2018
LAWYERS CONFERENCE

COURSE MATERIALS

DELRAY BEACH MARRIOTT
DELRAY BEACH, FLORIDA
SEPTEMBER 6 – 8, 2018

AMERICAN CIVIL LIBERTIES UNION
Florida

2018 LAWYERS CONFERENCE
Delray Beach Marriott

Co-Sponsored by:

Rosemary Wilder & Karen Costello-Wilder, Gelber Schachter & Greenberg, P.A., Beltz & Beltz, P.A., Carlton Fields, Joel S. Perwin, Marlow, Adler, Abrams, Newman & Lewis Attorneys at Law, The Gwen S. Cherry Black Women Lawyers Association

Program Agenda

CLE for 12.0 General credit hours, including 1.0 Ethics hour

Thursday, September 6, 2018

6:00 p.m. – 7:30 p.m. Welcome Reception

Friday, September 7, 2018

8:00 a.m. – 9:00 a.m. **Breakfast served**

9:00 a.m. – 9:10 a.m. **Welcome**

9:10 a.m. – 10:20 a.m. **America's Evolving Immigration Policy and Its Impact on Asylum Seekers**

Moderator: *Amien Kacou*, Staff Attorney, ACLU of Florida

Panelists: *Kendall Coffey*, University of Miami School of Law, Coffey Burlington, PL

Shalini Ray, University of Alabama School of Law

Lauren Gilbert, St. Thomas University School of Law

10:30 a.m. – 11:20 a.m. **Balancing Interests: Free Speech in Today's Political Climate**

Moderator: *Benjamin Stevenson*, Staff Attorney, ACLU of Florida

Panelists: *Daniel Aaronson*, Benjamin, Aaronson, Edinger & Patanzo, PA, Fort Lauderdale, FL

David Caicedo, Florida State Director – Vote Mob & Student Power Network

11:30 p.m. – 12:20 p.m. **Eleventh Circuit Update**

Prof. Michael Masinter
Nova Southeastern University Shepard Broad Law Center

12:30 p.m. – 1:45 p.m. **Keynote Luncheon: The Role of Courts, Lawyers, and Civil Society in the Defense of Liberty in the Trump Era**

Introduction: *Prof. JoNel Newman*
University of Miami School of Law

Speaker: *David Cole*, National Legal Director, ACLU

2:00 p.m. – 3:10 p.m. **Election Protection in 2018 and Gearing up for the 2020 Redistricting Cycle**

Moderator: *Nancy G. Abudu*, Legal Director, ACLU of Florida

Panelists: *Daniel A. Smith, Ph.D.*, Chair and Professor, University of Florida, Department of Political Science

Kira Romero-Craft, Associate Counsel, LatinoJustice PRLDEF

3:20 p.m. – 4:30 p.m. **Additional and Less Explored Frontiers in Advancing LGBTQ Rights**

Moderator: *Daniel Tilley*, Staff Attorney, ACLU of Florida

Panelists: *Alison Foley-Rothrock*, Attorney and Firm Owner, Foley Immigration Law Inc.

Landon (LJ) Woolston, MSW, Homeless Youth Programs & Services Manager, Pridelines

Mary Greenwood, Managing Attorney, Brandon Family Law Center, LLC

4:40 p.m. – 5:45 p.m. **Prosecutors & Public Defenders: Strategic Partnerships for Criminal Justice Reform**

Moderator: *Melba Pearson*, Deputy Director, ACLU of Florida

Panelists: *Aramis Donell Ayala*, State Attorney
Ninth Judicial Circuit Court of Florida

Carlos Martinez, Public Defender
Eleventh Judicial Circuit Court of Florida

6:00 p.m. – 7:30 p.m. **Reception and Award for Lifetime Achievement**

Honoree: Howard Simon, Executive Director of the ACLU of Florida, for his 44 years of service to the ACLU and in celebration of his retirement

Saturday, September 8, 2018

8:00 a.m. – 9:00 a.m. **Breakfast served**

9:00 a.m. – 10:20 a.m. **Prevailing Over Prisons: Litigation and Policy Strategies for Reform**

Moderator: *Jacqueline Azis*, Staff Attorney, ACLU of Florida

Panelists: *Lisa Graybill*, Deputy Legal Director
Southern Poverty Law Center

Sabarish ("Sab") Neelakanta, General Counsel and Litigation Director, Human Rights Defense Center

Randall ("Randy") Berg, Executive Director
Florida Justice Institute

10:30 a.m. – 11:20 a.m.	**The Ethics of Civil Procedure and Collecting Attorneys' Fees: Common Pitfalls**	
	Moderator:	*Marc Gold*, Retired Judge, Broward County, FL
	Panelists:	*James K. Green, P.A.*, West Palm Beach, FL
		Prof. Michael Masinter, Nova Southeastern University Shepard Broad Law Center
11:30 a.m. – noon	**Discovery and E-filing – Amendments and Other Changes to Rules**	
	Michael Barfield, Law Office of Andrea Flynn Mogensen, P.A.	

KEYNOTE LUNCHEON SPEAKER

DAVID COLE

In his role as national legal director, David Cole directs a program that includes approximately 1,400 state and federal lawsuits on a broad range of civil liberties issues. He manages 100 ACLU staff attorneys in New York headquarters, oversees the organization's U.S. Supreme Court docket, and provides leadership to more than 200 staff attorneys who work in ACLU affiliate offices.

Cole has litigated many constitutional cases in the Supreme Court, including Texas v. Johnson and United States v. Eichman, which extended First Amendment protection to flag burning; National Endowment for the Arts v. Finley, which challenged political content restriction on NEA funding; and most recently, Masterpiece Cakeshop v. Colorado Civil Rights Commission, in which the ACLU represented a gay couple refused service by a bakery because they sought a cake to celebrate their wedding.

Cole is on leave from Georgetown University, where he has taught constitutional law and criminal justice since 1990, and is the Hon. George J. Mitchell Professor in Law and Public Policy. Cole writes regularly for The Nation, New York Review of Books, Washington Post, and many other periodicals. He is the author or editor of 10 books, several of which have won awards, including the Palmer Civil Liberties Prize, the American Book Award, and prizes from the American Political Science Association, the Boston Book Review, and the Jesuit Honor Society. His most recent book, "Engines of Liberty: How Citizen Movements Succeed," published in 2016, examines the strategies civil society organizations employ to change constitutional law. Cole has received two honorary degrees and many awards for his civil liberties and human rights work, including the inaugural Norman Dorsen Presidential Prize from the ACLU, awarded to an academic for lifetime commitment to civil liberties.

PANELISTS

DANIEL AARONSON

Daniel Aaronson, Benjamin Aaronson Edinger & Patanzo (Ft. Lauderdale), focuses his practice on First Amendment challenges, adult entertainment law, and criminal defense. He has successfully challenged numerous adult entertainment ordinances as a violation of free speech. He is a frequent lecturer and author of articles about the First Amendment. He graduated from the University of Florida in 1976 and the Cumberland School of Law in Birmingham, Alabama in 1979.

NANCY ABUDU

Nancy Abudu joined the ACLU of Florida as the Legal Director in 2013. Prior to becoming Legal Director, Nancy served as senior staff counsel with the ACLU's Voting Rights Project where she litigated civil rights cases in federal and state courts, and provided legal advice to ACLU affiliates around the country, cooperating attorneys, and others seeking assistance and information on issues such as felon disfranchisement, redistricting, challenges to photo ID and proof of citizenship laws, and general enforcement of the Voting Rights Act of 1965.

She began her legal career as an associate with Skadden, Arps, Slate, Meagher & Flom LLP in New York in the Products Liability/ Mass Tort department. During her time with the firm, she was also a Skadden Extern with the Legal Aid Society of New York and represented victims of domestic violence under the Violence Against Women Act. Her professional experience also includes being a staff attorney with the Eleventh Circuit Court of Appeals in Atlanta, serving as an International Election Observer for the Organization of Security and Co-operation in Europe, and testifying on behalf of environmental justice groups before the United Nations Commission on Human Rights.

Prior to moving to Miami, she was the Chair of the Georgia Chapter of the National Lawyers Guild and served on the advisory board for Re-Entry Connection, Inc. (a holistic rehabilitation program for female ex-offenders). She was also co-chair of the Political Action Committee for the Georgia Association of Black Women Attorneys and served as a state legislative coordinator for Amnesty International USA. She currently serves on the ABA's Advisory Commission to the Standing Committee on Election Law, and is a Senior Fellow with the Environmental Leadership Program based in Washington, D.C.

She received her B.A. from Columbia University, her J.D. from Tulane Law School, and she is admitted to practice in Florida, New York, Georgia, the U.S. Supreme Court, and several other federal courts.

ARAMIS DONELL AYALA

Aramis Donell Ayala received a Bachelor of Arts in Political Science from the University of Michigan, a Master of Science in Criminal Justice from the University of Central Florida, and a Juris Doctor from the University of Detroit-Mercy School of Law. On November 9, 2016 she was elected by Orange and Osceola County voter to serve as State Attorney for the Ninth Judicial Circuit Court of Florida. Prior to running for this office, Ms. Ayala was an Assistant State Attorney in the Homicide/Major Crimes Unit in Orlando, Florida. In addition to serving as a prosecutor she committed nearly a decade of her career as an Assistant Public Defender, representing indigent criminal defendants. She is a member of the adjunct faculty at Florida A&M College of Law and the University of Central Florida's Legal Studies Department. She has also taught at Hillsborough Community College.

JACKIE AZIS

Jackie Azis joined the staff of the ACLU of Florida in February 2017 as a staff attorney who will focus on criminal justice issues.

Jackie studied journalism at the University of Florida and went to law school at the University of North Carolina School of Law. During law school, Jackie interned with the ACLU of North Carolina and the ACLU-Capital Punishment Project, and served as the ACLU president for the UNC Law chapter. She received the Norman Smith Award from the ACLU of North Carolina for outstanding volunteer work and was inducted into the James E. and Carolyn Davis Society at the UNC School of Law, an honor bestowed upon only eight students from each law graduation class based on academic and personal excellence.
In her final year of law school, Jackie worked for the Orange County (North Carolina) Public Defender's Office. Before joining the ACLU of Florida, Jackie worked for a civil rights and employment law firm in Peoria, Illinois and then served as an assistant public defender in the Fifth Judicial Circuit of Florida, representing hundreds of clients facing misdemeanor and felony charges. In 2016, the Florida Association of Criminal Defense Lawyers presented Jackie with the James T. Miller Scholar award recognizing outstanding young criminal defense lawyers.

MICHAEL BARFIELD

Michael Barfield is a paralegal consultant focusing on the enforcement of open government laws. He is an expert and frequent lecturer on Florida's Public Records Act and Sunshine Law. Michael previously served two terms as Vice President of the ACLU of Florida and is currently the organization's President. He also chairs the legal panel of the Sarasota Chapter of the ACLU of Florida. He is a lifelong member of the Florida Association of Criminal Defense Lawyers and received the organization's Extra Mile Award in 2008 for work related to indigent criminal defense. Michael is an Associate Member of the American Bar Association, Criminal Justice Section and the State and Local Government Section, serving on the Racial Justice & Diversity Committee, Electronic Communications Committee, and the Appellate & Habeas Practice Committee. Michael lives in Sarasota, Florida, and was recognized by Sarasota Magazine as one of the 25 most influential individuals in his community.

RANDALL C. BERG, JR.

Randall C. Berg, Jr. is the Executive Director of the Florida Justice Institute and has held that position since 1978. During that time, Randy has been involved in numerous individual and major statewide class action lawsuits for injunctive relief and damages aimed at improving Florida's prisons and jails, as well as numerous other large impact cases for the poor in the areas of housing discrimination, disabilities, and for violations of Floridians' civil rights and civil liberties. He also established and directs the Volunteer Lawyers' Project for the U.S. District Court for the Southern District of Florida. He previously established and directed the Public Interest Law Bank (now known as "Put Something Back") for the Dade County Bar Association. He was a consultant to the ABA and LSC to establish other pro bono programs nationwide. Randy worked for years to develop our nation's first interest on lawyers' trust account (IOLTA) program in Florida and assisted nationwide in establishing IOLTA programs and defending the constitutionality of IOLTA as the Executive Director and founder of the National IOLTA Clearinghouse and later as Legal Counsel for the National Association of IOLTA Programs (NAIP). Randy is past Chairman of the Corrections Committee of The Florida Bar, past President and Legal Panel Chair of the ACLU of Florida and is an Adjunct Professor of Law at the University of Miami School of Law. Among the honors Randy has received are Common Cause's Public Service Achievement Award, the Human Rights Award from Amnesty International, the Stanley Milledge Award from the ACLU, and several awards for developing and defending IOLTA from The Florida Bar Foundation, the ABA and NAIP. Randy is a former officer in the U.S. Navy. He graduated from the University of North Carolina at Chapel Hill and the George Mason University School of Law.

DAVID CAICEDO

David Caicedo, Florida State Director - Vote Mob & Student Power Network has over 10 years of campaign and mobilization experience ranging from local, statewide and national electoral campaigns to more issue-based movement building campaigns. His worldview is shaped by his upbringing in Brownsville, Brooklyn whose motto is “never did, never will;” and having experienced the immigrant struggle for citizenship first hand as the first U.S. born child of Colombian immigrants, who despite working fulltime union jobs, still lived in poverty. Before his current role, he was with a tenant support unit within the current New York City administration. After seeing that the struggles of poverty and marginalization was not only his, David was inspired to focus his career on what he calls the “fight left.” His goal is to reshape political discourse through escalated youth engagement in electoral and movement politics.

KENDALL COFFEY

Kendall Coffey, Adjunct Faculty, J.D. Program, is a founding member of the law firm Coffey Burlington, based in Miami, and currently serves as the Chair of the Federal Judicial Nominating Commission for South Florida. Mr. Coffey served during the 1990’s as the U.S. Attorney for the Southern District of Florida, the nation’s largest federal prosecution office. As U.S. Attorney, he was responsible for thousands of federal criminal prosecutions as well as civil lawsuits involving the United States. After his public service, he resumed private law practice with major litigation roles in such high-profile cases as the Elian Gonzalez international custody battle, and the 2000 U.S. Presidential Election Recount. Today, Mr. Coffey’s law practice areas include business disputes and litigation, national as well as international litigation, fraud cases, enforcement of contracts and loan agreements, government disputes and defense of criminal investigations. A frequent lecturer, he has been a guest Legal Analyst providing legal commentary for national and international networks such as CNN International, Telemundo, Univision, Canadian Broadcasting Company, CNBC, CNN, CNN Headline News, FOX, MSNBC and NBC. Mr. Coffey is also an adjunct faculty member for University of Miami School of Law and Florida International University. In addition, Mr. Coffey is on the Advisory Board of the Russian American Chamber of Commerce and writes a monthly legal column for its newsletter. He presently serves on the Steering Committee of the Russia Eurasia Committee of the American Bar Association’s International Law Section. At Miami Law he teaches “Florida Constitutional Law.”

ALISON FOLEY-ROTHROCK

Alison Foley-Rothrock; Attorney and Firm Owner, Foley Immigration Law Inc. Drawn to immigration law by her desire to fight injustice and a broken system, Attorney Alison Foley attended Roger Williams University School of Law on a full academic scholarship. She placed among the top third of the 2004 graduating class, received several other academic awards, and has been featured in the alumni magazine. After graduating, Attorney Foley worked for Progreso Latino, Rhode Island’s largest non-profit organization serving the state’s Latino population. In 2008, Attorney Foley became the legal director of an immigration program at Catholic Social Services aimed at assisting victims of domestic violence and other crimes and was named Lawyer of the Year by Rhode Island Lawyer Weekly in 2009. In 2010, Attorney Foley moved to the Sunshine State with her two sons, Paul and Jordan, where she now oversees a growing private practice. Foley Immigration Law currently has offices in the beautiful Ybor City area of Tampa and in downtown Lakeland. While in private practice, Attorney Foley continues to invest in her community through political activism and volunteer work with several local, grassroots organizations.

LAUREN GILBERT

Lauren Gilbert was an associate with the law firm of Arnold & Porter in Washington, D.C. from 1988-1991, a Fulbright Lecturer in Law in Costa Rica in 1991, an attorney-investigator for the United Nations Truth Commission for El Salvador from 1992-1993, the Director of the Women and International Law Program at American University’s Washington College of Law from 1994-1998, and a legal services attorney from 1998 until 2002, before joining the faculty at St. Thomas in May 2002. She served as an election monitor in Santiago, Chile in 1989 for the International Human Rights Law Group and for the Florida Democratic Committee in 2004 and 2008. Most recently, her research has zoomed in to focus on immigrant integration issues at the local level, including field research on the Somali refugees who resettled in Lewiston, Maine, and on efforts to expand the suffrage in New York City to include noncitizen voters, while zooming out to examine immigration enforcement issues through the lenses of separation of powers and federalism. At St. Thomas University School of Law, Professor Gilbert teaches Constitutional Law (I & II), Immigration Law and Family Law.

RETIRED JUDGE MARC GOLD

Retired Judge Marc Gold was a judge of the 17th Judicial Circuit Court, Criminal Division, in Florida. He was elected on September 3, 1996, taking office the following January. He was re-elected in 2008 and 2014 and retired from the court in February 2017. Mr. Gold received a B.S. degree and a Ph.D. degree in economics from Wayne State University. He received his J.D. degree from Nova Southeastern University, Shepard Broad Law Center and has been admitted to the Florida Bar since 1982. He has also taught, lectured, or otherwise spoken on issues ranging from legal ethics, law and economics, and statistics.

LISA GRAYBILL

Lisa Graybill, as a Deputy Legal Director, oversees the Southern Poverty Law Center's work to reverse the "new Jim Crow" and eliminate the structural racism entrenched in the policing, sentencing, imprisonment, and post-conviction practices of states in the Deep South through litigation, legislation, and public education. Lisa's previous experience includes teaching civil rights and immigration practice in the clinical programs at the University of Denver Sturm College of Law; serving as the Legal Director for the ACLU of Texas; and working on police and prison conditions cases as a trial attorney in the Special Litigation Section of the Civil Rights Division at the U.S. Department of Justice. A native Texan, Lisa clerked for a federal judge in New Jersey after graduating from the University of Texas School of Law and Smith College.

JAMES K. GREEN

James K. Green is a lawyer based in West Palm Beach focusing on complex federal and civil litigation, land use, constitutional law, civil and human rights, and class actions. Mr. Green has been practicing law for more than 40 years and is admitted to practice before the United States Supreme Court, and all state and federal courts in Florida and the District of Columbia. He has argued numerous major civil rights cases throughout his career and has been a leader in the ACLU Foundation of Florida, Inc. serving as its Legal Director from 1987-1992 and its President from 1993-1996. He is a graduate of the University of Pennsylvania and the Antioch College School of Law.

MARY GREENWOOD

Mary Greenwood, Managing Attorney, Brandon Family Law Center, LLC, is a Michigan native who earned her undergraduate degrees in History and English from Hillsdale College in 1983, and is a 1986 graduate of the University of Michigan Law School. Since 1989, she has been providing legal advice and counsel to individuals and families throughout the Tampa Bay area and the State of Florida, as a sole practitioner. Her practice includes personal client services in the areas of adoption and surrogacy, elder law, estate planning, probate and guardianship. Mary also has extensive experience advising clients in family law matters, including pre-marital and post-marital planning. Mary is a member of the American Bar Association, Florida Bar Association, the Hillsborough County Bar Association, the Brandon Bar Association, the Florida Adoption Council, and the National Association of Elder Law Attorneys. She is also proud to offer service to the Brandon, Florida community through the Brandon Foundation, and as President of the Board of Directors for Apostles Village, an affordable housing community for seniors.

AMIEN KACOU

Amien Kacou is a staff attorney for the ACLU of Florida in Tampa working on immigrants' rights and other issues of civil rights or civil liberties.

He joined the ACLU in 2017 after years in solo immigration practice based out of Miami, FL, Alexandria, VA, and Albuquerque, NM. He began his legal career as an associate at a small firm in Baltimore, MD, where he focused on removal defense, family unity and naturalization. Prior to that, he served as an intern at public interest organizations in the United States and abroad working with refugees and child trafficking victims. Amien is originally from Côte d'Ivoire (the Ivory Coast).

He received his BA in government from the University of Maryland and his JD from Florida Coastal School of Law. In addition, he has a master's degree in Global Security Studies from Johns Hopkins University, where he studied constitutional issues related to national security, and has authored or edited numerous publications in the fields of immigration and national security.

CARLOS J. MARTINEZ

Carlos J. Martinez, Miami-Dade County's Public Defender, is the first Hispanic elected Public Defender in the US. Mr. Martinez manages an office with a $30 million budget, and 400 employees, handling approximately 70,000 cases each year. Mr. Martinez represented thousands of clients before working as an administrator for more than two decades. He has instituted numerous programs to help troubled youth get on the right track. He has been active in addressing the crisis of minority children cycled from schools to prisons and helped to lead the successful effort in Florida to ban indiscriminate shackling of children in juvenile court. Mr. Martinez serves on the Florida Bar Special Committee on Child and Parent Representation, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, the National Association for Public Defense Executive Committee, and is a member of the Institute for Innovation in Prosecution's Executive Session on Rethinking the Role of the Prosecutor in the Community. He served on the Florida Department of Juvenile Justice's Detention Risk Assessment Instrument Committee, the Supreme Court of Florida Steering Committee on Drug Courts and the Steering Committee on Families and Children, and the Florida Blueprint Commission on Juvenile Justice, was Vice President of the Florida Public Defender Association, and chaired The Florida Bar's Legal Needs of Children Committee.

PROFESSOR MICHAEL MASINTER

Professor Michael Masinter joined the Shepard Broad College of Law faculty in 1978 where he has taught Employment Discrimination Law, Civil Rights Litigation, Constitutional Law, Civil Procedure and Negotiable Instruments. He has also taught Federal Courts, Evidence, Sales, and Antitrust. He is admitted to practice before the Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and the Trial Bar for the U.S. District Courts for the Southern and Middle Districts of Florida. Professor Masinter was the principal author of the original edition of Federal Practice for Legal Services Attorneys and he writes regularly on the rights of students with disabilities in higher education. For over 20 years, he chaired the state Legal Panel of the ACLU Foundation of Florida, Inc. and throughout his 40 years as a member of the Florida Bar has specialized in civil rights and civil liberties litigation both before trial courts and the courts of appeals. He lectures regularly for the Florida Bar, the ACLU, the Association on Higher Education and Disability, and served on the Editorial Advisory Board for Section 504 Compliance Handbook when it was published by Thompson Publishing. Before joining the College of Law faculty, Professor Masinter was Director of Litigation for Florida Rural Legal Services, Inc.

JIMMY MIDYETTE

Jimmy Midyette is a staff attorney for the ACLU of Florida, in Jacksonville, where he litigates cases that align with ACLU priorities; 50% of his cases advance our LGBTQ rights work and the other half of his time is dedicated to other civil liberty issues. Midyette was admitted to The Florida Bar in 2001. From 2001 until 2015 he practiced poverty law in the civil legal aid system. Next, he worked as a family lawyer in private practice and also with the Jacksonville Coalition for Equality to pass LBGTQ human rights protections in his native Jacksonville.

Midyette has made public service his life's work. When he's not preparing cases for trial or in court litigating, you will find him enjoying Florida's state parks, volunteering in his community, and spending time with friends and family. Midyette graduated from the University of North Florida and the Florida State University College of Law.

SABARISH ("SAB") NEELAKANTA

Sabarish ("Sab") Neelakanta is the Litigation Director for the Human Rights Defense Center (HRDC). He is an accomplished trial lawyer having litigated more than 50 jury trials and dozens of appeals in state and federal courts throughout the United States. Sab has been lead counsel on federal civil rights cases in over 15 states, secured injunctions against government and privately-run correctional facilities, as well as statewide departments of corrections, and has been at the frontier of litigation concerning the First Amendment rights of prisoners and their correspondents resulting in numerous published opinions. Prior to joining HRDC, Sab was the advocacy director for the Inter-American Center for Human Rights, a researcher with the U.S. Committee for Refugees in Washington, D.C., a public defender, an activist and a writer.

PROFESSOR JONEL NEWMAN

Professor JoNel Newman, Professor of Clinical Legal Education at the University of Miami School of Law, received her B.A. with

honors, summa cum laude from the University of Missouri where she was awarded the William E. Kemp Prize in Literature. She received her J.D. from Yale Law School, where she was a senior editor of the Yale Law Journal. After clerking for Judge R. Lanier Anderson of the U.S. Court of Appeals for the Eleventh Circuit, she was a partner in the firm of Garrison, Silbert & Arterton in New Haven, Connecticut where she had a civil rights, plaintiff's employment law and labor practice. Professor Newman subsequently worked at the Connecticut Civil Liberties Union Foundation and the Florida Justice Institute, acting as lead counsel in numerous First Amendment political and civil rights, law reform, immigration and prisoner litigation cases, as well as at Florida Legal Services, where she was responsible for providing litigation support to legal services organizations throughout Florida and for the litigation of Migrant Farmworker Justice Project cases. In 2001, she received the John Minor Wisdom Public Service and Professionalism Award from the ABA Section of Litigation and the Steven M. Goldstein Award for Excellence from the Florida Bar Foundation for her advocacy on behalf of disabled immigrants. In 2018, she was awarded the C. Clyde Atkins Civil Liberties Award for her dedication to social justice and her leadership as Chair of the ACLU of Florida's state Legal Panel.

MELBA PEARSON

A New York native, Melba Pearson has called Miami home for more than 20 years. After receiving her undergraduate degree at New York University, she completed her studies at Hofstra University School of Law.
Ms. Pearson is the Deputy Director for the American Civil Liberties Union (ACLU) of Florida. Before joining the ACLU, Ms. Pearson was an Assistant State Attorney in Miami-Dade County for 16 years. She ended her prosecutorial career in 2017 as Assistant Chief in the Career Criminal/Robbery Unit, supervising junior attorneys while prosecuting homicides.

Ms. Pearson is a frequent guest lecturer on a wide array of law enforcement concerns. She serves as adjunct faculty for the University of Phoenix and Bryant and Stratton College, teaching law to undergraduate as well as master's students. A prolific writer and blogger, she has published numerous popular and scholarly articles on topics including police encounters, domestic violence, crimes against women, criminal trial procedure, along with everyday legal issues. Publications that have profiled, featured or quoted her include The New York Times, The Baltimore Sun, Essence Magazine, The Huffington Post, The Miami Herald, and Ebony Magazine. Ms. Pearson has been a regular guest on Sunday morning political television show "This Week in South Florida." She has also been a guest on national media regarding legal trends.

Ms. Pearson has been extensively involved in various community groups and has taken every opportunity to spread the messages of the dangers of domestic violence, as well as the importance of self-empowerment. She has taken on a leadership/mentoring role in several charity organizations. Ms. Pearson is Past President of the National Black Prosecutors Association; Co-Chair of the Prosecution Function Committee of the American Bar Association; 2018-2019 President of the Gwen S. Cherry Black Women Lawyers Association in South Florida as well as President of the National Black Prosecutors Foundation.

SHALINI BHARGAVA RAY

Shalini Bhargava Ray is an immigration law scholar focusing on immigrants' rights and migration management. She earned her B.A. from Stanford University and J.D. from Harvard Law School. She worked as a litigation associate at Morrison & Foerster LLP in San Francisco after law school and then clerked for the Honorable Anita B. Brody (E.D. Pa.) in Philadelphia. After serving for two years as a staff attorney at the U.S. Court of Appeals for the Third Circuit, she joined the University of Florida Levin College of Law, where she taught legal skills courses and published law review articles in the area of immigration law. At UA Law, she teaches courses including Legal Profession, Legislation & Regulation, and Immigration Law. Her recent articles include Saving Lives, 58 B.C. L. REV. 1225 (2017) and Plenary Power and Animus in Immigration Law, 80 OHIO ST. L. J. __ (2019) (forthcoming).

KIRA ROMERO-CRAFT

Kira Romero-Craft is an Associate Counsel at LatinoJustice PRLDEF, focusing on immigrants' rights, voting rights, employment law cases and criminal justice reform. Kira began her legal career as an Equal Justice Works fellow for the Legal Aid Society of the Orange County Bar Association in Orlando, Florida where she focused on representation of undocumented immigrant children in juvenile and immigration court. Kira has organized collaborations with the private bar and law schools to lead pro bono clinics to address gaps in representation for indigent clients applying for immigration status under humanitarian benefits.

Prior to joining LatinoJustice, she was the Program Director for the Children's Legal Program at Americans for Immigrant Justice where she led a team of lawyers representing immigrant children in dependency and removal proceedings. Kira is the Co-Chair of the Advocacy Committee for the American Immigration Lawyers Association, Central Florida Chapter. Kira was born in Portoviejo, Ecuador and lived in New York City prior to moving to Central Florida with her family. She is a graduate of Rollins College and the Florida State University, College of Law.

DANIEL A. SMITH

Daniel A. Smith, Ph.D., University of Wisconsin-Madison, is a Professor and Chair of Political Science at the University of Florida. He received his Ph.D. in Political Science from the University of Wisconsin – Madison in 1994, and his B.A. (Phi Beta Kappa) in History from Penn State University in 1988. He has published more than forty scholarly articles, books and book chapters on politics and elections in the American states in the leading political science journals, including The American Political Science Review. His other writings include a co-authored book entitled, Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States (University of Michigan Press, 2004), Tax Crusaders and the Politics of Direct Democracy (Routledge, 1998), and the widely-used co-authored textbook, State and Local Politics: Institutions and Reform (Cengage, 2013), now in its third edition. Professor Smith has written extensively on the history of the adoption of direct democracy in the American states, the campaign financing of ballot measure campaigns, initiatives and referendums that have attempted to reform ethics and electoral systems in the American states, the popular support and fate of redistricting initiatives, the impact of anti-gay marriage measures on candidate elections, and the priming effects of initiatives raising the minimum wage. Professor Smith serves on the Board of Directors of the Ballot Initiative Strategy Center Foundation (BISCF), a nonprofit organization based in Washington, DC, and is a member of the Board of Scholars with the Initiative and Referendum Institute at the University of Southern California. Smith has also served as a Visiting Scholar at Stanford University, a Senior Fulbright Scholar in Ghana for the 2000-01 academic year, and a Research Associate at the Center for Democratic Development in Ghana. He has advised numerous groups, including the US Chamber of Commerce and several US embassies and civic organizations in Africa, on voting and electoral practices in the American states. He has served as an expert witness in numerous legal cases dealing with ballot measures, campaign finance laws, redistricting, and voting rights.

BENJAMIN STEVENSON

Benjamin James Stevenson is a staff attorney for the ACLU of Florida in Pensacola, where he litigates a broad array of ACLU issues. He joined the ACLU in 2007 after several years in private and government practice. He has challenged numerous unconstitutional practices throughout the state, including the DMV's suspension of a driver's license for failure to pay court courts (Foster v. DMV) and the clerk's refusal to enroll a driver on a reasonable payment plan to pay court costs (Washington v. Clerk), a government agency's denial of access to public records (ACLU v. City of Sarasota), and school officials' censorship of LGBT-supportive speech (Gillman v. Holmes School Board). Stevenson graduated from the University of the South (Sewanee) and Florida State University College of Law.

DANIEL TILLEY

Daniel Tilley, Staff Attorney, ACLU of Florida, is a staff attorney with the ACLU of Florida whose work focuses primarily on the LGBT community. Among his other work, he served as lead counsel in the ACLU's federal-court litigation that, as part of a pair of consolidated cases and a team of lawyers, brought marriage equality to Florida in January 2015. Daniel studied classical piano and German language and literature at New York University before returning to his home state for law school at the University of Georgia. During law school, Daniel received the Spurgeon Public Interest Fellowship, was a member of the Georgia Law Review and the Order of the Coif, and interned in Arusha, Tanzania at the U.N. International Criminal Tribunal for Rwanda. Before joining the ACLU, Daniel clerked in Atlanta at the U.S. District Court for the Northern District of Georgia and in Washington, D.C. at the U.S. Court of Appeals for the Armed Forces. While in D.C., he served on the D.C. Lawyer Chapter board of the American Constitution Society.

LANDON (LJ) WOOLSTON

Landon (LJ) Woolston, MSW; Homeless Youth Programs & Services Manager, Pridelines, is an advocate and artist, a youth worker, and a trans-pan-queer Miami native. Through his own personal journey navigating social justice issues, LJ dedicated himself to using his privilege to interrupt oppression, standing alongside and amplifying the narratives of those who are most marginalized in our communities. Through his work in LGBTQ youth homelessness, as well as in his volunteerism and activism, LJ is committed to affirming and empowering queer youth. By equipping young people with community support, resources, and knowledge around self-advocacy, LJ hopes to see the eventual elimination of the many barriers that prevent LGBTQ youth from living whole and authentic lives. In addition to his work and social justice advocacy, LJ uses his art and photography as a form of activism — a means of sparking critical dialogue around body and sex positivity, gender, and race. His images have been shown in a variety of venues and have also been published in several queer publications and The New Times. LJ sees photography as a particularly powerful, radical medium for trans/queer folk to explore themselves, and to document their varied paths toward self-discovery, body-love and self-love.

LAYSSA ZAMORA

Layssa Zamora, of Mexican and Cuban heritage, joined the ACLU as Legal Program Associate to oversee the process by which the ACLU of Florida reviews and screens requests for assistance on potential civil liberties litigation. In 2017 she assumed the role of Paralegal and currently supports the work of the ACLU-FL Legal Department. A long-standing respect for multi-culturalism, civil liberties, public awareness and environmental protection led her to seek out a position with an organization such as the ACLU. Layssa holds a B.A. in Anthropology/Sociology and certificates in Latin American, African American, and Women's studies from Florida International University and a Paralegal Studies certificate from Miami Dade College.

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

AMERICA'S EVOLVING IMMIGRATION POLICY AND ITS IMPACT ON ASYLUM SEEKERS

Moderator: *Amien Kacou*, Staff Attorney, ACLU of Florida

Panelists: *Kendall Coffey*, University of Miami School of Law, Coffey Burlington, PL

Shalini Ray, University of Alabama School of Law

Lauren Gilbert, St. Thomas University School of Law

ACLU OF FLORIDA 2018 LAWYERS CONFERENCE

Delray Beach, FL

September 7, 2018

Panel #1: "***America's Evolving Immigration Policy and Its Impact on Asylum Seekers***"

Moderator: Amien Kacou, Staff Attorney, ACLU of Florida

Panelists:

- **Shalini Ray** is an immigration law scholar and a visiting lecturer at the University of Alabama Law School. Previously, she taught at the University of Florida Law School, served as a staff attorney at the U.S. Court of Appeals for the Third Circuit, clerked for a federal district court judge, and worked at a large law firm in San Francisco. She graduated from Stanford University and Harvard Law School. Her scholarship focuses on immigrants' rights and asylum law, and she has written specifically about access to asylum.
- **Lauren Gilbert** is Professor of Law at St. Thomas University Law School, former attorney-investigator for the United Nations Truth Commission for El Salvador, and former Director of the Women and International Law Program at American University's Washington College of Law. She graduated from Harvard University and the University of Michigan Law School. She is the author of several articles and book chapters on immigration and citizenship, and currently serves as pro bono counsel in the expedited removal proceedings of an Iraqi asylum seeker in the context of *Hamama v. Adducci* (an ACLU class action in the 6th circuit). She also returned in early August from a week at the Karnes Detention Center in Texas where she and a team of 12 law students worked alongside RAICES with fathers and sons who had recently been reunited in compliance with Judge Sabraw's order in *Ms. L v. ICE*.
- **Kendall Coffey** is a founding member of Coffey Burlington, PL, and the former U.S. Attorney for the Southern District of Florida. He is a member of the Southern District Conference, Florida Federal Judicial Nominating Commission. Kendall is a prominent legal analyst and an adjunct at the University of Miami Law School. He has authored several books and articles on various legal topics, including (most relevantly) "The Due Process Right to Seek Asylum in The United States" (which was partly based on his experience as an attorney in the high profile case of Elian Gonzalez).

INTRODUCTION

Context:

- History
    - Key developments: 1951 Refugee Convention following WWII; Cold War and use of parole for people fleeing Communist regimes; Civil Rights movement and 1967 Refugee Protocol; 1980 Refugee Act; Haitian interdictions; Illegal immigration Reform and Immigrant Responsibility Act of 1996 creates border regime of expedited removal and credible fear screenings; War on Terror; Northern Triangle surge
- Relevant statutes, regulations, and recent administrative decisions/guidance
    - 8 U.S.C. §§ 1158 (asylum applies broadly to aliens physically present or arriving, irrespective of status; but attorney general has broad power to define ineligibility and terminate status, subject to judicial review), 1231 (implementing nonrefoulement via withholding of removal) 1225 (providing for expedited removal and credible fear

proceedings for arriving aliens), 1252 (nearly eliminating meaningful judicial review of decisions under Section 1225; but providing for appellate judicial review of decisions under Convention Against Torture).
    - 8 C.F.R. §§ 208, 212.5, 1235 (implementing regulations + implementing parole authority); new regulations or rules or policies being contemplated to deny discretionary asylum to "illegal entrants" (beyond *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), or to change the definition of "firm resettlement," etc.
    - *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); related USCIS guidance (dated July 11, 2018).
- Recent caselaw
    - *Grace v. Sessions*, No. 1:18-cv-01853 (D.D.C. filed Aug. 7, 2018) (ACLU challenging pursuant to 8 USC 1252(e)(3) the application in asylum and expedited removal proceedings of *Matter of A-B*---which limits/excludes domestic and gang violence as grounds for asylum—in violation of the INA and the APA, etc.).
    - *Ms. L. v. ICE*, 302 F. Supp. 3d 1149, 2018 WL 2725736 (S.D. Cal. June 6, 2018) (habeas jurisdiction for asylum seekers detained at ports of entry or shortly after unlawful entry, who had substantive due process right not to be separated from their children without a finding of unfitness or danger to the child: "[a]lthough Plaintiffs do not limit this case to asylum seekers, that each of the named Plaintiffs is seeking asylum is important to the due process analysis").
    - *MMM v. Sessions*, *et al.*, No. 3:18-cv-01832 (S.D. Cal. filed July 27, 2018) (children of *Ms. L* parents ordered removed were granted a stay of removal to pursue separate asylum claims as a matter of statutory right).
    - *Al Otro Lado, Inc. v. Duke*, No. 2:17-cv-05111 (S.D. Cal. filed July 12, 2017) (AIC/CCR challenging CBP practice of turning away asylum seekers at the border in violation of statutes, due process and international law of nonrefoulement—under both the Refugee Convention as implemented by the Refugee Act *and* by non-derogable customary international law, or *jus cogens*, "actionable under the Alien Tort Statute").
    - *Castro v. USDHS*, 835 F.3d 422 (3rd Cir. 2017) (no constitutional habeas right for aliens arrested within hours of surreptitious entry, and who had no other ties to the U.S.).
    - *Ibrahim v. Acosta*, No. 17-cv-24574, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018) (judicial stays of removal granted to class of Somalis for an opportunity to file motions to reopen their asylum cases).

PART 1 (Shalini Ray)
- International sources of asylum and related law: international history, Universal Declaration of Human Rights, treaties, customs

PART 2 (Lauren Gilbert)
- Current facts on the ground (see PowerPoint)

PART 3 (Kendall Coffey)
- General policy and judicial (11th circuit / SCOTUS) outlook

DISCUSSION

- STATUTORY INTERPRETATIONS:
    - **To what extent does the Immigration and Nationality Act (8 USC § 1252) bar judicial jurisdiction over claims by asylum seekers arriving at the border or placed in expedited removal proceedings ("asylum seekers at the border")?** *See, e.g., MMM V. Sessions* (children reunited with their parents under *Ms. L. v. ICE* were likely entitled via mandamus relief at least to credible fear hearings, where their claim arose not from an expedited removal order but from their earlier separation).
    - **To what extent should courts defer to federal agencies' interpretation of federal statutes affecting asylum seekers at the border under *Chevron USA v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984)** (holding that courts must defer to reasonable agency interpretations of ambiguous statutes) **and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005)** ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion")? *See Grace v. Sessions* (rejecting *Matter of A-B-* notably because it intrudes on federal circuit court authority and because "*Chevron* deference is not dispensed in bulk").
        - *See also* Justice Kennedy's concurrence in *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) (warning against "cursory" review of agency interpretations and expressly calling for a reexamination of *Chevron*).
        - What are likely *Chevron* developments under Justices Gorsuch and (maybe) Kavanaugh?
    - **Do asylum seekers at the border even have a judicially-enforceable statutory "right" to apply for discretionary asylum in the first place,** in light of 8 U.S.C. § 1158(d)(7) ("Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person")? *See MMM v. Sessions*; *Al Otro Lado*, Complaint at *34 ("The U.S. government has admitted that the duty to allow a noncitizen access to the asylum process is "not discretionary" ").
        - *See also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (the Immigration and Naturalization Service failed to observe its own regulations in effecting the deportation of a resident alien), as applied in *Damus v. Nielsen*, No. 18–578 (JEB), 2018 WL 3232515 (D.D.C. July 2, 2018) (an ICE directive may be binding under the Administrative Procedures Act despite "language in the Directive disclaiming that the document confers any substantive rights").
        - In the alternative, asylum seekers have a right to withholding of removal under 8 USC § 1231(b)(3) (a judicially-enforceable statutory right not to be returned to a country where they would face persecution).
    - **Can 8 USC § 1325 (which criminalizes "illegal entry") reasonably be read to apply to asylum seekers, especially to those who have already been found to express a credible fear of return**? In light of:
        - The breath of the asylum statute, and the fact that the 1980 Refugee Act implements the Refugee Convention, Art. 31 of which prohibits "penalties" on refugees "on account of their illegal entry or presence."

        - The fact that U.S. law provides few avenues for legal entry to asylum seekers and that CBP has been turning people away at the border.
        - The policy concern with perverse incentives ("rewarding" irregular migration vs. neediest asylum seekers).
- CONSTITUTIONAL LAW: **Do asylum seekers at the border have a constitutional right to seek asylum?**
    - Distinguish between (a) whether arriving aliens have any constitutional rights, vs. (b) whether they have constitutional rights related to their asylum applications.
    - For (a), with respect to issues other than entry/admission, *see Ms. L* (finding substantive due process in family unity); *Boumediene v. Bush*, 553 U.S. 723 (2008) (where the sovereign exercises jurisdiction, the constitution—via habeas, at least—applies); *Rodriguez V. Swartz*, 2018 WL 3733428 (9th Cir. 2018) (applying 4th Amendment *Bivens* via *Boumediene* in the limited circumstance of a CBP cross-border shooting, and distinguishing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990)); also, the government hasn't challenged the normal application of the Constitution to criminal prosecutions of arriving aliens, including in unlawful entry cases.
    - For (b), we must also distinguish the use of constitutional law (1) as source of interpretation of substantive asylum standards (e.g., what counts as persecution) vs. (2) as an additional source or complementary authority for asylum rights.
    - For (b)(2), *see* complaint in *Al Otro Lado* at *38 ("where Congress has granted statutory rights and has directed an agency to establish a procedure for providing such rights, the Constitution requires the government to establish a fair procedure and to abide by that procedure"); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970). For less favorable caselaw, *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (holding that the "right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate"); *Jean v. Nelson,* 727 F.2d 956 (11th Cir. 1984) ("Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges are granted by Congress"); *Gonzales v. Reno*, 215 F.3d 1243 (11th Cir. 2000); *Castro v. USDHS* (no constitutional habeas review of expedited removal proceedings for "Aliens who were apprehended within hours of surreptitiously entering United States" and thus had no constitutional rights regarding their admission").
        - *Castro v. USDHS*:
            - *Castro* at 445 distinguishes *Boumediene* (incoherently) as being about extraterritoriality but as having no implications on entry fiction analysis, ignoring the fact that enemy combatants in *Boumediene* had no connection to U.S. soil, adding: "The reason Petitioners' Suspension Clause claim falls at step one [of *Boumediene*] is because the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," based on pre-Refugee Act dictum from *Landon v. Plasencia*, 459 U.S. 21 (1982). *But see Elrod v. Bums*, 427 U.S. 347, 361 (1976) ("this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'"); also, habeas right is referred to as "privilege" in the Constitution.

        - *Castro* does leave space for constitutional habeas where aliens have just slightly stronger U.S. ties. *Cf*. *Osorio-Martinez v. Attorney General United States of America*, 893 F.3d 153 (2018) (finding habeas for *Castro v. USDHS* children once they acquire Special Immigrant Juvenile status).
    - **Assuming judicial review were granted, would courts find that current expedited removal and credible fear statutes, regulations, policies or practices meet constitutional requirements?** *Cf. American Immigration Lawyers Ass'n v. Reno*, 18 F.Supp.2d 38, 53-57 (D.D.C.1998), aff'd, 199 F.3d 1352 (D.C.Cir.2000).
    - **What about substantive due process?**
        - *See* David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 649 (2006): "The Due Process Clause has also been understood to express an evolving understanding of protected liberties, and the Supreme Court has looked to the practices of 'English-speaking peoples' in assessing what liberties were fundamental to 'ordered liberty' and therefore incorporated under the Due Process Clause and applicable to the states. Thus, challenges to the fairness of deportation and detention procedures in the immigration context can profitably look to international standards to guide the interpretation of the constitutional rights that apply," citing *Adamson v. California*, 332 U.S. 46, 67 (1947) and *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).
- <u>INTERNATIONAL LAW IN US COURTS</u>
    - Distinguish use of international law (a) as source of interpretation of U.S. asylum laws (which is less controversial), vs. (b) as independent basis for private right of action by asylum seekers against U.S. government and persons in U.S. courts
    - **Under (a), does the international right to seek asylum (or the obligation of nonrefoulement under treaties or customs) apply extraterritorially?** (yes = UNHCR view, and European Union view in *Hirsi-Jamaa v. Italy*, App. No. 27765/09, 2012 Eur. Ct. H.R.; no = U.S. view in *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155 (1993))
        - From a U.S. law perspective, there would be a presumption against the extraterritorial application of statutes; but *Sale* was based in part on a separate analysis of the Refugee Convention.
            - Should we read *Sale* differently after *Boumediene*? (the interdicted Haitians were being processed in Guantanamo Bay, after all)
    - Also, under (a), we might argue for a "background rule of statutory construction to presume that Congress seeks to legislate in conformity with our international obligations," Cole, *The Idea of Humanity*, at 646.
    - **Under (b), is the international right to seek asylum (or the obligation of nonrefoulement) independently enforceable in U.S. courts? Against the U.S. government? Against individuals?**
        - If the relevant treaties are not self-executing, how explicitly must Congress signal its intent to implement a treaty, or to have courts apply customary international law? Can customary international law apply independently in U.S. courts, either to invalidate statutes (unlikely) or where Congress is silent (maybe)?
        - <u>Authorities</u>: *The Paquete Habana, 175 U.S. 677, 700 (1900); Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (plurality rejecting the appeals court argument that the Geneva Conventions were not judicially-enforceable, and finding that an alien could invoke the Conventions to challenge procedures used by military commission in his trial, since the relevant U.S. military laws pointed to the laws

of war in providing procedures for the treatment of military prisoners); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Alien Tort Statute—which does not allow suits against the U.S. government—was "enacted on the understanding that the common law would provide a cause of action for [a] modest number" of violations of "present-day" international customs that are " 'specific, universal, and obligatory," especially where such violations "[threaten] serious consequences in international affairs," keeping practical consequences of judicial involvement in mind; but also noting that Congress could shut the door to this entirely, either by saying so or by occupying the field); *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1402 (2018) ("*Sosa* is consistent with this Court's general reluctance to extend judicially created private rights of action," citing *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), which limited *Bivens* remedies).

- Contrast (a) Justice Kennedy, who declined to reach the international law issues in his concurrence in *Hamdan* (where the plurality found that the procedural requirements of the Conventions "must be understood to incorporate at least the barest of the trial protections recognized by customary international law") but expressed caution about private rights of action when speaking for the Court in *Jenner* following *Sosa*, with (b) Justices Scalia and Thomas (who believe there are basically no judicially-enforceable international law norms).
- What can we expect from Kennedy's former clerks (Gorsuch and Kavanaugh)? *See, e.g., Doe v. Exxon Mobil Corp*., 654 F.3d 11, 77–78 (C.A.D.C. 2011) (Kavanaugh, J., dissenting in part).

- <u>POLICY ISSUES</u>:
  - Would children benefit from pursuing asylum irrespective of their parents' views, in the context of family separations at the border? *See, e.g., MMM v. Sessions*; *cf*. *Gonzales v. Reno*
    - *MMM v. Sessions*, Complaint at *4, n.3 ("Plaintiffs point out that families apprehended at or near the border prior to the zero tolerance policy would have gone through [Section 1225] proceedings together" . . . "Plaintiffs note this is important because the credible fear determinations for parents and children are different." . . . "In considering the children's claim, the inquiry may be broader in that their "particular social group" may "be comprised of 'immediate family members' of their" parent." . . . "If, during this process, either the parent or child receives a credible fear finding, both parent and child are taken out of expedited removal proceedings and placed in [regular removal] proceedings.")

RIGHT TO SEEK ASYLUM: A VIEW FROM THE FIELD

Statutory and Regulatory Framework

Lauren Gilbert, Esq.
Professor of Law
St. Thomas University School of Law

TOPICS TO COVER

- Situation on the ground
- Statutory and Regulatory Framework
- Recent Challenges in Federal Court
- Other Administrative Developments
- A Way Through the Morass?

KARNES CITY RESIDENTIAL CENTER

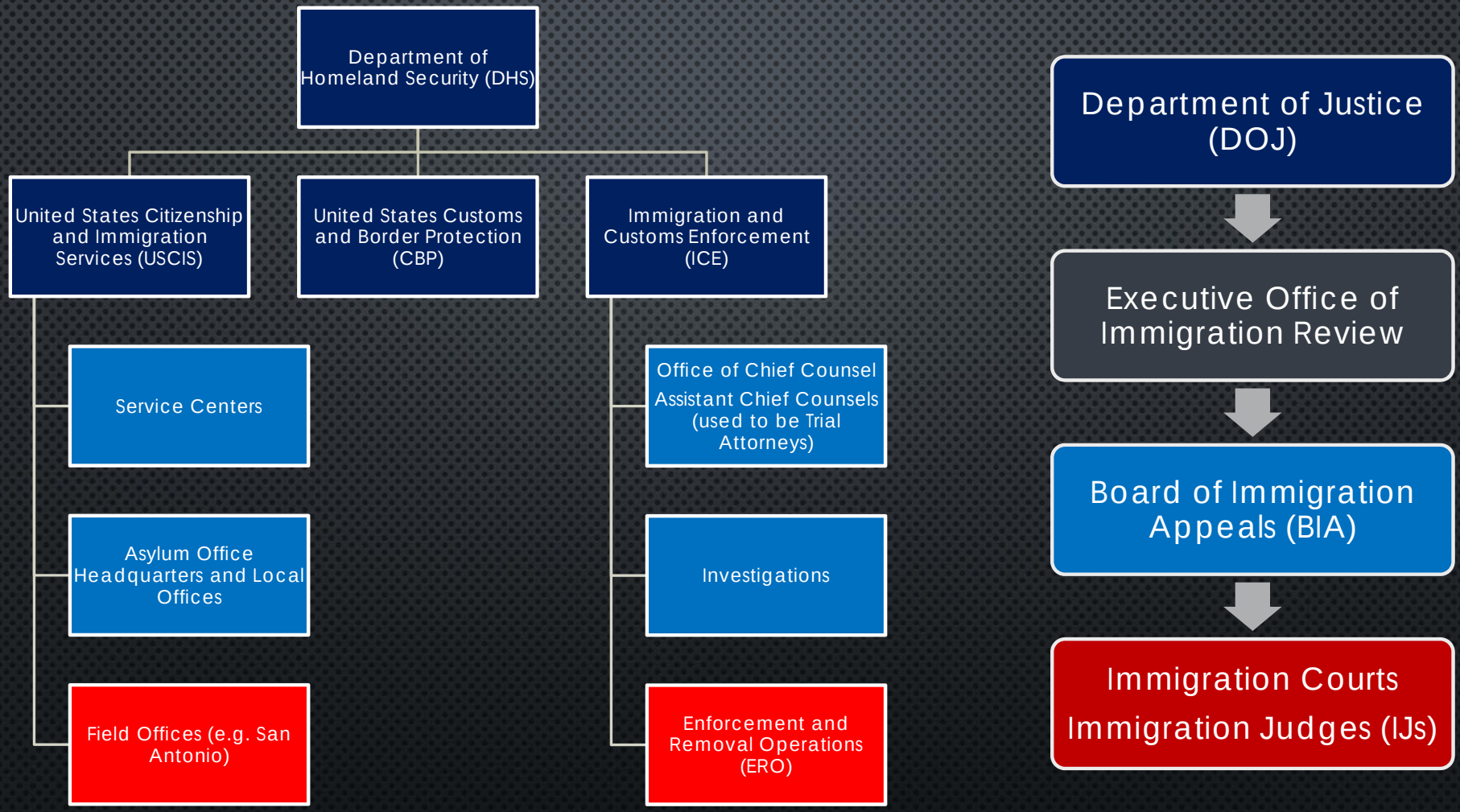
SITUATION ON THE GROUND

- Trip to Karnes Detention Center Three days After Family Reunification Deadline
- Attorney General Sessions "Zero Tolerance Policy" in action
  - Asylum Seekers Turned Back at Ports of Entry
  - Asylum Seekers Seek to Enter via Land or River
  - Separation of Parents and Children at Border
  - Prosecution of Parents
- Ms. L and Reunification of Parents and Children
- Karnes as Staging Ground for Removal of Fathers and Sons
- NCFIs, RFRs, Papelitos and Intake Addendums
- How to preserve rights of fathers seeking deportation while protecting children's rights?

STATUTORY AND REGULATORY FRAMEWORK

- The Statute -- 8 U.S.C.
  - §1101(a)(48)(A) – Definition of refugee [INA § 101(a)(48)(A)]
  - §1103(a)(1)– Powers of the Attorney General and Secretary of Homeland Security [INA 103(a)(1)]
  - §1158 -- The Asylum Definition and Conditions for Granting Asylum [INA § 208]
  - §1225 -- Expedited Removal and the Credible Fear Process [INA § 235(b)]
  - §1252 – Limits on Judicial Review of Expedited Removal Orders [INA § 242]
- The Regulations
  - 8 CFR § 208 -- Asylum, Withholding and Relief under the Convention Against Torture
  - 8 CFR §212.5 -- Humanitarian Parole
  - 8 CFR §1001.3(h) – Certification power
- The Chevron Doctrine

RELEVANT GOVERNMENT ENTITIES



LIMITS ON JUDICIAL REVIEW OF EXPEDITED REMOVAL

- Except as provided below "[N]o court shall have jurisdiction to review …any individual determination or to entertain any other cause or claim ***arising from or relating to*** the implementation or operation of an [expedited removal order]." 8 USC § 1252
- No Court may certify a class
- Habeas review limited as to whether petitioner
  - Is an alien
  - Was Ordered removed
  - Can prove that he or she already has been granted permanent status as LPR, refugee or asylee
- Challenges to the system limited by statute
  - Must be brought ***in D.C. district court***
  - Must be brought ***within 60 days*** of issuance of challenged law, guideline, Directive or procedure
  - whether regulation, "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, **is not consistent with applicable provisions of this title or is otherwise in violation of law"**

RECENT CHALLENGES IN FEDERAL COURT

- Ms. L v. ICE – Family reunification injunction
- MMM v. Sessions
- N.T.C. v. U.S. ICE (Legal Aid Society of New York on behalf of UACs)
- Grace v. Sessions
- Al Otro Lado

IMPACT OF MATTER OF A-B- (AG JUNE 11, 2018)

1) USE OF CERTIFICATION POWER TO OVERTURN BIA PRECEDENT IN A-R-C-G;
2) TURNED CLOCK BACK ON WOMEN'S RIGHTS BY 20 YEARS BY INDICATING THAT DOMESTIC VIOLENCE IS A PRIVATE FAMILY MATTER NOT SUBJECT TO THE PROTECTION OF THE ASYLUM LAWS;
3) SIGNALED INTENT TO REWRITE ASYLUM LAW TO MAKE IT MORE DIFFICULT FOR ASYLUM SEEKERS – ESPECIALLY CENTRAL AMERICANS-- TO WIN THEIR CASES;
4) MOST ASYLUM CLAIMS INVOLVING GANG VIOLENCE WILL NOT SATISFY ASYLUM DEFINITION;
5) NEW HIGHER "COMPLETE HELPLESSNESS" STANDARD FOR PROVING LACK OF STATE PROTECTION;
6) WHERE THERE IS A FEDERAL APPELLATE DECISION INCONSISTENT WITH AG'S INTERPRETATION OF THE ASYLUM STATUTE, THE AG'S INTERPRETATION SHOULD PREVAIL.
7) JULY 11, 2018: USCIS GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B-
8) NEW "FATAL FLAW" RULE: ASYLUM SEEKERS AT BORDER GOING THROUGH CREDIBLE FEAR SCREENING MUST SHOW THAT THEY SATISFY EACH ELEMENT OF THE ASYLUM DEFINITION

OTHER RECENT ADMINISTRATIVE DEVELOPMENTS

- Use of Certification Power by the Attorney General
  - Matter of Castro-Tum (AG 2018) -- Eliminates IJs use of administrative closure
  - Matter of E-F-H-L- (AG 2018) -- asylum seekers don't have a right to an evidentiary hearing
  - Matter of A-B- (AG 2018)-- overturns A-R-C-G- and sets forth new standards
  - Matter of L-A-B-R- (AG 2018) -- limits judges power to grant continuances
- USCIS Guidance on Matter of A-B- (July 11, 2018)
  - From USCIS rather than Asylum Office -- no author
  - Tracks language in A-B- , superceding all previous guidance
  - guidance to USCIS officers on asylum interviews and credible fear interviews
  - Requires that each case satisfy all elements of asylum definition – no "fatal flaws"

A WAY THROUGH THE MORASS?

- Grace v. Sessions
  - Judicial Review of expedited removal process in light of Matter of A-B- and USCIS Guidelines
- Role of Judge Sabraw in Ms. L v. ICE and related litigation
  - Transfer of related cases to Judge Sabraw
  - Need to structure remedies consistent with rights of parents and children
  - Opting out v. creation of subclasses
- Role of Chevron Deference – Will Justice Gorsuch and Judge Kavanaugh be consistent in their criticisms when it comes to immigration policy?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE*, MINA*, GINA*, MONA*, and MARIA*,
T. Don Hutto Residential Center
1001 Welch Street
Taylor, TX 76574;

CARMEN* and her minor daughter, J.A.C.F. (by and through her mother),
South Texas Family Residential Center
300 El Rancho Way
Dilley, TX 78017;

GIO*,
Albany County Correctional Facility
840 Albany Shaker Road
Albany, NY 12211;

NORA* and her minor son, A.B.A. (by and through his mother),
c/o 125 Broad Street, 18th Floor
New York, NY 10004;

CINDY ARDON MEJIA and her minor daughter, A.P.A. (by and through her mother)
c/o 125 Broad Street, 18th Floor
New York, NY 10004;

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS III,
Attorney General of the United States, in his official capacity,
950 Pennsylvania Avenue, NW
Washington, DC 20530;

KIRSTJEN M. NIELSEN, Secretary of the Department of Homeland Security, in her official capacity,
245 Murray Lane, SW,
Washington, DC 20528;

No. 2018-cv-_____

LEE FRANCIS CISSNA, Director of United States Citizenship and Immigration Services, in his official capacity,
20 Massachusetts Ave., NW
Washington, DC 20529;

JAMES MCHENRY, Director of the Executive Office for Immigration Review, in his official capacity,
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Violation of Refugee Act, Immigration and Nationality Act, Administrative Procedure Act, Separation of Powers, and Due Process)

* Plaintiffs proceeding under a pseudonym are indicated with an asterisk.

INTRODUCTION

1. This case seeks to prevent the evisceration of asylum protections for the most vulnerable immigrants fleeing horrific persecution. Plaintiffs are adults and children who fled their home countries after suffering pervasive sexual abuse, kidnapping, beatings, shootings, the murder of family members, and/or death threats. They are challenging new policies that unlawfully deprive them of their right to seek humanitarian protection.

2. Specifically, the Defendants have recently implemented written policies that subject Plaintiffs and other individuals placed into summary "expedited removal" proceedings to an unlawful screening standard–a standard intended to eliminate most domestic violence and gang-related asylum claims. The new expedited removal policies stem from a legal opinion issued on June 11, 2018, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which articulated new, erroneous standards for adjudicating asylum claims relating to domestic and gang-related violence, and subsequent guidance applying these erroneous standards to expedited removal screenings.

3. As a result of the new policies, the immigration authorities summarily rejected Plaintiffs' asylum claims and ordered them removed to countries where they face grave danger or even death. Unless the new policies are enjoined, many other bona fide asylum seekers face the same fate.

4. When Congress created "expedited removal" proceedings in 1996, it was careful to build in protections for asylum seekers. These protections require that *every* individual who comes to this country seeking humanitarian protection be given a fair chance to establish eligibility for asylum and related protection from deportation. Specifically, immigrants in expedited removal who express fear of return to their home countries must be afforded a threshold screening interview with an asylum officer, called a "credible fear" interview. At that interview, the

question is not whether that person will ultimately be eligible for asylum, but only whether there is "a significant *possibility* . . . that the alien *could* establish eligibility for asylum[.]" 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). If the noncitizen passes this low "credible fear" screening standard, the law requires that she be taken out of expedited removal and allowed to pursue her claim for asylum in regular removal proceedings, where she is entitled to a full trial-type immigration court hearing and administrative appellate review, followed by review in the federal court of appeals. Congress intended the credible fear standard to be low, so that asylum seekers would be given the benefit of the doubt and no one with a potentially meritorious asylum claim would be sent back to danger.

5. Prior to Defendants' implementation of the challenged policies, all of the Plaintiffs would have satisfied the threshold credible fear standard and been entitled to seek asylum and related protection in full removal hearings before an immigration judge.

6. But the new policies unlawfully elevate the credible fear standard far above the low threshold Congress enacted and prevent asylum seekers from ever pursuing their asylum claims. The new credible fear policies based on *Matter of A-B-* unlawfully change the credible fear standard in at least three ways.

7. First, they direct asylum adjudicators to deny most credible fear claims connected to domestic violence or gangs, even though by law, credible fear must be decided on the specific facts of each case and there is no categorical bar against such claims under the asylum laws.

8. Second, they instruct asylum adjudicators to evaluate and deny credible fear for such claims based on multiple erroneous legal standards. For example, although it is well-established that individuals fearing persecution by non-governmental actors can qualify for asylum if they show that their home government is "unable or unwilling" to protect them, the new policies

require applicants to meet a much more stringent test: showing that their government "condones or is completely helpless" to protect them. Similarly, for individuals who assert they are being targeted for persecution because they are a member of a particular social group (one of the five protected grounds for asylum), the new policies impose an erroneous, more demanding burden for showing that the persecution they fear is "on account of" such membership.

9. Finally, they require asylum adjudicators to ignore any federal court of appeals decisions that conflict with the new credible fear policies, thus purporting to make the immigration authorities the ultimate arbiters of the law, and undermining both Congress's lawmaking authority and the Article III judiciary's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803).

10. Each of these instructions by themselves unlawfully alters and heightens the credible fear standard and deprive Plaintiffs and other asylum seekers of their right to pursue asylum. Taken together, their effect is to distort the credible fear process beyond recognition.

11. Plaintiffs seek a declaration that the new credible fear policies violate the Immigration and Nationality Act ("INA"), the Refugee Act, the Administrative Procedure Act, Article III's separation-of-powers principle, and the Due Process Clause; an order enjoining the application of the new credible fear policies; and an order that Plaintiffs' expedited removal orders be vacated and that they be provided with a new credible fear process under the proper legal standard or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a. Without an injunction, Plaintiffs and thousands of other immigrants like them desperately seeking safety will be unlawfully deported to places where they fear they will be raped, kidnapped, beaten, and killed.

JURISDICTION AND VENUE

12. This case arises under the United States Constitution; the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*; the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* and its implementing regulations; and the Convention Against Torture ("CAT"), the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

13. The Court has jurisdiction under 8 U.S.C. § 1252(e)(3). Section 1252(e)(3) is a provision of the INA that provides jurisdiction in the United States District Court for the District of Columbia over systemic challenges "to [the] validity of the [expedited removal] system," including regulations and "written" policies regarding expedited removal. The Court also has jurisdiction under 28 U.S.C. § 1331.

14. Venue is proper in this District because 8 U.S.C. § 1252(e)(3)(A) requires that all § 1252(e)(3) actions be brought in the United States District Court for the District of Columbia. In addition, venue is proper under 28 U.S.C. § 1391(e)(1) because a substantial part of the events or omissions giving rise to this action occurred in this District.

PARTIES

15. Plaintiff Grace* fled Guatemala to escape her abusive partner and his violent gang-member sons. Grace's partner of 22 years repeatedly beat and threatened to kill her and her children throughout their relationship and after she tried to leave him. He also sexually assaulted her and her daughter over many years. Grace is part of an indigenous group that is discriminated against in Guatemala by Ladinos (non-indigenous Guatemalans). Grace's abuser, who is Ladino, would often berate her for being an "India" (a slur used to denigrate indigenous people) and "stupid," because she could not read or write, especially when he was violently abusing her.

* Plaintiffs proceeding under a pseudonym are indicated with an asterisk.

Once, he beat Grace's pregnant daughter so severely that she had a miscarriage. In October 2016, Grace sought police protection from her abuser and his two gang member sons from another relationship, who had recently joined their father in abusing Grace and her children. However, the police did nothing to stop him and his sons from returning to Grace's house to attack her. When she tried to leave him, Grace's abuser took advantage of her illiteracy to take the legal title to her home. He then arranged to have the police evict Grace from her longtime residence, and she and her son were forced to move in with a neighbor. Even after having evicted her, Grace's abuser and his sons continued to terrorize her and her son. Because his sons are members of a powerful gang, which has a network across the country, Grace does not believe she could find safety in another city. Despite being found to have testified credibly, she received a negative credible fear determination on July 20, 2018. Grace is detained at T. Don Hutto Residential Center in Taylor, Texas.

16. Plaintiff Carmen*, together with her young daughter, Plaintiff J.A.C.F., fled her home in El Salvador to escape two decades of horrific sexual abuse by her husband and death threats from a violent gang. Carmen's husband routinely raped, stalked, and threatened her with death, treating her as his property, even after they were living apart. Carmen did not report her husband's threats to the police because she had seen that the police did not protect women from their husbands' abuse. She had also heard about women who reported abuse to the police, only to be killed by their husbands in retaliation, and believed her husband would do the same if she reported him. Carmen also fears that she and her daughter would be killed by a violent gang, who targeted her because she was a vulnerable single mother living alone with her child, and because she had a good factory job. They held her up at gunpoint in May 2018 when she was on her on her way home from work and demanded that she pay a monthly "tax," making clear that

they would kill her and her little girl if she did not comply. The gang also threatened to kill her if she went to the police. Because four or five of her co-workers were killed by the same gang in the past year, she knew their threats were serious and fled with J.A.C.F. to avoid death. In June 2018, Carmen and her daughter sought asylum in the United States. Despite being found to have testified credibly, they both received negative credible fear determinations on June 29, 2018, which were affirmed by an immigration judge on July 23, 2018. Carmen and her little girl are detained at the South Texas Family Residential Center in Dilley, Texas.

17. Plaintiff Mina* fled her home in Honduras after suffering a vicious attack and receiving death threats from a powerful drug trafficking gang that controlled her town. Members of the gang targeted Mina and her family after her husband and father-in-law helped a friend escape when the gang was trying to kill him. After murdering her father-in-law and threatening to kill her husband, members of the gang beat Mina so badly that she could not walk the next day. Her attackers told her they would rape her and mutilate her body if she did not leave town. Mina knew she could not report the attack to the police because of their close ties to the gang and because the police had failed to investigate her father-in-law's murder after her family sought police assistance. Mina and her husband fled to the United States and sought asylum. Despite being found to have testified credibly, Mina received a negative credible fear determination on July 23, 2018. She is detained at T. Don Hutto Residential Center in Taylor, Texas.

18. Plaintiff Gina* fled her home in Honduras in June 2018 because she fears death or torture at the hands of a powerful Honduran family that threatened to kill her because of her relationship to her nephew, who murdered someone close to them years ago. The family has already succeeded in murdering Gina's brother and maiming her son in an attempt to kill him. Although Gina made several police reports following these crimes, the police did not help her because the

family targeting her is powerful and well-connected to the Honduran government; the family has also threatened to kill her because she dared to report their crimes. She attempted to find safety by moving away from the area, but people sent by the family recently came to her new town, asking for her by name. Gina fled to the United States to save her life. Despite being found to have testified credibly, she received a negative credible fear determination on July 16, 2018. Gina is detained at T. Don Hutto Residential Center in Taylor, Texas.

19. Plaintiff Mona* fled her country and sought asylum in the United States after a powerful gang brutally murdered her long-term partner, who was a member of a special military force dedicated to combating gangs, and threatened to kill her next because of her relationship with him. Earlier this year, Mona's partner and four other people were gunned down by armed men in a hail of bullets. Mona was present at the shooting and narrowly escaped with her life. When she called her partner's phone after the shooting to try to locate it, the killers answered, taunting her and threatening that they knew she was his partner and she would be next. Shortly after her partner's death, she was accosted by gang members at the market while attempting to purchase flowers for his funeral. They repeated that they knew she was her partner's woman and threatened to kill her. She was recently alerted by family members that gang members were following her bus, forcing her to get off quickly and hide until someone could pick her up. Mona feared that if she reported the threats to the local police, many of whom collaborate with gangs, she would only put herself in greater danger. She also knew of other cases where the police were not able to protect family members of police officers and soldiers who were killed by gangs just because of their relationship with law enforcement. Fearing for her life, Mona fled to the United States and sought asylum. Despite being found to have testified credibly, she received a negative

credible fear determination on July 20, 2018. She is detained at T. Don Hutto Residential Center in Taylor, Texas.

20. Plaintiff Gio* fled his home in El Salvador after being targeted by members of two rival gangs. Gio lived in a neighborhood controlled by one notoriously brutal gang, whose members recently threatened his life when he refused to sell drugs for them because of his deep Christian faith. Gio also fears the gang will kill him if it learns that his half-brother is a member of their rival gang. If the gang that controls his neighborhood does not kill him, Gio fears that the rival gang will. Some years ago, Gio was terrorized by members of the rival gang when he visited his father, who lives in their territory. The rival gang members kidnapped him, accused him of being a spy for the other gang, broke his arm during a vicious beating, and threatened to throw him in a well and leave him to die. They also threatened to harm him if he made a police report. He escaped, but the gang's members have continued to threaten him for years, any time he has encountered them. In June 2018, after the gang that controls his neighborhood threatened him for refusing to sell drugs, Gio fled to the United States to save himself. Gio believed that attempting to get help from the police would only put him and his family in even graver danger. Despite being found to have testified credibly, he received a negative credible fear determination on July 16, 2018. Gio is detained at Albany County Correctional Facility in Albany, New York.

