execution. The court then held that the exception to foreign sovereign immunity in Section 1610(a) did not apply because it requires that the foreign state itself must have used its property for a commercial activity in the United States, which was not the case.

The circuit court decided that Section 1610(g) does not provide an independent basis to execute on the artifacts, but merely abrogates the so-called Bancce rule for Section 1605A judgments. The Bancce rule, established by the U.S. Supreme Court in 1983, “holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality.” The rule does not apply when the foreign state and its instrumentality are alter egos or when “adherence to the rule of separateness would work an injustice.” Section 1610(g) abrogates the Bancce rule for holders of terrorism-related judgments, allowing attachment in aid of execution “as provided in this section” without regard to the presumption of separateness—that is, without the requirement of establishing alter-ego status or showing an injustice.” Accordingly, terrorism victims with unsatisfied Section 1605A judgments against foreign states may execute on the foreign state’s property and the property of its agency or instrumentality—without regard to the Bancce presumption of separateness—but they must do so “as provided in this section.” That is, they must satisfy an exception to execution immunity found elsewhere in Section 1610—namely, subsections (a) or (b).

Finally, the circuit court agreed with the district court that the artifacts in the Persepolis Collection are not currently blocked, with the result that the artifacts are not subject to TRIA, and attachment and execution under TRIA is not available.

All three judges of the Seventh Circuit panel deciding the case agreed on the above holding. Circuit Judge David F. Hamilton, who was not on the panel, dissented from the denial of an en banc review, criticizing that the panel opinion created a circuit split and overruled, in part, two recent decisions of the Seventh Circuit.

**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 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 jurisdictional immunity are set forth in Sections 1605 and 1605A of the FSIA. These exceptions include, among others, 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. 28 U.S.C. §§ 1609–1611. Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, for example, special rules for service of process, default judgments, and appeals.

The decision in the Ruben case deals with the interpretation of the FSIA provisions governing attachments based on terrorism-related judgments. The general grant of sovereign immunity is set forth in Section 1609, which is titled “Immunity from attachment and execution of property of a foreign state” and provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.
Section 1610(a) is titled “Exceptions to the immunity from attachment or execution” and provides, in pertinent part:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if

... (7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based. (Emphasis added.)

The Seventh Circuit in Rubin held that the “use for a commercial activity” must be by the foreign sovereign itself, not merely by one of its agencies or instrumentalities. (Petitioners’ petition for certiorari attacking this holding was not accepted by the Court.)

The Bancec doctrine, referenced by the court below, has its genesis in First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 103 S. Ct. 2591, 88 L. Ed. 2d 46 (1983). In that decision, the Supreme Court “established a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality.” The Supreme Court held that this rule, which generally applies to private corporations, also governs the relationship between juridically separate instrumentalities of foreign governments. The Court recognized two exceptions in which the veil can be pierced: “The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work a fraud or injustice.”

But the Court expressly declined to elaborate on these exceptions. Instead, the lower courts filled the gap by formulating a set of five exception factors courts should consider when determining if the exceptions applied:

(1) The level of economic control by the government;

(2) whether the entity’s profits go to the government;

(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

(4) whether the government is the real beneficiary of the entity’s conduct; and

(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

In 2008, the National Defense Authorization Act (NDAA) enacted, among others, Section 1610(g), which provides, in pertinent part:

Property in Certain Actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

... (3) Third-party joint property holders.

Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment. (Emphasis added.)

Because the five Bancec-exception factors are virtually identical to the five factors made irrelevant by Section 1610(g) ("regardless of"), the Seventh Circuit ruled in 2014 in the Gates case that subsection (g) overrides the Bancec doctrine for terrorism-related judgments. See Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014). The question left open by Gates is “whether subsection (g) goes further and establishes a freestanding ‘terrorism’ exception to execution immunity.” The Seventh Circuit held in Rubin that it does not establish such an exception, expressly rejecting the Ninth Circuit contrary holding in Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016).

Petitioners argue that Section 1610(g) provides an independent exception to immunity from attachment, based on an expansive reading of the text of the subsection as well as on legislative intent. The provision is “ambiguous,” but the text, intent, and history show that it is “intended to enable judgment creditors to execute their judgments against all property of foreign state sponsors of terrorism.” The circuit court’s “narrow” construction of the provision “creates internal inconsistencies and impossibilities that render subsection 1610(g) all but meaningless” because
that construction “requires judgment creditors proceeding under subsection 1610(g) to additionally satisfy the strict commercial use requirements.”

Petitioners contend that the Ninth Circuit’s “expansive” construction is consistent with the intent and history of the statute and “provides a clearer read of the statutory text.” The lower court erred in deciding that an independent, expansive Section 1610(g) “would render superfluous other terrorism execution immunity exceptions contained in subsections (a)(7) and (b)(3).” Rather, Congress upheld those subsections to deal with cases not included within Section 1610(g), “either because the judgments were entered under the former terrorism exception to jurisdictional immunity, to which subsection 1610(g) does not apply, or because the judgments are otherwise not enforceable under subsection 1610(g).”

Petitioners assert that the phrase “as provided in this section” leads to “textual tension” under the interpretations advanced by both the Seventh and the Ninth Circuit. The Seventh Circuit’s reading would limit judgment creditors under Section 1610(g) to property that meets the commercial use requirement. This restriction “itself creates the internal inconsistencies referred to above.” The Ninth Circuit would apply Section 1610(g) to proceedings under Section 1610(f), an earlier terrorism exception to execution immunity. This interpretation is logical “because Congress designed those procedures to deal with terrorism cases and they provide assistance in executing upon blocked assets, both of which are relevant to execution of judgments under subsection 1610(g).”

Petitioners claim that the problem with the Ninth Circuit’s interpretation “is that the reference to ‘this section’ should be a reference to subsection (f).” But this weakness in the Ninth Circuit’s construction of the statute cannot be decisive “because due to the internal inconsistencies in the Seventh Circuit’s reading, as applied, subsection 1610(g) would work only under very limited circumstances, and only in conjunction with subsection (a)(7).”

Petitioners submit that an alternative interpretation of the phrase “as provided in this section” suggests that “this section” refers to the 2008 NDAA itself, that is, to Section 1083 of the NDAA of 2008. This interpretation would give meaning to both “this section” and Section 1610(g) as a whole.

Finally, petitioners argue that the legislative intent and history combined with the inclusion of Section 1610(g) “within a comprehensive terrorism exception support the expansive construction of the execution immunity exception.” Congress has declared “clearly and consistently” that it intends to provide “meaningful relief to victims of state sponsored terrorism.” Concerns of “international comity” must be rejected when dealing with designated state sponsors of terrorism. But even if comity applied to Iran as a sovereign state, “Congress has the power to, and in fact did, legislate to place the interests of the terrorism victims and of our national interests above the interests of international comity.”

Petitioners’ position is supported by three amicus briefs:

1. Amicus the Foundation for Defense of Democracies (FDD) is a nonprofit, nonpartisan policy institute focusing on foreign policy and national security. Through its Iran Project and other initiatives, FDD conducts extensive research on state sponsorship of terrorism and efforts to combat such terrorism. FDD’s research and analysis has been used by members of Congress to, among other things, develop legislation relating to the scope of Iran’s sovereign immunity from attachment and execution to satisfy judgments based on that state’s sponsorship of terrorism. FDD argues that “[t]he simplest and most natural reading of the text of § 1610(g) is that it applies, as written, to ‘the property of a foreign state,’ such as the artifacts at issue in this case.” The lower court, FDD argues, erred in holding that Section 1610(g) does nothing more than abrogate the Bancec rule because such a construction would render part of the provision superfluous as the Bancec factors are irrelevant to the execution against the property of a state (as opposed to an instrumentality). The court below erroneously analyzed the phrase “as provided in this section” to refer only to substantive subsections and failed to engage in the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination.”

2. Amici Victims of Iranian Terrorism (Victims) are Michael and Linda Bennett, who hold a judgment against Iran for the terrorism-related murder of their daughter. They are respondents in the Ninth Circuit decision, which permitted the attachment of funds at Bank Melli, Iran’s largest bank. The Victims assert that interpreting Section 1610(g) as an independent “exception to the sovereign immunity of assets of state sponsors of terrorism is most consistent with the statutory text, as well as Congress’s manifest purpose to enlarge opportunities for victims of state-sponsored terrorism to access the funds of those terrorist states.”

3. Amici Former U.S. Counterterrorism Officials, National Security Officials, and National Security Scholars (Former Officials) have “spent substantial portions of their careers developing, interpreting, and enforcing this country’s framework of federal laws designed to prevent heinous acts of terrorism.” Their “experience confirms that successfully starving terrorist organizations of funding is a sure way to save American lives.” They assert that “private lawsuits must be an integral component of any effective strategy to keep money out of terrorists’ hands.” The Former Officials point out that foreign sovereigns like Iran are the source of much of the money that funds terror activities. The Former Officials argue that Section 1610(g) “cannot be understood in isolation, but must be interpreted as part of the larger legal antiterrorism framework in which it operates. This robust, comprehensive body of law evinces Congress’s absolutist purpose to prevent rogue nations from sponsoring terror operations, utilizing every economic tool at its disposal, including administrative sanctions, civil and criminal penalties, and private lawsuits.”

Respondent Iran argues that Section 1610(g) was enacted in order to allow “certain terrorism plaintiffs to execute against sovereign and instrumentality assets without regard to the customary presumption of separate status” recognized in the Bancec decision. But, in doing so, “Congress did not eliminate the rules of sovereign immunity for terrorism judgments altogether.” Iran asserts that petitioners’ interpretation is not supported by the legislative history. Rather, it “shows that Congress enacted § 1610(g) to eliminate Bancec’s focus on domination and control as the standard for piercing the corporate veil, replacing it with a test of ‘simple’ and ‘beneficial’ ownership.” Iran claims that “[t]here is no evidence that Congress also intended to abrogate the longstanding commercial activity requirement for overcoming execution immunity.” Petitioners’ interpretation of
Section 1610(g) instead represents “a dramatic departure from the traditional restrictive theory of immunity. It would put the United States in violation of international law.” Iran demands that the Court “insists on a clear indication of Congress’s intent before countenancing such a result.” Finally, Iran points to the Executive Branch, which “has warned [that] expansive constructions of immunity exceptions threaten United States interests by encouraging reciprocal actions by foreign government.”

Respondent University explains that “Iran long ago entrusted the Persepolis Collection, which dates from approximately 500 B.C.E., to the University for study and publication. The Collection is part of the cultural patrimony not just of Persia and Iran but of humankind. The University supports the claim of sovereign immunity in this case so that it may continue to carry out its core missions of research and teaching, and so that it may maintain ties to individuals and institutions in other nations who share the University’s commitment to the advancement of human knowledge.” The University asserts that, because Section 1610(g) “says nothing about sovereign immunity, [ ] it is implausible to suppose that Congress would have abrogated execution immunity in such a casual fashion in a provision dealing with an entirely different issue.” The University contends that the phrase “as provided in this section” must refer to Section 1610, because a reference to Section 1610(f) or the NDAA are not plausible. This is consistent with the construction of the FSIA, which states in Section 1609 that property “shall be immune” and in Section 1610 that property “shall not be immune” (or that Section 1609 “shall not apply”). Section 1610(g), on the other hand, “contains no such language.” Finally, the University submits that “especially in connection with execution immunity—the more sensitive aspect of foreign sovereign immunity—the distinction between commercial activity and property, on the one hand, and noncommercial activity and property, on the other, is foundational. That distinction is emphasized in the FSIA itself; in this Court’s decisions; in the State Department’s statements; in the United Nations convention on the subject; and in a decision of the International Court of Justice. Congress, of course, has the power to override that distinction, but the Court should not assume that Congress has done so unless there is clear evidence that Congress did. Here the opposite is true; the evidence is overwhelming that Congress intended no such abrogation of sovereign immunity.”

Respondent Museum advised the Court that “it has no interest in the outcome of [the] proceedings” and, thus, waived the filing of a brief on the merits.

As of this writing, the United States has not submitted a brief in response to petitioners’ September 2017 merits brief. Nonetheless, in May 2017, in response to the Court’s order inviting the Acting Solicitor General to express the views of the United States on the question whether certiorari should be granted, the United States submitted an amicus brief, arguing that the petition should be granted, but only as to the interpretation of Section 1610(g). In that brief, the United States asserted that Section 1610(g) does not provide a freestanding exception, reasoning: “The Ninth Circuit’s decision in Bennett is wrong, for essentially the reasons stated in the Seventh Circuit’s decision below, and the proper resolution of this question is important. Although the United States sympathizes with petitioners and other victims of terrorism, the seizure of a foreign sovereign’s property via attachment or execution can affect the United States’ foreign relations. The United States therefore has a strong interest in the proper interpretation and application of the FSIA’s rules governing judicial seizure of foreign state property in the United States.”

**SIGNIFICANCE**

The Court is called on to decipher the meaning of a discreet subsection amid a patchwork of statutes that have been amended and supplemented over decades. This task will certainly include a thoughtful exploration of the intricacies of textual analysis. But the Court may also have to balance significant interests of important stakeholders.

If the Court finds that Section 1610(g) is a freestanding exception to executional immunity, priceless artifacts like the Persepolis Collection can be attached and sold to the highest bidder, thus significantly affecting scholarship in history, art, and other worthy disciplines. Also, the Executive Branch may face difficulties managing foreign relations and protecting U.S. interests, because “enlarging the category of property available for…execution in the United States invites similar treatment by other countries where our assets may be located.”