21. Plaintiff Maria*, a recently orphaned teenager, fled her home in El Salvador to escape a forced relationship and sexual violence at the hands of a gang member nicknamed "F." When Maria's brother-in-law, a member of the same gang, began to use her recently deceased mother's house as a gathering place for the gang, Maria stood up to him because her strong Christian faith leads her to morally oppose gangs. After she asked her brother-in-law to leave, F. threatened her by screaming at her and beating the walls of her house with a baseball bat, to teach her a lesson

about defying the gang. He then began to make aggressive sexual advances toward her, telling her that she had no choice but to be his "woman" and that he would force her if she resisted. He continued to escalate these advances until he attempted to sexually assault her days before she fled. Maria resisted F. because of her Christian faith and because she saw that gang members treat their girlfriends like property and frequently beat them. Maria knew this because her brother-in-law abuses her older sister, who has a physical disability and has trouble defending herself. Maria knew the police could not control the gang's violence against women, and she had seen the gang retaliate against people who file police reports. The gang killed a woman in Maria's town in front of her children just days after she reported that the gang had kidnapped one of her sons. Maria fled to the United States to save her life. Despite being found to have testified credibly, she received a negative credible fear determination on July 23, 2018. She is detained at T. Don Hutto Residential Center in Taylor, Texas.

22. Plaintiff Nora* and her three-year-old son, Plaintiff A.B.A., fled their home in El Salvador in May 2018, after their lives and safety were threatened by members of a notoriously brutal gang. Over the course of years, Nora suffered rape and physical beatings at the hands of her partner, who is the father of her son, A.B.A. Nora's abuser is affiliated with the gang and has had the gang surveil her since she attempted to end their relationship. Earlier this year, gang members who gather at a corner near Nora's house began to question her about whether A.B.A. was the son of her abuser. One of the gang's members named "E.T." began to make aggressive sexual advances whenever she passed by. In May, when Nora was walking home with her three young children, E.T. pursued her down the street and told her that he knew that she lived alone with her children and that he would come to her house at night to have sex with her. He showed her a gun in his waistband and then looked to her son, indicating that he would kill them both if

she did not submit to his sexual demands. She fled to the United States to save her son's life as well as her own. Despite being found to have testified credibly, Nora and her son both received negative credible fear determinations on June 15, 2018, which were affirmed by an immigration judge on June 26, 2018. USCIS denied their request for reconsideration and Nora and her son were removed to El Salvador on or about July 26, 2018, where they continue to fear for their lives.

23. Plaintiff Cindy Ardon Mejia fled her home in Central America with her young daughter, Plaintiff A.P.A., after suffering extensive past persecution, including rape, physical beatings, and shootings carried out by her daughter's father and members of his gang. Ms. Ardon Mejia's abuser, a powerful and violent member of a local gang, targeted and claimed her as his "woman" when she was just 14 years old and controlled and abused her sexually for years. On one occasion, her abuser ordered his gang to shoot up her house while she and her family were inside, leaving A.P.A. so traumatized that she is now upset by the sound of rain on the roof, believing that it is the sound of bullets. Ms. Ardon Mejia fled her country after having a relationship with another man, which her abuser had prohibited even though they were separated. She feared that he would kill her for disobeying his attempts to control her and that he would kidnap their daughter, as he has done in the past. Although she repeatedly sought police protection, her government never protected her from her abuser and his gang. Ms. Ardon Mejia and her little girl entered the United States in June 2018, seeking asylum. Despite being found to have testified credibly, they both received negative credible fear determinations on June 28, 2018, which were affirmed by an immigration judge on July 10, 2018. USCIS denied their request for reconsideration on July 25, 2018. On or about July 26, 2018, Ms. Ardon Mejia and

her daughter were removed to their home country, where they continue to be terrified for their lives.

24. Defendant Jefferson Beauregard Sessions III is sued in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office for Immigration Review ("EOIR") (the administrative immigration court system), and is empowered to grant asylum or other relief.

25. Defendant Kirstjen M. Nielsen is sued in her official capacity as the Secretary of DHS. In this capacity, she directs each of the component agencies within DHS, including United States Immigration and Customs Enforcement ("ICE"), United States Citizenship and Immigration Services ("USCIS"), and United States Customs and Border Protection ("CBP"). In her official capacity, Defendant Nielsen is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, and is empowered to grant asylum or other relief.

26. Defendant Lee Francis Cissna is sued in his official capacity as the Director of USCIS, which is the agency that, through its asylum officers, conducts interviews of certain individuals placed in expedited removal to determine whether they have a credible fear of persecution and should be permitted to apply for asylum before an immigration judge.

27. Defendant James McHenry is sued in his official capacity as the Director of the Executive Office for Immigration Review, the agency within the Department of Justice that, through its immigration judges, conducts limited review of negative credible fear determinations.

BACKGROUND

A. Asylum Protections in the United States

28. The immigration laws provide that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum[.]" 8 U.S.C. § 1158(a)(1).

29. To be eligible for asylum, a noncitizen must establish that she is "a refugee within the meaning of [8 U.S.C.] section 1101(a)(42)(A)[.]" 8 U.S.C. § 1158(b)(1)(A); *see also* 8 U.S.C. § 1158(b)(1)(B)(i). A refugee is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

8 U.S.C. § 1101(a)(42)(A).

30. The current asylum system was enacted in 1980, as part of the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, and was intended to bring U.S. law into conformity with our obligations under the United Nations Convention Relating to the Status of Refugees and 1967 United Nations Protocol Relating to the Status of Refugees. Consistent with international law, the definition of "refugee" does not require a showing of *certain* harm. Instead, individuals can establish eligibility for asylum based on a "well-founded fear of persecution." The Supreme Court has explained that a showing of a 1 in 10 chance of persecution is sufficient to satisfy that standard. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 440 (1987).

31. At the time of the 1980 Act it was well understood in both domestic and international law that persecution included harm inflicted by actors other than the official government of a country, so long as the government was "unable or unwilling to control" the persecutors. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

32. It is also well established that refugee protections extend to women fleeing gender-based persecution. For decades, the Board of Immigration Appeals ("BIA"), the immigration authorities, and federal courts have broadly recognized that women harmed by non-state actors because of their gender can show they are persecuted "on account of" one of the protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. *See, e.g.*, *In re Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (recognizing asylum claim based on female genital cutting by non-governmental actors); *Matter of Acosta*, 19 I&N Dec. at 233 (explaining that "persecution on account of membership in a particular social group" "mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . such as sex").

B. The Expedited Removal System and Credible Fear

33. Prior to 1996, noncitizens were generally entitled to a full hearing in immigration court before they could be removed, whether they were seeking admission at the border or had already entered the country. They were also entitled to administrative appellate review before the BIA and judicial review in federal court.

34. In 1996, Congress enacted legislation that created a type of highly truncated removal mechanism called "expedited removal" that could be used for certain noncitizens seeking admission. *See* 8 U.S.C. § 1225(b)(1).

35. Noncitizens subjected to expedited removal are ordered removed by an immigration officer "without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i).

36. Congress, however, was careful to carve out an exception for individuals who express fear of return to their home countries. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30(f).

37. If an individual indicates any fear of returning to his or her home country, the immigration officer must refer the individual for an interview with an asylum officer, called a "credible fear" interview. 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B); 8 C.F.R. § 235.3(b)(4); *see also* 8 C.F.R. § 208.30. If the noncitizen is referred to an asylum officer, the officer conducts (with the assistance of an interpreter if necessary) a rudimentary "credible fear interview" which is designed "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). The asylum officer must "conduct the interview in a non-adversarial manner." *Id.* Further, in determining whether credible fear is satisfied, the officer must "consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." 8 C.F.R. § 208.30(e)(4).

38. At the conclusion of the interview, if the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination that "shall include . . . the officer's analysis of why, in light of [the] facts, the alien has not established a credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(iii)(II).

39. Upon the individual's request, the agency must provide for prompt review of the asylum officer's negative credible fear determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see also* 8 C.F.R. § 208.30(g)(1). The immigration judge's decision is administratively "final and may not be appealed." 8 C.F.R. § 1208.30(g)(2)(iv)(A). Noncitizens undergoing credible fear review before immigration judges are still in expedited removal

proceedings, and do not get the full panoply of rights available in regular immigration court removal proceedings.

40. Noncitizens who receive a negative credible fear determination are issued an expedited removal order, which comes with significant consequences, beyond removal itself. Noncitizens who are removed pursuant to expedited removal orders are subject to a five-year bar on admission to the United States. 8 U.S.C. § 1182(a)(9)(A)(i).

41. To ultimately prevail on an asylum claim, the applicant need only establish that there is a 10% chance that he or she will be persecuted on account of one of the five protected grounds for asylum. To prevail at a credible fear interview, however, the applicant need only show a "significant possibility" of asylum eligibility—i.e., a "significant possibility" of a 1 in 10 chance of persecution, or a *fraction* of 10%. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum[.]").

42. If a noncitizen is found by the asylum officer to have a "credible fear," the individual is taken out of the expedited removal process and referred for a regular removal hearing before an immigration judge. At that hearing, they will have the opportunity to develop a full record before the judge, and they may appeal an adverse decision to the BIA and federal court of appeals. 8 C.F.R. § 208.30 (f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

43. The reason for the low threshold at the credible fear stage is straightforward. An asylum claim is highly fact-specific and often will take significant time, resources and expertise to develop, including expert testimony and extensive evidence about country conditions. It may also involve complex legal questions. In the expedited removal system, however, abbreviated

credible fear proceedings occur within days of arrival, with little to no preparation or assistance by counsel, little to no knowledge of asylum law by the applicant, no opportunity to examine witnesses or gather evidence, and while the individual is detained. It is thus highly unrealistic for applicants in the expedited removal system to present a fully developed asylum claim. Accordingly, Congress established a low threshold at the credible fear stage to ensure that potentially valid asylum claims could be developed properly in a full trial-type hearing before an immigration judge. Congress viewed this credible fear process as an essential safeguard to ensure bona fide asylum seekers would not be summarily removed.

C. The New Written Credible Fear Policies

44. On June 11, 2018, Defendant Sessions, in his role as Attorney General, issued a precedential decision in an asylum case, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), reversing a grant of asylum to a Salvadoran woman who fled more than fifteen years of extreme domestic violence at the hands of her then-husband. Although the BIA had held that Ms. A.B. had established her eligibility for asylum, Defendant Sessions used an extraordinary procedure by which he "certified" the BIA's decision to himself for review and reversed the BIA's earlier precedent in *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014). *A-R-C-G-* had recognized, consistent with the then-longstanding legal position of DHS, that asylum claims based on domestic violence can qualify for protection.

45. Moreover, Defendant Sessions used *Matter of A-B-* as a vehicle to articulate new legal standards for the adjudication of asylum cases based on persecution from non-governmental actors on account of membership in a particular social group, focusing particularly on claims by individuals fleeing domestic abuse and gang violence. *Matter of A-B-* misstates or mischaracterizes multiple aspects of asylum law, seeking to heighten the asylum standards and

increase the burden on asylum seekers to prove eligibility. Defendant Sessions specifically opined that, based on the newly articulated standard, few claims pertaining to domestic or gang violence by non-governmental actors would qualify for asylum or satisfy the credible fear standard. *See id.* at 320 and n.1.

46. On June 13, 2018, USCIS issued a written Interim Guidance from John L. Lafferty to USCIS Asylum Division staff, instructing asylum officers to apply *Matter of A-B-* to credible fear interviews. *See* Asylum Division Interim Guidance – Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018), June 13, 2018 (hereinafter "USCIS Interim Guidance") ("we are issuing the following interim guidance on how to proceed with decision-making on asylum cases and CF . . . screening determinations").

47. On July 11, 2018, USCIS issued final written guidance to employees, including asylum officers responsible for conducting credible fear interviews, instructing them, inter alia, to assess credible fear in light of *A-B-* and directing that claims based on domestic violence and gang-related harms generally will not establish the basis for a credible fear of persecution. USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) (hereinafter "USCIS Guidance" or "Guidance"), at 1.[1] *See also id.* (indicating that the "Authority" for the Guidance includes the expedited removal statute, 8 U.S.C. § 1225, and its implementing regulations at 8 C.F.R. §§ 235 and 208).

[1] Although past agency practice has always been to have USCIS Asylum Division guidance drafted within that office and approved by the Chief of the Asylum Division, on information and belief, this USCIS Guidance was issued outside those channels, without approval from any of DHS's Asylum Division experts. Unlike previous guidance of this type, the USCIS Guidance memorandum has no "FROM" field, no authors identified, and no signature.

48. The USCIS Guidance also announces a new credible fear policy not mentioned in *Matter of A-B-*. Although under prior USCIS policy credible fear applicants could rely on the law of the most favorable federal court of appeals circuit, the Guidance mandates that in making credible fear determinations, USCIS asylum officers shall ignore all federal court of appeals case law that is inconsistent with *A-B-*, and even then consider only the law of the circuit where the applicant is physically located during her credible fear interview.

49. On information and belief, the components of DHS and the Department of Justice (including the Executive Office for Immigration Review) involved in adjudicating and enforcing the immigration laws have issued further written documents applying the pronouncements in *Matter of A-B-* to the credible fear process.

50. *Matter of A-B-* and the subsequently issued guidance documents establish written policies concerning credible fear interviews and implementing the expedited removal provisions at 8 U.S.C. § 1225(b)(1). Taken together, the *Matter of A-B-* decision and the guidance issued by USCIS, EOIR, and other components of DHS and DOJ addressing the applicability of *Matter of A-B-* to credible fear decisions are referred to herein as "the new credible fear policies." The new credible fear policies were first implemented during the last 60 days.

51. These policies unlawfully change the credible fear standard in multiple interrelated ways, to further an explicit goal of foreclosing claims brought by women, children, and other migrants fleeing gender and gang-related violence. The new credible fear policies are designed to ensure that those fleeing domestic violence or gang-related violence do not make it into full immigration proceedings. The new policies:

- instruct asylum officers to deny virtually all credible fear claims based on domestic violence or gang-related harms, in violation of the requirement that each case be adjudged based on its specific facts;

- ratchet up the showing for failure of government protection that such applicants must prove at the credible fear stage to establish eligibility for asylum based on fear of harm by non-governmental actors;

- impose a heightened, erroneous standard for proving that persecution is "on account of" (or has a "nexus" to) a protected ground for asylum;

- impose an inappropriate burden on credible fear applicants to articulate and provide precise evidence identifying the specific particular social group that forms the basis for their persecution;

- direct asylum officers to exercise "discretion" to deny eligible applicants, even though the only question at the threshold credible fear stage is legal eligibility and not discretion; and

- instruct asylum adjudicators making credible fear determinations to disregard contrary court of appeals precedents and to apply only the case law in the circuit where the credible fear applicant is detained.

Each of these unlawful changes to the credible fear standard is described further below.

The Instruction to Deny Virtually All Credible Fear Claims Based on Domestic Violence and Gang-Related Harm

52. Even though it is well established that credible fear and asylum claims must be assessed on a case-by-case basis according to the specific circumstances and evidence presented, and even though there are no categorical bars in the INA based on the type of claim presented, the new credible fear policies instruct asylum adjudicators to reject credible fear claims based on domestic violence or gang-related harms in all but the most extraordinary cases.

53. In *A-B-*, the Attorney General asserted that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." 26 I&N Dec. at 320. Although Ms. A.B.'s case was not at the credible fear stage (and even though she did not present an asylum claim based on gang violence), the Attorney General

added that "[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution. *See* 8 U.S.C. 1225(b)(1)(B)(v)[.]" *Id.* at 320 & n.1 (quoting the credible fear standard).

54. Moreover, the USCIS Guidance asserts, in bold font, that "**[i]n general, . . . claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for . . . a credible . . . fear of persecution.**" USCIS Guidance at 6.

55. This instruction is incorrect and arbitrary, deprives credible fear applicants of an impartial adjudication of their claims based on the specific facts of their case, violates the fundamental principle in the Refugee Act that a single standard should apply to all asylum seekers without discrimination, represents an improper departure from prior policy, and reflects Defendants' unlawful presumption against entire categories of claims at the credible fear stage.

The New "Condoned" or "Complete Helplessness" Standard for Failure of Government Protection

56. It is well-settled that for all five protected grounds for asylum (race, religion, nationality, membership in a particular social group, and political opinion), a noncitizen can qualify for asylum based on a well-founded fear of persecution by a private actor, where the government is "unable or unwilling" to protect the applicant. However, the new credible fear policies mandate a new, higher standard in such cases.

57. In *A-B-*, the Attorney General asserted that victims of persecution by non-governmental actors, and specifically those asserting claims based on domestic or gang violence, must now establish that "the government condoned the private actions 'or at least demonstrated a complete helplessness to protect the victims.'" 27 I&N Dec. at 337. The USCIS Guidance repeats and adopts this instruction in *A-B-* for all asylum officers, including those making credible fear

determinations. *See, e.g.*, USCIS Guidance at 6 (explaining that the "unable or unwilling" standard requires a showing that "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim"); *id.* at 10 ("[T]he home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution."); *see also* USCIS Interim Guidance ("the applicant must show that the government condoned the behavior or demonstrated a complete helplessness to protect the victim").

58. This new "condoned" or "complete helplessness" formulation for credible fear interviews is inconsistent with the text and context of the Refugee Act and the INA and with Congress's intent in the Refugee Act to adopt the settled agency construction of "well-founded fear of persecution" and conform the refugee definition to international norms. It is also inconsistent with decades of asylum case law and the government's own longstanding policy, which have recognized the viability of claims involving non-governmental persecutors and have uniformly held that the "unable or unwilling" standard is met even where the applicant has not demonstrated that the government condones the harm or is completely helpless to prevent it.

Nexus and Circularly Defined Particular Social Groups

59. *Matter of A-B-* concluded that in cases involving non-governmental actors–specifically, domestic violence and gang cases–it will be difficult to establish that the motive for the persecution was "on account of" (or has a "nexus" to) the protected ground and not any personal relationship between the applicant and the persecutor. 27 I&N Dec. at 337-39. *See also* USCIS Guidance at 6 ("[W]hen a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be 'one central reason' for the abuse."). That assertion however, violates the plain text of the INA, which contemplates mixed

motives for persecution, as well as the credible fear standard itself. Asylum applicants have successfully established "nexus" in a range of circumstances that inherently or predominantly involve personal relationships, including female genital cutting, honor killings, forced marriages, and persecution of homosexuals by family members. Further, the credible fear policies also set forth an unprecedented and unlawful evidentiary requirement, demanding evidence that the persecutor was aware of the social group as defined in the asylum claim in order to establish nexus. *See, e.g.*, *A-B-*, 27 I&N Dec. at 339.

60. The new credible fear policies also establish a presumption that asylum claims founded on domestic violence present impermissibly circular social groups. Circularly defined particular social groups generally do not meet the refugee definition because of a failure of nexus; for example, a domestic abuser generally does not batter his victim because she is a battered woman. *A-B-* erroneously concludes that groups defined in part by the applicant's inability to leave the relationship are impermissibly circular because "the inability 'to leave' was created by harm or by threatened harm" (referring to the harm committed by the abuser). 27 I&N Dec. at 335. The USCIS Guidance affirms this position and encourages adjudicators to reject similarly worded social groups. USCIS Guidance at 5 ("The applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the particular social group by the harm on which the asylum claim was based."). Yet the inability of a woman to leave her relationship may be caused by many factors apart from the fact of harm, including her abuser's beliefs or social and cultural norms that subordinate women to men. The credible fear policies are unlawful, represent an improper departure from prior policy, and rely on impermissible generalizations about domestic violence asylum claims, their societal context, and the motives of domestic violence perpetrators that have no basis in fact.

"Exact Delineation" of Particular Social Group

61. *Matter of A-B-* asserted that "an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group." *Id.* at 344. *See also* USCIS Guidance at 3 ("an applicant seeking asylum or refugee status based on membership in a particular social group must present facts that clearly identify the proposed particular social group"). The new credible fear policies thus provide that noncitizens must specify the "particular social group" that they are claiming.

62. That requirement cannot be imposed at the credible fear screening stage. Congress intended the credible fear standard to be a low, threshold standard that would not screen out any potentially valid asylum claims or require development of legally or factually complicated issues in such a truncated, "nonadversarial" process. *See* 8 C.F.R. § 208.30. Yet defining and establishing membership in a "particular social group" is one of the most complex and difficult questions in asylum law, one frequently requiring expert testimony and extensive documentary evidence. *See, e.g.*, 65 Fed. Reg. 76588-01, Proposed Rule, Immigration and Naturalization Service, Asylum and Withholding Definitions (Dec. 7, 2000) ("Membership in a particular social group is perhaps the most complex and difficult to understand" of the five protected grounds for asylum). Such a requirement is fundamentally inconsistent with the credible fear scheme that Congress enacted.

Adverse Discretion at the Credible Fear Stage

63. *Matter of A-B-* also made a point of "remind[ing] *all* asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for

asylum eligibility under the INA." 27 I&N Dec. at 345 n.12 (emphasis added). Likewise, the USCIS Guidance addresses the exercise of discretion, explaining under the heading of "USCIS Officers' General Duties" that "if eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application." USCIS Guidance at 2. It then repeats *Matter of A-B-*'s discussion of the exercise of discretion, emphasizing the use of unlawful entry into the United States as a negative factor. *Id.* at 7-8.

64. Yet that requirement cannot be imposed at the credible fear stage, where discretion is simply irrelevant. Credible fear is defined as "a significant possibility . . . the alien can establish *eligibility* for asylum" or other similar protection. 8 C.F.R. § 208.30 (emphasis added).

Disregarding Contrary Court of Appeals Rulings

65. The new credible fear policies assert a categorical rule that asylum officers should "apply the case law of the relevant federal circuit court" only "to the extent that those cases are not inconsistent with *Matter of A-B-*." USCIS Guidance at 8-9.

66. This new policy thus asserts that for every statement contained in *Matter of A-B-*, the Attorney General's opinion is controlling regardless, and credible fear adjudicators will not follow any contrary court of appeals decisions.

67. Under our Constitutional scheme, however, it is the Judiciary's authority to interpret the law, and the federal agencies cannot categorically disregard federal court rulings.

68. Moreover, because credible fear is a low screening threshold, designed to allow *all* meritorious cases to reach the asylum application stage, applicants should prevail if any circuit is likely to recognize the validity of her claim.

69. The new credible fear policies also seek to eliminate asylum seekers' ability to rely on federal circuit law by providing that the "relevant federal circuit court" from which to apply

decisions—to the extent the guidance permits such reliance at all—"is the circuit where the removal proceedings will take place if the officer makes a positive credible fear . . . determination." *See, e.g.*, USCIS Guidance at 8-9. The new credible fear policies then go on to assert that "the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview." *Id.* at 9.

70. This marks a dramatic change in policy. For example, for years, asylum officers have been trained that where circuit courts disagree on an issue of law, "generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard." *See, e.g.*, Refugee, Asylum, and International Operations Directorate Officer Training Asylum Officer Training Course ("RAIO Training Course"), Credible Fear of Persecution and Torture Determinations (Feb. 13, 2017), at 17; RAIO Training Course, Credible Fear of Persecution and Torture Determinations (Feb. 28, 2014), at 16 (same); RAIO Training Course, Credible Fear of Persecution and Torture Determinations (Apr. 14, 2006), at 14 (same). This means that the relevant circuit law to apply is the most favorable circuit on that issue for the asylum seeker. The credible fear policies offer no adequate explanation for this change.

71. The prior policy of giving applicants the benefit of the most favorable circuit law is in keeping with the credible fear standard. If an applicant will prevail under a particular circuit's caselaw, then by necessity there is a significant possibility that she will prevail. The new policies, by contrast, violate the credible fear standard.

72. The new credible fear policies contain numerous other legal errors affecting the credible fear process.

73. Taken together, these changes impermissibly distort the credible fear process and undermine Congress's intent that the credible fear standard be a low, threshold standard that would not screen out any potentially meritorious claims.

D. Defendants Sessions' and Nielsen's Public Statements Regarding Their Goal to Undermine Asylum Protections

74. Rather than comply with our asylum laws, Defendant Sessions and Defendant Nielsen have been open about their desire to weaken asylum protections, particularly for victims of domestic violence and gangs from Central America. Indeed, Defendant Sessions has repeatedly expressed his hostility towards such claims, and urged a higher credible fear screening standard in order to speed the removal of such individuals. The new policies seek to advance these goals.

75. For example, in October 2017, speaking to the Executive Office for Immigration Review, Defendants Sessions expressed his apparent view that the "particular social group" ground for asylum protection should not be included in the statute. The Attorney General stated that our asylum laws "are meant to protect those who because of characteristics like their race, religion, nationality, or political opinions cannot find protection in their home countries."[2] He did not acknowledge the "particular social group" ground. Instead, he complained that other claims– which he deemed "insubstantial," "vague," and "subjective" –have "swamped our system."[3] Because he listed the other four protected grounds as proper asylum claims, his implication was that claims based on a "particular social group" are insubstantial.

76. Defendant Sessions was also explicit about his goal to "elevate the threshold standard of proof in credible fear interviews."[4]

---

[2] Attorney General Jefferson Beauregard Sessions III, Remarks to the Executive Office for Immigration Review, Falls Church, VA (Oct. 12, 2017).
[3] *Id.*
[4] *Id.*

77. The same day he issued *Matter of A-B-*, he told an audience of immigration judges that "the vast majority of the current asylum claims are not valid."[5]

78. Defendant Nielsen has likewise been explicit about her goal of heightening the credible fear standard as well, testifying before a January 16, 2018, Senate hearing that "we must tighten case processing standards, including the 'credible-fear' standard[.]"[6]

79. Thus, the unlawful efforts to heighten the credible fear standard evinced in the credible fear policies culminated from Defendants' express desires to change that standard. But neither Defendant Sessions nor Defendant Nielsen have the power to change the credible fear standard, which can be changed only by Congress.

E. The New Credible Fear Policies Place Plaintiffs in Grave Danger

80. Under the correct legal standards, each of the Plaintiffs should have easily passed the credible fear interview and would have been referred for regular removal proceedings to seek asylum. Instead, because of the new credible fear policies, they were each issued a negative credible fear determination.

81. Many other bona fide asylum applicants who meet the credible fear standard similarly have received and will receive negative credible determinations based on the new policies.

82. Defendants' new policies are depriving Plaintiffs and other asylum seekers of their right to pursue potentially meritorious claims for protection. Indeed, immigration service providers across the country have already reported that the new credible fear policies are causing a dramatic increase in the proportion of asylum seekers who receive negative credible fear determinations.

---

[5] Attorney General Jefferson Beauregard Sessions III, Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, D.C. (June 11, 2018).
[6] Secretary Kirstjen M. Nielsen, Department of Homeland Security, Testimony at Hearing Before the Senate Committee on Judiciary (Jan. 16, 2018).

83. The result is that individuals have been and will continue to be sent back to countries that have repeatedly been cited for their pervasive and widespread violence against women and children, including domestic violence, rape, and beatings, and other abuse by gangs. For example, it has been widely recognized, including by the State Department in 2018, that El Salvador has one of the highest homicide rates in the world, and Amnesty International has described El Salvador as "one of the most dangerous countries to be a woman." Numerous other reports, including by the UNHCR, have documented that gender-motivated killings and other murders of women in El Salvador, Honduras and Guatemala are commonplace, and that Central American gangs perpetrate "pervasive, pernicious, and often uncontrollable violence and disruption in the region." Human rights reports have also widely documented the systemic failures in state protection in Central American countries.

84. Indeed, numerous migrants from Central America who were deported from the United States have suffered brutal harms, including death, after returning to their home countries. For example, one study documented that up to 83 individuals deported to Northern Triangle countries between 2014 and 2015 have been killed.

85. Without judicial intervention, the Defendants will be able to effectively rewrite the expedited removal scheme and substantive asylum law to achieve the policy goal of eliminating the ability of Central American refugees to seek safety in the United States.

FIRST CLAIM FOR RELIEF

(Refugee Act, Immigration and Nationality Act, Administrative Procedure Act)

86. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

87. Pursuant to 8 U.S.C. § 1252(e)(3), judicial review is available before the Court regarding whether "a written policy directive, written policy guideline, or written procedure issued by or

under the authority of the Attorney General to implement [8 U.S.C. § 1252(b)] is not consistent with applicable provisions of [Subchapter II of the INA] or is otherwise in violation of law."

88. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706, provides that a Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

89. The new credible fear policies relating to *Matter of A-B-* violate the INA and the Refugee Act and are arbitrary and capricious and contrary to law under the APA for multiple reasons. Among other reasons, the new policies conflict with the definition of "refugee," *see* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A); conflict with the credible fear standard at 8 U.S.C. § 1225(b)(1)(B)(v); represent a departure from the agency's longstanding policy without an acknowledgement of or a reasoned explanation for that departure; are illogical and irrational; and deprive credible fear applicants of a meaningful opportunity to establish their potential eligibility for asylum pursuant to 8 U.S.C. §§ 1158(b)(1) and 1225(b)(1)(B).

SECOND CLAIM FOR RELIEF

(Separation of Powers, Immigration and Nationality Act, Administrative Procedure Act)

90. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

91. The doctrine of separation of powers is embodied in the U.S. Constitution. The Constitution establishes the paramount authority of the Judiciary to interpret the law–"to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)–and to render decisions that bind the other branches of government in our constitutional system. The Executive Branch–like Congress–is bound by the decisions issued by the federal courts. Respect for the controlling

authority of judicial opinions and judgments is a fundamental component of the rule of law. The new credible fear policies violate the separation of powers; violate the INA, including the credible fear standard at 8 U.S.C. § 1225(b)(1)(B)(v); and are arbitrary and capricious and contrary to law under the APA.

92. In addition, the new mandate to ignore contrary circuit court precedent, and to apply only the case law in the circuit where the credible fear applicant is detained, is arbitrary and capricious and contrary to law in violation of the APA.

THIRD CLAIM FOR RELIEF

(Due Process Clause of the Fifth Amendment to the United States Constitution)

93. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

94. Plaintiffs have protected interests in applying for asylum, withholding of removal, and Convention Against Torture relief upon a showing that meets the applicable standards, and in not being removed to a country where they face serious danger and potential loss of life.

95. Plaintiffs are entitled under the Due Process Clause to a fair hearing of their claims, and a meaningful opportunity to establish their potential eligibility for asylum and related relief from removal.

96. The new credible fear policies relating to *Matter of A-B-* have violated Plaintiffs' right to due process in numerous respects, including by foreclosing their claims regardless of their individual facts or merits; by applying an unlawful, more burdensome legal standard to Plaintiffs' claims; and by depriving them of a meaningful opportunity to establish their potential eligibility for asylum and related relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray this Court to:

a. Declare the new credible fear policies (including but not limited to *Matter of A-B-*, the USCIS Guidance, and all written credible fear guidance issued by DHS and DOJ relating to *Matter of A-B-*) contrary to law;

b. Enter an order vacating the new credible fear policies (including but not limited to *Matter of A-B-*, the USCIS Guidance, and all written credible fear guidance issued by DHS and DOJ relating to *Matter of A-B-*);

c. Enter an order enjoining Defendants from continuing to apply the new credible fear policies (including but not limited to *Matter of A-B-*, the USCIS Guidance, and all written credible fear guidance issued by DHS and DOJ relating to *Matter of A-B-*) to credible fear determinations, interviews, or hearings issued or conducted by asylum officers or immigration judges;

d. Enter an order staying the expedited removal of each of the Plaintiffs and vacating the expedited removal orders issued to each of the Plaintiffs;

e. Enter an order enjoining Defendants from removing the Plaintiffs without first providing each of them with a new credible fear process under correct legal standards or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a; and, for any Plaintiffs who have been removed pursuant to an expedited removal order prior to the Court's order, to parole those Plaintiffs into the United States for the duration of those credible fear and/or removal proceedings;

f. Award Plaintiffs' counsel reasonable attorneys' fees under the Equal Access to Justice Act, and any other applicable statute or regulation; and

g. Grant such further relief as the Court deems just, equitable, and appropriate.

Dated: August 7, 2018

Respectfully submitted,

Scott Michelman (D.C. Bar No. 1006945)
Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
(202) 457-0800

Jennifer Chang Newell**
Katrina Eiland**
Cody Wofsy**
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0774

Judy Rabinovitz**
Omar C. Jadwat**
Lee Gelernt**
Celso J. Perez*** (D.C. Bar No. 1034959)
American Civil Liberties Union Foundation,
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

Sandra S. Park**
Lenora M. Lapidus
American Civil Liberties Union Foundation,
Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7871

Eunice Lee**
Karen Musalo**
Anne Dutton**
Center for Gender & Refugee Studies
200 McAllister St.
San Francisco, CA 94102
(415) 565-4877

Thomas Buser-Clancy
Andre Segura
ACLU Foundation of Texas
P.O. Box 8306
Houston, TX 77288
(713) 942-8146

Attorneys for Plaintiffs

***Pro hac vice application forthcoming*
****Admission to D.D.C. forthcoming*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 18-cv-1853 (EGS)
JEFFERSON B. SESSIONS, III, Attorney General of the United States, et al.,	)	
Defendant.	)	

ORDER GRANTING TEMPORARY STAY OF REMOVAL

Upon consideration of Plaintiffs' Emergency Motion for a Stay of Removal, the opposition thereto, and Plaintiffs' reply, and for the reasons stated in open Court at the motion hearing this date, it is **HEREBY ORDERED** that Defendants, their agents, and any persons acting in concert with them are enjoined from removing Plaintiffs Grace, Mina, Gina, Mona, Maria, Carmen and her daughter J.A.C.F., and Gio, from the United States pending resolution of the Court's determination of whether it has jurisdiction to enter a stay of removal in this case.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
August 9, 2018

LATHAM & WATKINS LLP
Wayne S. Flick (Bar No. 149525)
wayne.s.flick@lw.com
Manuel A. Abascal (Bar No. 171301)
manny.abascal@lw.com
James H. Moon (Bar No. 268215)
james.moon@lw.com
Kristin P. Housh (Bar No. 286651)
kristin.housh@lw.com
Robin A. Kelley (Bar No. 287696)
robin.kelley@lw.com
355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Telephone: +1.213.485.1234
Facsimile: +1.213.891.8763

AMERICAN IMMIGRATION COUNCIL
Melissa Crow (*pro hac vice* pending)
mcrow@immcouncil.org
Karolina Walters (*pro hac vice* pending)
kwalters@immcouncil.org
Kathryn Shepherd (*pro hac vice* pending)
kshepherd@immcouncil.org
1331 G Street, NW, Suite 200
Washington, DC 20005
Telephone: +1.202.507.7523
Facsimile: +1.202.742.5619

CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy (*pro hac vice* pending)
bazmy@ccrjustice.org
Ghita Schwarz (*pro hac vice* pending)
gschwarz@ccrjustice.org
Angelo Guisado (*pro hac vice* pending)
aguisado@ccrjustice.org
666 Broadway, 7th Floor
New York, NY 10012
Telephone: +1.212.614.6464
Facsimile: +1.212.614.6499

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AL OTRO LADO, INC., a California corporation; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE and JOSE DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JOHN F. KELLY, Secretary, United States Department of Homeland Security, in his official capacity;

Case No. 2:17-cv-5111

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR:

(1) VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1101, *ET SEQ.*

(2) VIOLATION OF THE ADMINISTRATIVE

KEVIN K. MCALEENAN, Acting Commissioner, United States Customs and Border Protection, in his official capacity; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection, in his official capacity; and DOES 1-25, inclusive,

Defendants.

PROCEDURE ACT, 5 U.S.C. § 551, *ET SEQ.*

(3) VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION (PROCEDURAL DUE PROCESS)

(4) VIOLATION OF THE *NON-REFOULEMENT* DOCTRINE

CLASS ACTION

I. INTRODUCTION

Plaintiff Al Otro Lado, Inc. ("Al Otro Lado"), a non-profit legal services organization, and Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe and Jose Doe ("Class Plaintiffs"), acting on their own behalf and on behalf of all similarly situated individuals presenting themselves at Ports of Entry ("POEs," or individually, "POE") along the U.S.-Mexico border to seek asylum in the United States, allege as follows:

1. U.S. Customs and Border Protection ("CBP") officials have systematically violated U.S. law and binding international human rights law by refusing to allow individuals, including Class Plaintiffs – who present themselves at POEs along the U.S.-Mexico border and assert their intention to apply for asylum or a fear of returning to their home countries – to seek protection in the United States.

2. CBP is violating the law by utilizing various tactics – including misrepresentations, threats and intimidation, verbal abuse and physical force, and coercion – to deny asylum seekers, including Class Plaintiffs, access to the asylum process. CBP officials have, for example, misinformed asylum seekers that they could not apply for asylum because "Donald Trump just signed new laws saying there is no asylum for anyone," coerced asylum seekers into signing forms abandoning their asylum claims by threatening to take their children away, threatened to deport asylum seekers back to their home countries (where they face persecution) if they persisted in their attempts to seek asylum, and even forcefully removed asylum seekers from POEs.

3. The prevalence and persistence of CBP's illegal practice of denying asylum seekers access to the U.S. asylum process has been observed by Plaintiff Al Otro Lado and Class Plaintiffs and has been well documented as occurring along the entire U.S.-Mexico border through comprehensive reporting by non-governmental organizations, such as Human Rights First, Amnesty International,

and Human Rights Watch; other experts working in the U.S.-Mexico border region; as well as numerous news outlets, including The Washington Post, The New York Times, and USA Today.

4. CBP's illegal conduct is occurring as a humanitarian crisis drives vulnerable people experiencing persecution in their home countries to seek refugee protection in the United States. Asylum seekers, including Class Plaintiffs, have fled persecution, violence and death, and face grave and immediate danger to their lives if denied access to the asylum process – a system specifically designed to protect refugees like them. CBP's unlawful practice of turning asylum seekers away from POEs is forcing asylum seekers, including Class Plaintiffs, to return to Mexico and other countries where they remain susceptible to serious harm such as kidnapping, rape, trafficking, torture or even death.

5. On information and belief, CBP's unlawful acts were performed (and continue to be performed) at the instigation, under the control or authority of, or with the knowledge, consent, direction or acquiescence of, the Defendants named in this action ("Defendants"). By refusing to follow the law, Defendants are engaged in an officially sanctioned policy or practice that has caused, and will continue to cause, Class Plaintiffs and Al Otro Lado concrete and demonstrable injuries and irreparable harm.

6. Defendants have deprived Class Plaintiffs and similarly situated individuals of their statutory and regulatory rights to apply for asylum, violated their due process rights under the Fifth Amendment to the United States Constitution and violated the United States' obligations under international law to uphold the principle of *non-refoulement*. Each Class Plaintiff has attempted to access the asylum process and would seek to do so again, but for Defendants' systematic, illegal practice at issue in this action, which has deprived them of such access.

7. Defendants have caused injury to Plaintiff Al Otro Lado by frustrating its ability to advance and maintain its central institutional mission and forcing the organization to divert substantial portions of its limited time and resources away from its various programs in Los Angeles, California and Tijuana, Mexico to counteract CBP's unlawful practices.

8. Despite persistent advocacy by Al Otro Lado and other advocates, and despite Class Plaintiffs' desperate need to seek asylum in the United States, CBP shows no signs of abating its illegal practice. Accordingly, Al Otro Lado and Class Plaintiffs require the intervention of this Court to declare that CBP's conduct violates U.S. and international law, to enjoin Defendants from circumventing their legal obligations and to order Defendants to implement procedures to ensure effective oversight and accountability in the inspecting and processing of asylum seekers. Absent the Court's intervention, CBP's unlawful conduct will continue to imperil the lives and safety of numerous vulnerable asylum seekers.

9. In addition, because Class Plaintiffs face imminent and irreparable injury if they are not afforded access to the asylum process, they seek immediate injunctive relief in the form of a temporary restraining order ordering Defendants to allow Class Plaintiffs to enter the United States to pursue their asylum claims. Plaintiff Al Otro Lado and Class Plaintiffs also seek permanent injunctive relief to ensure that Defendants no longer deny other asylum seekers the rights afforded to them under U.S. and international law.

II. JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, and 1350. Defendants have waived sovereign immunity for purposes of this suit pursuant to 5 U.S.C. § 702. The Court has authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in this district under 28 U.S.C. § 1391(e). All Defendants are sued in their official capacity. Plaintiff Al Otro Lado is an organization that resides and is incorporated in Los Angeles, California.

III. PARTIES

12. Plaintiff Al Otro Lado is a non-profit, non-partisan organization incorporated in California, and was established in 2014. Al Otro Lado is a legal services organization serving indigent deportees, migrants, refugees and their families, principally in Los Angeles, California and Tijuana, Mexico. Al Otro Lado's mission is to coordinate and to provide screening, advocacy and legal representation for individuals in asylum and other immigration proceedings, to seek redress for civil rights violations and to provide assistance with other legal and social service needs. Defendants have frustrated Al Otro Lado's mission and have forced Al Otro Lado to divert significant resources away from its other programs to counteract CBP's illegal practice of turning away asylum seekers at POEs.

13. Through its Refugee Program in Tijuana, Mexico, Al Otro Lado assists individuals seeking protection from persecution in the United States. In response to CBP's unlawful practice, Al Otro Lado has had to expend significant organizational time and resources and alter entirely its previously used large-scale clinic model. For example, Al Otro Lado previously held large-scale, mass-advisal legal clinics in Tijuana that provided a general overview on asylum laws and procedures. This type of assistance (similar to the Legal Orientation Program of the Executive Office for Immigration Review) only was workable when CBP allowed asylum seekers into the United States in accordance with the law.

14. Since 2016, however, CBP's illegal conduct has compelled Al Otro Lado to expend significant time and resources to send representatives to Tijuana from Los Angeles multiple times per month for extended periods to provide more individualized assistance and coordination of legal and social services, including

individual screenings and in-depth trainings to educate volunteer attorneys and asylum seekers regarding CBP's practice and potential strategies to pursue asylum in the face of CBP's tactics. Whereas Al Otro Lado previously was able to accommodate several dozen attorneys and over 100 clients at a time in its large-scale clinics, Al Otro Lado has been forced to transition to an individualized representation model where attorneys are required to work with asylum seekers one-on-one and provide direct representation. Al Otro Lado has expended (and continues to expend) significantly more resources recruiting, training and mentoring pro bono attorneys to help counteract CBP's unlawful practice. Nevertheless, even asylum seekers provided with such individualized pro bono representation are being turned away by CBP in violation of the law.

15. Al Otro Lado also has spent time and resources advocating that CBP provide asylum seekers with access to the asylum process and cease using unlawful tactics to circumvent its legal obligations. For example, Al Otro Lado representatives have filed numerous complaints with the U.S. government detailing examples of CBP's unlawful practice depriving asylum seekers of access to the asylum process.

16. Such diversion of Al Otro Lado's time and resources negatively impacts its other programs. For example, Al Otro Lado has not been able to pursue funding for or otherwise advance the following programs: (1) its Deportee Reintegration Program through which Al Otro Lado assists deportees who struggle to survive in Tijuana, many of whom have no Mexican identity documents or health coverage, and may not even speak Spanish; and (2) its Cross-Border Family Support Program through which Al Otro Lado assists families with cross-border custody issues, and helps connect family members residing in the United States to social, legal, medical and mental health services. Other programs that have been impacted include Al Otro Lado's Deportee Financial Literacy Program, Deportee

Education Fund, Refugee Mental Health Program and Opioid Recovery Program, among others.

17. In addition, the constraints on Al Otro Lado's limited time and resources has negatively impacted its operations in Los Angeles, including delaying the opening of its Los Angeles office through which it coordinates "Wraparound" services for low-income immigrants in Los Angeles. The increased need for on the ground support in Tijuana has impacted Al Otro Lado's ability to satisfy its clinical obligations for low-income immigrants at the Wellness Center, located on the grounds of the Los Angeles County+USC Medical Center, and to conduct outreach to provide free legal assistance to homeless individuals in Los Angeles to allow them to better access permanent supportive housing, employment and educational opportunities.

18. Al Otro Lado continues to be harmed by Defendants because CBP's illegal practice at the border frustrates its organizational mission and forces Al Otro Lado to divert resources from its other objectives. If Al Otro Lado had not been compelled to divert resources to address CBP's unlawful conduct at the U.S.-Mexico border, it would have directed these resources toward its other programs to further the advancement of its core mission.

19. Plaintiff Abigail Doe ("A.D.") is a female native and citizen of Mexico. She is the mother of two children under the age of ten. A.D. and her family have been targeted and threatened with death or severe harm in Mexico by a large drug cartel that had previously targeted her husband, leaving her certain she would not be protected by local officials. A.D. fled with her two children to Tijuana, where they presented themselves at the San Ysidro POE. On behalf of herself and her children, A.D. expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced A.D. into recanting her fear and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that A.D.

does not have a credible fear of returning to Mexico. As a result of Defendants' conduct, A.D. and her children were unable to access the asylum process and were forced to return to Tijuana, where they remain in fear for their lives. A.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understands that they would likely be turned away again. A.D. and her children are currently living in temporary housing in Tijuana and can no longer remain in Mexico and have no place else to turn for safety but the United States.

20. Plaintiff Beatrice Doe ("B.D.") is a female native and citizen of Mexico. She is the mother of three children under the age of sixteen. B.D. and her family have been targeted and threatened with death or severe harm in Mexico by a dangerous drug cartel; she was also subject to severe domestic violence. B.D. fled with her children and her nephew to Tijuana, where they presented themselves once at the Otay Mesa POE and twice at the San Ysidro POE. On behalf of herself and her children, B.D. expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced B.D. into recanting her fear and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that B.D. and her children have no fear of returning to Mexico. As a result of Defendants' conduct, B.D. and her children were unable to access the asylum process and were forced to return to Tijuana, where they remain in fear for their lives. B.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understands that they would likely be turned away again. B.D. and her children are currently living in temporary housing in Tijuana and can no longer remain in Mexico and have no place else to turn for safety but the United States.

21. Plaintiff Carolina Doe ("C.D.") is a female native and citizen of Mexico. She is the mother of three children. C.D.'s brother-in-law was kidnapped

and dismembered by a dangerous drug cartel in Mexico, and after the murder, her family also was targeted and threatened with death or severe harm. C.D. fled with her children to Tijuana, where they presented themselves at the San Ysidro, POE. On behalf of herself and her children, C.D. expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced C.D. into recanting her fear on video and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that C.D. and her children have no fear of returning to Mexico. As a result of Defendants' conduct, C.D. and her children were unable to access the asylum process and were forced to return to Tijuana, where they remain in fear for their lives. C.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understands that they would likely be turned away again. C.D. and her children are currently living in temporary housing in Tijuana and can no longer remain in Mexico and have no place else to turn for safety but the United States.

22. Plaintiff Dinora Doe ("D.D.") is a female native and citizen of Honduras. D.D. and her eighteen-year-old daughter have been targeted, threatened with death or severe harm, and repeatedly raped by MS-13 gang members. D.D. fled with her daughter to Tijuana, where they presented themselves at the Otay Mesa, POE on three occasions. D.D. expressed her fear of returning to Honduras and her desire to seek asylum in the United States. CBP officials misinformed D.D. about her rights under U.S. law and denied her the opportunity to access the asylum process. As a result of Defendants' conduct, D.D. and her daughter were forced to return to Tijuana, where they remain in fear for their lives. D.D. and her daughter would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understands that they would likely be turned away again. D.D. is

currently living in temporary housing with her daughter in Tijuana and can no longer remain in Mexico and have no place else to turn for safety but the United States.

23. Plaintiff Ingrid Doe ("I.D.") is a female native and citizen of Honduras. She is the mother of two children and is currently pregnant with her third child. I.D.'s mother and three siblings were murdered by 18th Street gang members in Honduras. After the murders, 18th Street gang members threatened to kill I.D. I.D. and her children were also subject to severe domestic violence. I.D. fled with her children to Tijuana, where they presented themselves at the Otay Mesa POE and at the San Ysidro POE. On behalf of herself and her children, I.D. expressed her fear of returning to Honduras and her desire to seek asylum in the United States. CBP officials misinformed I.D. about her rights under U.S. law and denied her the opportunity to access the asylum process. As a result of Defendants' conduct, I.D. and her children were forced to return to Tijuana, where they remain in fear for their lives. I.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understands that they would likely be turned away again. I.D. is currently living in temporary housing with her children in Tijuana and can no longer remain in Mexico and have no place else to turn for safety but the United States.

24. Plaintiff Jose Doe ("J.D.") is a male native and citizen of Honduras. J.D. was brutally attacked by 18th Street gang members in Honduras. The 18th Street gang also murdered several of his family members and threatened to kidnap and harm J.D.'s two daughters. J.D. fled Honduras and arrived in Nuevo Laredo, Mexico, where he was accosted by gang members. J.D. presented himself at the Laredo, Texas POE the next day. J.D. expressed his fear of returning to Honduras and his desire to seek asylum in the United States. CBP officials misinformed J.D. about his rights under U.S. law and denied him the opportunity to access the

asylum process. As a result of Defendants' conduct, J.D. was forced to return to Nuevo Laredo where he again was approached by gang members. J.D. fled to Monterrey, Mexico, where he remains in fear for his life. J.D. would like to present himself again for asylum but, based on his experience and the experience of others with CBP's practice at the U.S.-Mexico border, he understands that he would likely be turned away again. J.D. is currently staying temporarily with his wife's relatives in Monterrey, Mexico and is afraid to return to Honduras. J.D. can no longer remain in Mexico and have no place else to turn for safety but the United States.

25. Defendant John F. Kelly is the Secretary of the United States Department of Homeland Security ("DHS"). In this capacity, he is charged with enforcing and administering U.S. immigration laws. He oversees each of the component agencies within DHS, including CBP, and has ultimate authority over all CBP policies, procedures and practices. He is responsible for ensuring that all CBP officials perform their duties in accordance with the Constitution and all relevant laws.

26. Defendant Kevin K. McAleenan is Acting Commissioner of CBP. In this capacity, he has direct authority over all CBP policies, procedures and practices, and is responsible for ensuring that all CBP interactions with asylum seekers are performed in accordance with the Constitution and all relevant laws. Defendant McAleenan oversees a staff of more than 60,000 employees, manages a budget of more than $13 billion, and exercises authority over all CBP operations.

27. Defendant Todd C. Owen is the Executive Assistant Commissioner of CBP's Office of Field Operations ("OFO"). OFO is the largest component of CBP and is responsible for border security, including immigration and travel through U.S. POEs. Defendant Owen exercises authority over 20 major field offices and 328 POEs. Defendant Owen oversees a staff of more than 29,000 employees, including more than 24,000 CBP officials and specialists, and manages a budget of

more than $5.2 billion. Defendant Owen is responsible for ensuring that all OFO officials perform their duties in accordance with the Constitution and all relevant laws.

28. Does 1 through 25, inclusive, are sued herein under fictitious names inasmuch as their true names and capacities are presently unknown to Al Otro Lado and Class Plaintiffs. Al Otro Lado and Class Plaintiffs will amend this complaint to designate the true names and capacities of these parties when the same have been ascertained. Al Otro Lado and Class Plaintiffs are informed and believe, and on that basis allege, that Does 1 through 25, inclusive, were agents or alter egos of Defendants, or are otherwise responsible for all of the acts hereinafter alleged. Al Otro Lado and Class Plaintiffs are informed and believe, and on that basis allege, that the actions of Does 1 through 25, inclusive, as alleged herein, were duly ratified by Defendants, with each Doe acting as the agent or alter ego of Defendants, within the scope, course, and authority of the agency. Defendants and Does 1 through 25, inclusive, are collectively referred to herein as "Defendants."

IV. FACTUAL BACKGROUND

A. Humanitarian Crisis South of the U.S.-Mexico Border

29. In recent years, children and adults have fled horrendous persecution in their home countries and arrived at POEs along the U.S.-Mexico border to seek protection in the United States through the asylum process. The vast majority of these individuals come from Guatemala, Honduras and El Salvador, an area often termed Central America's "Northern Triangle."

30. These governments are known for corruption,[1] including having corrupt police forces filled with gang-related members.[2] Furthermore, the "penetration of the state by criminal groups" is responsible, at least in part, for the fact that as many as 95% of crimes go unpunished.[3]

31. The "pervasive and systematic levels of violence" associated with the increasing reach of gangs in the Northern Triangle have been well documented.[4] Those fleeing the Northern Triangle cite "violence [from] criminal armed groups, including assaults, extortion, and disappearances or murder of family members,"[5] as reasons for their flight. These armed groups operate with impunity due to their influence and control over the governments of Northern Triangle countries, which have repeatedly proven to be unable or unwilling to protect their citizens.[6] The

---

[1] *See* Christina Eguizábal *et al.*, *Crime and Violence in Central America's Northern Triangle*, The Wilson Ctr., 2 (2015), https://www.wilsoncenter.org/sites/default/files/FINAL%20PDF_CARSI%20REPORT_0.pdf.

[2] "Over the past five years, at least 435 members of the [Salvadoran] armed forces were fired for being gang members or having ties to gangs . . . . Another 39 aspiring police officers were expelled from the National Public Security Academy over the same period, of which 25 'belonged to' the Mara Salvatrucha, or MS13, while 13 were from the Barrio 18 gang. Nine more active police officers were also dismissed for alleged gang ties over the five years." Mimi Yagoub, *480 Gang Members Infiltrated El Salvador Security Forces: Report*, InSight Crime (Feb. 22, 2016), http://www.insightcrime.org/news-briefs/did-480-gang-members-infiltrate-el-salvador-security-forces.

[3] Eguizábal *et al.*, *supra* note 1, at 2.

[4] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 15 (2015), http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html [hereinafter *Women on the Run*].

[5] *Id.*

[6] *Id.* at 16 (finding that citizens of Northern Triangle countries are "murdered with impunity"); *id.* at 23 (finding that 69% of women interviewed tried relocating within their own countries at least once before fleeing and indicating that 10% "stated that the police or other authorities were the direct source of their harm").

degree of violence suffered by people in the Northern Triangle has been compared to that experienced in war zones.[7]

32. This violence and corruption is not limited to the Northern Triangle, but also is experienced by individuals fleeing Mexico. Mexico has faced a drastic rise in criminal activity since the early 2000s that is attributed to organized criminal groups and has been accompanied by increases in violence and corruption.[8] Although the northern half of Mexico was often considered the most dangerous, recent reports reveal an increase in violence in the central and southern states of Mexico, particularly in Guerrero, Michoacán, and the State of Mexico.[9] Along with the increase in violence and organized criminal activity, it is well documented that the police and armed forces operate with impunity in Mexico, leaving victims unable to resort to their own government for protection.[10] Indeed, "[i]n some regions of Mexico the state has become so closely identified with

---

[7] Médecins Sans Frontières (Doctors Without Borders), *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis*, 6 (2017), https://www.doctorswithoutborders.org/sites/usa/files/msf_forced-to-flee-central-americas-northern-triangle.pdf [hereinafter *Forced to Flee*].

[8] Dominic Joseph Pera, *Drugs Violence and Public [In]Security: Mexico's Federal Police and Human Rights Abuse*, 2-4, 7 (Justice in Mex. Working Paper Series Paper No. 1, 2015), https://justiceinmexico.org/wp-content/uploads/2015/12/151204_PERA_DOMINIC_DrugViolenceandPublicInsecurity_FINAL.pdf; *see* U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014*, https://www.state.gov/j/drl/rls/hrrpt/2014humanrightsreport/index.htm?year=2014&dlid=236702#wrapper.

[9] *See, e.g.*, U.S. Dep't of State, Bureau of Diplomatic Sec., *Mexico 2015 Crime and Safety Report: Mexico City*, https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17114 (reporting that a "common practice is for gangs to charge 'protection fees' or add their own tax to products and services with the threat of violence for those who fail to pay").

[10] *See* Pera, *supra* note 8, at 4 ("Drug trafficking organizations have infiltrated government positions in many areas, and their influence over state personnel has dramatic implications.").

criminal gangs and drug cartels that these criminal organizations do not need to corrupt the state – they essentially 'are' part of the state."[11]

33. In addition, women and children often flee severe domestic violence. Women report prolonged instances of physical, sexual and psychological domestic violence, and most of their accounts demonstrate that the authorities in their home countries were either unable or unwilling to provide meaningful assistance.[12] Abusive partners are often members or associates of criminal armed groups.[13] Abusers frequently threaten women with harm to their parents, siblings or children if they try to leave.[14] Some women who fled their countries have heard from family members back home that their abusers continue to look for them.[15]

34. After fleeing their home countries, children and adults face an arduous and dangerous journey to the United States.[16] The situation along the popular migration routes to the United States has been termed a "humanitarian crisis"

---

[11] Alberto Díaz-Cayeros *et al.*, *Caught in the Crossfire: The Geography of Extortion and Police Corruption in Mexico*, 3-4 (Stanford Ctr. for Int'l Dev., Paper No. 545, 2015), http://scid.stanford.edu/publications/caught-crossfire-geography-extortion-and-police-corruption-mexico.

[12] *Women on the Run*, *supra* note 4, at 25. The women interviewed described repeated rapes and sexual assaults as well as violent physical abuse that included: "beatings with hands, a baseball bat and other weapons; kicking; threats to do bodily harm with knives; and repeatedly being thrown against walls and the ground." *Id*.

[13] *Id*.

[14] *Id*. at 27.

[15] *Id*.

[16] *See id*. at 43-45 (describing extortion, sexual violence, and physical violence); *see also* Rodrigo Dominguez Villegas, *Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses*, Migration Info. Source (Sept. 10, 2014), http://www.migrationpolicy.org/article/central-american-migrants-and-%E2%80%9Cla-bestia%E2%80%9D-route-dangers-and-government-responses (listing "injury or death from unsafe travelling conditions, gang violence, sexual assault, extortion, kidnapping, and recruitment by organized crime" as dangers faced on the journey to the United States).

because of the extraordinary violence faced by those making the journey.[17] In 2015 and 2016, 68% of migrants from the Northern Triangle region experienced violence, including sexual assault, on their journeys through Central America and Mexico.[18] Perpetrators of violence "include[] members of gangs and other criminal organizations, as well as members of the Mexican security forces."[19] Thus, the initial mistrust and inability to rely upon government authorities for protection that leads many to flee their home countries accompanies them along their journeys.[20]

35. In addition, Mexico's northern border region is particularly plagued with crime and violence, presenting renewed dangers for asylum seekers just as they approach their destination.[21] The most pervasive problems include disappearances, kidnappings, rape, trafficking, extortion, execution and sexual and

---

[17] *See* Eguizábal *et al.*, *supra* note 1, at 3.

[18] *See Forced to Flee*, *supra* note 7, at 11. Close to half (44%) of the migrants reported being hit, 40% said they had been pushed, grabbed or asphyxiated, and 7% said they had been shot. *Id.* Nearly one-third (31.4%) of women and 17.2% of men surveyed during that same time period had been sexually abused during their journeys. *Id.* at 12.

[19] *Id.* at 5.

[20] *See, e.g.*, Villegas, *supra* note 16 (referencing documentation of "the abuse of power by various Mexican authorities, including agents from the National Migration Institute, municipal governments, and state police" against individuals traveling to the U.S. border).

[21] *See* U.S. Dep't of State, *Mexico Travel Warning* (Dec. 8, 2016), https://travel.state.gov/content/passports/en/alertswarnings/mexico-travel-warning.html (reporting violent crime and an increase in homicide in the state of Baja California (including Tijuana and Mexicali); criminal activity and violence in the state of Chihuahua (including Ciudad Juarez); violence and criminal activity, including homicide, armed robbery, carjacking, kidnapping, extortion, and sexual assault in the state of Coahuila (particularly along the highways between Piedras Negras and Nuevo Laredo); that the state of Sonora (including Nogales) is a key region in the international drug and human trafficking trades; and violent crime, including homicide, armed robbery, carjacking, kidnapping, extortion, and sexual assault in the state of Tamaulipas (including Matamoros, Nuevo Laredo, and Reynosa), where state and municipal law enforcement capacity is limited to nonexistent in most parts of the state).

labor exploitation by state and non-state actors.[22] Recently, the situation at the border has worsened: smugglers have increased their prices, cartel members have increased their surveillance and control of areas around border crossings, and the number of migrants kidnapped and held for ransom has increased.[23]

36. By rejecting asylum seekers at POEs, Defendants are forcing them to return to the dangerous conditions that drove them to flee their countries in the first place.[24]

B. Defendants' Systematic, Illegal Practice

37. Since at least the summer of 2016 and continuing to the present, CBP officials, at or under the direction or with the knowledge of Defendants, have consistently and systematically prevented asylum seekers arriving at POEs along the U.S.-Mexico border from accessing the U.S. asylum process.[25] CBP's illegal

---

[22] B. Shaw Drake *et al.*, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, Human Rights First, 16 (2017), https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf [hereinafter *Crossing the Line*].

[23] *Id.*

[24] *Id.; see also* B. Shaw Drake, *Violations at the Border: The El Paso Sector*, Human Rights First, 2-3 (2017), http://www.humanrightsfirst.org/sites/default/files/hrf-violations-at-el-paso-border-rep.pdf (explaining the risks facing asylum seekers who are turned away at U.S. POEs, including being deported back to their home countries where they face persecution).

[25] There is evidence that CBP officials began unlawfully dissuading asylum seekers from pursuing their claims or flatly refusing them entry to the United States even prior to 2016. *See* American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, 10 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_and_credible_fear_claims_final_0.pdf (reporting that Mexican asylum seekers arriving in El Paso "expressed a fear of persecution [but] were told by CBP that the U.S. doesn't give Mexicans asylum, and they [we]re turned back"); *see also* U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations*, 54 (2005) [hereinafter 2005 USCIRF Report] (reporting that two groups of asylum seekers who arrived at the San Ysidro POE were "improperly refused entry to the United States for . . . lacking proper documentation and [were] 'pushed back' . . . without [being] refer[red] . . . to secondary inspection" and without a "record of the

practice, which violates U.S. and international law, has been documented in hundreds of cases at POEs, including POEs in San Ysidro, California; Otay Mesa, California; Tecate, California; Calexico, California; Nogales, Arizona; Eagle Pass, Texas; El Paso, Texas; Laredo, Texas; and Hidalgo, Texas, among others.

38. CBP's practice of denying asylum seekers access to the asylum process has been well documented.[26] Al Otro Lado and Class Plaintiffs, as well as numerous non-governmental organizations[27] and news outlets,[28] have documented

---

primary inspection" being created); *see also* Human Rights Watch, *"You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm*, 2, 8 (2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk [hereinafter *You Don't Have Rights Here*] (concluding that the "cursory screening [conducted by CBP officials] is failing to effectively identify [asylum seekers]" and reporting that some "border officials acknowledged hearing [non-citizens'] expressions of fear but pressured them to abandon their claims").

[26] *See, e.g.*, Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border*, 12 (2017), https://media.wix.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf (reporting that "it is commonplace for asylum seekers to be placed in expedited removal proceedings and summarily deported . . ., despite expressing fear"); U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 20 (2016) (reporting that despite findings and recommendations in a 2005 study relating to primary inspection, USCIRF observers in 2016 continued to find "several examples of non-compliance with required procedures" in CBP primary inspection interviews); *see also* 2005 USCIRF Report, *supra* note 25, at 54 (finding that, in approximately half of the inspections observed, inspectors failed to read the proper advisals regarding asylum to the non-citizen and that "in 15 percent of [the] cases [ ] where an arriving [non-citizen] expressed a fear of return to the inspector, that [non-citizen] was not referred" for a credible fear interview).

[27] *See, e.g.*, *Crossing the Line*, *supra* note 22; Amnesty Int'l, *Facing Walls: USA and Mexico's Violation of the Rights of Asylum Seekers*, 19-22 (2017), https://www.amnestyusa.org/reports/facing-walls-usa-mexicos-violation-rights-asylum-seekers/ [hereinafter *Facing Walls*]; "*You Don't Have Rights Here*," *supra* note 25, at 2, 4.

[28] Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say*, Wash. Post (Jan. 16, 2017), https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.

well over 100 cases in which CBP officials have failed to comply with U.S. and international law and arbitrarily denied access to the asylum process to asylum seekers presenting themselves at POEs along the U.S.-Mexico border.

1. Defendants Have Violated Each of the Class Plaintiffs' Rights to Seek Asylum

Plaintiff Abigail Doe

39. A.D. is a native and citizen of Mexico. She is the mother of two children under the age of ten, with whom she previously lived in Central Mexico. In May 2017, A.D.'s husband disappeared after he refused to allow drug cartel members to use his tractor-trailer to transport drugs.

40. When A.D. reported her husband's disappearance to governmental authorities, members of the drug cartel abducted her, held her at gunpoint, and threatened to kill her and her children if she continued to investigate her husband's disappearance. One cartel member told A.D. that she had to leave if she wanted to live. Fearing for her life, A.D. fled to Tijuana with her children to seek asylum in the United States.

41. After arriving in Tijuana, A.D. and her children immediately went to the San Ysidro POE, where she informed CBP officials of her intent to apply for asylum and her fear of returning to Mexico. CBP officials repeatedly misinformed A.D. that she did not qualify for asylum. One CBP official threatened that her children would be taken away from her if they allowed her to cross the border and again misinformed her that only the Mexican government could help her.

42. CBP officials coerced A.D. into signing a document in English which she could not read and did not understand. The document stated that she did not

---

html?utm_term=.83c7aed8fc6c; Caitlin Dickerson & Miriam Jordan, *'No Asylum Here': Some Say U.S. Border Agents Rejected Them*, N.Y. Times (May 3, 2017), https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html; Rafael Carranza, *Are Asylum Seekers Being Turned Away at the Border?*, USA Today (May 5, 2017), https://www.usatoday.com/story/news/politics/2017/05/05/asylum-seekers-turned-away/311552001/.

have a fear of returning to Mexico and was withdrawing her application for admission. CBP officials then instructed A.D. to say that she had agreed to accept the assistance of the Mexican government and used a video camera to record her statement. A CBP official then took A.D. and her children back to Mexico and left them to fend for themselves.

43. The statements CBP coercively obtained from A.D. were and are still false; A.D. does fear returning to and staying in Mexico and does not intend to seek assistance from the Mexican government because she believes such efforts would be futile.

44. A.D. and her children would like to present themselves again to seek asylum but, based on their experience and the experience of others with CBP's practice at POEs, she understands that they would likely be turned away again or that CBP would take her children away from her.

45. A.D. and her children are currently staying in temporary housing in Tijuana, where A.D. continues to fear for her life and the lives of her children. A.D. can no longer remain in Mexico and has no place else to turn for safety but the United States.

Plaintiff Beatrice Doe

46. B.D. is a native and citizen of Mexico. In May 2017, B.D. fled her hometown in Mexico with her three children, ages seven, eleven and fifteen, and her nephew. B.D.'s nephew was targeted by the Zetas, a Mexican drug cartel that controls most of Southern Mexico, for failing to pay a fee that the Zetas demanded from all individuals who worked in the market. The Zetas threatened to kill B.D.'s nephew and to harm his family if he did not pay the fees. The cartel also pressured B.D.'s nephew to join their forces and threatened to increase the fee if he refused. On two occasions when B.D.'s nephew failed to pay the fees, the Zetas beat him up.

47. B.D. herself suffered severe domestic violence at the hands of her husband. In May 2017, she reported his abuse to two government agencies. When Mexican government officials subsequently requested that B.D.'s husband meet with them, he responded that he would continue to do what he wanted with B.D. and his children. Terrified, B.D. left their house the same day.

48. B.D. fled with her children and nephew and traveled to Tijuana in order to seek asylum in the United States. Initially, B.D. and her family went to the Otay Mesa POE. When B.D. expressed their intent to seek asylum, a CBP official told her that asylum-related services were not provided at that port, and directed her to go to the San Ysidro POE. B.D. and her family then attempted twice to request asylum at the San Ysidro POE, but CBP officials turned them away both times.

49. The first time B.D. and her family presented themselves at the San Ysidro POE, she explained that their lives were at risk in Mexico and that she was afraid of her husband. CBP officials misinformed her that the U.S. government had no obligation to help her or her family, that they did not have a right to enter the United States because they were not born there, and that she should seek help from the Mexican government.

50. Another CBP official then threatened to take B.D.'s nephew away from her and to put her in jail if she refused to sign an English document which she did not understand. Believing that she had no other option, she signed the document. CBP officials then escorted B.D. and her family out of the POE.

51. The statement CBP coercively obtained from B.D. were and are still false; B.D. and her children do fear returning to and staying in Mexico.

52. The next day, B.D. and her family returned to the San Ysidro POE. A CBP official who recognized B.D. from the day before misinformed her that she had no right to enter the United States or seek asylum, and that she would be put in jail for three years if she returned to the POE. After another CBP official

separately threatened to transfer B.D.'s nephew to Mexican authorities and return him to Southern Mexico, CBP officials again escorted B.D. and her family out of the San Ysidro POE.

53. B.D. and her children would like to present themselves again for asylum, but based on their experience and the experience of others with CBP's practice at POEs, she understands that they would likely be turned away again or put in jail as the CBP officials threatened.

54. B.D. and her children are currently staying in temporary housing in Tijuana, where B.D. continues to fear for her life and the lives of her children. B.D. can no longer remain in Mexico and has no place else to turn for safety but the United States.

Plaintiff Carolina Doe

55. C.D. is a native and citizen of Mexico. In May 2017, C.D. fled her hometown in Mexico with her three children, ages nine, fifteen and eighteen, after her brother-in-law, a high-ranking police official, was kidnapped, tortured and killed by members of a drug trafficking cartel. His dismembered body was found in garbage bags in a cemetery. C.D.'s husband witnessed the kidnapping and showed C.D. a picture of one of the men who was involved. Drug cartel members threatened C.D.'s husband after the murder, and C.D. and her husband saw the van used in the kidnapping drive by their house twice. Two men followed C.D. and her daughters on her way home from work, and several men came to their home at night. C.D. was terrified and hid with her daughters in the bathroom because she feared for her life and the lives of her daughters.

56. In May 2017, C.D. fled in the middle of the night with her daughters and traveled to Tijuana in order to seek asylum in the United States. C.D. and her daughters presented themselves at the San Ysidro POE, and C.D. explained that they were afraid of returning to Mexico and wanted to seek asylum. CBP officials locked them in a room overnight at the San Ysidro POE. In the morning, a CBP

official told C.D. that she would not be granted asylum and misinformed her that the protection she was seeking in the United States could be provided by the Mexican authorities. The CBP official threatened to take away C.D.'s fifteen-year-old U.S. citizen daughter and put her in foster care, and told C.D. that if she did not want her daughter taken away from her, then she had to make a statement on video that she was not afraid of returning to Mexico.

57. The CBP officials coerced C.D. into recanting her fear on video. C.D. initially did not respond as the CBP officials instructed her to do because the responses they told her to say were not true. C.D. was afraid and wanted to respond that she was very scared to return to Mexico. One of the CBP officials repeated that the only way C.D. and her daughters would be able to leave voluntarily without her U.S. citizen daughter being taken away from her was if C.D. stated on video that she was not scared. Having been locked in a room overnight, C.D. was tired and scared and felt like she was in jail. The CBP officials continued to coerce her until she finally did what they told her to do, believing she had no choice.

58. The CBP officials also coerced C.D. into signing a document in English which she could not read and did not understand. The document stated that she did not have a fear of returning to Mexico and was withdrawing her application for admission. The statements CBP coercively obtained from C.D. were and are still false; C.D. does fear returning to and staying in Mexico.