If, on the other hand, the Court determines that Section 1610(g) does not provide an independent immunity exception, the ability of terrorism victims to obtain private redress will be significantly frustrated, and public efforts to curtail terrorism funding may be hindered. As Amici Former Officials pointed out, “While ‘terrorists seldom kill for money,…they always need money to kill.’”

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STATE AND FEDERAL JURISDICTION

Does the Securities Act of 1933 Permit State Courts to Adjudicate Covered Class Actions Based Only on Federal-Law Claims?

CASE AT A GLANCE

This case is about the history and context of securities litigation and the federalism-generated concerns about federal and state court jurisdiction. It is also about the perceived need to control class action abuse. At issue is the Securities Act of 1933, modified by the Private Securities Litigation and Reform Act (Reform Act) passed in 1995 and the Securities Litigation Uniform Standard Act (SLUSA) in 1998. Cyan, Inc., argues that SLUSA divested state courts of jurisdiction over “covered class actions,” as defined therein, such as this one. The Beaver County Employees Retirement Fund (Beaver County) disagrees.

Cyan, Inc. v. Beaver County Employees Retirement Fund
Docket No. 15-1439

Argument Date: November 28, 2017
From: California Court of Appeal

by Barbara L. Jones
Minneapolis, MN

ISSUE

Do state courts lack subject-matter jurisdiction over “covered class actions” that allege only claims under the Securities Act of 1933?

FACTS

Cyan, Inc., is a company that supplied hardware and software for communications networks. It went public in 2013, and the following year a putative class action was brought in California state court by Beaver County investors. The investors made federal claims that the company’s public offering contained material statements and omissions. The complaint did not allege any state law violations or fraud. It asserted only claims under the Securities Act of 1933, 15 U.S.C. § 77a et seq.

The court certified a class, and Cyan then moved for judgment on the pleadings, arguing that the Securities Litigation Uniform Standard Act (SLUSA) divested state courts of concurrent jurisdiction over covered class actions (of greater than 50 members), alleging only claims under the Securities Act of 1933, such as Beaver County’s. The California Superior Court denied the motion based on the California Court of Appeal’s 2011 decision in Luther v. Countrywide Financial Corp., which said that concurrent jurisdiction arising under the 1933 Act survived SLUSA. The Court of Appeal denied, relief, and the California Supreme Court denied discretionary review.

The Supreme Court invited the views of the solicitor general, who agreed with Beaver County that state courts had concurrent jurisdiction and urged the Court to hear the case because some trial courts had issued conflicting rulings, and the issue could evade appellate review.

CASE ANALYSIS

The argument in this case is a thorough parsing of a dense group of statutes, primarily SLUSA, but also the 1933 Securities Act (15 U.S.C. sec. 77a et seq.) and the Private Securities Litigation Reform Act, which, along with SLUSA, was incorporated into Section 77a et seq.

The statute at issue is the 1933 Act’s Section 77v(a) as amended by SLUSA sec. 101. Section 77v(a) states that the “district courts shall have jurisdiction, concurrent with state courts, except as provided in section 77p of this title with respect to covered class actions, to enforce any liability created by this subchapter. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States.” (Emphasis added.)

The statute is naturally read to except 1933 Act claims in covered class actions from the concurrent jurisdiction of state courts, Cyan argues, summing up its entire argument.

(Cyan refers to the words “except as provided in Section 77p with respect to covered class actions” as the “except” clause. Section 77p is the citation for the U.S. Code, but the law is also referred to as Section 16, which refers to SLUSA.)

First, the structure of the 1933 Securities Act, as amended, reinforces that reading, Cyan asserts. The except clause was part of a package that included two other amendments to address class action abuse. One precluded state law covered class actions, Section 77 p(b), the other prevented removal from state to federal court of cases involving a mix of state and federal claims, Section 77v(a).
The except clause then should be read to include only covered class action federal claims and exclude them from state court jurisdiction. “Construing the ‘except’ clause in that way honors the ‘symmetrical and coherent regulatory scheme’ that Congress presumably intended,” Cyan claims.

Without the except clause, cases could be stuck in state court, where protections against abuse of the lawsuit are allegedly ineffective or absent. Thus, the statute also advances Congress’s goals in enacting SLUSA because it keeps cases in federal court, it stems the tide of state court filings, and it helps achieve uniform substantive and procedural standards for the type of securities litigation of special concern, covered class actions involving nationally traded securities.

In short, Cyan continues, Congress recognized that, to achieve uniformity, it would have to do more than preclude class actions involving covered securities from being brought under state law; Congress would also have to prevent such actions under the 1933 Act from being brought in state court. And that is exactly what the except clause does: it provides that such actions under the 1933 Act may be heard only in a federal forum.

Cyan goes on to argue that the competing interpretations of the except clause advanced by Beaver County and the United States should be rejected. Beaver County argues that the clause is about preclusion, not jurisdiction, but that makes no sense to Cyan. “When an action is precluded it must be dismissed for failure to state a claim, not for lack of jurisdiction. So an ‘except’ clause about preclusion, which creates no ‘except[ion]’ to jurisdiction at all, cannot be squared by the text or common sense,” Cyan argues. Instead, “Congress crafted a ‘targeted bill,’ precluding only those state-law class actions of greatest federal concern—and no others.”

Furthermore, it is doubtful that Congress intended in SLUSA to fail to address federal claims in state court and thus create a loophole that allows one type of class action to be tried in state court. That would not advance the goal of national uniform substantive and procedural standards for securities class actions, Cyan asserts.

The United States argues that the statute should be construed to allow covered class actions to be removed to federal court, which is more faithful to the statutory scheme but not completely right, Cyan continues.

“[T]he United States’ position still fails to give any meaningful effect to the ‘except’ clause. Its principal submission is that Congress added the ‘except’ clause to make clear that in class actions involving a mix of 1933 Act claims and state-law claims precluded by SLUSA, state courts lack jurisdiction over the state-law claims,” Cyan argues.

In contrast, Beaver County points out that state courts have had concurrent jurisdiction to decide Securities Act claims since that statute was enacted nearly 85 years ago. Nothing Congress did in the Reform Act or the SLUSA altered that “well-settled understanding—let alone with sufficient clarity to strip state courts of jurisdiction to hear every single covered class action under the Securities Act,” Beaver County argues. Beaver County’s suit is not precluded because it does not assert a claim under state law.

The SLUSA amendment to the Securities Act abridges state court jurisdiction over “mixed” cases—covered class action lawsuits asserting state claims as well as Securities Act claims. The amendments thereby prevent plaintiffs from circumventing Section 77p’s restrictions on jurisdiction by tacking Securities Act claims onto their prohibited state law claims to avoid dismissal.

The statute should be read as a whole, argues Beaver County, which moves the emphasis in the statutory phrase, “except as provided in section 77p of this title with respect to covered class actions,” from the word except to the word provided. Provided generally means “supplied.” Here, the relevant limitations on jurisdiction should be supplied by Section 77p in its entirety, not restricted to one sub-section as Cyan argues.

Continuing, Beaver County also points out that the definition of a covered class action in subsection 77p(f)(2) is ancillary to Section 77p as a whole. A reference to the section most naturally refers to what the court has described as its “core provision,” that is, the substantive limitation on covered class actions. Under Beaver County’s interpretation, the SLUSA amendments to Section 77v(a) work with Section 77p’s core provision: they prevent Section 77v(a)’s grant of jurisdiction and removal bar from creating an “end run” around Section 77p. And they incorporate all of the operative provisions and limitations that Congress carefully incorporated into Section 77p.

Beaver County’s interpretation is the only one that reflects SLUSA’s purpose, they argue. The statute was carefully drawn to target the most troublesome state-law cases while simultaneously preserving the power of state courts and governments to address other cases, including cases that do not involve nationally traded securities, they argue.

Beaver County asserts its reading ensures that SLUSA’s core prohibition remains effective. SLUSA’s purpose was to bar state-law claims alleging falsehoods or fraud, and it was not intended to affect cases that do not involve nationally traded securities, Beaver County continues. Its goal is to ensure uniformity by using federal law. “There simply is no evidence that Congress regarded state court adjudication of cases alleging only Securities Act claims to be a problem when it enacted SLUSA.”

Beaver County also argues that the solicitor general’s theory, that SLUSA authorizes the removal of cases like this one, is also incorrect. To accept that theory would require ignoring language limiting SLUSA to cases based on state law and would be inconsistent with precedent, they argue.

SIGNIFICANCE

The big bogeyman to many defendants is the class action, and many also find state courts monstrous. The specter of allegedly frivolous litigation coats their arguments like cobwebs. The Court has the assistance of twelve amici, eight of whom support Beaver County. That does not include the United States, which offers a reading of the statute embraced by neither party, that of allowing state court jurisdiction but also removal to federal court.

DRI, the Voice of the Defense Bar, perhaps provides the most attitude, while reminding the Court that the California state court
decisions are outliers, at best. When plaintiffs are permitted to proceed with class actions alleging 1933 Act claims in state courts, the systemic abuses that prompted Congress to pass the Reform Act in the first place are put back into play, DRI argues.

“If the decision below is affirmed, plaintiffs will continue to bring and litigate class actions for claimed violations of the Securities Act of 1933 in state courts, where federal protections are not uniformly enforced and applied. No doubt, a decision that follows the rationale of the Superior Court of the State of California, County of San Francisco (‘Superior Court’) will result in a further increase in the filing of ‘strike suits’—meritless suits brought to coerce an expensive settlement—in state courts.”

And by expensive, DRI means a phenomenal amount of money. The costs of a major lawsuit can sound the death knell for new companies and those suffering under today’s current economic climate, says DRI. One study showed that the average securities fraud claim was $40 million, with 10 percent of the cases seeking more than $100 million in damages, the organization states.

The Washington Legal Foundation, which appears to have a conservative/libertarian bent, supports Beaver County, noting that all publicly held companies and their shareholders are interested in maintaining the balanced, fair, and predictable securities litigation system established by the Reform Act.

“This system would be thrown into chaos if SLUSA were interpreted to permit concurrent state court jurisdiction over securities class actions under the 1933 Act,” says the Foundation in its brief. “WLF is particularly concerned about the impact of this decision on technology and other growth companies, whose volatile stock prices make them especially vulnerable to abusive securities class actions. Many such companies are located in Silicon Valley in California, where a spate of class actions asserting 1933 Act claims has been filed since the California Court of Appeal issued its decision in Luther v. Countrywide Fin. Corp.”

But a group of scholars, writing for Cyan, argues that the “chaos” would come from upending a jurisdictional scheme that has been in place since the Securities Act became law. There is a strong presumption in the law that favors concurrent jurisdiction, they write.

“Any doubt as to whether SLUSA preserved concurrent state court jurisdiction over federal securities claims under the Securities Act of 1933 should be resolved in accord with this Court’s longstanding presumption in favor of concurrent state court jurisdiction. See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458 (1990),” says the scholars’ brief. “That presumption reflects the basic structure of our judicial system, which decouples the law upon which a claim is based from the court that may hear that claim. As the Supremacy Clause makes clear, federal law is part of the binding law in every state, and the state courts generally have both the power and the obligation to hear claims based on that law in the absence of an affirmative act of Congress preempting their jurisdiction.”

The amici supporting Cyan oppose what they appear to think are “scare tactics” employed by Beaver County and Beaver County’s amici, saying the state courts can handle these cases by applying federal law and there is no need to panic over the so-called spate of state court filings in California. On the other hand, “State courts are not the plaintiff-friendly free-for-all that Cyan and its amici describe. Rather, they are an efficient forum for wronged shareholders to recover their losses, in front of judges with ample experience handling complex civil cases,” notes the Los Angeles County Employees Retirement Association.
INTRODUCTION

Greene’s Energy Group, LLC, filed for inter partes review against a patent owned by Oil States Energy Services, LLC. The U.S. Patent and Trademark Office’s Patent Trial and Appeal Board accepted the petition, conducted inter partes review of the challenged claims, and determined that the challenged claims were not patentable. Oil States appealed, challenging the Board’s decision and arguing that inter partes review violated the separation of powers and the Seventh Amendment.

ISSUE

Does “inter partes review” impermissibly encroach upon the judicial role of the courts and deprive a party of the Seventh Amendment guarantee of a jury trial?

FACTS

When an inventor files a patent application with the United States Patent and Trademark Office (USPTO), a patent examiner reviews the application to be sure that it complies with certain requirements. These include eligibility and utility, novelty, and non-obviousness over existing inventions (called “prior art”). This review is an ex parte proceeding, so that no person other than the applicant can participate. As part of the proceeding, the applicant must disclose relevant prior art of which he or she is aware, but the applicant has no general duty to search prior art. As a result, the patent examiner may be unaware of prior art.

In 1980, Congress created a process called “ex parte reexamination” as a way to correct erroneous grants of patents. Under this process, any person at any time may file a request with the USPTO for reexamination of any patent based on prior art that might bear on its patentability. The USPTO can then institute an ex parte reexamination if the petition raised “a substantial new question of patentability.” The ex parte reexamination involves only the patent owner; third-party petitioners are precluded from involvement, except that a third-party petitioner can respond to a patent-owner’s statement seeking to rebut the petitioner’s assertions. An administrative patent judge within the Board of Patent Appeals and Interferences (BPAI) can cancel any claims that they find to be unpatentable.

In 1999, Congress created a new process, called “inter partes reexamination,” to expand the USPTO’s check on erroneous grants of patents. Inter partes reexamination was an optional process similar to ex parte reexamination—inter partes reexamination did not replace ex parte reexamination—but inter partes reexamination allowed third parties greater opportunities to participate in the process. In particular, third parties could respond to the patent-owner’s arguments, introduce evidence, and engage in motions practice. Later amendments also allowed third parties to participate in any appeal of the decision.

Then, in 2011, Congress replaced inter partes reexamination with new review procedures to expand yet further the USPTO’s checks on erroneous grants of patents. Under the American Invents Act (AIA), Congress created one new procedure, called “post-grant review,” for third-party challenges to patentability brought within nine months after patent issuance. As relevant to this case, it also created a second procedure, called “inter partes review,” for challenges brought more than nine months after patent issuance. Inter partes review is similar to the prior inter partes reexamination, but it expanded the roles of third-party challengers in the process. In particular, in inter partes review, challengers may obtain discovery;
file affidavits, declarations, and written memorandum; and request an oral hearing. The newly created Patent Trial and Appeal Board (PTAB, or Board), which replaced the BPAI, issues a final decision, and the parties may appeal to the United States Court of Appeals for the Federal Circuit.

According to the government, as of July 2017, challengers had filed more than 7,000 petitions for inter partes review, and the USPTO had issued final written decisions cancelling more than 1,300 patents in whole or in part. The government asserts that “[t]he median cost of litigating a patent dispute in federal court substantially exceeds the median cost of an inter partes review.”

In 2012, Oil States Energy Services, LLC, filed a patent infringement suit against Greene’s Energy Group, LLC. Oil States argued that Greene’s infringed its patent that relates to apparatuses and methods of protecting wellhead equipment in hydraulic fracturing. (The parties refer to this patent as the “‘053 Patent,” after its number, U.S. Patent Number 6,179,053.) Almost a year into the litigation, Greene’s petitioned the PTAB to institute inter partes review of Oil States’s ‘053 Patent. Greene’s argued that the Patent was anticipated by prior art in a previous patent application filed in Canada. This previous application was also filed by the same inventor (an employee of the Oil States’s predecessor corporation) who invented the art covered by the ‘053 Patent.

The Board granted Greene’s petition, conducted an inter partes review, and concluded that the challenged claims were unpatentable. In particular, the Board found that the claims were anticipated by the earlier Canadian patent application, which the original patent examiner did not mention during the initial examination of Oil States’s application for the ‘053 Patent. (Oil States contends that the district court, where its patent infringement suit continued to move forward, then issued an order in Oil States’s patent-infringement suit that “conclusively resolved against Greene’s the claim that [the Canadian] application anticipated the ‘053 Patent.”)

Oil States appealed to the United States Court of Appeals for the Federal Circuit, challenging the PTAB’s determination and arguing that inter partes review violates the separation of powers and the Seventh Amendment. While Oil States’s appeal was pending, the Federal Circuit rejected a comparable claim in another case. The court then issued an unpublished order affirming the Board’s ruling against Oil States. This appeal followed.

**CASE ANALYSIS**

Oil States argues that the inter partes review process violates the separation of powers, because inter partes review impermissibly intrudes upon the judiciary’s power under Article III of the Constitution. Oil States claims that inter partes review transfers the responsibility for deciding certain common-law disputes—those “traditional actions at common law tried by the courts at Westminster in 1789,” at the time of the framing—to Executive Branch officials. It says that patent-validity cases fall into this category. Moreover, Oil States contends that inter partes review has all the characteristics of an adversarial case—motions practice, discovery, and an adversarial “trial” before a “judge”—that under Article III belong to the “judicial Power of the United States.” It asserts that the government cannot escape this result by claiming that inter partes review tests a “public right,” because inter partes review involves a dispute between two private parties over a private property right (the patent). It also asserts that the government cannot escape this result by claiming that inter partes review “operates without meaningful Article III supervision and without the litigants’ consent.”

Oil States argues next that inter partes review violates its Seventh Amendment right to a jury trial. Oil States says (again) that patent-infringement claims were heard by courts of law at the time of the framing and that patent-validity claims, therefore, fall squarely within the Seventh Amendment’s guarantee of a jury trial “[i]n suits at common law.” It contends that even if a patent-infringement claim were filed in the Court of Chancery (the court of equity), the Court of Chancery “was required to send the matter to a court of law for a jury trial.” It asserts that “[j]uries inevitably decided the disputed questions of fact regarding patent validity.” Yet it says that inter partes review removes this guarantee in violation of the Seventh Amendment.

Greene’s Energy counters that inter partes review does not violate the separation of powers, because it is merely an error-correcting mechanism within the USPTO, and because it does not impermissibly encroach upon the role of the courts. Greene’s says that Congress created the USPTO and vested it with the exclusive authority to issue patents pursuant to Congress’s plenary authority to provide for patents. (Contrary to Oil States, Greene’s argues that patents do not derive from the common law, but instead derive “exclusively from statutes enacted to advance a paramount public purpose” under Congress’s plenary patent power.) It says that inter partes review is merely an administrative error-correcting mechanism within the USPTO that is part and parcel of the congressionally authorized patent process. Moreover, Greene’s contends that inter partes review does not impermissibly intrude on the courts’ powers, because patents are a “public right” (that is, they are conferred by the government), and they are, therefore, subject to this kind of administrative action. Greene’s says that inter partes review, as an error-correcting mechanism that is part of the congressionally created patent process, is meaningfully different from litigation in the federal courts. (The government adds that any similarities to litigation are designed merely “to improve the accuracy of the Board’s decisions” and to enhance efficiency and reduce costs. The government says that in any event Oil States can appeal the Board’s decision to the federal courts.)

Greene’s argues next that inter partes review does not violate Oil States’s Seventh Amendment right to a jury, because inter partes review is simply an error-correcting administrative process. Greene’s says that because Congress has authority to create this error-correcting process (as part of its patent power), under Supreme Court precedent the Seventh Amendment “posts no independent bar.” Moreover, Greene’s contends that inter partes review “is not a suit at common law, does not adjudicate a ‘legal claim,’ and entails no possible award of damages.” Therefore, it asserts that the Seventh Amendment does not apply.

The government, as respondent (because the Board intervened as respondent in Oil States’s appeal to the Federal Circuit), makes substantially similar arguments.
SIGNIFICANCE

Oil States, in its petition for certiorari, argues that inter partes review has a substantial effect on the U.S. economy. It points to the enormous value ($886 billion) of the more than 2.1 million patents currently in force and argues that inter partes review has invalidated “almost ten thousand claims through March of 2016.” Citing one estimate, Oil States writes that “inter partes review has, thus far, destroyed $546 billion of the United States economy by invalidating patents, and wiped out about $1 trillion in value by devaluing the companies holding those patents.” Oil States also claims that relaxed standing requirements for inter partes review allow challengers to strategically game the process, for example, to reduce the value of patent-holders’ companies. (Oil States has a notably lopsided number of amici supporting it.)

The government, for its part, sees inter partes review as an internal second-check on an agency grant of a public right and, therefore, an important way to promote efficiency and accuracy in executive administration of public rights. It wrote in its opposition to certiorari review that “[n]umerous other statutes contain similar provisions that allow agencies to correct their own errors, including by recovering erroneous disbursements of money to private parties,” suggesting that a ruling against inter partes review could sweep much more broadly. But the government cited only three examples of this and did not clarify that they work in the same (adversarial, quasi-judicial) way as inter partes review. As a result, it’s not obvious that any ruling striking inter partes review would apply outside of the patent context.

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Tracking the Term*

15 – Number of oral arguments
1 – Number of cases (granted full review and oral argument) decided
28 – Days of oral argument remaining
52 – Number of cases granted to date

*As of November 15, 2017
ISSUE
Should the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 be broadly construed to protect complainants who have failed to report alleged securities violations directly to the United States Securities and Exchange Commission?

FACTS
In 2002, Congress enacted the Sarbanes-Oxley Act (Sarbanes-Oxley) to enhance securities reporting requirements in the wake of the demise of Enron. The statute declares a broad protection for whistleblowers, whether they report directly to the SEC, Congress, or even to a corporate supervisor. A whistleblower claiming protected status must file a complaint with the Secretary of Labor and exhaust administrative remedies before seeking vindication in federal court. Any complaints must be filed within six months.

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in response to the 2008 market crash and ensuing recession. Congress stated its purpose in protecting investors, mitigating the impact of future crashes on the markets, and protecting the U.S. economy. Section 922(a) of Dodd-Frank defines whistleblowers, establishes a rewards program for whistleblowers, and protects whistleblowers from retaliation.

Congress defined a Dodd-Frank whistleblower as:

Any individual who provides information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission. 15 U.S.C. § 78u-6(a)(6)

Dodd-Frank protects from retaliation those whistleblowers who also provide information to the SEC in accordance with the law, assist in a Commission proceeding, or make disclosures under various statutes, including Sarbanes-Oxley. Dodd-Frank allows aggrieved whistleblowers to file suit in federal court as a first option within six years of the violation.

Thereafter, the SEC began the notice and comment rulemaking process regarding the whistleblower provision. The SEC initially proposed a rule tracking Dodd-Frank’s definition of “whistleblower.” Without notice and without referencing any adverse comments regarding this definition, the SEC suddenly changed the definition of whistleblower when it enacted the final rule on June 13, 2011. The final rule brought within its sweep even those complainants who had not reported securities violations directly to the SEC. 17 C.F.R. § 240.21F-2.

DRT is a publicly traded real estate investment trust. DRT hired Paul Somers as a vice president of portfolio management in 2010. Somers came to believe his supervisor was violating the Sarbanes-Oxley Act by eliminating internal controls. Somers reported his concerns internally in accordance with what he surmised were the contours of the Sarbanes-Oxley Act. DRT fired Somers in April 2014. Somers did not have the opportunity to report his allegations to the SEC before his termination.

Somers filed suit against DRT and its management, claiming DRT and management retaliated against him for blowing the whistle on the company. Somers claimed this alleged retaliation violated Dodd-Frank’s whistleblower protection provision. Somers brought other state and federal law claims. DRT filed a motion to dismiss, claiming
Somers fell outside Dodd-Frank’s protection because he failed to report his allegations to the SEC.

The district court denied DRT’s motion to dismiss. The district court acknowledged the statutory provision was ambiguous, but found the SEC’s interpretation of the rule entitled to Chevron deference. (In Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), the Court held that courts should defer to agency interpretations of statutes that the agencies enforce, unless such interpretations are unreasonable.) In the district court’s view, Chevron deference was the “determinative issue.” Recognizing courts had split on the question, the district court certified an appeal of the ruling before the trial concluded.

The United States Court of Appeals for the Ninth Circuit granted DRT’s petition for permission to file an interlocutory appeal.

Noting the case involved a question of interpretation that had not previously been addressed (that is, a case of first impression), a divided panel of the Ninth Circuit affirmed the judgment of the district court on March 8, 2017. The Ninth Circuit held that any person who reports misconduct, whether or not to the SEC, is protected by Dodd-Frank. The court also held that its interpretation was most consistent with Congressional purpose to protect whistleblowers, whether or not they reported their concerns to the SEC.

The court held the case should be viewed contextually. For point of comparison, the court described the financial scandals which it said led to the enactment of Sarbanes-Oxley. That statute broadly protected whistleblowers, whether those individuals reported to federal agencies, Congress, or internal supervisors. Similarly, according to the court, Congress passed Dodd-Frank to address the financial collapse of 2008 created in part by subprime mortgage fraud. Congress recorded its purposes to promote financial stability, enhance accountability and transparency, and protect consumers. The court held that only a broad reading of the statute thus honors Congressional intent.

Moreover, the court found that Dodd-Frank incorporates Sarbanes-Oxley, which protects whistleblowers who report their conduct internally as well as to the SEC. The court was not dissuaded by Dodd-Frank’s definition of whistleblowers as only those who report to the Commission, holding that “statutory definitions are, after all, just one indication of a meaning.”

As an additional basis for its holding, the court held that the SEC’s broad understanding of the whistleblower term under Dodd-Frank was entitled to deference under Chevron.

DRT filed a petition for certiorari on April 25, 2017. The Supreme Court granted the petition for certiorari on April 25, 2017.

CASE ANALYSIS

DRT argues this is a very straightforward case of statutory interpretation. Dodd-Frank contains a definition of whistleblower which explicitly excludes those who fail to report allegations to the SEC. DRT argues that complainants do not qualify for whistleblower status unless they report alleged violations to the SEC. DRT states its interpretation comports with the plain meaning of Dodd-Frank. DRT argues the statutory definition is the Congressional “glossary,” which courts must respect. DRT asserts as beyond question the applicability of Dodd-Frank’s statutory definition of “whistleblower” to the anti-retaliation provision. Indeed, the language is not even ambiguous, and this should be the beginning and end of the inquiry, says DRT.

Somers responds that the statutory scheme is ambiguous. By Somers’s reading, Congress did not intend to limit the definition of whistleblower in Dodd-Frank even though the definition is constricted. Somers contends the restricted definition of whistleblower contained within Dodd-Frank itself must be discarded because the definition is incompatible with the statutory scheme. Moreover, Somers asserts the term whistleblower is not a term of art but is idiomatic.

DRT argues that the anti-retaliation section in the context of the statute further validates the plain language of the statute. DRT argues the statute heavily emphasizes SEC involvement in the whistleblower process, including for enforcement actions and monetary awards. These provisions work together with the reporting requirement to incentivize complainants to aid the SEC’s enforcement responsibilities. This creates a comprehensive statutory scheme in which the SEC’s role is integral.