59. Several days after CBP turned away C.D. and her daughters at the POE, C.D. made arrangements for her U.S. citizen daughter to cross into the United States. C.D. and her other two children would like to present themselves again for asylum, but based on their experience and the experience of others with CBP's practice at POEs, she understands that they would likely be turned away again.

60. C.D. and her two children are currently staying in temporary housing in Tijuana, where C.D. continues to fear for her life and the lives of her children. C.D. can no longer remain in Mexico and has no place else to turn for safety but the United States.

Plaintiff Dinora Doe

61. D.D. is a native and citizen of Honduras. MS-13 gang members repeatedly threatened to kill D.D. and her then-seventeen-year-old daughter if they did not leave their house. After receiving the third threat, they fled to another city where they remained in hiding.

62. When D.D. and her daughter subsequently returned home, three MS-13 members held them captive for three days and repeatedly raped each of them in front of the other.

63. When D.D. and her daughter finally escaped, they fled to a shelter in Mexico. However, after being threatened by MS-13 gang members again in Mexico, they knew they had to leave.

64. On three separate occasions in August 2016, D.D. and her daughter went to the Otay Mesa POE and expressed their intent to seek asylum in the United States. Each time, CBP officials turned them away.

65. During D.D.'s first attempt, CBP officials misinformed her that there was no asylum in the United States and escorted D.D. and her daughter outside the POE.

66. During her second attempt later the same day, one CBP official misinformed D.D. that there was no asylum available in the United States for Central Americans and that if they returned to the POE, they would be handed over to Mexican authorities and deported to Honduras.

67. During her third attempt the next morning, a CBP official misinformed D.D. that she could pass through the POE, but would have to leave

her daughter behind. When D.D. insisted that she and her daughter had a right to apply for asylum, CBP officials escorted them out of the POE.

68. D.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at POEs, she understands that they would likely be turned away again or separated from each other.

69. D.D. and her daughter are currently staying in Tijuana. In June 2017, D.D. received a call from a person connected to the MS-13 gang trying to identify her location in Mexico. D.D. continues to fear for her life and the life of her daughter. D.D. can no longer remain in Mexico and has no place else to turn for safety but the United States.

Plaintiff Ingrid Doe

70. I.D. is a native and citizen of Honduras. I.D. has two children and is pregnant and expecting her third child in September.

71. 18th Street gang members murdered I.D.'s mother and three siblings. They also threatened to kill I.D.

72. For several years, I.D. and her children were subject to severe abuse by her partner and the father of her son and the child that she is expecting. I.D.'s partner regularly raped I.D., sometimes in front of her children. He would also burn and beat I.D. One day, I.D.'s partner put a gun to I.D.'s head and threatened to kill her.

73. In June 2017, I.D. fled with her children to Tijuana, where they presented themselves at the Otay Mesa POE to seek asylum in the United States.

74. When they arrived at the Otay Mesa POE, I.D. approached CBP officials and expressed her intent to seek asylum. The CBP officials misinformed I.D. that they could not help her at the Otay Mesa POE and that she must go to the San Ysidro POE.

75. I.D. immediately went to the San Ysidro POE with her children, approached several CBP officials, and expressed her intent to seek asylum. One of the officials misinformed I.D. that there was no asylum and that she could not pass through the POE because she did not have any documents. I.D. again stated that she wanted to seek asylum and that she could not go back to Honduras because she and her children would be killed. The CBP official responded that there was a new law in the United States that meant that there was no more asylum. Another CBP official then escorted I.D. and her children out of the port.

76. I.D. and her children would like to present themselves again for asylum but, based on their experience and the experience of others with CBP's practice at POEs, I.D. understands that they would likely be turned away again.

77. I.D. and her children are currently staying in a shelter in Tijuana, where I.D. continues to fear for her life and the lives of her children. I.D. can no longer remain in Mexico and has no place else to turn for safety but the United States.

Plaintiff Jose Doe

78. J.D. is a native and citizen of Honduras. J.D. operated a small banana business in Honduras. 18th Street gang members began targeting his business for extortion and brutally attacked J.D. with a machete when he fell behind on payments. 18th Street later targeted another business J.D. established.

79. In 2016, 18th Street kidnapped and killed his wife's cousin after she resisted the gang, and threatened to kidnap and sexually assault J.D.'s two teenage daughters. 18th Street also killed two of his wife's uncles.

80. In June 2017, J.D. fled Honduras and took many buses through Honduras and Guatemala to avoid detection. J.D. arrived in Nuevo Laredo and was accosted by multiple gang members. J.D. presented himself at the Laredo, Texas POE the next day after this terrifying encounter, and he explained that he was afraid of returning to Honduras and wanted to seek asylum. CBP officials at

the POE misinformed J.D. that he needed a visa to apply for asylum and told him that there was no one to handle his application. CBP officials sent J.D. back to Nuevo Laredo, where he again was approached by gang members.

81. J.D. would like to present himself again to seek asylum but, based on his experience and the experience of others with CBP's practice at POEs, he understands that he would likely be turned away again.

82. J.D. is currently staying temporarily with his wife's relatives in Monterrey, Mexico where he continues to fear for his life. J.D. cannot remain in Mexico and has no place to turn for safety but the United States.

2. CBP Officials Have Systematically Denied Numerous Other Asylum Seekers Access to the Asylum Process

83. Class Plaintiffs' experiences reflect a systematic and persistent practice by CBP that has unlawfully denied numerous other asylum seekers access to the U.S. asylum process.

84. CBP officials have carried out Defendants' systematic practice of denying asylum seekers access to the U.S. asylum process by relying on certain categories of tactics, including misrepresentations, threats and intimidation, verbal and physical abuse, and coercion. Asylum seekers and advocates have experienced and/or witnessed firsthand CBP's illegal conduct.

a. Misrepresentations:

85. CBP officials misinform asylum seekers of the following: that the United States is no longer providing asylum; that President Trump signed a new law that ended asylum in the United States; that the law providing asylum to Central Americans recently ended; that Mexicans are no longer eligible for asylum; that the United States is no longer accepting mothers with children; that asylum seekers cannot seek asylum at the POE but must go to the U.S. Consulate in Mexico instead; that visas are required to cross at a POE; and that asylum seekers

must obtain a "ticket" from a Mexican government agency (Grupo Beta) before they will be allowed to enter the United States to seek asylum.

86. Class Plaintiffs A.D., B.D., D.D., I.D., and J.D. each experienced this practice. D.D. and I.D. both were told asylum was no longer available in the United States. A.D. was told that only the Mexican government could help her. B.D. was told that the U.S. government had no obligation to help her and that she had no right to enter the United States. J.D. was told, falsely, that he needed a visa in order to apply for asylum.

b. Use of Threats and Intimidation:

87. CBP officials threaten and intimidate asylum seekers in the following ways: threatening to take asylum seekers' children away from them if they did not leave the POE; threatening to detain and to deport asylum seekers to their home countries if they persisted in their claims; threating to call Mexican immigration or otherwise turn asylum seekers over to the Mexican government if they do not leave the POE; threatening to ban asylum seekers from the United States for life if they continued to pursue asylum; and blocking asylum seekers from entering the CBP office and threatening to let dogs loose if they did not leave the POE.

88. Class Plaintiffs A.D., B.D. and C.D. each experienced this practice and were threatened that if they tried to cross and pursue their asylum claims, U.S. government officials would take their children away or separate their families. Additionally, D.D. was threatened that if she and her daughter returned to the POE, they would be deported to Honduras. B.D. was told that if she returned to the POE, she would be put in jail for three years.

c. Use of Verbal and Physical Abuse:

89. As part of their systematic practice of denying asylum seekers arriving at POEs access to the U.S. asylum process, CBP officials also regularly resort to verbal and even physical abuse.

90. For example, CBP officials have resorted to the following verbal and physical abuse: grabbing an asylum seeker's six-year-old daughter's arm and throwing her down onto the ground; holding a gun to an asylum seeker's back and forcing her out of the POE; knocking a transgender asylum seeker to the ground and stepping on her neck; telling an asylum seeker she was scaring her five-year-old son by persisting in her request for asylum and accusing her of being a bad mother; laughing at an asylum-seeking mother and her three children and mocking the asylum seeker's thirteen-year-old son who has cerebral palsy; and yelling profanities at an asylum-seeking mother and her five-year-old son, throwing her to the ground, and forcefully pressing her cheek into the pavement.

91. Class Plaintiffs D.D. and B.D. both experienced this practice. One CBP official pulled D.D. inside a gate at the POE to try to separate her from her daughter. Later, as CBP officials escorted D.D. and her daughter out of the POE, one of the CBP officials tried to drag D.D. by her arm. B.D. also experienced rough treatment and cried out in pain when a CBP official forcefully searched her for drugs.

d. Use of Coercion:

92. CBP officials resort to coercion to deny asylum seekers arriving at POEs access to the U.S. asylum process, including: coercing asylum seekers into recanting their fear on video; and coercing asylum seekers into withdrawing their applications for admission to the United States.

93. Class Plaintiffs A.D., B.D. and C.D. each experienced this practice of coercion. Each was coerced to sign a form, written in English and not translated, which they did not understand, that stated they were voluntarily withdrawing their claims for asylum on the grounds that they did not fear returning to Mexico. The forms CBP officials coerced them to sign were and still are false: A.D., B.D. and C.D. still have a grave fear of persecution in Mexico.

94. CBP officials' use of various tactics, including misrepresentations, threats and intimidation, verbal and physical abuse, and coercion, at the POEs along the U.S.-Mexico border further evidence a systematic practice of denying asylum seekers access to the U.S. asylum process.

95. The prevalence and persistence of CBP's illegal practice has been heavily documented by non-governmental organizations and other experts working in the U.S.-Mexico border region.

96. In May 2017, Human Rights First, a respected non-governmental organization, published an Exhaustive Report entitled, "Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers."[29] In that report, Human Rights First details firsthand accounts of CBP officials turning away asylum seekers without referring them for further screening or immigration court proceedings at POEs across the U.S.-Mexico border. The report details the following conduct:

a. CBP officials simply ignore requests by individuals to seek asylum;

b. CBP officials give false information about U.S. laws and procedures, such as saying that "the United States is not giving asylum anymore" and "[President] Trump says we don't have to let you in";

c. CBP officials mock and intimidate asylum seekers;

d. CBP officials impose a "gauntlet" and "charade" of procedures, including a "ticketing" system, to discourage asylum seekers; and

e. CBP officials coerce asylum seekers into denouncing any fear of persecution.

97. Despite the complete lack of statistics or recordkeeping on CBP's failure to comply with the law, Human Rights First's Report references more than

[29] *See Crossing the Line*, *supra* note 22.

125 cases of CBP turning away individuals and families seeking asylum at POEs along the U.S.-Mexico border between November 2016 and April 2017. This is likely a small fraction of the number of asylum seekers being illegally denied access to the asylum process.

98. In June 2017, Amnesty International, a non-profit human rights organization, published a report on CBP's ongoing practice of turning away asylum seekers at the U.S.-Mexico border entitled "Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers."[30] In compiling the report, Amnesty International interviewed more than 120 asylum seekers as well as approximately 25 government officials and 40 civil society organizations. The report documents numerous instances in which CBP officials denied asylum seekers access to the asylum system at five different POEs along the U.S.-Mexico border. The report details the following conduct:

a. CBP officials coerce asylum seekers into recanting their fear of persecution on videotape and threaten to deport them back to their home countries if they do not comply;

b. CBP officials tell asylum seekers that they will first have to get a "ticket" from Mexican authorities before seeking asylum;

c. CBP officials coerce asylum seekers into signing a voluntary return paper under the threat that, if they do not, then they will be deported and will never be allowed into the United States; and

d. CBP officials tell Mexican asylum seekers that there is no more asylum for Mexicans.

99. From October 2016 to the present, the Women's Refugee Commission, a non-profit organization that advocates for women and children fleeing violence and persecution, has investigated and documented numerous

[30] *See Facing Walls*, *supra* note 27.

instances in which CBP officials have turned asylum seekers away and refused to process them at four POEs along the U.S.-Mexico border, including POEs in Calexico, California; Nogales, Arizona; McAllen, Texas; and Laredo, Texas. The Women's Refugee Commission has documented the following conduct:

a. CBP officials tell asylum seekers there is no space for them;

b. CBP officials tell asylum seekers that the policies have changed and that they no longer qualify for asylum;

c. CBP officials threaten to call Mexican immigration authorities to remove asylum seekers from the POEs;

d. CBP officials forcibly remove asylum seekers from the POEs; and

e. CBP officials tell asylum seekers to go away.

100. From October 2016 through the present, the Project in Dilley, which provides pro bono legal services to mothers and children detained at the South Texas Family Residential Center in Dilley, Texas, has identified more than 50 asylum-seeking mothers who were turned away by CBP officials at POEs along the U.S.-Mexico border, including POEs in San Ysidro, California; McAllen, Texas; Laredo, Texas; and Eagle Pass, Texas. The Project in Dilley has documented the following conduct:

a. CBP officials tell asylum seekers that asylum law is no longer in effect;

b. CBP officials tell asylum seekers that they have orders to send away everyone who is seeking asylum;

c. CBP officials tell asylum seekers they cannot seek asylum because there is no more space;

d. CBP officials threaten to deport asylum seekers to their home countries; and

e. CBP officials use physical force to remove asylum seekers from POEs, including by handcuffing them, throwing them to the ground, shoving them and dragging them out of the POEs.

101. Since December 2015, representatives of Plaintiff Al Otro Lado have accompanied more than 160 asylum seekers to the San Ysidro POE. Several representatives have witnessed firsthand and/or otherwise documented the tactics employed by CBP to prevent asylum seekers from accessing the U.S. asylum process. Al Otro Lado representatives have documented the following conduct:

a. CBP officials tell asylum seekers they have to apply for asylum at the U.S. Consulate in Mexico;

b. CBP officials tell asylum seekers that they must first obtain a "ticket" from Mexican immigration in order to seek asylum;

c. CBP officials tell asylum seekers that they are not processing asylum seekers at that POE and they must go to another POE to be processed;

d. CBP officials tell asylum seekers that they cannot seek asylum at that time and must be put on a waiting list;

e. CBP officials tell asylum seekers that they do not qualify for asylum; and

f. CBP officials coerce asylum seekers into withdrawing their asylum claims, including by threatening that they will be deported if they do not do so.

102. On January 13, 2017, various non-governmental organizations submitted an administrative complaint to DHS' Office for Civil Rights and Civil Liberties ("CRCL") and Office of Inspector General ("OIG").[31] The

---

[31] *See* American Immigration Council, Complaint Re: U.S. Customs and Border Protection's Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border, 1-2 (Jan. 13, 2017), https://www.

administrative complaint provided specific examples of CBP turning away asylum seekers at POEs along the U.S.-Mexico border and urged CRCL and OIG to conduct a prompt and thorough investigation into this illegal practice and take swift corrective action.

103. Despite this administrative complaint, Defendants' illegal practice continues. In fact, CBP has acknowledged its illegal practice in sworn testimony before Congress. On June 13, 2017, in questioning before the House Appropriations Committee, the Executive Assistant Commissioner for CBP's OFO admitted that CBP officials were turning away asylum applicants at POEs along the U.S.-Mexico border.[32]

V. LEGAL BACKGROUND

A. U.S. Law Requires that Individuals Be Provided a Meaningful Opportunity to Seek Asylum in the United States

104. U.S. law requires CBP to give individuals who present themselves at a POE and express a desire to apply for asylum or a fear of persecution in their home countries the opportunity to seek protection in the United States.

105. Specifically, the Immigration and Nationality Act ("INA") and its implementing regulations set forth a variety of ways in which such individuals may seek protection in the United States. *See, e.g.*, 8 U.S.C. § 1157 (admission of refugees processed overseas); 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (restriction of removal to a country where individual's life or freedom would be threatened); 8 C.F.R. §§ 208.16-18 (protection under the Convention Against Torture).

---

americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf.

[32] *Hearing on the Immigration and Customs Enforcement and Customs and Border Protection F.Y. 2018 Budgets*. Before the Subcomm. on Homeland Sec. of the H. Appropriations Comm., 115th Cong. (2017) (statement of John Wagner, Executive Assistant Comm'r for CBP's Office of Field Operations).

106. The INA provides that any noncitizen "who is physically present in the United States or who arrives in the United States" has a statutory right to apply for asylum, irrespective of such individual's status. 8 U.S.C. § 1158(a)(1). The INA also specifies processes that must be followed when an individual states a desire to seek asylum or expresses a fear of returning to his or her home country. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed [by individuals physically present in the United States or who arrive in the United States]."). Under the INA, CBP must either:

a. Refer the asylum seeker for a credible fear interview (*see* 8 U.S.C. § 1225(b)(1)); or

b. Place the asylum seeker directly into regular removal proceedings by issuing a Notice to Appear ("NTA"), which will then allow the asylum seeker to pursue his or her asylum claim before an immigration judge (*see* 8 U.S.C. §§ 1125(b)(2), 1229, 1129a).

107. The U.S. government has admitted that the duty to allow a noncitizen access to the asylum process is "not discretionary." *See, e.g.*, Federal Defendant's Reply Brief in Support of Motion for Summary Judgment and Dismissal for Lack of Jurisdiction, cited in *Munyua v. United States*, No. 03-4538, 2005 U.S. Dist. LEXIS 11499, at *16-19 (N.D. Cal. Jan. 10, 2005) ("[D]efendant acknowledges that [the immigration officers] did not have the discretion to ignore a clear expression of fear of return or to coerce an alien into withdrawing an application for admission").

108. CBP is responsible for the day-to-day operation of POEs along the U.S.-Mexico border. CBP's obligations include inspecting and processing individuals who present themselves at POEs to enable them to pursue their claims

for asylum in the United States. CBP officials themselves are not authorized to evaluate, grant or reject an individual's asylum claim.

109. All noncitizens arriving at POEs along the U.S.-Mexico border must be inspected by CBP officials. *See* 8 U.S.C. § 1225(a)(3) ("All [noncitizens] . . . who are applicants for admission or otherwise seeking admission . . . ***shall be inspected*** by immigration officers.") (emphasis added). During inspection, CBP officials must determine whether a noncitizen may be admitted to the United States. *See* 8 U.S.C. § 1182(a) (specifying grounds of inadmissibility). In order to make this determination, CBP scrutinizes an individual's entry documents. *See* 8 U.S.C. § 1181(a) (outlining documentation requirements for the admission of noncitizens into the United States). Asylum seekers often flee their countries on very short notice and thus frequently lack valid entry documents. Once a CBP official makes a determination of inadmissibility, the individual becomes subject to removal from the United States.

110. CBP officials must then place the noncitizen into either expedited removal proceedings under 8 U.S.C. § 1225(b) or regular removal proceedings under 8 U.S.C. § 1229.

111. Expedited removal proceedings involve a more streamlined process than regular removal proceedings and are reserved for people apprehended at or near the border. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (permitting certain persons who are seeking admission at the border to the United States to be expeditiously removed without a full immigration judge hearing). However, Congress included important safeguards in the expedited removal statute in an effort specifically to protect asylum seekers.

112. The INA unequivocally states that if a noncitizen placed in expedited removal proceedings "indicates either an intention to apply for asylum . . . or a fear of persecution, the [CBP] officer ***shall*** refer the [noncitizen] for an interview by an asylum officer." 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). The requirement

to refer an asylum seeker placed in expedited removal proceedings to an asylum officer is ***mandatory***.

113. Likewise, the applicable regulations promulgated under the INA reinforce that if an individual in expedited removal proceedings asserts an intention to apply for asylum or a fear of persecution, then "the inspecting officer ***shall not*** proceed further with removal of the [noncitizen] until the [noncitizen] has been referred for an interview by an asylum officer." 8 C.F.R. § 235.3(b)(4) (emphasis added).

114. Importantly, CBP officials must read a form to noncitizens subject to expedited removal advising them of their right to speak to an asylum officer if they express a desire to apply for asylum or a fear of returning to their home countries. *See* 8 C.F.R. § 235.3(b)(2)(i); DHS Form I-867A.

115. Affirming that the CBP officials themselves are not authorized to adjudicate asylum claims, the regulations specifically charge ***asylum officers*** from U.S. Citizenship and Immigration Services with making initial determinations as to whether there is a "significant possibility" that an individual can establish eligibility for asylum. *See* 8 C.F.R. § 235.3(b)(4); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii). This is because asylum officers are trained in the often complicated and evolving law surrounding asylum, and thus are uniquely positioned to conduct such interviews, which themselves require particular interviewing and assessment skills as well as comprehension of the social and political contexts from which asylum seekers flee. In fact, the INA specifically defines "asylum officer" as an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158." 8 U.S.C. § 1225(b)(1)(E).

116. Applicants who establish that they have a "significant possibility" of proving their eligibility for asylum receive positive credible fear determinations.

They are taken out of the expedited removal system altogether and placed into regular removal proceedings, where they have the opportunity to submit an asylum application, develop a full record before an Immigration Judge, appeal to the Board of Immigration Appeals and seek judicial review of an adverse decision. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 235.6(a)(1)(ii), (iii).

117. Alternatively, CBP officials may place noncitizens directly into regular removal proceedings by issuing an NTA. 8 U.S.C. §§ 1225(b)(2), 1229(a)(1), 1229a. Once in regular removal proceedings, the asylum seeker can submit an asylum application and must receive a full hearing before an Immigration Judge, file an administrative appeal with the Board of Immigration Appeals and seek judicial review. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

118. Despite these prescribed procedures, CBP regularly employs a variety of egregious tactics (including those described above) that have one unlawful result: depriving Class Plaintiffs, and the asylum seekers they represent, of *any* access to the asylum process, and stripping them of their right to seek asylum under U.S. law.

B. Defendants Have No Authority Under the INA to Turn a Noncitizen Seeking Admission Away at a POE

119. CBP's authority is limited to that granted by Congress in the INA. Nothing in the INA authorizes Defendants, through their officers and employees, to turn away a noncitizen who seeks admission at a POE.

120. When inspecting a noncitizen who arrives at a POE, CBP officials must follow the procedures mandated by Congress in 8 U.S.C. § 1225. Pursuant to this section, CBP officials are limited to the following possible actions with respect to any arriving noncitizen who is not clearly and beyond a doubt entitled to be admitted:

a. Place arriving noncitizens who are inadmissible under one of two grounds specified by statute in expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1)(A)(i);

b. Refer any noncitizen placed in expedited removal proceedings who expresses either an intent to apply for asylum or a fear of persecution if returned to his or her home country to an asylum officer for a credible fear interview pursuant to 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B);

c. Place "other" arriving noncitizens (*i.e.*, those who are not placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1)(A) and who are neither crewmen or stowaways) in removal proceedings under 8 U.S.C. § 1229a pursuant to 8 U.S.C. § 1225(b)(2);

d. Follow other removal procedures with respect to noncitizens suspected of being inadmissible on terrorism or related security grounds pursuant to 8 U.S.C. § 1225(c); or

e. Accept from the noncitizen a voluntary (*i.e.*, non-coerced) withdrawal of her application for admission pursuant to 8 U.S.C. § 1225(a)(4) and 8 C.F.R. § 235.4.

121. Defendants, through their officers and employees, act without authority and in violation of the law when they turn away an individual at a POE.

C. Class Plaintiffs Are Entitled to Procedural Due Process Rights Under the Fifth Amendment to the U.S. Constitution

122. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. In addition, where Congress has granted statutory rights and has directed an agency to establish a procedure for providing such rights, the Constitution requires the

government to establish a fair procedure and to abide by that procedure. In the asylum context, U.S. law mandates that asylum seekers be provided with such process. Multiple courts have recognized that such procedural rights are critical in the asylum context and can result in life or death decisions, because applicants wrongly denied asylum can be subject to death or other serious harm in their home countries. *See, e.g.*, *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.").

123. The INA and its implementing regulations provide Class Plaintiffs with the right to be processed at a POE and granted access to the asylum process. *See, e.g.*, 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2). By systematically turning away asylum seekers presenting themselves at POEs along the U.S.-Mexico border and thus denying them access to the asylum process, Defendants have failed to comply with the due process procedures for processing asylum seekers under the INA and its implementing regulations.

D. The *Non-Refoulement* Doctrine Under International Law Requires Implementation and Adherence to a Procedure to Access Asylum

124. The United States is obligated by a number of treaties and protocols to adhere to the duty of *non-refoulement* – a duty that prohibits a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture.

125. The primary treaty source for the duty of *non-refoulement* is the 1951 Convention on the Rights of Refugees. Article 33 of the Convention prohibits a state from returning "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

1951 Refugee Convention, Art. 33. The United States adopted the protections of Article 33 by signing onto the 1967 Protocol Relating to the Status of Refugees, which incorporated Articles 2-34 of the 1951 Convention.

126. The prohibition against *refoulement* is likewise central to other treaties ratified by the United States, including the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture ("CAT"), both of which prohibit returning an individual to harm and obligate the United States to implement and follow legal procedures to protect refugees' right to *non-refoulement*. *See* ICCPR, Art. 13; CAT, Art. 3.

127. In order to effectuate an asylum seeker's right to *non-refoulement*, the United States is obligated to implement and follow procedures to ensure that his or her request for asylum be duly considered. The United States implemented this legal obligation with the passage of the 1980 Refugee Act, which established a procedure for a noncitizen physically present in the United States or at a land border or POE to apply for asylum. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980).

128. In practice, the duty of *non-refoulement* covers not only those refugees and asylum seekers already present inside the country, but also those who present themselves at POEs along the U.S. border. The duty requires U.S. officials such as Defendants to consider the claims of those seeking to cross the U.S. border and not to deny them access to a lawful process to present a claim for asylum.

129. The norm of *non-refoulement* is specific, universal and obligatory. It is so widely accepted that it has reached the status of *jus cogens* – a norm not subject to derogation. Indeed, in 1996, the United Nations Executive Committee on the International Protection of Refugees explicitly concluded that the *non-refoulement* principle had achieved the status of a norm "not subject to derogation." Executive Committee Conclusion No. 79, *General Conclusion on International Protection* (1996). The principle was recognized as such in the 1984

Cartagena Declaration on Refugees; was included in a portion of the Refugee Convention from which derogation is not permitted; and has been recognized by bodies, including the Inter-American Commission on Human Rights and the Organization of American States General Assembly.

130. Defendants' actions to deny Class Plaintiffs, and the asylum seekers they represent, access to the U.S. asylum process violate their binding and enforceable obligations under international law.

VI. CLASS ACTION ALLEGATIONS

131. Class Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) on behalf of themselves and all other persons similarly situated. The proposed class is defined as follows:

> All noncitizens who present themselves at a POE along the U.S.-Mexico border, assert an intention to seek asylum or express a fear of persecution in their home countries, and are denied access to the U.S. asylum process by CBP officials.

132. The class is so numerous that joinder of all members is impracticable. CBP's misconduct toward asylum seekers at POEs along the U.S.-Mexico border has been the focus of monitoring, reporting and advocacy by numerous well-respected non-governmental organizations. These organizations have investigated and documented hundreds of examples of asylum seekers being turned away by CBP officials. Many more asylum seekers have likely been the victims of this unlawful conduct as these abuses often go unreported. Asylum seekers who are turned away at the border are continuously moving and relocating, also making joinder impracticable.

133. There are questions of law and fact that are common to the class. The class alleges common harms: a violation of the class members' statutory right to access the U.S. asylum process, procedural due process rights and right not to be returned to countries where they fear persecution. The class members' entitlement

to these rights is based on a common core of facts. All members of the proposed class have expressed a fear of return to their home countries or a desire to apply for asylum. These facts entitle all of them to the opportunity to seek asylum. Yet each class member has been and likely will again be unlawfully denied access to the U.S. asylum process by CBP. Moreover, all class members raise the same legal claims: that U.S. immigration laws and the Constitution require CBP officials at POEs to give them access to the asylum process. Their shared common facts will ensure that judicial findings regarding the legality of the challenged practices will be the same for all class members. Should Class Plaintiffs prevail, *all* class members will benefit; each of them will be entitled to a lawful inspection at a POE along the U.S.-Mexico border and an opportunity to seek asylum.

134. Class Plaintiffs' claims are typical of the claims of the class. Class Plaintiffs and class members raise common legal claims and are united in their interest and injury. All Class Plaintiffs, like all class members, are asylum seekers to whom CBP officials unlawfully denied access to the U.S. asylum process after they presented themselves at POEs along the U.S.-Mexico border. Class Plaintiffs and class members are thus victims of the same, unlawful course of conduct.

135. Class Plaintiffs are adequate representatives. Class Plaintiffs seek relief on behalf of the class as a whole and have no interest antagonistic to other members of the class. Class Plaintiffs' mutual goal is to declare Defendants' challenged policies and practices unlawful and to obtain declaratory and injunctive relief that would cure this illegality. Class Plaintiffs seek a remedy for the same injuries as the class members, and all share an interest in having a meaningful opportunity to seek asylum. Thus, the interests of the Class Plaintiffs and of the class members are aligned.

136. Class Plaintiffs are represented by attorneys from the American Immigration Council, the Center for Constitutional Rights and Latham & Watkins LLP. Counsel have a demonstrated commitment to protecting the rights and

interests of noncitizens and, together, have considerable experience in handling complex and class action litigation in the immigration field. Counsel have represented numerous classes of immigrants and other victims of systematic government misconduct in actions in which they successfully obtained class relief.

137. Defendants have acted or refused to act on grounds that are generally applicable to Class Plaintiffs and the class. Defendants have failed to provide Class Plaintiffs and class members with access to the U.S. asylum process. Defendants' actions violate Class Plaintiffs' and class members' statutory, regulatory and constitutional rights to access to the asylum process. Declaratory and injunctive relief are appropriate remedies.

138. In the absence of a class action, there is substantial risk that individual actions would be brought in different venues, creating a risk of inconsistent injunctions to address Defendants' common conduct.

FIRST CLAIM FOR RELIEF

DECLARATORY RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF THE RIGHT TO SEEK ASYLUM UNDER THE IMMIGRATION AND NATIONALITY ACT)

139. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

140. INA § 208(a)(1) (8 U.S.C. § 1158(a)(1)) gives any noncitizen who is physically present in or who arrives in the United States a statutory right to seek asylum, regardless of such individual's immigration status.

141. When a noncitizen presents himself or herself at a POE and indicates an intention to apply for asylum or a fear of persecution, CBP officials must refer the noncitizen for a credible fear interview under 8 U.S.C. § 1225(b)(1)(A)(ii) and

8 C.F.R. § 235.3(b)(4), or, in accordance with 8 U.S.C. § 1225(b)(2), place the noncitizen directly into regular removal proceedings under 8 U.S.C. § 1229(a)(1).

142. Class Plaintiffs presented themselves at U.S. POEs along the U.S.-Mexico border and asserted an intention to apply for asylum and/or a fear of persecution in their countries of origin. Nevertheless, CBP officials did not refer Class Plaintiffs to an asylum officer for credible fear interviews pursuant to 8 U.S.C. § 1225(b)(1)(A)(ii), or, in accordance with 8 U.S.C. § 1225(b)(2), place Class Plaintiffs directly into regular removal proceedings pursuant to 8 U.S.C. § 1229(a)(1).

143. Instead, in direct contravention of the INA, CBP officials engaged in unlawful tactics that prevented Class Plaintiffs from accessing the statutorily prescribed asylum process and forced them to return to Mexico.

144. CBP officials' treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction or acquiescence of Defendants.

145. As a result of Defendants' violations of the INA, Class Plaintiffs have been damaged – through the denial of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

146. As a result of Defendants' violations of the INA, Plaintiff Al Otro Lado has been damaged – namely its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

147. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their statutory rights. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged

herein, and therefore seek injunctive relief restraining Defendants from continuing to engage in the unlawful practices and policies alleged herein.

148. Pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of any party in any case involving an actual controversy.

149. An actual controversy has arisen and now exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' conduct and practices, as alleged in this Complaint, violate the INA. On information and belief, Defendants contend that the conduct and practices are lawful.

150. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

SECOND CLAIM FOR RELIEF

DECLARATORY RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT)

151. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

152. The Administrative Procedure Act ("APA") (5 U.S.C. § 551, *et. seq.*) authorizes suits by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA also provides relief for a failure to act: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

153. CBP officials have failed to take actions mandated by the following statutes and implementing regulations in violation of the APA:

- 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, ***may apply for asylum.*** . . .") (emphasis added);
- 8 U.S.C. § 1225(a)(1)(3) ("All aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States ***shall be inspected by immigration officers***.") (emphasis added);
- 8 U.S.C. § 1225(b)(1)(A)(ii) ("If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, ***the officer shall refer the alien for an interview by an asylum officer***. . . .") (emphasis added);
- 8 U.S.C. § 1225(b)(2) ("[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.");
- 8 C.F.R. § 235.3(b)(4) ("[T]he inspecting officer ***shall not proceed further*** with removal of the alien ***until the alien has been referred for an interview by an asylum officer***. . . .") (emphasis added); and
- 8 C.F.R. § 235.4 ("The alien's decision to withdraw his or her application for admission must be made voluntarily . . . .").

154. In addition, CBP officials have acted in excess of their statutorily prescribed authority and without observance of the procedures required by law in violation of the APA. *See* 5 U.S.C. §§ 706(2)(C), (D). Congress mandated the

various procedures that Defendants are authorized to follow when inspecting individuals who seek admission at POEs. *See* 8 U.S.C. § 1225. None of these procedures authorizes a CBP official to turn back a noncitizen seeking asylum at a POE.

155. In turning Class Plaintiffs and purported class members away at POEs along the U.S.-Mexico border without following the procedures mandated by the INA, CBP officials have acted and continue to act in excess of the authority granted them by Congress and without observance of procedure required by law.

156. CBP's treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction or acquiescence of Defendants.

157. Defendants' repeated and pervasive failure to act and the actions taken in excess of their authority, which denied Class Plaintiffs access to the statutorily prescribed asylum process, constitute unlawfully withheld or unreasonably delayed agency action, is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law, and therefore gives rise to federal jurisdiction and mandates relief under the APA.

158. As a result of the acts constituting violations of the APA, Class Plaintiffs have been damaged through the denial of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

159. As a result of the acts constituting violations of the APA, Plaintiff Al Otro Lado has been damaged – namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

160. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their statutory and regulatory rights. Class

Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from continuing to engage in the unlawful practices alleged herein.

161. Al Otro Lado and Class Plaintiffs have exhausted all available administrative remedies and have no adequate remedy at law.

162. Pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of any party in any case involving an actual controversy.

163. An actual controversy has arisen and now exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' conduct and practices, as alleged in this Complaint, violate the APA. On information and belief, Defendants contend that the conduct and practices are lawful.

164. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

THIRD CLAIM FOR RELIEF

DECLARATORY RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF PROCEDURAL DUE PROCESS)

165. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

166. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V.

167. Congress has granted certain statutory rights to asylum seekers, such as Class Plaintiffs and the asylum seekers they represent, and has directed DHS to establish a procedure for providing such rights. The Due Process Clause thus requires the government to establish a fair procedure and to abide by that procedure.

168. As set forth above, the INA and its implementing regulations provide Class Plaintiffs the right to be processed at a POE and granted access to the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2); *see also* 8 C.F.R. § 235.3(b)(4).

169. By using a variety of tactics to turn away asylum seekers at POEs along the U.S.-Mexico border, CBP officials have denied Class Plaintiffs access to the asylum process and failed to comply with procedures set forth in the INA and its implementing regulations.

170. CBP officials' treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction or acquiescence of Defendants.

171. By denying Class Plaintiffs access to the asylum process, Defendants have violated Class Plaintiffs' procedural due process rights under the Fifth Amendment to the U.S. Constitution.

172. As a result of the Defendants' violations of the Fifth Amendment to the U.S. Constitution, Class Plaintiffs have been damaged through the denial of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

173. As a result of Defendants' violations of the Fifth Amendment to the U.S. Constitution, Al Otro Lado has been damaged – namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

174. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their constitutional rights. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from engaging in the unlawful conduct and practices alleged herein.

175. An actual controversy exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' conduct and practices, as alleged in this Complaint, violate the Fifth Amendment to the United States Constitution. On information and belief, Defendants contend that the conduct and practices are lawful.

176. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

FOURTH CLAIM FOR RELIEF

DECLARATORY RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF THE *NON-REFOULEMENT* DOCTRINE)

177. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

178. CBP officials have systematically denied Class Plaintiffs, and the asylum seekers they represent, access to the asylum system, in violation of customary international law reflected in treaties which the United States has ratified and implemented: namely, the specific, universal and obligatory norm of *non-refoulement*, which has also achieved the status of a *jus cogens* norm, and

which forbids a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture.

179. CBP officials' treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction or acquiescence of Defendants.

180. Defendants' conduct is actionable under the Alien Tort Statute, 28 U.S.C. § 1350, which authorizes declaratory and injunctive relief.

181. As a result of the acts constituting violations of the *jus cogens* norm of *non-refoulement*, Class Plaintiffs have been damaged through denial of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

182. As a result of the acts constituting violations of the norm of *non-refoulement*, Al Otro Lado has been damaged – namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

183. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further denials of the protections afforded to them under international law. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from engaging in the unlawful conduct and practices alleged herein.

184. An actual controversy exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' conduct and practices, as alleged in this Complaint, violate the norm of *non-refoulement*. On information and belief, Defendants contend that the conduct and practices are lawful.

185. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

PRAYER FOR RELIEF

186. WHEREFORE, Plaintiff Al Otro Lado and Class Plaintiffs respectfully request that the Court:

a. Issue an order certifying a class of individuals pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2);

b. Appoint the undersigned as class counsel pursuant to Federal Rule of Civil Procedure 23(g);

c. Issue a judgment declaring that Defendants' policies, practices, acts and/or omissions described herein give rise to federal jurisdiction;

d. Issue a judgment declaring that Defendants' policies, practices, acts and/or omissions described herein violate one or more of the following:

(1) The Immigration and Nationality Act, based on violations of 8 U.S.C. §§ 1158 and 1225;

(2) The Administrative Procedure Act, based on violations of 8 U.S.C. §§ 1158, 1225 and 8 C.F.R. §§ 235.3, 235.4;

(3) The Due Process Clause of the Fifth Amendment; and

(4) The duty of *non-refoulement* under international law;

e. Issue injunctive relief requiring Defendants to comply with the laws and regulations cited above;

f. Issue injunctive relief prohibiting Defendants, and any of their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them or on their

behalf, from engaging in the unlawful policies, practices, acts and/or omissions described herein at POEs along the U.S.-Mexico border;

g. Issue injunctive relief requiring Defendants to implement procedures to provide effective oversight and accountability in the inspection and processing of individuals who present themselves at POEs along the U.S.-Mexico border and indicate an intention to apply for asylum or assert a fear of persecution in their home countries;

h. Award Plaintiffs their reasonable attorneys' fees, costs and other expenses pursuant to 28 U.S.C. § 2412, and other applicable law; and

i. Grant any and all such other relief as the Court deems just and equitable.

Dated: July 12, 2017

LATHAM & WATKINS LLP
Wayne S. Flick
Manual A. Abascal
James H. Moon
Kristin P. Housh
Robin A. Kelley

By */s/ Manuel A. Abascal*
Manuel A. Abascal

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

M.M.M., on behalf of his minor child, J.M.A., et al.,

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States, et al.,

Defendants.

Case No.: 18cv1832 DMS (MDD)

ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs are migrant children who were forcibly separated from their parents shortly after crossing the United States-Mexico border. The children entered the United States with their parents at or between ports of entry and were fleeing violence from countries in Central America. They were seeking refuge in the United States and hoped to be granted asylum together as a family. However, under the Government's "zero tolerance" immigration policy, immigrant parents unlawfully entering the United States with their young children were subject to criminal prosecution and systematically separated from their children. In less than two months following implementation of the zero tolerance policy, approximately 2,600 families were separated, sparking national protests and condemnation.

The parents of these children sought relief in this Court over the government's family separation practices. On June 26, 2018, this Court certified a nationwide class of separated parents and issued a classwide preliminary injunction requiring the Government to reunify these parents with their children by July 26, 2018, on a showing that the parents' fundamental right to family integrity under the Fifth Amendment to the United States Constitution had been violated. *See Ms. L. v. U.S. Immigration and Customs Enforcement*, ("*Ms. L.*"), Case No. 18cv0428 DMS (MDD), ECF No. 83. The Government marshaled its resources and reunified nearly 2,000 of these parents with their children by the deadline. These timely reunifications were possible because the parents and children were still in the United States. Approximately 400 other parents, however, were deported to countries in Central America without their children prior to the Court's reunification order. An intensive collaborative effort is presently underway to locate and reunite these parents with their children.

With approximately 2,000 families recently reunified in the United States, attention has turned to what lies ahead for these parents and their children. Plaintiffs in this putative class action are the children of the parents in the *Ms. L.* case. They contend that Defendants intend to immediately remove some of the families, thereby depriving Plaintiffs of certain asylum procedures guaranteed by statute and under the United States Constitution. (Compl. ¶ 4.) Over half of the parents completed their asylum proceedings and were issued final orders of removal after their claims were rejected. These parents cleared background checks and were deemed suitable for reunification, but did not otherwise meet the requirements for asylum or other relief from removal. Some of their children, who are Plaintiffs in the present action, were also in asylum proceedings that had been initiated for them by the Government before reunification occurred. Plaintiffs allege that Defendants have "since reversed course, revoking [these proceedings] with the immigration court, presumably on the basis" that their parents waived their rights to seek asylum when they executed forms agreeing to be removed with their children. (*Id.* ¶¶ 49-50.) The Government does not dispute that it intends to remove parents with removal orders, and to

remove their children (Plaintiffs) with them based on the parents' requests to be removed with their children. Plaintiffs dispute that their parents knowingly and voluntarily waived their rights, and thus request the Court to issue a temporary restraining order ("TRO") enjoining the Government from removing them and their parents pending a determination of these issues.[1]

Plaintiffs initially filed this action on July 27, 2018, before Judge Paul L. Friedman in the United States District Court for the District of Columbia. (Case No. 1:18cv01759 PLF.) Judge Friedman observed that these cases, the present one and *Ms. L.*, "represent two sides of the same coin: whether and to what extent parents may waive their children's rights to pursue asylum and whether and to what extent children may independently assert their individual asylum rights." (ECF No. 25 at 11.) On August 3, 2018, Judge Friedman transferred the case to this Court given the interrelated issues and invited it to "untie this sailor's knot." (*Id.* at 8.) To do so requires an understanding of what is actually in dispute and what is not.

Importantly, both sides appear to agree on maintaining family unity—they just do not agree on how the family unit should be treated. Plaintiffs want to access asylum proceedings to which they are statutorily entitled and to be accompanied by their parents, while Defendants want to remove the families forthwith.[2] Plaintiffs therefore seek a TRO prohibiting their removal and the removal of their parents until a determination is made

---

[1] The relief requested here overlaps with the relief requested by the plaintiffs in *Ms. L.* in their July 16, 2018 Motion for Stay of Removal and Emergency Temporary Restraining Order Pending Ruling on the Stay Motion. (*See Ms. L.*, ECF No. 110.) The Court granted the plaintiffs' request for TRO in *Ms. L.* pending the parties' attempt to resolve and brief the issues. On August 15, 2018, Defendants renewed their request for additional time to explore resolution, but Plaintiffs in *M.M.M.* declined the invitation. With this ruling, the TRO in *Ms. L.* is moot, and will be denied in a separate order to be filed in that case.

[2] Importantly, Defendants do not argue, either here or in *Ms. L.*, that they wish to remove parents with final removal orders without their children. Rather, Defendants appear to be seeking removal of parents and children together. The only dispute here is whether those removals should occur now or at a later time.

about whether and to what extent they may assert their individual asylum rights. The principal dispute here is not whether the children have their own asylum rights (Defendants agree they do), but whether their parents waived those rights, and if they did not, what *type* of asylum procedures the children are entitled to—a potentially quick one under § 235 of the Immigration and Nationality Act ("INA"), or a more involved one under § 240 of the INA that was initially provided to some of the children after they were separated.[3]

As noted, this case is not about Defendants' authority—or desire—to deport the parents at issue without their children. It does not appear Defendants wish to do so. Rather, this case is about the *timing* of removal of the *family unit* and whether an orderly asylum process should be permitted. Re-separation of the family would be antithetical to the President's Executive Order which expressly restored family unity and abandoned the family separation policy,[4] and it would greatly exacerbate the intensive efforts presently

---

[3] Plaintiffs point out that families apprehended at or near the border prior to the zero tolerance policy would have gone through § 235 proceedings together. (Mem. of Law in Supp. of Pls.' Application for TRO and Prelim. Inj. at 16, ECF No. 6-1.) In those family proceedings, the asylum officer would make credible fear determinations as to both parent and child, and if one received a positive credible fear finding, that finding would inure to the benefit of the other. (Pls.' Supp. Mem. of Law in Supp. of Mot. for TRO, Ex. A (Decl. of Shalyn Fluharty) ¶¶ 3-5, ECF No. 33.) Plaintiffs note this is important because the credible fear determinations for parents and children are different. In analyzing the parent's claim, the asylum officer considers whether the parent has been targeted with persecution on account of a reason other than race, religion, nationality, political opinion or membership in a particular group. In considering the children's claim, the inquiry may be broader in that their "particular social group" may "be comprised of 'immediate family members' of their" parent. (*Id.* ¶ 3.) If, during this process, either the parent or child receives a credible fear finding, both parent and child are taken out of expedited removal proceedings and placed in proceedings under § 240. (*Id.* ¶ 4.) However, if neither parent nor child receives a positive credible fear finding, both are subject to expedited removal.

[4] *See* Executive Order, Affording Congress an Opportunity to Address Family Separation § 1, 2018 WL 3046068 (June 20, 2018) (stating it is "the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.").

underway to reunite the nearly 400 parents who were previously removed from the country with their children who remain in the United States.

For the reasons set forth below, the Court concludes it has jurisdiction to issue the requested injunction and exercises its discretion to do so. Plaintiffs have met all the required factors for the relief they request, including likely success on the merits—which encompasses the waiver issue.

I.

DISCUSSION

Generally, injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To meet that showing, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). The purpose of a temporary restraining order, in particular, is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974) (noting a temporary restraining order is restricted to its "underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer").

A. Jurisdiction

Before turning to the merits of Plaintiffs' request for a temporary restraining order, the Court must first address Defendants' argument that the Court lacks jurisdiction to grant the requested relief, more specifically, to enjoin the execution of any final removal orders

issued to Plaintiffs' parents. (*See* Defs.' Opp'n to Mot. at 6-9, ECF No. 15.)[5] In support of this argument, Defendants rely on the INA, specifically 8 U.S.C. §§ 1252(a)(2)(A)(i), 1252(e)(1), (2), (4), and 1252(g). Plaintiffs in both this case and in *Ms. L.* disagree that these statutes deprive the Court of jurisdiction to grant the requested relief. The *Ms. L.* Plaintiffs, in particular, also argue the Court has authority to issue orders necessary to ensure implementation of its injunction in that case. (*See Ms. L.*, ECF No. 110 at 8.)

The statute Defendants rely on to support their argument that the Court lacks jurisdiction is 8 U.S.C. § 1252, which is entitled "Judicial Review of Orders of Removal." Defendants rely first on subsection (a)(2)(A)(i) of this statute, which states, "no court shall have jurisdiction to review any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2)(A)(i). Although Plaintiffs in this case did not address this specific statute, the *Ms. L.* Plaintiffs argue this statute does not apply here because the relief they are requesting does not "aris[e] from ... the implementation or operation of an order of removal[.]" *Id.* Rather, they contend the requested relief arises from "the government's decision to separate them from their children[.]" (*Ms. L.*, ECF No. 110 at 9.)

In *Jennings v. Rodriguez*, ___ U.S. ___, 138 S.Ct. 830 (2018), the Supreme Court addressed the "arising from" language in a neighboring subsection of § 1252. There, the Court refused to give this language an "expansive interpretation," stating it "would lead to staggering results." *Id.* at 840. Instead, the Court concluded that § 1252(b)(9) did not present a jurisdictional bar where respondents were "not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek

---

[5] Defendants also raised this argument in their opposition to the motion to stay in the *Ms. L.* case. (*See Ms. L.*, ECF No. 177 at 18-23.) Because the jurisdictional issue presented in that case is the same as the one presented here, the Court incorporates the parties' arguments and briefing from *Ms. L.* into this discussion.

removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at 841.

Here, as in *Jennings*, Plaintiffs are not asking this Court to review any individual removal orders. Indeed, none of the Plaintiffs in this case have final removal orders. The only persons with final removal orders here are Plaintiffs' parents, but they are not challenging the Government's ultimate decision to detain or remove them. All Plaintiffs are asking of the Court is to stay removal of their parents pending resolution of Plaintiffs' separate claims for asylum. Because this request does not "aris[e] from … the implementation or operation of an order of removal[,]" § 1252(a)(2)(A)(i) does not deprive this Court of jurisdiction to consider Plaintiffs' request.

Next, Defendants rely on § 1252(e)(1). That statute provides, no court may "(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection[.]" 8 U.S.C. § 1252(e)(1). The parties do not devote much attention to this subsection, but like § 1252(a)(2)(A)(i), it also does not deprive this Court of jurisdiction to entertain Plaintiffs' request. On its face, this statute applies only to "action[s] pertaining to an order to exclude an alien in accordance with section 1225(b)(1)[,]" 8 U.S.C. § 1252(a)(1)(A), and the cases and motions at issue here do not fit that description. Thus, this statute does not act as a jurisdictional bar to the Court's consideration of the motion.

The final subsection of the statute Defendants rely on is § 1252(g). This subsection states "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Like subsection (a)(2)(A)(i) above, the relevant language here is "arising from," and as stated above, the claims in the cases and motions at issue here do not "arise from" the Attorney General's decision to execute removal orders against parents in *Ms. L.* Rather, the claims in *Ms. L.* and the relief requested in the motion to stay

in that case arise from the parents' separation from their children pursuant to Defendants' policies. The present case is even farther afield of § 1252(g) as the claims here are brought on behalf of the children of *Ms. L.* parents, none of whom even have final orders of removal. Thus, § 1252(g) does not deprive the Court of jurisdiction to consider the present motion. *See Arce v. United States*, ___ F.3d ___, 2018 WL 3763524, at *2-4 (9th Cir. Aug. 9, 2018) (rejecting government's argument that § 1252(g) deprived the courts of jurisdiction to hear "FTCA claims of a noncitizen who was wrongfully removed in violation of a court order."); *Barahona Gomez v. Reno*, 167 F.3d 1228, 1233 34 (9th Cir. 1999) (rejecting defendants' argument that § 1252(g) deprived court of jurisdiction to "stay deportation pending resolution of [plaintiffs'] constitutional claims."); *Walters v. Reno*, 145 F.3d 1032, 1051 53 (9th Cir. 1998) (same). There being no jurisdictional impediment to hearing the present motion, the Court now turns to the merits of Plaintiffs' request.

B. Likelihood of Success

"The first factor under *Winter* is the most important—likely success on the merits." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). While Plaintiffs carry the burden of demonstrating a likelihood of success, they are not required to prove their case in full at this stage but only such portions that enable them to obtain the injunctive relief they seek. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Here, Plaintiffs argue they are likely to succeed on the merits on all of their claims, but the Court need only discuss one: the claim for mandamus relief, which is premised on the children's independent right to seek asylum under well settled law. To prevail on this claim, Plaintiffs must show (1) their claim is clear and certain, (2) Defendants' duty to perform "is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997) (citing *Azuring v. Von Raab*, 803 F.2d 993, 995 (9th Cir. 1986)). Plaintiffs have shown a likelihood of success on this claim for the reasons stated below.

First, Plaintiffs' claim is clear and certain. Plaintiffs argue—and it is undisputed—that prior to the Government's separation policy, Plaintiffs and similarly situated children

would have been subject to proceedings under § 235 of the INA. (Compl. ¶ 53.) Under § 235, a person who requests asylum by expressing a fear of persecution in his or her home country has the right to be interviewed by an asylum officer to determine whether that individual has a credible fear of returning to their home country. The statute provides,

> If an immigration officer determines that an alien ... who is arriving in the United States ... is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum ... or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer ....

8 U.S.C. § 1225(b)(1)(A)(ii). Here, Plaintiffs allege they have "triggered the non-discretionary duty outlined" in this statute, namely, the duty to refer them for an interview by an asylum officer. (Compl. ¶ 122.) More specifically, they allege they have requested an opportunity to explain to an immigration or asylum officer their fear of returning to their home countries, but not one of them has received a response to those requests. (*Id.* ¶¶ 73, 80, 88, 94, 99, 103.)

Second, the duty set out in the statute is "nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt[.]" *Patel*, 134 F.3d at 931. By its plain language, the statute provides the immigration officer "shall" refer the alien for an interview by an asylum officer. 8 U.S.C. § 1182(b)(1)(A)(ii). "The word 'shall' generally imposes a nondiscretionary duty[.]" *SAS Institute, Inc. v. Iancu*, ___ U.S. ___, 138 S.Ct. 1348, 1351 (2018); *see also Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 691 (9th Cir. 2003) (stating use of "shall" reflects nondiscretionary duty). Indeed, Defendants' counsel conceded that children, like the Plaintiffs here, have a right to pursue asylum separate and apart from their parents. (Rep. Tr. at 14-15, August 8, 2018, ECF No. 180.)

Third, there is no dispute that no other adequate remedy is available to Plaintiffs.

In their opposition to the motion, Defendants did not address whether Plaintiffs had shown a likelihood of success on this claim. However, at oral argument and in *Ms. L.* Defendants raised the defense of waiver. Specifically, Defendants assert Plaintiffs' parents

waived their children's separate right to pursue asylum by executing one of the forms during the reunification process.

An election form was provided to parents in *Ms. L.* and attached to their class notice, which was entitled "Notice of Potential Rights for Certain Detained Alien Parents Separated from their Minor Children." The class notice was created and distributed to advise the parents of their right to reunification with their children. The notice was proposed, in part, as a response to a form the Government had previously distributed to parents in the *Ms. L.* class, entitled "Separated Parent's Removal Form." (*See* Ms. L. Pls.' Mem. Regarding Reunification Forms, Ex. 63, ECF No. 32.) The government form offered two choices to parents with final removal orders: (1) to be reunited with their child for the purpose of repatriation to their home country, or (2) to "voluntarily" return to their home country without their child, who would "remain in the United States to pursue available claims of relief." (*Id.*) The *Ms. L.* plaintiffs argued the government form was misleading and was being used improperly to suggest to parents that they needed to waive their right to contest removal in order to obtain reunification. Plaintiffs in *Ms. L.* therefore requested the Court to issue the class notice to "dispel that impression, and nothing more." (*See Ms. L.*, ECF No. 168 at 1.) The class notice included information left out of the government form, namely, that a preliminary injunction had issued compelling the government to reunify the parents with their children. (*See* Ms. L. Pls.' Mem. Regarding Reunification Forms, Ex. 62, ECF No. 32.) The class notice clarified, "The government must reunify you with your child. ... You do NOT need to take any action to be reunified with your child. ... You do NOT need to agree to removal from the United States in order to be reunified with your child." (*Id.* at 10.) A similar statement appeared on the election form attached to the class notice. (*Id.* at 11) ("You DO NOT have to agree to removal from the United States in order to be reunified with your child. Even if you continue to fight your case, the government must still reunify you.")

Notably, neither the government form nor the class notice included any language concerning the children's separate rights to pursue asylum. Similarly, there is no language

on the election form concerning the children's right to pursue asylum, the parents' ability to waive those rights, or any place on the form for the parents to actually execute such a waiver. The reason for this omission is apparent: the class notice was designed to advise *parents* of their *right to reunification* without having to take any action on their own or abandoning their own challenge to removal, and nothing more. The core allegations in *Ms. L.* focused on the constitutional violation caused by the Government's family separation policy, and the obligation of the Government to reunify the separated families to redress the wrong. The class notice, therefore, was not designed to advise parents of their childrens' asylum rights, let alone to waive those rights. It was about the right to reunify. The complete absence of any mention of the children's asylum rights on any of the forms at issue here dooms Defendants' waiver argument. *See Kirkpatrick v. Chappell*, 877 F.3d 1047, 1055 (9th Cir. 2017) (stating "knowing, voluntary, and intelligent requirement" that applies to waivers means the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."); *see also United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir. 1993) ("Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights.") (citations omitted).

Nevertheless, Defendants maintain the election form provided with the class notice—created in the context of reunification—constitutes a waiver of the children's separate rights to pursue asylum. Defendants hinge their waiver argument on two statements in the election form. First, the form states: "IF YOU LOSE YOUR CASE AND THE GOVERNMENT IS GOING TO REMOVE YOU FROM THE UNITED STATES, you must decide at that time whether you want your child to leave the United States with you." Next, the form prompts those parents to choose from one of three options: (1) to be removed with child, (2) to be removed without child, or (3) if undecided, "to talk with a lawyer before deciding" whether to be removed with or without child. Based on that language, Defendants argue the election form was "designed to allow the parent to make the election whether to forego any separate relief their child may have and return home

together[.]" (ECF No. 169 at 3.) However, as discussed above, that is simply not the case. The class notice and election form were not designed for that purpose; they focused solely on the parents' reunification rights, not the childrens' rights, and certainly not on any waiver of those rights.

On the present record, Defendants have not met their burden of showing that the parents' execution of either the government form or the election form provided with the class notice effected a waiver of their children's asylum rights. *See Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 377 (C.D. Cal. 1982) (citing *In re Gault*, 387 U.S. 1, 42 (1967)) ("Abandonment of a federal right must be intentional; it will not be presumed.") Thus, Plaintiffs have shown a likelihood of success on their second claim for relief, which weighs in favor of issuance of the temporary restraining order.[6]

C. Irreparable Injury and Balance of Equities

Turning to the next two factors, Plaintiffs must show they are "'likely to suffer irreparable harm in the absence of preliminary relief[,]'" and demonstrate that "'the balance of equities tips in [their] favor.'" *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (quoting *Winter*, 555 U.S. at 20). Plaintiffs have met that burden.

Plaintiffs allege, and Defendants do not dispute, that the Government plans to remove recently reunified families absent a court order to the contrary. (*See* Mem. of Law in Supp. of Pls.' Application for TRO and Prelim. Inj. at 23, ECF No. 6-1) (stating government is threatening to remove Plaintiffs without providing them access to any asylum proceedings); (Rep. Tr. at 14, August 8, 2018, ECF No. 180) (confirming government's plan "to remove these families as soon as practical.") This would harm Plaintiffs and similarly situated children by depriving them of their right to seek asylum. "By definition, aliens seeking asylum contend that they are subject to persecution when

---

[6] In light of this conclusion the Court declines to address at this time Plaintiffs' other claims.

they return to their own countries, where they risk further harm, potentially including imprisonment or even death." *Desta v. Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004).

In their brief in opposition to the present motion, Defendants did not raise any hardships to them if the temporary restraining order was granted. At oral argument, defense counsel asserted there was some unrest in at least one of the family detention facilities, but it is unclear what that unrest is and there is no evidence before the Court to support counsel's statement. To be sure, each side faces some burden if a temporary restraining does or does not issue, but on balance these factors clearly favor Plaintiffs. *Cf. Barahona-Gomez*, 167 F.3d at 1236 (upholding finding that balance of hardships favored plaintiffs where "without a preliminary injunction, ... the plaintiffs may never have an opportunity to seek review of the actual cause of denial of their applications for suspension of deportation.")

D. Public Interest

The final factor for consideration is the public interest. *See Hernandez*, 872 F.3d at 996 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)) ("When, as here, 'the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction.'") To obtain the requested relief, "Plaintiffs must demonstrate that the public interest favors granting the injunction 'in light of [its] likely consequences,' i.e., 'consequences [that are not] too remote, insubstantial, or speculative and [are] supported by evidence.'" *Id.* (quoting *Stormans*, 586 F.3d at 1139).

Here, there are a number of public interests at stake. First, there is "a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Second, there is "a public interest in prompt execution of removal orders[.]" *Id.* As the Supreme Court has stated, "[t]he continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and 'permit[s] and prolong[s] a continuing violation of United States law.'" *Id.* (quoting *Reno v. American-*

Arab Anti-Discrimination Comm., 525 U.S. 471, 490 (1999)). Third, there is a public interest in ensuring that government officials charged with executing the law fulfill their duties. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (stating that if an alien "indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).") Finally, there is a public interest in ensuring that Plaintiffs' constitutional right to family association and integrity is upheld. Each of these interests is important, and all but one will be served by the issuance of a temporary restraining order in this case.

The only interest that will not be served is the interest in prompt execution of removal orders. There is no doubt this an important interest. This Court, situated as it is on the border between the United States and Mexico, "is keenly aware of the serious problems already caused by the influx of illegal aliens into the United States and recognizes the dangers to both citizens and illegal immigrants arising from this situation." *Orantes-Hernandez*, 541 F.Supp. at 379-80. However, "these problems must not and surely need not be solved by depriving people of their rights." *Id.* at 380. By furthering the other public interests set out above, "the Court is not directing that the doors be opened to illegal aliens with no right to be in this country." *Id.* Rather, the Court is upholding the rights provided to all persons under the United States Constitution, rights that are particularly important to minor children seeking refuge through asylum, and rights that have been specifically recognized by the President's Executive Order in the particular circumstances of this case. *See* Executive Order § 1, 2018 WL 3046068 ("[T]he policy of this Administration [is] to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.") Maintaining family unity under these circumstances is appropriate, consistent with law, *see* 8 U.S.C. § 1225(b)(1)(B)(iv) (alien may choose persons to consult with prior to credible fear interview or any review thereof), and would not unfairly or unduly tax available government resources. Notably, the laws enacted by Congress provide "that those aliens with claims of persecution in their homeland should at least be heard and that those with valid claims

of persecution in their homeland should receive protection." *Orantes-Hernandez*, 541 F.Supp. at 380. In the end, it may be that many of these children will be denied the relief they seek, but the public has an interest in ensuring these children receive the process that Congress has provided. The hasty removal of these children and their parents at the expense of an ordered process provided by law would be antithetical to the public interests set out above, which plainly weigh in favor of granting the requested relief.

II.

CONCLUSION

For the reasons set out above, the Court hereby GRANTS Plaintiffs' motion for a temporary restraining order as follows:

Defendants and their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them are hereby TEMPORARILY RESTRAINED from removing from the United States, until the merits of Plaintiffs' motion for a preliminary injunction is resolved: (a) "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child," as modified by the Court's class definition in *Ms. L.*, and their children; (b) all such parents who have already been reunified, and their children; (c) all such parents who have allegedly waived reunification, and their children; and (d) all such parents whose background checks or case file reviews have allegedly raised "red flags," and their children.[7]

---

[7] Unlike in *Ms. L.*, Plaintiffs here did not move for class certification in conjunction with their request for TRO. Defendants, however, did not object to providing classwide relief other than on Plaintiffs' claim under 8 U.S.C. § 1252(e)(3). That claim remains pending before Judge Friedman in the district court for District of Columbia, and thus, that issue is more appropriately addressed to him. To the extent there is any objection to providing classwide relief here, the Court notes the reasoning behind certification of the class in *Ms.*

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to any person or entity that may be subject to any provision of this Order, including their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them or have any involvement in the removal of individuals from the United States.

A status conference will be held on **August 24, 2018**, at **1:00 p.m.** Plaintiffs' counsel should be prepared to address whether they wish to proceed with a request for a preliminary injunction, and counsel for both parties should be prepared to address how they wish to proceed on the issues of class certification and Plaintiffs' entitlement to asylum proceedings under §§ 235 or 240.[8] What is anticipated, as the Court has grown accustomed to in the *Ms. L.* case, is the parties will meet and confer and propose a solution—one which follows the law, and is equitable and reflective of ordered governance.

Dated: August 16, 2018

Hon. Dana M. Sabraw
United States District Judge

L. would seem to apply equally here. *See Ms. L. v. U.S. Immigration and Customs Enforcement*, ECF No. 82.

[8] Consistent with the Court's Orders in *Ms. L.*, it appears Plaintiffs' asylum claims would be more appropriately addressed under § 235 since Plaintiffs were not truly "unaccompanied" minors warranting removal proceedings under § 240. Nevertheless, the Court reserves ruling on that issue pending guidance from the parties on how they wish to proceed.

835 F.3d 422
United States Court of Appeals,
Third Circuit.

Rosa Elida CASTRO; A.A.G.C.; Laura Lisseth Flores–Pichinte; E.S.U.F.; Karen Margarita Zelaya Alberto; S.E.A.Z; Kelly Gutierrez Rubio; G.J.S.G.; Gladis Carrasco Gomez; B.J.R.C.; Wendy Amparo Osorio Martinez; D.S.R.O.; Carmen Leiva–Menjivar; E.A.M.L.; A.M.M.L.; Dina Isabel Huezo De Chicas; L.J.C.H.; Cindy Gisela Lopez Funez; W.S.M.L.; Lesly Grizelda Cruz Matamoros; C.N.V.C.; Jeydi Erazo Anduray; D.A.L.E.; Dinora Lemus; A.R.M.L.; Jennys Mendez Debonilla; A.B.B.M.; Marta Alicia Rodriguez Romero; W.A.M.R.; C.A.M.R.; Roxana Aguirre–Lemus; C.A.A.; Celia Patricia Soriano Bran; J.A.A.S.; Maria Delmi Martinez Nolasco; J.E.L.M.; Guadalupe Flores Flores; W.J.B.F.; Carmen Aleyda Lobo Mejia; A.D.M.L.L.; Julissa Clementina Hernandez Jiminez; A.H.V.H.; *Maria Erlinda Mejia Melgar; *E.N.C.M.; *D.G.C.M.; Jethzabel Martiza Aguilar Manica; V.G.R.A.; Heymi Lissamancia Arevalo–Monterroza; R.N.F.A; Elsa Milagros Rodriguez Garcia; J.M.V.G.; Elizabeth Benitez De Marquez; A.M.B.; Ingrid Maricela Elias Soriano; A.E.C.E.; Maribel Maria Escobar Ramirez; C.Y.L.E.; Y.I.L.E.; R.J.L.E.; Ana Maricel Rodriguez–Granados; J.A.B.R.; V.E.B.R.; Zulma Lorena Portillo De Diaz; K.L.D.P., Appellants

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; United States Customs and Border Protection; United States Citizenship and Immigration Services; United States Immigration and Customs Enforcement Secretary of DHS; Attorney General of the United States; Commissioner of CBP; Director of USCIS; Philadelphia Field Director, CBP; Philadelphia Assistant Field Office Director, ICE; Director, Berks County Residential Center

* Dismissed Pursuant to Court's Order entered May 13, 2016.

No. 16–1339
|
Argued May 19, 2016
|
(Opinion Filed: August 29, 2016)

Synopsis

Background: Aliens filed habeas petitions against Department of Homeland Security (DHS) to prevent or postpone their expedited removal from United States. The United States District Court for the Eastern District of Pennsylvania, Paul S. Diamond, J., 2016 WL 614862, dismissed petitions, and aliens appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] district court lacked habeas jurisdiction over aliens' claims, and

[2] aliens could not invoke Suspension Clause.

Affirmed.

Hardiman, Circuit Judge, concurred dubitante and filed opinion.

West Headnotes (9)

[1] Federal Courts
Jurisdiction

Court of Appeals reviews de novo district court's determination that it lacked subject matter jurisdiction.

Cases that cite this headnote

[2] Federal Courts
Presumptions and burden of proof

Party asserting jurisdiction bears burden of proving that jurisdiction exists.

1 Cases that cite this headnote

[3] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews pure legal questions of statutory interpretation de novo.

Cases that cite this headnote

[4] **Statutes**
Relation to plain, literal, or clear meaning;ambiguity

Statute must be enforced according to its plain meaning, even if doing so may lead to harsh results.

Cases that cite this headnote

[5] **Habeas Corpus**
Aliens

Federal district court lacked habeas jurisdiction over aliens' claims regarding purported inadequacy of credible fear proceedings pursuant to expedited removal statute. Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(e)(5).

6 Cases that cite this headnote

[6] **Constitutional Law**
Burden of Proof

Party challenging statute's constitutionality bears burden of proof.

Cases that cite this headnote

[7] **Habeas Corpus**
Constitutional and statutory provisions

Statute modifying scope of habeas review is constitutional under Suspension Clause so long as modified scope of review is neither inadequate nor ineffective to test legality of person's detention. U.S. Const. Art. 1, § 9, cl. 2.

Cases that cite this headnote

[8] **Habeas Corpus**
Aliens

Habeas Corpus
Suspension of Writ

Aliens who were apprehended within hours of surreptitiously entering United States were, in essence, seeking initial admission to United States, and as such had no constitutional rights regarding their applications for initial admission, and thus they could not invoke Suspension Clause to seek habeas review of Department of Homeland Security's (DHS) application of expedited removal statute. U.S. Const. Art. 1, § 9, cl. 2; Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(e)(5).

4 Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship**
Admission as privilege or right

Alien seeking initial admission to United States requests privilege and has no constitutional rights regarding his application.

4 Cases that cite this headnote

***424** On Appeal from the United States District Court for the Eastern District of Pennsylvania, District Court Nos. 5–15–cv–06153, 5–15–cv–06403, 5–15–cv–06404, 5–15–cv–06406, 5–15–cv–06410, 5–15–cv–06411, 5–15–cv–06428, 5–15–cv–06429, 5–15–cv–06430, 5–15–cv–06431, 5–15–cv–06451, 5–15–cv–06472, 5–15–cv–06474, 5–15–cv–06475, 5–15–cv–06546, 5–15–cv–06547, 5–15–cv–06551, 5–15–cv–06553, 5–15–cv–06591, 5–15–cv–06592, 5–15–cv–06594, 5–15–cv–06595, 5–15–cv–06676, 5–15–cv–06677, 5–15–cv–06755, 5–15–cv–06788, 5–15–cv–06798, 5–15–cv–06863, 5–16–cv–00069, District Judge: The Honorable Paul S. Diamond

Attorneys and Law Firms

Lee P. Gelernt [ARGUED], American Civil Liberties Union, Immigrants' Rights Project, 125 Broad Street,

18th Floor, New York, NY 10004, Jennifer C. Newell, American Civil Liberties Union Foundation, 39 Drumm Street, San Francisco, CA 94111, Mary Catherine Roper, Molly M. Tack–Hooper, American Civil Liberties Union of Pennsylvania, P.O. Box 60173, Philadelphia, PA 19106, Witold J. Walczak, American Civil Liberties Union, 313 Atwood Street, Pittsburgh, PA 15213, Counsel for Appellants

Joseph A. Darrow, Erez Reuveni [ARGUED], United States Department of Justice, Office of Immigration, Litigation, 450 5th Street, N.W., Washington, DC 20001, Counsel for Appellees

Ethan D. Dettmer, Gibson Dunn, 555 Mission Street, Suite 3000, San Francisco, CA 94105, Counsel for Amici Curiae Gabriel J.Chin, Nancy Morawetz, Hiroshi Motomura, David Thronson, Leti Volpp, and Stephen Yale–Loehr

Jonathan H. Feinberg, Kairys Rudovsky Messing & Feinberg, 718 Arch Street, Suite 501 South, Philadelphia, PA 19106, Mark C. Fleming, WilmerHale, 60 State Street, Boston, MA 02109, Counsel for Amici Curiae Erwin Chermerinsky, Eric M. Freedman, Brandon L. Garrett, Jonathan L. Hafetz, Paul D. Halliday, Randy A. Hertz, Aziz Huq, Lee Kovarsky, Christopher N. Lasch, James S. Liebman, Gerald L. Neuman, Kermit Roosevelt, Theodore W. Ruger, Stephen I. Vladeck, and Michael J. Wishnie

Bruce P. Merenstein, Nancy Winkelman, Schnader Harrison Segal & Lewis, 1600 Market Street, Suite 3600, Philadelphia, PA 19103, Counsel for Amici Curiae Tahirih Justice Center, David B. Thronson, Young Center for, Immigrant Childrens Rights, Sheila I. Velez–Martinez, Shoba S. Wadhia, Maureen A. Sweeney, Harvard Immigration and Refugee Clinic, American Friends Service, Farrin R. Anello, Jon Bauer, Lenni Benson, Linda Bosniak, Benjamin Casper, Center for Gender & Refugee Studies, Denise Gilman, Joanne Gottesman, Geoffrey A. Hoffman, KIND, Inc., National Immigrant Justice, Center (NIJC), Sarah H. Paoletti, Michele R. Pistone, Galya Ruffer, and Rebecca A. Sharpless

Charles Roth, National Immigrant Justice Center, 208 South LaSalle Street, Suite 1300, Chicago, IL 60604, Counsel for Amicus Curiae National Immigrant Justice Center (NIJC)

Before: SMITH, HARDIMAN, and SHWARTZ, Circuit Judges

OPINION

SMITH, Circuit Judge.