Somers responds that respect for the SEC’s role calls for deference to its interpretation. Here, the SEC renders generously the label of Dodd-Frank whistleblower. Rather, Dodd-Frank must be viewed in conjunction with Sarbanes-Oxley, asserts Somers. In both statutes, Congress evinced a desire to protect whistleblowers. Somers describes Dodd-Frank as prioritizing monetary rewards and protecting victims of retaliation. Somers characterizes Dodd-Frank’s whistleblower protection as even broader than that provided by Sarbanes-Oxley. Dodd-Frank allows double backpay, provides for longer limitations, and covers a larger group of corporations. If anything, Dodd-Frank whistleblowers should cover a wider swath of complainants than Sarbanes-Oxley.

DRT argues the Court need not look at legislative history given the plain meaning of the statute. However, were the Court to examine the Congressional record, DRT argues Dodd-Frank’s history supports a plain language interpretation of the statute. First, Congress considered and rejected broader language for Dodd-Frank which would have covered all whistleblowers, not just those who reported to the SEC. Second, the Congressional purpose was to funnel information about securities fraud to the one agency most entrusted to police such fraud. Third, reporting to the SEC provides a layer of protection to whistleblowers Congress fully intended for vulnerable employees to wield. Eliminating that reporting requirement would only undermine Congress’s insight on the dangers of retaliatory employers.

Somers interprets the legislative history more ambiguously. Somers alleges that Dodd-Frank’s definition of whistleblower was added at the midnight hour. Unsurprisingly, says Somers, it does not conform to the remainder of the statute. Indeed a careful reading of the remainder of Dodd-Frank shows that Congress’s primary goal was to generally prohibit retaliation. Somers argues whistleblower protection should not turn on the “happenstance” on whether employees report to the SEC or to their employers. Somers characterizes DRT’s statutory construction as less than serious.
In doing so, Somers urges a view of the language of the statute as anomalous given the legislative backdrop.

DRT also claims a plain language interpretation underscores the difference between Dodd-Frank and its parent, Sarbanes-Oxley. DRT argues that Dodd-Frank serves a different purpose than Sarbanes-Oxley. Dodd-Frank reflects Congressional concern about the power of SEC enforcement in the wake of the Bernie Madoff financial scandal. By contrast, Sarbanes-Oxley reflects Congressional concern about the Enron implosion. Congress focused at that point on rooting out corporate fraud more generally. DRT claims the whistleblower protections provided by each statute are independent, as Congress intended.

Somers asserts that Dodd-Frank ought to be viewed as mirroring Sarbanes-Oxley. According to Somers, Sarbanes-Oxley focuses on internal compliance and reporting. Unless Dodd-Frank were construed similarly, the Court would “cripple” its coherent constructions, claims Somers. Indeed, most federal statutes require internal reporting as a precondition to external complaints. Even the SEC supports this argument, Somers states, by providing equivalent protection under Sarbanes-Oxley as well as Dodd-Frank. Any other result, asserts Somers, would create statutory disharmony, internal reporting impediments, and a chilling effect.

DRT asserts that reporting to the SEC is the most logical interpretation of the statute. It is not the province of the courts to correct drafting errors or impose preferences. Nor is the plain meaning interpretation of the statute contrary to the Court’s recent decision in King v. Burwell in which the Court looked to the whole framework of a statute crafted to enlarge coverage in the personal health insurance market, where the contested term was ambiguous. Here, DRT argues, Congress specifically defined the meaning of whistleblower in the most limited manner. To hold otherwise, DRT claims, would be to wrongly assume that Congress attempted to “hide elephants in mouseholes.”

Somers asserts that the statute ought not be read literally, but contextually. Somers urges the Court to consider as well the purpose of the statute, the context of the law, and precedent. Here, Somers claims a “mechanical” reading of the statute would defeat the purpose, context, and precedent under which Dodd-Frank ought to be viewed. Somers also argues that the same term may mean different things in different sections of the same statute and only a broader contextual reading helps discern Congressional intent.

DRT finally argues the SEC’s contrary interpretation of the statute is not entitled to deference. First, DRT argues that Congress has already spoken on the matter of statutory interpretation in unambiguous fashion, and the SEC’s conflicting views are irrelevant. The SEC’s interpretation is antithetical to Dodd-Frank’s text, structure, and history, claims DRT. Essentially, DRT argues the SEC lacks the authority to rewrite the statute.

Somers squarely asserts that “this is a Chevron case.” Somers relies heavily on the SEC’s construction of the statute and rulemaking authority in asking the Court to accord to the SEC’s interpretation, which defines whistleblower broadly. Somers argues the SEC’s construction of the statute must prevail under the Court’s longstanding deference to the views of administrative agencies.

According to Somers, the Court must accept the SEC’s definition of whistleblower unless that definition is unambiguously foreclosed.

DRT counters that the SEC’s rulemaking process purporting to expand Dodd-Frank’s statutory definition of whistleblower was procedurally defective. DRT claims the SEC failed to give “fair notice” of the contents of the final rule. Initially, the SEC proposed a rule which tracked the statutory definition. Months later, without warning and without justification, the SEC announced a final rule which reversed the definition of whistleblower to include complainants who failed to report directly to the SEC. This reversal deprived parties in opposition of the opportunity to make known their complaints to the SEC. The SEC’s complete lack of explanation for its reversal of course also failed to inform the public of its rationale. In sum, the SEC’s lack of transparency renders its views here outside the realm of Chevron deference, protests DRT.

Somers reminds the Court that Congress expressly delegated authority to the SEC to administer the whistleblower provision of Dodd-Frank. Somers asserts that in so doing, Congress broadly entrusted the SEC with the power to interpret, administer, and enforce Dodd-Frank. Somers warns the Court that a ruling deviating from the SEC’s interpretation would undermine the agency’s authority. Moreover, an adverse ruling would undermine the heart of Chevron. Although the presumption is that a statutory definition controls, this case presents a situation where the presumption ought not hold in light of Chevron, which Somers contends presents the “legal lens” through which to interpret Dodd-Frank’s whistleblower provision.

SIGNIFICANCE

Although the SEC is not a party to this case, it has intervened to explain its views, declared its interpretation of the statute to be entitled to Chevron deference, and sided with Somers. Chevron deference has been a subject of controversy for some time now, and numerous justices have signaled their skepticism toward the doctrine. Justice Neil Gorsuch, while serving on the U.S. Court of Appeals for the Tenth Circuit, strongly criticized Chevron. Although DRT has declined to launch a full-scale assault on Chevron, Somers places the issue of Chevron deference front and center. Perhaps unintentionally, Somers has set up this matter as the possible sleeper case of the term. This case may be an interesting vehicle for the Court to examine whether the expansion of the Chevron doctrine has grown beyond reason.

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PREVIEW of United States Supreme Court Cases, pages 87–90. © 2017 American Bar Association

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In October, the Court heard a number of interesting cases. Below, we highlight an exchange between the justices and the attorney representing the petitioner in Ayestas v. Davis, a case about the level of funding available to indigent defendants who are challenging death penalty cases. This exchange occurred during a discussion over phrases defining what is “reasonably necessary” for defendants to be granted funds, or whether there is “substantial need” for the money.

Justice Samuel Alito: Well, I would think the most relevant language is the language of the statute, reasonably necessary. And I really struggled with that, and also with the phrase “substantial need.” But taking reasonably necessary, if it just said necessary, that would be a pretty tough standard. Would you accept the interpretation of reasonably necessary to mean that this is something that a reasonable attorney would think is necessary?

Lee Kovarsky (on behalf of petitioner): That—the reasonable attorney standard and a reasonable attorney representing a client of finite means is the standard that we think is appropriate. And it’s actually the way they interpreted the word “necessary.” Necessary is the word that appears in the CJA (Criminal Justice Act). And they interpret necessary to mean reasonably necessary under the CJA, and even single court of appeals, with the exception of the D.C. Circuit, which does basically the same thing, interprets reasonably necessary to mean a reasonable attorney representing a client of finite means.

Justice Elena Kagan: And the finite means business is just to make sure that, like a reasonable attorney for Bill Gates, would scour the earth and not care about it.

Mr. Kovarsky: Exactly. Or, you know, the standard doesn’t involve a Richie Rich client or something like that.


Justice Alito: But the—but the attorney, the reasonable attorney still has to think that it is necessary, which is pretty tough.

Mr. Kovarsky: Well, the standard that Congress
Justice Alito: What’s necessary doesn’t mean necessary.

Mr. Kovarsky: We assume…

Justice Alito: It’s like the necessary and proper clause. It doesn’t mean that it’s really necessary. (Laughter.)

Mr. Kovarsky: Right. We know what Congress was thinking when it used the phrase “reasonably necessary.”

Justice Alito: You really know what they were thinking? (Laughter.)

(continued on page 94)
**FOURTH AMENDMENT**

Does the Government’s Warrantless Search and Seizure of a Cell Phone User’s Cell-Site Data from a Cell Phone Carrier Violate the Fourth Amendment?

**CASE AT A GLANCE**

The government obtained “transactional” cell phone records from cell phone carriers as part of its investigation into a string of armed robberies in and around Detroit. The government obtained the records by filing applications with magistrates pursuant to the Stored Communications Act, which permits the government to obtain these kinds of records based on a standard less stringent than probable cause. After the government used these records to obtain a conviction, the defendant appealed, arguing that the searches and seizures violated the Fourth Amendment.

**Carpenter v. United States**

Docket No. 16-402

Argument Date: November 29, 2017

From: The Sixth Circuit

by Steven D. Schwinn

The John Marshall Law School, Chicago, IL

**INTRODUCTION**

The Fourth Amendment generally requires that the government obtain a warrant, based on probable cause, before executing a search and seizure. But the Stored Communications Act allows the government to obtain records related to electronic or wire communications based only on “specific and articulable facts” that show that it is reasonable to believe that the records are relevant to an ongoing criminal investigation. Because the Act’s standard is lower than the Fourth Amendment, a search pursuant to the Act violates the Fourth Amendment, if it is a “search” under the Fourth Amendment.

**ISSUE**

Does the government’s search of locational cell phone records without a warrant, but pursuant to the Stored Communications Act, violate the Fourth Amendment?

**FACTS**

In April 2011, Detroit police arrested four men suspected of committing a string of armed robberies at Radio Shack and T-Mobile stores in and around Detroit. One of the men confessed that he had a role in eight of these robberies between December 2010 and March 2011. He also identified 15 other individuals who had been involved in at least one of these robberies.

Based on this information, an Assistant United States Attorney submitted three applications to magistrate judges to obtain cell phone location records for several of the suspects, including Timothy Carpenter. In particular, the applications sought “transactional records” from various wireless carriers for 16 different phone numbers. The applications sought “[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones from December 2, 2010 to present,” a period that covered 127 days of records, as well as “cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls….” (The applications sought only transactional information about the calls—numbers called and received and cell-tower location information for each call—not the substance of the calls.)

The magistrates granted the applications pursuant to the Stored Communications Act. This Act allows the government to require the disclosure of certain telecommunications records when “specific and articulable facts show[ ] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(c). (This standard is lower than the Fourth Amendment’s probable-cause standard for a warrant.)

The government charged Carpenter with six counts of aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, and aiding and abetting the use or carriage of a firearm during a federal crime of violence. (The government also charged Carpenter’s half-brother, Timothy Sanders, but this appeal involves only Carpenter.) Carpenter moved to suppress the government’s cell-site evidence on Fourth Amendment grounds, arguing that the government failed to obtain a warrant based on probable cause. The district court denied the motion.

At trial, the government used the evidence obtained from Carpenter’s cell carrier, MetroPCS, and Sprint, which operated a tower where Carpenter was roaming, to show that Carpenter’s...
cell phone established connections with certain cell sites that were within a half-mile to two miles of the location of each of the robberies around the times the robberies occurred. For example, the government used MetroPCS records to show that Carpenter was near a Detroit Radio Shack store that was robbed around 10:35 a.m. on December 13, 2010. The records showed that Carpenter received a call at 10:24 a.m. that day from a MetroPCS cell tower that was located southwest of the store, with a signal that pointed north-northeast.

The jury convicted Carpenter on all counts, except one of the gun counts. The court sentenced him to 116 years' imprisonment.

Carpenter appealed his conviction to the United States Court of Appeals for the Sixth Circuit, again arguing that the government violated the Fourth Amendment. The Sixth Circuit rejected that claim and ruled in favor of the government. This appeal followed.

CASE ANALYSIS

As a general matter, the Fourth Amendment requires the government to obtain a warrant, based upon probable cause, before it executes a search. A “search” under the Fourth Amendment includes an invasion or trespass on certain physical property; it also includes a search that intrudes upon a target’s “reasonable expectation of privacy.”

Applying these principles to technologies that long predate cell phones, the Court has ruled that the government’s use of a pen register (to record only the telephone numbers called from a traditional home phone) was not a “search” under the Fourth Amendment, because the caller could not reasonably expect those numbers to remain private. Smith v. Maryland, 442 U.S. 735 (1979). The Court also said in Smith that the telephone user voluntarily transmitted those numbers to the phone company and could expect that the phone company would record them for legitimate business purposes. The Court said that the government, in turn, could obtain those records from the “third-party” phone company. (The Court ruled similarly in United States v. Miller, 425 U.S. 435 (1976), a case involving banking records.) This is called the “third-party doctrine.”

The Court also ruled in Smith that there is a difference between the form or transactional features of a communication, on the one hand, and the substantive content of a communication, on the other. Surveillance of the transactional components of a communication—like the telephone numbers dialed—is not a “search” under the Fourth Amendment, but surveillance of the content of the communication—such as the words spoken during a phone conversation—is.

Finally, the Court has held that the government need not obtain a warrant based on probable cause when a search is “reasonable.” A search is reasonable when the government’s interest in the matter outweighs the target’s privacy interests.

The parties in this case wrangle over how these principles, built on dated technologies, apply to the very different world of modern cell phones.

Carpenter argues that the government’s search of his cell-site location information (or CSLI) constitutes a “search” under the Fourth Amendment. He says that he has a reasonable expectation of privacy in his locational information. In support, he points to United States v. Jones, 565 U.S. 400 (2012), in which the Court held that the government violated the Fourth Amendment when it placed a GPS device on a vehicle registered to the defendant’s wife in order to track the defendant’s movements over a four-week period. Carpenter contends that this kind of monitoring reveals highly sensitive information about a person and that it will only become more intrusive as the technology improves. Moreover, Carpenter claims that the government’s search impinged on his federally recognized interest in protecting his cell phone records. (Carpenter points to 47 U.S.C. § 222(f), which prohibits service providers from disclosing certain cell phone records without the “express prior authorization of the customer.”)

Carpenter argues next that the Court’s earlier rulings allowing searches of dialed telephone numbers and banking records are not applicable here. He says that “[t]he detailed and pervasive location records obtained in this case are far more comprehensive and sensitive than discrete telephone or banking information.” Moreover, he contends that cell phone users, merely by virtue of using their cell phones for everyday, essential tasks, do not intend to disclose their minute-by-minute location in perpetuity. He says that “[c]arrying a smartphone, checking for new emails from one’s boss, updating the weather forecast, and downloading directions ought not license total surveillance of a person’s entire life.” Carpenter also warns that exempting this kind of information from the Fourth Amendment could invite searches of certain substantive communication: “It would mean…that persons would lack any reasonable expectation of privacy in the contents of emails and other communications that are necessarily shared with service providers to enable their transmission.”

Finally, Carpenter argues that the government’s search under the lower standard in the Stored Communications Act is unreasonable. He says that Congress enacted the Act before the widespread proliferation of cell phones and before it knew about the availability of cell-site location information, and thus did not foresee its vast reach. He also contends that no exception to the Fourth Amendment’s warrant requirement applies here. In particular, he asserts that the government’s subpoena power over certain business records should not extend to this kind of search, where individuals have a reasonable expectation of privacy.

The government counters that its acquisition of cell-site records did not constitute a Fourth Amendment “search.” The government says that Carpenter had no reasonable expectation of privacy in the business records that his cell carrier created and maintained of the cell towers that routed his calls. The government contends that cell phone users are aware that they must be within a tower’s coverage area and that their carriers know the location of their towers and may make records of their use. Citing the third-party doctrine, the government asserts that Carpenter did not have a reasonable expectation of privacy in those records. The government contends, contrary to Carpenter, that cell-site information is far less precise than GPS data (as in Jones) and not more sensitive than records of phone numbers dialed or banking records in Smith and Miller. The government says that Carpenter voluntarily revealed transactional information to his cell carrier—just like the defendants in Smith and Miller—and that the government can lawfully obtain that information from the third-party carrier without triggering a Fourth
Amendment “search.” The government claims that a cell provider’s use of technology should not change this result. The government argues that Carpenter’s assertion that its position would allow the government to obtain emails is wrong: “[email] contents, like those of a sealed letter, may remain private.” It also argues that, unlike the GPS tracking in *Jones*, this case does not involve a trespass-based search.

The government argues that application of the third-party doctrine to this case would not eliminate all constitutional protections. It says that cell providers can still invoke their own Fourth Amendment rights to object to certain searches and that other constitutional provisions may also protect against abuse. The government contends that if these searches raise new privacy concerns, legislatures can enact additional protections.

The government argues next that even if its acquisition of cell-site information amounted to a Fourth Amendment search, that search was reasonable. The government says that “[u]nder longstanding Fourth Amendment principles,” it can use a subpoena to obtain records without a warrant. Moreover, it contends that applying standard Fourth Amendment balancing principles leads to the same result: because Carpenter’s privacy interest in the third-party records is diminished, while the government has a compelling interest in obtaining those records, the search was reasonable and did not require a warrant.

Finally, the government argues that if the Court concludes that a warrant is required for some cell-site records, it should exempt short-term cell-site records from that rule. The government says that such an exemption would apply to some of the records here: “that principle would validate the request for seven days of records from Sprint, as that is well within the range of ordinary visual surveillance of a person suspected of a crime.”

**SIGNIFICANCE**

This case tests Fourth Amendment principles that the Court created long ago, in an altogether different technological environment, against modern realities. As we all know, cell phones carry and convey vast amounts of highly personal information. And as technology increases, so, too, will the detail, accuracy, and sheer volume of the information that our cell phones convey to our carriers—even with regard to information like cell-site location. Moreover, this will happen in ways that we simply cannot anticipate today. Indeed, the parties in this case even disagree about the kind of information that might be available to cell carriers now; let alone the future. Some of the amici (weighing in for Carpenter) also address this question and other technological uncertainties that complicate this case. Given all this, it’s not at all clear how traditional Fourth Amendment principles will apply to this case.

The Court itself has given us only a few clues in its more recent Fourth Amendment cases dealing with modern technologies. For example, it ruled in *Jones* that the government violated the Fourth Amendment when it placed a GPS device on a suspect’s vehicle in order to track the suspect’s movements over four weeks. And it ruled in *Riley v. California*, 134 S. Ct. 2473 (2014), that, absent exigent circumstances, the government had to obtain a warrant before searching a smartphone. On the one hand, these cases tell us that the Court is concerned about lengthy and intrusive monitoring of a suspect’s movement and that it is sensitive to the vast amount of very private information on a cell phone. That bodes well for Carpenter. But on the other hand, these cases do not squarely address the government’s acquisition of information from a third-party provider, a key question in this case. If the Court applies a rigid third-party rule, that may bode well for the government. In any event, if the Court rules that the government’s acquisition is not a “search” under the Fourth Amendment, it will have to do some very careful line-drawing in order to account for the ruling’s application to now-unknown advances in technology.

All this said, both parties have given the Court a way around addressing the thorniest questions in this case. Carpenter writes that the Court “may wish to allow the Sixth Circuit to determine in the first instance whether a search of CSLI pursuant to an order under the Stored Communications Act is ‘reasonable’ under the Fourth Amendment.” This seems to invite the Court to remand for further proceedings on the reasonableness question. (Carpenter goes on to argue that the Court itself should just go ahead and rule itself that the search was unreasonable.) The government, for its part, writes that “[i]f the Court concludes that a warrant is required to obtain some cell-site records, it should hold, as petitioner concedes, that requests for short-term cell-site records fall outside that rule.” According to the government, this approach would allow some information to come in (the government’s request for seven days of records from Sprint), even if not all of it. With these invitations, and with all the complexities of the case, the Court may well punt on the harder questions—at least for now.
Mr. Kovarsky: Well, Congress plucked that phrase directly from the case law that was interpreting the word “necessary” in the CJA. And it is not a particularly close question in the courts of appeal about what the word necessary meant. At the time that Congress wrote the statute, necessary meant reasonably necessary, and reasonably necessary meant the reasonable attorney rule that I described at the top of my opening.

Justice Alito: Okay. What is the difference between “reasonably necessary” and “substantial need”? I have been racking my brain trying to think of something that it is reasonably necessary for me to obtain but as to which I do not have the substantial need. And I can’t think of an example. Maybe you can give me an example.

Mr. Kovarsky: So, Justice Alito, I’m going to scrap the formal labels for a minute. I’m not going to use substantial need or reasonably necessary.

Justice Alito: No, don’t do that, because one is the statutory language and the other is the language that’s used by the Fifth Circuit. And that’s what we have to deal with, no matter what the various courts of appeals have said about this.

Mr. Kovarsky: I’m just trying to answer the question functionally. 
Can a State Apply Its Anti-discrimination Law to a Wedding Cake Artist Who Refuses to Make a Wedding Cake for a Same-Sex Couple Because of His Religious Objections to Same-Sex Marriage?

**CASE AT A GLANCE**

Charlie Craig and David Mullins asked Jack C. Phillips, owner of Masterpiece Cakeshop outside of Denver, Colorado, and self-described “cake artist,” to design and create a cake for their wedding celebration. Phillips declined, saying that he objected to same-sex weddings, but that he would provide any other baked goods for the couple. Craig and Mullins brought a complaint under Colorado’s anti-discrimination law and won. Phillips argued that the law violated his rights to free speech and free exercise of religion under the First Amendment.

**Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission**

Docket No. 16-111

**Argument Date: December 5, 2017**

From: The Colorado Court of Appeals

by Steven D. Schwinn

The John Marshall Law School, Chicago, IL

**INTRODUCTION**

Colorado law bans discrimination by sexual orientation in commercial exchanges. At the same time, the First Amendment Free Speech Clause forbids the government from compelling a person to speak, and the Free Exercise Clause forbids the government from targeting a person’s exercise of religion. This case tests whether and how the anti-discrimination law holds up against either of these constitutional rights.

**ISSUE**

Does Colorado’s anti-discrimination law, which forbids businesses engaged in sales to the public from denying service because of a customer’s sexual orientation, violate the free-speech and free-exercise-of-religion rights of a person who designs and makes custom wedding cakes, but who refuses to make a cake for the wedding of a same-sex couple?

**FACTS**

Masterpiece Cakeshop, Inc., is a bakery in Lakewood, Colorado, owned by Jack C. Phillips and his wife. Phillips designs and creates custom wedding cakes, which he describes as “an art form.” Prior to this case, custom wedding cakes accounted for about 40 percent of Phillips’s business.

Phillips describes himself as “a devout Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business.” For example, he closes Masterpiece on Sundays so that he and his employees can attend religious services. And while he says that he “gladly serves people from all walks of life, including individuals of all races, faiths, and sexual orientations,” he does not design custom cakes that “express ideas at odds with his religious beliefs.” Thus, he does not design cakes that celebrate Halloween; that convey “anti-family” themes (like divorce); that express hateful, vulgar, or profane messages (“such as a cake disparaging gays and lesbians”); or that “promote atheism, racism, or indecency.” As part of his faith, he “believes that marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church.”

In July 2012, Charlie Craig and David Mullins, two men, visited Masterpiece Cakeshop and asked Phillips to design and create a cake for their wedding. Craig and Phillips planned to marry in Massachusetts, which recognized same-sex marriages, and to celebrate later with friends in Colorado, which at the time did not. (That changed, of course, when the Supreme Court held in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), that bans on same-sex marriages violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.) Phillips declined, telling Craig and Mullins that he did not create wedding cakes for same-sex weddings, but that he would be happy to make and sell them any other baked goods. Craig and Mullins promptly left the store. The following day, Craig’s mother called Phillips, and Phillips explained that he did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.

Craig and Mullins filed charges of discrimination with the Colorado Civil Rights Commission, alleging discrimination based on sexual orientation in a place of public accommodation. An administrative
Phillips argues that the Commission’s order violates his right to Free Exercise. (The Commission’s final cease-and-desist order required that Masterpiece take remedial measures, including comprehensive staff training and alteration of the company’s policies to comply with Colorado’s anti-discrimination law, and file quarterly compliance reports for two years.

Phillips appealed to the Colorado Court of Appeals, arguing, among other things, that the Commission’s ruling violated his rights to free speech and to free exercise of religion. The Court of Appeals ruled against Phillips. Phillips sought review in the Colorado Supreme Court, but that court declined to take up the case.

Meanwhile, rather than comply with the Commission’s order, Phillips stopped designing and creating all wedding cakes. This appeal followed.

**CASE ANALYSIS**

The case involves two legal issues. Let’s take them one at a time.

**Free Speech**

Phillips claims that the Commission’s order violates his free speech rights, because it forces him to communicate a message that he disagrees with. Phillips says that as an artist he designs his wedding cakes “for the purpose of celebrating his clients’ marriages,” and that they therefore “necessarily express ideas about marriage and the couple.” But he claims that the Commission’s order compels him to design and create a cake for a wedding—a same-sex wedding—that is at odds with his own faith. Phillips contends that this kind of forced speech violates the general rule that the government cannot compel a person to convey a particular message, much less one that the person opposes. (The government weighs in to support Phillips and makes substantially similar arguments.)

Craig and Mullins argue that the Commission’s order does not violate free speech. They claim that Colorado’s prohibition on discrimination in the sale of goods and services to the public is a commercial regulation that affects free speech only incidentally, and that the Court has repeatedly upheld this kind of anti-discrimination law against First Amendment defenses like Phillips’s. Moreover, they argue, contrary to Phillips, that Colorado’s law does not force Phillips to speak, but instead simply regulates a commercial exchange in a content-neutral way. Craig and Mullins assert that even if Colorado’s law triggers heightened scrutiny under the First Amendment, it passes muster, because “it is precisely tailored to serve…a compelling government interest in ending discrimination by commercial establishments open to the public.” Finally, Craig and Mullins contend that Phillips’s and the government’s attempts to limit their claims to “expressive products” are not supported by the record in this case, not supported by Court precedent, and would lead to a slippery slope allowing discrimination by numerous other businesses against many other classes of people. (The Commission filed a brief with substantially similar arguments.)

**Free Exercise**

Phillips argues that the Commission’s order violates his right to free exercise of religion, because it applies only in a one-sided way “under which people of faith who share Phillips’s beliefs always lose.” To illustrate, he says that “[c]ake artists who support same-sex marriage may refuse requests to oppose it,” but that he “may not decline requests to support it.” Phillips says that this one-sided application “defies the requirements of neutrality and general applicability” under free-exercise doctrine. Moreover, he contends that because this case involves a confluence of free-speech and free-exercise rights, the Court should apply strict scrutiny to the Commission’s order. He says that the Commission’s order fails that rigid test, because the Commission’s order is not narrowly tailored to meet a sufficiently compelling interest. (The government does not offer an argument on Phillips’s free-exercise claim.)