Petitioners are twenty-eight families—twenty-eight women and their minor children—who filed habeas petitions in the United States District Court for the Eastern District of Pennsylvania to prevent, or at least postpone, their expedited removal from this country. They were ordered expeditiously removed by the Department of ***425** Homeland Security (DHS) pursuant to its authority under § 235(b)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(1). Before DHS could effect their removal, however, each petitioning family indicated a fear of persecution if returned to their native country. Nevertheless, following interviews with an asylum officer and subsequent *de novo* review by an immigration judge (IJ), Petitioners' fear of persecution was found to be not credible, such that their expedited removal orders became administratively final. Each family then filed a habeas petition challenging various issues relating to their removal orders.

In this appeal we must determine, first, whether the District Court has jurisdiction to adjudicate the merits of Petitioners' habeas petitions under § 242 of the INA, 8 U.S.C. § 1252. [1] Because we hold that the District Court does not have jurisdiction under the statute, we must also determine whether the statute violates the Suspension Clause of the United States Constitution. This is a very difficult question that neither this Court nor the Supreme Court has addressed. We hold that, at least as applied to Petitioners and other similarly situated aliens, § 1252 does not violate the Suspension Clause. Consequently, we will affirm the District Court's order dismissing Petitioners' habeas petitions for lack of subject matter jurisdiction.

I. STATUTORY FRAMEWORK

The statutory and regulatory provisions of the expedited removal regime are at the heart of this case. We will, therefore, provide an overview of the provisions which form the framework governing expedited removal

before further introducing Petitioners and their specific claims. First, we will discuss 8 U.S.C. § 1225(b)(1) and its implementing regulations, which lay out the administrative side of the expedited removal regime. We will then turn to 8 U.S.C. § 1252, which specifies the scope of judicial review of all removal orders, including expedited removal orders.

A. Section 1225(b)(1)

Under 8 U.S.C. § 1225(b)(1) and its companion regulations, two classes of aliens are subject to expedited removal if an immigration officer determines they are inadmissible due to misrepresentation or lack of immigration papers: (1) aliens "arriving in the United States," and (2) aliens "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border." [2] *See* 8 U.S.C. § 1225(b)(1)(A)(i) & (iii); Designating Aliens for Expedited Removal, 69 Fed Reg. 48877–01 (Aug. 11, 2004). [3] If an alien ***426** falls into one of these two classes, and she indicates to the immigration officer that she fears persecution or torture if returned to her country, the officer "shall refer the alien for an interview by an asylum officer" to determine if she "has a credible fear of persecution [or torture]." 8 U.S.C. § 1225(b)(1)(A)(ii) & (B)(ii); 8 C.F.R. § 208.30(d). The statute defines the term "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title." 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(3) ("An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture.").

Should the interviewing asylum officer determine that the alien lacks a credible fear of persecution (i.e., if the officer makes a "negative credible fear determination"), the officer orders the removal of the alien "without further hearing or review," except by an IJ as discussed below. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). The officer is then required to "prepare a written record" that must include "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution." *Id.* § 1225(b)(1)(B)(iii)(II). Next, the asylum officer's supervisor reviews and approves the negative credible fear determination, after which the order of removal becomes "final." 8 C.F.R. § 235.3(b)(7); *id.* § 208.30(e)(7). Nevertheless, if the alien so requests, she is entitled to have an IJ conduct a *de novo* review of the officer's negative credible fear determination, and "to be heard and questioned by the [IJ]" as part of this review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). Assuming the IJ concurs in the asylum officer's negative credible fear determination, "[t]he [IJ]'s decision is final and may not be appealed," and the alien is referred back to the asylum officer to effect her removal. 8 C.F.R. § 1208.30(g)(2)(iv)(A). [4]

B. Section 1252

Section 1252 of Title 8 defines the scope of judicial review for all orders of removal. This statute narrowly circumscribes judicial review for expedited removal orders issued pursuant to § 1225(b)(1). It provides that "no court shall have jurisdiction to review ... the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)]." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in § 1252(e), the statute strips courts of jurisdiction to review: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order"; (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of [§ 1225(b)(1)]." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv). Thus, the statute ***427** makes abundantly clear that whatever jurisdiction courts have to review issues relating to expedited removal orders arises under § 1252(e).

Section 1252(e), for its part, preserves judicial review for only a small subset of issues relating to individual expedited removal orders:

> Judicial review of any determination made under [§ 1225(b)(1)] is available in habeas corpus proceedings, but shall be limited to determinations of—
>
> (A) whether the petitioner is an alien,

> (B) whether the petitioner was ordered removed under [§ 1225(b)(1)], and
>
> (C) whether the petitioner can prove ... that the petitioner is [a lawful permanent resident], has been admitted as a refugee ... or has been granted asylum ....

Id. § 1252(e)(2). In reviewing a determination under subpart (B) above—i.e., in deciding "whether the petitioner was ordered removed under [§ 1225(b)(1)]"—"the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually admissible or entitled to any relief from removal." *Id.* § 1252(e)(5).

Section 1252(e) also provides jurisdiction to the district court for the District of Columbia to review "[c]hallenges [to the] validity of the [expedited removal] system." *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or its implementing regulations, as well as challenges claiming that a given regulation is inconsistent with law. *See id.* § 1252(e)(3)(A)(i) & (ii). Nevertheless, systemic challenges must be brought within sixty days after implementation of the challenged statute or regulation. *Id.* § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F.Supp.2d 38, 47 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000) (holding that "the 60–day requirement is jurisdictional rather than a traditional limitations period"). [5]

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are natives and citizens of El Salvador, Honduras, and Guatemala who, over a period of several months in late 2015, entered the United States seeking refuge. While their reasons for fleeing their home countries vary somewhat, each petitioner claims to have been, or to fear becoming, the victim of violence at the hands of gangs or former domestic partners. United States Customs and Border Protection (CBP) agents encountered and apprehended each petitioner within close proximity to the border and shortly after their illegal crossing. In fact, the vast majority were apprehended within an hour or less of entering the country, and at distances of less than one mile from the border; in all events, no petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border. [6] And because none of the petitioners ***428** presented immigration papers upon their arrest, and none claimed to have been previously admitted to the country, they clearly fall within the class of aliens to whom the expedited removal statute applies. *See* Part I.A above.

After the CBP agents apprehended them and began the expedited removal process, Petitioners each expressed a fear of persecution or torture if returned to their native country. Accordingly, each was referred to an asylum officer for a credible fear interview. As part of the credible fear interview process, the asylum officers filled out and gave to Petitioners a number of forms, including a form memorializing the officers' questions and Petitioners' answers during the interview. Following the interviews—all of which resulted in negative credible fear determinations—Petitioners requested and were granted *de novo* review by an IJ. Because the IJs concurred in the asylum officers' conclusions, Petitioners were referred back to DHS for removal without recourse to any further administrative review. Each petitioning family then submitted a separate habeas petition to the District Court, [7] each claiming that the asylum officer and IJ conducting their credible fear interview and review violated their Fifth Amendment procedural due process rights, as well as their rights under the INA, the Foreign Affairs Reform and Restructuring Act of 1998, the United Nations Convention Against Torture, the Administrative Procedure Act, and the applicable implementing regulations. [8] All the petitions were reassigned to Judge Paul S. Diamond for the limited purpose of determining whether subject matter jurisdiction exists to adjudicate Petitioners' claims.

Petitioners argued before the District Court that § 1252 is ambiguous as to whether the Court could review their challenges to the substantive and procedural soundness of DHS's negative credible fear determinations. As such, they argued that the Court should construe the statute to allow review of their claims in order to avoid "the serious constitutional concerns that would arise" otherwise. JA 19. The District Court roundly rejected this argument, concluding instead that § 1252 unambiguously forecloses judicial review of all of Petitioners' claims, and that to adopt Petitioners' proposed construction would require

the Court "to do violence to the English language to create an 'ambiguity' that does not otherwise exist." JA 20.

***429** Turning then to the Suspension Clause issue, the District Court separately analyzed what it termed as Petitioners' "substantive" challenges—those going to the ultimate correctness of the negative credible fear determinations—versus their challenges relating to the procedures DHS followed in making those determinations. Based on the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), the Court derived four "factors in determining the scope of an alien's Suspension Clause rights": "(1) historical precedent; (2) separation-of-powers principles; (3) the gravity of the petitioner's challenged liberty deprivation; and (4) a balancing of the petitioner's interest in more rigorous administrative and habeas procedures against the Government's interest in expedited proceedings." JA 25 (citations omitted). Applying these factors, the Court determined that the Suspension Clause did not require that judicial review be available to address any of Petitioners' claims, and therefore that § 1252(e) does not violate the Suspension Clause. Thus, the Court dismissed with prejudice the consolidated petitions for lack of subject matter jurisdiction. Petitioners then filed a timely notice of appeal with this Court. [9]

III. ANALYSIS

[1] **[2]** Petitioners challenge on appeal the District Court's holding that it lacked subject matter jurisdiction under § 1252(e) to review Petitioners' claims, as well as the Court's conclusion that § 1252(e) does not violate the Suspension Clause. We review *de novo* the District Court's determination that it lacked subject matter jurisdiction. [10] *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 163 (3d Cir. 2010). Petitioners, as the side asserting jurisdiction, "bea[r] the burden of proving that jurisdiction exists." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 293 (3d Cir. 2012).

A. Statutory Jurisdiction under § 1252(e)

The government contends that § 1252 unambiguously forecloses judicial review of Petitioners' claims, and that nearly every court to address this or similar issues has held that the statute precludes challenges related to the expedited removal regime. Petitioners, on the other hand, argue that the statute can plausibly be construed to provide jurisdiction over their claims, and that, per the doctrine of constitutional avoidance, the statute should therefore be so construed. They also point to precedent purportedly supporting their position.

[3] **[4]** We review pure legal questions of statutory interpretation *de novo*. *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 221 (3d Cir. 2004). "The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* at 222 (internal quotation marks and citations omitted). If ***430** the statute is unambiguous, we must go no further. *Roth v. Norfalco LLC*, 651 F.3d 367, 379 (3d Cir. 2011). The statute must be enforced according to its plain meaning, even if doing so may lead to harsh results. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.... Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding." (internal quotation marks and citations omitted)). Thus, we begin with the statute's plain meaning.

As discussed in our overview of the expedited removal regime, *see* Part I.B above, § 1252 makes abundantly clear that if jurisdiction exists to review any claim related to an expedited removal order, it exists only under subsection (e) of the statute. *See* 8 U.S.C. § 1252(a)(2)(A). And under subsection (e), unless the petitioner wishes to challenge the "validity of the system" as a whole rather than as applied to her, the district courts' jurisdiction is limited to three narrow issues. *See id.* § 1252(e)(2) & (3). Petitioners in this case concede that two of those three issues do not apply to them; that is, they concede they are aliens, *id.* § 1252(e)(2)(A), and that they have not previously been lawfully admitted to the country, *id.* § 1252(e)(2)(C). Nevertheless, they argue that their claims fall within the third category of issues that courts are authorized to entertain: "whether [they have been] ordered removed under [§ 1225(b)(1).]" *Id.* § 1252(e)(2)(B).

At first glance, it is hard to see how this latter grant of jurisdiction can be of any help to Petitioners, since they do not dispute that an expedited removal order is

outstanding as to each. Indeed, their argument seems even more untenable in light of § 1252(e)(5), the first sentence of which clarifies that when a court must "determin[e] whether an alien has been ordered removed under [§ 1225(b)(1)], the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." *Id.* § 1252(e)(5). How could the government's alleged procedural deficiencies in ordering the Petitioners' expedited removal undermine the fact that expedited removal orders "in fact w[ere] issued" and that these orders "relat[e] to the petitioner[s]"? *Id.*

Nevertheless, Petitioners argue that the second sentence of § 1252(e)(5) creates a strong inference that courts have jurisdiction to review claims like theirs. This sentence states, "There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id.* Petitioners argue that because this sentence explicitly prohibits review of only two narrow questions, we should read it to implicitly authorize review of other questions related to the expedited removal order, such as whether the removal order resulted from a procedurally erroneous credible fear proceeding. Furthermore, Petitioners argue that the government's proposed construction of § 1252(e)(2)(B) and (e)(5) would render the second sentence of § 1252(e)(5) superfluous since the first sentence—which would essentially limit courts' review "only [to] whether the agency literally issued the alien a piece of paper marked 'expedited removal,' " Pet'rs' Br. 15—would already prevent review of the questions foreclosed by the second sentence. Based on these arguments, Petitioners claim that the statute is at least ambiguous as to whether their claims are reviewable and that we should construe the statute in their favor in order to avoid the "serious constitutional problems" that may ensue if we read it to ***431** foreclose habeas review. *Sandoval v. Reno*, 166 F.3d 225, 237 (3d Cir. 1999).

[5] Petitioners are attempting to create ambiguity where none exists.[11] Their reading of the second sentence in § 1252(e)(5) may be creative, but it completely ignores other provisions in the statute—including the sentence immediately preceding it—that clearly evince Congress' intent to narrowly circumscribe judicial review of issues relating to expedited removal orders. *See, e.g.,* 8 U.S.C. § 1252(a)(2)(A)(iii) ("[N]o court shall have jurisdiction to review ... the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)]."). As for their argument that the government's construction renders superfluous the second sentence of § 1252(e)(5), we think the better reading is that the second sentence simply clarifies the narrowness of the inquiry under the first sentence, i.e., that "review should only be for whether an immigration officer issued that piece of paper and whether the Petitioner is the same person referred to in that order." *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F.Supp.3d 1156, 1163–64 (D.N.M. 2014), *vacated as moot*, No. 14–769, 2015 WL 7454248 (D.N.M. Sept. 23, 2015); *see also id.* ("Rather than being superfluous ... the second sentence seems to clarify that Congress really did mean what it said in the first sentence."); *Diaz Rodriguez v. U.S. Customs & Border Prot.*, No. 6:14–CV–2716, 2014 WL 4675182, at *2 (W.D. La. Sept. 18, 2014), *vacated as moot sub nom. Diaz–Rodriguez v. Holder*, No. 14–31103, 2014 WL 10965184 (5th Cir. Dec. 16, 2014) ("The second sentence of Section 1252(e)(5) ... is most fairly interpreted as a clarification and attempt by Congress to foreclose narrow interpretations of the first sentence of Section 1252(e)(5)."). [12]

By reading the INA to foreclose Petitioners' claims, we join the majority of courts that have addressed the scope of judicial review under § 1252 in the expedited removal context. *See, e.g., Shunaula v. Holder*, 732 F.3d 143, 145–47 (2d Cir. 2013) (observing that § 1252 "provides for limited judicial review of expedited removal orders in habeas corpus proceedings" but otherwise deprives the courts of jurisdiction to hear claims related to the implementation or operation of a removal order, and holding that an alien's claims disputing that he sought to enter the country through fraud or misrepresentation and asserting that he was not advised that he was in an expedited removal proceeding or given the opportunity to consult with a lawyer "f[ell] within this jurisdictional bar"); *Brumme v. I.N.S.*, 275 F.3d 443, 448 (5th Cir. 2001) (characterizing argument that courts have jurisdiction under ***432** § 1252(e)(2)(B) to determine whether the expedited removal statute "was applicable in the first place" as an attempt to make "an end run around" the "clear" language of § 1252(e)(5)); *Li v. Eddy*, 259 F.3d 1132, 1134–35 (9th Cir. 2001), *opinion vacated as moot*, 324 F.3d 1109 (9th Cir. 2003) ("With respect to review of expedited removal orders, ... the statute could not be much clearer in its intent to restrict habeas review. Accordingly, only two issues were properly before the district court: whether the order removing the petitioner

was in fact issued, and whether the order named [the petitioner].” (citation omitted)); *Khan v. Holder*, 608 F.3d 325, 329–30 (7th Cir. 2010) (accord); *Diaz Rodriguez*, 2014 WL 4675182, at *2 (rejecting proposed construction similar to Petitioners' argument in this case; “The expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation.”).

Petitioners claim that the Ninth Circuit and two district courts in other circuits have construed § 1252 to allow judicial review of claims that the aliens in question had been ordered expeditiously removed in violation of the expedited removal statute. In *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), Smith, a Canadian national, was ordered removed under § 1225(b)(1) when, upon presenting himself for inspection at the United States–Canada border, the CBP agent concluded that he was an intending immigrant without proper work-authorization documents. Smith filed a habeas petition under § 1252(e)(2)(B), claiming that Canadians are exempt from the documentation requirements for admission, which meant that the CBP agent exceeded his authority in ordering Smith removed. Therefore (Smith's argument went), he was not “ordered removed under [§ 1225(b)(1)].” *Id.* at 1021. The Ninth Circuit “[a]ccept[ed] [Smith's] theory at face value” only to then reject Smith's argument on the merits. *Id.* Although the Supreme Court has disapproved of the practice, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), the court appears merely to have assumed *hypothetical* jurisdiction in order to dispose of the appeal on easier merits grounds. We therefore assign no weight to either *Smith*'s outcome or its reasoning.

In *American–Arab Anti–Discrimination Committee v. Ashcroft*, 272 F.Supp.2d 650 (E.D. Mich. 2003), several Lebanese aliens were ordered removed under § 1225(b)(1), years after entering the United States using fraudulent documentation. They filed habeas petitions challenging their expedited removal orders, and the district court concluded that it had jurisdiction “under the circumstances here ... to determine whether the expedited removal statute was *lawfully applied* to petitioners in the first place.” *Id.* at 663. To support this conclusion, the court latched onto the language in § 1252(e)(5) limiting the scope of habeas review under § 1252(e)(2)(B) to “whether [the expedited removal order] relates to the petitioner,” reasoning that an order “relates to” a person only if it was lawfully applied to the person. *Id.* We find the court's construction of the statute to be not just unsupported, but also flatly contradicted by the plain language of the statute itself. *See* 8 U.S.C. § 1252(a)(2)(A)(iii) (“[N]o court shall have jurisdiction to review ... the *application* of [§ 1225(b)(1)] to individual aliens.” (emphasis added)). Accordingly, we decline to follow it.

The last case Petitioners point us to is *Dugdale v. U.S. Customs and Border Protection*, 88 F.Supp.3d 1 (D.D.C. 2015). Dugdale was an alien who had lived for extended periods in the United States but who was ordered removed pursuant to ***433** § 1225(b)(1) after trying to return to the country following a visit to Canada. He filed a habeas petition to challenge his removal order under § 1252(e)(2). In his petition he claimed, *inter alia*, that because his removal order was not signed by the supervisor of the issuing immigration officer, he was not actually “ordered removed” under § 1225(b)(1). *See id.* at 6. Addressing this argument, the court recognized that the “[c]ase law on this question is scarce.” *Id.* Nevertheless, the court ultimately concluded “that a determination of whether a removal order ‘in fact was issued’ fairly encompasses a claim that the order was not lawfully issued due to some procedural defect.” *Id.* (quoting 8 U.S.C. § 1252(e)(5)). Because the claim that the supervisor failed to sign the removal order “f[ell] within that category of claims,” *id.* the court exercised its jurisdiction, and ordered further briefing to determine if the CBP had complied with its own regulations in issuing his removal order.

Even if we were to agree with *Dugdale* that § 1252(e)(2)(B) encompasses claims alleging “some procedural defect” in the expedited removal order, we would nonetheless find Petitioners' claims easily distinguishable. The procedural defect that Dugdale alleged was at least *arguably* related to the question whether a removal order “in fact was issued.” Petitioners' claims here, on the other hand, have nothing to do with the issuance of the actual removal orders; instead, they go to the adequacy of the credible fear proceedings. Furthermore, to treat Petitioners' claims regarding the procedural shortcomings of the credible fear determination process as though they were “claim[s] that the order was not lawfully issued due to some procedural defect” would likely eviscerate the clear jurisdiction-limiting provisions of § 1252, for it would allow an alien to challenge in court practically any perceived shortcoming in the procedures prescribed by Congress or employed

by the Executive—a result clearly at odds with Congress' intent.

In a final effort to dissuade us from adopting the government's proposed reading of the statute, Petitioners suggest a variety of presumably undesirable outcomes that could stem from it. For instance, they argue that under the government's reading, a court would lack jurisdiction to review claims that, in ordering the expedited removal of an alien, "the government refused to provide a credible fear interview, manifestly applied the wrong legal standard, outright denied the applicant an interpreter, or even refused to permit the applicant to testify." Pet'rs' Br. 18; *see also* Brief for National Immigrant Justice Center as *Amicus Curiae* 5–21 (suggesting several other factual scenarios in which courts would lack jurisdiction to correct serious government violations of expedited removal statute). To this, we can only respond as the Seventh Circuit did in *Khan* when acknowledging some of the possible implications of the jurisdiction-stripping provisions of § 1252: "To say that this [expedited removal] procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior ... is not, however, to say that courts are free to disregard jurisdictional limitations. They are not ...." 608 F.3d at 329. [13]

***434** For these reasons we agree with the District Court's conclusion that it lacked jurisdiction under § 1252 to review Petitioners' claims, and turn now to the constitutionality of the statute under the Suspension Clause.

B. Suspension Clause Challenge

[6] The Suspension Clause of the United States Constitution states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The government does not contend that we are in a time of formal suspension. Thus, the question is whether § 1252 operates as an unconstitutional suspension of the writ by stripping courts of habeas jurisdiction over all but a few narrow questions. As the party challenging the constitutionality of a presumptively constitutional statute, Petitioners bear the burden of proof. *Marshall v. Lauriault*, 372 F.3d 175, 185 (3d Cir. 2004).

Petitioners argue that the answer to the ultimate question presented on appeal—whether § 1252 violates the Suspension Clause—can be found without too much effort in the Supreme Court's Suspension Clause jurisprudence, especially in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), and *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), as well as in a series of cases from what has been termed the "finality era." The government, on the other hand, largely views these cases as inapposite, and instead focuses our attention on what has been called the "plenary power doctrine" and on the Supreme Court cases that elucidate it. The challenge we face is to discern the manner in which these seemingly disparate, and perhaps even competing, constitutional fields interact. Ultimately, and for the reasons we will explain below, we conclude that Congress may, consonant with the Constitution, deny habeas review in federal court of claims relating to an alien's application for admission to the country, at least as to aliens who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country.

We will begin our discussion with a detailed overview of the Supreme Court's relevant Suspension Clause precedents, followed by a summary of the Court's plenary power cases. We will then explain how we think these two areas coalesce in the context of Petitioners' challenges to their expedited removal orders.

1. Suspension Clause Jurisprudence

[7] The Supreme Court has held that a statute modifying the scope of habeas review is constitutional under the Suspension Clause so long as the modified scope of review—that is, the habeas substitute—"is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (citing *United States v. Hayman*, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952)). The Court has weighed the adequacy and effectiveness of habeas substitutes on only a few ***435** occasions, and only once, in *Boumediene*, has it found a substitute wanting. *See Boumediene*, 553 U.S. at 795, 128 S.Ct. 2229 (holding that "the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus," and therefore striking down under the Suspension Clause § 7 of the Military Commissions Act, which stripped federal courts of habeas jurisdiction

over Guantanamo Bay detainees). Thus, *Boumediene* represents our only "sum certain" when it comes to evaluating the adequacy of a given habeas substitute such as § 1252, and even then the decision "leaves open as many questions as it settles about the operation of the [Suspension] Clause." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 578 (2010).

Before we delve into *Boumediene*, however, we must examine the Supreme Court's decision in *St. Cyr*, another case on which Petitioners heavily rely. Although the Court in *St. Cyr* ultimately dodged the Suspension Clause question by construing the jurisdiction-stripping statute at issue to leave intact courts' habeas jurisdiction under 28 U.S.C. § 2241, the opinion offers insight into "what the Suspension Clause might possibly protect." Neuman, *supra*, at 539 & n.8.

St. Cyr was a lawful permanent resident alien who, in early 1996, pleaded guilty to a crime that qualified him for deportation. *St. Cyr*, 533 U.S. at 293, 121 S.Ct. 2271. Under the immigration laws prevailing at the time of his conviction, he was eligible for a waiver of deportation at the Attorney General's discretion. *Id.* Nevertheless, by the time he was ordered removed in 1997, Congress had enacted the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009–546. Among the myriad other revisions to our immigration laws that these enactments effected, AEDPA and IIRIRA stripped the Attorney General of his discretionary power to waive deportation, and replaced it with the authority to "cancel removal" for a narrow class of aliens that did not include aliens who, like St. Cyr, had been previously "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). When St. Cyr applied to the Attorney General for waiver of deportation, the Attorney General concluded that AEDPA and IIRIRA stripped him of his waiver authority even as to aliens who pleaded guilty to the deportable offense prior to the statutes' enactment. 533 U.S. at 297, 121 S.Ct. 2271. St. Cyr filed a habeas petition in federal district court under § 2241, claiming that the provisions of AEDPA and IIRIRA eliminating the Attorney General's waiver authority did not apply to aliens who pleaded guilty to a deportable offense before their enactment. *Id.* at 293, 121 S.Ct. 2271.

The government contended that AEDPA and IIRIRA stripped the courts of habeas jurisdiction to review the Attorney General's determination that he no longer had the power to waive St. Cyr's deportation. *Id.* at 297–98, 121 S.Ct. 2271. The Court ultimately disagreed with the government, construing the judicial review statutes to permit habeas review under § 2241. To support this construction, the Court relied heavily on the doctrine of constitutional avoidance, under which courts are "obligated to construe the statute to avoid [serious constitutional] problems" if such a saving construction is "fairly possible."[14] *Id.* at 299–300, 121 S.Ct. 2271 (internal quotation marks and citations omitted). In the ***436** Court's review, the government's proposed construction of the jurisdiction-stripping provisions would have presented "a serious Suspension Clause issue." *Id.* at 305, 121 S.Ct. 2271.

To explain why the Suspension Clause could possibly have been violated by a statute stripping the courts of habeas jurisdiction under § 2241, the Court began with the foundational principle that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' " *Id.* at 301, 121 S.Ct. 2271 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). Looking to the Founding era, the Court found evidence that "the writ of habeas corpus was available to nonenemy aliens as well as to citizens" as a means to challenge the "legality of Executive detention." *Id.* at 301–02, 121 S.Ct. 2271. In such cases, habeas review was available to challenge "detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.* at 302, 121 S.Ct. 2271.

Even while discussing the Founding-era evidence, however, the Court in *St. Cyr* was "careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post–1789 developments that define the present scope of the writ." *Boumediene*, 553 U.S. at 746, 128 S.Ct. 2229. Indeed, the Court discussed at some length the "historical practice in immigration law," *St. Cyr*, 533 U.S. at 305, 121 S.Ct. 2271, with special focus on cases from what may be termed the "finality era." *See id.* at 306–07, 121 S.Ct. 2271. In order to understand the role that these finality-era cases appear to play in *St. Cyr*'s Suspension Clause analysis, and because Petitioners place significant weight on them in their argument that § 1252 violates the Suspension Clause, we will describe them in some depth.

The finality-era cases came about during an approximately sixty-year period when federal immigration law rendered final (hence, the "finality" era) the Executive's decisions to admit, exclude, or deport aliens. This period began with the passage of the Immigration Act of 1891, ch. 551, 26 Stat. 1084, [15] and concluded when Congress enacted the Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163, which permitted judicial review of deportation orders through declaratory judgment actions in federal district courts. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 51–52, 75 S.Ct. 591, 99 L.Ed. 868 (1955). [16] During this period, and despite the statutes' finality provisions appearing to strip courts of all jurisdiction to review the Executive's immigration-related determinations, the Supreme Court consistently recognized the ability of immigrants to challenge the legality of their ***437** exclusion or deportation through habeas corpus. Based on this, Petitioners contend that the finality-era cases "establishe[d] a constitutional floor for judicial review," Pet'rs' Br. 26, and that the Suspension Clause was the source of this floor. In making this argument, Petitioners rely especially on *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953), in which the Court derived from its finality-era precedents the principle that the statutes' finality provisions "had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution*." *Id.* at 234–35, 73 S.Ct. 603 (emphasis added); *see also id.* at 234, 73 S.Ct. 603 ("During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable *to the fullest extent possible under the Constitution*." (emphasis added; citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) ("The power to exclude or to expel aliens ... is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department ... *is required by the paramount law of the constitution*, to intervene." (emphasis added)))).

Indeed, the *Heikkila* decision brings us back to *St. Cyr* and helps us understand the significance that the Court apparently assigned to the finality-era cases in its Suspension Clause discussion. First, the Court in *St. Cyr* noted that the government's proposed construction of the AEDPA and IIRIRA jurisdiction-stripping provisions "would entirely preclude review of a pure question of law by any court." 533 U.S. at 300, 121 S.Ct. 2271. Such a result was problematic because, under "[the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.' " *Id.* (quoting *Heikkila*, 345 U.S. at 235, 73 S.Ct. 603). In short, the Court found in the finality-era cases evidence that, as a matter of historical practice, aliens facing removal could challenge "the Executive's legal determinations," [17] including "Executive interpretations of the immigration laws." *Id.* at 306–07, 121 S.Ct. 2271.

We turn now to *Boumediene*. In *Boumediene* the Court addressed two main, sequential questions. First, the Court considered whether detainees at the United States Naval Station at Guantanamo Bay, ***438** Cuba, "are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status ... as enemy combatants, or their physical location ... at Guantanamo Bay." 553 U.S. at 739, 128 S.Ct. 2229. Then, after determining that the detainees were entitled to the protections of the Suspension Clause, the Court addressed the question "whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus." *Id.* at 771, 128 S.Ct. 2229.

In answering the first question regarding the detainees' entitlement *vel non* to the protections of the Suspension Clause, the Court primarily looked to its "extraterritoriality" jurisprudence, i.e., its cases addressing where and under what circumstances the Constitution applies outside the United States. From these precedents the Court developed a multi-factor test to determine whether the Guantanamo detainees were covered by the Suspension Clause:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical

> obstacles inherent in resolving the prisoner's entitlement to the writ.

Id. at 766, 128 S.Ct. 2229. Based on these factors, the Court concluded that the Suspension Clause "has full effect at Guantanamo Bay." [18] *Id.* at 771, 128 S.Ct. 2229.

The Court next considered the adequacy of the habeas substitute provided to the detainees by Congress. The Detainee Treatment Act (DTA) granted jurisdiction to the Court of Appeals for the D.C. Circuit "only to assess whether the CSRT [Combat Status Review Tribunal [19]] complied with the 'standards and procedures specified by the Secretary of Defense' and whether those standards and procedures are lawful." *Id.* at 777, 128 S.Ct. 2229 (quoting DTA § 1005(e)(2)(C), 119 Stat. 2742). Under the DTA, the D.C. Circuit lacked jurisdiction "to inquire into the legality of the detention generally." *Id.*

In assessing the adequacy of the DTA as a habeas substitute, the Court acknowledged the lack of case law addressing "standards defining suspension of the writ or [the] circumstances under which suspension has occurred." *Id.* at 773, 128 S.Ct. 2229. It also made clear that it was not "offer[ing] a comprehensive summary of the requisites for an adequate substitute for habeas corpus." *Id.* at 779, 128 S.Ct. 2229. Having pronounced these caveats, the Court then began its discussion of what features the habeas substitute needed to include to avoid violating the Suspension Clause. To begin, the Court recognized what it considered to be two "easily identified attributes of any constitutionally adequate habeas corpus proceeding," *id.*: ***439** first, the Court "consider[ed] it uncontroversial [ ] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," *id.* (quoting *St. Cyr*, 533 U.S. at 302, 121 S.Ct. 2271); and second, "the habeas court must have the power to order the conditional release of an individual unlawfully detained," *id.*

In addition to these two seemingly irreducible attributes of a constitutionally adequate habeas substitute, the Court identified a few others that, "depending on the circumstances, [ ] *may* be required." *Id.* (emphasis added). These additional features include: the ability of the prisoner to "controvert facts in the jailer's return," *see id.* at 780, 128 S.Ct. 2229; "some authority to assess the sufficiency of the Government's evidence against the detainee," *id.* at 786, 128 S.Ct. 2229; and the ability "to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner," *id.* at 780, 128 S.Ct. 2229; *see also id.* at 786, 128 S.Ct. 2229. To determine whether the circumstances in a given case are such that the habeas substitute must also encompass these additional features, the Court discussed a number of considerations, all of which related to the "rigor of any earlier proceedings." *Id.* at 781, 128 S.Ct. 2229. In short, the Court established a sort of sliding scale whose focus was "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Id.* at 783, 128 S.Ct. 2229.

Applying these principles, the Court ultimately concluded that the DTA did not provide the detainees an adequate habeas substitute. The Court believed the DTA could be construed to provide *most* of the attributes necessary to make it a "constitutionally adequate substitute" for habeas—including the detainees' ability to challenge the CSRT's legal and factual determinations, as well as authority for the court to order the release of the detainees if it concluded that detention was not justified. *Id.* at 787–89, 128 S.Ct. 2229. Nevertheless, the DTA did not afford detainees "an opportunity ... to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings." *Id.* at 789, 128 S.Ct. 2229. This latter deficiency doomed the DTA as a habeas substitute. Because of this, the Court held that the Military Commissions Act, which stripped federal courts of their § 2241 habeas jurisdiction with respect to the CSRT enemy combatant determinations, "effects an unconstitutional suspension of the writ." *Id.* at 792, 128 S.Ct. 2229.

2. Plenary Power Jurisprudence

Against the backdrop of the Court's most relevant Suspension Clause precedents, we direct our attention to the plenary power doctrine. Because the course of this doctrine's development in the Supreme Court sheds useful light on the current state of the law, a brief historical overview is first in order.

The Supreme Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (internal quotation marks and citation

omitted). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst v. Mandel*, 408 U.S. 753, 765–766 & n.6, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (collecting cases). The doctrine first emerged in the late nineteenth century in the context of the Chinese Exclusion Act, one of the first federal statutes to regulate immigration.

***440** The case that first recognized the political branches' plenary authority to exclude aliens, *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889), involved a Chinese lawful permanent resident who, prior to departing the United States for a trip abroad, had obtained a certificate entitling him to reenter the country upon his return. *Id.* at 581–82, 9 S.Ct. 623. While he was away, however, Congress passed an amendment to the Chinese Exclusion Act that rendered such certificates null and void. *Id.* at 582, 9 S.Ct. 623. Thus, after immigration authorities refused him entrance upon his return, the alien brought a habeas petition to challenge the lawfulness of his exclusion, arguing that the amendment nullifying his reentry certificate was invalid. *Id.* The Court upheld the validity of the amendment, reasoning that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution," and therefore that "the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one." *Id.* at 609, 9 S.Ct. 623; *see also id.* (concluding that questions regarding the political soundness of the amendment "are not questions for judicial determination").

In subsequent decisions from the same period, the Court upheld and even extended its reasoning in *Chae Chan Ping*. For instance, in *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892), another exclusion (as opposed to deportation) case, a Japanese immigrant was denied entry to the United States because immigration authorities determined that she was "likely to become a public charge." *Id.* at 662, 12 S.Ct. 336 (internal quotation marks and citation omitted). The Court concluded that the statute authorizing exclusion on such grounds was valid under the sovereign authority of Congress and the Executive to control immigration. *Id.* at 659, 12 S.Ct. 336 (stating that the power over admission and exclusion "belongs to the political department[s] of the government"). In a statement that perfectly encapsulates the meaning of the plenary power doctrine, the Court declared:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

Id. at 660, 12 S.Ct. 336. [20]

The following year, in ***441** *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893), the Court extended the plenary power doctrine to deportation cases as well. *Fong Yue Ting* involved several Chinese immigrants who were ordered deported pursuant to the Chinese Exclusion Act because they lacked certificates of residence and could not show by the testimony of "at least one credible white witness" that they were lawful residents. *Id.* at 702–04, 13 S.Ct. 1016. The aliens sought to challenge their deportation orders, claiming, *inter alia*, that the Exclusion Act violated the equal protection clause of the Fourteenth Amendment. *See id.* at 724–25, 13 S.Ct. 1016 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). As it had done in *Chae Chan Ping* and *Nishimura Ekiu*, the Court declined to intervene or review the validity of the immigration legislation:

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress

> in the exercise of the powers confided to it by the constitution over this subject.

Id. at 731, 13 S.Ct. 1016; *see also id.* at 707, 13 S.Ct. 1016 ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

Thus, the Court's earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.

Yet not long after these initial decisions, the Court began to walk back the plenary power doctrine in significant ways. In *Yamataya v. Fisher*, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903), a Japanese immigrant was initially allowed to enter the country after presenting herself for inspection at a port of entry. *Id.* at 87, 23 S.Ct. 611. Nevertheless, just a few days later, an immigration officer sought her deportation because he had concluded, after some investigation, that she "was a pauper and a person likely to become a public charge." *Id.* About a week later, the Secretary of the Treasury ordered her deported without notice or hearing. *Id.* Yamataya then filed a habeas petition in federal district court to challenge her deportation, claiming that the failure to provide her notice and a hearing violated due process. *Id.* The Court acknowledged its plenary power precedents, including *Nishimura Ekiu* and *Fong Yue Ting*, *see id.* at 97–99, 23 S.Ct. 611, but clarified that these precedents did not recognize the authority of immigration officials to "disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *Id.* at 100, 23 S.Ct. 611. According to these "fundamental principles," the Court held, no immigration official has the power

> arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving ***442** him all opportunity to be heard upon the questions involving his right to be and remain in the United States.

Id. at 101, 23 S.Ct. 611.[21]

Thus, *Yamataya* proved to be a "turning point" in the Court's plenary power jurisprudence. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 n.85 (1953). Indeed, as Professor Hart explains, it was at this point that the Court "began to see that the premise [of the plenary power doctrine] needed to be qualified—that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary." *Id.* at 1390; *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 947–48 & n.62 (1995) (discussing *Yamataya*'s significance to the development of the plenary power doctrine). *Yamataya*, then, essentially gave way to the finality-era cases upon which Petitioners and *amici* place such considerable weight. Hart, *supra*, at 1391 & n.86 (noting the "[t]housands" of habeas cases challenging exclusion and deportation orders "whose presence in the courts cannot be explained on any other basis" than on the reasoning of *Yamataya*).

Nevertheless, *Yamataya* did not mark the only "turning point" in the development of the plenary power doctrine. Nearly fifty years after *Yamataya*, the Court issued two opinions—*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950) and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953)—that essentially undid the effects of *Yamataya*, at least for aliens "on the threshold of initial entry," as well as for those "assimilated to that status for constitutional purposes." *Mezei*, 345 U.S. at 212, 214, 73 S.Ct. 625 (internal quotation marks and alterations omitted); *see also* Hart, *supra*, at 1391–92 (explaining the significance of *Knauff* and *Mezei* for the Court's plenary power jurisprudence, noting specifically that by these decisions the Court "either ignores or renders obsolete every habeas corpus case in the books involving an exclusion proceeding").

In *Knauff*, the German wife of a United States citizen sought admission to the country pursuant to the War Brides Act. 338 U.S. at 539, 70 S.Ct. 309 (citing Act of

Dec. 28, 1945, ch. 591, 59 Stat. 659 (1946)). She was detained immediately upon her arrival at Ellis Island, and the Attorney General eventually ordered her excluded, without a hearing, because "her admission would be prejudicial to the interests of the United States." *Id.* at 539–40, 70 S.Ct. 309. The Court upheld the Attorney General's decision largely on the basis of pre-*Yamataya* plenary power principles and precedents:

> [T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation ***443** of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.... Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Id. at 543–44, 70 S.Ct. 309 (citing, *inter alia*, *Nishimura Ekiu*, 142 U.S. at 659–60, 12 S.Ct. 336 and *Fong Yue Ting*, 149 U.S. at 713–14, 13 S.Ct. 1016). Thus, with its holding in *Knauff*, the Court effectively "reinvigorated the judicial deference prong of the plenary power doctrine." Weisselberg, *supra*, at 956.

Similar to *Knauff*, *Mezei* involved an alien detained on Ellis Island who was denied entry for undisclosed national security reasons. Unlike Knauff, however, Mezei had previously lived in the United States for many years before leaving the country for a period of approximately nineteen months, "apparently to visit his dying mother in Rumania [*sic*]." 345 U.S. at 208, 73 S.Ct. 625. And unlike Knauff, Mezei had no choice but to remain in custody indefinitely on Ellis Island, as no other country would admit him either. *Id.* at 208–09, 73 S.Ct. 625. In these conditions, Mezei brought a habeas petition to challenge his exclusion (and attendant indefinite detention). *Id.* at 209, 73 S.Ct. 625. Nevertheless, the Court again upheld the Executive's decision, essentially for the same reasons articulated in *Knauff*. "It is true," the Court explained, "that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* at 212, 73 S.Ct. 625 (citing, *inter alia*, *Yamataya*, 189 U.S. at 100–01, 23 S.Ct. 611). In contrast, aliens "on the threshold of initial entry stan[d] on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' "[22] *Id.* (quoting *Knauff*, 338 U.S. at 544, 70 S.Ct. 309).

Thus, *Knauff* and *Mezei* essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country.[23] *See Fiallo*, 430 U.S. at 792, 97 S.Ct. 1473 ***444** ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (internal quotation marks and citations omitted)); *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." (citing *Knauff*, 338 U.S. at 542, 70 S.Ct. 309; *Nishimura Ekiu*, 142 U.S. at 659–60, 12 S.Ct. 336)).

3. Application to Petitioners and the Expedited Removal Regime

Having introduced the prevailing understandings of the Suspension Clause and of the political branches' plenary power over immigration, we now consider the relationship between these two areas of legal doctrine and how they apply to Petitioners' claim that the jurisdiction-stripping provisions of § 1252 violate the Suspension Clause.

Petitioners argue that under the Supreme Court's Suspension Clause jurisprudence—especially *St. Cyr* and

the finality-era cases—courts must, at a minimum, be able to review the legal conclusions underlying the Executive's negative credible fear determinations, including the Executive's interpretation and application of a statute to undisputed facts.[24] And because § 1252(e)(2) does not provide for at least this level of review, Petitioners claim that it constitutes an inadequate substitute for habeas, in violation of the Suspension Clause.

The government, on the other hand, claims that the plenary power doctrine operates to foreclose Petitioners' Suspension Clause challenge. In the government's view, Petitioners should be treated no differently from aliens "on the threshold of initial entry" who clearly lack constitutional due process protections concerning their application for admission. *Mezei*, 345 U.S. at 212, 73 S.Ct. 625. And because Petitioners "have no underlying procedural due process rights to vindicate in habeas," Respondents' Br. 49, the government argues that "the scope of habeas review is [ ] irrelevant." *Id.*

***445** Petitioners raise three principal arguments in response to the government's contentions above. First, they claim that to deny them due process rights despite their having indisputably entered the country prior to being apprehended would run contrary to numerous Supreme Court precedents recognizing the constitutional rights of all "persons" within the territorial jurisdiction of the United States. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (explaining that the Fifth Amendment applies to all aliens "within the jurisdiction of the United States," including those "whose presence in this country is unlawful, involuntary, or transitory"). Second, they argue that even if the Constitution does not impose any independent procedural minimums that the Executive must satisfy before removing Petitioners, the Executive must at least fairly administer those procedures that Congress has actually prescribed in the expedited removal statute. *Cf. Dia v. Ashcroft*, 353 F.3d 228, 238–39 (3d Cir. 2003) (en banc) (holding that Fifth Amendment entitles aliens to due process in deportation proceedings, and explaining that these rights "ste[m] from those statutory rights granted by Congress and the principle that '[m]inimum due process rights attach to statutory rights.' " (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996))). Third, Petitioners claim that, regardless of the extent of their constitutional or statutory due process rights, habeas corpus stands as a constitutional check against illegal detention by the Executive that is separate and apart from the protections afforded by the Due Process Clause.

[8] We agree with the government that Petitioners' Suspension Clause challenge to § 1252 must fail, though we do so for reasons that are somewhat different than those urged by the government. As explained in Part III.B.1 above, *Boumediene* contemplates a two-step inquiry whereby courts must first determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention. *Cf. Boumediene*, 553 U.S. at 739, 128 S.Ct. 2229. Only after confirming that the petitioner is not so prohibited may courts then turn to the question whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention (or removal). As we explain below, we conclude that Petitioners cannot clear *Boumediene*'s first hurdle—that of proving their entitlement *vel non* to the protections of the Suspension Clause.[25]

[9] The reason Petitioners' Suspension Clause claim falls at step one is because the Supreme Court has unequivocally concluded that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon*, 459 U.S. at 32, 103 S.Ct. 321. Petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as "alien[s] seeking initial admission to the United States." *Id.* And since the issues that Petitioners seek to challenge ***446** all stem from the Executive's decision to remove them from the country, they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them. As such, we need not reach the second question under the *Boumediene* framework, i.e., whether the limited scope of review of expedited removal orders under § 1252 is an adequate substitute for traditional habeas review.[26]

Petitioners claim that *St. Cyr* and the finality-era cases firmly establish their right to invoke the Suspension Clause to challenge their removal orders.[27] For two main reasons we think Petitioners' reliance on these cases is flawed. First, *St. Cyr* involved a lawful permanent resident, a category of aliens (unlike recent clandestine

entrants) whose entitlement to broad constitutional protections is undisputed. *Cf. Landon*, 459 U.S. at 32, 103 S.Ct. 321. Second, as stated earlier, *St. Cyr* discussed the Suspension Clause (and therefore the finality-era cases) only to explain what the Clause "might possibly protect," Neuman, *supra*, at 539 & n.8, not what the Clause most certainly protects—and even in this hypothetical posture the opinion was non-committal when discussing the significance of the finality-era cases to the Suspension Clause analysis. *See* 533 U.S. at 304, 121 S.Ct. 2271 ("St. Cyr's constitutional position finds *some* support in our prior immigration cases .... [T]he ambiguities in the scope of the exercise of the writ at common law ..., and the *suggestions* in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution, convince us that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant." (emphases added; citing *Heikkila*, 345 U.S. at 234–35, 73 S.Ct. 603)). Indeed, the Court had good reason to tread carefully when it came to the meaning of the finality-era cases; after all, none of them even mentions the Suspension Clause, let alone identifies it as the constitutional provision establishing the minimum measure of judicial review required in removal cases. [28] We therefore ***447** conclude that *St. Cyr* and the finality-era cases are not controlling here.

Another potential criticism of our position—and particularly of our decision to treat Petitioners as "alien[s] seeking initial admission to the United States" who are prohibited from invoking the Suspension Clause—is that it appears to ignore the Supreme Court's precedents suggesting that an alien's physical presence in the country alone flips the switch on constitutional protections that are otherwise dormant as to aliens outside our borders. *See Mathews*, 426 U.S. at 77, 96 S.Ct. 1883 ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to th[e] constitutional protection [of the Due Process Clause]."); *Zadvydas*, 533 U.S. at 693, 121 S.Ct. 2491 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Yamataya*, 189 U.S. at 100–01, 23 S.Ct. 611; *Mezei*, 345 U.S. at 212, 73 S.Ct. 625; *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958); *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Again, this criticism is misplaced for two principal reasons.

First, and perhaps most fundamentally, most of the cases cited above did not involve aliens who were seeking initial entry to the country or who were apprehended immediately after entry. *See, e.g., Yick Wo*, 118 U.S. at 358, 6 S.Ct. 1064 (long-time resident alien); *Mathews*, 426 U.S. at 69, 96 S.Ct. 1883 (lawfully admitted resident aliens); *Plyler*, 457 U.S. at 206, 102 S.Ct. 2382 (undocumented resident aliens); *Zadvydas*, 533 U.S. at 684–85, 121 S.Ct. 2491 (long-time resident aliens). And as for the cases that *did* involve arriving aliens, the Court rejected the aliens' efforts to invoke additional protections based merely on their presence in the territorial jurisdiction of the United States. [29] *See Mezei*, 345 U.S. at 207, 73 S.Ct. 625 ***448** (former resident alien held on Ellis Island seeking readmission after extended absence); *Leng May Ma*, 357 U.S. at 186, 78 S.Ct. 1072 (arriving alien allowed into the country on parole pending admission determination). Thus, Petitioners can draw little support from these latter cases.

Second, the Supreme Court has suggested in several other opinions that recent clandestine entrants like Petitioners do not qualify for constitutional protections based merely on their physical presence alone. *See Yamataya*, 189 U.S. at 100–01, 23 S.Ct. 611 (withholding judgment on question "whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed"); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50, 70 S.Ct. 445, 94 L.Ed. 616 (1950) ("It was under compulsion of the Constitution that this Court long ago held [in *Yamataya*] that an antecedent deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time even if illegally*." (emphasis added)); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S.Ct. 472, 97 L.Ed. 576 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the

Constitution to all people within our borders." (emphasis added)); *Landon*, 459 U.S. at 32, 103 S.Ct. 321 (1982) ("[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence* his constitutional status changes accordingly." (emphasis added)); *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (stating in dicta that "aliens receive constitutional protections when they have come within the territory of the United States *and developed substantial connections with this country* " (emphasis added)). At a minimum, we conclude that all of these cases call into serious question the proposition that even the slightest entrance into this country triggers constitutional protections that are otherwise unavailable to the alien outside its borders. Such a proposition is further weakened by the Court's adoption of the "entry fiction" to deny due process rights to aliens even though they are unquestionably within the territorial jurisdiction of the United States. In other words, if entitlement to constitutional protections turned entirely on an alien's position relative to such a rigid conception as a line on a map, then the Court's entry-fiction cases such as *Mezei* would run just as contrary to this principle as our holding in this case does. [30]

We thus conclude that, as recent surreptitious entrants deemed to be "alien[s] seeking initial admission to the United States," Petitioners are unable to invoke the Suspension Clause, despite their having effected a brief entrance into the country ***449** prior to being apprehended for removal. [31]

* * *

Our holding rejecting Petitioners' Suspension Clause claims is true to the arc traced by the Supreme Court's plenary power cases in recent decades. It is also consistent with the Court's analytical framework for evaluating Suspension Clause challenges. Even if Petitioners would be entitled to constitutional habeas under the finality-era cases, those cases, as explained above, no longer represent the prevailing view of the plenary power doctrine, at least when it comes to aliens seeking initial admission. Instead, we must look to *Knauff*, *Mezei*, and other cases reaffirming those sea-changing precedents, all of which point to the conclusion that aliens seeking initial admission to the country—as well as those rightfully assimilated to that status on account of their very recent surreptitious entry—are prohibited from invoking the protections of the Suspension Clause in order to challenge issues relating to their application for admission. [32]

*450 IV. CONCLUSION

We are sympathetic to the plight of Petitioners and other aliens who have come to this country seeking protection and repose from dangers that they sincerely believe their own governments are unable or unwilling to address. Nevertheless, Congress has unambiguously limited the scope of judicial review, and in so doing has foreclosed review of Petitioners' claims. And in light of the undisputed facts surrounding Petitioners' surreptitious entry into this country, and considering Congress' and the Executive's plenary power over decisions regarding the admission or exclusion of aliens, we cannot say that this limited scope of review is unconstitutional under the Suspension Clause, at least as to Petitioners and other aliens similarly situated. We will therefore affirm the District Court's order dismissing Petitioners' habeas petitions for lack of subject matter jurisdiction. *Rosa Elida Castro et al. v. U.S. Department of Homeland Security*, No. 16–1339.

HARDIMAN, Circuit Judge, concurring dubitante.

I join Judge Smith's excellent opinion in full, but I write separately to express my doubt that the expression of the plenary power doctrine in *Landon v. Plasencia* completely resolves step one of the Suspension Clause analysis under *Boumediene*. Although *Landon* appears to preclude "alien[s] seeking initial admission to the United States" from invoking any constitutional protections "regarding [their] application[s]," the question of what constitutional rights such aliens are afforded was not squarely before the Supreme Court in that case because the petitioner was a returning permanent resident. 459 U.S. 21, 23, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). Nor did the Court in *Landon* purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus. [1]

Despite my uncertainty about *Landon*'s dispositive application here, I am convinced that we would reach the same result under step two of *Boumediene*'s framework. Unlike the petitioners in *Boumediene*—who sought their release in the face of indefinite detention—Petitioners

here seek to alter their status in the United States in the hope of *avoiding* release to their homelands. That prayer for ***451** relief, in my view, dooms the merits of their Suspension Clause argument that 8 U.S.C. § 1252(e) provides an "inadequate or ineffective" habeas substitute.

United States v. Hayman, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952).

All Citations

835 F.3d 422

Footnotes

1 From this point in this opinion, we will refer to provisions of the INA by their location in the United States Code.

2 Any aliens otherwise falling within these two categories but who are inadmissible for reasons other than misrepresentation or missing immigration papers are referred for regular—i.e., non-expedited—removal proceedings conducted under 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1225(b)(2)(A).

3 The statute actually gives the Attorney General the unfettered authority to expand this second category of aliens to "any or all aliens" that cannot prove that they have been physically present in the United States for at least the two years immediately preceding the date their inadmissibility is determined, regardless of their proximity to the border. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). Although DHS (on behalf of the Attorney General) has opted to apply the expedited removal regime only to the limited subset of aliens described above, it has expressly reserved its authority to exercise at a later time "the full nationwide enforcement authority of [§ 1225(b)(1)(A)(iii)(II)]." *See* Designating Aliens for Expedited Removal, 69 Fed Reg. 48877–01 (Aug. 11, 2004).

4 On the other hand, if the interviewing asylum officer, or the IJ upon *de novo* review, concludes that the alien possesses a credible fear of persecution or torture, the alien is referred for non-expedited removal proceedings under 8 U.S.C. § 1229a, "during which time the alien may file an application for asylum and withholding of removal." 8 C.F.R. § 1208.30(g)(2)(iv)(B).

5 In its brief, as it did during oral argument, the government repeatedly argues that many of Petitioners' claims are of a systemic nature and should have been brought in the district court for the District of Colombia under § 1252(e)(3). In making this argument, however, the government conveniently elides the fact that the sixty-day deadline would clearly prevent Petitioners from litigating their systemic claims in that forum, because that deadline passed years ago.

6 For reasons explained in detail below, we consider the facts regarding Petitioners' entry and practically-immediate arrest by immigration enforcement officials to be crucial in resolving Petitioners' Suspension Clause argument. Accordingly, we grant the government's motion for judicial notice as well as its motion to file under seal the documents subject to its motion for judicial notice.

7 Petitioners filed their habeas petitions in the Eastern District of Pennsylvania because they are being detained pending their removal at the Berks County Residential Center in Leesport, Pennsylvania. While we are uncertain whether venue was proper in the Eastern District of Pennsylvania—§ 1252 does not appear to indicate where habeas petitions under § 1252(e)(2) should be filed—none of the parties has argued that venue was improper. In that venue is non-jurisdictional, we need not resolve the issue. *See Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.5 (3d Cir. 2005).

8 Though Petitioners assert on appeal that they each raised "a variety" of claims in their habeas petitions, Pet'rs' Br. 33, they specifically point us to only two as being uniform across all Petitioners: first, they claim that the asylum officers conducting the credible fear interviews failed to "prepare a written record" of their negative credible fear determinations that included the officers' "analysis of why ... the alien has not established a credible fear of persecution," 8 U.S.C. § 1225(b)(1)(B)(iii)(II); and second, they claim that the officers and the IJs applied a higher standard for evaluating the credibility of their fear of persecution than is called for in the statute.

9 A motions panel of this Court granted Petitioners' motion for stay of removal pending the outcome of this appeal, as well as Petitioners' motion to expedite the appeal. The panel also granted the motions of various persons and entities for leave to file amicus briefs in support of Petitioners. The Court thanks *amici* for their valuable contributions in this appeal.

10 Although the District Court concluded that it lacked subject matter jurisdiction and dismissed the petitions accordingly, we nonetheless have jurisdiction under 28 U.S.C. § 1291 "to determine [our] own jurisdiction." *White–Squire v. U.S. Postal Serv.*, 592 F.3d 453, 456 (3d Cir. 2010) (quoting *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)).

11 And because we conclude that the statute is unambiguous, we are unable to employ the canon of constitutional avoidance to reach Petitioners' desired result. *See Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000)

("[T]he canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not plainly contrary to the intent of Congress. We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (internal quotation marks and citations omitted)).

12 Furthermore, even if our reading of the statute means that the second sentence is superfluous, the canon against surplusage does not always control and generally should not be followed where doing so would render ambiguous a statute whose meaning is otherwise plain. *See Lamie*, 540 U.S. at 536, 124 S.Ct. 1023 (explaining that "our preference for avoiding surplusage constructions is not absolute," and that "applying the rule against surplusage is, absent other indications, inappropriate" where applying the rule would make ambiguous an otherwise unambiguous statute).

13 Of course, even though our construction of § 1252 means that courts in the future will almost certainly lack statutory jurisdiction to review claims that the government has committed even more egregious violations of the expedited removal statute than those alleged by Petitioners, this does not necessarily mean that all aliens wishing to raise such claims will be without a remedy. For instance, consider the case of an alien who has been living continuously for several years in the United States before being ordered removed under § 1225(b)(1). Even though the statute would prevent him from seeking judicial review of a claim, say, that he was never granted a credible fear interview, under our analysis of the Suspension Clause below, the statute could very well be unconstitutional as applied to him (though we by no means undertake to so hold in this opinion). Suffice it to say, at least some of the arguably troubling implications of our reading of § 1252 may be tempered by the Constitution's requirement that habeas review be available in some circumstances and for some people.

14 The Court also relied on "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." 533 U.S. at 298, 121 S.Ct. 2271.

15 Section 8 of the Act contained the finality provision: "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." Immigration Act of 1891, § 8, 26 Stat. 1084, 1085.

16 Between the 1891 and 1952 Acts, Congress revised the immigration laws on several occasions, each time maintaining a similar finality provision. *See, e.g.,* Immigration Act of 1907, § 25, 34 Stat. 898, 907 ("[I]n every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."); Immigration Act of 1917, § 19, 39 Stat. 874, 890 ("In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.").

17 As support for this proposition, the Court also cited *Gegiow v. Uhl*, 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114 (1915). *See St. Cyr*, 533 U.S. at 306 & n.28, 121 S.Ct. 2271. *Gegiow* involved Russian immigrants whom immigration officers had ordered deported after concluding that the aliens were "likely to become public charges." 239 U.S. at 8, 36 S.Ct. 2 (internal quotation marks omitted). The immigrants sought and obtained habeas review of the Executive's determination. According to the Supreme Court, the only reason the Executive provided to support its conclusion that the aliens were deportable was that they were not likely to find work in the city of their ultimate destination (Portland, Oregon) due to the poor conditions of the city's labor market. *Id.* at 8–9, 36 S.Ct. 2. In order to avoid the force of earlier Supreme Court precedent holding that "[t]he conclusiveness of the decisions of immigration officers under [the prevailing immigration statute's finality provision] is conclusiveness upon matters of fact," *id.* at 9, 36 S.Ct. 2 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892)), the Court presented the question on review as one of law, rather than one of fact: "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9–10, 36 S.Ct. 2. And because the Court ultimately concluded that such a consideration was not an appropriate grounds for ordering the aliens deported, it reversed the order. *Id.* at 10, 36 S.Ct. 2.

18 While the Court obviously analyzed how these factors apply to the Guantanamo detainees in much greater depth than our brief summary might suggest, we refrain from expositing its analysis further. That is because, as we explain in greater detail below, we think this multi-factor test provides little guidance in addressing Petitioners' entitlement to the protections of the Suspension Clause in this case.

19 CSRTs are the military tribunals established by the Department of Defense to determine if the Guantanamo detainees are "enemy combatants" who are therefore subject to indefinite detention without trial pending the duration of the war in Afghanistan. *See* 553 U.S. at 733–34, 128 S.Ct. 2229.

20 While the Court recognized Nishimura Ekiu's "entitle[ment] to a writ of *habeas corpus* to ascertain whether the restraint [of her liberty] is lawful," *id.* at 660, 12 S.Ct. 336, the scope of the Court's habeas review was limited to inquiring whether

the immigration officer ordering the exclusion "was duly appointed" under the statute and whether the officer's decision to exclude her "was within the authority conferred upon him by [the Immigration Act of 1891]." *Id.* at 664, 12 S.Ct. 336. Thus, *Nishimura Ekiu* cannot help Petitioners because, as we noted above, they have conceded that they fall within the class of aliens for whom Congress has authorized expedited removal, and that the immigration officials ordering their removal are duly appointed to do so. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). That said, it would be a different matter were the Executive to attempt to expeditiously remove an alien that Congress has *not* authorized for expeditious removal—for example, an alien who claims to have been continuously present in the United States for over two years prior to her detention. Such a situation might very well implicate the Suspension Clause in a way that Petitioners' expedited removal does not.

21 Although the Court recognized the due process rights of recent entrants to the country—even entrants who are subsequently determined "to be illegally here"—it explicitly declined to address whether very recent *clandestine* entrants like Petitioners enjoy such rights. *See Yamataya*, 189 U.S. at 100, 23 S.Ct. 611. For obvious reasons, and as we explain below, we consider this carve-out in the Court's holding to be of particular importance in resolving this appeal.

22 Although Mezei (like Knauff) was indisputably on United States soil when he was ordered excluded and when he filed his habeas petition, the Court "assimilated" Mezei's status "for constitutional purposes" to that of an alien stopped at the border. *See id.* at 214, 73 S.Ct. 625 (internal quotation marks and citation omitted). This analytical maneuver is often referred to as the "entry fiction" or the "entry doctrine." *See, e.g., Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). As explained below, the entry fiction plays an important, albeit indirect, role in our analysis of Petitioners' Suspension Clause challenge.

23 The Court has departed from its reasoning in *Knauff* and *Mezei* in other respects, including for lawful permanent residents seeking reentry at the border, *see Landon v. Plasencia*, 459 U.S. 21, 32–33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (holding that such aliens are entitled to protections of Due Process Clause in exclusion proceedings), as well as for resident aliens facing indefinite detention incident to an order of deportation following conviction of a deportable offense, *compare Zadvydas v. Davis*, 533 U.S. 678, 692–95, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (concluding that resident aliens ordered deported have liberty interest under Fifth Amendment in avoiding indefinite detention incident to deportation, and distinguishing *Mezei* on grounds that petitioners had already entered U.S. before ordered deported), *with id.* at 702–05, 121 S.Ct. 2491 (Scalia, J., dissenting) (arguing that *Mezei* controlled question whether aliens ordered deported had liberty interest to remain in United States such that they are entitled to due process in decision to hold them indefinitely, and stating that such aliens have no right to release into the United States).

24 Petitioners at times claim that they should also be entitled to raise *factual* challenges due to the "truncated" nature of the credible fear determination process. Notwithstanding *Boumediene*'s holding that habeas review of factual findings may be required in some circumstances, we think Petitioners' argument is readily disposed of based solely on some of the very cases they cite to argue that § 1252 violates the Suspension Clause. *See, e.g., St. Cyr*, 533 U.S. at 306, 121 S.Ct. 2271 (noting that in finality-era habeas challenges to deportation orders "the courts generally did not review factual determinations made by the Executive"); *Heikkila*, 345 U.S. at 236, 73 S.Ct. 603 (noting that "the scope of inquiry on habeas corpus" "has always been limited to the enforcement of due process requirements," and not to reviewing the record to determine "whether there is substantial evidence to support administrative findings of fact"); *Gegiow*, 239 U.S. at 9, 36 S.Ct. 2 ("The conclusiveness of the decisions of immigration officers under [the finality provision of the Immigration Act of 1907] is conclusiveness upon matters of fact.").

25 In evaluating Petitioners' rights under the Suspension Clause, we find *Boumediene*'s multi-factor test, referenced earlier in this opinion, to provide little guidance. As we explain above, the Court derived the factors from its extraterritoriality jurisprudence in order to assess the reach of the Suspension Clause to a territory where the United States is not sovereign. *See* 553 U.S. at 766, 128 S.Ct. 2229. In our case, of course, there is no question that Petitioners were apprehended within the sovereign territory of the United States; thus, the *Boumediene* factors are of limited utility in determining Petitioners' entitlement to the protections of the Suspension Clause.

26 And because we hold that Petitioners cannot even invoke the Suspension Clause to challenge issues related to their admission or removal from the country, we have no occasion to consider what constitutional or statutory due process rights, if any, Petitioners may have.

27 Petitioners also rely on this Court's decision in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), which is factually and analytically very similar to *St. Cyr*. Because *St. Cyr* essentially subsumes *Sandoval*, however, our reasons for rejecting *St. Cyr*'s significance in our case apply equally to *Sandoval*.

28 It was largely for this reason that the District Court below declined to assign much weight to the finality-era cases in its analysis of Petitioners' Suspension Clause argument. Petitioners and *amici* contend that the Suspension Clause was the only "logical" constitutional provision that the Court in *Heikkila* could have relied upon when explaining that

"the Constitution" required a certain level of judicial review of immigration decisions. *See* Brief for Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law as *Amicus Curiae* 12. Given the tentative and hypothetical nature of the Court's Suspension Clause analysis in *St. Cyr*, we too are hesitant to extract too much Suspension Clause-related guidance from a series of cases whose precise relationship (if any) to the Suspension Clause is far from clear. This is especially so in light of Justice Scalia's dissent in *St. Cyr* in which he forcefully critiqued the majority's reliance on the finality-era cases generally and *Heikkila* specifically:

> The Court cites many cases which it says establish that it is a "serious and difficult constitutional issue" whether the Suspension Clause prohibits the elimination of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," *Heikkila*, 345 U.S. at 234–35, 73 S.Ct. 603. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner's deportation order was unavailable; (2) does not specify to what extent judicial review was "required by the Constitution," which could (as far as the Court's holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish.

533 U.S. at 339, 121 S.Ct. 2271 (Scalia, J., dissenting) (some citations omitted).

Nevertheless, we need not resolve this issue in our case, for even if *St. Cyr* definitively established the import of the finality-era cases to the Suspension Clause, we still think the distinction between a lawful permanent resident and a very recent surreptitious entrant makes all the difference in this case. More on this below.

29 Petitioners make much of the fact that the Court extended constitutional due process protections to the alien in *Yamataya* despite her short stint in the United States. *See* 189 U.S. at 87, 100–01, 23 S.Ct. 611. Petitioners' reliance on this case ignores other language in the opinion clearly distinguishing Yamataya—an alien who was initially admitted to the country and who "ha[d] become ... a part of its population" before being ordered deported, *id.* at 101, 23 S.Ct. 611—from very recent clandestine entrants like Petitioners, *see id.* at 100, 23 S.Ct. 611. Thus, while *Yamataya* might apply in some future case where the alien ordered removed has been in the country for a period of time sufficient "to have become, in [some] real sense, a part of our population," *id.* that simply is not this case.

30 This is not to say that an alien's location relative to the border is *irrelevant* to a determination of his rights under the Constitution. Indeed, we think physical presence is a factor courts should consider; we simply leave it to courts in the future to evaluate the Suspension Clause rights of an alien whose presence in the United States goes meaningfully beyond that of Petitioners here.

31 In addition to the above, it is worth noting that when the Court in *Landon* stated that certain aliens lack constitutional rights regarding their application for admission, it did not categorize aliens based on whether they have *entered* the country or not; rather, the Court focused (as IIRIRA and the expedited removal regime focus) on whether the aliens are "seeking initial *admission* to the United States." *Landon*, 459 U.S. at 32, 103 S.Ct. 321 (emphasis added); *see also, e.g.,* 8 U.S.C. § 1225(b)(1) (conditioning aliens' eligibility for expedited removal, in part, on inadmissibility, even if aliens are physically present in the United States). Arguably, this suggests that, at least in some circumstances, an alien's mere physical presence in the country is of little constitutional significance unless that alien has previously applied for and been granted admission. *See* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 689 n.55 (2000) (arguing that "by emphasizing admission over entry, [*Landon*] may give more weight to" the constitutional significance of IIRIRA's focus on aliens' admissibility rather than physical location). Then again, *Landon* relied on *Knauff* to support its statement that "an alien seeking initial admission ... has no constitutional rights regarding his application." *See Landon*, 459 U.S. at 32, 103 S.Ct. 321 (citing, *inter alia*, *Knauff*, 338 U.S. at 542, 70 S.Ct. 309). And since *Knauff* focused on whether the alien had "entered" the country, "initial admission" in *Landon* may simply be synonymous with "initial entry." At all events, our opinion should not be read to place tremendous weight on this possible distinction.

32 Of course, as we recognized above, this is not to say that the political branches' power over immigration is limitless in all respects. We doubt, for example, that Congress could authorize, or that the Executive could engage in, the indefinite, hearingless detention of an alien simply because the alien was apprehended shortly after clandestine entrance. *Cf. Zadvydas*, 533 U.S. at 695, 121 S.Ct. 2491 (noting that the question before the Court—"whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States"—does not implicate questions regarding "the political branches' authority to control entry into the United States"). And we are certain that this "plenary power" does not mean Congress or the Executive can subject recent clandestine

entrants or other arriving aliens to inhumane treatment. *Cf.* *Wong Wing v. United States*, 163 U.S. 228, 237, 16 S.Ct. 977, 41 L.Ed. 140 (1896) (noting that "[n]o limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein," but distinguishing such valid exercises of power from a law allowing the Executive to subject deportable aliens to hard labor without a jury trial); *Zadvydas*, 533 U.S. at 704, 121 S.Ct. 2491 (Scalia, J., dissenting) (noting the difference between the rights of aliens not to be tortured or "subjected to the punishment of hard labor without a judicial trial" and the right to remain in the country after being deemed deportable); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment." (footnote omitted)). But to say that the political branches' power over immigration is subject to important limits in some contexts by no means requires that the exercise of that power must be subject to judicial review in all contexts.

1 *Landon* may also be at odds with the proposition that "the Suspension Clause protects the writ 'as it existed in 1789.' " *INS v. St. Cyr*, 533 U.S. 289, 301, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)); *see also* *Boumediene v. Bush*, 553 U.S. 723, 746, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). *See generally* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 Va. L. Rev. 575, 675–76 (2008) ("A sample of newspapers from the 1780s provides four instances of the use of the writ by slaves in Connecticut, New Jersey, Pennsylvania, and Maryland. These suggest that the use of the writ was not confined to native-born British–American citizens of European ancestry, and that American usage was paralleling that in England and its colonies. Indeed, it is difficult to imagine that Americans were not aware of reports of the decision in Somerset's Case of 1772, in which Chief Justice Mansfield ruled that a slave in England could not be held in custody.").