Craig and Mullins argue in response that Colorado’s law is a neutral, generally applicable law that governs all retail businesses and does not target religious exercise. Under settled free-exercise doctrine, Craig and Mullins say that the Court should apply mere rational basis review and that the law does not violate the Free Exercise Clause. Moreover, they contend that Phillips’s hybrid claim “lacks any support in precedent or reason.” They claim that Phillips cannot avoid rational basis review by coupling his free-exercise claim with “an otherwise unsuccessful free-speech claim.” (The Commission adds that even if strict scrutiny applied to Phillips’s free-exercise defense, it would be satisfied: “As this Court has acknowledged, public accommodations laws both serve compelling interests and are precisely tailored to address the harms of discrimination by commercial entities.”)

**SIGNIFICANCE**

This is one of the most closely watched cases on the Court’s docket this term. That’s because it deals with a critical and controversial follow-up issue to the Court’s ruling in Obergefell: If same-sex couples have a right to marry (as they do), then do they also have a right to anti-discrimination protection under state and local laws, as against a wedding-cake artist’s rights to free speech and free association?

This is certainly not the first time we’ve seen this kind of tension between anti-discrimination norms and First Amendment claims. It wasn’t that long ago, relatively speaking, that businesses, politicians, and even courts cited religious liberty as a justification for racial discrimination in violation of anti-discrimination laws. But the Supreme Court rejected those claims and affirmed that a religious justification could not overcome “a firm national policy to prohibit racial segregation and discrimination in…education.”

Bob Jones Univ. v. United States, 461 U.S. 574 (1983). See also Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). This case tests whether that principle also applies to a law prohibiting discrimination by sexual orientation. It’s not obvious why that difference should matter under the Free Exercise Clause, and any opinion from the Court in favor of Phillips would have to explain.

This case also tests whether that principle applies to a defense based on free speech. This might matter. For example, the Court held in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), that a state court violated free speech when it applied Massachusetts’s anti-discrimination law to require private citizens who organized a St. Patrick’s Day Evacuation Day parade to include a group formed to express its members’ pride in their Irish heritage as openly gay, lesbian, and bisexual individuals. The parties dispute whether and how Hurley applies to this case. But despite their disagreement, the case nevertheless illustrates one way that Phillips might get more
traction out of his free-speech claim than his free-exercise claim. (The fact that the government supported Phillips in his free-speech claim, but did not offer a free-exercise argument, also suggests that Phillips has a stronger free-speech claim than a free-exercise claim.)

But Phillips’s free-speech claim depends on a key threshold issue, whether Phillips’s cakes “talk.” It is not clear that Phillips’s wedding cakes communicate any message at all, even though he has gone to lengths to show that they are “art” and to show his belief that any wedding cake necessarily celebrates the wedding. But if the Court concludes that Phillips’s cakes don’t “talk,” then his free-speech claim will necessarily fail.

If the Court rules for Phillips, it will have to do some very careful line-drawing. That’s because Phillips’s defenses do not have obvious limits. For example, if those defenses are successful against laws banning discrimination by sexual orientation, should they also be successful against laws banning discrimination by race? By sex? Even by religion? And if they’re successful for a cake artist, should they also be successful for a high-end food caterer? A photographer? A musician? It’s hard to see how the Court might cabin Phillips’s arguments.

These are not just theoretical problems. Some 38 states and more than 100 local governments have laws that ban discrimination by sexual orientation in public accommodations. The Court’s ruling will affect all of these, one way or the other. Moreover, advocates on both sides seem to see this case, at least in part, as a kind of relitigation of Obergefell itself—and a statement as to how seriously the Court will treat that case.

Finally, it should come as no surprise that all eyes are on Justice Anthony Kennedy, the author of the Court’s opinion in Obergefell. All signs suggest that he is (again) the swing vote, and the parties have carefully tailored their arguments to him.

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Is the Federal Circuit’s Adoption of a Partial-Final-Written-Decision Regime Consistent with the Statutory Text and Intent of the U.S.C. Sections 314 and 318?

CASE AT A GLANCE

The Court will consider whether the text of 35 U.S.C. § 318(a), which requires a final written decision with respect to “any patent claim challenged by the petitioner,” is materially different from the language of 35 U.S.C. § 314(a), which allows institution of an inter partes review where there is a reasonable likelihood that the petitioner would prevail with respect to “at least 1 of the claims challenged in the petition.” Petitioner SAS Institute, Inc. (SAS) filed a petition with the U.S. Patent and Trademark Office to institute an inter partes review of claims 1–16 of Patent 7,110,936 (the “936 patent”), owned by ComplementSoft, LLC (ComplementSoft), pursuant to 35 U.S.C. § 311 et seq. Upon appeal, and with respect to the question of whether the “final written decision” issued by the Patent Trial and Appeal Board had to address the patentability of all of the claims challenged by SAS under Section 318(a), the panel of the U.S. Court of Appeals for the Federal Circuit, in a divided 2–1 opinion, held that the Patent Trial and Appeal Board was authorized to adopt a partial-final-written-decision regime under its rulemaking authority. The panel majority viewed SAS’s argument that the Patent Trial and Appeal Board must address all claims from the inter partes review petition in the final written decision as foreclosed by the Federal Circuit’s previously issued, February 10, 2016, 2–1 panel decision in Synopsys, Inc. v. Mentor Graphics Corp., 814 F.3d 1309 (Fed. Cir. 2016). The Supreme Court will now consider whether the Federal Circuit’s adoption of a partial-final-written-decision regime is proper under the statute.
On February 10, 2016, the Federal Circuit issued a split 2–1 panel decision, with Judge Pauline Newman dissenting, in *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309 (Fed. Cir. 2016) in which the panel majority held that the text of Section 318(a), which requires a final written decision with respect to any patent claim challenged by the petitioner, was materially different from the language of Section 314(a), which allows institution of an inter partes review where there is a reasonable likelihood that the petitioner would prevail with respect to “at least 1 of the claims challenged in the petition.” Id. at 1315. Accordingly, the panel majority concluded, the claims that the Patent Trial and Appeal Board must address in the final decision are different from the claims raised in the petition and concluded that “[a]lthough we find that the language is clear, if there were any doubt,” the Patent Trial and Appeal Board was authorized to adopt a partial-final-written-decision regime under its rulemaking authority. Id. at 1315–1316.

This current case requires the Court to assess whether the Federal Circuit’s adoption of a partial-final-written-decision regime in *Synopsys*, whose holding was applied in this case, is consistent with the statutory text and intent of Sections 314 and 318.

**FACTS**

On September 14, 2012, ComplementSoft sued SAS for patent infringement in the Northern District of Illinois. ComplementSoft’s complaint alleged that SAS had infringed one or more claims of ComplementSoft’s U.S. Patent No. 7,110,936, including but not limited to at least claims 1, 2, 3, 4, 8, and 10. On March 29, 2013, SAS petitioned for inter partes review of the ’936 Patent, challenging the patentability of all 16 of the patent’s claims, either as anticipated (35 U.S.C. § 102) or obvious (id. § 103) in view of prior art. On August 12, 2013, the Patent Trial and Appeal Board, acting as the Director’s delegate for making institution decisions pursuant to 37 C.F.R. § 42.4(a), and believing that it had the authority to institute inter partes review as to fewer than all 16 of the claims challenged in SAS’s petition, instituted inter partes review only as to claims 1 and 3–10.

After receiving evidence and argument, the Patent Trial and Appeal Board issued its final written decision under Section 318(a) on August 6, 2014, which addressed only claims 1 and 3–10, and not claims 2 and 11–16 of the ’936 Patent. SAS requested rehearing before the Patent Trial and Appeal Board, challenging its procedural failure under Section 318(a) to issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner. The Board denied rehearing on November 10, 2014.

SAS and ComplementSoft each timely appealed to the Court of Appeals for the Federal Circuit. SAS challenged the Board’s refusal to issue a final written decision with respect to the patentability of all 16 patent claims it had challenged, and ComplementSoft appealed the determination of unpatentability with respect to claims 1, 3, and 5–10 of the ’936 Patent. The Director of the Patent and Trademark Office intervened to defend the Patent Trial and Appeal Board’s decision to issue a final decision as to only some of the claims challenged by SAS.

On June 10, 2016, the Federal Circuit panel in this case issued its decision, affirming the Patent Trial and Appeal Board’s decision. With regard to the question of whether the final written decision had to address the patentability of all 16 claims challenged by SAS under Section 318(a), the Federal Circuit panel divided 2–1. The Federal Circuit panel majority viewed “SAS’s argument that the Board must address all claims from the IPR petition in the final written decision as foreclosed by *Synopsys,*” in which the Federal Circuit panel majority had previously concluded in a divided 2–1 holding, with Judge Newman dissenting, that the Patent Trial and Appeal Board was authorized to adopt a partial-final-written-decision regime under its rulemaking authority.

In this case, Judge Newman dissented and, reiterating many of the objections first outlined in her *Synopsys* dissent, stated that:

The [US]PTO’s position that it need not review some of the claims challenged in a petition for review via a post-grant proceeding is inconsistent with the Act. The [US]PTO is authorized to refuse to institute review entirely—but a partial review cannot be inferred from the statute or accommodated to its purpose.

The statutory provisions and the legislative purpose of substituting an agency tribunal for district court proceedings on aspects of patent validity are defeated by the [US]PTO’s position that it can leave some challenged claims untouched. The America Invents Act presents a new system of reviewing issued patents, providing for stays of district court proceedings, and estoppels in all tribunals, based on the [US]PTO decision. Final determination of the validity of a challenged patent is not achieved when the [US]PTO selects, as its sole and unreviewable choice, which claims it will review and which it will not touch.

SAS petitioned for rehearing en banc on the issue of whether the Board was obligated to issue a final written decision on all 16 of the challenged claims. On November 7, 2016, over Judge Newman’s dissent, the Federal Circuit denied SAS’s petition.

SAS petitioned to the Supreme Court for a writ of *certiorari*. On May 22, 2017, the Court granted the petition.

**CASE ANALYSIS**

In this case, the Court must determine whether Section 318(a) requires the Patent Trial and Appeal Board (the Board) in an inter partes review to issue a final written decision with respect to the patentability of every patent claim challenged by the petitioner, or whether the Board be allowed to issue a final written decision with respect to the patentability of only some of the patent claims challenged by the petitioner.

On the issue of whether Section 318(a) requires the Board in an inter partes review to issue a final written decision with respect to the patentability of every challenged patent claim, the petitioner and respondents frame the issue before the Court in different ways. Petitioner frames the issue as a matter of strict statutory interpretation. Because the plain language of Section 318(a) states that “…the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d),” petitioner argues that the Board is obligated, “by a plainly worded statutory mandate, to decide all 16 of those challenged
Petitioner argues that the Federal Circuit failed to analyze the plain language of Section 318(a)’s mandate, to include the imperative use of the terms “shall” and “any,” that would require the issuance of a final written decision with respect to the patentability of every challenged patent claim and, instead, improperly looked to Section 314(a), which sets forth the “threshold” for the Director’s discretionary decision whether or not to institute inter partes review, to conclude that the claims that the Board must address in the final decision are different from the claims raised in the petition under Section 314(a).

Petitioner argues that Section 314(a), which provides that the Director of the USPTO “may not authorize an inter partes review to be instituted unless the Director determines that [the information contained in the parties’ institution-related filings] shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition, does not explicitly authorize the Director to ‘institut[e]’ ‘an inter partes review’ that is limited to fewer patent claims than are challenged in the petition, nor does it say that such a partial institution transforms the un-instituted patent claims into claims that are no longer ‘challenged by the petitioner,’ in the words of § 318(a).” Buttressing this argument, petitioner notes that the relevant Act provisions, to include Sections 312(a)(3), 314(a), 315(e), 316(a), and 318(a), “assume that inter partes review will proceed, and take the place of litigation, on all claims challenged by a petitioner in a petition” and that no other sections of the Act “suggests that inter partes review will proceed on only a subset of the challenged claims.”

Petitioner suggests that there is no statutory indication that the Board has the discretion to address fewer claims than those challenged by the petitioner. Indeed, petitioner argues that the language of Section 318(a) is mandatory (“shall”), complete (“any claim challenged”), and strictly additive (“and any new claim added under section 316(d’)). Thus, petitioner suggests that because “the combination of the ‘shall’ mandate with the broad and inclusive ‘any claim’ language compels the conclusion that the final written decision must reach all of the claims challenged by the petitioner; the USPTO cannot reduce Congress’s mandate by administrative fiat.”

Petitioner refers to Judge Newman’s trio of dissenting opinions, in Synopsys, in the panel decision in this case, and from the denial of rehearing en banc in this case, in arguing that the panel’s interpretation of Section 318(a) will do harm to the efficient operation of the post-patent-issuance challenge regime that was established by the Act. Petitioner suggests that the totality of the Act demonstrates that Congress designed a regime of post-patenting review that would resolve challenges to all claims that the petitioner has challenged upon initiation of an inter partes review, and that the Board’s use of a partial-decision regime eliminates the ability to have patentability determinations as to a particular patent adjudicated efficiently in a single proceeding, either before the Board or in court.

With respect to Chevron deference, petitioner argues that the clarity of the language of Section 318(a) compels the Board to issue a final and appealable written decision as to all challenged claims, and that the statute fails to provide any indication that Congress intended to delegate to the USPTO the power to narrow its otherwise broad Section 318(a) mandate.

As amicus in support of petitioner, the Intellectual Property Owners Association (the Association) states that Congress intended inter partes review proceedings to act as “a true alternative” to district court litigation for the determination of patent validity and argues that the Board’s adoption of a partial-decision regime frustrates congressional purpose. The Association adopts the “plain language” argument framed by the petitioner and suggests that the use of a partial-decision regime undermines the legislative intent in enacting the inter partes review provisions of the Act and, in particular, the estoppel provision that was intended to eliminate abusive litigation tactics that are present under a partial-decision regime.

The Association argues that the Board’s failure to address challenged but noninstituted claims is incorrect in view of the “clear and unambiguous statutory language” of Section 318(a). Further, the Association suggests that the Board’s interpretation of Section 318(a) is nonserving of Chevron deference directly, and plainly requires the final written decision to address all claims challenged by the petitioner, and that the USPTO cannot “rewrite clear statutory terms to suit its own sense of how the statute should operate.” The Association cited the Congressional Record in arguing that inter partes review under the Act was envisioned to “completely substitute for at least the patents-and-printed-publications portion” of infringement litigation and that the “creation of a complete substitute for district court litigation was intended to benefit both the petitioner and the patent owner.” The Association further notes that the Board’s adoption of the partial-decision regime frustrates Congress, whose intent under Section 315(e)(2) of the Act is “to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge,” as courts have not applied the estoppel provision of Section 315(e) to claims that are not addressed in an issued final written decision.

Thus, the Association suggests that the Board should be required to conform to the statutory language of Section 318(a) and underlying congressional intent and address all challenged claims in a final written decision.
The Federal respondent frames the relevant issues in two parts: whether “the USPTO may agree to institute inter partes review regarding the patentability of a subset of the patent claims of which review is requested,” and whether, “if the USPTO institutes review of some but not all of the claims that are challenged in a petition for inter partes review, the Board must address the unreviewed claims in its final written decision.” Federal respondent argues that the mechanisms created by inter partes review under the Act were designed to create an “efficient system for challenging patents that should not have issued.” Federal respondent further suggests that the Act provides the USPTO broad discretion in determining “whether to institute inter partes review, and it makes the agency’s decisions whether to institute review ‘final and nonappealable.’”

Federal respondent notes that the provisions of the Act that authorize the USPTO to institute inter partes review place no restriction on the scope of that review once the USPTO determines that the statutory prerequisites are satisfied and that the Act provisions that govern institution of inter partes review, such as Section 312, contemplate that the USPTO may conduct a claim-by-claim analysis. Federal respondent turns to Section 314(a), and the particular use of the phrase “at least 1 of the claims challenged in the petition,” to argue that the USPTO can apply the statute’s reasonable-likelihood test on a claim-by-claim basis.

Federal respondent notes that the Act allows the USPTO to institute review “where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the [USPTO’s] decision to institute inter partes review.” Federal respondent argues that the same code section imposes “no mandate to institute review” and that no other provision of the Act “requires the USPTO to institute review of all challenged claims if the agency agrees to review any of them.”

With respect to Section 318(a), Federal respondent suggests that this section be read in its statutory context and that the plain language of Section 318(a) “does not refer to every claim of which review was originally requested, but only to those claims that were challenged within the instituted review proceeding, i.e., those claims the USPTO agreed to review.” Federal respondent argues that the Board’s partial-decision regime allows the USPTO to operate efficiently while improving patent quality.

Federal respondent further argues that the Act is properly interpreted to permit the USPTO to institute inter partes review with respect to a subset of the claims of which review is sought and suggests that the USPTO’s interpretation, adopted after notice-and-comment rulemaking, is at a minimum reasonable and is therefore entitled to Chevron deference.

Respondent echoes the efficiency arguments presented by the Federal respondent and suggests that neither the plain text of Section 318(a), in isolation or in context, nor the purposes of the Act are served by forcing patent owners and the Board to expend resources litigating invalidation arguments to a final written decision where the petitioner failed to show a reasonable chance of success at the institution stage. Thus, respondent suggests that the Board’s adoption of the partial-decision regime is a reasonable interpretation of the Act’s provisions and that the USPTO “need not otherwise deny a petition outright or use its limited resources litigating unreasonable arguments by petitioners.”

Respondent argues that, because the Act provides for a progression of steps from institution of the inter partes review through the issuance of the final written opinion, the differences in language at the final written opinion step expressed in the text of Section 318(a) should continue “the narrowing progression from ‘may request,’ to challenged in ‘the petition,’ to remaining ‘challenged’ after institution; should be understood to apply to claims challenged in the specific stage in which the term is used; and should be interpreted to exclude any claims for which the petitioner had failed to make a proper challenge at the institution stage.”

Respondent further notes that the estoppel provisions of the Act, Section 315, contemplate that not all challenged claims will be the subject of a final written decision. This section states that a petitioner in “an inter partes review of a claim in a patent under this chapter that results in a final written decision” is estopped from asserting “that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review.” Thus, respondent suggests that “if the Board does not institute review as to a particular claim, there has been no adjudication and therefore no repeated adjudication of the same issue later in district court.”

As amicus in support of respondents, the Houston Intellectual Property Law Association (the HIPLA) argues that Congress allowed the USPTO broad discretion in deciding whether to review patents challenged by petitioners seeking review under Section 314(d). HIPLA suggests that inter partes review was “never intended to wholly prevent validity challenges in parallel district court litigation” in dismissing potential estoppel concerns presented by the Board’s use of a partial-decision regime. Rather, HIPLA suggests that the Board’s partial-decision regime provides an expedited pathway for patent owners to enforce their rights.

HIPLA’s argument looks to the language of Section 318(a), which provides that “[i]f an inter partes review is instituted and not dismissed,” then the only claims that remain “challenged” at the stage of the inter partes review process governed by Section 318(a) are those for which the Board has instituted review under Section 314(a). Thus, HIPLA notes that “at least some of the claims for which the Board declines to institute review are those on which the petitioner has failed to show even a reasonable likelihood that it would prevail in establishing that the claims are unpatentable” and that such determinations are “final and nonappealable” under Section 314(d). HIPLA suggests that Section 318(a) be properly read to exclude claims to which the Board has properly declined to institute review as having been “challenged by the petitioner.”

HIPLA also suggests that the Board’s partial-decision regime allows the USPTO to operate efficiently while improving patent quality. HIPLA notes that inter partes review does not replace the invalidity portions of a district court litigation. Rather, HIPLA argues that, under Section 311(b), inter partes review is limited to invalidity challenges that could be raised under Sections 102 or 103 and only on the basis of prior art consisting of patents or
Petitioner replies by arguing that the Federal Circuit failed to analyze the plain language of Section 318(a)’s mandate. In a position echoed by respondents, petitioner argues that the Federal Circuit erred in looking to Section 314(a) of the Act, which sets forth the “threshold” for the Director’s discretionary decision whether or not to institute inter partes review. The reference there to “the claims challenged in the petition,” when compared to Section 318(a)’s reference to “any patent claim challenged by the petitioner,” yields the conclusion, according to respondents, that “the text makes clear that the claims that the Board must address in the final decision are different than the claims raised in the petition.” Petitioner argues that there is no statutory provision under the Act that allows the Board to have the discretion to address fewer claims than those challenged by the petitioner in the final written decision.

Petitioner reiterated the argument that the Federal Circuit failed to address the plain language of Section 318(a), “which is mandatory (‘shall’), complete (‘any claim challenged’), and strictly additive (‘any new claim added under section 316(d)’).” Petitioner argues that the combination of the “shall” mandate with the broad and inclusive “any claim” language compels the conclusion that a proper interpretation of Section 318(a) requires that “the final written decision must reach all of the claims challenged by the petitioner,” and that the USPTO “cannot reduce Congress’s mandate by administrative fiat.”

Petitioner suggests that the Board’s adoption of the partial-decision regime erroneously eliminates the Act’s intended use as an efficient substitute for district-court invalidity litigation. Petitioner further argues that the Board’s use of the partial-decision regime undermines the Act’s congressional intent, “which was designed to create an effective, efficient, and fair system for determining patentability.”

SIGNIFICANCE

Section 318(a) provides that the Patent Trial and Appeal Board in an inter partes review “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” This case involves whether Section 318(a) requires the Board to issue a final written decision as to every claim challenged by the petitioner, or whether it allows the Board to issue a final written decision with respect to the patentability of only some of the claim challenged by the petitioner. A decision reversing the Board’s adoption of the partial-decision regime and requiring an issuance of a final written decision that addresses each claim “challenged” by the petitioner would provide clarity to the scope of all of the claims that were initially challenged by the petitioner and would allow for appeal of the entirety of the “challenged” claims by the Federal Circuit, which has a reputation of being hostile to patent owners. However, the Court’s affirmation of the Board’s use of a partial-decision regime could serve to maximize the USPTO’s efficiencies and allocations of scarce time and money resources, as well as protect the patent owner from having to defend all challenged claims when the inter partes review petitioner has failed to meet its burden in the first place.

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Is Tax Obstruction Limited to Cases in Which the Defendant Interferes with a Known Proceeding?

**CASE AT A GLANCE**

Business owner Carlo J. Marinello, II, failed to file personal or business taxes or keep books and records. Years later and unbeknownst to Marinello, the Department of Justice (DOJ) worked with the Internal Revenue Service (IRS) and opened an investigation against Marinello. A federal jury in New York convicted Marinello of nine counts of tax fraud and obstruction. Marinello appealed his obstruction conviction, arguing that he could not have obstructed an investigation of which he had no knowledge. The district court rejected Marinello’s motions for acquittal and a new trial. The Second Circuit affirmed and denied a petition for rehearing en banc, holding that knowledge of a pending investigation is not an element of the offense of obstruction in tax cases. A circuit split exists; the Sixth Circuit held that knowledge of an existing investigation is an element of the offense.

**Carlo J. Marinello, II v. United States of America**

*Docket No. 16-1144*

*Argument Date: December 5, 2017*

*From: The Second Circuit*

by Rachel K. Paulose

DLA Piper LLP, Minneapolis, MN

**ISSUE**

Does 26 U.S.C. § 7212(a), the provision of the Internal Revenue Code which prohibits obstruction, include as an element of the offense the defendant’s awareness of a pending IRS audit, investigation, or case?

**FACTS**

Carlo J. Marinello, II, owned and led a freight courier service based in western New York. Marinello’s company served customers throughout the United States and Canada.

Marinello did not run a tight ship. He paid his employees in cash. He refused to file W-2s. He routinely shredded company records. He used company assets to fund his mortgage payments and his mother’s senior living bills. Although his company made profits in the hundreds of thousands of dollars each year, Marinello neglected to maintain corporate books and records; declined to file personal income tax returns; and failed to file corporate income tax returns from 1992 to 2010.

The IRS began investigating Marinello in 2004, without his knowledge. The next year, Marinello sought counsel from a lawyer and an accountant, both of whom informed Marinello of his legal obligations to keep records and file tax returns. Marinello did not heed this advice. In 2009, the IRS finally interviewed Marinello, during which time Marinello admitted his sloppy business practices.

On February 14, 2012, a federal grand jury indicted Marinello on nine counts of tax fraud, including for failing to file individual and corporate tax returns and obstruction. The grand jury superseded the indictment on October 4, 2012. Marinello’s jury trial began on August 5, 2014. After the evidence closed on August 11, 2014, Marinello moved for a judgment of acquittal, which the court denied. The jury convicted Marinello on all counts.

Marinello filed a Fed. R. Crim. P. 29 motion for a judgment of acquittal and a Fed. R. Crim. P. 33 motion for a new trial. Marinello asserted that he could not have committed obstruction under Section 7212 because he was unaware of a pending IRS investigation against him. Without that knowledge, Marinello claimed he could not have interfered with the “due administration” of the law. Marinello also asserted that he did not possess the requisite criminal intent to “corruptly” obstruct or impede the administration of the criminal code.

Section 7212(a) provides as follows:

*Corrupt or forcible interference.* Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term “threats of force,” as used in this subsection...
On June 26, 2015, the district court denied Marinello's motions. The district court disposed of Marinello's “due administration” argument and held that “knowledge of a pending investigation is not an essential element of the crime.” The district court also pointed to substantial evidence of Marinello’s corrupt intent, including his commingling of personal and professional funds, destruction of records even after obtaining the advice of professionals, and false statements to the IRS.

The court sentenced Marinello to 36 months in prison and ordered him to pay more than $350,000 in restitution. Marinello appealed his conviction to the United States Court of Appeals for the Second Circuit.

On October 14, 2016, the Second Circuit affirmed Marinello’s conviction. The court first rejected Marinello’s argument that Section 7212's statutory prohibition on the “due administration of this title” required Marinello’s knowledge of a pending investigation. The Second Circuit affirmed the district court. The appellate court cited the plain meaning of phrase, the statute’s legislative history, internal DOJ guidance, and the decisions of sister courts. Second, the court disposed of Marinello’s theory that his conviction for obstruction could not stand upon an omission, rather than an affirmative act.

The Second Circuit denied rehearing en banc on February 15, 2017. Judges Dennis Jacobs and José Cabranes dissented from this denial, with Judge Jacobs writing, “The panel weighed in on the wrong side of a circuit split, affirmed a criminal conviction based on the most vague of residual clauses, and in so doing has cleared a garden path for prosecutorial abuse.”

Marinello filed a petition for a writ of certiorari on March 21, 2017. The Supreme Court granted the petition for a writ of certiorari on June 27, 2017.