End of Document

'Expedited Removal' process as cold as ICE: Response to Jeh Johnson

Lauren Gilbert, Esq.

I remember the look of dread on Mariana's face when I told her I was returning to Miami. I met with her on my first day in Texas, volunteering at the Karnes family detention center with the non-profit Refugee and Immigrant Center for Education and Legal Services (RAICES). Mariana, a 30-year-old Salvadoran with a seven-year-old son Rafael, had sought RAICES' assistance because an Asylum Officer (AO) decided that there was "no significant possibility" that the young mother had a "credible fear of persecution" and was deserving of asylum.

But she was terrified for good reason. Her brother had been forced to join Marasalvatrucha – aka MS-13, a predominantly Salvadoran gang with ties to one of the world's most violent drug cartels – when he was 15 and now, three years later, he was trying to get out. MS-13 members threatened to kill his family, so he told them: "It is too late for me, but not for you. You need to leave El Salvador." Mariana fled with Rafael and both were picked up at the U.S.-Mexican border; her parents went into hiding; her brother later fled.

A "credible fear interview" (CFI) is the heart of ICE's "expedited removal" procedure, an alternative to a full-blown asylum hearing where an immigrant has time to seek legal counsel, gather evidence, and present her case. Mariana's testimony at her CFI focused primarily on a strange man who had tried to break inside her home in El Salvador. Later, when evidence of the deadly peril she faced from MS-13 emerged, the threat was deemed a fabrication.

Herein lies a concern about fraud that has led to the failure to comprehend the various reasons why asylum seekers, particularly women, do not always reveal the most intimate details of their lives to asylum officers. Unsure of their questioner's purpose and fearing reprisal for naming names, immigrants are often hesitant to immediately disclose the basis of their very well-founded fears. The process bears an uncanny resemblance to the prompt outcry requirement in rape law.

If the asylum seeker passes her CFI, she can apply for asylum and is eligible for release. If she fails, like Mariana did, she gets a rudimentary hearing before an immigration judge, who can overturn or affirm the asylum officer's decision. Once the immigration judge affirms, there is no appeal, the asylum seeker has no right to apply for asylum, and is subject to immediate deportation unless the Asylum Office decides that there was some defect in the process. Judge McPhaul, who affirms virtually all negative CFIs, affirmed Mariana's too, leaving her with few options.

The RAICES family detention team, under the direction of Manoj Govindaiah, particularly law fellow Andrea Meza, and law student Hudson Kyle, did not give up. They learned from her family that Mariana's brother had fled. They confirmed that

she suffered from PTSD. They filed several Requests for Reconsideration with the Asylum Office, each with more evidence. They filed a Civil Rights complaint. Despite compelling evidence that Mariana and her family had been targeted by MS-13, her claim was still rejected, and late last week, she was deported back to El Salvador.

In a piece in *The Hill*, Homeland Security Secretary Jeh Johnson described family detention as a "critical" tool for screening immigrant families to evaluate whether they are a flight risk or have legitimate claims to asylum. But the reality is that bona fide refugees are regularly sent back to their persecutors. Johnson justifies U.S. policy by emphasizing that, "We don't have open borders, and if we ceased removals, we'd have a humanitarian crisis." Detention of asylum seekers is used as deterrence, violating all notions of due process. What Johnson *didn't* say is that the willingness of AOs and judges to dispatch imperiled asylum seekers back into the arms of the gangs they fled constitutes a humanitarian crisis of its own.

There is something wrong with a system that would deport Mariana and her son back to El Salvador without an opportunity to even apply for asylum. This week a member of RAICES team spoke with Mariana in El Salvador. This is what Mariana said:

The truth is, I left feeling very bad about Karnes, because for me it all was so unfair. They think you're inventing stories, and all that made me feel bad, but I was telling the truth. Only you can know that anguish, and it is not easy to talk about, you know the reality of your country… I don't know why they didn't give me the opportunity to explain my case…

I haven't returned to my home in El Salvador. At the moment I am renting a room in the center of El Salvador. I can't sleep at night because I know that the maras are waiting for me. And when they see me, I am not going to be alive to tell about it. …

Although Jeh Johnson and the bureaucrats who deported Mariana and Rafael will never give the young mother and son another thought, when Mariana is gunned down by MS-13, it will have been our own system that quite deliberately placed her within their sights.

Lauren Gilbert is a law professor at St. Thomas University School of Law and a member of the American Immigration Lawyers Association. Mariana and Rafael are pseudonyms to protect the identity of the deportees in this case.

The views expressed by authors are their own and not the views of The Hill.

SAVING LIVES

SHALINI BHARGAVA RAY

SAVING LIVES

SHALINI BHARGAVA RAY*

Abstract: When Alan Kurdi, a Syrian toddler, drowned in the Mediterranean while fleeing civil war in his home country, the world's attention turned to the Syrian refugee crisis. Offers to transport and house refugees surged. Private boats set out on the Mediterranean Sea to rescue refugees dying in the water. A billionaire offered to purchase an island on which the refugees could live out their lives. This Article analyzes private humanitarian aid to asylum seekers, a subset of migrants whose claims for refugee protection have not yet been filed or adjudicated, and who typically travel without authorization. This Article determines that much of this aid is currently illegal or operates under a cloud of legal uncertainty, principally due to criminal laws prohibiting the smuggling, transport, and harboring of unauthorized migrants. In light of the compelling humanitarian interests at stake, as well as asylum states' concern for national security, this Article argues for law reform to decriminalize private humanitarian aid to asylum seekers.

INTRODUCTION

> *Activists often speak as though the solutions we need have not yet been launched or invented, as though we are starting from scratch, when often the real goal is to amplify the power and reach of existing alternatives. What we dream of is already present in the world.*
>
> —Rebecca Solnit[1]

On the day of his death, Syrian toddler Alan Kurdi wore a bright red shirt, blue shorts, and sneakers. His family fled the violence in Syria and planned to

* University of Alabama School of Law. A.B., Stanford University; J.D., Harvard Law School. I am grateful to Berta Hernandez-Truyol, Shani King, Peter Margulies, Martha Minow, Gerald Neuman, Jaya Ramji-Nogales, and Sharon Rush for comments on earlier drafts of this Article. I also benefited from feedback received from participants in the AALS Immigration Law Panel, especially Jennifer Moore; the Immigration Law Teachers Workshop, especially Lori Nessel and Elissa Steglich; the Conference of Asian Pacific American Law Faculty, especially Steven Nam and Huyen Pham; and the LWI Writers Workshop, especially Debbie Borman, Amy Griffin, and Kim Holst. I also benefited from valuable exchanges with Alyson Flournoy, Audrey Macklin, Deborah Cupples, Stacey Steinberg, and Sugata Ray. I thank Berta Hernandez-Truyol for suggesting the title, "Saving Lives." Shamika Dalton at the University of Florida Legal Information Center, Penny Gibson and Blake Beals of the Bounds Law Library at the University of Alabama, Samuel Alexander, and Julia Kapusta provided exceptional research assistance.

[1] REBECCA SOLNIT, HOPE IN THE DARK: UNTOLD HISTORIES, WILD POSSIBILITIES, at xvii (3d ed., 2016).

travel to the Greek island of Kos to apply for asylum, and then reunite with family in Canada.[2] He and his brother, Galip, together with their parents, Rihanna and Abdullah, boarded a dinghy boat from Bodrum, Turkey. Only Abdullah survived.[3]

Abdullah Kurdi was a barber from Damascus.[4] The family found Damascus a "cosmopolitan" oasis in an otherwise fractured region.[5] Abdullah and his family, however, increasingly found themselves in peril as the conflict in Syria continued. In response to protests against Syrian president Bashar al-Assad, the family relocated to Kobani, a small town along the Turkish border with a large Kurdish community.[6] Despite not provoking either side, the family inhabited a world of daily violence. In September of 2014, the violence worsened, as the Islamic State ("Daesh") shelled Kobani, sending families running for their lives. After younger extended family members witnessed a suicide bombing, the police sought out the male elders for questioning.[7] At that point, the family decided to flee.

Abdullah went first. He fled to Turkey, found work, and sent money home.[8] He eventually called for his own family to join him. Life in Turkey, however, proved impossible financially, as Abdullah was unable to support the four of them. He devised a plan to reunite with family in Canada. He borrowed money for a dinghy boat to carry his family from Bodrum to Kos, where they would apply for asylum.[9] Once they received refugee status, they could travel to Canada. Abdullah's sister had already raised $20,000 to sponsor them.[10]

Abdullah approached the journey with caution. Many had died on similar voyages; but some had lived, and those who had survived were thriving in their new homelands.[11] A smuggler made the arrangements, and on September 2, 2015, along with another raft of refugees, they set out on one of the safest routes to Europe.[12] The sea, however, was wild, and the journey quickly turned perilous. The smuggler abandoned the boat, leaving Abdullah to take the boat's tiller, "swerv[ing] over the waves."[13] The boat capsized. The family held on to Abdullah, who clung to the boat, kissed one of his sons, and implored them

---

[2] Anne Barnard, *Syrian Family's Tragedy Goes Beyond Image of Boy on Beach*, N.Y. TIMES (Dec. 27, 2015), https://nyti.ms/2jKtUqA [https://perma.cc/2WTW-GEQM]. Alan Kurdi is also referred to as "Aylan," which is closer to the Turkish pronunciation of his name. *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Id.*

[11] *See id.*

[12] *See id.*

[13] *Id.*

both not to let go. Despite his efforts, the waves washed his family away: Rihanna, Galip, and Alan, "one by one."[14] A day later, Alan's body washed up on to the beach, face down, a lifeless doll. He was still wearing his clothes and sneakers.[15]

The media widely reported the Kurdi family's horror, and the story galvanized private citizens across the world.[16] Donations to nongovernmental organizations (NGOs) helping refugees spiked in the days following the discovery of Alan's body.[17] NGOs sponsoring private boats, which had been conducting search and rescue for over a year in some instances, saw increased donations and news coverage of their work.[18] A billionaire businessman from Egypt publicly announced a plan to purchase a Greek Island and name it after Alan.[19]

---

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, Anne Barnard & Kareem Shoumali, *Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus*, N.Y. TIMES (Sept. 3, 2015), https://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html?mcubz=0 [https://perma.cc/TNW7-K77S]; Gordon Rayner, *Aylan and Galip Kurdi: Everything We Know About Drowned Syrian Refugee Boys*, TELEGRAPH (Sept. 3, 2015), http://www.telegraph.co.uk/news/worldnews/europe/11841802/eu-migrant-crisis-refugee-boys-aylan-galip-kurdi.html [https://perma.cc/AUE2-2LY6]; Yaron Steinbuch, *Photo of Drowned Toddler Causes Outcry Over Migrant Crisis*, N.Y. POST (Sept. 2, 2015), http://nypost.com/2015/09/02/photo-of-drowned-toddler-causes-outcry-over-migrant-crisis/ [https://perma.cc/PN4G-YJ67]; Ishaan Tharoor, *Death of Drowned Syrian Toddler Aylan Kurdi Jolts World Leaders*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/image-of-drowned-syrian-toddler-aylan-kurdi-jolts-world-leaders/?utm_term=.bc1e1eb1336e [https://perma.cc/MZ5G-Q442]; Griff Witte, *European Rail Service Hit Hard by Surge of Migrants*, WASH. POST, Sept. 3, 2015, at A12.

[17] Rick Gladstone & Karen Zraick, *Donations for Refugees Surging, American Charities Report*, N.Y. TIMES (Sept. 11, 2015), https://nyti.ms/2suT9Bg [https://perma.cc/9P2F-ZCVW]; Lisa O'Carroll, *Donate Cash if You Want to Help Syrian Refugees, Aid Groups Say*, THE GUARDIAN (Sept. 8, 2015), https://www.theguardian.com/world/2015/sep/08/donate-cash-help-syrian-refugees-aid-groups-unicef-wfp-say [https://perma.cc/B5TB-S47V] (reporting that charities experienced a significant donation increase after the photograph of Alan Kurdi's body was released, with Save the Children receiving £1.2 million in just a few days); Megan O'Neil, *Photo of Drowned Syrian Child Spurs Spike in Donations*, CHRON. PHILANTHROPY (Sept. 9, 2015), https://www.philanthropy.com/article/Photo-of-Drowned-Syrian-Child/232957 [https://perma.cc/BV67-GKCX].

[18] *See* Jessica Elgot, *Charity Behind Migrant-Rescue Boats Sees 15-Fold Rise in Donations in 24 Hours*, THE GUARDIAN (Sept. 3, 2015), https://www.theguardian.com/world/2015/sep/03/charity-behind-migrant-rescue-boats-sees-15-fold-rise-in-donations-in-24-hours [https://perma.cc/B4RW-PSRD] (Migrant Offshore Aid Station (MOAS) reported €150,000 in individual donations in a twenty-four hour period, with a previous high of only €10,000); Jon Henley et al., *Britons Rally to Help People Fleeing War and Terror in Middle East*, THE GUARDIAN (Sept. 3, 2015), https://www.theguardian.com/uk-news/2015/sep/03/britons-rally-to-help-people-fleeing-war-and-terror-in-middle-east [https://perma.cc/58L8-P35B] (Caroline Anning, of Save the Children, reported a seventy percent increase in calls and e-mails in a twenty-four hour period).

[19] Keren Blankfeld, *Africa's 10th Richest Man Still Waiting to Buy a Greek Island to House Refugees*, FORBES (Nov. 18, 2015), https://www.forbes.com/sites/kerenblankfeld/2015/11/18/africas-10th-richest-man-still-waiting-to-buy-a-greek-island-to-house-refugees/#3b01ed672fde [https://perma.cc/6Z9B-2LH8] (noting that Naguib Sawaris, the Egyptian billionaire who proposed buying and naming a Greek island after Alan Kurdi, is still waiting for Greece's approval); Amanda Gomez, *Egyptian Billionaire Wants to Buy Island for Refugees*, PBS NEWSHOUR: THE RUNDOWN (Sept. 4, 2015),

Private humanitarian aid to asylum seekers,[20] however, occurs amid legal uncertainty—and in some instances, outright prohibition. The United Nations Migrant Smuggling Protocol defines smuggling as occurring for "material benefit, direct or indirect," but states are not required to adopt that restricted definition.[21] As a result, states have remained free to criminalize private acts of aid as part of standard border control policy.[22] The major Western asylum states, the United States, Canada, and the European Union, have overbroad statutes criminalizing all instances of alien smuggling and related offenses, regardless of whether done for financial gain. In the United States, the relevant statute prohibits a range of actions, including "bringing in," transporting, "conceal[ing], harbor[ing], or shield[ing] from detection" unauthorized migrants.[23] In Canada, prior to 2015, the anti-smuggling statute criminalized all acts of aiding and abetting anyone "coming into Canada" without authorization.[24] Finally, in the EU, member states generally criminalize acts that facilitate unauthorized migration without any exception for humanitarian actors.[25] Thus, for example, acts of rescue, when coupled with transport of refugees and migrants to the frontiers of an asylum state, are susceptible to prosecution if the receiving state does not consent to receiving those refugees and migrants.[26] In 2004, Italy prosecuted an NGO carrying rescued African migrants from Ghana and Nigeria. The NGO, faced with no alternative, docked at an Italian port despite Italy's express denial of permission to do so.[27] Although a judge ultimately acquitted the NGO, the NGO's prosecution has become a cautionary tale that private humanitarian actors tell to distinguish and protect their own work.[28] Similarly, in the United States, providing housing, food, clothing, and so forth,

---

http://www.pbs.org/newshour/rundown/egyptian-billionaire-wants-buy-island-refugees/ [https://perma.cc/5NPK-NNWF].

[20] This Article uses the term "asylum seekers" to refer both to internally-displaced persons who intend to flee to seek humanitarian protection, as well as migrants who have fled their country of origin for the purpose of seeking humanitarian protection. *See infra* note 76.

[21] Protocol Against the Smuggling of Migrants by Land, Sea and Air arts. 3, 6, Nov. 15, 2000, 2241 U.N.T.S. 480 [hereinafter Migrant Smuggling Protocol]. Article 6.1 criminalizes smuggling and related offenses, such as "enabling" an unauthorized migrant to "remain" in the destination state without complying with the destination state's requirements for lawful presence.

[22] Combatting Migrant Smuggling into the EU: Main Instruments, PARL. EUR. DOC. (PE 581.391) 7 (2016) (noting that most member states do *not* "decriminali[z]e humanitarian assistance to smuggled migrants").

[23] 8 U.S.C. § 1324(a) (2012).

[24] Regina v. Appulonappa, [2015] 3 S.C.R. 754, ¶ 19 (Can.). The current statute prohibits organizing, instigating, aiding or abetting entry into Canada that "is or would be in contravention of" the statute. Immigration & Refugee Protection Act, S.C. 2001, c. 27, § 117 (Can.) [hereinafter IRPA]. Generally, this includes acts such as trafficking, smuggling and hiding migrants for profit, but no longer applies to humanitarian assistance. *Id.* §§ 117–119.

[25] *See infra* notes 243–245 and accompanying text.

[26] *See infra* notes 247–258 and accompanying text.

[27] *See infra* notes 247–258 and accompanying text.

[28] *See infra* notes 110–114 and accompanying text.

has constituted illegal "harboring"[29] because providing such aid facilitates asylum seekers' "unlawful presence."[30] Such legal doctrine has led to the prosecution of humanitarian actors, including individuals assisting Central American migrants in Arizona and Texas as part of the Sanctuary Movement of the 1980s.[31]

Since its inception, international law has avoided any explicit protection for private humanitarian aid to refugees.[32] Although international law does not offer clear authorization for private humanitarian aid to refugees, some argue that such aid finds *indirect* support in international law.[33] First, evidence suggests that the drafters of the Refugee Convention believed that certain aid to refugees should not be criminalized, but the treaty stopped short of explicitly authorizing such aid (or forbidding its criminalization under a party state's domestic law).[34] Some scholars have drawn on international humanitarian law for support, suggesting that customary international law requires private individuals to provide temporary refuge to those fleeing war zones.[35] The status of temporary refuge as a customary norm, however, is unsettled.[36] Accordingly, international humanitarian law offers at best indirect support for the legality of private humanitarian aid to refugees.

This Article argues that private humanitarian aid takes a variety of forms that benefit both asylum seekers and civil society. To realize the full potential of private humanitarian aid, the major Western asylum states—specifically, the United States, Canada, and the European Union—should decriminalize private humanitarian aid to asylum seekers by redefining smuggling-related offenses to require financial or material benefit of any kind, consistent with international law, or by adopting an exception for humanitarian assistance.[37]

---

[29] *See infra* notes 182–190 and accompanying text.

[30] *See infra* notes 182–190 and accompanying text; *see also* Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 159–60 (2010).

[31] *See infra* notes 182–190 and accompanying text.

[32] *See* Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 511 (1986) (discussing absence of explicit authorization for private aid to refugees in various international instruments).

[33] *See id.*

[34] *See id.*; *see also* U.N. ECOSOC, 2d sess., 40th mtg. at 8–9, U.N. Doc. E/AC.32/SR.40 (Sept. 27, 1950) (comments of Mr. Juvigny, French delegate). *But see* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (noting that recourse to the "preparatory work" of a treaty is permitted only as a "supplementary means of interpretation," which suggests that a delegate's comments have limited interpretive value).

[35] *See* Helton, *supra* note 32, at 516 (noting that the United States recognizes "the international humanitarian norms of temporary refuge and *nonrefoulement*").

[36] *See id.*; *see also* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1168 (1990) (discussing a federal court's ruling that Congress preempted the temporary refuge norm with the passage of the Refugee Act of 1980).

[37] The U.S. Senate considered such an amendment as part of a package of immigration law reforms, but these reforms ultimately failed to become law. *See* Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People*

Although other scholars have discussed U.S. state and federal laws that essentially criminalize private charity to undocumented immigrants, including asylum seekers,[38] this Article is the first to offer a comparative analysis of the laws governing private humanitarian aid to asylum seekers with reference to the worlds' richest asylum states and regions—namely, the United States, Canada, and the European Union. This comparative approach is essential because the problem of how to treat those who assist irregular migrants is a global one. Unlike the narrower question of U.S. law, on which judges might disagree about the relevance of foreign states' laws and practices, the question of how to treat private humanitarian actors assisting asylum seekers calls for a global response informed by international and comparative law.

Apart from offering a unique comparative approach, this Article is also the first to propose a major statutory revision to refine the smuggling statute to limit liability to profit-seeking actors rather than on those who conceal asylum seekers from immigration authorities. Ultimately, this Article argues that under current legal regimes, too much private humanitarian aid is criminalized or potentially subject to prosecution, and thus, deterred. For this reason, citizens should insist that governments reform their smuggling laws.

This Article proceeds in three Parts. Part I describes various manifestations of private humanitarian assistance to asylum seekers, and the legal framework within which they operate.[39] Part II discusses national security and economic interests as primary motivations for criminalizing private humanitarian assistance, both nationally and internationally.[40] Part III proposes a legal compromise by criminalizing unauthorized migration activities that provide some monetary or material benefit to smugglers, but de-criminalizing not-for-profit private humanitarian assistance.[41]

Under 8 U.S.C. 1324(A)(1)(A)(III), 11 RUT. J.L. & RELIGION 214, 241 (2009) (describing proposed humanitarian exception); Sean Higgins, *Why Immigration Reform Didn't Happen in 2007*, WASH. EXAMINER (Nov. 20, 2012), http://www.washingtonexaminer.com/why-immigration-reform-didnt-happen-in-2007/article/2513987 [https://perma.cc/BKK7-EN7D].

[38] This analysis has related primarily to the Sanctuary and New Sanctuary Movements of the United States. *See* Breslin, *supra* note 37, at 226; Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 100–01 (2012); Helton, *supra* note 32, at 511; Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law,* 28 HARV. C.R.-C.L. L. REV. 119, 123–24 (1993). Notably, criminal statutes prohibiting aid do not apply to individuals assisting in preparing asylum applications or aiding asylum seekers who have filed an application but have not yet received a decision. I thank Peter Margulies for raising this point.

[39] *See infra* notes 42–193 and accompanying text.

[40] *See infra* notes 194–314 and accompanying text.

[41] *See infra* notes 315–374 and accompanying text.

I. DANGEROUS JOURNEY AND THE MANY PLACES OF PRIVATE HUMANITARIAN AID

This Part defines and describes "private humanitarian aid" in its many forms and explains its value to both asylum seekers and citizens of the states receiving them. Private humanitarian aid refers to assistance designed to preserve life and human dignity, and ease suffering associated with "man-made crises" and natural disasters,[42] provided by non-state actors for altruistic or non-material reasons.[43] Humanitarian aid further connotes immediacy—immediate relief from an imminent threat.[44] Aid can also extend beyond such relief to longer-term provision of food, housing, medical care, and education, all informed by broad humanitarian, protective interests.[45]

A discussion of private humanitarian aid to asylum seekers requires some analysis of the legal regime that produces asylum seekers' dangerous journeys in the first place.[46] Asylum seekers principally undertake unauthorized travel because states offer them no travel authorization options.[47] No country currently offers an "asylum visa" to migrants who intend to apply for refugee status upon arrival in the asylum state.[48] Thus, when driven from their homes, asylum seekers *must* use false papers or seek the services of a smuggler.[49] These avenues of travel subject asylum seekers to tremendous danger, which some private humanitarian actors work to alleviate.

Private humanitarian aid takes many forms, beginning in an asylum seekers' country of origin and ending in the asylum state. The most visible form of

---

[42] *Defining Humanitarian Assistance*, DEV. INITIATIVES, http://devinit.org/defining-humanitarian-assistance/ [https://perma.cc/ASZ2-VC3A].

[43] Not all donations constitute "humanitarian assistance." For example, if the nonprofit arm of a Silicon Valley company decided to donate coding lessons to asylum seekers to assist with job training in the asylum state, few would regard this as humanitarian aid, although it certainly would constitute a nonprofit donation. *See, e.g.*, *Coding Skills for Over 430,000 Young Africans and Refugees in the Middle East*, SAP NEWS (Nov. 30, 2016), http://news.sap.com/coding-skills-for-over-430000-young-africans-and-refugees-in-the-middle-east/ [https://perma.cc/BBG5-NY6A].

[44] *See* RELIEFWEB, GLOSSARY OF HUMANITARIAN TERMS 29 (2008), http://reliefweb.int/sites/reliefweb.int/files/resources/4F99A3C28EC37D0EC12574A4002E89B4-reliefweb_aug2008.pdf [https://perma.cc/9RHB-8FMH] (defining Humanitarian Assistance as aid that aims to preserve life and "alleviate suffering of a crisis affected population," and which must align "with the basic humanitarian principles of humanity, impartiality and neutrality").

[45] *See id.* at 8, 39.

[46] *See* Hugh Eakin, *The Terrible Flight from the Killing*, N.Y. REV. BOOKS (Oct. 22, 2015), http://www.nybooks.com/articles/2015/10/22/terrible-flight-killing/ [https://web.archive.org/web/20170422124739/http://www.nybooks.com/articles/2015/10/22/terrible-flight-killing/] (describing the human toll of the lack of any legal course of travel for asylum seekers).

[47] *See, e.g.*, Slobodan Djajić, *Asylum Seeking and Irregular Migration*, 39 INT'L REV. L. & ECON. 83, 84 (2014) (describing asylum seekers' necessary resort to human smuggling due to lack of availability of any kind of entry visa to an asylum state).

[48] Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT'L L. 1215, 1219 (2013).

[49] *Id.* at 1231 ("Thus, the asylum system expects and relies upon illegal or deceptive entry.").

humanitarian assistance is rescue. Chris and Regina Catrambone, a wealthy couple, run a fully equipped yacht in the Mediterranean to rescue asylum seekers and migrants from unseaworthy vessels.[50] Their project, called Migrant Offshore Assistant Station ("MOAS"), has thus far rescued more than 30,000 people.[51] A group of German friends from Brandenburg similarly responded to "the devastating loss of life at sea" by buying a boat and setting out on the Mediterranean to provide "a civil sea rescue service" for asylum seekers and migrants in distress.[52] An Eritrean Catholic priest in Switzerland facilitates rescue less directly by receiving calls from desperate asylum seekers and migrants in the Mediterranean and then informing the Italian authorities of the boats' location.[53]

Rescue, though highly visible, is not the only form of private humanitarian aid offered in the wake of recent war-born migrations. The Pope has urged parishes in Europe to accept refugees into their homes.[54] Individuals in Germany have signed up to read to refugee children, teach asylum seekers German, and offer job training, pending approval of the their asylum petitions.[55] Private individuals also rejected stingy government policy in Iceland. After Iceland's minister offered to resettle a mere fifty Syrians, Icelanders created a Facebook page welcoming refugees, and in some instances, offering to house them; this page garnered 10,000 "likes."[56] A U.S. mother launched Carry the Future, an NGO that delivers baby carriers to refugee parents carrying their

---

[50] *See, e.g.*, Jessica Elgot, *Migrant Crisis: Good Samaritans Set Sail in Daring Mediterranean Rescue Mission*, THE GUARDIAN (Apr. 20, 2015), http://www.theguardian.com/world/2015/apr/20/migrant-crisis-good-samaritans-mediterranean-rescue-mission [https://perma.cc/G4J5-X7XV]; Sheena McKenzie, *Meet the Wealthy Couple on a Mission to Save Drowning Migrants*, CNN (Apr. 20, 2015), http://edition.cnn.com/2015/04/20/sport/boat-migrants-mediterranean-drown-moas/ [https://perma.cc/RD23-VUM4].

[51] *About MOAS*, MOAS, https://www.moas.eu/about/ [https://perma.cc/36XY-F4FC].

[52] *Sea-Watch Rescue Blog*, HUM. RTS. AT SEA (May 1, 2015), https://www.humanrightsatsea.org/news/sea-watch-migrant-rescue-blog/ [https://perma.cc/Y68P-VFDH].

[53] Mattathias Schwartz, *The Anchor*, NEW YORKER (Apr. 21, 2014), http://www.newyorker.com/magazine/2014/04/21/the-anchor [https://perma.cc/YGY5-SMG4].

[54] *See* Anthony Faiola & Michael Birnbaum, *Pope Calls on Europe's Catholics to Take in Refugees*, WASH. POST (Sept. 6, 2015), https://www.washingtonpost.com/world/refugees-keep-streaming-into-europe-as-crisis-continues-unabated/2015/09/06/8a330572-5345-11e5-b225-90edbd49f362_story.html [https://perma.cc/9FBM-36HL] (noting Pope Francis appealed to all religious communities and institutions to "take in" a refugee family, which could provide "shelter to tens of thousands").

[55] Martin Knobbe et al., *Welcome to Germany: Locals Step in to Help Refugees in Need*, DER SPIEGEL (Aug. 18, 2015), http://www.spiegel.de/international/germany/refugees-encounter-willing-helpers-in-germany-a-1048536.html [https://perma.cc/9RLE-LSF3].

[56] Elliot Hannon, *Iceland Caps Syrian Refugees at 50; More Than 10,000 People Respond with Support for Syrian Refugees*, THE SLATIST (Aug. 31, 2015), http://www.slate.com/blogs/the_slatest/2015/08/31/_10_000_icelanders_offer_to_house_syrian_refugees.html [https://perma.cc/H52N-XAVA].

toddlers for hundreds of miles across Europe.[57] An Egyptian billionaire sought to purchase a Greek island on which refugees could live out their lives.[58] Private humanitarian aid emerges where governments fail to meet the needs of asylum seekers and migrants. Fully understanding the impact of asylum states' policies, and where they fall short, requires analyzing these diverse forms of aid together as a unified phenomenon.

This Part describes private humanitarian aid to asylum seekers at each point along the geographic continuum: while asylum seekers reside in their country of origin, seek exit from their country of origin, travel to the asylum state, seek entry into the asylum state, and reside in the asylum state. By illustrating examples of private humanitarian aid administered in each place, this Part provides a foundation for subsequent analysis of barriers to private humanitarian aid and the rationales for legal restrictions.

A. In-Country Aid

The first place where individuals and private organizations provide aid to asylum seekers is the asylum seekers' home country. Such aid often takes the form of donations to NGOs such as the International Committee for the Red Cross ("ICRC") or Doctors Without Borders (also known as Médecins Sans Frontières, or "MSF"). These NGOs provide basic provisions for daily life in war-torn places. For example, the Syrian Civil Defense, known as the "White Helmets," has saved over 95,024 people from barrel bomb attacks in Syria.[59] This corps of unarmed and neutral rescue workers saves lives, secures buildings, and performs other public services to assist "people on all sides of the conflict." [60]

Even though international relief organizations assist a broader population than just refugees, donations to such NGOs may still reflect the public's interest in helping refugees specifically. For example, after the New York Times published an image of Syrian toddler Alan Kurdi's lifeless body, drowned in the Mediterranean, NGOs like MSF saw donations increase sevenfold.[61] Although MSF typically receives donations of $30,000 a day, donations spiked to $200,000 the first day after Kurdi's photograph appeared in the papers and then decreased to around $80,000 four days later.[62] Thus, members of the public are ready to donate money to NGOs that help asylum seekers. Private aid

---

[57] *See* FAQ, CARRY THE FUTURE, http://www.carrythefuture.org/faq/ [https://perma.cc/4D4V-YJ8C].

[58] Gomez, *supra* note 19.

[59] *Support the White Helmets*, WHITE HELMETS, https://www.whitehelmets.org/en [https://perma.cc/MQX7-Y6NW].

[60] *Id.*

[61] *See* O'Neil, *supra* note 17.

[62] *Id.*

often takes the form of donations to NGOs working on the ground in asylum seekers' home countries—even if those NGOs focus on issues beyond asylum.

International relief organizations, however, often face political or practical restrictions to administering aid inside a conflict zone.[63] Aid workers may face violence or death, bandits may steal supplies, and the home country's government may severely restrict the operation of NGOs.[64] In 2015, the United States inadvertently bombed an MSF clinic in Kunduz, Afghanistan, killing thirty patients and staff.[65] MSF contends that it had supplied its GPS coordinates to the U.S. military prior to the bombing, but the U.S. military nonetheless mistakenly thought the hospital to be "a Taliban-seized government building."[66] In another example, insurgents attacked humanitarian aid providers in Iraq during and after the Iraq war, because they mistakenly believed that aid workers were mere instruments of the U.S. military.[67] These incidents illustrate the inherent dangers of operating in a conflict zone, which often make it impossible to work within refugees' countries of origin.

Apart from political or practical impediments, some NGOs face concerns about their legitimacy. For example, the NGO Hand in Hand for Syria ("Hand in Hand") was created in 2011 shortly after the Syrian crisis began, and it provides aid *solely* within Syria.[68] The organization seeks to stabilize conditions so that Syrians do not feel compelled to flee.[69] Hand in Hand claims to use funds raised from European donors to purchase food and medical supplies in Turkey, one of the places where it is officially registered, and in Syria to boost the local economy.[70] The organization states that it then quickly provides aid in places that other NGOs fail to reach, such as locations behind front lines and in remote areas.[71] Due to the scope of the conflict, Hand in Hand now operates in ninety percent of the country.[72]

---

[63] *See About Us*, HAND IN HAND FOR SYRIA, https://hihfad.org/about [https://perma.cc/TTM7-9HAG].

[64] *See id.*

[65] Adam Chandler, *The Human Error Behind the Kunduz Hospital Strike*, THE ATLANTIC (Nov. 25, 2015), http://www.theatlantic.com/international/archive/2015/11/doctors-without-borders-kunduz-human-error/417750/ [https://perma.cc/YLA9-3A2J].

[66] *Id.*

[67] Government rhetoric conflating military action and humanitarian aid also increases the danger to humanitarian aid providers. In the Iraq War, the United States government represented the military objective as one and the same as the humanitarian one—liberating the unfree and providing the basics that Saddam Hussein had failed to provide, namely adequate electricity, medical facilities, and water. This, in turn, made aid workers more vulnerable. *See* Nicolas de Torrente, *Humanitarian Action Under Attack: Reflections on the Iraq War*, 17 HARV. HUM. RTS. J. 1, 22–23 (2004).

[68] *See About Us*, HAND IN HAND FOR SYRIA, *supra* note 63.

[69] *See id.*

[70] *Id.*

[71] *Where We Work*, HAND IN HAND FOR SYRIA, https://hihfad.org/where-we-work [https://perma.cc/CH8F-863W].

[72] *See id.*

A Canadian research group, however, has suggested that the organization actually supports political militants opposed to Assad.[73] British authorities have also critiqued Hand in Hand for essentially serving as a cover for the Syrian opposition.[74] Even if this critique were inaccurate, and legitimate charities do disburse funds in Syria, funds are notoriously difficult to track once they arrive in the conflict zone. Authorities note that they cannot guarantee that funds *do not* support militants.[75] Given the lack of clarity over the legitimacy of various relief organizations, donors often lack sufficient information when donating funds to assist displaced persons while such persons remain in their war-torn home country. These are the potential hazards of private aid in the country of origin. As a result, much of the private aid provided to asylum seekers is provided in some other place.

B. Exit

Private actors also administer aid at the next place in the geographic continuum by facilitating asylum seekers' travel out of their country of origin, often using unofficial channels.[76] Human smugglers are private actors who facilitate exit, primarily by using fraudulent documents or arranging travel in vessels not designed for humans.[77] If such work is done for material benefit, it

---

[73] Robert Stuart, *UK Charity Which Shares Syrian Opposition "Aims and Objectives" Benefits from Alan Kurdi Tragedy*, GLOB. RES. (Sept. 10, 2015), http://www.globalresearch.ca/uk-charity-which-shares-syrian-opposition-aims-and-objectives-benefits-from-alan-kurdi-tragedy/5475090 [https://perma.cc/7T6L-GRYE].

[74] *Id.*

[75] Christopher Hope, *Charity Cash 'Going to Syrian Terror Groups,'* TELEGRAPH (Oct. 4, 2013), http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10357537/Charity-cash-going-to-Syrian-terror-groups.html [http://perma.cc/VLC6-ZC43].

[76] Technically, refugees are people who have already fled their country of origin; persons who remain within their country of origin are more typically referred to as "internally displaced persons." *Questions and Answers About IDPs*, U.N. HUM. RTS., OFF. HIGH COMM'R, http://www.ohchr.org/EN/Issues/IDPersons/Pages/Issues.aspx [https://perma.cc/J2DG-GAZV] (explaining that, "[a] crucial requirement to be considered a 'refugee' is crossing an international border"). "Asylum seekers" are people whose claim for "sanctuary" has not yet been adjudicated. *See Asylum-Seekers,* U.N. HIGH COMM'N REFUGEES, http://www.unhcr.org/en-us/asylum-seekers.html [https://perma.cc/VDU8-2DZL]. But to simplify matters, this Article uses "asylum seekers" to refer both to internally displaced persons and refugees in this context.

[77] *See* Adam Lidgett, *Syrian Refugee Smugglers Arrested: Human Trafficking Charges in Netherlands Alleged After Hundreds Illegally Taken to Holland, Police Say*, INT'L BUS. TIMES (Sept. 18, 2015), http://www.ibtimes.com/syrian-refugee-smugglers-arrested-human-trafficking-charges-netherlands-alleged-after-2103559 [https://web.archive.org/web/20160122133028/http://www.ibtimes.com/syrian-refugee-smugglers-arrested-human-trafficking-charges-netherlands-alleged-after-2103559] (describing smugglers in Netherlands with partners who coordinated exit of refugees from various Syrian cities to destinations such as Athens, Budapest, Milan, and Vienna).

cannot be considered "humanitarian."[78] Local smugglers in Syria, for example, oversee asylum seekers' clearance "through all Syrian checkpoints on the way to Turkey" in exchange for bribes.[79] As of September 2015, Europol estimated 30,000 smugglers are transporting asylum seekers out of their countries of origin and into potential asylum states.[80]

Private individuals often aid asylum seekers in exiting their home countries in more benign ways as well. For example, a family member might drive an asylum seeker across a border into a third country, where a smuggler might then provide a fake passport.[81] The family member has privately aided the asylum seeker in crossing the border, but then it falls upon a smuggler to provide papers and a plan to circumvent border controls.[82] Ultimately, informal smuggling out of the country of origin remains a significant element of most asylum seekers' journeys.[83]

C. Rescue

Once an asylum seeker crosses the border out of their home country and into a new territory, the journey to an asylum state begins in earnest. Private actors play an important role in preventing death along the way.[84] For asylum seekers at sea or otherwise in transit to the asylum state, the risk of distress or death is real. At least 22,000 migrants have died "trying to reach Europe" since 2000.[85] In 2013, a group of 360 migrants, consisting of mostly Eritreans, drowned off the coast of the Italian island of Lampedusa.[86] In just one month in 2014, 700 migrants and refugees drowned in two different shipwrecks.[87] As a result, governments in recent years have conducted search and rescue operations to limit the humanitarian costs of traveling to Europe. In particular, Italy

---

[78] Boštjan Videmšek, *In the Human Smugglers' Den*, POLITICO (Oct. 22, 2015), http://www.politico.eu/article/refugee-crisis-smugglers-syria-turkey-migrants-the-worlds-largest-human-bazaar-migration-refugees-smugglers-greece-turkey/ [https://perma.cc/AXL8-8FDU].

[79] *See id.*

[80] Lidgett, *supra* note 77.

[81] *See* Nicholas Schmidle, *Ten Borders*, NEW YORKER (Oct. 26, 2015), http://www.newyorker.com/magazine/2015/10/26/ten-borders [https://perma.cc/PCE4-2H97].

[82] *See id.*

[83] *See* Susan Raufer, *In-Country Processing of Refugees,* 9 GEO. IMMIGR. L.J. 233, 233 (1995).

[84] ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 446 (2014) ("It is privately owned and operated vessels, not designated SAR vessels, which are playing the frontline role in SAR efforts.").

[85] Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POL'Y INST. (Oct. 16, 2014), http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing [https://perma.cc/K7LY-VX9J].

[86] *Id.*

[87] *Id.*

conducted an operation called Mare Nostrum, which rescued at least 140,000 people in 2014.[88] Italy eventually suspended the program due to high costs.[89]

The suspension of Mare Nostrum was part of the European Union's deliberate effort to scale back rescue efforts in order to deter refugees and migrants from making the journey in the first place.[90] After suspending the program, Italy transferred responsibility to Frontex, the European Union's border agency.[91] Frontex, for its part, conducted a much more limited operation on a fraction of the budget and without any of its own search and rescue vessels.[92] In fact, Frontex does not officially perform search and rescue or provide access to humanitarian protection.[93] Limiting rescue efforts, however, failed to deter refugees and migrants.[94]

In the face of government retrenchment, private humanitarian actors have entered the search and rescue arena. For example, MSF has been doing rescue work for over fifteen years.[95] In 2015, MSF teams directly rescued over 20,000 people in the Mediterranean and safely disembarked passengers in Italy more than eighty times.[96] In addition, organizations such as MOAS[97] and Sea-Watch[98] expressly focus on rescuing refugees and migrants in unseaworthy boats to prevent deaths on the way to Europe from Africa and the Middle East. These organizations serve to substitute, in part, government search and rescue programs, but they are only effective to the extent that governments cooperate.

MOAS launched its first mission in 2014, a year after nearly 400 refugees and migrants died off the coast of Lampedusa, an Italian island where many asylum seekers find themselves before the government deports or processes them.[99] The founders of MOAS, Regina and Chris Catrambone, were inspired to act by the Pope's sermon condemning global indifference to the plight of

---

[88] *Id.*

[89] The operation cost was nine million euros per month. *Id.*

[90] *Sea-Watch Rescue Blog*, *supra* note 52 ("The general opinion in Brussels was that the greater the rescue capability . . . the greater the likelihood more migrants would attempt to enter Europe via these means.").

[91] *Id.*

[92] McKenzie, *supra* note 50.

[93] *See Mission and Tasks*, FRONTEX, http://frontex.europa.eu/about-frontex/mission-and-tasks/ [https://perma.cc/H2AW-ASSU].

[94] McKenzie, *supra* note 50.

[95] *MSF Expands Mediterranean Search and Rescue Operations*, DRS. WITHOUT BORDERS (May 9, 2015), http://www.doctorswithoutborders.org/article/msf-expands-mediterranean-search-and-rescue-operations [https://perma.cc/A6VR-DJ9E].

[96] *MSF Ends Search and Rescue Operations in Central Mediterranean*, DRS. WITHOUT BORDERS (Jan. 5, 2016), http://www.doctorswithoutborders.org/article/msf-ends-search-and-rescue-operations-central-mediterranean [https://perma.cc/6LD8-DJJW].

[97] *About MOAS*, *supra* note 51.

[98] *Sea-Watch Rescue Blog*, *supra* note 52.

[99] McKenzie, *supra* note 50.

refugees and migrants.[100] In response, the couple purchased a vessel for rescuing refugees and migrants in distress at sea and named it the "M.Y. Phoenix."[101]

MOAS has saved nearly 12,000 lives since the project began.[102] Using high-tech drones and thermal night imaging to monitor major migrant shipping lanes, MOAS can detect the presence of distressed boats and quickly render aid.[103] When it encounters a vessel in distress, the MOAS crew rescues the individuals at risk and provides water, food, and basic medical care until government authorities arrive.[104] The crew typically consists of 20 people, and in 2015, MOAS partnered with MSF to add two doctors to the crew.[105] MOAS claims that, as an NGO, it is uniquely capable of approaching waters near a country's coast, which means it can respond more quickly to distressed boats than vessels affiliated with a particular government.[106] Thus, a lack of government affiliation is an important characteristic of MOAS's approach.

Central to MOAS's work is its collaboration with Maritime Rescue Coordination Centers ("MRCCs"), facilities that states must provide to perform "search and rescue services round their coasts" under international law.[107] The International Convention on Maritime Search and Rescue establishes the requirement of a system of MRCCs, consisting of centers and sub-centers, equipped to receive "distress communications" and to communicate with adjacent MRCCs.[108] The International Maritime Organization set up a network in 1979, known as Inmarsat, to enable ships to call for help "no matter how far out to sea."[109] In this way, international law has required states to create infrastructure to promote rescue at sea, and MOAS's work complements existing search and rescue practice.

The Sea-Watch project is a similar private rescue operation run by a crew from Hamburg. Sea-Watch both reacts to distress calls and actively searches for distressed vessels, as many of these vessels lack satellite phone technology

---

[100] *Id.*

[101] *Id.*

[102] *About MOAS*, *supra* note 51.

[103] *Id.*

[104] *Id.*

[105] *See id.*

[106] Claire Ward, *For First Time Ever, a Private Rescue Ship Transfers Migrants to UK Warship*, VICE NEWS (May 13, 2015), https://news.vice.com/article/private-humanitarian-rescue-ship-transfers-migrants-to-uk-warship [https://perma.cc/V27X-24KS] (explaining that because MOAS is neutral and "not affiliated with any government," representatives assert MOAS can enter Libyan waters to respond more rapidly to migrants' distress calls).

[107] United Nations Convention on the Law of the Sea art. 98(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; International Convention on Maritime Search and Rescue preamble, annex §§ 2.1, 2.2.1, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97 [hereinafter ICMSR].

[108] ICMSR, *supra* note107, at annex § 2.3.3.

[109] *About Us*, INMARSAT, http://www.inmarsat.com/about-us/ [https://perma.cc/F895-ARXT].

and cannot make distress calls.[110] Sea-Watch operates primarily in the summer months when refugees and migrants are most likely to undertake the journey across the Mediterranean, but its search and rescue operations continue into the fall.[111] The organization undertakes "missions" that last about six days each, with a different crew each time.[112] One of their main tasks is to locate distressed vessels accurately and then to rescue refugees and migrants from sinking ships.[113] Sea-Watch harbors refugees and migrants on board its boats temporarily and provides life vests until Coast Guard ships arrive.[114]

Like MOAS, Sea-Watch operates in an uncertain legal environment, at the intersection of the duty to rescue under international maritime law, rights under the Refugee Convention, and prohibitions contained in EU anti-smuggling legislation.[115] Under customary international law and the United Nations Convention on the Law of the Sea ("UNCLOS"), states should rescue those in distress at sea.[116] UNCLOS specifically establishes that "masters of vessels sailing under the flag of signatory States" in international waters have an affirmative duty to rescue individuals in distress.[117] Additional legal support for rescue comes from both the International Convention for the Safety of Life at Sea ("SOLAS") and the International Convention on Maritime Search and Rescue.[118] Under these instruments, states are obligated "to cooperate and co-

---

[110] *Sea-Watch Rescue Blog*, *supra* note 52.

[111] *Id.*

[112] *See id.*

[113] *See id.*

[114] *Id.* (noting that in accordance with international law, no migrants will be taken on board a Sea-Watch vessel or ferried to shore). *But see* Elgot, *supra* note 50.

[115] *Sea-Watch Rescue Blog*, *supra* note 52.

[116] Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, 36 SYRACUSE J. INT'L L. & COM. 145, 203–04 (2009).

[117] UNCLOS states:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighboring States for this purpose.

UNCLOS, *supra* note 107, art. 98(1); *see* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 626–27 (2009).

[118] GALLAGHER & DAVID, *supra* note 84, at 84 ("The obligation to render assistance to those lost or in peril at sea is part of customary international law and has been codified in many international agreements, including UNCLOS and two widely ratified treaties: the 1974 International Convention

ordinate" rescue.[119] The act of "rescue" is not complete until those in distress reach a "place of safety,"[120] and courts have ruled that this "place of safety" must be a place other than the rescuing ship.[121] Scholars have noted, however, that governments are not necessarily obligated to "disembark the survivors in [their] own area[s]."[122] Thus, although governments must complete the rescue of those in distress, rescue is not tantamount to a right of admission to the rescuing state.[123]

The tension evident in rescue work, however, originates outside of maritime law, for international refugee law itself places refugees in limbo on their journey to an asylum state. International refugee law guarantees neither a right to be granted asylum, nor a right to admission into an asylum state.[124] The Universal Declaration of Human Rights ("UDHR") guarantees "the right to seek and to enjoy . . . asylum from persecution,"[125] but scholars have suggested that states understood this to secure the *asylum* state's right to grant asylum without interference from the refugee's country of origin.[126] Article 33 of the UN Convention Relating to the Status of Refugees, however, prohibits asylum states from returning refugees to places where they would face persecution.[127] This raises the question: when does this obligation not to return arise? At the

---

for the Safety of Life at Sea (SOLAS Convention), and the 1979 International Convention on Maritime Search and Rescue (SAR Convention)."); *Sea-Watch Rescue Blog*, *supra* note 52.

[119] GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 283–84 (3d ed., 2007) (discussing amendments to the SAR and SOLAS Conventions to impose this obligation "with minimal disruption to the ship's planned itinerary (implying that disembarkation should occur at the nearest coastal State—UNHCR's favoured approach)"); Papastavridis, *supra* note 116, at 206 (citing GOODWIN-GILL & MCADAM, *supra*, at 283).

[120] Legal Brief, U.N. High Commissioner on Refugees, Int'l Law and Rescue at Sea ¶ 6 (May 19, 2008), http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=487b47f12&query=Refugee%20Protection%20in%20International%20Law [https://perma.cc/U5CS-HB6S] (citing ICMSR, *supra* note 101, at annex § 1.3.2); INT'L MARITIME ORG. & U.N. HIGH COMM'R REFUGEES, RESCUE AT SEA: A GUIDE TO PRINCIPLES AND PRACTICE AS APPLIED TO MIGRANTS AND REFUGEES 5–7, http://www.unhcr.org/450037d34.pdf [https://perma.cc/M9QW-ZQKR].

[121] GALLAGHER & DAVID, *supra* note 84, at 457.

[122] Papastavridis, *supra* note 116, at 206.

[123] NGOs rely on these international agreements to justify their work. Sea-Watch sails under the German flag, and Germany is a signatory to UNCLOS and related instruments. *Sea-Watch Rescue Blog*, *supra* note 52. In light of the full range of relevant authorities, Sea-Watch regards its activities as fulfilling international legal obligations, although these rescue obligations apply because Sea-Watch desires to patrol the Mediterranean looking for distressed vessels.

[124] GOODWIN-GILL & MCADAM, *supra* note 119, at 358–60.

[125] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14(1) (Dec. 10, 1948) [hereinafter UDHR]; *see* Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT'L L. 1215, 1242 (2013) (citing GOODWIN-GILL & MCADAM, *supra* note 119, at 358, 383).

[126] 2 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 101 (1972).

[127] Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

border of an asylum state's territory?[128] On the high seas?[129] At a pre-clearance point in an airport within the refugee's country of origin?[130] Or should the test be based on the asylum state's exercise of jurisdiction, understood as "effective control"?[131]

The European Court of Human Rights in *Hirsi Jamaa & Others v. Italy* ruled that states must "guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection."[132] In *Hirsi*, the court evaluated Italy's responsibility toward refugees interdicted on the high seas.[133] The court held that Italy was exercising jurisdiction extra-territorially through its interdiction efforts.[134] In a concurring opinion, Judge Pinto de Albuquerque opined that the European Convention on Human Rights ban on "collective expulsion" required Italy to provide some screening process to asylum seekers to determine if they qualified for humanitarian protection before turning them back.[135] Thus, on this reasoning, states party to the Refugee Convention, which prohibits *refoulement*, generally have an obligation to extend some asylum procedure to migrants outside of the migrants' country of origin to determine whether they are in fact "refugees."[136]

---

[128] *See* THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM 232–33 (Cambridge Stud. Int'l & Comp. L., Series No. 77, 2011).

[129] *See id.* at 63.

[130] *See id.* at 131–32 (discussing the *Roma Rights* case in which the British Court of Appeal ruled that *non-refoulement* did not apply to pre-clearance checks by British immigration officers at the Prague airport, in part because the refugees had not yet left their home country).

[131] *Id.* at 46.

[132] Hirsi-Jamaa v. Italy, App. No. 27765/09, 2012 Eur. Ct. H.R. ¶ 27; *Sea-Watch Rescue Blog*, *supra* note 52.

[133] GALLAGHER & DAVID, *supra* note 84, at 477.

[134] *Hirsi-Jamaa*, 2012 Eur. Ct. H.R. ¶ 78; *see also* Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, AM. SOC'Y INT'L L. (Jan. 4, 2016), https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights [https://perma.cc/F6C6-ZS2N].

[135] *Hirsi-Jamaa*, 2012 Eur. Ct. H.R. (concurring opinion of J. Pinto Albuquerque); *see also* Ramji-Nogales, *supra* note 134.

[136] GAMMELTOFT-HANSEN, *supra* note 128, at 232–33 ("[S]tates do not rid themselves of international obligations simply by offshoring and outsourcing migration control. . . . Even if it was not the case fifty years ago, it is today clear that the *non-refoulment* principle must be interpreted to apply everywhere a state exercises jurisdiction."); *see also* David A. Martin, *Human Rights and Migration Management: Of Complexity, Balance, and Nuance*, 106 AM. SOC'Y INT'L L. PROC. 69, 71–72 (2012) (interpreting *Hirsi-Jamaa* to require "shipboard screening of potential claims . . . and [to suggest] that such screening may necessitate the provision of lawyers."). The United States Supreme Court has interpreted *non-refoulement* far more narrowly, as applying only to refugees at the border or refugees who have effectuated an entry. *See* Sale v. Haitian Centers Council, 509 U.S. 155, 180–81 (1993) (ruling that the word "return" in article 33 of the Refugee Convention has a narrower meaning than the common meaning of the word); *see also* GAMMELTOFT-HANSEN, *supra* note 128, at 45; GALLAGHER & DAVID, *supra* note 84, at 472 (describing competing interpretations of article 33's *non-refoulement* obligation).

Such a right to an asylum procedure and the duty to rescue under maritime law, however, have clashed with anti-smuggling laws that criminalize the transport of unauthorized migrants to an asylum state.[137] These anti-smuggling laws potentially render illegal some aspects of rescue,[138] and the work of these NGOs reflects this ambiguity. Although these humanitarian actors publicly focus on preventing death at sea rather than obtaining legal entry or status for asylum seekers, such rescue efforts are difficult to divorce from the asylum seekers' ultimate objective of effectuating an entry into the asylum state. Officially, MOAS states that its ultimate goal is to mitigate "loss of life."[139] MOAS will not act as "a migrant ferry," and it will not rescue refugees and migrants exclusively, but it will use all "its resources to assist appropriate official Rescue Coordination Centers to locate and help suffering human beings and save lives where possible."[140] Although MOAS casts its efforts as merely supplementing existing government search and rescue operations, such efforts do much more. They necessarily present governments with decisions to make regarding the fate of refugees and migrants. For example, after rescuing refugees and migrants on a sinking boat in the Mediterranean and supplying them with water and groceries, what does MOAS do? In light of legal (and perhaps moral) restrictions on transporting bona fide refugees back to their country of origin,[141] the organization must eventually transfer rescued refugees and migrants to a governmental authority, such as the Italian Coast Guard. But what if the Coast Guard refuses to accept them? What would MOAS do in such a situation? Although the law governing disembarkation of smuggled refugees and migrants is unclear, scholars indicate "there remains abundant State practice"

---

[137] *See, e.g.*, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: EU Action Plan Against Migrant Smuggling (2015–2020)*, COM (2015) 285 final (May 27, 2015), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf [https://perma.cc/5DZ6-LZK8] (proposing an "Action Plan" to reduce migrant smuggling through enhanced prosecution of smugglers).

[138] Tugba Basaran, *Saving Lives at Sea: Security, Law and Adverse Effects*, 16 EUR. J. MIGRATION & L. 365, 377 ("Anti-smuggling legislation can be used to sanction rescue, even though rescue is firmly anchored in national and international legislation.").

[139] *Current Mission—Central Mediterranean*, MOAS, http://www.moas.eu/central-mediterranean/ [https://perma.cc/FCW8-NGAB].

[140] Elizabeth Mavropoulou, *The Success of the Migrant Offshore Aid Station (MOAS)*, HUM. RTS. AT SEA (Dec. 10, 2014), https://www.humanrightsatsea.org/the-success-of-the-migrant-offshore-aid-station-moas/ [https://perma.cc/DA97-UJH7]. The Rescue Coordination Centers are government-operated search and rescue facilities created as a result of the ICMSR. Parties to the ICMSR committed to establish rescue coordination centers and sub-centers. Each center is required to have "adequate means for the receipt of distress communications via a coast radio station or otherwise." ICMSR, *supra* note107, at annex § 2.3.3.

[141] Refugee Convention art. 33, *supra* note 127 (prohibiting the *refoulement* of refugees to places where their lives or freedom would be threatened).

refusing to allow disembarkation in such situations.[142] The organization does not indicate what it would do, or whether it has ever faced a dilemma of this kind.[143] Ultimately, the clash of deeply held goals, "manageable migration system[s]", and human rights[144] creates legal uncertainty for private humanitarian actors.

Individuals and NGOs play an important role in saving the lives of asylum seekers travelling in international lands and waters, but their work inherently depends on government cooperation and remains vulnerable to legal scrutiny. NGOs operate with greater clarity when they emphasize the limited goal of saving lives rather than advocating for the broader rights of refugees and migrants or any particular durable solution.[145] The ultimate question of the rights of refugees and migrants, however, cannot be avoided completely, and private humanitarian aid in the absence of government cooperation is incomplete or ineffective. Thus, even a seemingly benign form of aid—like saving lives in the ocean—carries risks for private humanitarian actors.[146]

D. Entry

Smugglers have a pivotal role at the point of entry into an asylum state. Anecdotes abound of Syrians who have hired smugglers to procure fake passports to facilitate travel to northern EU asylum states.[147] In one harrowing instance, a smuggler hid seventy-one refugees and migrants in a truck to transport them through Hungary to Austria, but all seventy-one refugees and migrants suffocated, their bodies discovered in Austria too late.[148] Smugglers also routinely pack sixty people in a boat designed to carry a dozen.[149]

---

[142] GALLAGHER & DAVID, *supra* note 84, at 460.

[143] These are not theoretical dilemmas. In 2001, the M/V Tampa, a Norwegian commercial vessel, sought to land at an Australian port after rescuing 438 asylum seekers. The Australian government refused to permit entry to Australian waters and a crisis ensued. In August 2001, at the request of Australian authorities, the Tampa saved 433 people from a sinking vessel off the coast of Indonesia. Initially headed to Indonesia, the captain was forced to change course for Christmas Island after several migrants threatened to commit suicide if the ship continued on to Indonesia. Despite their knowledge of the urgent medical situation on board, Australian authorities denied the Tampa's entry into Australian territorial waters. After two days, during which Australian authorities threatened the Tampa's captain with people-smuggling charges upon unauthorized entrance, the ship entered Australian territorial waters without permission. The Australian military boarded the vessel and provided medical supplies, but denied disembarkation. Five days later, the migrants were moved to an Australian military vessel and the crew of the Tampa was charged with people-smuggling. *Id.* at 6.

[144] *See* Martin, *supra* note 136, at 72.

[145] *See Solutions*, U.N. HIGH COMM'R REFUGEES, http://www.unhcr.org/pages/49c3646cf8.html [https://perma.cc/WGA9-8U95].

[146] *See* Basaran, *supra* note 138, at 384 (discussing "blurr[ed] boundaries between criminal and humanitarian conduct" under international agreements).

[147] *See infra* notes 148–151 and accompanying text.

[148] *See* David D. Kirkpatrick, *Migrant Suffocations in Truck Near Hungary Reveal Tactics of Smugglers*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/20/world/europe/migrant-

Some of these private actors seek profits. With refugees and migrants willing to pay $1,200 for transport of an adult and $600 for each child, smugglers can collectively amass millions of dollars a day, unmonitored.[150] Syrian refugees and migrants reputedly are more selective with respect to smugglers, as they have more money and are willing to pay higher prices for more acceptable conditions.[151] Thus, the huge flight out of Syria has proved particularly profitable for smugglers.

In contrast, some private actors serve refugees and migrants purely out of humanitarian concern, or even out of a sense of solidarity. For example, Hungarians have volunteered to drive refugees and migrants to the Austrian border from locations in southern Hungary bordering Serbia and Croatia, despite new laws that criminalize such aid.[152] Unlike smugglers or traffickers, these individuals offer to transport refugees and migrants for free, even though free assistance is often illegal.[153] At least one such volunteer indicated that his own family members were Jewish refugees, and he felt he could not ignore the plight of Syrians escaping both Daesh and Assad.[154] The law, however, restricts many forms of private aid at this juncture without regard to humanitarian motives.

E. Aid in the Asylum State

The final place of aid in the continuum is the asylum state itself, where private actors administer aid to asylum seekers who have effectuated an (often surreptitious) entry.[155] For example, private individuals might house refugee families, in keeping with the Pope's exhortation.[156] Or they might provide food, language training, or other services to refugee families.[157] In Germany,

---

suffocations-in-truck-near-hungary-reveal-tactics-of-smugglers.html?_r=0 [https://perma.cc/K4R5-L49J]. Recently, and in a similar vein, nine migrants died from severe heat exposure and asphyxiation after being left in a locked tractor-trailer for twelve hours in Texas. David Montgomery et al., *Journey Fatal for 9 Migrants Found in Truck in a San Antonio Parking Lot*, N.Y. TIMES (July 23, 2017), https://www.nytimes.com/2017/07/23/us/san-antonio-truck-walmart-trafficking.html?mcubz=0 [https://perma.cc/4ZAT-3BHR].

[149] Videmšek, *supra* note 78.

[150] *Id.*

[151] *See id.*

[152] Lauren Frayer, *Risking Arrest, Thousands of Hungarians Offer Help to Refugees*, NPR (Sept. 29, 2015), http://www.npr.org/sections/parallels/2015/09/29/444447532/risking-arrest-thousands-of-hungarians-offer-help-to-refugees/ [https://perma.cc/YY5D-RH87].

[153] *Id.*

[154] *Id.*

[155] Typically, asylum seekers must enter an asylum state "irregularly" because no country currently has an asylum visa. *See* Ray, *supra* note 48, at 1246.

[156] *See* Faiola & Birnbaum, *supra* note 54.

[157] Lucy Westcott, *Iceland, U.S. Facebook Groups See Outpouring of Humanity for Syrian Refugees*, NEWSWEEK (Sept. 5, 2015), http://www.newsweek.com/iceland-and-us-facebook-groups-see-outpouring-humanity-syrian-refugees-368934 [https://perma.cc/NQ2S-WKJ4] (describing outpouring

private individuals seek to assist refugees in a variety of ways. An elderly woman wished to read to refugee children, others donated toys at the church, and students at the University of Siegen organized daily language classes for asylum seekers staying in the university gymnasium pending the processing of their applications.[158] In the United States, private humanitarian aid within the asylum state has occurred primarily in the Southwest, where asylum seekers enter from Mexico. For example, a humanitarian group, Humane Borders, left water jugs out along migrant trails in an effort to stem the tide of border-crossing deaths in the southern Arizona desert.[159] U.S. NGOs, however, have also taken the lead in finding novel approaches to linking "ordinary individuals" to asylum seekers in need outside of U.S. borders. For example, a U.S. mother, seeing footage of Syrian parents holding their toddlers on long treks from Greece to northern Europe, concluded that these parents could benefit from baby carriers to lessen their load and free their hands.[160] Within the first month of operation, her organization received over 3,000 baby carriers to donate.[161]

Private humanitarian aid may also take the form of assisting asylum seekers on a journey *within* the asylum state, and this may violate laws regarding the transport of unauthorized migrants within the jurisdiction.[162] Groups like Samaritans and No More Deaths transported migrants to medical clinics when necessary, such as when migrants had fainted or had bloody limbs and were unable to walk.[163] The NGOs contend these individuals would have died in the desert absent aid.[164] The federal government responded, however, by prosecuting these NGO volunteers for transporting unlawful migrants in violation of federal anti-smuggling law.[165]

The American Sanctuary Movement ("Sanctuary Movement") is the quintessential example of private aid in the asylum state that the government considered illegal.[166] In the 1980s and 1990s, countless religious humanitarian

---

of goodwill toward refugees). An Icelandic politics professor acknowledges, however, that "support on Facebook doesn't amount to much." *Id.*

[158] Martin Knobbe et al., *supra* note 55.

[159] Maria Lorena Cook, *"Humanitarian Aid Is Never a Crime": Humanitarianism and Illegality in Migrant Advocacy*, 45 L. & SOC'Y REV. 561, 561–62 (2011). U.S. Fish & Wildlife fined them for littering. *Id. But see* United States v. Millis, 621 F.3d 914, 918 (9th Cir. 2010) (reversing conviction after finding "the term 'garbage' within the context of the regulation . . . sufficiently ambiguous" to apply the rule of lenity).

[160] CARRY THE FUTURE, http://www.carrythefuture.org/ [https://perma.cc/KPL4-7TQV].

[161] *Who We Are*, CARRY THE FUTURE, http://www.carrythefuture.org/whoweare/ [https://perma.cc/YA2F-3JY4].

[162] *See* 8 U.S.C. § 1324(a)(1)(A)(ii) (2012) (prohibiting transport of aliens insofar as transport furthers their smuggling).

[163] Cook, *supra* note 159, at 574.

[164] *See id.*

[165] *Id.* at 562.

[166] Loken & Babino, *supra* note 38, at 123.

workers assisted Central Americans fleeing violence in their home countries.[167] Sanctuary workers believed they had a moral responsibility to aid asylum seekers because many sanctuary workers subscribed to religious traditions, such as liberation theology, that require adherents to actively combat social injustice.[168] Some sanctuary workers provided aid in transporting refugees to other places in the United States or Canada. Others merely provided a place to stay so that the particular asylum seekers they encountered would not become homeless.[169]

Founded by Jim Corbett, a Quaker rancher in Arizona, the Sanctuary Movement arose out of a belief that U.S. policies of funding and training brutal regimes in Central America contributed to the instability and violence that drove asylum seekers to U.S. territory in the first place.[170] Sanctuary workers believed not only that U.S. policy drove mass migrations, but that the U.S. government's treatment of asylum seekers who had arrived in the U.S. violated international human rights law.[171] Specifically, many Central Americans sought asylum, but U.S. asylum law recognized only a small proportion of claims filed.[172] This followed principally from U.S. asylum law's requirement that persecution occur on account of the asylum seeker's political opinion or other protected characteristics rather than as a result of generalized violence.[173] Cor-

---

[167] MARÍA CRISTINA GARCÍA, SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA 98 (2006) (describing origins of the Sanctuary Movement in America).

[168] IGNATIUS BAU, THIS GROUND IS HOLY 14 (1985) (noting the impact of liberation theology on the world's churches); Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 L. & SOC. INQUIRY 63, 67 (2001).

[169] *See* Loken & Babino, *supra* note 38, at 129.

[170] *Id.* at 130; *see also* Coutin, *supra* note 168, at 68 (noting "solidarity workers" believed Salvadoran and Guatemalan migrants were "political refugees" because of the repressive governments in their home countries).

[171] GARCÍA, *supra* note 167, at 98 (describing the Sanctuary Movement as a "grassroots resistance movement that protested US foreign policy through the harboring and transporting of refugees, in violation of immigration law"); *see also id.* at 100 (noting that some "sanctuary workers" aimed to conceal refugees in anticipation of a shift in U.S. foreign policy, or until the situation in the refugees' home countries improved and they could return safely).

[172] *Id.* at 85 (describing "small fraction" of successful asylum applicants among Central Americans who fled their home countries to Mexico or the United States); *id.* at 87 (noting that most Central American migrants were not eligible for asylum in the United States after the 1980 Refugee Act was passed).

[173] *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2012) (defining "refugee"); *see also* Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569, 573 (2011) (discussing asylum law's purpose of addressing exceptional cases in which a person flees their country of citizenship because the country failed to provide and protect basic human rights, and noting that these "exceptional" cases have "become all too common"). Corbett and others, however, maintained that Central American asylum seekers were refugees under the 1949 Geneva Convention because they were driven from their homes due to war. *See* Jim Corbett, *Sanctuary, Basic Rights, and Humanity's Fault Lines: A Personal Essay*, 5 WEBER

bett and others believed that Central American refugees may not have been individually targeted in all instances, but that they were entitled to protection under the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War.[174] Although the U.S. government dismissed Central American asylum seekers as "economic migrants," sanctuary workers regarded them as Geneva Convention "refugees."[175]

According to sanctuary workers, U.S. government officials were the ones violating international human rights law. The sanctuary workers' decision to follow international human rights law and violate U.S. government policy was the *truly* legal path forward.[176] Many sanctuary workers sought to transport Central American migrants to Canada, where the migrants would be more likely to win asylum.[177] Although individuals and NGOs openly defied federal law in the name of a higher law—international human rights law, or "God's law"—they also sought to change the law, or the prevailing interpretation of it, to make their actions legal.[178] Although some participants in the Sanctuary Movement believed they were opposing unjust laws as a form of "civil disobedience," others believed their humanitarian work was a form of "civil initiative," or more foundational social justice work. [179] Corbett, in particular, disavowed the label "civil disobedience," noting that sanctuary was premised on "civil initiative."[180] The concept connotes the preservation of civil society, not the pursuit of revolution; the use and adherence to law, not the resort to violence; direct humanitarian service, not political agitation and reform.[181]

The federal government, however, dismissed the Sanctuary Movement as the work of individuals and organizations that believed they were above the

---

STUD. 1 (1988), https://weberstudies.weber.edu/archive/archive%20A%20%20Vol.%201-10.3/Vol.%205.1/5.1Corbet.htm [https://perma.cc/FA29-393B].

[174] Corbett, *supra* note 173; *see also Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380 [https://perma.cc/7ZPD-4H6F].

[175] Corbett, *supra* note 173.

[176] *See id.*

[177] *See id.*

[178] Cook, *supra* note 159, at 575–76.

[179] GARCÍA, *supra* note 167, at 102. One scholar has described civil disobedience as "public violation of a bad law" and civil initiative as centering around "the structural processes that condone and prolong injustice by attempting to protect the victims of governmental violations of fundamental rights." ILSUP AHN, RELIGIOUS ETHICS AND MIGRATION: DOING JUSTICE TO UNDOCUMENTED WORKERS 55 (2014). This scholar further noted that civil disobedience is understood within a liability framework, while civil initiative occurs within a "social connectedness" framework. *Id.*

[180] *See* Corbett, *supra* note 173.

[181] Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 970–73 (1995) (describing characteristics of civil initiative and contrasting them to civil disobedience).

law.[182] It responded by prosecuting sanctuary workers for "harboring" or "transporting" unauthorized migrants.[183] The first prosecutions of sanctuary workers in the early 1980s resulted from undercover work by the former Immigration and Naturalization Service in what was known as "Operation Sojourner."[184] The operation deployed investigators and paid informants who posed as church volunteers.[185] The informants gathered one hundred tape recordings over ten months, culminating in the Justice Department decision to charge sixteen sanctuary workers,[186] including Corbett and Pastor John Fife, often regarded as another founder of the movement.[187]

As these prosecutions progressed in federal court, the government and defenders of the sanctuary workers contested the legality of the movement's work. Defenders claimed that the Refugee Convention, incorporated into U.S. law via the 1980 Refugee Act, implicitly authorized private humanitarian aid to refugees, regardless of their unauthorized entry into the United States.[188] They further argued that sanctuary workers had First Amendment rights to Free Exercise of Religion that authorized their humanitarian acts toward refugees.[189] These defenses largely failed, and courts concluded that providing food, shelter, and comfort to unauthorized migrants, including individuals whom the government might ultimately recognize as refugees, violated the anti-smuggling statute.[190]

A final and more fantastical example of aid in the asylum state is the proposal to create a new country to house refugees. Naguib Sawiris, an Egyptian billionaire, was so moved by Alan Kurdi's death that he contacted the owners of two private islands near Greece with the plan to purchase one of the islands to house refugees.[191] Committing $200 million to the project, Sawiris proposed buying an island to avoid creating competition between refugees and "lo-

---

[182] *See* GARCÍA, *supra* note 167, at 103, 106 (describing the Reagan administration's Justice Department memorandum warning "clergy and church workers [that they] were not exempt from prosecution," and Operation Sojourner, through which the FBI infiltrated church sanctuary sites, leading to the arrest of over eighty individuals, "including refugees and church workers who had transported them," for "conspiracy and transporting/harboring illegal aliens").

[183] *See* Loken & Babino, *supra* note 38, at 129–30.

[184] Helton, *supra* note 32, at 556–57.

[185] *Id.*

[186] GARCÍA, *supra* note 167, at 106.

[187] *Id.*

[188] Helton, *supra* note 32, at 561. Article 31 of the Convention Relation to the Status of Refugees also prohibits parties from penalizing refugees for their irregular entry. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137.

[189] Helton, *supra* note 32, at 576–78.

[190] *See id.*; *see also infra* notes 246–258 and accompanying text.

[191] Nolan Feeney, *Egyptian Billionaire Contacts Owners to Buy an Island for Refugees*, TIME (Sept. 16, 2015), http://time.com/4036044/egyptian-billionaire-refugees-greek-island/ [http://perma.cc/NC4N-RT65].

cals."[192] Similarly, businessman Jason Buzi proposed creating a "refugee nation," and experts have taken the idea seriously.[193]

All of these examples of private aid are voluntary, charitable projects that advance humanitarian ends. As discussed above, however, the law frequently outlaws private humanitarian aid, especially at points of rescue, entry into the asylum state, and assistance therein, because powerful asylum states' interests in sovereignty peak at these points in an asylum seeker's journey.

II. STATES' INTERESTS IN CRIMINALIZING PRIVATE HUMANITARIAN AID TO ASYLUM SEEKERS

All of the instances of private humanitarian aid described in Part I illustrate the groundswell of goodwill toward asylum seekers,[194] but the law frequently frustrates this intense desire to provide humanitarian assistance. For example, U.S. law criminalizes the transport of smuggled aliens, which might encompass acts as innocuous as giving a ride within the country to anyone without a valid visa.[195] Even acts of rescue on the high seas, mandated under international maritime law, might result in prosecution if coupled with transport to an asylum state's territory.[196] What interests motivate laws criminalizing private humanitarian acts to aid asylum seekers? This Part analyzes the principal interests underlying legal restrictions on private humanitarian aid. It identifies three principal interests: national security, crime control, and economic preservation.[197] It further

---

[192] Hannah Roberts, *Will One of These Be 'Aylan's Island'? As Egyptian Billionaire Refuses to Name Greek Isle He Plans to Turn into Home for 200,000 Refugees, Experts Reveal Most Likely Ones*, DAILY MAIL (Sept. 25, 2015), http://www.dailymail.co.uk/news/article-3247948/Will-one-Aylan-s-Island-Egyptian-billionaire-refuses-Greek-island-plans-turn-home-200-000-refugees-experts-reveal-likely-ones.html [http://perma.cc/8AL3-5H3B].

[193] Alexander Betts, *Is Creating a New Nation for the World's Refugees a Good Idea?*, THE GUARDIAN (Aug. 4, 2015), http://www.theguardian.com/global-development-professionals-network/2015/aug/04/refugee-nation-migration-jason-buzi [https://perma.cc/S8GB-TJRT] (describing advantages and disadvantages of Buzi's proposal).

[194] Animus toward refugees also rose following the Paris attacks, but analyzing its role in migration policy is beyond the scope of this Article.

[195] 8 U.S.C. § 1324 (2012); United States v. Barajas-Chavez, 162 F.3d 1285, 1289 (10th Cir., 1999); Frayer, *supra* note 152.

[196] *See* Stefan Steinberg, *Prosecuted for Saving the Lives of Refugees*, WORLD SOCIALIST WEBSITE (Oct. 9, 2009), https://www.wsws.org/en/articles/2009/10/cape-o09.html [https://perma.cc/45E2-HM4M].

[197] *See* Alexander Betts, *The Normative Terrain of the Global Refugee Regime*, ETHICS & INT'L AFF. (Oct. 7, 2015), http://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/ [https://perma.cc/4BTN-YXVJ] (describing states' perception of "economic, social, and political costs" of accepting refugees). Interests such as social cohesion and political stability also influence a state's desire to restrict migration, but they are not specifically interests that lead to restrictions on private aid to refugees. For example, smuggling is not outlawed because the government fears that people will import refugees of a minority culture who will then have trouble integrating into mainstream culture. It is, however, outlawed due to fears of terrorism, crime, and economic consequences.

considers whether private humanitarian aid serves to "pull" more refugees and migrants into embarking on perilous journeys by creating a hope or expectation of rescue, and whether private humanitarian aid crowds out government resources devoted to humanitarian assistance.

A. Security- and Money-Based Interests

Criminal laws in the United States, Canada, and the European Union, applicable to private humanitarian actors assisting asylum seekers, reveal concerns about terrorism, crime, and economic preservation, both in terms of jobs and public spending. These considerations underlie government policies to exclude unauthorized migrants. These laws typically prohibit any person from assisting an unauthorized migrant in entering the territory of the asylum state. These laws also prohibit individuals from transporting, harboring, concealing, or shielding from detection any unauthorized migrant who has already entered the territory.[198] These are essentially the same considerations that drive the criminal prohibitions on unauthorized entry into these states.

1. Asylum Seekers as Threats to National Security and Sources of Crime

The first and most significant interest in justifying limits on private aid to asylum seekers is national security.[199] U.S. Presidents and Congress have used the term "national security" to refer to a range of concepts, such as the American constitutional system of government, U.S. economic interests, and the American "way of life."[200] Immigration law defines the term as "the national defense, foreign relations, or economic interests of the United States."[201] One of the principal functions of government under U.S. immigration law today is to screen incoming refugees and migrants for preferred characteristics.[202] With this premise, accepting open borders or migration based on the private choice of current citizens or residents would render a nation vulnerable to security threats because such scenarios bypass the government screening process.[203]

---

[198] *See infra* notes 215–262 and accompanying text.

[199] *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1830 (2007).

[200] Arthur Rizer & Sheri R. Glaser, *Breach: The National Security Implications of Human Trafficking*, 17 WIDENER L. REV. 69, 73–75 (2011).

[201] *Id.* at 74.

[202] *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824–25 (2007).

[203] *See id.*

Unscreened refugees and migrants entering a host state might commit an act of terrorism that harms people or the asylum state's interests.[204]

Refugees are often the lightning rod for these national security concerns. For example, Paris suffered three heinous terrorist attacks in one evening, all perpetrated by Daesh.[205] Although none of the attackers was a refugee, politicians characterized the attack as the product of an overly generous refugee policy.[206] This, in turn, caused dozens of American governors to call for curtailing the United States' refugee resettlement program, at least with respect to Syrians.[207] The governor of Texas even directed NGOs doing resettlement work to cease all aid to Syrian refugees.[208] Although these state-level restrictions raise unique legal issues and are likely unconstitutional,[209] they reflect the general approach of banning private humanitarian aid to refugees in the name of national security.

Crime control is a related concern, and scholars have noted the frequent conflation of immigration enforcement, national security, and crime control.[210] Politicians and public figures have frequently linked higher rates of unauthorized immigration with higher rates of crime, and an individual's unauthorized migration with a greater propensity for law breaking generally. These assertions lack empirical support.[211] Border control agents, however, have reported significant rates of illegal entry by gang members, thus stoking fears of the "common criminal who enter[s] the United States illegally," regarding the United States "'as fertile ground for violence.'"[212] Politicians have singled out refugees specifically as security threats.[213] To the extent that private humanitar-

---

[204] *See, e.g.*, Andrea Shalal, *Syrian Refugee in Germany Arrested After Killing Woman in Machete Attack*, REUTERS (July 25, 2016), http://www.reuters.com/article/us-europe-attacks-germany-migrant-idUSKCN1040SF [https://perma.cc/3VR9-4N7T].

[205] *Paris Attacks: What Happened on the Night*, BBC (Dec. 9, 2015), http://www.bbc.com/news/world-europe-34818994 [https://perma.cc/X5MS-6L7J].

[206] Anton Troianovski & Marcus Walker, *Paris Terror Attacks Transform Debate over Europe's Migration Crisis*, WALL ST. J., Nov. 16, 2015, at A10.

[207] *See* Arnie Seipel, *More Than 30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees*, NPR (Nov. 17, 2015), http://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees [https://perma.cc/6ET9-4ZZ].

[208] Lauren Talarico, *Nonprofits Told Not to Help Syrian Refugees,* KHOU (Nov. 20, 2015), http://www.khou.com/story/news/local/2015/11/20/nonprofits-asked-not-to-help-syrian-refugees/76134346/ [https://perma.cc/Y5PJ-YCR3].

[209] Andre Segura & Cody Wofsy, *Governors' Threats to Exclude Syrian Refugees Are Not Only Fear Mongering—They're Unconstitutional*, AM. CIVIL LIBERTIES UNION (Nov. 18, 2015), https://www.aclu.org/blog/speak-freely/governors-threats-exclude-syrian-refugees-are-not-only-fear-mongering-theyre [https://perma.cc/DP9R-R5L].

[210] Chacón, *supra* note 199, at 1831.

[211] *Id.* at 1839–40.

[212] Rizer & Glaser, *supra* note 200, at 83.

[213] Jenna Johnson & Sean Sullivan, *Why Trump Warned About Somali Refugees—And Why It Could Backfire* (Nov. 7, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/11/07/

ian aid to asylum seekers bypasses the government screening process prior to their arrival, it stands to frustrate security-related objectives.[214]

a. U.S. Law

Security-related concerns drive some legal restrictions on private humanitarian aid. For example, federal law proscribes the knowing provision of "material support or resources to designated foreign terrorist organizations."[215] Donors have been prosecuted for supporting nonprofits that are designated Foreign Terrorist Organizations ("FTOs").[216] Thus, even aid in the country of origin, which does not implicate irregular migration and has the goal of keeping displaced persons at home, may violate criminal prohibitions, in addition to incurring the inherent safety risks discussed in Part I.

Federal criminal law reflects concerns for national security and crime control, as well as protection from "economic migrants." Federal law prohibits human trafficking, which Congress has characterized as a "contemporary manifestation of slavery."[217] The Trafficking Victims Protection Act of 2000 ("TVPA") criminalizes human trafficking and seeks to protect victims of trafficking.[218] Specifically, the portion of the TVPA codified in 18 U.S.C. section 1590 criminalizes the harboring or transport of "any person for labor or services" in violation of the statute.[219] Victims and perpetrators of trafficking are often irregular migrants.[220] Commentators have posited that irregular migration itself threatens national security. Thus, to the extent that anti-trafficking laws attempt to curb irregular migration, they protect interests in national security and crime control.[221]

Scholars have argued that this conflation of irregular migration with criminality has imposed a variety of costs on migrants, including asylum seekers

---

why-trump-warned-about-somali-refugees-and-why-it-could-backfire/?utm_term=.b6d2ac19b24f [https://perma.cc/GV38-QVGN].

[214] *See* Cox & Posner, *supra* note 202, at 812 (discussing immigration law's screening function).

[215] 18 U.S.C. § 2339B (2012); *see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1281 (2016) (discussing constitutionality of section 2339B).

[216] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010) (upholding federal law prohibiting material support to FTOs).

[217] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101).

[218] *See* Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466; *Current Federal Laws*, POLARIS, https://polarisproject.org/current-federal-laws [https://perma.cc/7R4U-8U9M].

[219] 18 U.S.C. § 1590(a).

[220] Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1629 (2010).

[221] Rizer & Glaser, *supra* note 200, at 82–85 (discussing the premise that any illegal entry into the United States triggers national security concerns).

and other vulnerable migrants.[222] The view that irregular migration itself is a crime that threatens U.S. interests, for example, has led U.S. anti-trafficking law to emphasize the prosecution of "bad actors" at the expense of a more complete, accurate understanding of the causes of trafficking and the nature of markets that traffickers supply.[223] By constructing trafficking as a problem "that is the sole responsibility of noncitizens and outsiders," U.S. anti-trafficking discourse further criminalizes trafficked migrants, who themselves are often undocumented.[224] Thus, although the law views unauthorized migration as a source of criminal behavior in the asylum state,[225] undocumented status itself drives this perception of criminality.[226]

Federal criminal law also prohibits "alien smuggling, domestic transportation of unauthorized aliens, [and] concealing or harboring unauthorized aliens," among other offenses.[227] Commentators have indicated that the anti-smuggling statute was designed simply to exclude or remove unauthorized aliens from the United States.[228] The statute creating criminal penalties for these offenses was originally passed as part of the Immigration and Nationality Act[229] and was primarily concerned with regulating people who interacted with single Mexican men lacking familial ties to the United States.[230] Congress struggled to define the crime of "harboring" and assumed that, much like the lawmakers of other countries, decisionmakers would be able to evaluate each situation and "assign culpability based on [that] assessment."[231] Congress passed the final version of the bill without defining "harboring," and questions remained about whether and under what circumstances the knowing provision of assistance to an unlawful alien would be prohibited.[232] This failure to define "harboring" led federal courts to interpret the statute in different ways. Initial-

---

[222] *See* Chacón, *supra* note 199, at 1835–39.

[223] Chacón, *supra* note 220, at 1628, 1631–32.

[224] *Id.* at 1634.

[225] *See* Chacón, *supra* note 199, at 1839–40.

[226] Chacón, *supra* note 220, at 1627–28.

[227] 8 U.S.C. § 1324(a) (2012); U.S. DEP'T JUST., CRIMINAL RESOURCE MANUAL 1901–1999 § 1907, http://www.justice.gov/usam/criminal-resource-manual-1907-title-8-usc-1324a-offenses [https://perma.cc/B8HH-25NW].

[228] *See* Matthew F. Leitman & Paul D. Hudson, *Defending Employers When ICE Puts the Heat On*, CHAMPION MAG., Jan.–Feb. 2012, at 48 (citing United States v. Acosta de Evans, 531 F. 2d 428 (9th Cir. 1976)).

[229] Bau, *supra* note 168, at 93–94 (describing Congress's decision to adopt criminal penalties for harboring and related offenses in 1952 after the Supreme Court found earlier penalties for those offenses ambiguous).

[230] Jain, *supra* note 30, at 160.

[231] *Id.* at 165.

[232] *Id.* Canada's anti-smuggling law applied with similar breadth, leading the Canadian Supreme Court in 2015 to strike down the law due to its failure to exempt humanitarian actors. The court noted that Parliament never intended for the law to apply to such actors in the first place. *See Appulonappa*, 3 S.C.R. ¶¶ 39, 69.

ly, courts focused on defendants' intention to conceal aliens from immigration authorities, but later courts expanded the statute to cover any conduct "substantially facilitating" an alien's unlawful presence within the territory.[233]

This expansive interpretation effectively criminalizes many everyday interactions with unauthorized migrants, such as sharing meals or offering a place to stay, with no exception for humanitarian assistance.[234] For example, the statute has ensnared U.S. NGOs providing humanitarian aid near the border with Mexico. Volunteers with a group called No More Deaths were prosecuted for transporting migrants in need of medical care from the Arizona desert to hospitals or clinics in Tucson.[235] By performing medical evacuations, the volunteers had technically "transport[ed] aliens" in violation of federal law.[236] Although the charges were ultimately dropped, No More Deaths continues to face Customs and Border Protection's scrutiny, culminating in a 2017 raid of a desert campsite medical clinic.[237] American sanctuary workers faced a similar fate decades ago.[238] Thus, anti-smuggling laws have criminalized acts of private humanitarian aid.[239]

b. International, EU, and Canadian Law

Several international instruments also address smuggling and trafficking. Although they frame unlawful migration as a matter of international criminal law, they explicitly recognize an exception for humanitarian acts. The United Nations Convention against Transnational Organized Crime, drafted in 2000, is the foundational instrument.[240] Its *Protocol Against the Smuggling of Migrants by Land, Sea, and Air* defines the "smuggling of migrants" to involve the "procurement . . . of the illegal entry" of a person, who is neither a citizen nor a permanent resident of the country entered, for direct or indirect "financial or

---

[233] Jain, *supra* note 30, at 166, 169.

[234] *Id.* at 176 (discussing court's observation, in a harboring case, that "a host of commonplace interactions could arguably help an unauthorized alien remain in the United States").

[235] Cook, *supra* note 159, at 562.

[236] *Id.*

[237] *Id.* at 574–75; Eric Boodman, *After Trump's Immigration Crackdown, a Desert Clinic Tries to Save Lives Without Breaking the Law*, STAT NEWS (July 6, 2017), https://www.statnews.com/2017/07/06/immigration-desert-clinic/ [https://perma.cc/K9DP-JSTX] (describing the Trump Administration's aggressive stance toward NGOs providing humanitarian aid to migrants in the southwest United States).

[238] GARCÍA, *supra* note 167, at 106.

[239] *See* Jain, *supra* note 30, at 171–74. State governments have led more recent efforts to outlaw sanctuary. *See* Campbell, *supra* note 38, at 81. Such criminalization has a much longer history. *See* GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–43 (2003) (describing state and federal efforts to limit migration of criminals, the sick, the poor, and slaves in the nineteenth century).

[240] G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

other material benefit."[241] By limiting the definition to smuggling for "financial or . . . material benefit," the Migrant Smuggling Protocol expressly excludes humanitarian smuggling from the ambit of criminal law.[242]

In light of these international instruments, the European Union adopted several measures regarding smuggling. In 2002, the European Union adopted a directive on the "facilitation of unauthori[z]ed entry, transit and residence" and a Framework Decision on strengthening criminal laws on the same.[243] The Facilitation Directive applies broadly to "any person who intentionally assists [a non-citizen] . . . to enter, or transit across, the territory of a Member State" in breach of that state's migration laws.[244] Although the Framework Decision contains a "savings clause" to avoid prejudicing the rights of refugees and asylum seekers under international law, it does not define smuggling as narrowly as the Migrant Smuggling Protocol.[245] As such, the Facilitation Directive and Framework Decision contain an expansive definition of smuggling.

The European Union's anti-smuggling laws have complicated the work of European NGOs saving lives on the Mediterranean. NGOs such as Sea-Watch note the legal uncertainty created by these laws, whereby humanitarian organizations can become the targets of prosecution for assisting refugees and migrants in distress if those refugees and migrants are brought to shore.[246] Back

---

[241] Migrant Smuggling Protocol, *supra* note 21, at art. 3.

[242] Abdelnaser Aljehani, *The Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol*, 79 J. CRIM. L. 122, 127 (2015). Importantly, this means only that the Migrant Smuggling Protocol imposes no obligations on states to criminalize humanitarian smuggling, but it does not preclude them from doing so.

[243] GALLAGHER & DAVID, *supra* note 84, at 91; *see* Directive 2002/90/EC, of the Council of the European Union of 28 November 2002 on Defining the Facilitation of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328/17) [hereinafter Facilitation Directive] (defining punishable offenses of entry and transit without reference to financial or material benefit); Framework Decision 2002/946/JHA, of the Council of the European Union of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence, 2002 O.J. (L 328/1) [hereinafter Framework Decision] (same).

[244] Facilitation Directive, *supra* note 243. Article 1.2 of the Facilitation Directive contains an optional clause permitting states to decriminalize humanitarian facilitation of illegal entry and transit, but most states have chosen to adopt the broad definition of entry and transit in Article 1.1(a), without an exception for humanitarian assistance. *Id.* at art. 1.2; *see* EUR. UNION AGENCY FUNDAMENTAL RTS., CRIMINALISATION OF MIGRANTS IN AN IRREGULAR SITUATION AND OF PERSONS ENGAGING WITH THEM 9–10 (Mar. 2014), http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them [https://perma.cc/9YCC-QN72] (noting that most EU states do not require proof of financial gain to punish facilitation of entry, but rather view financial gain as an aggravating factor). Both the Facilitation Directive and the Framework Decision require states to criminalize facilitation of residence only when done for "financial gain," but states remain free to criminalize facilitation of residence without a financial gain requirement.

[245] GALLAGHER & DAVID, *supra* note 84, at 91; *see* Framework Decision, *supra* note 243, at art. 6 (savings clause).

[246] *See* GALLAGHER & DAVID, *supra* note 84, at 91–92; *Anti-Smuggling Legislation and Migrant Rights*, HUM. RTS. AT SEA (May 26, 2015), https://hras-seawatch.org/2015/05/26/anti-smuggling-legislation-and-migrant-rights/ [https://perma.cc/Q4QS-9BNR].

in 2004, Italy prosecuted Cap Anamur, an NGO that docked at an Italian port without authorization.[247] The ship carried refugees and migrants from Ghana and Nigeria who had been rescued at sea.[248] In executing the duty to rescue under international maritime law, the captain of Cap Anamur sought to bring the refugees and migrants to a "safe place."[249] No such safe place, however, consented to the docking.[250] After a two-week standoff with Italian authorities, the captain docked the ship without authorization.[251] Italy prosecuted the rescuers with the crime of "aiding illegal migration."[252] Five years later, the defendants were acquitted.[253] The court ruled that the master of the ship could not be *liable* for rescue because international law *mandated* such rescue.[254] Moreover, the master of the ship was not liable for bringing the refugees and migrants to the Italian coast without authorization because the duty to rescue, under international maritime law, includes the transport of those in danger to a "place of safety."[255] Scholars have argued that this "arguably extends the mantle of what constitutes a 'rescue operation' up until the point of disembarkation, whether this is on to land or some other suitable facility."[256] On this view, merely holding rescued persons on the rescuer's vessel does not discharge the duty owed.[257] Although scholars contend that a finding of criminal liability under such circumstances would result in "manifest injustice," governments continue to regard with suspicion the transport of rescued refugees and migrants to their territory for processing.[258]

For many years, Canadian law echoed these themes, and historically, the Canadian government has responded to asylum seekers' unauthorized travel by prosecuting the private actors who organized the journey to Canada, whether for

---

[247] GALLAGHER & DAVID, *supra* note 84, at 462.

[248] Rupert Colville, *Handling of Cap Anamur Asylum Claims Was Flawed, Says UNHCR*, U.N. HIGH COMM'R REFUGEES (July 23, 2004), http://www.unhcr.org/4101252e4.html [https://perma.cc/MWM3-WJS8] (noting that refugees and migrants were ultimately deported to Ghana and Nigeria).

[249] *See id.*

[250] GALLAGHER & DAVID, *supra* note 84, at 462.

[251] Colville, *supra* note 248.

[252] GALLAGHER & DAVID, *supra* note 84, at 462. More recently, Italy acquitted an activist who assisted migrants in crossing the French border. *See Italy Acquits Activist Who Helped Migrants Cross French Border*, THE LOCAL (Apr. 27, 2017), https://www.thelocal.it/20170427/italy-acquits-activist-who-helped-migrants-cross-french-border [https://perma.cc/HZ3Z-NYCK].

[253] GALLAGHER & DAVID, *supra* note 84, at 462.

[254] *Id.*

[255] *Id.*

[256] *Id.* at 463.

[257] *See id.*

[258] *Id.* ("It remains to be seen whether the crew of a rescuing vessel that . . . disembarks rescued persons in breach of instructions from the coastal State, would be able to avoid prosecution under domestic laws by relying on their obligation to render humanitarian assistance.").

profit or not.[259] The government has also "aggressive[ly]" punished asylum seekers who assist fellow asylum seekers on the same unauthorized journeys as them by placing such individuals in inadmissibility proceedings.[260] These proceedings are likely to extinguish their asylum rights permanently.[261] Ultimately, anti-smuggling legislation in the major Western asylum states generally reveals little to no concern about potentially criminalizing private humanitarian aid.[262]

2. Asylum Seekers as Economic Threats

Concerns about the economic impact of asylum seekers on wages and jobs for existing residents of an asylum state also motivate the prosecution of humanitarian actors rendering aid to unauthorized migrants, even if those migrants are ultimately recognized as refugees.[263] Although some evidence indicates that refugees are, in fact, an economic asset—perhaps due to the "stimulative effect" on the economy—[264] the public frequently views them as a liability. [265] Restrictionists also imagine refugees requiring massive public support, stoking fears that refugees will strain public welfare budgets.[266] Scholars, how-

---

[259] Angus Grant, *The Smuggled and the Smuggler: Exploring the Distinctions Between Mutual Aid, Humanitarian Refugee Assistance and People Smuggling in Canadian Law*, REFLAW, http://www.reflaw.org/the-smuggled-and-the-smuggler-exploring-the-distinctions-between-mutual-aid-humanitarian-refugee-assistance-and-people-smuggling-in-canadian-law/ [https://perma.cc/4T7G-9USG].

[260] *Id.*

[261] *Id.*

[262] *See* GALLAGHER & DAVID, *supra* note 84, at 91 (noting that "[t]he Protocol sets out a straightforward definition of migrant smuggling that clearly includes a profit element," while "[t]he Framework Decision and Directive do not . . . take full account of the profit element"). *Compare* Migrant Smuggling Protocol, *supra* note 21, at art. 3 (defining criminal smuggling more narrowly as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry into a State party" of a person who is not a citizen or permanent resident of that state), *with* 18 U.S.C. § 1324 (2012) (defining without reference to financial or material benefit the punishable offenses of bringing in, transporting, concealing, harboring, or shielding from detection unauthorized migrants), *and* Framework Decision, *supra* note 243, at art. 1(1) (describing penalties without reference to "financial gain"), *and Appulonappa*, 3 S.C.R. ¶¶ 39, 69.

[263] *See* Helton, *supra* note 32, at 561 (discussing government's justification for prosecuting sanctuary workers based on "the need to maintain a strict immigration policy in order to stem the tide of undocumented aliens entering the United States as 'economic migrants'").

[264] Robert J. Shiller, *Economists on the Refugee Path*, PROJECT SYNDICATE (Jan. 19, 2016), https://www.project-syndicate.org/commentary/economic-research-contribution-to-asylum-reform-by-robert-j--shiller-2016-01?barrier=accessreg [https://perma.cc/6JTM-DNW4].

[265] *See id.* (noting that opponents of policies admitting refugees frequently argue that "the newcomers will take locals' jobs and drive down wages").

[266] *See* Didier Bigo, *Criminalization of "Migrants": The Side Effects of the Will to Control the Frontiers and the Sovereign Illusion*, in IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES 61, 63–64 (Barbara Bogusz et al. eds., 2004) ("Migration of the poor, and of the people obliged to flee from their own country—that is asylum seekers—is seen as the equivalent of an 'invasion,' based on the idea that people coming that way, want to settle definitely in the prosperous economies to benefit from the welfare state."); *see also* Jacob Poushter, *European Opinions of the Refugee Crisis In 5 Charts*, PEW RES. CTR. (Sept. 16,

ever, have noted that the tendency for refugees to become assets or liabilities to the economy depends largely on the policy framework in place in the asylum state.[267] For example, in Uganda, where the law grants refugees freedom of movement and freedom to work, refugees have contributed positively to the economy and country as a whole.[268] The notion that refugees are a monolithic group that either benefit or burden a society misses the point that a particular society's institutions facilitate or stifle refugees' capacity to contribute.[269]

As a historical matter, however, anxiety about the economic effects of irregular migration has been the most significant concern behind calls for stiffer penalties for alien smuggling and transport, as well as for the creation of new offenses for harboring and concealment under U.S. law.[270] President Harry S. Truman, in a message to Congress, highlighted the wage depressive effects of illegal immigration from Mexico, noting also the conditions for exploitation created when a group works under constant threat of deportation.[271] He called for stricter smuggling and transport prohibitions, as well as punishment for harboring or concealing immigrants who entered illegally.[272] Noting the difficulty of sealing the entire U.S. land border to unauthorized entry, he concluded that these criminal laws would serve as tools to locate and process unauthorized migrants and to discourage U.S. citizens from assisting their entry into the United States.[273] Unsurprisingly, the legislative history of the anti-smuggling law reveals not a single mention of "persecution" or the possible refugee status of any aliens who enter illegally, for the Refugee Convention had not yet been drafted, and Central America did not become the site of widespread political violence and turmoil until the 1980s.[274] Thus, the subsequent prosecution of NGOs for assisting asylum seekers was likely never contemplated when the statute was drafted and passed,[275] because Congress was principally concerned about regulating migrants seeking economic opportunity, not asylum.[276]

2016), http://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/ [https://perma.cc/9QRH-5T37].

[267] *See* Betts, *supra* note 197.

[268] *Id.*

[269] *See id.*

[270] *See* 97 CONG. REC. 82, 8144–46 (1951); *cf.* Jain, *supra* note 30, at 160 (describing lawmakers' view that irregular migrants seek economic opportunity).

[271] *See* 97 CONG. REC. 82, at 8144–46.

[272] *Id.*

[273] *Id.* at 8145.

[274] *Cf.* Jain, *supra* note 30, at 169 (discussing legislative history of statute).

[275] *Id.*; *see also* Bau, *supra* note 168, at 102 (noting that Congress later considered amending the statute to specifically require proof of commercial motivation).

[276] Jain, *supra* note 30, at 160, 164 ("The debates reflected lawmakers' consensus that unauthorized aliens came to the United States because of the lure of jobs.").

B. Policy-Based Concerns

Apart from concerns about national security, crime control, and economic preservation, there are other reasons to limit private humanitarian aid. First, private humanitarian aid simply may not be the right tool to address the massive humanitarian crisis facing refugees.[277] Only the government can lawfully establish criteria for screening, meaning that private actors can never fully substitute for the government in managing migration.[278] Further, humanitarian crises merit a coordinated, appropriately scaled response—another comparative advantage of government solutions.[279] This line of thinking presents a false choice, though, for none of these advantages of government action precludes meaningful private action in responding to the immediate human needs of refugees "in our midst," whether within our borders or just beyond them.[280] Relying completely on coordinated state action also creates a risk that many people will go without the help they need.[281]

Some may also worry that private humanitarian aid serves as a "pull factor," drawing asylum seekers into perilous journeys with the hope of rescue and a better life, and that private humanitarian aid will displace government aid, or create incentives for governments to reduce already-limited support for search and rescue operations.[282] These concerns require empirical analysis, but generally, they appear misplaced. First, asylum seekers and migrants continue to embark on dangerous journeys quite possibly because most people who undertake them actually survive. Out of 1 million migrants who crossed the Med-

---

[277] *Cf.* Oliver Cunningham, *The Humanitarian Aid Regime in the Republic of NGOs: The Fallacy of 'Building Back Better,'* 4 JOSEPH KORBEL J. ADV. INT'L STUD. 102, 113–14 (2012), http://www.du.edu/korbel/jais/journal/volume4/volume4_cunningham.pdf [https://perma.cc/VZ32-3XWP] (discussing merits of government-based alternative solutions to traditional humanitarian aid under certain circumstances).

[278] *See* Cox & Posner, *supra* note 202, at 812 (discussing substantive screening criteria under U.S. law and more general theoretical insights regarding *ex ante* and *ex post* screening performed by the government).

[279] Governments typically have more resources than private actors, including both money and the equipment necessary to carry out large-scale responses to international crises; governments are the only actors that have the power to alter international law; governments are responsible for determining their own immigration policies and procedures, whereas private actors merely work legally within those frameworks or illegally outside of them; and governments are not restricted by market forces, like many private actors, which typically must generate enough revenue to cover their operating costs. Thus, governments are uniquely positioned to formulate and execute an appropriate response to mass migrations.

[280] *See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 42 (1998) (noting the "special moral claims of those in our midst seeking U.S. protection").

[281] I thank Martha Minow for raising this point.

[282] Leila Østerbø, *Who Is Who in the Mediterranean Rescue Scene*, MIGRANT REP. (June 20, 2015), http://migrantreport.org/infographic-mediterranean-assets/ [https://perma.cc/PQ8N-6BDC] (noting UK's opposition to Mare Nostrum based on the view that it served as a "pull factor").

iterranean without authorization in 2015, ninety-eight percent reached the shore safety.[283] 360,000 migrants successfully crossed the Mediterranean and roughly 5,000 died on the journey in 2016.[284] Even if several thousand were rescued out of the population of migrants who undertook the journey, the vast majority still successfully completed the journey without rescue or humanitarian assistance. Thus, it appears empirically rational for migrants to continue to choose risky dinghy boat passage to Europe because, in fact, most survive.

Second, critics have failed to establish a causal connection between increased private humanitarian assistance and reduced government spending on search and rescue operations. Indeed, in some instances, the causation is reversed. For example, Italy ceased its highly successful, but costly, search and rescue program, Mare Nostrum in October of 2014.[285] Triton, a program that is largely funded by the European Union, replaced it, but with an emphasis on border enforcement, instead of search and rescue.[286] When deaths at sea spiked, private actors entered the arena *to replace government aid that had already been eliminated*.[287] In addition, political pressure mounted on the European Union to expand its search and rescue efforts, which resulted in a "commitment to triple Triton's budget for 2015–16."[288] Thus, the presence of multiple NGOs performing search and rescue work has not had a chilling effect on governments. As a historical matter, the incentives have worked in the opposite direction, with government retrenchment prompting private humanitarian actors to intervene.

Systemic restrictions on such assistance, however, might make sense generally in light of questions about the sustainability of private charitable interests and the accountability of private actors. If societies encourage private actors to provide humanitarian assistance to asylum seekers in need over a longer time period, what happens if and when private humanitarian actors become

---

[283] *See Latest Global Figures*, INT'L ORG. MIGRATION: MISSING MIGRANTS PROJECT, http://missingmigrants.iom.int/latest-global-figures [https://perma.cc/LDP6-X9LB].

[284] Ben Quinn, *Migrant Death Toll Passes 5,000 After Two Boats Capsize Off Italy*, THE GUARDIAN (Dec. 23, 2016), https://www.theguardian.com/world/2016/dec/23/record-migrant-death-toll-two-boats-capsize-italy-un-refugee [https://perma.cc/EQ6A-WPXR].

[285] *Sea-Watch Rescue Blog*, *supra* note 52 ("The general opinion in Brussels was that the greater the rescue capability . . . the greater the likelihood more migrants would attempt to enter Europe via these means.").

[286] Østerbø, *supra* note 282; *see* Glenda Garelli & Martina Tazzioli, *The EU Hotspot Approach at Lampedusa*, OPENDEMOCRACY (Feb. 26, 2016), https://www.opendemocracy.net/can-europe-make-it/glenda-garelli-martina-tazzioli/eu-hotspot-approach-at-lampedusa [https://perma.cc/9DGQ-4B96]; *MareNorstrum to End—New Frontex Operation Will Not Ensure Rescue of Migrants in International Waters*, EUR. COUNCIL REFUGEES & EXILES (Oct. 10, 2014), http://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/ [https://perma.cc/3YL6-EWUE].

[287] *See* Østerbø, *supra* note 282 (identifying dates when MOAS, Sea-Watch, and Norwegian Society for S&R began their efforts, *after* Mare Nostrum ended).

[288] *Id.*

exhausted, find that they have taken on more than they can handle, or simply lose interest?[289] Are private desires to assist asylum seekers sufficiently resilient for the task at hand?[290] Supporting asylum seekers in the process of applying for refugee status and then integrating into society is a long-term commitment. The danger of permitting individuals to privately assist refugees of their choosing is that private interest in those refugees may prove short-lived.[291] Relatedly, questions of accountability arise. How can we trust the quality of private humanitarian aid when it is decentralized, potentially capricious, and answers to no one?[292] What oversight is required as to the quality of aid provided? Restrictions on private humanitarian aid might ultimately benefit some asylum seekers because private smuggling and housing could lead to exploitation, particularly if the asylum seeker lacks a reasonable path to legal status.[293]

Governments, however, can address many of these concerns through prudent policy choices. For example, governments can educate volunteers and train them on best search and rescue practices or how best to meet asylum seekers' needs during the period when their asylum applications are pending.[294] Through such public-private partnerships, private actors can work to meet asylum seekers' needs while answering to public standards.[295]

Ultimately, security, crime control, and economic preservation are all generally legitimate interests that asylum states invoke to justify restricting private aid to refugees. To the extent that private aid might lead asylum seekers to bypass government screening, it creates potential security or crime risks and facilitates acts, such as smuggling, that are themselves viewed as crimes. Policy-makers should also consider the potential distortion of incentives that private humanitarian aid might cause, both with respect to government commitment to search and rescue and asylum seekers' willingness to risk peril in travelling to the asylum state. In the most recent mass flights from violence, however, these feared incentive effects do not appear to have materialized.

---

[289] *Cf.* Tracey M. Derwing & Marlene Mulder, *The Kosovar Sponsoring Experience in Northern Alberta*, 4 J. INT'L MIGRATION & INTEGRATION 217, 227 (discussing Canadian private refugee sponsors' frustrations with refugees' "unrealistic expectations" that sponsors be "on call at all times").

[290] *Cf. id.*

[291] *See id.*

[292] *See* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 31–35 (2002) (discussing the lack of "accountability mechanisms" over private organizations receiving public funding).

[293] *Cf.* Krzystof Kotsarski & Samuel Walker, *Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, 7 IUS GENTIUM: COMP. PERSP. L. & JUST. 239, 257 (2011).

[294] *E.g.*, *Guide to the Private Sponsorship of Refugees Program*, GOV'T CANADA (last updated May 26, 2017), http://www.cic.gc.ca/english/resources/publications/ref-sponsor/index.asp [https://perma.cc/GZW3-LDLG] [hereinafter Canadian Private Refugee Sponsorship program].

[295] *See* MINOW, *supra* note 292, at 142 ("It should not be controversial to insist that public values follow public dollars.").

C. The Case for Private Humanitarian Aid

Private individuals and NGOs have an important role in responding to the needs of migrants. A complete exploration of the philosophical arguments relating to the role of NGOs and private humanitarian actors in civil society is beyond the scope of this Article, but at the most basic level, private humanitarian aid is important because it defends human life and promotes related rights articulated by international human rights law.[296] It further stands to strengthen civil society by providing a space for individuals to act freely and to strengthen democratic capacities of those who participate.[297] Finally, it provides an avenue for expressing dissent from government policy and constructing a positive vision of the law.[298]

International human rights law protects many rights.[299] Core rights relate to life, bodily integrity, freedom of movement, and freedom from state-imposed harm.[300] Asylum seekers are typically fleeing threats to these core rights. Humanitarian aid in the form of funding or providing basic needs, such as food, shelter, clothing, and medical care, helps preserve life—in either the country of origin or in the asylum state. Acts of rescue along the way also preserve life, often dramatically.[301] Such aid protects fundamental rights, because without it some asylum seekers would lose their lives. In this way, private humanitarian aid is valuable because it protects fundamental rights recognized by international human rights law.

Promoting and protecting private humanitarian aid also stands to strengthen civil society. As Corbett and other participants in the Sanctuary Movement have noted, serving those in need remedies injustice more directly than petitioning the government to pass a law to require government officials to do the same.[302] Private humanitarian aid places the tools of justice in the hands of non-state actors, empowering and strengthening those non-state ac-

---

[296] *See infra* notes 299–314 and accompanying text.

[297] *See infra* notes 299–314 and accompanying text.

[298] *See infra* notes 299–314 and accompanying text.

[299] *See* UDHR, *supra* note 125 (containing thirty articles, almost all of them declaring individual rights); *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (enumerating individual rights in the first twenty-seven Articles, for the most part); ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW app. at 151–61 (2014).

[300] The rights to life, freedom from torture, and freedom of movement are protected by both the UDHR and ICCPR. UDHR, *supra* note 125, at arts. 3, 5, 13; ICCPR, *supra* note 299, at arts. 6, 7, 12.

[301] *See MOAS Saves Migrants at Sea in Record Numbers: More Than 1,400 Saved from Inhumane Conditions in First Two-Week Mission*, MOAS, https://www.moas.eu/moas-saves-migrants-at-sea-in-record-numbers-more-than-1400-saved-from-inhumane-conditions-in-first-two-week-mission/ [https://perma.cc/9UCE-GDEE] ("The search and rescue charity Migrant Offshore Aid Station (MOAS) helped rescue 1,441 people in just 12 days in back-to-back sea rescues from unseaworthy boats in the central Mediterranean Sea.").

[302] *See* Corbett, *supra* note 173.

tors entrusted to "do justice" themselves.[303] It is, in this sense, justice unmediated. It permits the expression of dissent[304] but also the communication of a positive vision of the law.[305]

Opportunities for private individuals and groups to aid asylum seekers have other value for society as a whole.[306] Acts of private humanitarian aid, unlike state-sponsored humanitarian action, embody and promote essential freedoms, such as expression and association.[307] Individuals can join together, publicly asserting their values, ideas, and visions through action and through communication with others.[308] More generally, engagement in associational activities promotes pluralism, tolerance, and solidarity.[309] Scholars have defined pluralism as "the lively interaction among inherited particularities," a process through which new particularities evolve.[310] When people experience pluralism and participate in a range of associational activities, individuals' sense of their own effectiveness grows, promoting tolerance.[311] This, in turn, creates space for solidarity.[312] Ultimately, scholars have argued that participating in associational activities allows individuals to develop critical faculties such as arguing, deliberating, decision making, and taking responsibility that then redound to the benefit of a democratic society as a whole.[313]

The law should facilitate private humanitarian aid because it creates space for ordinary individuals to act in big and small ways, and slowly change socie-

---

[303] Corbett, *supra* note 173; Bezdek, *supra* note 181, at 910.

[304] *Cf.* Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1147 (2009) (noting that state and local governments enact "moving border laws" to express symbolic messages of disagreement with the federal government).

[305] *See* Bezdek, *supra* note 181, at 905.

[306] *See* Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL'Y 555, 573 (1998) (summarizing Professor Michael Walzer's view that "it makes good public policy to encourage the proliferation and strength of these associational ties that constitute American civil society").

[307] MINOW, *supra* note 292, at 44 (noting that nonprofits play a key role in democratic society through "vitaliz[ing] civil society," promoting First Amendment freedoms of association and expression, and "enable[ing] people to participate in running their lives").

[308] Philosopher Hannah Arendt's theory linking freedom to pluralism is particularly powerful in this context. HANNAH ARENDT, THE HUMAN CONDITION 7 (1958) ("Action . . . corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world."); *Hannah Arendt,* STAN. ENCYCLOPEDIA PHIL., (July 27, 2006), http://plato.stanford.edu/entries/arendt/#ActFrePlu [https://perma.cc/4GJN-D86Y].

[309] *See* Bucholtz, *supra* note 306, at 576.

[310] *Id.* at 573 (citing PETER L. BERGER & RICHARD I. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURE IN PUBLIC POLICY 206 (1977)).

[311] *Id.* at 573.

[312] *Id.* at 565 (noting that a leading commentator has concluded that "the nonprofit sector promotes solidarity among individuals, and thereby empowers them to influence activities in the public sector").

[313] *Id.* at 576 (quoting ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 516 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840)).

ty until a time when the humanitarian aid provided by private people is no longer necessary. It provides "hope in the dark."[314]

III. LAW REFORM TO UNLEASH PRIVATE HUMANITARIAN AID TO ASYLUM SEEKERS

Private humanitarian actors have the desire to assist asylum seekers, but states also have an interest in criminalizing smuggling, trafficking, harboring, and related conduct involving unauthorized migrants, including asylum seekers. This Part considers potential reforms to mediate this seemingly impossible division. It considers the broader context for asylum seekers' dangerous travel and two specific responses: first, the notion of protected entry procedures; and second, a humanitarian exception to smuggling and related crimes, or possibly redefining smuggling to require proof of "material benefit, direct or indirect," consistent with the standard articulated in the Migrant Smuggling Protocol.[315]

A. Protected Entry Procedures

Under current legal regimes, asylum seekers must resort to dangerous journeys to reach asylum states, thus triggering the need for search and rescue and other humanitarian assistance.[316] Scholars and policymakers alike have called for asylum states' governments to issue asylum visas so that asylum seekers can travel by air or other common carriers rather than on unseaworthy vessels or other hazardous means.[317] Such a proposal has significant costs and benefits,[318] but inaction and a complete failure even to consider the matter has taken a horrible human toll.[319] Such measures should become a regular part of

---

[314] *See generally* SOLNIT, *supra* note 1 (cataloging and comparing pivotal moments of social activism across the globe from the late 1980s to the early 2000s).

[315] Migrant Smuggling Protocol, *supra* note 21, at art. 3.

[316] *See infra* notes 317–319 and accompanying text.

[317] Eakin, *supra* note 46 (describing the human toll of a lack of any legal course of travel for refugees); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT'L J. REFUGEE L. 542, 573 (2005) (arguing that States ought to provide Protected Entry Procedures to asylum seekers, although such an obligation is relatively weak); Ray, *supra* note 48, at 1218 (arguing that the United States should issue asylum visas to individuals who demonstrate a credible asylum claim in order to improve access to asylum as well as the amount and accuracy of the government's information about individuals entering the country); Alexander Betts, *Let Refugees Fly to Europe*, N.Y. TIMES (Sept. 25, 2015), https://nyti.ms/2tym1wg [https://perma.cc/KD33-53MB].

[318] *See* Ray, *supra* note 48, at 1252–65.

[319] To the extent that financial costs impede such programs, asylum states should consider creating opportunities for private individuals to fund additional consular staffing at embassies in key locations. This suggestion is inspired by an analog, the private refugee sponsorship program in Canada. *See Guide to the Private Sponsorship of Refugees Program*, *supra* note 294. An analysis of the program, which has inspired calls for a similar program here in the United States, is beyond the scope of this Article. This Article focuses solely on asylum seekers who lack travel authorization. The private refugee sponsorship in Canada, however, is focused solely on refugees, those permitted to travel for

the conversation on the legal status of asylum seekers and the private humanitarian actors who assist them.

B. Governments Should Define "Smuggling" and Related Offenses to Require Financial or Material Benefit or Adopt a Humanitarian Exception

Second, governments receiving asylum seekers should reform anti-smuggling statutes to shift the law's focus away from the prevention of border-crossing and toward protecting migrants from exploitation. For-profit human smuggling and trafficking produces serious harm, and exploitation is most likely to occur when smugglers and traffickers engage in for-profit smuggling and trafficking.[320] The U.S. anti-smuggling statute currently imposes criminal penalties on:

> any person who—(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever [that alien] at a place other than a designated port of entry . . . ; (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remain in the United States in violation of law, transports, or moves or attempts to transport or move . . . such alien within the United States . . . in furtherance of such violation of law; (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place . . . .[321]

The statute lacks any express exception for humanitarian smuggling, transport, shielding, concealing, or harboring.[322] Instead, it criminalizes the facilitation of noncitizens' unlawful presence,[323] even if those noncitizens have a credible asylum claim.[324] Scholars, however, have observed that Congress never in-

---

resettlement purposes. The legal issues facing these populations differ based on their access to legal authorization to travel to the asylum state; refugees enjoy such status, while asylum seekers do not. I thank Elissa Steglich for highlighting the importance of this distinction.

[320] *See* Firas Nasr, *Refugees and Trafficking: A Dangerous Nexus*, HUM. TRAFFICKING SEARCH (Sept. 28, 2015), http://www.humantraffickingsearch.net/wp1/refugees-and-trafficking-a-dangerous-nexus [https://perma.cc/T4UA-PBHN]; *Smuggling of Migrants: The Harsh Search for a Better Life*, U.N. OFF. DRUGS & CRIME, https://www.unodc.org/toc/en/crimes/migrant-smuggling.html [https://perma.cc/4WCM-RLL7].

[321] 8 U.S.C. § 1324(a)(1)(A)(i)–(iii) (2012). Omitted from the excerpt above, due to their limited relevance, are provisions criminalizing knowing or reckless acts of "encouraging or inducing" an unauthorized migrant to "come to, enter, or reside in the United States" and conspiracy to commit any of the preceding acts. *See id.* § 1324(a)(1)(A)(iv)–(v).

[322] *Id.* § 1324(a)(1)(A)(i)–(v).

[323] Jain, *supra* note 30, at 169.

[324] *See* Leitman & Hudson, *supra* note 228, at 47–48; Loken & Babino, *supra* note 38, at 138.

tended for the law to criminalize humanitarian aid,[325] and thus, an exception should be created explicitly in the legislative text to prevent the prosecution of humanitarian actors.[326] Merely relying on prosecutorial discretion is insufficient to prevent this outcome, as evidenced by the sanctuary prosecutions of individuals for sheltering or transporting unauthorized migrants who they believed were refugees eligible for asylum.[327] When government officials remain free to target humanitarian actors, they will do so. The following subsections discuss several specific options for pursuing reform.

1. Defining Offenses to Require Proof of "Financial or Material Benefit"

The first option is for legislatures to redefine smuggling and related offenses to require proof of "financial or . . . material benefit," thereby excluding humanitarian assistance.[328] The Migrant Smuggling Protocol defines smuggling in terms of acting intentionally "in order to obtain, directly or indirectly, a financial or other material benefit."[329] Such a broad benefit clause was designed to close potential loopholes for smugglers receiving indirect benefits, including sexual gratification, as related to child pornography rings or trafficking schemes.[330] Scholars note that the Protocol's Interpretive Notes reveal that the parties did not intend for the Protocol to require states to criminalize humanitarian smuggling by family, religious groups, or NGOs.[331] Thus, the one major international treaty on the subject insulates private humanitarian actors from criminal liability for humanitarian smuggling.[332]

---

[325] Jain, *supra* note 30, at 169 (discussing Congress' preoccupation with preventing entry of "economic migrants").

[326] *See* Campbell, *supra* note 38, at 72; Breslin, *supra* note 37, at 217; Loken & Babino, *supra* note 38, at 161; *cf.* Helton, *supra* note 32, at 554–58 (describing prosecutions of sanctuary workers).

[327] *See supra* notes 162–190 and accompanying text.

[328] This is the standard in the Migrant Smuggling Protocol. European NGOs engaged in rescue work have endorsed this idea of distinguishing for-profit smuggling from humanitarian transport of asylum-seekers. On this view, where private actors transport migrants for profit, such acts should be illegal (and barred by laws against "human trafficking"). On the other hand, where private actors transport migrants for free, such acts should not be criminalized at all, because such actors are not seeking to exploit migrants or profit from their work on behalf of migrants. This manner of distinguishing smuggling from trafficking, however, does not track migrants' consent. Smuggling typically refers to voluntary transit, for profit or not, while trafficking implies involuntary transit. IRPA §§ 118–119; *see Sea-Watch Rescue Blog*, *supra* note 52.

[329] Migrant Smuggling Protocol, *supra* note 21, at arts. 3, 6.

[330] GALLAGHER & DAVID, *supra* note 84, at 365–66.

[331] *Id.* at 46.

[332] The Migrant Smuggling Protocol is not a human rights instrument, but rather an agreement to coordinate criminal sanctions across UN member states for human smuggling. Thus, its failure to criminalize humanitarian assistance does not indicate that a signatory *may not* criminalize it, but simply that signatories *are not required to criminalize it*. *See id.* at 48 (discussing the Migrant Smuggling Protocol's lack of victim protection and assistance provisions and noting that, "the Protocol is essentially an instrument of international cooperation"); Grant, *supra* note 259.

It is critical to consider the implications of the "financial or material benefit" standard on the influential Migrant Smuggling Protocol. For example, would salaries received by employees of rescue organizations count as financial or material benefit, direct or indirect, thus requiring that all rescue be performed on a volunteer-basis or without the provision of food, drink, or safety equipment to workers?[333] Or might the law be construed to require that the benefit come *from* the provision of service to the smuggled migrants, such as payment by family members or smugglers from an earlier leg of the journey?

An analogy to insider trading liability, in the context of liability for tippers who reveal inside information about a corporation and tippees who trade on that inside information, under U.S. securities law might prove instructive.[334] The U.S. Supreme Court has determined that a tipper breaches a duty if, for example, the tipper "receives a direct or indirect personal benefit *from the disclosure*, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[335] Thus, in a sense, the *disclosure* itself must be the source of the benefit—not a random third party.[336] As applied to the example of salaried NGO employees, one might compare the NGO employee to a tipper, and the rescued migrant to the tippee. In rescuing a migrant, the NGO employee performs a service, just as a tipper would offer a service to the tippee in the form of a disclosure of information. But in the usual case, the NGO employee would not receive a financial or material benefit *from performing the service* (the "disclosure"). Instead, the NGO employee's financial or material benefit—the salary for working as an NGO staff member, for example—would be attributable to potentially unknown philanthropic donors. This is like a tipper disclosing information, doing nothing else, and then enjoying a nice dinner out, his friend's treat, to congratulate him on his work anniversary. Such a benefit has nothing to do with the particular act of service or "disclosure," although it might relate generally to the work the tipper does. Thus, one can argue that, even though the current international framework lacks such nuanced treatment of private humanitarian actors, there are workable frameworks available to parse liability to target better the population of smugglers the parties to the treaty intended to target, but without ensnaring humanitarian actors, even those who earn salaries for their work. Ultimately, humanitarian actors might passively receive benefits (from someone) while transporting unauthorized migrants, but this is not equivalent to those actors transporting unauthorized migrants *for the purpose of receiving financial or other material benefits*.

---

[333] *See* Migrant Smuggling Protocol, *supra* note 21, at art. 6.
[334] *See* Dirks v. SEC, 463 U.S. 646, 647 (1983).
[335] *Id.* at 663 (emphasis added).
[336] *Id.* (emphasis added).

2. Recent Canadian Precedent

Heeding the Migrant Smuggling Protocol's framework, the Canadian Supreme Court recently struck down Canada's anti-smuggling law as unconstitutionally overbroad due to its possible application to humanitarian actors.[337] At the relevant time, section 117 of the Immigration and Refugee Protection Act ("IRPA") stated: "No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act."[338] The Canadian Supreme Court recently determined that the statute unconstitutionally failed to distinguish humanitarian smuggling from for-profit smuggling. The court characterized the text of the disputed provision as "broad."[339] The court also determined that the actual object of the statute was narrower on account of Canada's international obligations, the role of the disputed provision in the overall scheme, and statements of legislative purpose at the time the statute was passed.[340]

First, the court examined Canada's international obligations, focusing on Article 31 of the Refugee Convention, which prohibits states from penalizing refugees' illegal entry when refugees flee a place where "their lives or freedom are threatened" and who promptly seek to "show good cause" for entering the country without authorization.[341] Canadian law reflects this principle, as IRPA section 133 prohibits the authorities from charging foreigners with "illegal entry or presence while their refugee claims are pending."[342] The court further noted that refugees often flee in groups, and thus, may aid others in entering Canada illegally. A state cannot punish refugees solely for their act of aiding others in illegal entry. The court also determined that the Smuggling Protocol's material or financial benefit element indicates a desire not to criminalize humanitarian smuggling. Although states are free to do so, the Protocol's "savings clause" provides that the Protocol shall not affect states' other responsibilities and obligations under humanitarian and human rights law. Thus, the court determined that the disputed provision's purpose must be harmonized with Canada's international obligations to limit it to smuggling in the context of organized crime.[343]

---

[337] *Appulonappa*, 3 S.C.R. ¶¶ 39, 69 (finding the Canadian Parliament did not intend to criminalize humanitarian assistance to unauthorized migrants). I thank Audrey Macklin for directing me to this decision.

[338] *Id.* ¶ 19. Canada's anti-smuggling law addressed smuggling only—the transgression of the Canadian border—and not subsequent assistance, unlike the U.S. anti-smuggling statute, which also addresses post-entry acts such as harboring.

[339] *Id.* ¶ 36.

[340] *Id.* ¶ 34.

[341] *Id.* ¶ 42 (quoting the Refugee Convention, *supra* note 127, at art. 31).

[342] *Id.* ¶ 43.

[343] *Id.* ¶ 45.

The court next observed that the role of IRPA section 117 within the broader statutory framework and the statements of legislative purpose also supported finding a narrower purpose. Specifically, section 117 mirrors the language of the Migrant Smuggling Protocol, a scheme created to penalize smuggling in the context of organized crime rather than humanitarian assistance.[344] Further, at the time section 117 was adopted, the Canadian Parliament expressly indicated its desire to shield humanitarian actors and immediate family members from prosecution, but these concerns never made their way into the statutory text.[345] The court determined that Parliament itself understood that the statute would likely ensnare humanitarian actors, contrary to Parliament's intent.[346] Nonetheless, Parliament apparently believed this possibility would not come to pass because the Attorney General (AG) authorized all prosecutions and presumed that the AG would not authorize the prosecution of humanitarian actors. The Canadian Supreme Court rejected this purported safety valve of AG screening and concluded that, essentially, Parliament threw up its hands and passed a law that codified a "drafting dilemma."[347]

As a result, the court deemed the actual purpose of section 117 to be far narrower than it initially appeared. Unlike U.S. First Amendment jurisprudence, Canadian jurisprudence regards a statute as unconstitutionally overbroad if it "deprives individuals of life, liberty or security of the person in cases that do not further [its] object."[348] As section 117 of IRPA covered classes of conduct beyond the narrow purpose of the statute, it was overbroad. Accordingly, the court struck down the law and invited Parliament to redraft the anti-smuggling statute.[349]

This result offers a point of comparison to the U.S. legal regime. In both instances, the law-making bodies expressly indicated a desire not to ensnare humanitarian actors. In the United States, government officials deliberately pursued such prosecutions to advance an anti-migrant agenda years later. Can-

---

[344] *Id.* ¶ 48; *see also* GALLAGHER & DAVID, supra note 84, at 366 (explaining that the Protocol's drafting history "confirms that . . . [the financial or material benefit element] was intended to . . . [exclude] . . . the activities of those who provided support to migrants for humanitarian reasons").

[345] *Appulonappa*, 3 S.C.R. ¶ 67.

[346] *Id.* ¶ 68.

[347] *Id.* ¶ 66.

[348] *Id.* ¶¶ 26–27. This overbreadth analysis differs significantly from the analysis under U.S. First Amendment jurisprudence. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984) (noting that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge").

[349] *Appulonappa*, 3 S.C.R. ¶ 86. The Canadian law was already narrower in scope than the U.S. law, as it focused on transgressing the national boundary, not on transporting, harboring, concealing or shielding upon entry. Nonetheless, the Canadian Supreme Court *still* found the law insufficiently focused on the true "bad actors," for-profit smugglers. *Id.* It stands to reason that the U.S. law, which more broadly covers harboring after entry and not merely transgression of the national boundary, requires refinement as well.

ada has a similar history of responding to asylum seekers and those who assist them with prosecution and inadmissibility proceedings, where relevant.[350] Poorly drafted statutes from decades ago have inadvertently empowered today's prosecutors to pursue harsh, anti-migrant policies.

3. Statutorily-Based "Humanitarian" Exception

Ultimately, the Migrant Smuggling Protocol and recent Canadian Supreme Court decisions suggest an emerging consensus that states should define smuggling and related offenses to require "material benefit." The proposal, however, is controversial, and some have criticized the "material benefit" requirement as creating a loophole for smugglers. Arguing that prosecutors lack methods at the border to investigate and uncover facts to prove this "material benefit" element,[351] critics contend that it can be impossible to prove that the smugglers expected or received payment.[352] They assert the "benefit" element has thereby suppressed convictions for for-profit smuggling.[353]

To some extent, the choice for lawmakers is between over- and under-inclusion. States may purport to prefer erring on the side of prosecuting too many rather than too few, but the drafting history of the relevant statutes in the United States and Canada indicates that legislators actually held no such preference.[354] In fact, lawmakers in both countries expressed concern about the effects of anti-smuggling laws on humanitarian actors or immediate family members of smuggled persons.[355] At least one nation's highest court has found over-inclusion impermissible.[356]

As an alternative, to the extent that requiring proof of "benefit" may thwart the prosecution of criminal, for-profit smuggling, states might consider adopting a "humanitarian" exception. In 2006, the U.S. Senate considered a humanitarian exception to certain offenses as part of comprehensive immigration reform. [357] The package of reforms never became law because the Senate passed the bill containing them, but the House did not.[358] The text of this pro-

---

[350] Grant, *supra* note 259.

[351] Aljehani, *supra* note 242, at 128 (noting the difficulty of establishing "an intention or agreement to receive payment" in the "initial stages of investigations" due to a lack of "investigative methods used at borders").

[352] *See id.*

[353] *Id.*

[354] *See Appulonappa*, 3 S.C.R. ¶ 38 (discussing Parliament's intention not to apply the anti-smuggling law to humanitarian actors); Jain, *supra* note 30 at 160–61(discussing legislative history).

[355] *See Appulonappa*, 3 S.C.R. ¶ 38; Jain, *supra* note 26 at 160–61.

[356] *Appulonappa*, 3 S.C.R. ¶ 77.

[357] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 205(c)(1) (as passed by Senate May 25, 2006) [hereinafter CIRA]; *see also* 152 CONG. REC. S5174 (daily ed. May 25, 2006) (remarks of Sen. Durbin describing humanitarian exception).

[358] *See* CIRA, *supra* note 357; *S. 2611 (109th): Comprehensive Immigration Reform Act of 2006*, GOVTRACK, https://www.govtrack.us/congress/bills/109/s2611 [https://perma.cc/N4UC-FHJL].

posal added a provision to the anti-smuggling statute that insulated humanitarian aid from criminal liability:

> It is not a violation of [statutory provisions prohibiting alien harboring, concealing, shielding, or transporting] . . . (B) for an individual or organization, not previously convicted of a violation of this section, to provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.[359]

This illustrative list of forms of humanitarian assistance creates a "blanket exception" to criminal liability for all offenses other than smuggling, thus indicating that humanitarian actors would still face liability for assisting unauthorized migrants in entering U.S. territory, or "smuggling."[360]

In general, where the description of a criminal offense is complete without considering the exception, the absence of the exception is not an "element" of the crime that the prosecution must prove.[361] Smuggling and related offenses can be defined without reference to their humanitarian quality and without consulting the list of exceptions. Thus, an exception to anti-smuggling statutes would likely function as an affirmative defense rather than an element of the statute that the government would have to prove. Under this regime, states would initiate prosecutions of humanitarian actors for a smuggling-related offense.[362] The humanitarian actors would then assert the statutorily defined defense and bear the burden of proving that their work was truly "humanitarian."

This approach would insufficiently protect humanitarian actors because it would subject them to criminal prosecution and only protect them from criminal liability only later, offering immunity from liability, but not prosecution.[363]

---

[359] CIRA, *supra* note 357, § 205(c)(1) (proposed amendment to 8 U.S.C. § 1324 (2012)); *see* Breslin, *supra* note 37, at 241.

[360] Breslin, *supra* note 37, at 241–42.

[361] *See* McKelvey v. United States, 260 U.S. 353, 357 (1922) ("[I]t has come to be a settled rule in this jurisdiction that an indictment . . . on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by a proviso or other distinct clause."); United States v. Cook, 84 U.S. (17 Wall.) 168, 173–74 (1872) ("[I]f the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference.").

[362] Senator Durbin described the proposed humanitarian exception in these very terms. *See* 152 Cong. Rec. S5174; *see also Immigration Reform Bill: Senate Judiciary Committee Markup* (C-Span television broadcast Mar. 27, 2006) (Senator Durbin describing humanitarian exception as an affirmative defense that defendant would have to prove).

[363] *Cf.* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (describing qualified immunity as "immunity from suit rather than a mere defense to liability . . . " and noting that such immunity is "effectively lost if a case is erroneously permitted to go to trial") (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

Moreover, focusing on an "exception" for humanitarian assistance misses the point that the "bad act" at the root of smuggling and related offenses is not evading immigration authorities per se, but exploiting migrants' desperation to procure financial or material benefit from their lack of safe travel options. The "material benefit" standard captures this concern more effectively.

Ultimately, an affirmative defense would prove costly. Separating humanitarian actors from for-profit smugglers requires time and expertise.[364] Distinguishing the source of funds received by private actors, whether from donors or from the migrants themselves, is another task that would require authorities to parse facts and law carefully. Finally, subjecting humanitarian actors to prosecution and only later eliminating liability stands to reduce the supply of humanitarian aid. For all of these reasons, states might instead consider providing an administrative process of pre-approval for humanitarian actors,[365] thus preventing needless prosecutions and expenditure of time and money by governments and NGOs.[366]

4. Accounting for Asylum States' Interests

Each of the proposals stands to frustrate national interests understood in a general sense.[367] A humanitarian exception shields from liability NGOs and individuals who, for reasons other than procuring financial or material benefit, assist migrants, including asylum seekers. These migrants are typically individuals whom the government has not yet screened, thus implicating the na-

---

[364] I thank Martha Minow for making this point specifically and for raising the general possibility of an administrative process to sort humanitarian from for-profit actors.

[365] I thank Alyson Flournoy for raising this point.

[366] The details of such a proposal are beyond the scope of this Article.

[367] The proposals for reform also do not make or depend on distinctions among migrants. The proposed statutory revisions apply equally, no matter whether an unauthorized migrant seeks refugee status, some other form of humanitarian protection, or economic opportunity. Thus, the proposals are not designed solely to protect those who assist asylum seekers, but to protect those who assist all unauthorized migrants. Avoiding this outcome appears impossible. First, if proposed reform were to apply exclusively to "asylum seekers," NGOs would not know whom to assist. Without asking questions first, an NGO or coast guard officer will not know if a given migrant intends to apply for asylum, and is, thus, an asylum seeker. Often, questioning cannot occur during rescue operations, when migrants are necessarily in distress. Second, a given boat of migrants could contain a mix of asylum seekers and economic migrants. Requiring rescuers to sort asylum seekers from economic migrants before rendering aid would likely prove unworkable. Finally, the distinction between the two groups of migrants is not always clear, and some economic migrants may ultimately have good claims for asylum, while some asylum seekers will ultimately lose their bid for refugee status and be deported. Better distinguishing the groups would require NGOs to engage in more probing questioning about the basis of the asylum claim—something ill-suited for situations where NGOs provide humanitarian assistance, especially in emergencies. Many migrants are asylum seekers, however, and thus, the proposals contained here will often, but not exclusively, apply to asylum seekers. I thank Gerald Neuman for raising these issues.

tional security and crime control interests of asylum states.[368] How might legislators address this concern through the proposed reform?[369]

One option is to limit the scope of the exception to exclude smuggling. Under this option, the humanitarian exception would extend only to acts committed *after* entry in the asylum state, i.e., to transport and harboring offenses. As in the Senate's proposal, the humanitarian exception could be limited *only* to assistance rendered after the asylum seeker has entered on their own (or at a minimum, without help from the NGO seeking immunity from liability).[370] Thus, NGOs would not be immune to liability for smuggling itself.

The law, however, ought to permit humanitarian smuggling when required under international law. When asylum seekers take dangerous journeys on the high seas—whether from Libya or Haiti—the international duty to rescue applies,[371] and humanitarian actors bringing asylum seekers to shore for processing should not be subject to criminal liability for discharging their duties. Criminalizing humanitarian smuggling—the act of bringing unauthorized migrants to the frontiers of asylum states' territories—leaves NGOs with almost no alternative but to let refugees and migrants die in the water, a result that violates international law.[372] Thus, immunity from liability for humanitarian smuggling is necessary in such scenarios.

In contrast, humanitarian actors generally have no obligation under international law to rescue asylum seekers traveling by land, whether via Mexico or Turkey. As a result, international legal duties do not compel smuggling in those circumstances, and a more limited exception might be called for in such scenarios. Drafters of the humanitarian exception should consider these matters.

---

[368] *See supra* notes 194–295 and accompanying text.

[369] The most obvious route is to promote policies that permit willing donors to serve willing migrants without imposing any third-party costs. A private refugee sponsorship program, for example, would preserve the government's usual role in screening incoming migrants and would not otherwise threaten asylum states' interests. *See Guide to the Private Sponsorship of Refugees Program*, *supra* note 294.

[370] *See* 152 CONG. REC. S5174 (remarks of Senator Durbin describing humanitarian exception); Breslin, *supra* note 37, at 241.

[371] Nessel, *supra* note 117, at 626. This is not to suggest that individuals and organizations on land have a general obligation to bring asylum seekers to shore; rather, international law obligates only those at sea who *encounter* distressed vessels to make reasonable rescue efforts. *See* UNCLOS, *supra* note 117, at art. 98(1)(b).

[372] *See, e.g.*, International Convention on Salvage art. 10, Apr. 28, 1989, S. Treaty Doc. No. 102-12, 1953 U.N.T.S. 194 ("Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea."); United Nations Convention on the Law of the Sea art. 98, Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 ("Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers . . . to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance."); Convention for the Safety of Life at Sea annex, at c. 5, regulation 10, Nov. 1, 1974, 32 U.S.T. 47 ("The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance.").

Canada's legal regime, which prohibits the criminalization of humanitarian *smuggling*, is well-suited to its particular status as an asylum state that receives large numbers of asylum seekers who have traveled by sea.[373] In contrast, such a regime may ultimately be wrong for the United States, which has a porous border with Mexico, a country that itself receives a large number of asylum seekers fleeing violence.[374]

Humanitarian aid is not a cure for the suffering of millions of asylum seekers, but it is a way of creating organic change; of slowly untying a seemingly indissoluble knot of violence, poverty, insecurity, and exclusion through uncoordinated, unmediated action. Protecting humanitarian actors is an important step in creating a culture that values human lives, even migrant ones.

CONCLUSION

Individuals and organizations around the world provide or wish to provide humanitarian aid to asylum seekers, and such aid currently manifests in many forms and in a range of places—from the asylum seeker's home country to the asylum state and all points in between. The laws prohibiting smuggling and related offenses in the United States and the European Union criminalize much of this aid. At the very least, these laws create a cloud of legal uncertainty under which humanitarian actors provide aid with some risk of prosecution. Until recently, Canadian law did the same. These laws, although overinclusive, are based on core interests in national security, crime control, and economic preservation.

By acknowledging these core interests but also exposing their thinness, this Article argues for a specific reform to ease the toll of the dilemma. Specifically, it proposes law reform: creating a humanitarian exception to anti-

---

[373] *See Appulonappa*, 3 S.C.R. ¶ 5 ("[I]nsofar as [the Immigration and Refugee Protection Act] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members, it is unconstitutional."); CANADIAN COUNCIL ON REFUGEES, SUN SEA: FIVE YEARS LATER 14 (Aug. 2015), http://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf [https://perma.cc/2TQT-NPBE] (noting the Canadian government's "increased priority" to "disrupt people smuggling, especially by sea"). *But see* Mike Blanchfield, *Haitian Asylum Seekers Flee to Canada After Trump Proposes End to Protected Status*, GLOBAL NEWS (Aug. 27, 2017), http://globalnews.ca/news/3699160/haitian-asylum-seekers-canada-trump-end-protected-status/ [https://perma.cc/EG4R-QN7U].