CASE ANALYSIS

Marinello argues that the plain language of Section 7212(a) reveals that Congress intended the clause to apply only to obstruction of known IRS proceedings. Marinello points to a parallel statute, 18 U.S.C. Section 1503(a), which generally prohibits obstruction of justice and specifically prohibits interference with the “due administration of justice.” Congress adopted Section 1503 in 1948; Marinello argues the language of Section 7212(a), adopted in 1954, tracks nearly verbatim the language of Section 1503(a). Later, the Court interpreted Section 1503(a) to require knowledge of a proceeding as an element of the offense. With this context in mind, Marinello urges the Court to adopt a similar interpretation of Section 7212(a).

The government argues that a conviction for obstruction under Section 7212(a) does not require as an element of the offense proof of the defendant’s knowledge of a pending proceeding. Such a requirement appears nowhere in the text of Section 7212(a). According to the government, the plain meaning of the “due administration of the title” includes any action that compromises the IRS’s ability to calculate, assess, and collect taxes. Further, the government argues Section 1503(a) offers no insight on Section 7212(a), because Section 1503(a) explicitly refers to the “due administration of justice,” which the government argues implicitly invokes a pending judicial proceeding.

The definitional fight between the parties may come down to the meaning of “due administration.” Marinello regards Section 7212(a)’s reference to “due administration” as applicable only to known proceedings. Marinello asserts the plain meaning of “due administration” is not so plain and must be construed from the perspective of analogous case law, including the case law interpreting Section 1503(a). Marinello points to Court decisions dating to the nineteenth century requiring a Section 1503(a) prosecution to be tied to a particular investigation, not law enforcement generally. A more general interpretation, warns Marinello, would transform Section 7212(a) into an all-purpose tax felony law.

The government argues the plain meaning of “due administration” implicates any aspect of the IRS’s charge to enforce the tax code. The IRS’s charge is necessarily broad as the scope of the tax laws is vast. To give full force and effect to the term “due administration,” the government urges the Court to interpret it to include activity well preceding any formal investigation. The government warns that endorsing Marinello’s theory would reward criminals, when in fact the “due administration” of the tax laws depends on citizens voluntarily and proactively complying with their duties. In light of taxpayer responsibilities, the government describes Section 7212(a) as an omnibus clause applicable to any attempt to interfere with the IRS’s mission.

Marinello contends that a broad reading of the statute is unconstitutional. Marinello cites the Court’s recent white-collar precedent in arguing the statute should be interpreted strictly. Citing a string of cases ranging from Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S. Ct to Yates v. United States, 135 S. Ct. 1074 (2015) to McDonnell v. United States, 136 S. Ct. 2355 (2016), Marinello urges the Court to continue to look askance at statutes which are so broadly worded as to perhaps encompass unwitting conduct. In each of the aforementioned cases, the Court declined to interpret residual clauses of criminal statutes to include the broad interpretation the government sought.

The government denies the statute is so generally worded as to be vulnerable to attack on constitutional grounds. The government acknowledges that obstruction assumes a factual connection between the alleged obstructive acts or omissions and the administration of the tax laws. However, the government contends that an obstruction conviction does not require any proceeding to be actually pending. To hold otherwise would be to render meaningless the taxpayer’s obligations to comply throughout the year with the various provisions of the tax code.

Marinello claims the government’s overbroad reading of the statute creates an illegal all-purpose felony statute. Marinello asserts that if Section 7212(a) is interpreted as a felony catch-all, it renders the rest of the statute superfluous. Separate sections of the statute specifically and separately prohibit interference with officers and official acts. Marinello urges the Court to interpret Section 7212(a) in a way that does not duplicate the other provisions of the statute.

The government argues that the scienter element of Section 7212(a) restricts its breadth. The government defines mens rea to require
that a defendant knows that his actions impact the tax code, that he intentionally takes such actions, and that his purpose is to obtain advantages which the defendant knows to be unlawful. The government contends that many tax laws overlap because Congress intended the IRS to have a wide array of enforcement tools at its disposal.

Marinello argues that the government’s vague interpretation of the statute could be alleged in almost any felony indictment, using the same acts to allege both a primary felony count as well as an obstruction count. This practice violates the prohibition against multiplicity in criminal indictments, which prohibits the government from alleging the same elements as part of two separate crimes. The proof is in the pudding, and Marinello points to statistics showing the government has increasingly brought obstruction charges in cases alleging other felonies.

The government contends that Section 7212(a) is phrased generally because Congress intended it to apply to acts which occur well before the government launches an investigation. The government is untroubled by the replication of the same factual allegations as the bases for multiple counts. The “administration of this title” to which Section 7212(a) refers covers the waterfront of IRS duties. Administration is not a discrete event, but covers all the duties incumbent upon each taxpayer: keeping accurate tax records, seeking expert assistance as necessary, and filing truthful tax forms.

Marinello insists the statute’s “corruptly” mens rea requirement does not save the statute from its constitutional infirmities. First, Marinello claims the government has improperly conflated “corruptly” with “willfully.” The difficulty is that in any scenario where a citizen knowingly takes action he is unaware is unlawful, the government could characterize that action post hoc as corrupt. Second, Marinello argues that the government’s theory that failing to keep records or provide information to an accountant, absent an independent recordkeeping requirement, is so amorphous as to be boundless. Marinello suggests many Americans innocently have violated the statute many times over. Third, Marinello claims that the potential for abuse requires the Court to cabin the definition of “corrupt” in criminal cases. Without any limits, the specter of menacing prosecutions by overzealous prosecutors is a real and present danger.

The government answers that the statute’s “corruptly” mens rea requirement appropriately limits its enforcement to situations where the defendant intends to obtain a benefit which he knows is illegal. The government characterizes the meaning of “corruptly” in Section 7212(a) as even more rigorous as the same term’s meaning in other obstruction statutes. By requiring the defendant to act with the specific intent to block the effective functioning of the tax code, the government asserts it pursues only those defendants who understand the consequences of their actions. The government claims the merely confused, rather than the malevolent, will be spared prosecution.

Marinello urges the Court to apply the rule of lenity in interpreting what it describes as an unconstitutional statute. Marinello argues that any ambiguity should be interpreted in his favor. Marinello claims the crime of which he is convicted is more typically classified as a misdemeanor. Marinello argues that Congress’s failure to speak in clear terms should not result in harm to him. Moreover, it should not empower a reckless prosecutor who could bend the statute to his liking. Because the statute did not give him due warning that his behavior crossed a line, Marinello insists his conviction should be reversed.

The government critiques Marinello’s public policy arguments. The government disputes Marinello’s arguments that Section 7212(a) overlaps with other criminal statutes or chills lawful conduct. The government mocks Marinello’s claim that lawful conduct could be stifled and challenges Marinello to name specific instances of appropriate action repressed by wrong judgments about what the tax code permits or prohibits. The government also contends that the rule of lenity has no application in a case where, as here, the statute is clear.

SIGNIFICANCE

Professors, white collar defense lawyers, and judges have faulted Marinello’s obstruction prosecution as another example of prosecutors run amuck. Citing an array of recent Supreme Court reversals from United States v. Aguilar, 515 U.S. 593 (1995), to McDonnell v. United States, 136 S. Ct. 2355 (2016), the Second Circuit’s own Judge Jacobs, joined by Judge Cabranes, predicted the Court would be concerned about another overbroad statute which failed to give a defendant fair warning about criminal consequences. In dissenting from the Second Circuit’s denial of rehearing en banc, Judge Jacobs wrote, “At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, ‘Show me the man and I’ll find you the crime.’” This case has the potential to set an important marker on the limits of expansive criminal statutes.
ISSUE

Does the statutory language in the Prison Litigation Reform Act that reads “not to exceed 25 percent” mean any amount up to 25 percent or exactly 25 percent?

FACTS

Petitioner Charles Murphy was an inmate at Vandalia Correctional Center in Illinois where respondents Robert Smith and Gregory Fulk were guards. In July 2011, Murphy went to his assigned seat in the cafeteria and noticed food and water in his seat. He asked one of the respondents to notify an inmate working in the cafeteria that there was food and water in his seat. This apparently angered Smith and Fulk.

Smith ordered Murphy to clean it up himself. When Murphy replied, Smith told Murphy “to get the F out of my chow hall.” Another guard then handcuffed Murphy, escorted him out of the cafeteria, and deposited him in the prison's segregation unit. Smith punched Murphy in the right eye. The guards further manhandled Murphy in the cell, causing Murphy to hit his head on the toilet. Smith and Fulk removed Murphy’s clothes and left him naked and bleeding in the cell.

A nurse arrived 30 minutes later and found that Murphy’s eye socket was crushed. Murphy filed a civil rights suit against Smith, Fulk, and two other officers alleging a violation of the Eighth Amendment. The jury awarded Murphy $241,001 in compensatory and punitive damages against respondent Smith and $168,750 in compensatory and punitive damages against Fulk. The district court remitted the combined damage award to $307,733.82.

The district court awarded attorney fees to Murphy, the prevailing party, to the tune of $108,446.54, and determined that 10 percent of the judgment should be applied to cover the attorney’s fees. The district court ordered that Murphy pay $30,773.48 (10 percent of the award) of the attorney’s fees from the judgment and the remainder of the attorney’s fees be paid by the respondents.

Smith and Fulk appealed to the U.S. Court of Appeals for the Seventh Circuit. The appeals court affirmed as to liability but reversed as to the division of attorney’s fees. The Seventh Circuit determined that Murphy should pay 25 percent of the attorney’s fees from the judgment. The Seventh Circuit read the attorney fee statute, 42 U.S.C. § 1997e(d)(2) in the Prison Litigation Reform Act differently than the district court. Instead, the Seventh Circuit interpreted the statute as requiring Murphy to pay 25 percent of the attorney’s fees from the judgment.

The Seventh Circuit’s reasoning differs from that of several other circuit courts of appeals. Murphy petitioned to the Supreme Court, which granted review.

CASE ANALYSIS

The statute in question, 42 U.S.C. Section 1997e(d)(2), provides for how attorney’s fees should be awarded in prisoner civil rights cases. The statute reads:
Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

Murphy argues that the statutory language plainly provides for an upper limit of 25 percent but provides for no lower limit. The language “not to exceed 25 percent” would seem to indicate a range up to 25 percent. This appears to be the plain language reading of the statute. Murphy writes that “[h]ere, the text is so clear that interpretation can end there as well.”

Murphy also points out that if Congress meant to deny district courts the discretion on these attorney’s fees awards, it could have done so easily. The language provides district courts with discretion that they have had for decades in such cases, Murphy argues.

As noted, the language “not to exceed 25 percent” certainly seems to favor Murphy’s reading of the statutory language.

However, Smith and Fulk contend that the statute’s language “not to exceed 25 percent” must be interpreted alongside the other phrase in the statute that reads “to satisfy the amount of attorney’s fees awarded against the defendant.” According to the respondents, the phrase “not to exceed 25 percent” means that Congress expected “that some fee awards will be satisfied by applying less than 25 percent of the judgment.” In other words, “[i]f 10 or 20 percent of the judgment is enough to satisfy the fee award, that is all that need be applied.”

Smith and Fulk also argue that the statute must be interpreted holistically in light of the corresponding provisions of the attorney fee statute and the overall purpose of the Prison Litigation Reform Act. They argue that all the other parts of Section 1997e(d) “constrain judicial discretion in order to limit the defendant’s exposure to attorney’s fee liability in PLRA actions.”

Subsection (d)(1) limits damage awards by requiring they be directly related and proportional to the actual damages suffered by the prisoner. Subsection (d)(3) caps attorney’s fees at an hourly rate equal to 150 percent of the rate awarded to appointed counsel. Subsection (d)(4) provides that a defendant is not liable for any additional fees the prisoner may have agreed to pay his attorney.

Thus, according to Smith and Fulk, subsection (d)(2) should also be read in this spirit of narrowing fee awards in prisoner lawsuits and discouraging the filing of frivolous inmate claims.

**SIGNIFICANCE**

The decision gives the Court the opportunity to resolve the circuit split over the statutory construction of the statute. The Seventh Circuit below read the statute as requiring prevailing prisoners to pay 25 percent of the attorney’s fees from their judgments, while the Second, Third, Sixth, and Eighth Circuits have read the statute as giving district courts discretion to require prisoners to pay an amount not to exceed 25 percent of the attorney’s fees from the judgment.

The American Civil Liberties and others in their amicus briefs contend that a ruling affirming the Seventh Circuit will weaken the deterrent effect of damage awards against those who violate prisoner rights: “A rule that categorically forbids the victims of such abuse from recovering more than 75 percent of their damages would weaken arbitrarily the important role of damages under § 1983 as a source of recompense for victims and a check against future misconduct.”

The Court could provide guidance on statutory construction, particularly when a plain language reading of the statute may not be consonant with the overall purpose of the act.

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In Support of Petitioner Charles Murphy

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In This Issue

FIRST AMENDMENT
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission
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FOURTH AMENDMENT
Carpenter v. United States
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PRISONER RIGHTS
Murphy v. Smith
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SECURITIES LAW
Digital Realty Trust, Inc. v. Somers
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SEPARATION OF POWERS
Oil States Energy Services, LLC v. Greene’s Energy Group, LLC
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STATE AND FEDERAL JURISDICTION
Cyan, Inc. v. Beaver County Employees Retirement Fund
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STATES’ RIGHTS
Christie v. National Collegiate Athletic Association and New Jersey Thoroughbred Horsemen’s Association, Inc. v. National Collegiate Athletic Association
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WHITE COLLAR CRIMINAL LAW
Carlo J. Marinello, II v. United States of America
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