[374] *See* John Burnett, *U.S.-Mexico Border Sees Resurgence of Central Americans Seeking Asylum*, NPR (May 31, 2016), http://www.npr.org/2016/05/31/480073262/u-s-mexico-border-sees-resurgence-of-central-americans-seeking-asylum [https://perma.cc/W436-HWSB] (noting that although "U.S. Border Patrol averaged 330 apprehensions of Central Americans a day," the agency nevertheless "ends up releasing the vast majority of family members it apprehends because U.S. court rulings restrict its ability to detain them"). *But see* W. Gardner Selby, *Barack Obama, in Austin, Says Illegal Immigration at 40-Year Low*, POLITIFACT (Mar. 17, 2016), http://www.politifact.com/texas/statements/2016/mar/17/barack-obama/barack-obama-austin-says-illegal-immigration-40-ye/ [https://perma.cc/V3GR-CWE].

harboring and anti-transport laws and, in some instances, anti-smuggling laws. It further proposes law reform through which asylum seekers can obtain travel authorization or status prior to making a long, perilous journey to the asylum state. Such reforms would potentially obviate the need for much of the private humanitarian aid provided today.

The widespread desire to provide private humanitarian aid to refugees and migrants, and the pervasive criminalization of such aid create a dilemma that is neither new nor unique to this context. Scholars have rightly characterized the clash of state sovereignty, border control, and individual human rights as a "wicked problem."[375] Such problems do not lend themselves to neat solutions, either in law or politics.[376] They often point to the need for large-scale institutional transformations. Here, the dilemma identified is a symptom of a legal regime that is not equipped to regulate migration and protect refugees effectively.[377] Without economic, political, and social development in refugee-producing countries and reductions in global inequality, little will change, and the demand to reach asylum states—by any means necessary—will only rise.[378]

These stark global trends create the backdrop and impetus for the responses that have followed: individuals and NGOs in the United States and around the world working, individually, locally, and immediately, to meet the urgent needs of those seeking refuge. They are sending donations to rebuild war-torn villages; rescuing asylum seekers making perilous journeys; sending baby carriers to ease the physical burdens of refugee parents crossing a continent with young children in their arms; and welcoming asylum seekers with food, shelter, clothing, foreign language instruction, and other necessities to help them integrate into the asylum states they have reached while awaiting the adjudication of their claims for asylum.

---

[375] GALLAGHER & DAVID, *supra* note 84, at 18 (quoting JEFFREY CONKLIN, DIALOGUE MAPPING: BUILDING SHARED UNDERSTANDING OF WICKED PROBLEMS 13–16 (2006) (describing criteria for so-called "wicked problems")).

[376] *Id.* (defining a "wicked problem" as a dynamic problem that is difficult to define or resolve "because of preexisting factors that are themselves highly resistance to change," such as "the very existence of States, gross inequalities among them, and strong motivations on the part of some to keep out others").

[377] *See id.* at 17 ("Migration is one of the oldest strategies of human advancement and . . . it is unsurprising that the modern Nation State, specifically liberal democracies, are not up to the task of stopping it.").

[378] *Id.* at 18 (asserting that smuggling will endure as a key method of unregulated migration unless there is a "fundamental change to global migration governance," and that to deny this fact is a "willful disregard of both evidence and experience"); *see also id.* (quoting the U.N. Special Rapporteur on the Human Rights of Migrants opining that escalating "repressive mechanisms [in response to migration] . . . will not lower the pressure . . . it will only exacerbate the tensions, fuel international criminality and result in more rights violations for the migrants themselves").

Asylum states and the international community can do more. They can facilitate the work of private humanitarian actors. Public-private partnerships and collaborations are not new, but they are increasingly important in emergency situations. Moreover, although private humanitarian aid is no substitute for effective, humane government policy, it constitutes a form of profound engagement in the world.[379] To criminalize private humanitarian actors' direct service to asylum seekers is to deny completely any role for private actors in the assertion of asylum rights, an extreme position not justified by states' interests. Taken together, the proposals articulated in this Article offer a humane path forward.

[379] *See* Corbett, *supra* note 173; *see also* SOLNIT, *supra* note 1, at 95 ("These other versions of what revolution means suggest that the goal is not so much to go on and create the world as to live in that time of creation, and with this the emphasis shifts from institutional power to the power of consciousness and the enactments of daily life, toward a revolution that does not institute its idea of perfection but opens up the freedom for each to participate in inventing the world.").

Optimal Asylum

*Shalini Bhargava Ray**

ABSTRACT

The U.S. asylum system is noble but flawed. Scholars have long recognized that asylum is a "scarce" political resource, but U.S. law persists in distributing access to asylum based on an asylum seeker's ability to circumvent migration controls rather than the strength of the asylum seeker's claim for protection. To apply for asylum, an asylum seeker must either arrange to be smuggled into the United States or lie to the consulate while abroad to obtain a nonimmigrant visa. Nonimmigrant visa requirements effectively filter the pool of asylum applicants according to wealth, educational attainment, and intent not to remain in the United States indefinitely—criteria completely unrelated to or at odds with the purposes of refugee law. The system as currently designed, therefore, selects asylum seekers based entirely on their ability to satisfy irrelevant criteria and without regard to their relative need for protection from persecution. Such a system fails to maximize the humanitarian benefits of scarce U.S. asylum resources.

To better protect individuals facing serious persecution, this Article contends, Congress should consider reforming the immigration laws to provide for an "asylum visa" to be made available to certain foreign nationals. U.S. consulates abroad, under proper and limited circumstances, might issue this visa to foreign nationals who demonstrate a credible fear of persecution on a ground enumerated in the United Nations Convention Relating to the Status of Refugees (Refugee Convention). Applicants would then lawfully enter the United States and apply for asylum. Successful applicants would remain, and unsuccessful applicants would face removal. Drawing on the extant literature on "protected entry procedures" (PEPs) that once existed in Europe, this Article considers the costs and benefits of the practice of issuing asylum visas. This Article concludes that, despite serious and uncertain costs and the impracticability of issuing asylum visas in some countries, this practice would likely create substantial benefits. In particular, it would likely decrease asylum seekers' reliance on human smugglers, clear a path to protection for bona fide asylum seekers, and increase the accuracy of information possessed by both asylum seekers and the U.S. government. Thus, the asylum

visa would assist asylum seekers in making better-informed decisions ex ante and help to achieve a better allocation of asylum resources ex post. For these reasons, the creation of an asylum visa and the potential details of such a proposal merit further study.

TABLE OF CONTENTS

I. INTRODUCTION

Chen Guangcheng, a Chinese human rights activist, escaped from house arrest in the Shandong Province and entered the U.S. embassy in Beijing on April 26, 2012, seeking refuge from the Chinese authorities.[1] Chen's escape and subsequent sheltering by the U.S. embassy triggered a diplomatic crisis, calling attention to China's abuse of rights activists at a time when the two countries were on the verge of economic talks.[2] The embassy sheltered Chen for six days.[3] Chen apparently rejected the idea of political asylum in the United States and expressed a desire to remain in China, provided the Chinese authorities would ensure his safety and that of his family.[4] Chen eventually left the embassy unaccompanied by embassy officials.[5] Within hours, he concluded that he could not live safely in China.[6] The U.S. government subsequently negotiated a deal with the Chinese government that would allow Chen to travel to the United States on a student visa and enroll at New York University Law School as a visiting fellow.[7]

---

* Lecturer, University of Florida Levin College of Law. B.A., Stanford University; J.D., Harvard Law School. Thanks to Jaya Ramji-Nogales, Jennifer Rellis, Sugata Ray, and Seema Shah for valuable comments and to the participants in the Emerging Immigration Law Teachers and Scholars Conference in June 2013 for helpful feedback. I also benefited from presenting this project in an "incubator" session at the Immigration Law Teachers Workshop of 2012. The views expressed in this article and any errors are my own.

1. *Chen Guancheng Timeline*, WASH. POST (May 2, 2012), http://www.washingtonpost.com/wp-srv/special/world/chen-guangcheng-timeline/.

2. *Id.* (providing an overview of Mr. Chen's escape to the United States).

3. Martin Patience, *China Dissident Chen Guancheng Heads to US*, BBC NEWS (May 19, 2012), http://www.bbc.co.uk/news/world-asia-18127886.

4. Jan Perlez & Andrew Jacobs, *A Car Chase, Secret Talks, and Second Thoughts*, N.Y. TIMES (May 2, 2012), http://www.nytimes.com/2012/05/03/world/asia/a-car-chase-secret-talks-and-second-thoughts.html?pagewanted=2.

5. Thomas Kaplan, Andrew Jacobs & Steven Lee Myers, *Blind Dissident From China Arrives in US, Ending Ordeal*, N.Y. TIMES (May 19, 2012), http://www.nytimes.com/2012/05/20/world/asia/china-dissident-chen-guangcheng-united-states.html.

6. *See id.* (explaining how Mr. Chen came to change his mind several hours after initially choosing to remain in China).

7. *See* Kaplan, Jacobs & Myers, *supra* note 5 (explaining that the terms of the "complex understanding" would permit Mr. Chen "to attend law school on a fellowship rather than seek asylum"); Steven Lee Myers & Mike Landler, *Behind Twists of Diplomacy in the Case of a Chinese Dissident*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/09/world/asia/behind-twists-of-diplomacy-in-case-of-chen-guangcheng.html?ref=world (discussing the negotiations that "resulted in a

In this way, the United States resolved the matter temporarily by granting Chen a student visa and transporting him to the airport.[8] Chen boarded a plane to the United States without incident and without being confronted by the Chinese authorities.[9] By avoiding talk of political asylum, which China considered an "affront,"[10] this arrangement allowed China to save face and the United States to extend protection, however temporary, to Chen.[11]

Chen's story highlights the core humanitarian concerns of refugee law as well as the sensitive political and diplomatic considerations that shape the asylum system. To a lesser extent, it demonstrates the subterfuge that the U.S. system depends upon—the admission of refugees on temporary, nonimmigrant visas because the law neither acknowledges the refugee's intent to seek asylum nor facilitates that process openly. Although Chen's quest for safety ended successfully, many lower profile asylum seekers lack access to protection.

This Article assesses the current methods by which U.S. law regulates access to the asylum procedure, focusing on the role of nonimmigrant visas—issued only for purposes other than asylum. These visas generally require applicants to demonstrate sufficient wealth and—in some cases—education.[12] These requirements effectively filter for characteristics that are wholly irrelevant to the goals of refugee law.[13] More fundamentally, the system as currently designed deprives both sides of important information. The migrant has no information about his or her chances of prevailing in a claim for asylum prior to incurring significant cost and risk to make the journey to U.S. territory.[14] Similarly, the U.S. government lacks

---

second arrangement to allow Mr. Chen to study at New York University but not to seek asylum").

8. Myers & Landler, *supra* note 7.

9. *Id*.; Kaplan, Jacobs & Myers, *supra* note 5, at 2 (suggesting that, after concluding negotiations, Chinese authorities did not try to prevent Mr. Chen from leaving China).

10. Kaplan, Jacobs & Myers, *supra* note 5, at 2.

11. *See id*. at 3 (discussing China's "eager[ness] to blunt the domestic impact of Mr. Chen's departure").

12. *See* 8 U.S.C. §§ 1101(a)(15)(B), (F) (2012) (defining "classes of nonimmigrant aliens" as exceptions to the term *immigrant* and outlining the requirements for a tourist and student visa).

13. *See, e.g.*, James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 116 (1997) ("The goal of refugee law, like that of public international law in general, is not enforceability in a strict sense. It is instead a mechanism by which governments agree to compromise their sovereign right to independent action in order to manage complexity, contain conflict, promote decency, or avoid catastrophe.").

14. *See ECRE Interview with Susanne Bolz, Head of the Protection Unit at the Swiss Refugee Council (SFH/OSAR)*, EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) (Sept. 2, 2011), *available at* www.ecre.org/component/downloads/downloads/

knowledge of the applicant's true intentions; that is, whether he or she is a tourist, a student, a scholar, a refugee, or perhaps none of these.[15]

This Article argues for addressing this problem by instituting an "asylum visa."[16] Such a visa would be issued at the embassy within the applicant's home country or in a third country for individuals who demonstrate, for example, a "credible fear of persecution"[17] and wish to enter the United States for the purpose of applying for asylum. The practice of issuing asylum visas would allow the United States to openly facilitate the journey of applicants with strong claims, discourage applicants with no chance of success, and reduce asylum seekers' reliance on human smuggling to access U.S. territory.[18] Although no Western country currently issues asylum visas on a regular basis,[19] these visas have a rich history rooted in the experiences of World War II refugees.[20] Thus, they are hardly novel or unprecedented.

283.html (discussing the value of prescreening to asylum seekers in informing them of their chances of success).

15. *Cf.* OUTI LEPOLA, COUNTERBALANCING EXTERNALIZED BORDER CONTROL FOR INTERNATIONAL PROTECTION NEEDS: HUMANITARIAN VISA AS A MODEL FOR SAFE ACCESS TO ASYLUM PROCEDURES 21 (Collaborative Project, Seventh Framework Programme 2011), *available at* www.detecter.bham.ac.uk/pdfs/D14_3_Humanitarian_Visas.doc (discussing humanitarian visas as tools to enhance national security by providing more accurate information to asylum states about the identity of the visa holder).

16. This term appears in Gregor Noll, *New Issues in Refugee Research: From 'Protective Passports' to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate* 11 (United Nations High Commissioner for Refugees, Working Paper No. 99), *available at* http://www.unhcr.org/3fd731964.html [hereinafter Noll, *Protective Passports*] (quoting a statement by Mr. Ruud Lubbers, UNHCR, that uses the term *asylum visa*); *id.* at 7 (arguing that issuance of such a visa has historically been part of what was known as a "protected entry procedure," which existed in several European states until a few years ago and in Switzerland until 2012); *ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (explaining the concept of special visas for those seeking asylum in Switzerland from abroad); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?* 17 INT'L. J. REFUGEE L. 542, 542–44 (2005) (discussing PEPs in Northern EU states); Urs Geiser, *Parliament Moves to Tighten Asylum Laws*, SWISS INFO (June 14, 2012), http://www.swissinfo.ch/eng/swiss_news/Parliament_moves_to_tighten_asylum_laws.html?cid=32897538 (reporting that the Swiss government abolished "the possibility of applying for asylum at Swiss embassies" on June 13, 2012).

17. *See* DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 815 (2d ed. 2013) (raising the question of whether a visa system should be invalid for failure to "mandate issuance of a visa to a person who makes a threshold showing (perhaps a 'credible fear of persecution') to the consular officer").

18. *See* SHELDON X. ZHANG, SMUGGLING AND TRAFFICKING IN HUMAN BEINGS 2, 160–61 (2007) (noting that demand for smuggling rises when "legitimate channels [of entry] are either blocked or inadequate").

19. For a brief survey of PEPs that existed at various times in EU countries, see LEPOLA, *supra* note 15, at 13–17. Lepola includes asylum applications at embassies (or in-country asylum) as part of the range of PEPs that have been made available to individuals fleeing from harm in their home countries.

20. *See* Noll, *Protective Passports*, *supra* note 16, at 3 (characterizing the history of protection as "so much richer" than is commonly acknowledged); *id.* at 3–5

This Article proceeds in three parts. Part II describes the U.S. refugee protection regime and its political and humanitarian purposes. The U.S. refugee protection regime includes the resettlement of overseas refugees in addition to statutory asylum and the withholding of removal (withholding) for refugees present on U.S. soil. It further suggests that while resettlement, grounded in the executive's authority, may necessarily prioritize political considerations when distributing protection and access, humanitarian considerations should prevail in the asylum system.[21] Ultimately, Part II identifies the central problem in the current system of access to asylum in the United States—that it fails to fully realize its humanitarian aims because it distributes access to asylum in a manner that ignores both the need for protection and the strength of an asylum seeker's claim. Part III considers the history of the current refugee law framework and explains why the international legal regime does not require asylum states to issue visas to asylum seekers facing acute harm. It also briefly considers the history of protected entry procedures (PEPs). Part IV describes the asylum visa in general terms and considers the costs and benefits of this potential reform, noting its limitations and impracticability in some instances, but concluding that the idea of an asylum visa warrants further study.

II. THE PROBLEM WITH ASYLUM IN THE UNITED STATES

A. *The Purposes of Asylum and Refugee Law*

Since the founding of the League of Nations, nations have recognized the "responsibility of the international community" to protect refugees.[22] Under the United Nations Convention Relating to the Status of Refugees (Refugee Convention), a refugee is

> any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

---

(discussing Sweden's and Switzerland's uses of protective passports during World War II).

21. *See* Deborah E. Anker, *Discretionary Asylum*, 28 VA. J. INT'L L. 1, 32–36, 39–40 (1987) (characterizing different purposes of overseas refugee resettlement and statutory asylum and indicating that "Congress may have institutionalized the historically different roles of resettlement and asylum: one serves the larger requirements of U.S. policy; the other responds to the immediate needs of individuals").

22. *See* U.N. HIGH COMM'R FOR REFUGEES, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF REFUGEES, at 2, RLD1 (1992), *reprinted in* KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 19 (4th ed. 2011) (explaining that "an awareness of the responsibility of the international community to provide [refugees] protection, and help them to solve their problems, dates only from the time of the League of Nations").

> group, or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . . .[23]

The elements of this definition require that the individual be outside his or her country of nationality, have a "well-founded fear" of persecution "for reasons" of a ground enumerated in the treaty, and be unwilling or unable to return to that country on account of this fear.[24]

Refugee law has political as well as humanitarian purposes. Politically, refugee law represents an effort by states to provide a coordinated response to the displacement of "involuntary migrants" by balancing refugees' need for protection with the interests of the states that absorb them.[25] Accordingly, the international refugee law framework recognizes few rights or obligations regarding access to protection other than a limited right against expulsion or return, or nonrefoulement, once a refugee has effectuated an entry into an asylum state.[26] Refugee law creates no right to be granted asylum[27] or admission to the asylum state,[28] nor does it guarantee an asylum seeker's ability to flee his or her home country or to travel to safety through lawful means.[29] These legal limitations reflect the political reality that asylum states lack the resources and will to absorb all the world's refugees.[30] These limitations further demonstrate that refugee law is far from a field of unfettered humanitarianism.[31]

---

23. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

24, *See id.* (defining the term *refugee*).

25. *See* Hathaway & Neve, *supra* note 13, at 116 (explaining that "[i]nternational refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of inevitable involuntary migration").

26. *See* Refugee Convention, *supra* note 23, at art. 33 (explaining that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened").

27. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 300–01 (2005) (highlighting the differences between the "duty of *non-refoulement*" and the "right to asylum from persecution").

28. *See id.* ("State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted."); *see also* Anker, *supra* note 21, at 3 ("States generally have not recognized a duty to admit an alien and grant asylum status.").

29. *Cf.* Refugee Convention, *supra* note 23, at Recommendations (A) (facilitation of refugee travels).

30. *See* Hathaway & Neve, *supra* note 13, at 116–18 (noting that "[w]e can no longer . . . expect all governments, whatever their circumstances, simply to receive and provide quality protection to all refugees who arrive at their territory").

31. Anker, *supra* note 21, at 42 (counseling not to "read too much into some of [the Refugee Act's] exhortatory rhetoric").

Despite the political constraints on refugee protection, a compelling humanitarian purpose continues to animate refugee law.[32] For centuries, societies have honored the "tradition" of shielding strangers who would face harm if forced to return to their place of origin.[33] According to some scholars, refugee law provides "surrogate protection" to a refugee when the state fails to fulfill its role of protecting citizens from violations of core human rights.[34] Courts around the world have increasingly cast refugee law as a tool for human rights protection,[35] and scholars have lauded the expansion of substantive bases for asylum in the United States to cover persecution by nonstate actors, especially in cases of violence against women.[36]

The U.S. refugee protection regime reflects this mix of political realism and humanitarian stirrings.[37] The regime currently consists of refugee resettlement for refugees located abroad and statutory asylum and withholding for refugees located within U.S. territory or at the border.[38] Resettlement and asylum both serve the purpose of protecting refugees, but they protect very different people for different reasons.[39] Overseas refugee resettlement historically has provided extensive group-based protection on foreign policy grounds, and statutory asylum and withholding provide individualized

---

32. *Cf. id.* at 41–42 (noting the humanitarian purposes of U.S. asylum law); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1266 (1990) (discussing the "proud tradition" of offering "asylum to the persecuted" and noting the popularity of bona fide refugees in the "public imagination").

33. *See* MUSALO, MOORE & BOSWELL, *supra* note 22, at 19 (explaining that "[r]efugees have been around as long as history").

34. *See* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 453–54 (2006) (describing James Hathaway's "surrogate protection" view); *cf.* Andrew J. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 283 (1985) (arguing for expanding the definition of refugee to cover internally displaced persons whose states fail to provide them with basic protection).

35. *See, e.g.*, Hathaway & Neve, *supra* note 13, at 117 (characterizing the "essence of refugee protection as a human rights remedy").

36. *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 135–39 (2002) (explaining that "[g]ender asylum law has also been a catalytic force in itself, a major vehicle for the articulation and acceptance of the human rights paradigm").

37. *See supra* note 21 and accompanying text.

38. Although asylum and withholding have distinct statutory bases, this Article treats them together here to emphasize the contrast between these forms of relief, which are available only after a noncitizen has effectuated an entry or reached the border, and the overseas resettlement program, which determines refugee status while the refugee is located abroad. *See* Immigration and Nationality Act, Pub. L. No. 82-414 (1952) (codified as amended in scattered sections of 8 U.S.C.) (setting forth the laws governing resettlement, asylum, and the withholding of deportation for refugees); 8 U.S.C. § 1157 (2012) (overseas refugee program); *id.* § 1158 (a)(1) (asylum); *id.* § 1231(b)(3) (withholding).

39. *See supra* note 21 and accompanying text.

protection on more explicitly humanitarian grounds.[40] For example, the greatest beneficiaries of the U.S. resettlement program have traditionally been refugees from countries where the United States has engaged in war, such as Vietnam and Iraq, or nationals of enemy nations.[41] The greatest beneficiaries of asylum, however, have been from China and Ethiopia.[42]

The U.S. refugee protection regime seeks to protect refugees, but it cannot protect everyone in the world who satisfies the definition of a refugee.[43] Accordingly, the question arises: whose claims should have priority? Whose claims should the United States attract, and whose should it deter? Scholars have debated this question with respect to overseas refugee resettlement for decades, and many support the view that the United States should channel its limited refugee protection resources toward those individuals who, otherwise satisfying the definition of refugee, need it most—those who face the greatest harm from persecution as defined by its imminence and severity.[44] Others defend a system that prioritizes the claims of

---

40. Anker, *supra* note 21, at 31–36.

41. Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233, 254–55 (1995). More recently, the greatest numbers of refugees admitted through the overseas refugee program were from Iraq and Burma. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES, & MIGRATION, FY 2011 REFUGEE ADMISSION STATISTICS (Jan. 31, 2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm.

42. *See* Office of Planning, Analysis, & Tech., *Immigration Courts FY 2011 Asylum Statistics by Nationality*, *in* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUST., FY 2011 STATISTICAL YEARBOOK 2–3 (Feb. 2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf (demonstrating the number of applications for asylum granted in FY 2011).

43. *See* David A. Martin, *The Refugee Concept: On Definitions, Politics, and Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 34–37 (Howard Adelman ed., 1991) (explaining the tension between "genuinely wish[ing] to provide [a] haven for the persecuted" and the "value [of] the reassurance that comes from reasonable control over the entry of aliens").

44. *See, e.g.*, Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 699 (1995) ("[O]ne can distinguish within the class of refugees both by the likelihood of persecution and by the harm they will face if the threatened persecution materializes."); Raufer, *supra* note 41, at 252–53 (noting that a goal of refugee protection is to protect people facing imminent danger); Court Robinson & Bill Frelick, *Lives in the Balance: The Political and Humanitarian Impulses in US Refugee Policy*, INT'L J. REFUGEE L. 293, 297 (1990) ("[O]ur principal recommendation is that a single criterion be used to govern our refugee and asylum programme—*priority must be given to those with the greatest need for protection*.") (alteration in original); *id.* at 301 (advocating for a resettlement program that uses an "index of vulnerability" that considers the "nature of persecution suffered or feared" and prioritizes claims based on "life-threatening or especially acute" harm, among other factors); Daniel J. Steinbock, *The Qualities of Mercy*, 36 U. MICH. J.L. REFORM 951, 973 (2003) ("[T]he most important factors [measuring the relative need for protection] are the degree and probability of harm."). This view resonates with the intuition that scarce resources should be allocated to maximize the objective function and assumes that the objective function of refugee protection is to protect refugees from severe and imminent harm.

refugees who share ideological, ethnic, or religious commitments with large portions of the population.[45]

Few scholars, however, have considered this question of priority in the context of asylum.[46] Asylum is typically cast as a passive, residual[47] form of relief, one that has no numerical limit, and therefore, one for which the question of priority simply does not arise.[48] In theory, the secretary of the U.S. Department of Homeland Security or the U.S. attorney general could, in his or her discretion, grant every single meritorious asylum claim that is filed in the United States.[49] However, this characterization glosses over the ways by which the United States selects its asylum seekers in the first place through its principal tool of migration control: the visa system.[50] Far from avoiding the question of prioritization, the current system implicitly prioritizes asylum claims at the source by limiting access to travel and entry.[51] U.S. law prioritizes claims from those who make it on to U.S. shores without any inquiry into the likelihood and severity of the persecution they face before they arrive.[52]

This Article posits that asylum should generally be granted to those individuals who, otherwise satisfying the definition of refugee, need protection the most. Considering the mismatch between the goal

---

45. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 48–51 (1983) (explaining that "we can also be bound to help men and women persecuted or oppressed by someone else—if they are persecuted or oppressed because they are like us"); *see also* MUSALO, MOORE & BOSWELL, *supra* note 22, at 83 (noting that some scholars have advocated an approach based on "choos[ing] among the victims on the basis of ethnic, religious or ideological affinity").

46. *But see* Robinson & Frelick, *supra* note 44, at 305 (advocating for prioritizing asylum claims based on objective human rights criteria); *see also* Price, *supra* note 34, at 465 (arguing for prioritizing claims based on the "persecution criterion" rather than simply humanitarian need).

47. *See* Martin, *supra* note 32, at 1259–60 (describing Congress's approach to asylum as "largely a legislative afterthought").

48. This assertion is an inference drawn from the dearth of discussion of "priority" regarding asylum and the abundance of such discussion with respect to resettlement. *See supra* note 44.

49. *See* 8 U.S.C. § 1158(b)(1) (2012) (describing the "[c]onditions for granting asylum").

50. *See* GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 374 (3d ed. 2007) (describing "visa regimes" as a "permissible tool of immigration control").

51. *See, e.g.*, Hathaway & Neve, *supra* note 13, at 120 ("[M]ost Northern states impose a visa requirement on the nationals of refugee-producing states, and penalize airlines and other transportation companies for bringing unauthorized refugees into their territories. By refusing to grant visas for the purpose of making a claim for asylum, Northern countries have been able to insulate themselves from many potential claimants of refugee status."); GOODWIN-GILL & MCADAM, *supra* note 50, at 37–76 (discussing the exploitation and deterrent effects of visa regimes).

52. *Cf.* Anker, *supra* note 21, at 35–36, 39 n.189 ("Whether those who arrive at our borders, by virtue of that fact, have demonstrated greater desperation, greater resourcefulness, or some combination of both, is a difficult issue and one that Congress did not seem to address.").

of refugee protection and the purposes of migration control, Congress should consider reforming the law's method of distributing access to the asylum procedure. It is not enough merely (to aspire) to rank by relative need the claims of those applicants who are already present[53] for the neediest asylum seekers are also most likely the ones with the least access to U.S. shores.[54] To truly realize the protective potential of asylum, the system should consider the applicant's need for protection at the point of providing access to the territory. Only through such a change can the United States ensure that the law allocates its scarce[55] asylum resources optimally.

One objection to this premise is that the United States *should* embrace the preference for those who happen to be "in our midst."[56] On this view, asylum should be available exclusively to "the lucky or the aggressive, who have somehow managed to make their way across our borders . . . ."[57] According to this view, asylum is as much a benefit for the United States as it is for the asylum seeker; by offering asylum, the United States avoids the harsh act of deporting a refugee from its territory.[58]

However, such a view focuses excessively on the needs of the asylum state at the expense of the asylum seeker. Moreover, it glosses over the legal and policy framework that screens those "lucky or aggressive"[59] migrants for particular traits that happen to be irrelevant to asylum.

B. *Overview of the Paths to Protection*

The 1980 Refugee Act[60] (the Act) is the centerpiece of U.S. refugee law.[61] Through the Act, Congress codified international

---

53. *Cf.* Robinson & Frelick, *supra* note 44, at 304–05 (noting that "a rating scale based on measurable human rights criteria might, in fact, be helpful in guiding adjudicators to appreciate in a more objective fashion the situations asylum applicants are fleeing").

54. *Cf. ECRC Interview with Susanne Bolz*, *supra* note 14, at 2–3 (discussing the role of PEPs in facilitating protection for asylum seekers facing a "crisis" or an "acute" harm).

55. Martin, *supra* note 43, at 36.

56. Anker, *supra* note 21, at 42–43. Price calls this a "proximity bias." Price, *supra* note 34, at 446–48.

57. WALZER, *supra* note 45, at 50–51.

58. *Id.* at 51; *see also* Price, *supra* note 34, at 448 ("To deny admission to refugees at our border, and force them to return to countries to face serious harm, violates the injunction to 'do no harm,' and thus implicates us in having caused their plight.").

59. WALZER, *supra* note 45, at 51.

60. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

61. *See* Deborah E. Anker & Michael Posner, *The Forty Years Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (characterizing the Act as "the most comprehensive United States law ever enacted concerning refugee admissions and resettlement").

commitments to protect refugees and divided authority over refugee policy between the president and Congress, ending a 40-year period of scattered, [62] ideologically driven asylum policy.[63] In the early and middle parts of the twentieth century, the executive branch had used its parole authority to grant asylum to refugees in response to mass migrations.[64] Critics and members of Congress decried the system as ad hoc and overly political.[65] After years of attempts at reform, the final compromise reflected agreement on four principal areas.[66] First, it incorporated the definition of refugee contained in the Refugee Convention and the Protocol Relating to the Status of Refugees (1967 Protocol), and it extended protection to certain additional persons when authorized by the president.[67] Second, it codified the Refugee Convention's obligation not to return (*refouler*) refugees to territories where their life or freedom would be threatened, creating a mandatory[68] form of relief known today as withholding.[69] Third, it provided for the president, in consultation with Congress, to determine the numerical cap for refugee admissions through the overseas refugee program.[70] Fourth, it created a uniform procedure for discretionary asylum to noncitizens who are "physically present in the United States or at a land border or port of entry," and it provided

---

62. *See id*. at 12 (characterizing the purpose of the Act as moving away from "*ad hoc* refugee admission procedures").

63. *See id.* at 13 (noting that the executive branch "viewed refugee admission as an instrument of foreign policy").

64. *See id.* at 15 (discussing the use of parole authority for mass admission of Hungarian refugees).

65. *See, e.g.*, *id.* at 30–31 (quoting Senator Edward Kennedy's criticism of the executive's practice of waiting until a refugee crisis develops and then using an emergency parole program to admit refugees on a mass scale); *id.* at 46 (quoting Ambassador William Clark's testimony that the most current emergency "should not blind us to the hardships" faced by refugees from other regions of the world); *id.* at 63 (quoting Congresswoman Shirley Chisholm's observation that only a miniscule number of refugees admitted to the United States since World War II have been from Africa or Latin America).

66. *See id.* at 64 ("[T]he Refugee Act is the product of years of debate and compromise.").

67. *Id*. at 60; 8 U.S.C. § 1101(a)(42) (2012) (extending refugee status to persons who remain within their country of origin, where authorized by the president).

68. *See* Anker & Posner, *supra* note 61, at 56 ("[T]he House and Senate Committees eliminated the discretionary element in the withholding provision making its provisions mandatory."); Martin, *supra* note 32, at 1260 ("Congress changed INA 234(h) to a mandatory form, leaving no doubt about the obligatory character of the *nonrefoulement* provisions in domestic law.").

69. *See* 8 U.S.C § 1231(b)(3) (2012) (establishing a general principle of "restriction on removal to a country where [an] alien's life or freedom would be threatened"). The U.S. Supreme Court has determined that withholding is owed only to a subset of refugees who can prove a higher likelihood of harm, namely that it is "more likely than not" that their life or freedom would be threatened if removed to a particular country. INS v. Stevic, 467 U.S. 407, 429–30 (1984).

70. Anker & Posner, *supra* note 61, at 61.

for "the adjustment of status for asylees."[71] Thus, the Act incorporated the Refugee Convention and 1967 Protocol, clarified the nonrefoulement obligation, and codified two paths to refugee protection: 1) overseas resettlement for refugees located abroad outside their home countries and 2) statutory asylum and withholding for refugees within U.S. territory or at the border or a port of entry.

Both refugee resettlement and statutory asylum play important roles in refugee protection. Traditionally, the United States has admitted more refugees for resettlement than it has granted statutory asylum claims.[72] In fiscal year (FY) 2011, 56,424 refugees were admitted through the resettlement program.[73] During that same period, the United States received 41,000 applications for statutory asylum.[74] Of these, 27,300 were filed "affirmatively" and 13,600 were filed "defensively." Over 11,500 applications were granted.[75]

The next two subparts sketch out the mechanics of resettlement and asylum to illuminate the explicit and implicit policy choices that prevent many worthy claims of asylum from ever being heard.

1. Resettlement

Tens of thousands of refugees who have fled their countries of origin may qualify for resettlement annually through the United States Refugee Admissions Program (USRAP).[76] USRAP is a collaboration of several government agencies and voluntary organizations.[77] The Department of State's (the State Department) Bureau of Population, Refugees, and Migration (PRM), the

71. *Id.* at 62.

72. *Compare* MUSALO, MOORE & BOSWELL, *supra* note 22, at 79 (refugee admissions statistics for 2001–2010), *with* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2010 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY10AsyStats-Current.pdf (2010 asylum grant statistics), *and* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2009 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY09AsyStats-Current.pdf (2009 asylum grant statistics), *and* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2008 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY08AsyStats-Current.pdf (2008 asylum grant statistics).

73. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FY 11 REFUGEE ADMISSIONS STATISTICS (2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm.

74. EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2011 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY11AsyStats-Current.pdf (documenting that the United States received 40,729 asylum applications in FY 2011 not abandoned or withdrawn).

75. *Id.*

76. *See U.S. Refugee Admissions Program*, U.S. DEP'T OF STATE, http://www.state.gov/j/prm/ra/admissions/index.htm (last visited Oct. 20, 2013) (listing the government agencies and nongovernmental organizations contributing to USRAP).

77. *Id.*

Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), and the Department of Health and Human Services' Office of Refugee Resettlement are each involved.[78]

Under the Act, the president, in consultation with Congress, determines the maximum number of refugees that the United States can resettle during the coming FY.[79] In FY 2011, the cap for all regions combined was 80,000, but the United States actually admitted 56,424 refugees during this period.[80] Admission numbers have traditionally fallen short of the cap, suggesting that the United States does not resettle as many refugees as it could.[81] Yet, the United States resettles more refugees than "all other resettlement countries combined."[82]

USRAP considers applications primarily from refugees who have fled their home country and who have registered with the Office of the United Nations High Commissioner for Refugees (UNHCR).[83] The UNHCR determines whether the individual qualifies as a refugee and determines the "best possible durable solution" for the individual, whether it be "safe return to the home country," "local integration" in the country to which the individual fled, or "third-country resettlement."[84] In some cases, the UNHCR may refer a refugee applicant to USRAP.[85] One of nine Resettlement Support Centers (RSC) worldwide then processes the case.[86] A USCIS officer interviews the applicant face-to-face and reviews "the information that the RSC has collected."[87] Successful applicants may be admitted to the United States as refugees.[88]

---

78. *Id.*

79. 8 U.S.C. § 1157(a)(2) (2012).

80. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 11 REFUGEE ADMISSIONS STATISTICS (2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm. The combined cap for FY 2010 was also 80,000, and the United States admitted 73,311 refugees during this period. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 10 REFUGEE ADMISSIONS STATISTICS (2010), *available at* http://www.state.gov/j/prm/releases/statistics/181160.htm.

81. *See, e.g.*, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 10 REFUGEE ADMISSIONS STATISTICS (2010), *available at* http://www.state.gov/j/prm/releases/statistics/181160.htm (showing a refugee admissions ceiling of 80,000 with 73,311 actually admitted).

82. *See U.S. Refugee Admissions*, U.S. DEP'T OF STATE, http://www.state.gov/j/prm/ra/ (last visited Oct. 20, 2013) (noting that, of the "15.4 million refugees in the world," "less than one percent . . . are eventually resettled in third countries" and that the United States admits "over half of these refugees").

83. *See id.* ("The first step for most refugees is to register with the [UNHCR] in the country to which s/he has fled.").

84. *Id.*

85. *See U.S. Refugee Admissions Program*, *supra* note 77 ("When UNHCR . . . refers a refugee applicant to the United States for resettlement, the case is first received and processed by a Resettlement Support Center (RSC).").

86. *Id.*

87. *Id.*

88. 8 U.S.C. § 1157(c)(1) (2012).

Scholars and policymakers have criticized the resettlement program for prioritizing foreign policy objectives over humanitarian need.[89] However, some have also noted that a program over which the president has such extensive discretion will inevitably privilege foreign policy considerations over humanitarian ones.[90] As it was designed to achieve U.S. policy objectives,[91] and not to vindicate human rights abuses, the very character of resettlement is irreducibly political.[92] Thus, it is unsurprising that USRAP was not designed to give priority to refugees who face the most severe or imminent harm.[93] Instead, the numbers allocated to each region have historically reflected the United States' Cold War priorities—namely, undermining Communist regimes by admitting their fleeing nationals.[94] Access to USRAP is also limited by the applicant's location and ties to the United States,[95] thus placing it beyond the reach of most refugees.[96] In sum, despite the creation of a priority for refugees who pose a "special humanitarian concern," overseas resettlement by design does not offer protection to those refugees who need it most.[97]

2. Asylum

Given the United States' long history of refugee resettlement and the comparatively recent phenomenon of asylum seekers traveling to U.S. territory, the purpose of statutory asylum is not immediately apparent.[98] Indeed, scholars have characterized asylum as a

89. *See supra* note 44 and accompanying text.

90. *See* Legomsky, *supra* note 44, at 701 (noting the "inherent unreality of expecting" the president to weigh humanitarian considerations over foreign affairs).

91. *See* Anker, *supra* note 21, at 39–40 (explaining that resettlement has historically served "the larger requirements of U.S. policy").

92. *Id*. at 46.

93. *See id*. at 36 ("[A]dmission decisions are not . . . prioritized individually based on the relative desperation of the applicant's plight, the strength of his persecution claim, or his need for protection."). *But see* Raufer, *supra* note 41, at 252 (discussing one goal of the refugee program as the "protection of persons in imminent danger").

94. *See* Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 921–38 (1990), *reprinted in* MUSALO, MOORE & BOSWELL, *supra* note 22, at 81 (highlighting the political considerations at play in the formulation of U.S. refugee policy).

95. Anker, *supra* note 21, at 36.

96. *See id*. ("[F]or most persons in need of protection there is no practical opportunity for admission [through USRAP], even in those cases where the applicants are members of a designated nationality group.").

97. For criticism of overseas resettlement as insufficiently directed at helping those refugees in greatest need, see *supra* note 44.

98. *See* Martin, *supra* note 32, at 1258 ("[Until recently], [r]esponding to refugees meant resettling displaced persons from refugee camps overseas, rather than dealing with populations already on national territory."); *see also* Martin, *supra* note

"legislative afterthought."[99] Deborah Anker and Michael Posner's analysis of the legislative history of the Act indicates that Congress sought to protect asylum applicants' interest in due process and to prevent the abuse of existing asylum procedures.[100] More fundamentally, Congress sought to institutionalize a mechanism for "select[ing] refugees based primarily on humanitarian criteria."[101] Although the legislative history does not indicate that Congress sought to prioritize humanitarian considerations over all others, commentators have suggested few other compelling purposes, especially given the overtly political purposes of resettlement.[102]

The current framework for permitting access to the asylum procedure does not serve these humanitarian ends adequately. It offers no method of attracting strong claims or deterring weak ones.[103] This is largely due to the system's reliance on irregular migration.[104] Under the Refugee Convention, illegal entry does not bar an application for asylum,[105] so an asylum seeker may apply for asylum without penalty after having entered either without inspection or pursuant to a valid visa.[106] However, because satisfying the definition of a refugee is not a basis for receiving a U.S. visa,[107] "as a practical matter, most asylum seekers cannot use the normal migration procedures to reach U.S. . . . soil and apply for asylum."[108]

43, at 35 ("We did not have to confront this built-in tension [between refugee status and immigration control] so baldly in earlier times, largely because physical distances and the cost of travel provided natural limitations on the numbers who might seek extra-regional asylum . . . .").

99. Martin, *supra* note 32, at 1260 ("Even though asylum applications were increasing throughout the period of legislative deliberation [over the Refugee Act] . . . , asylum was again largely a legislative afterthought.").

100. Anker & Posner, *supra* note 61, at 41.

101. Anker, *supra* note 21, at 39.

102. *See supra* notes 37–42. *But see* Price, *supra* note 34, at 424 (discussing the purpose of asylum as a way to shame nations).

103. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (listing classes applicable for nonimmigrant visas, none of which relate to humanitarian need).

104. *See* HATHAWAY, *supra* note 27, at 292 ("Because a visa will not be issued for the purpose of seeking refugee protection, only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries of the transportation company employees who effectively administer [the asylum state's] law abroad.").

105. *See* Refugee Convention, *supra* note 23, at art. 31, ¶ 1 ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.").

106. *See* 8 U.S.C. § 1158(a)(1) (2012) ("Any alien who is physically present in the Unites States or who arrives in the United States . . . *irrespective of such alien's status*, may apply for asylum . . . .") (emphasis added).

107. *See* MARTIN ET AL., *supra* note 17, at 774 ("Satisfying the refugee definition is not a basis for receiving a U.S. visa, although it can provide a basis . . . for papers that will ultimately lead to admission under the overseas refugee program.").

108. *Id.* at 594.

Moreover, even those asylum seekers who initially entered after obtaining a valid visa either violate the terms of the visa after arrival (by seeking to remain in the United States indefinitely) or have committed fraud in obtaining papers.[109] As a result, they are typically "out-of-status" by the time they apply for asylum.[110] Thus, the asylum system expects and relies upon illegal or deceptive entry,[111] and there is almost no way for a person in the United States to be both an asylum seeker and a lawfully present foreign national.[112] Although unlawful entry does not and should not prejudice an asylum seeker's claim in light of the many barriers to a lawful entry,[113] it is surprising that the law does not make any attempt to lift this burden for applicants who face acute harm.[114]

As described below, the current system provides two principal paths of access to the asylum procedure, neither of which selects asylum seekers based on relevant traits. The first is entrance through smuggling.[115] The second is entrance on a valid nonimmigrant visa.[116]

---

109. *See* Anker, *supra* note 21, at 29 ("The only group of out-of-status asylum seekers, other than those who enter undocumented or with false documents, are aliens who enter in a lawful status, but subsequently overstay the period of time authorized or otherwise violate the original conditions of their entry.").

110. *Id.* at 29 (quoting T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY (1985)).

111. *See id.* at 28 ("[B]eing an asylum seeker and entering 'irregularly' are inextricably linked.") (citations omitted).

112. *See id.* at 29–30 (noting that the Board of Immigration Appeals' preoccupation with fraudulent documents or illegal entry leaves asylum available only to people "subject to political changes" who become refugees after entry in the asylum state or refugees *sur place*).

113. *See id.* at 5 ("[R]efugees are by definition persons who lack entry or travel documentation and whose desperate search for a country of refuge often leaves them with little alternative but to use false documentation in order gain airline passage, exit from other countries, or entry into the United States.").

114. *Cf.* James C. Hathaway, *The Emerging Politics of Non-entrée*, REFUGEES 40, 40 (1992) (discussing the ways in which Northern countries have imposed burdens on asylum seekers attempting to enter asylum states).

115. *See, e.g.*, Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of "Refugee"*, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1295 (2000) (discussing Chinese asylum seekers' use of human smugglers to access U.S. territory).

116. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (listing grounds for nonimmigrant visas); *see also* Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B. U. INT'L L.J. 61, 65–68 (2009) (discussing asylum seekers' use of and difficulty in obtaining nonimmigrant visas to access U.S. territory).

a. Illegal Entry Through Human Smugglers

Human smuggling is an important and dangerous form of illegal entry for asylum seekers and other migrants.[117] Smugglers "essentially peddl[e] services for financial gain in exchange for the illegal entry into a country of someone who either does not qualify for or is not willing [or able] to go through legal channels."[118] Smugglers bring roughly 500,000 undocumented migrants into the United States annually.[119] Another 500,000 undocumented migrants enter without smugglers.[120] Chinese "snakeheads" move thirty thousand to forty thousand Chinese nationals into the United States illegally each year,[121] some of whom subsequently apply for asylum.[122] People who retain the services of a smuggler often pay thousands of U.S. dollars in fees.[123] Others cram into vehicles, nearly a dozen to a car, or stow away in commercial fishing vessels or freight boats.[124] Migrants who use smugglers not only take serious physical risks and incur significant costs to enter the United States, but they often face retribution by "street gangs" if they fail to pay the fees due to the smugglers.[125] As a result, migrants who use smugglers risk torture and death if they are unable to pay.[126]

b. Entry on Nonimmigrant Visas Issued for Nonasylum Purposes

Aside from entry without inspection, asylum seekers may enter using a nonimmigrant visa.[127] Although previously rare, passports and visas became crucial after World War I for anyone who wished to cross a national boundary.[128] The United States first authorized

---

117. *See* Kung, *supra* note 115, at 1275, 1305 ("[T]he 1996 Amendment facilitated a dramatic rise in the number of Chinese migrants smuggled into the U.S. . . . . Debt-collectors [then] use brutal tactics [on behalf of smugglers] to insure . . . full payment [from those brought into the country].").

118. ZHANG, *supra* note 18, at 23.

119. *Id.* at 18.

120. *Id.*

121. *Id.* at 18–19.

122. *See* Kung, *supra* note 115, at 1286 ("Chinese migrants apprehended by the INS can . . . escape immediate deportation by seeking asylum.").

123. *See* ZHANG, *supra* note 18, at 59 (describing an anecdote of Eastern European migrants who paid a smuggler $5,000 to $9,000 to cross the Mexico–U.S. border from Tijuana).

124. *Id.* at 60, 70.

125. *Id.* at 71.

126. *See id.* ("[S]tories of migrants being assaulted, tortured, and even killed have appeared frequently in the news media.").

127. Settlage, *supra* note 116, at 66.

128. *See* BUREAU OF CONSULAR AFFAIRS, THE VISA FUNCTION 1, *available at* http://www.travel.state.gov/pdf/FY2000%20visa%20function.pdf ("In 1917, a general requirement that all aliens seeking to enter the United States obtain visas was instituted and has been continued since that time . . . .").

consular officials to issue visas to "certain" noncitizens in 1884.[129] In 1917, it imposed a "general requirement" that all noncitizens seeking to enter the United States obtain a visa.[130]

Current U.S. law requires most foreign nationals to obtain visas prior to entering the United States.[131] Although visas do not guarantee admission,[132] they allow a foreign national to request admission at the border.[133] Common carriers bound for the destination country also require foreign nationals to produce sufficient travel documents, including a valid visa, and carriers face sanctions for permitting any person to board without such documents.[134] Accordingly, it is generally not possible for a foreign national to board a vessel bound for the United States without documentation of the foreign national's right to seek admission.[135] For asylum seekers who cannot or do not wish to hire a human smuggler to enter without inspection, the only remaining options are lying to the consulate about their intentions or obtaining fraudulent papers.[136] This subterfuge at the heart of the U.S. asylum system may reveal U.S. ambivalence about the humanitarian purposes of asylum.[137]

i. Visa Adjudications

Foreign nationals apply for visas in U.S. consulates abroad, typically in their home country.[138] Consular officials, who possess "special training in the visa process" and expertise regarding "local culture," adjudicate visa applications filed at the consulate where they are posted.[139] Consular officials review the paperwork and

---

129. *Id.*

130. *Id.*

131. James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 8–9 (1991). *But see Visa Waiver Program (VWP)*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/without/without_1990.html#overview (last visited Oct. 20, 2013) (listing countries the citizens of which need not obtain a visa prior to traveling to the United States).

132. *See* 8 U.S.C. § 1185(d) (2012) (providing for the nonadmission of certain aliens).

133. *See* Nafziger, *supra* note 131, at 14 ("A visa is . . . more of a clearance to request admission by the INS at the border or other port of entry.").

134. *See* MARTIN ET AL., *supra* note 17, at 774 ("Carriers are not supposed to permit a noncitizen who lacks a passport or visa to board a vessel or plane bound for the United States (unless the visa requirement is inapplicable), and they are subject to significant fines if they fail in this duty.").

135. *Id.*

136. HATHAWAY, *supra* note 27, at 292; *see also supra* note 105.

137. *See* Martin, *supra* note 43, at 36 (discussing limitations on asylum that result from states' fears of political backlash).

138. *See* Nafziger, *supra* note 131, at 9 (illustrating typical visa application procedures).

139. *Id.* at 53–54.

conduct face-to-face interviews with applicants.[140] They attempt to discern the applicant's intentions, especially regarding the applicant's intention to leave the United States before the visa expires.[141]

Consular officials may not deny a visa application absent knowledge or "reason to believe" that the applicant is ineligible.[142] Accordingly, they must base a denial on known facts about the applicant.[143] However, once the official denies a visa, the applicant has limited recourse.[144] The Visa Office in the Bureau of Consular Affairs of the State Department may review denials, but the applicant is not entitled to notice of this review, and further administrative or judicial review is unavailable under current law.[145]

ii. Types of Nonimmigrant Visas

Although visa regimes serve the legitimate purpose of migration control,[146] they also deter asylum seekers[147] and filter them for particular characteristics.[148] Under U.S. law, the most common nonimmigrant visas impose stringent requirements and, most importantly, require proof of intent *not* to immigrate to the United States.[149] The law presumes every foreign national to be an immigrant "until he establishes to the satisfaction of the consular

---

140. *See Temporary Visitors to the U.S.*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/temp_1305.html (last visited Oct. 20, 2013) (describing the process of applying for and processing a visa, including the interview at the embassy).

141. *See* Nafziger, *supra* note 131, at 13 (analyzing relevant factors for the adjudication of applications for nonimmigrant visas).

142. *Id*. at 12.

143. *Id.*

144. *Id*.

145. *See id.* at 93–94 (illustrating the review process for visa denials); *see also* Donald S. Dobkin, *Challenging the Doctrine of Consular Non-Reviewability*, 24 GEO. IMMIGR. L.J. 113, 122 (2010) (noting that the "doctrine of consular non-reviewability still persists [in the United States]").

146. GOODWIN-GILL & MCADAM, *supra* note 50, at 374.

147. *See* Hathaway & Neve, *supra* note 13, at 120 (discussing the deterrent effect of visas and noting that "[b]y refusing to grant visas for the purpose of making a claim to asylum, Northern countries have been able to insulate themselves from many potential claimants of refugee status")*; see also* Satvinder Juss, *Sovereignty, Culture, and Community: Refugee Policy and Human Rights in Europe*, UCLA J. INT'L L. & FOREIGN AFF. 463, 483–84 (Fall/Winter 1998–1999) (discussing the deterrent effect of the EU visa regime).

148. *Cf.* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 825 (2007) (discussing the ex ante screening of noncitizens under U.S. law based on "pre-entry credentials, credentials that are determined in advance and identified at the border").

149. *See, e.g.*, 8 U.S.C. § 1101 (a)(15)(F)(i) (2012) ("[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student . . . .")*; see also* MARTIN ET AL., *supra* note 17, at 774 (" . . . U.S. law bars the issuance of a nonimmigrant visa in the most widely used categories, such as a student or tourist, if there are indications that the person intends, for any reason to abandon his or her foreign residence.").

officer, at the time of application for a visa . . . that he is entitled to nonimmigrant status under [Immigration and Nationality Act] section 101(a)(15)."[150]

The specific requirements of each of these visas bear no relationship to the merits of an asylum applicant's claim; indeed, the requirement of proof of nonimmigrant intent and rejection of "dual intent"[151] means that an applicant who indicates a desire to apply for asylum will most likely have his or her application denied.[152] Nonimmigrant visas also typically require the applicant to submit evidence of wealth, education, or extraordinary scientific, artistic, or athletic skill.[153] Below, this Article focuses on student and tourist visas, which are two of the most common nonimmigrant visas issued.[154]

a) Students

To be eligible for the "F visa," the applicant must show that he or she is a bona fide student, has no intent to remain in the United States after his or her course of study has ended, and has the funds sufficient to pay for his or her educational program.[155] The State Department further cautions that applicants "should be prepared to provide" transcripts from previous institutions attended, standardized test scores, and "financial evidence that shows that you or your [sponsor] has sufficient funds to cover your tuition and living expenses during the period of your intended stay."[156] The consulate may require tax returns or bank statements as additional evidence of ability to pay.[157] Under current law, a student is ineligible for this

---

150. 8 U.S.C. § 1184 (b) (2012).

151. Dual intent refers to a nonimmigrant's intent to remain in the United States "permanently in accordance with the law, should the opportunity to do so present itself." T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 400 (6th ed. 2008) (internal citation omitted).

152. *See* MARTIN ET AL., *supra* note 17, at 774 ("[A] consular officer's judgment that the visa applicant may be interested in asylum in the United States could even lead to the refusal of a temporary-visit visa for which the applicant seems otherwise qualified.").

153. *See, e.g.*, 8 U.S.C. §§ 1101 (a)(15)(J), (O), (P) (2012) (defining "scholars," "artist[ists] [and] athlete[es] . . . [of] sustained national or international acclaim," and "performers").

154. *See* DEP'T OF STATE, NONIMMIGRANT VISAS ISSUED, FISCAL YEAR 2011, Table XVII (Part I), *available at* http://www.travel.state.gov/pdf/FY11AnnualReport-Table%20XVII.pdf (last visited Oct. 20, 2013) (indicating that the grand total of F visas issued in FY 2011 was 476,072 and the grand total of B visas issued during this period was 4,349,087).

155. *Student Visas*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1268.html#6 (last visited Oct. 20, 2013) (explaining the requirements and steps to obtain an F visa).

156. *Id.*

157. *Id.*

visa if, at the time of applying for it, he or she intends to remain in the United States after graduation.[158]

b) Tourists

To be eligible for the "B visa," commonly known as the "tourist" visa, the criteria are less numerous but equally focused on wealth.[159] The applicant must show that he or she has sufficient funds to cover his or her expenses for the trip, that he or she has sufficient ties outside the United States to ensure that he or she will leave when her visa expires, and that the purpose of the trip is for "business, pleasure, or for medical treatment."[160]

The consular official's determination as to whether the applicant is likely to become a public charge requires the official to make "speculative predictions."[161] For some visa adjudications, consular officials may look to the applicant's savings on deposit, as well as his or her "total estate and income potential."[162]

Not surprisingly, applicants from poorer countries have great difficulties obtaining tourist visas.[163] For example, in FY 2011, the adjusted refusal rate for tourist visas from Somalia was nearly 67 percent; from Ghana, 59 percent; from Mauritania, 61 percent; and from Laos, nearly 75 percent.[164] Issuance of these visas has also plummeted after the terrorist attacks of September 11, 2001.[165] Nonimmigrant visas are harder than ever to obtain for many foreign nationals.[166]

By their requirements, the student and tourist visas privilege wealthy, more educated applicants and discourage poor, less educated

---

158. *See* 8 U.S.C. § 1101(a)(15)(F) (2012) (requiring a nonimmigrant seeking to enter as a student to be "an alien having a residence in a foreign country which he has no intention of abandoning"); *see also* Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473, 479 (2003) (discussing the denial of an F visa due to the student's failure to prove nonimmigrant intent).

159. *See generally Visitor Visas – Business and Pleasure*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1262.html#4 (last visited Oct. 20, 2013). Some inquiry into the applicant's wealth is necessary to ensure that the applicant is not inadmissible due to a likelihood of becoming a public charge under 8 U.S.C. § 1182(a)(4) (2012).

160. *Id.*

161. *See* Nafziger, *supra* note 131, at 18 (explaining the controversy and safeguards surrounding "speculative predictions" made by consular officials).

162. *Id.*

163. *Adjusted Refusal Rate – B-Visas Only, by Nationality, Fiscal Year 2011*, U.S. DEP'T OF STATE, http://www.travel.state.gov/pdf/FY11.pdf (last visited Oct. 20, 2013) (providing the adjusted refusal rate for B visas by nationality for FY 2011).

164. *Id.*

165. *Cf.* Edward Alden et al., *Faster, Safer, and Smarter: A Modern Visa System for the United States*, COUNCIL ON FOREIGN RELATIONS (Jan. 2012), http://www.cfr.org/immigration/faster-safer-smarter-modern-visa-system-united-states/p27055 (noting a backlog in visa adjudications after September 11, 2001).

166. *See* Settlage, *supra* note 116, at 66–68 (discussing the difficulty of obtaining nonimmigrant visas post-9/11).

applicants, effectively driving less elite applicants into the hands of smugglers[167] if such applicants are able to flee at all.

3. Assessment of the Current System

Ultimately, the purposes of visa controls have no connection to the purposes of refugee law,[168] and yet the U.S. asylum system depends on these controls to regulate access to asylum.[169] Visa controls serve to control the type of migrants who enter so that they are temporary, self-sufficient visitors, some of whom possess exceptional skills or educational potential.[170] Refugee law seeks to extend protection to those at risk of persecution on account of a protected characteristic.[171]

U.S. asylum law, in particular, began formally as a residual humanitarian benefit for those within or at U.S. borders,[172] but it has become an important system of protection.[173] Nonetheless, nonhumanitarian interests continue to dominate asylum because of the method by which the law regulates access.[174] The visa system precludes applicants from traveling to the United States openly for the purpose of applying for asylum, instead driving them to hire human smugglers, to obtain fraudulent documents, or to lie at their consulate interviews.[175] This system of access conveys to asylum seekers that the purpose of the system is not providing humanitarian protection but testing applicants' abilities to navigate a bureaucratic maze.[176] Without widespread legal aid services for individuals applying for asylum, the system remains a mystery, and applicants

---

167. *See ECRE Interview with Susanne Bolz*, *supra* note 14 (asserting that asylum visas reduce asylum seekers' reliance on smugglers).

168. *See* MARTIN ET AL., *supra* note 17, at 774 ("The basic U.S. visa system grew up for reasons having nothing to do with asylum . . . .").

169. *Cf.* Hathaway & Neve, *supra* note 13, at 120 (discussing asylum states' use of visa requirements to limit access to asylum).

170. *See* Cox & Posner, *supra* note 148, at 825 (describing the ex ante screening of noncitizens under U.S. immigration law).

171. *See* Refugee Convention, *supra* note 23 (defining *refugee* under the Convention).

172. *See* Martin, *supra* note 32, at 1260 (tracing the development of asylum legislation in the United States); *see also* Robinson & Frelick, *supra* note 44, at 293 (noting that the U.S. asylum provision was created "[a]lmost as an afterthought").

173. *See* Robinson & Frelick, *supra* note 44, at 294–95 (noting that initial estimates predicted around five thousand asylum requests annually but that actual applications soon exceeded thirty thousand).

174. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (nonimmigrant visa categories, none of which relate to asylum).

175. *See* HATHAWAY, *supra* note 27, at 292 (describing how visa requirements are used by multiple countries to prevent applications for refugee status by migrants).

176. *See generally* DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA (2008) (describing the odyssey of a refugee who was denied asylum).

may believe that adjudicators will recognize only the most egregious claims, leading to unnecessary embellishment.[177]

As previously noted, the current visa system also filters the type of asylum seekers who can access the territory and seek protection.[178] Those who use nonimmigrant visas to gain admission must meet certain requirements regarding health, wealth, ties abroad, and—in some cases—education.[179] One might argue that these are valid bases on which to select U.S. refugees,[180] but this cannot be so. The current bases of selection have *no relationship* to the purposes of refugee law. It is not clear why the law should contain separate criteria for admission if these criteria do not represent a different basis of selection.[181] Instead, to make the best use of the "scarce resource"[182] of asylum, U.S. laws should make asylum available to those in the greatest danger of persecution[183] and deter applications from those who need it less. Asylum seekers facing such acute harm often require the greatest assistance in fleeing and becoming refugees.[184]

III. HISTORY OF THE REFUGEE PROTECTION FRAMEWORK

U.S. refugee law is grounded in international refugee law.[185] Neither international nor domestic refugee law recognizes an individual's right to be granted asylum in a foreign country,[186] nor do they guarantee individuals access to the asylum state's territory in order to seek asylum.[187] Instead, international and domestic refugee law recognizes that most asylum seekers will enter the asylum state's

---

177. *See* Suketu Mehta, *The Asylum Seeker*, THE NEW YORKER, Aug. 1, 2011, at 32–37 (describing the context in which asylum seekers increasingly embellish their applications while illustrating the particular embellishments made by one asylum seeker on her own application).

178. *Cf.* Cox & Posner, *supra* note 148, at 825 (discussing ex ante screenings of noncitizens under U.S. law based on "pre-entry credentials, credentials that are determined in advance and identified at the border").

179. 8 U.S.C. §§ 1101 (a)(15)(B), (F), (J) (2012).

180. *Cf.* MUSALO, MOORE & BOSWELL *supra* note 22, at 83 (querying whether states should "choose among the victims [of persecution] on the basis of ethnic, religious or ideological affinity") (quoting Michael Walzer).

181. *Cf.* Tyson, *supra* note 94, at 927 ("Congress's humanitarian intent is implicit in the choice of the 'humanitarian concern' language to describe the standard for determining admissions allocations.").

182. Martin, *supra* note 43, at 36.

183. *See* Anker, *supra* note 21, at 42 (warning of "exaggerat[ing] the significance" of references to "humanitarian" purposes in the Act but suggesting that statutory asylum, like nonrefoulement, reflects "some recognition of the special moral claims of those in our midst seeking U.S. protection").

184. *ECRE Interview with Susanne Bolz, supra* note 14, at 3.

185. MUSALO, MOORE & BOSWELL, *supra* note 22, at 3.

186. *See generally* ATLE GRAHL-MADSEN, 2 THE STATUS OF REFUGEES IN INTERNATIONAL LAW (A. W. Sijthoff 1972).

187. *Id.* at 101.

territory without formal admission. With the Refugee Convention,[188] States Party superimposed international refugee law on existing migration control systems, revealing their competing interests in providing humanitarian protection and controlling migration into their territory.[189]

A. *A State's Right to Grant Asylum*

International refugee law does not recognize an individual's right to be granted asylum in a foreign country.[190] The Universal Declaration of Human Rights (UDHR) recognizes only the "right to seek and to enjoy, in other countries, asylum from persecution."[191] At a minimum, this principle secures the individual's right of asylum "*vis-à-vis* the pursuing [s]tate"—the right to flee the pursuing state and to seek and enjoy asylum elsewhere.[192] But this right imposes no obligation on states to grant asylum—or even access to the territory—to a refugee.[193] Atle Grahl-Madsen has explained that the United Nations Commission on Human Rights (UNCHR), in drafting the UDHR, initially considered recognizing the "right to seek and be granted, in other countries, asylum."[194] The British delegation, however, resisted this phrasing, believing that it would effectively entitle any asylum seeker to admission into any other country of his or her choosing.[195] Such a right would tread on states' immigration laws.[196] As an alternative, the British delegation proposed replacing the phrase "be granted" with "to enjoy."[197] Members of the UNCHR understood plainly that an individual's right to enjoy asylum meant little without a corresponding right to be granted asylum.[198]

---

188. Refugee Convention, *supra* note 23.

189. *See* Hathaway & Neve, *supra* note 13, at 116 ("International refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of inevitable involuntary migration."); *see also* Anker, *supra* note 21, at 41 ("[A]sylum will retain a certain ambiguity, caught as it is in the irresolution of obligation and discretion inherent in international refugee law.").

190. GRAHL-MADSEN, *supra* note 186, at 80.

191. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 14 (Dec. 10, 1948).

192. GRAHL-MADSEN, *supra* note 186, at 79, 101.

193. *Id.* at 101.

194. *Id.* at 100.

195. *Id.* at 100–01 (discussing the objection of Mrs. F. Corbet of the United Kingdom, specifically her concern that the draft of present Article 14 of the UDHR "was closely linked to immigration laws, inasmuch as it gave any person . . . persecuted for political or other reasons the right to demand admission into the country of their choice").

196. *Id.* at 100.

197. *Id.*

198. *See id.* at 101 (discussing the remarks to this effect of Soviet delegate Mr. Alexei Pavlov); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 384 ("To have any

However, the British delegation cared not about the *individual's* right to enjoy asylum; it was concerned with the rights of asylum states to "enjoy" granting asylum.[199] The proposed revision would protect "'the right of every State to offer refuge and to resist all demands for extradition.'"[200] By characterizing asylum as a sovereign right of an asylum state rather than a human right of the individual, the British delegation advanced the view of asylum as a discretionary institution compatible with states' complete territorial sovereignty.[201]

The territorial sovereignty of the pursuing state generally prevents an asylum state from providing refuge to an asylum seeker who has not yet fled. In *The Asylum Case*, the International Court of Justice determined that an asylum state's act of protecting an asylum seeker from the pursuing state's authorities *within* the pursuing state constituted "derogation from the territorial sovereignty" of the pursuing state.[202] Accordingly, a state generally cannot grant asylum in an embassy or consulate located in the pursuing state without that state's consent.[203] This does not preclude individuals from seeking the physical safety of an embassy.[204] Rather, in Grahl-Madsen's words, such protection constitutes merely a "tolerated stay," not asylum.[205] An asylum seeker thus resides for a time in a jurisdiction from which he or she wishes to "separate" himself or herself.[206] For this reason, "internal asylum" may both produce undesirable diplomatic consequences for the pursuing and asylum states and present practical challenges, such as transporting the asylum seeker out of the pursuing state without obstruction.[207] Accordingly, the asylum seeker's flight plays a central role in international refugee law: absent flight from the pursuing state, the asylum state may have only a limited ability to execute a grant of asylum.[208]

---

meaning, the right to seek asylum implies not only a right to access asylum procedures, but also to be able to leave one's country in search of protection.").

199. *See* GRAHL-MADSEN, *supra* note 186, at 101 (quoting HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947) (quoting the British delegation)).

200. *Id.* (quoting the British delegation). Grahl-Madsen notes that the UDHR cannot be invoked to resist legitimate demands for extradition, i.e., those in accordance with a treaty. *Id.* at 101–02 n.55. More fundamentally, Grahl-Madsen emphasizes that extradition and asylum are best conceived of as two distinct institutions rather than as two sides of a single issue, or one as the rule and the other as the exception.

201. GOODWIN-GILL & MCADAM, *supra* note 50, at 355.

202. GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing *The Asylum Case*).

203. *Id.* at 46.

204. *Id.*

205. *Id.*

206. Raufer, *supra* note 41, at 257–58.

207. *See id.* ("It is unreasonable to expect that an in-country program which processes refugees who are in current fear will not be affected by, or affect, the diplomatic relationship between the countries.").

208. *See* GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing diplomatic asylum).

WikiLeaks founder Julian Assange's ongoing efforts to flee the United Kingdom and enjoy asylum in Ecuador demonstrate this difficulty.[209] Sweden seeks to exercise jurisdiction over Assange to try him for alleged sexual offenses arising out of a trip he took there in 2010.[210] Assange fled to the United Kingdom, which then determined that it was obligated to extradite him to Sweden.[211] He then sought refuge in the Ecuadorian embassy and applied for asylum, hiding for two months while awaiting a decision.[212] Ecuador ultimately granted him "diplomatic asylum" on the ground that he might ultimately be extradited to the United States and subjected to the death penalty.[213] Nonetheless, the United Kingdom maintained that it was bound to extradite Assange and that it would arrest him if he attempted to flee the Ecuadorian embassy to travel to Ecuador. [214] Accordingly, although Assange has obtained a grant of asylum in a third country, he has no straightforward way to travel there without the risk of apprehension and extradition. Asylum has no force where the individual remains within the territory of the pursuing state and the latter prevents the individual's flight to the safe haven.[215] As a result, even an asylum state's right to enjoy granting asylum is circumscribed by the interests of the pursuing state.

B. *An Individual's Right to Seek Asylum*

Against this backdrop of territorial sovereignty, however, are the individual's right to seek asylum and international human rights

---

209. *See* William Neuman & Maggy Ayala, *Ecuador Grants Asylum to Assange, Defying Britain,* N.Y. TIMES (Aug. 16, 2012), http://www.nytimes.com/2012/08/17/world/americas/ecuador-to-let-assange-stay-in-its-embassy.html?pagewanted=all ("Tensions between Britain and Ecuador had been building over Britain's efforts to secure a handover of Mr. Assange."); *see also Ecuador Restates Support for Assange on Asylum Anniversary*, THE GUARDIAN (Aug. 16, 2013), http://www.theguardian.com/media/2013/aug/16/ecuador-julian-assange-asylum-anniversary ("'Ecuador accepts that resolving Julian's status and specifically his right to leave the embassy without threat of arrest and onward extradition to the US involves the jurisdictions of three sovereign nations – the UK, Sweden and Ecuador.'").

210. *Julian Assange Loses Extradition Case,* THE GUARDIAN (May 30, 2012), http://www.guardian.co.uk/media/blog/2012/may/30/julian-assange-extradition-verdict-live-coverage.

211. *See, e.g.*, Nicolas Watt, *UK Tells Ecuador Assange Can't Be Extradited If He Faces Death Penalty*, THE GUARDIAN (Sept. 3, 2012), http://www.guardian.co.uk/media/2012/sep/03/ecuador-julian-assange-extradited-death-penalty?newsfeed=true (observing that Britain was obligated to extradite Assange to Sweden as long as his human rights would not be violated there).

212. Neuman & Ayala, *supra* note 209.

213. *Id.*

214. *Id.*

215. *See* GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing diplomatic asylum).

related to free movement.[216] Some have argued that Article 14 of the UDHR implicitly guarantees individuals a right to access an asylum procedure by guaranteeing the right to *seek* asylum.[217] Moreover, the right to seek asylum established in the UDHR continues to evolve in relation to other international instruments, reflecting developments in human rights law.[218] These instruments reinforce the right of individuals to flee a country of persecution[219] and encourage asylum states to admit refugees for this purpose.[220]

The right to emigrate is chief among these rights.[221] Article 13.2 of the UDHR establishes that "[e]veryone has the right to leave any country, including his own, and to return to his country."[222] Article 12 of the International Covenant on Civil and Political Rights (ICCPR) codifies this guarantee: "Everyone shall be free to leave any country, including his own."[223] States may, however, restrict this right to "protect national security, public order, public health or morals or the rights and freedoms of others."[224] Moreover, the right to emigrate imposes obligations on the country of origin not to thwart departure or withhold travel documents, but it does not obligate asylum states to admit asylum seekers.[225]

The Declaration on Territorial Asylum further endorses the "moral" right of a refugee to gain admission to a country of refuge,[226] but it is neither a binding treaty obligation nor customary international law.[227] Accordingly, absent greater engagement with

---

216. *See* Universal Declaration of Human Rights, *supra* note 191, at art. 14 (expressing the right to seek asylum); *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. At 52, U.N. Doc. A/6316, at art. 12 (Dec. 16, 1966) (guaranteeing the freedom to "leave any country").

217. THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 14 n.6 (2011) ("A closer reading of the drafting history further suggests that while the declaration falls short of an individual right to be *granted* asylum, a procedural right to *seek,* or in other words a right to an asylum process, was intended to remain.") (alteration in original).

218. GOODWIN-GILL & MCADAM, *supra* note 50, at 383 (observing that asylum protections overlap with the right to freedom of movement, protected by the ECHR).

219. *Id.*

220. GRAHL-MADSEN, *supra* note 186, at 102.

221. *Id.* at 105.

222. Universal Declaration of Human Rights, *supra* note 191, at art. 13.2.

223. International Covenant on Civil and Political Rights, *supra* note 216, at art. 12.

224. GOODWIN-GILL & MCADAM, *supra* note 50, at 381 (quoting the ICCPR).

225. *See id.* at 382 ("The right to leave is not a right which other states need to 'complete' through a duty to admit; rather, it is simply a right which each State must guarantee to those within its own territories, as a matter of constitutional principle.").

226. GRAHL-MADSEN, *supra* note 186, at 108.

227. *Id.*

human rights law, traditional concepts of territorial sovereignty continue to constrict the right to seek asylum.[228]

C. *Refugee Convention*

The central treaty on the rights of refugees, the Refugee Convention, obligates states not to refouler refugees to countries where they face persecution. [229] This subpart describes the nonrefoulement obligation and observes that international refugee law is not designed to attract asylum claims from abroad based on the degree of harm suffered by the claimant. Instead, international refugee law is designed to address the status of people who have already fled into another country.[230] Accordingly, refugee law does not obligate asylum states to issue visas to facilitate the travel of asylum seekers who wish to flee their countries of origin.[231] Its failure to do so, however, means that the community of refugees existing in any asylum state represents not those refugees who necessarily face the most imminent or severe harm but those who succeeded in crossing national boundaries and navigating migration controls.[232]

This subpart begins by examining the principle of nonrefoulement generally; next, it explores its purpose in a regime that expects most asylum seekers to enter asylum states illegally; it then describes how nonrefoulement applies to visa rules; and, finally, it discusses the role of nonrefoulement in U.S. law.

1. Nonrefoulement Generally

Refugee law has evolved since the adoption of the UDHR into a "hybrid"[233] of discretionary asylum and obligatory nonreturn to a persecuting country.[234] The Refugee Convention is widely regarded as

---

228. *Cf.* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 630 (2009) (arguing for interpreting the Refugee Convention in the context of international human rights law).

229. Refugee Convention, *supra* note 23, at art. 33.

230. *See id.* at art. 1 (defining *refugee* as a person who is "outside his country of nationality" among other requirements).

231. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 572 (noting that there is "no implied obligation [on an asylum state] to issue an entry visa flowing from" the ICCPR).

232. *See* Martin, *supra* note 32, at 1268 ("After all, the only clear requisites for [filing an application for asylum] are physical presence on the soil of a Western democracy and persistence in asserting the claim.").

233. *See* Anker, *supra* note 21, at 40–41 ("The best view of asylum is a hybrid, an intermediary status, partaking of the relatively generous definitional standard of the overseas refugee program and some of the protection purposes of section 243(h).").

234. *See id.* at 41 ("Beyond this, asylum will retain a certain ambiguity, caught as it is in the irresolution of obligation and discretion inherent in international refugee law.").

the "centerpiece"[235] of international refugee law and an important humanitarian achievement.[236] The Refugee Convention defines who is a "refugee" and establishes states' obligations toward refugees.[237] However, as scholars have noted, the treaty is far less generous than it is typically understood to be.[238] Although it extends numerous rights to refugees upon admission and recognition, such as the right to industrial property,[239] it does not create a right to asylum and does not require states to provide asylum seekers with access to the asylum procedure unless they are inside the territory of the asylum state or at the frontier.[240] In fact, some scholars characterize the Refugee Convention as an agreement premised on the right of states to control migration in the usual ways.[241]

The central feature of the Refugee Convention is its definition of *refugee*:

> [A]ny person who . . . (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . . .[242]

This definition has been widely praised as "nondiscriminatory,"[243] and it serves as the foundation for modern refugee law.[244]

---

235. *See* Refugee Convention, *supra* note 23, at 2.

236. *See* Sadako Ogata, *Foreword* to THE REFUGEE CONVENTION, 1951 (Paul Weis ed., 1995), *available at* http://www.unhcr.org/4ca34be29.pdf (noting that "[o]ne of the outstanding achievements of the 20th century in the humanitarian field has been the establishment of the principle that the refugee problem is a matter of concern to the international community and must be addressed in the context of international cooperation and burden-sharing").

237. *See id.* ("At the universal level, the most comprehensive legally binding international instrument defining standards for the treatment of refugees is the United Nations Convention relating to the Status of Refugees of 28th July 1951.").

238. *See* Martin, *supra* note 32, at 1255 ("The 1951 Convention, a cautious and more limited treaty than is often appreciated, provides relatively few actual guarantees to refugees illegally present in the country of haven (as most asylum seekers now are).").

239. Refugee Convention, *supra* note 23, at art. 14; *see also id.* at arts. 16–17, 22 (providing refugees with access to courts, the right to wage-earning employment, and public education, respectively).

240. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 45 (discussing nonrefoulement).

241. *See* James C. Hathaway, *Preface* to RECONCEIVING INTERNATIONAL REFUGEE LAW, at xviii–xix (James C. Hathaway ed., 1997) ("The absence of a duty to grant permanent residence to refugees was critical to the successful negotiation of the Convention. While willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories.").

242. Refugee Convention, *supra* note 23, at art. 1.

243. *See* Anker & Posner, *supra* note 61, at 60 ("Both House and Senate sponsors emphasized [in the conference report for the Refugee Act of 1980] that the

Although not a party to the Refugee Convention, the United States ratified the 1967 Protocol, and thereby committed not to return refugees to any country where their life or freedom would be threatened on account of a protected ground.[245] The Senate viewed the 1967 Protocol as a codification of existing humanitarian commitments.[246] The 1967 Protocol revised the definition of *refugee* by eliminating the requirement that a refugee be displaced due to events occurring before 1951.[247] It also removed the restriction that these events have occurred in Europe.[248] The 1967 Protocol otherwise incorporated by reference the key provisions of the Refugee Convention.[249] As a result, the United States has essentially acceded to the entire Refugee Convention.[250]

At its core, the Refugee Convention offers a limited guarantee against refoulement to foreign nationals who, having somehow accessed the territory of the "country of haven,"[251] or, on some interpretations, appeared at the frontier,[252] would face threats to their life or freedom if returned to their country of origin.[253] Article 33.1 of the Refugee Convention states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[254] The emphatic[255]

---

purpose was to create a nondiscriminatory definition of refugee and to make the United States law conform to the UN Convention.").

244. *See* Refugee Convention, *supra* note 23, at 2 (referring to the Refugee Convention as the "centerpiece" of international refugee law).

245. Martin, *supra* note 32, at 1259 (noting that ratification of the 1967 Protocol "was tantamount to acceding to the earlier instrument").

246. *See id.* ("An unexamined assumption that U.S. practices conformed fully to the 1951 Convention's requirements permeated the proceedings, and executive spokespersons assured the Senate that the 1967 Protocol could be implemented without changes in the statutes.").

247. Refugee Convention, *supra* note 23, at 2 ("[The Convention] has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.").

248. *Id.*

249. Martin, *supra* note 32, at 1259.

250. *Id.*

251. *See id.* at 1255 ("Article 33 [of the Refugee Convention] affords a limited and country-specific protection" from refoulment).

252. GOODWIN-GILL & MCADAM, *supra* note 50, at 208 (observing that a broader interpretation of nonrefoulement has been established through state practice, as states regularly allow large numbers of asylum seekers to cross their frontiers).

253. Refugee Convention, *supra* note 23, at art. 33.

254. *Id.* at art. 33.1. Article 33.2 limits this guarantee: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Id.* at art. 33.2.

255. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 53–54, 60 ("[P]rohibiting *non-refoulement* 'in any manner whatsoever' would suggest that it applies regardless of

expression "in any manner whatsoever" belies the restrictive interpretation of refoulement adopted by some states and the general disagreement over its scope.[256]

2. Nonrefoulement and "Impunity"[257] for Illegal Entry

The Refugee Convention creates no obligations to admit refugees, nor does it require states to facilitate refugees' flight from harm.[258] It addresses the plight of refugees who have already fled their home countries and who have effectuated an entry into an asylum state.[259] Because asylum states generally do not admit refugees formally for the purpose of applying for asylum, refugees must ordinarily enter the asylum state irregularly.[260] Under this framework, access to asylum is distributed to those who succeed in evading normal immigration controls.[261] Although flight and successful entry may reflect a refugee's desperation and his or her need to escape harm, it may also simply reflect the refugee's *ability* to effectuate an entry[262]—his or her skill in navigating official paperwork, procuring false documents, or arranging for smuggling.[263] Thus, the legal framework for refugee protection is not designed to extract credible claimants from their home countries, to sort claims by strength, or to create a priority for claims based on the severity or imminence of harm.

Not surprisingly, the Refugee Convention expressly contemplates that refugees will enter asylum states illegally and prohibits states from penalizing refugees for such entry.[264] Other than a few brief, nonbinding recommendations that nations provide travel documents to refugees,[265] the treaty does not candidly address the "controversial

---

whether actions occur inside the territory of an acting state, at the border, or even beyond the national territory."); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 385 ("[R]emoving refugees 'in any manner whatsoever' to territories where they may be persecuted, whether removal occurs within or outside State territory, will breach article 33(1).").

256. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 17, 68 (noting states' restrictive interpretations of nonrefoulement and summarizing the debate).

257. GRAHL-MADSEN, *supra* note 186, at 209.

258. GOODWIN-GILL & MCADAM, *supra* note 50, at 264.

259. *See* Martin, *supra* note 32, at 1255 (highlighting the fact that most asylum seekers have already fled their home countries).

260. MARTIN ET AL., *supra* note 17, at 775.

261. GAMMELTOFT-HANSEN, *supra* note 217, at 61 (questioning the logic of maintaining an "interpretation whereby the refugee who manages to elude the border guard and enter illegally will receive more protection than the refugee who honestly presents his or her asylum claim to the authorities at or before the border").

262. Martin, *supra* note 32, at 1268.

263. *See* HATHAWAY, *supra* note 27, at 292 (noting that, absent an asylum visa, "only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries" of those who screen refugees abroad).

264. Refugee Convention, *supra* note 23, at art. 31.

265. *Id.* at Recommendations (A) (facilitation of refugee travels).

question of admission."[266] Instead, Article 31 establishes "impunity" [267] for illegal entry:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[268]

In failing to impose any substantive or procedural admission requirements, the Refugee Convention reflects the States Party's unwillingness to alter existing migration control systems in light of humanitarian needs.[269]

Modern trends have demonstrated states' resolve to minimize burdens associated with accepting and assimilating refugees. [270] James Hathaway and R. Alexander Neve contend that refugee protection has evolved from a temporary "human rights remedy"[271] to an end run around existing migration procedures leading to permanent residence.[272] Seeking to avoid the burden of permanently hosting large numbers of involuntary migrants from the Global South, states have enacted policies of "non-entrée."[273] These policies include a range of deterrent measures, including summary exclusion procedures, burden-shifting arrangements, interdiction, carrier sanctions, and restrictive visa regulations.[274]

3. Nonrefoulement Applied to Visa Regimes

Visas limit access to asylum because they limit asylum seekers' access to the asylum state's territory. When countries require entrants to obtain a visa in order to board a common carrier, but they do not offer a visa for the purpose of applying for asylum, they deny asylum seekers "all legal means" of accessing the asylum

---

266. GOODWIN-GILL & MCADAM, *supra* note 50, at 264.

267. GRAHL-MADSEN, *supra* note 186, at 209.

268. Refugee Convention, *supra* note 23, at art. 31.

269. *See* Hathaway & Neve, *supra* note 13, at 117 ("[G]overnments increasingly believe that a concerted commitment to refugee protection is tantamount to an abdication of their migration control responsibilities. They see refugee protection as little more than an uncontrolled back door route to permanent immigration, in conflict with official efforts to tailor admissions on the basis of economic or other criteria.").

270. Hathaway, *supra* note 114, at 41.

271. *See* Hathaway & Neve, *supra* note 13, at 210 (offering a view of refugee law as a human rights remedy rather than a back door to permanent immigration).

272. *Id.*

273. Hathaway, *supra* note 114, at 40.

274. *Id.*; Hathaway & Neve, *supra* note 13, at 122 (discussing summary exclusion procedures and interdiction); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 370 (describing "deflection techniques" used by states).

procedure.[275] Visa regimes may eliminate access to asylum or force asylum seekers to pursue fraudulent visas or entry through smuggling or other "illegal migration channels."[276]

Ultimately, international institutions accept visa regimes as legitimate tools of migration control,[277] and no court has interpreted the decision to grant or deny a visa to access a territory as refoulement.[278] In the *Roma Rights* case, for example, British courts considered the legality of the British pre-entry screening procedure at the Prague Airport, which targeted asylum seekers of Roma ethnicity who sought to flee mistreatment in the Czech Republic.[279] The Court of Appeal determined that the pre-entry procedure violated international legal principles of nondiscrimination on the basis of race but that the procedure was lawful under the Refugee Convention; the House of Lords agreed.[280] The prescreening program was consistent with nonrefoulement and not a breach of the duty of good faith because a state's obligation not to refouler is "triggered [only] once an asylum seeker is outside his or her country of origin or habitual residence."[281] Accordingly, denying visas to asylum seekers does not constitute refoulement under the Refugee Convention even if objectionable on other grounds.[282]

---

275. GOODWIN-GILL & MCADAM, *supra* note 50, at 375 ("If external movement is premised on the acquisition of a visa, and visas for asylum are not forthcoming, then all legal means of seeking asylum are denied.").

276. *Id.* at 374–75.

277. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 134 ("In general, however, granting or denying a visa, even if conducted directly by consular or embassy agents, has seldom been considered sufficient to constitute *refoulement*. Merely refusing a visa does not necessarily provide a sufficient causal link to any future violation of the *non-refoulement* principle, and visa controls in general thus seem to have been accepted as legitimate measures even by UNHCR."). *But see* HATHAWAY, *supra* note 27, at 312–13 (discussing the UNHCR's view that visa controls may breach duties under the ICCPR's guarantees of "freedom of international movement").

278. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 133–35 (discussing the refoulement principle in this context); *see also* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 556 ("With regard to embassy applications, one cannot subsume the rejection of an entry visa under the terms of expulsion, return, *refoulement* or transfer to the frontier of territories or to another State or to a country where the specified threats await an applicant. Accordingly, there is no obligation to provide for a [visa for the migrant to enter the haven state's territory for the purpose of applying for asylum] inherent in these norms.") (internal quotation marks omitted).

279. GOODWIN-GILL & MCADAM, *supra* note 50, at 371 (discussing the *Roma Rights* case).

280. *See* HATHAWAY, *supra* note 27, at 308–12 (discussing the *Roma Rights* decision).

281. GOODWIN-GILL & MCADAM, *supra* note 50, at 385.

282. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 573.

4. Emergence of PEPs

Given that international refugee law does not obligate states to issue visas to refugees to facilitate their journey and admission to the asylum state, it may be surprising that countries chose to adopt PEPs at various points in time during the twentieth century.[283] To understand the rationale for PEPs from the asylum state's perspective, it is useful to trace the history of the use of passports and visas for humanitarian ends.

Protective passports and other types of protective papers first appeared during the infancy of international refugee law.[284] During World War II, for example, Swedish diplomats initially restricted entry of Jewish refugees.[285] However, faced with knowledge that mere "persecution" had morphed into mass atrocities,[286] these diplomats issued protective papers to a number of Jews in Norway,[287] Denmark,[288] and Hungary,[289] who otherwise faced deportation to Holocaust "death camps."[290] Many recipients of protective papers had only tenuous connections to Sweden, and some had none.[291] German and Hungarian authorities honored these papers, albeit inconsistently,[292] possibly because they had been issued pursuant to "diplomatic and bureaucratic norms"[293] and provided "physical evidence of the concern of a foreign power."[294] In Hungary after German occupation, for example, "[e]veryone understood that the mere possession of an official looking paper might have some positive

283. *See, e.g.*, INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM AND REFUGEES, ASYLUM PROCEDURES: REPORT ON POLICIES AND PRACTICES IN IGC PARTICIPATING STATES 2009, at 239 [hereinafter IGC] (describing the Netherlands' defunct asylum visa and long-standing resettlement program).

284. *See* J. Craig Barker, *The Function of Diplomatic Missions in Times of Armed Conflict or Foreign Armed Intervention*, 81 NORDIC J. INT'L L. 388, 393 (2012) (describing the Swedish protective passport or schutzpass during World War II and noting "little evidence . . . that such passes had ever been used before").

285. *See* PAUL A. LEVINE, FROM INDIFFERENCE TO ACTIVISM: SWEDISH DIPLOMACY AND THE HOLOCAUST 1938–1944, at 103 (1996) (noting that, unlike Great Britain which "opened its doors more than before," "Sweden turned the other way and tightened its restrictions when the need for refuge grew most acute").

286. *Id.* at 130.

287. *See id.* at 146 (describing Swedish diplomatic efforts to provide "papers indicating Swedish interest in" Norwegians at risk).

288. *See id.* at 233, 242 (describing Swedish diplomat Gösta Engzell's cable to Danish Minister von Dardel that indicated "mere possession of a Swedish document might induce better treatment [of vulnerable Jews]" and discussed authorization of "provisional passports" to Danish Jews).

289. *See id.* at 267 (discussing the value of Swedish documents in protecting Jews in Hungary).

290. *Id.* at 52.

291. *Id.* at 139.

292. *See id.* at 268 (explaining how the "various types of document[s] issued by the Swedes" came to have "relative value[s]").

293. *Id.* at 46.

294. *Id.* at 267.

effect."[295] Thus, diplomats continued to issue protective papers when deemed appropriate, despite their inconsistent effect.[296]

Protective documents ranged from the protective passport to an entry visa to Sweden to two types of protective letters.[297] Swedish diplomats determined that protective passports had the highest relative "protective value."[298] These passports, known as *schutzpass*, were made to look official; through "trial and error"[299] diplomats determined whether letterhead, stamp, certificate, and signature affected the impact of these documents.[300] Swedish diplomats were inundated with requests for help, and they could not assist everyone who asked.[301] Ultimately, however, they used a combination of passports, visas, and other papers to protect thousands of Jews from certain death.[302]

Switzerland also issued protective papers during World War II, and for that reason it may be less surprising that Switzerland provides the most recent example of a country offering a PEP.[303] The Swiss asylum law contained a provision for PEPs as early as 1979.[304] When the program existed, Swiss embassies announced the availability of the PEP visa on their websites.[305] The application for a PEP visa required applicants to explain, orally or in writing, the basis of the claim for refugee status.[306] The embassy would then forward the information to the Federal Office of Migration (FOM), which screened the application.[307] If the application presented sufficient

---

295. *Id.*

296. *Id.*

297. *See id.* at 268 (examining a memorandum describing the various Swedish papers).

298. *Id.*

299. *Id.*

300. *See id.* ("[A] document with a signature was worth more than one without it […] possession of any document with a Swedish letterhead or stamp was better than having nothing at all.").

301. *Id.* at 269.

302. *See id.* at 277 ("Many thousands [of Jews] survived at least partly due to the heroic efforts of Wallenberg, Anger, Swiss diplomat Charles Lutz and others.").

303. *See Few Humanitarian Visas Granted by Swiss*, SWISSINFO.CH (Apr. 25, 2013, 9:11 PM), http://www.swissinfo.ch/eng/swiss_news/Few_humanitarian_visas_granted_by_Swiss.html?cid=35632382 (noting the prior Swiss practice of issuing asylum visas).

304. CHRISTOPHER HEIN & MARIA DE DONATO, EUROPEAN REFUGEE FUND, EXPLORING AVENUES FOR PROTECTED ENTRY IN EUROPE 12–13 (Laura Facchi ed., Mar. 2012), *available at* http://www.fluechtlingshilfe.ch/asylrecht/eu-international/schengen-dublin-und-die-schweiz/exploring-avenues-for-protected-entry-in-europe/?searchterm=entering.

305. *Visa for People Living in India/*Bhutan, FED. DEP'T OF FOREIGN AFFAIRS, http://www.eda.admin.ch/eda/en/home/reps/asia/vind/ref_visinf/visind.html (on file with the author).

306. *Asylum Applicants from Abroad, At a Border Crossing, or At the Airport*, FED. OFFICE OF MIGRATION, http://www.bfm.admin.ch/bfm/en/home/themen/asyl/asylverfahren/asylgesuch/asylgesuch_aus_ausland.html (on file with the author).

307. *Id.*

merit, FOM would recommend issuing a PEP visa, and the applicant would be permitted to travel to Switzerland for the purpose of applying for asylum properly.[308] The procedure also required applicants to demonstrate some ties to Switzerland to explain why Switzerland would be the most appropriate destination for resettlement.[309] Thus, PEP was not equivalent to in-country processing of asylum claims or the adjudication of asylum claims at an embassy. A visa through PEP simply authorized the travel and entry of an asylum seeker with a credible claim.[310]

The Swiss PEP played an important role in helping asylum seekers facing acute harm to circumvent the barriers erected by non-entrée.[311] According to an official from the Swiss Refugee Council, a nongovernmental organization advocating for refugees, the purpose of PEP was to be able to respond to "very special situations of acute danger or to help persons out of protracted situations of insecure or unsafe conditions."[312] This official has also asserted that the PEP visa benefitted women disproportionately,[313] as women comprised a greater share of asylum applicants through PEP, at the airport and at the border, than applicants lodging applications from inside Swiss territory after overstaying a nonimmigrant visa or entering without inspection.[314] The Swiss government, however, maintained that most PEP applications were unsuccessful and branded the program an administrative and financial drain.[315] Accordingly, it began dismantling PEP in 2011 and fully abolished it in 2012.[316] News reports suggest the government intended to limit asylum claims from Eritrean conscientious objectors at Swiss embassies.[317] PEP has been replaced with a "humanitarian visa," available to individuals whose "life or physical integrity is seriously and concretely under threat in their homeland."[318] However, only half a dozen such visas have been granted to date.[319]

---

308. *Id*.
309. *Id*.
310. *Id.*
311. See Hathaway, *supra* note 114, at 40.
312. *ECRE Interview with Susanne Bolz*, *supra* note 14, at 3.
313. *See id.* at 2 ("Statistics show that the rate of women among the persons allowed entry is higher than among spontaneous arrivals.").
314. *See* E-mail from Susanne Bolz to Author (June 14, 2012, 04:34 CET) (on file with author) (detailing the figures on "special" asylum applications from the Swiss border and airport procedure from 2010–2011); HEIN & DE DONATO, *supra* note 304, at 59.
315. *ECRE Interview with Susanne Bolz*, *supra* note 14.
316. *See* Geiser, *supra* note 16 (explaining the process by which the Swiss government dismantled the PEP program).
317. *Swiss Protests Against Tightening of Asylum Laws*, AL ARABIYA NEWS (June 23, 2012, 9:42 PM), http://english.alarabiya.net/articles/2012/06/23/222323.html.
318. *Few Humanitarian Visas Granted by Swiss*, *supra* note 303.
319. *Id*.

It is also worth noting that Switzerland participates in refugee resettlement on an ad hoc basis only,[320] and thus, PEP may have served as its way of contributing to overseas refugee protection. Participating in refugee resettlement and offering PEPs, however, were not mutually exclusive.[321] During the heyday of PEPs in Western Europe, a few countries, such as the Netherlands, did both.[322]

In 2002, six European states offered such protected entry visas or received asylum applications at their embassies, but three of those countries abolished those practices shortly thereafter "due to the adoption of increasingly restrictionist political agendas."[323] Today, such visas are not offered regularly, but they may be available in exceptional circumstances.[324] As of June 2012, when Switzerland abolished its PEP,[325] no Western country offers this visa as a matter of course.[326] The disappearance of PEPs from modern migration control is a huge loss for the humanitarian objectives of refugee law.

IV. THE ASYLUM VISA

A. *Overview*

An asylum visa is a visa granted to a foreign national at the asylum state's embassy in that person's home country, or a third country, that permits that person to enter the asylum state lawfully for the purpose of filing an application for asylum.[327] An asylum visa is designed in part to facilitate access to the asylum procedure for an individual who seeks to flee his or her country of origin but has not yet done so.[328] A person who has not yet fled his or her country of

---

320. *See* IGC, *supra* note 283, at 344 (explaining that "Switzerland does not have in place an annual resettlement program" but does engage in ad hoc resettlement activities).

321. *Id.* at 239.

322. *Id.*

323. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 542.

324. *See* IGC, *supra* note 283, at 148 (discussing the "informal possibility" of obtaining a visa in order to enter France to "make a formal application for asylum").

325. Geiser, *supra* note 16.

326. Press Conference, International Press Center, Reaching Europe in Safety: The Possibility to Seek Asylum Through an Embassy Saved My Life (Mar. 28, 2012), *available at* http://www.presscenter.org/en/event/press-conference-reaching-europe-in-safety-the-possibility-to-seek-asylum-through-an-embassy-s.

327. This is also referred to as a "humanitarian visa" by some policymakers. *See* LEPOLA, *supra* note 15, at 5. However, this terminology is not universal; in Switzerland, for example, the government has implemented a so-called humanitarian visa as a *replacement* for PEP. For this reason, this Article uses the term *asylum visa* over *humanitarian visa*.

328. *See* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 543 ("The notion of Protected Entry Procedures 'is understood to allow a non-national to approach the

origin is generally ineligible for resettlement.[329] Thus, his or her remaining options for flight from his or her country of origin are to obtain a visa for some other purpose, such as tourism or education, or to embark on a journey to enter without inspection, most likely through smuggling. The subparts below consider the costs and benefits of an asylum visa.

B. *Benefits*

An asylum visa would likely provide the following benefits: (1) increased access to asylum for nonelite asylum seekers, (2) the ability to attract asylum seekers with the strongest claims, (3) increased transparency to applicants and the U.S. government, and (4) cost savings related to decreased detention of asylum seekers without travel documents or those with marginal[330] claims.

First, an asylum visa stands to benefit asylum seekers who currently are unable to obtain nonimmigrant visas to board common carriers bound for the United States because of their inability to prove their intent *not* to immigrate or to satisfy other visa requirements. These are people who are unable to convince consular officials of their story (including unskilled liars) or who simply do not know what to say or how to qualify for a nonimmigrant visa (including those who are ignorant of the law).[331] As the failure to prove nonimmigrant intent is a significant reason why such visas are

---

potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.'") (quoting EUROPEAN COMM'N, COMMC'N TO THE COUNCIL AND THE EUROPEAN PARLIAMENT TOWARDS MORE ACCESSIBLE, EQUITABLE AND MANAGED ASYLUM SYSTEMS, COM (2003) 315 FINAL (JUNE 3, 2003)).

329. *See The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Apr. 8, 2013), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD (noting that "[r]efugees must generally be outside their country of origin, but [they] can process some individuals in their home countries if authorized by the President").

330. *Cf.* Martin, *supra* note 32, at 1287 ("When the process cannot reliably sort the qualified from the unqualified, asylum applicants drawn to the system will include not only those with a reasonable chance of qualifying but also others whose claims are marginal or nonexistent.").

331. By definition, people who do not receive visas are those who were deemed unqualified by consular officials. All asylum seekers are generally ineligible for nonimmigrant visas because of their inability to prove that they intend to return home; if they receive a visa, it is because they led the consulate to believe that they did not intend to abandon their home country. If they did not receive a visa, it is because they did not succeed in this effort or failed to qualify for some other reason. They might not have succeeded because they did not know that they needed to establish nonimmigrant intent (unaware of requirements) or were simply ineffective in doing so.

denied,[332] it appears that asylum seekers who are truly desperate to flee their country of origin may have particular difficulty obtaining travel documents under the current system.[333] By providing an alternative lawful status with which to board a common carrier, an asylum visa would provide access to these applicants as well as to those who are unable to secure a loan, unable to obtain a scholarship, or are otherwise less elite and unqualified for existing nonimmigrant visas.[334] Moreover, an asylum visa would also facilitate claims from applicants who are less willing or able to lie[335] or hire a smuggler.[336]

Second, apart from enhancing access for less elite applicants and applicants less willing or able to lie, an asylum visa would also enhance access for those with strong claims of asylum based on imminent risk of severe persecution. Applicants facing the gravest, most imminent risk often require the most assistance in fleeing because they have the least time to plan an escape;[337] creating a status for traveling that is responsive to their situation will facilitate applications from individuals facing serious harm. This may particularly enhance access for women and girls, many of whom may lack the financial independence or access to loans to hire a smuggler or obtain guidance in applying for nonimmigrant visas.[338] Admittedly, an asylum visa is unlikely to help a political dissident who is easily recognized by his or her country of origin and for whom the very act of applying for any kind of visa would pose a grave risk.[339] However, an asylum visa may help an asylum seeker who has been victimized by his or her family, tribe, or other nongovernmental entity where the government is unwilling or unable to stop the harm. Such a person may be completely unknown to his or her home government. An asylum visa may also help those facing political

---

332. Nafziger, *supra* note 131, at 14; *Visa Denials*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/frvi/denials/denials_1361.html (last visited Oct. 20, 2013) (explaining what the denial of a visa means under 8 U.S.C. § 1184(b)).

333. *See* Settlage, *supra* note 116, at 66 (discussing the difficulty of obtaining nonimmigrant visas from poorer countries and the lack of visas for the purpose of seeking protection).

334. Whether the new visa captures claims from poorer asylum seekers also depends on whether applicants for the asylum visa are required to prove that they are unlikely to become public charges or whether this ground of inadmissibility would be waived for them. *See* 8 U.S.C. § 1182(a)(4) (2012) (detailing the public charge ground of inadmissibility).

335. *See supra* note 104.

336. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 2 ("The embassy procedure contributes also to undermine the activities of unscrupulous human smugglers that are abusing the desperate situation of refugees.").

337. *See id.* at 3 ("It is important to have a legal possibility to access protection from outside the country to be able to react to very special situations of acute danger or to help persons out of protracted situations of insecure and unsafe conditions.").

338. *Id.* at 1.

339. *See* Raufer, *supra* note 41, at 256 ("The people least likely to be able to avail themselves to ICP are . . . those who would be recognized by the government as adversaries.").

persecution who have fled to a third country but have no hope for resettlement there.

Third, institutionalizing an asylum visa would enhance transparency for both applicants and the U.S. government, which, in turn, could enhance humanitarian outcomes and security.[340] The applicant would receive an indication of his or her chances of prevailing on a claim for asylum, and the Swiss experience suggests that asylum seekers value this information.[341] The preliminary screening performed in the adjudication of the asylum visa may deter asylum seekers with marginal[342] claims from making the journey by alerting them to the likelihood of failure.[343] And it would facilitate the journey of applicants with strong claims.[344] Through adjudication of asylum visas, the United States would also be in a position to collect more accurate information about the intentions and characteristics of potential asylum seekers. Higher quality information about potential entrants could enhance security.[345] Policymakers have suggested that, in this way, an asylum visa might function as a tool of "externalized border control" that helps both asylum seekers and the asylum states.[346]

Fourth, institutionalizing an asylum visa could save money by reducing detention costs associated with detaining asylum seekers at the border who possess no travel papers.[347] Under § 235 of the

---

340. *See* LEPOLA, *supra* note 15, at 11 (noting that one of the purposes underlying the Visa Information System (VIS) is to prevent threats to internal security).

341. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 2 (describing the benefit to asylum applicants of learning their chances of success prior to traveling to Switzerland).

342. Martin, *supra* note 32, at 1287.

343. David A. Martin has suggested that:

> Designing policy to discourage the unqualified from even applying for a benefit is a perfectly legitimate policy objective, particularly when existing statistics demonstrate that a high percentage of applications lack merit. To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim. In design, at least, these restrictive practices are meant to send a 'general deterrence' message to persons still in the home country.

Id. at 1290. Here, the denial of an asylum visa would also potentially deter an applicant from making a journey to the United States and filing an application.

344. *See id.* ("To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim.").

345. LEPOLA, *supra* note 15, at 10 (highlighting the security strength of a functioning VIS).

346. *Id.* This author does not endorse the use of externalized border control but simply notes that an asylum visa can be cast as a "win-win" tool of externalized border control. *See id.*

347. *See* HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 47 (2009), *available at* http://www.humanrightsfirst.org/

Immigration and Nationality Act, the government must place in expedited removal all foreign nationals, including asylum seekers, who attempt to enter at the border or a port of entry with fraudulent documents or no documents.[348] To the extent that an asylum visa provides appropriate travel papers to an asylum seeker who would otherwise rely on smuggling or fraudulent documents, the government would need to spend less on detaining such applicants because there would be fewer of them.

Finally, any measure that reduces the use of detention will benefit asylum seekers because detention imposes tremendous costs on them.[349] Detained asylum seekers face greater barriers to proving their claims largely because of their inability to participate in the development of their case.[350] An asylum visa would offer many asylum seekers an alternative to the use of fraudulent documents and thus diminish one source of prolonged detention for many of them.

C. *Costs of Asylum Visa*

Instituting an asylum visa may involve the following costs: (1) the loss of the ability to screen applicants based on certain attractive characteristics, (2) the inability to assess the strength of claims made prior to flight from the asylum seeker's home country, (3) damage to diplomatic relations, (4) danger to applicants, (5) domestic political disapproval, and (6) costs of increased workload at the consulates.[351]

First, allowing applicants to enter for the sole purpose of applying for asylum eliminates barriers that filter for attractive characteristics: diligence and savvy to procure a visa or hire a smuggler, wealth or ability to secure a loan, an appetite for risk, and knowledge of what the consular official needs to hear to grant the visa.[352] Given that the United States cannot (and has no duty) to

---

wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf (finding that the U.S. government spent $300 million to detain asylum seekers between March 2003 and February 2009); *see also id*. at 49 (discussing the cost savings of using alternatives to detention).

348. *See* Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J. ETHICS & PUB. POL'Y 1, 3 (2001) (discussing the process of expedited removal due to fraud).

349. HUMAN RIGHTS FIRST, *supra* note 347, at 42–45 (discussing the impact of detention on asylum seekers to include increased incidence of depression, post-traumatic stress disorder, anxiety, a reduced ability to win asylum, and pressure to abandon asylum claims altogether).

350. *Id.*

351. These considerations are adapted from Susan Raufer's article, which focuses on self-selection, risk, diplomacy, and the value of flight. *See* Raufer, *supra* note 41, at 257–60.

352. An asylum visa might also encourage those with claims of past persecution to come forward over those who fear future harm, and this could undermine the purpose of capturing claims of asylum seekers facing "acute" harm. Raufer's analysis of the "self-selection" phenomenon in the context of in-country refugee processing is

absorb all of the world's refugees,[353] some might defend the current system for its ability to select for other traits, such as potential for economic success.[354] Introducing an asylum visa would interfere with this selection mechanism. However, as discussed extensively in Part II, the U.S. visa system already heavily, almost exclusively, privileges those with economically advantageous traits. U.S. asylum law need not and should not do the same. Instead, it should privilege those with strong asylum claims based on fear of severe and imminent persecution.[355]

Second, the absence of flight eliminates an important signal of the seriousness of the claim.[356] Once an applicant has arrived in the United States, one can begin to conceive of that person as a refugee as defined in the Refugee Convention because that person has successfully fled from his or her country of origin.[357] If consular officials are tasked with considering asylum visa applicants as potential refugees, but without the benefit of those applicants having fled (already), it could lead consular officials to demand more information or evidence regarding the strength of the asylum claim than what would be demanded once the applicant has already fled.[358] However, the adjudication of an asylum visa can serve simply as a prescreen of the asylum claim and not a full adjudication of the claim.[359] Proper training of consular officials could help address this issue, but it remains a serious concern.

---

instructive. Raufer argues that in-country processing programs attract applicants with claims of past persecution, because claims based on past persecution are, by definition, based on events that occurred with certainty rather than events that are only likely to occur. Thus, applicants for asylum based on past persecution have greater confidence about their likely success in qualifying for protection. In contrast, applicants with claims based only on future persecution may not risk coming forward if success is uncertain. Raufer concludes that ICP programs, with their numerical caps, thus divert precious refugee protection resources to victims of past persecution rather than asylum seekers facing imminent future threats. *Id.* at 255. This concern may apply with equal force to an asylum visa program.

353. MUSALO, MOORE & BOSWELL, *supra* note 22, at 80.

354. *See* Price, *supra* note 34, at 450–51 (arguing that the duty to provide refugee protection is stronger when domestic political support is "greater-than-usual," as in the case of refugees who will "impose less of an economic hardship because their skill profile better complements the national economy").

355. *See* Raufer, *supra* note 41, at 255 (arguing that the primary goal of the U.S. refugee program should be to provide a "safe alternative" to those facing imminent persecution); *see supra* Part II.

356. *See* Raufer, *supra* note 41, at 260–61 (noting that flight "may be a determining factor in an asylum application").

357. *See* Refugee Convention, *supra* note 23, at art. 1(A)(2) (defining a refugee as, among other things, "a person who is outside the country of his nationality").

358. *Id.*; *see also* Raufer, *supra* note 41, at 261 ("[T]he absence of flight in an ICP application results in a greater burden for the in-country applicant.").

359. *See* HEIN & DE DONATO, *supra* note 304, at 55 (noting that travel authorization in the form of a protection visa is given if the government seeks to "clarify the merits and facts of the case").

Third, an asylum visa could prove diplomatically costly or even completely infeasible in some countries. Countries that produce asylum seekers are likely to take offense to a U.S. practice of issuing visas so that their citizens can advance claims of persecution in the United States.[360] The very existence of the practice in the home country's territory and jurisdiction would appear to undermine the traditional regard for territorial jurisdiction evident in refugee law.[361] As embassies operate and issue visas "at the behest of the government from which the [asylum seekers] wish to separate themselves," it may not be possible to offer asylum visas in all countries.[362] The prior existence of asylum visa procedures for a number of European countries suggests, however, that such a program can be implemented, at least in part, without diplomatic crisis.[363]

Fourth, an asylum visa may endanger asylum seekers who obtain (or even apply for) such a visa by exposing them as government adversaries.[364] For an asylum seeker who succeeds in obtaining an asylum visa, the visa amounts to an announcement to the country of origin, by a stamp in the applicant's passport, that the applicant desires asylum in the United States and intends to accuse

---

360. *Cf.* Price, *supra* note 34, at 443 (discussing asylum as a tool to shame or sanction other nations).

361. *See* Raufer, *supra* note 41, at 257–58 (discussing the diplomatic costs of adjudicating in-country asylum claims); *cf.* GRAHL-MADSEN, *supra* note 186, at 45 ("A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State." (quoting *The Asylum Case*)).

362. Raufer, *supra* note 41, at 257. With regard to in-country processing, Raufer states,

> In such a program the United States is placed in the untenable position of negotiating an ongoing program of release with a government it is accusing of violating its citizens' rights. When a person comes to the U.S. embassy fleeing current or potential persecution, a grant of refugee status by the U.S. necessarily conveys to the home country that the U.S. believes the home country is currently in violation of its duties to that person, either by actively persecuting, or by failing to protect the individual.

Id. at 257–58. An asylum visa, however, presents a distinct situation where the United States would not be adjudicating the claim of refugee status but simply performing a preliminary screen to expedite and facilitate the individual's flight from the home country. *See also* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 552–53.

363. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (noting the existence of a Swiss PEP since 1979).

364. *See* Raufer, *supra* note 41, at 256 (discussing the risks asylum seekers would face by the physical act of coming to the embassy to file a claim for asylum through an in-country processing program); *see also* Anker & Posner, *supra* note 61, at 47 (discussing congressional testimony from a representative of the ACLU stating that "it would be impossible for a person in a country where he is suffering persecution, to be pre-cleared, screened or processed by the Immigration and Naturalization Service") (quoting David Carliner, American Civil Liberties Union).

the country of origin of persecution or unwillingness, or inability, to stop persecution.[365] Such concerns could be dealt with through establishing the asylum visa as a "shadow" visa. It would not need to openly announce the applicant's intention to apply for asylum but could be designed to look exactly the same as other common nonimmigrant visas. Further, it might carry a unique bar code or other identifying information detectable only by USCIS. These measures might sufficiently shield asylum seekers' intentions from the country of origin. However, the country of origin's knowledge of this practice itself may complicate its execution, as countries that tolerate or purport to tolerate the issuance of such visas may still thwart suspected asylum seekers' efforts to flee by, for example, detaining and questioning suspected asylum seekers at the airport. Ultimately, the practice of issuing asylum visas would be impracticable in some countries.

Fifth, the American public is wary of perceived abuse of the asylum system, and the media have fueled the perception that the system is filled with and, to a lesser extent, creates incentives to commit fraud.[366] The domestic political cost of creating an asylum visa is the popular fear of opening the "floodgates"[367] to asylum seekers worldwide. Creating a new basis for entering the country while preserving the old would seem to increase access without any limit.[368] However, one strategy for combating public disapproval is to emphasize the way in which an asylum visa provides a more straightforward path to the U.S. asylum procedure, decreasing the forced deception at the heart of the current system. Despite the unequivocal purpose of increasing access, the asylum visa may, in this way, also serve as an antifraud device.

Ultimately, as noted above, an asylum visa is not a practical option for many asylum seekers. Applicants for asylum, therefore, must still be allowed to resort to other means of accessing the asylum procedure.[369] If embassies offer asylum visas abroad, however, what

---

365. *See generally* Glenna MacGregor, *Human Rights First Concerns about US-VISIT's Implications for Asylum Seekers' Confidentiality and Safety*, http://epic.org/privacy/us-visit/hrf_memo.pdf (last visited Oct. 20, 2013) (discussing the privacy interests of asylum seekers).

366. *See* Mehta, *supra* note 177, at 32–37.

367. *See* Anker & Posner, *supra* note 61, at 57 (discussing then-Congressman Dante Fascell's modification of the House committee's amended refugee definition allowing those still within the country of persecution to "qualify as refugees").

368. *Cf.* Hathaway & Neve, *supra* note 13, at 117–18 (noting that governments cannot be expected to provide "quality protection to all refugees who arrive at their territory. The critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states . . . .").

369. Refugee Convention, *supra* note 23, at art. 31(1) (stating that the contracting states "shall not impose penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without

will the public, not to mention the courts, make of claims filed by asylum seekers who entered after obtaining other visas or who were smuggled in? Will those claims be tainted by an assumption that the applicant is not credible? If Congress creates a ground for admission that supports an asylum visa, it will need to address such matters as well.

Sixth, introducing an asylum visa would undoubtedly impose new administrative and financial costs on the government. The "pull" effect of such a visa could be staggering.[370] Embassies would likely be flooded with applicants, many of whom would not be asylum seekers but rather purely economic migrants seeking to qualify for a new ground for admission. There would undoubtedly be an increase in the workload for consular officials. Consular officials would be stretched by the burden of adjudicating these additional visa applications.[371] This would likely require hiring more consular officials and securing a larger State Department budget. A modest fee for an asylum visa application could ameliorate the financial burden and deter frivolous applications, but no system can be designed to preclude fraud entirely. Careful design, however, might help mitigate these basic structural concerns. A rational asylum visa provision must contend with these possibilities.

Lastly, the potentially significant costs associated with deporting unsuccessful applicants must also be considered.

D. *Objections*

This subpart addresses additional objections apart from the "costs" discussed above. First, one might wonder why the United States should not simply institute in-country processing of asylum applications or expand the overseas refugee program instead of instituting a new visa. As explained above, in-country processing suffers from a number of problems that Susan Raufer has identified.[372] In particular, it grants a status that actually has no effect until the asylee, in this case, leaves his or her home country.[373] As in the situation faced by Julian Assange, a grant of asylum while one is still within the country one seeks to flee is particularly

---

authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence").

370. I am grateful to Jennifer Rellis for raising this point; *see also ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 (discussing the Swiss government's fear of the "pull-effect" of the PEP).

371. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 (discussing the overwhelming workloads of Swiss consular officials).

372. Raufer, *supra* note 41, at 253–59.

373. *See* GRAHL-MADSEN, *supra* note 187, at 77 (noting that a right to grant in-country asylum is "not recognized" outside Latin America, although states may still provide temporary refuge to persons in danger).

ineffective.[374] Would a grant of *less* protection, a mere visa, help *more*? The lessons of World War II suggest yes—modest interventions often have greater effect than a large scale, public rescue.[375] For lesser known figures who are not on the government's radar, but who still have a well-founded fear of persecution, such a visa is a "quiet" way of facilitating the asylum seeker's escape without shaming the country of origin through an outright grant of asylum.[376] For famous figures, such as Chen Guangchen, nothing short of diplomatic talks is likely to work; an asylum visa may do little to help such a person, but the current system is no better.[377]

Expanding USRAP is also no substitute for facilitating travel for asylum seekers in imminent danger of severe persecution. As discussed in Part II, USRAP is generally unavailable and privileges political considerations.[378] Merely expanding that program without recognizing the unique role of asylum misses the opportunity to make the most of the U.S. asylum system. One might respond that having consular officials adjudicate asylum visas reproduces this very problem by involving the State Department in an adjudication related to asylum. However, there are advantages to this approach, which are discussed below.

One might also assert that the asylum visa stops arbitrarily at the point of providing papers to authorize travel and admission. Why not cover airfare and other expenses? The neediest asylum seekers, after all, could very well be destitute and unable to access the asylum visa for that reason. This Article proposes to draw the line at providing a visa because, as controversial as such a measure might be, providing additional support would invite greater controversy.[379] The many decades of PEPs in Europe demonstrate that an asylum visa, however, is not inherently untenable, financially or

---

374. *See* Raufer, *supra* note 41, at 238 (discussing the anomaly under international law of a country extending permission to enter while an individual remains in his or her home country, which is seen as a foreign country inserting "one's own law between the individual and the laws of the sovereign country"); *see also Ecuador Restates Support for Assange on Asylum Anniversary*, THE GUARDIAN (Aug. 16, 2013), http://www.theguardian.com/media/2013/aug/16/ecuador-julian-assange-asylum-anniversary (noting that Assange's ability to leave the Ecuadorian embassy without the threat of extradition implicates the jurisdiction of the United Kingdom, Sweden, and Ecuador).

375. LEVINE, *supra* note 285, at 278.

376. *Cf.* Price, *supra* note 34, at 443 (discussing the "political conception" of asylum as a "sanction against other states").

377. Chen Guancheng, *Timeline*, WASH. POST (May 2, 2012), http://www.washingtonpost.com/wp-srv/special/world/chen-guangcheng-timeline/.

378. *See supra* Part II.

379. *Cf.* Martin, *supra* note 43, at 35 (discussing the public's backlash against the asylum adjudication system when it is demonstrated to be "dismayingly ineffective").

administratively.[380] The political choices that Western European countries have made to dismantle those programs do not undermine their potential value elsewhere.[381]

Finally, it is important to consider the wisdom and practicability of any U.S. measure in the context of other countries' protection policies.[382] Most asylum states have scaled back humanitarian protections in recent years and have increasingly adopted deterrence policies to prevent asylum seekers from entering the asylum state's territory.[383] Under what circumstances would it make sense for the United States to offer more opportunities for protection, especially given the tremendous existing U.S. resettlement program? Framed this way, the reason for doing so is unclear, other than outsized generosity. However, an asylum visa offers the potential of screening asylum claims at the origin (or near to the origin) for the strength of the claim, which, as this Article has argued, could potentially lead to a better allocation of existing U.S. asylum resources to the neediest claimants rather than simply "more" asylum. Nonetheless, many scholars and practitioners have rightly acknowledged the need among states for a collaborative solution to protecting refugees.[384]

E. *Toward an Ideal Asylum Visa Regime*

An ideal asylum visa regime would maximize humanitarian benefits and minimize fraud. A complete discussion of the details of an ideal asylum visa regime is beyond the scope of this Article, but a few observations will be offered in this subpart.

1. Role of Asylum Visa in Context of Other Visas and Entry Without Inspection

To maximize humanitarian benefits, an asylum visa provision should allow applicants to apply for the visa without preclusive effect;

---

380. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (noting that the asylum visa had been available in Switzerland since 1979).

381. *See* Noll, *Seeking Asylum in Embassies*, *supra* note 16, at 542 (discussing "restrictionist political agendas" in Northern Europe that led to the dismantling of PEPs there).

382. I am grateful to Michael Kagan for raising this point.

383. *See* Hathaway & Neve, *supra* note 13, at 115–16 (noting that "many countries are withdrawing from the legal duty to provide refugees with the protection they require").

384. *Id.* at 169–70 (discussing a collaborative approach to temporary refugee protection); *ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 ("We believe that the situation [the pressure to dismantle the PEP] might have been different if Switzerland had not been one of the very few countries with such a procedure in place at that time. If refugees had had the opportunity to address other countries as well, there could have been a more concerted proceeding, to the benefit of the refugees. This exemplifies just how important it is to look for European solutions. It all boils down to the issue of shared responsibility.").

this means they could reapply after some period of time or after a relevant change in circumstances if unsuccessful on the first application. Due to U.S. obligations under Article 31 of the Refugee Convention, and because an asylum visa would not be practicable for many asylum seekers,[385] those who obtain other nonimmigrant visas or who enter without inspection should retain the same right to apply for asylum after entering the United States without any penalty for having not first obtained an asylum visa.[386]

2. Adjudicators of the Visa Must be Trained in Refugee Law

As in the Swiss PEP, consular officials could send asylum visa applications to asylum officers to adjudicate.[387] Under the Swiss program, asylum officers determined the merit of the application and recommended whether the embassy should issue a visa.[388] That approach has numerous advantages—principally, that it uses the asylum officer corps' existing expertise in refugee law.[389] The disadvantage, however, is the potential for delay and extra administrative burdens in a context where applicants might face imminent harm. Ultimately, the more effective approach might be to train consular officials in refugee law and then to utilize their expertise in visa adjudication and local conditions in the countries where they work.[390] USCIS and the State Department should join forces to train consular officials in refugee law so that they are competent to adjudicate asylum visas.

385. *See supra* note 305.

386. *See* Refugee Convention, *supra* note 23, at art. 31(1) ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.").

387. *Asylum Applicants from Abroad*, *supra* note 306.

388. *Id.*

389. *See* Nafziger, *supra* note 131, at 53 (highlighting the expertise of consular officers).

390. *Id.*

3. Adjudications Must be Expeditious to Benefit Asylum Seekers Facing Imminent Harm and Perform Only a Basic Review of the Claim for Protection

An asylum visa will only help those facing acute harm if consular officials can adjudicate visa applications quickly.[391] This will require sufficient staffing at the consulates and adequate training of consular officials in refugee law. Applicants for an asylum visa would undergo screening for admissibility according to general visa guidelines, such that asylum seekers with certain criminal histories will not be admitted.[392] Beyond the basic background checks performed by the State Department, further inquiry into potential bars to eligibility for asylum would be improper at this stage. Consideration of such issues would increase the complexity of the analysis and delay decisions. Moreover, applicants could overcome bars through advocacy once they have prepared their applications after arrival.[393]

4. Efficacy

An asylum visa, as described thus far, essentially creates a new ground for admission that potentially leads to permanent residence. Such a basis for admission must be used carefully to retain public support and efficacy abroad.[394] It may not be feasible for Congress to create an asylum visa in the mold of others as a "normal" basis for admission. Instead, an asylum visa may work best when used in exceptional cases of humanitarian crisis. As Paul Levine notes at the close of his study, Swedish diplomat Gösta Engzell captured the possibility and limitations of protective passports in a cable to a fellow diplomat:

> Finally I want to touch upon the provisional passports and want to emphasize that we must be restrictive with them. Everyone wants one and it would be a debacle if we conceded too much. It is partially chance who gets them. We don't really know what good they do. . . . Much is a question of judgement which is difficult to decide from here. . . . But if you see in individual cases that such papers can save someone, we of course have nothing against your decision.[395]

---

391. *See* LEPOLA, *supra* note 15, at 22 ("[A] request for a humanitarian visa should enable the applicant to leave the country as soon as possible.").

392. *Visa Denials*, *supra* note 332 (explaining that an applicant's past or current criminal actions can make the applicant ineligible for a visa).

393. A formal visa appeals process for asylum visas would also promote accuracy and fairness in the adjudication of these applications. I am grateful to Kate Aschenbrenner for raising this point. *Cf.* Dobkin, *supra* note 145, at 120–21 (describing the dangers of insulating consular decisions from judicial review in light of the effects of racism and other "malicious factors").

394. *Cf.* Mehta, *supra* note 177.

395. LEVINE, *supra* note 285, at 278 (quoting Engzell's cable to a fellow diplomat).

Analogously, asylum visas granted too frequently or without careful consideration may antagonize "refugee-producing"[396] countries or prompt such countries to thwart visa holders attempting to flee.[397] The paradox of humanitarian rescue, alluded to by Engzell above, is that it is most effective when rare.[398] But this does not mean that the law should not authorize the possibility of rescue.

V. CONCLUSION

By design, the current method of regulating access to the asylum procedure in the United States screens asylum seekers based on criteria unrelated to their underlying claim for asylum. The two current paths to the asylum procedure are smuggling and entry on a nonimmigrant visa. The former requires asylum seekers to risk great danger, and the latter requires asylum seekers to prove great wealth or skill—characteristics unrelated to their need for protection from persecution. Thus, the law fails to facilitate the admission of applicants necessarily in greatest need of protection from persecution, and it fails to deter those whose claims are weaker and who may ultimately make the long journey for nothing. The United States can do better to honor its humanitarian aspirations while acknowledging the practical and political constraints on the system. The first step may be to explore more fully the idea of an asylum visa.

---

396. Hathaway & Neve, *supra* note 13, at 119 (noting that Northern states impose a visa requirement on nationals of "refugee-producing" countries).

397. *See* LEVINE, *supra* note 285, at 278 (discussing the risks of overusing protective papers).

398. *Id.*

Yale Law & Policy Review

Volume 19
Issue 2 *Yale Law & Policy Review*

Article 2

2000

The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy

Kendall Coffey

The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy

Kendall Coffey†

I. INTRODUCTION: THE DILEMMA OF IMMIGRATION

Stranded within the disquieting paradox of immigration, the constitutional right of an alien to seek asylum in this country remains a dilemma that strikes at our core values.[1] As a nation descended predominantly from immigrants, much that we represent as a people and the quality of life we enjoy today is owed to ancestors who braved myriad perils to reach our shores from foreign lands.[2] And yet, that same standard of living that each of us owes to refugees of the past is seemingly threatened by future immigrants who continue to flood across United States borders each year.[3] Therefore, deep-rooted ambivalence reaches across public and legal policies that cannot reconcile our legacy of compassion with present apprehensions about the massive consumption of finite resources that are professedly jeopardized by future immigrant multitudes.[4] This moral conflict is compounded by the enormous logistical chal-

† Co-Founder and Partner, Coffey, Diaz & O'Naghten, Miami, Florida. B.S., University of Florida; J.D., University of Florida.

1. As one commentator described the emotional impact of immigration, "No war, no national crisis has left a greater impress on the American psyche than the successive waves of new arrivals that quite literally built the country." Bernard A. Weisberger, *A Nation of Immigrants*, AMERICAN HERITAGE (Feb. - March, 1994) at 75.

2. Immigrants flooded to this country without restriction throughout much of our history. In 1790, our population stood at four million and reached thirty-two million by 1860. Weisberger *supra* note 1, at 82. Immigrant waves continued after the Civil War with fourteen million arriving between 1860 and 1900 with another 18,600,000 following between 1900 and 1930. *Id.* at 83-84

3. As the Supreme Court established in *Plyler v. Doe*, 457 U.S. 202 (1982), illegal and undocumented immigrant children are constitutionally entitled to a public education. Another source of public concern has been the impact of immigration on taxpayer obligations for government entitlements. While only a small fraction of immigrants are on welfare, their rate of 6.6 % is slightly higher than the 4.9 % for Native Americans. That usage is concentrated among the elderly who comprise 28 % of welfare benefits among immigrants. Michael Fix et al., *The Use of SSI and Other Welfare Programs By Immigrants*, Testimony Before the House Ways and Means Committee (May 23, 1996) (http://www.urban.org/testimon/fix.htm).

4. The true economic impact of immigration is the subject of active debate. A report by the Urban Institute has challenged the widespread assumption that immigrants represent an aggregate drain on societal resources. Michael Fix & Jeffrey S Passel, *Immigration and Immigrants, Setting the Record Straight*, The Urban Institute (May 1994) (http://www.urban.org/pubs/immig/immig.htm).

lenge in restricting immigration. Even hundred-mile walls have seen little success throughout history. Certainly, our country's thousands of miles of land and sea borders, along with undefinable access through the airways, eliminate any realistic possibility of effective physical containment.

As a result of the dilemma that immigration presents to our national ethic and the seemingly insurmountable obstacles that confront attempts at rigorous enforcement, the fusion of self-conflict and futility may have dispelled any sense that the challenge is truly solvable.[5] This equation of seeming intractability has deepened the already significant reluctance of the courts and the Congress to displace executive responsibility. Indeed, rather than challenge executive management of these largely unmanageable problems,[6] the other branches of government have typically avoided actions that might be seen as undermining the efforts of the Immigration and Naturalization Service. Yet, while declining roles of activism in immigration matters, the judiciary, like the Congress, has not awarded accolades to the INS.[7] To the contrary, criticisms

---

This misperception regarding immigrants' net fiscal impact has been reinforced by several highly publicized recent studies that overlook three basic facts about immigration. First, integration of immigrants is dynamic; their incomes and tax contributions both increase the longer they live in the United States. Second, incomes vary considerably for different types of immigrants with legally admitted immigrants, as a group, generally having significantly higher incomes than illegal immigrants or refugees. Finally, the studies do not take into account the indirect benefits of job creation from immigrant businesses or consumer demand.

The Urban Institute Report acknowledges, though, that a disproportionate impact may fall upon state and local governments.

Contrary to the public's perception, when all levels of government are considered together, immigrants generate significantly more in taxes paid than they cost in services received. This surplus is unevenly distributed among different levels of government, however, with immigrants (and natives) generating a net surplus to the federal government, but a net cost to some states and most localities.

5. In a hearing before the House Judiciary Committee on June 10, 1999, Representative Smith, Chair of the Subcommittee on Immigration and Claims, was blunt in describing the perceived problems of the present tide of immigration: "Many long-time residents are forced to move away from the communities where they grew up. Those who appeal to the federal government for immigration law enforcement receive little or no help." Transcript of Hearing Before the Subcommittee On Immigration On Claims of the Committee On the Judiciary, House of Representatives, 106th Congress, 1st Sus. (June 10, 1999) at 6 (http://commdocs.house.gov/committees/judiciary/hju62494.000/hju62494_O.htm) (hereinafter Remarks of Rep. Smith). In discussing the effectiveness of the INS, Representative Smith was equally direct: "Meanwhile, the interior enforcement strategy recently unveiled by the Immigration and Naturalization Service effectively gives up on removing illegal aliens from the United States. Except for a small fraction of convicted criminal aliens, illegal aliens have little or no fear that they will ever be deported." *Id.*

6. Immigrant poverty is another deep concern. Although the level of poverty is higher among immigrants, significantly, only 10 % of immigrants who have become naturalized citizens live in poverty as opposed to 29 % of non-citizen immigrants. Fix, *supra* note 3, (http://www.urban.org/testimon/fix.htm)." Also underscoring the reality of poverty among immigrants is a report by the Center for Immigration Studies indicating that the number of immigrant households below poverty nearly tripled from 2.7 million in 1979 to 7.7 million in 1997. Michael A. Fletcher, *Immigrants' Growing Role in U.S. Poverty Cited*, WASH. POST, Sept. 2, 1999, at A2. Throughout that same period, a relatively constant 12 % of the native born population lived in poverty while poverty among immigrants increased from 15.5 to 21.8 %. *Id.*

7. As one court expressed its view toward INS processes: "The proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers,

abound.[8] Accordingly, the unusual concentration of authority in the INS may reflect not just standard acknowledgments of administrative expertise, but also a judicial and legislative willingness to allocate public accountability for such hapless responsibilities almost entirely to the INS.

The ambivalence of the immigration paradox has profound constitutional dimensions. Perhaps no issue can be more basic than the threshold issue of the right of aliens to remain in this country. Strikingly, however, this transcendent question, a critical constitutional inquiry for millions of aliens,[9] has not been answered by the Supreme Court during the two decades since passage of the historic Refugee Act of 1980, establishing a statutory right to seek asylum.[10] When the issue of whether due process enveloped the alien's right to seek asylum was presented to the Court in 1985, it declined to reach the constitu-

---

including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality." Salameda v. INS, 70 F.3d 447, 449 (7th Cir. 1995). In another case, the court observed, "the Board seems unaware of the elementary facts of contemporary history, even those that bear vitally on its mission." Osmani v. INS, 14 F.3d 13, 14 (7th Cir. 1994); *see also* Bastanipour v. INS, 980 F.2d 1129, 1133 (7th Cir. 1992) ("The Board's handling of the question of apostasy makes us wonder whether the Board's knowledge of Iran is any greater than its knowledge of Biafra, about which we commented critically . . . ."). Other courts have also been blunt in expressing their skepticism. "Under any ordinary meaning that decent, compassionate human beings would attach to the words 'abuse of discretion,' the BIA has abused its discretion." Watkins v. INS, 63 F.3d 844, 852 (9th Cir. 1995); *see also* Melendez v. Dep't of Justice, 926 F.2d 211, 219 (2d Cir. 1991) (stating that INS position "turns logic on its head," "extraneous influences" may have influenced INS and therefore "the administrative proceeding in such case would simply be a charade.") Mikhael v. INS, 115 F.3d 299, 306 (5th Cir. 1997) ("The IJ gave cursory allegiance to both the Supreme Court's and this Circuit's precedent . . . ."). In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) the Supreme Court dismissed as a "mirage" the jurisdiction position advanced by the INS. *Id.* at 482.

8. While Congress and much of the public may criticize the INS for failing to do enough to contain immigration, others castigate its heavy-handed measures. According to the Human Rights Watch World Report 1999: United States: Human Rights Developments, (http://www.hrw.org/hrw/worldreport99/usa/index.html) (hereinafter *Human Rights Report*), the recent enactment and subsequent enforcement of IIRIRA has led to widespread violations of international human rights standards against asylum seekers. Much of that concern centered on the INS's treatment and incarceration of refugees:

> More than half of the immigrants held in INS custody during 1998, some 9,000 people, were sent to local jails to await immigration proceedings. Faced with an overwhelming, immediate demand for detention space, the agency handed over control of its detainees to local sheriffs and other jail officials without ensuring that basic international and national standards requiring humane treatment and adequate conditions were met.

Id., at 8.

9. Although the issue of constitutional recognition for illegal and unadmitted aliens has varied ramifications, the focus of this article is the right to seek asylum, a discretionary remedy permitting an alien to remain in this country on account of potential persecution in a foreign land. The majority of illegal immigrants who arrive on our shores seek a better life by leaving behind poor economic conditions in their home countries. Although a laudable objective, and one often pursued heroically, at great sacrifice and in the face of grave dangers, economics do not create a basis for asylum. Asylum may be granted "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987), *citing* 8 U.S.C. § 1101 (a)(42) (2000). Although asylum requires a particularized showing, it is, for many, a process that should present a realistic hope for success. Significantly, the test for showing a "well-founded fear" does not require a showing of probable harm and could, depending on the circumstances, be satisfied by a ten percent prospect of persecution. 480 U.S. at 440.

10. 8 U.S.C. §1101 *et. seq.* (1994); 8 U.S.C. § 1158 (a) (1994).

tional question and opted for disposition on purely statutory grounds.[11] Nor was any such constitutional right addressed in 1993, when the Court held that the interdiction of aliens on the high seas fell beyond the jurisdictional reach of the U.S. asylum laws and treaty obligations.[12] As a result, the question of whether aliens on U.S. soil have a constitutionally protected right to petition for asylum has engendered deep conflict among the circuit courts of appeals.[13] That conflict, and the absence of recent Supreme Court guidance, parallel the self-doubt that pervades much of our nation's immigration policy. With an estimated six million undocumented aliens within our borders,[14] few constitutional questions today embody such uncertain implications for so many people. Whatever may be the societal ambivalence that pervades immigration policy, it cannot be acceptable for the law to leave unanswered the question of whether so many men, women, and children who seek to remain here stand constitutionally invisible in their quest. Indeed, the doctrines that have traditionally defined the legal framework for those aspirations date back to the Nineteenth Century, an age of myriad constitutional abdications.[15] Plainly, in light of modern constitutional decisions, the Supreme Court should revisit and determine the due process safeguards for asylum seekers.

As is demonstrated in the pages that follow, it is submitted that a principled analysis of current due process doctrines will compel the conclusion that all aliens on U.S. soil do indeed have a due process right to seek asylum. Beginning with a brief overview of the early Supreme Court decisions, this Article turns to the passage of the Refugee Act of 1980, the landmark legislation con-

11. Jean v. Nelson, 472 U.S. 846 (1985).

12. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (addressing extraterritorial effect of U.S. asylum laws and treaty obligations). *See also* Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1424 (11th Cir. 1995).

13. As is analyzed below, most courts to address the issue have validated a due process right to an asylum hearing.) Selgeka v. Carroll, 184 F.3d 337 (4th Cir. 1999); Maldonado-Perez v. INS, 865 F.2d 328, 332 (D.C. Cir. 1989); Augustin v. Sava, 735 F.2d 32, 36-37 (2d Cir. 1984); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1034-38 (5th Cir. Unit B 1982). Other courts, including the Eleventh Circuit, subdivided aliens finding that only deportable or admitted aliens have any constitutional interest in the right to seek asylum even though it is congressionally mandated for all aliens in this country "irrespective of such alien's status." 8 U.S.C. §1158(a)(1). *Compare* Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987) (citing *Jean*, 727 F.2d at 977). Meanwhile, the Third Circuit has recognized that unadmitted aliens are constitutionally protected, Chi Thon Ngo v. INS, 192 F.3d 390, 395 (3d Cir. 1999), and finds that their right to seek asylum requires judicially-imposed safeguards, but characterizes their due process rights as a doctrine of statutory construction rather than a constitutional predicate. Marincas v. Lewis, 92 F. 3d 195, 203 (3d Cir. 1996).

14. According to one source, as many as 6,000,000 illegal and undocumented aliens currently reside in the U.S. Remarks of Cong. Smith. This is roughly consistent with the INS estimate that, as of October 1996, there were 5 million illegal aliens living in this country with the number growing by 275,000 each year. Steven Canarota, *5 Million Illegal Immigrants, An Analysis of New INS Numbers,* IMMIGRATION REVIEW No. 28 (Spring,1997), at (http://www.cis.org/articles/ 1997/IR28/5million.html). That estimate assumes 420,000 new illegal entries annually, a total which is reduced by emigration, deaths and adjustment to legal status.

15. Plessy v. Ferguson, 163 U.S. 537 (1896).

ferring upon all aliens physically present within our lands a right to petition for asylum.[16] Based on that congressional enactment, the analysis demonstrates that a clear entitlement is created that due process must recognize and protect. The existing judicial controversy among federal circuits is thus properly resolved by validating the constitutional imperative on terms required by the settled principles of due process that govern all people within the sovereign jurisdiction of the United States.

II. BACKGROUND OF THE CONTROVERSY

A. Immigrants and the U.S. Constitution

The saga of the immigrant's constitutional odyssey began in 1886 with the historic decision of *Yick Wo v. Hopkins*.[17] In that case, the Supreme Court invalidated a San Francisco ordinance which resulted in 200 Chinese laundries being closed while 80 other laundries remained open, all operated by non-Chinese. Finding that hostility to the race and nationality of petitioners could not be constitutionally tolerated, the Court applied the Equal Protection Clause to hold that their "rights . . . are not less, because they are aliens and subjects of the Emperor of China." Therefore, because the protections of the Fourteenth Amendment were universal in their application to "all persons within the territorial jurisdiction" of this country, the Court established that aliens were within the arms of the Constitution.

Three years later, however, amidst intensifying public concerns about Chinese immigration,[18] the Court decided the Chinese Exclusion case,[19] and issued resounding support for the power of the federal government to control immigration: "That the government of the United States . . . can exclude aliens from

16. The asylum provision of the Refugee Act, 8 U.S.C. §1158(a)(1) provides:
Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 1225(b) of this title.

17. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

18. In 1882, Congress began its policy of restrictions by excluding Chinese from entry and citizenship. Weisberger *supra* note 1, at 86. In 1924, Congress enacted the Johnson-Reed Act, which began to assess various quota limits on immigrants from outside the Western Hemisphere.

19. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (validating legislation that prohibited the return of Chinese laborers). While there were no quota-based restrictions on immigration prior to 1882, immigrants nonetheless confronted various forms of resistance, even hostility upon arrival. The Irish were the focus of anti-immigrant feelings that accelerated through the 1840's. The potato famine had created massive starvation that killed as many as a million of Ireland's 8.5 million inhabitants in 1845, prompting the first of many mass migrations to our shores. Such immigrants have not always been welcome. Quinn, "The Tragedy of Bridget Such-A-One" American Heritage (Dec. 1997 at 36). "Our Celtic fellow citizens," wrote a New York businessman, "are almost as remote from us in temperament and constitution as the Chinese." Weisberger *supra* note 1, at 82. Some of the anti-Irish feeling stemmed from anti-Catholic sentiments and led to acts of violence, including the burning of a convent in Boston and pre-civil war riots in Philadelphia. *Id.* at 83.

its territory is a proposition which we do not think open to controversy. Jurisdiction over its territory to that extent is an incident of every independent nation."[20] Therefore, while the Court established in *Yick Wo* the principle that aliens residing here are not beyond the reach of the Constitution, it defined in ensuing decisions a tradition of judicial unwillingness to extend rights to aliens seeking admittance. The anxieties of border protection became a recurring theme as the Supreme Court in 1892 further emphasized the right of the sovereign to exclude foreigners as "an accepted maxim of international law . . . essential to self preservation."[21] Along the same line, a year later, the Court in *Fong Yue Ting v. United States*[22] underscored the right to exclude or expel all aliens as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." As the public enthusiasm for unrestricted immigration continued to plunge,[23] court decisions piled up greater obstacles to gaining entry to the United States. In 1903, the Court observed that the power of Congress to "exclude aliens of a particular race from the United States . . . without judicial intervention, are principles firmly established by the decisions of this court."[24] While committing "the enforcement of the law to executive officers" the Court nonetheless declined to deny aliens already living in the United States protection of the Constitution. Thus, in *Wong Wing v. United States,* the Court rejected laws that subjected illegal Chinese immigrants to imprisonment at hard labor.[25] While explicitly avoiding any mitigation of prior decisions on the issues of exclusion or admission, the Court nonetheless emphasized that, "[t]he provisions of the Fifth, Sixth and Thirteenth Amendments of the Constitution apply as well to Chinese persons who are aliens as to American citizens."[26] Finding that "person" for Fifth Amendment purposes includes, "any and every human being within the jurisdiction of the republic," the Court held that aliens lawfully residing in this country were entitled to "the same protection under the laws that a citizen is entitled to."[27]

As a result, the doctrine that developed in the late nineteenth century largely removed "judicial intervention" from the gateways of entry to this country. Nonetheless, the Court acknowledged the Constitution's recognition

20. 130 U.S. at 603-04.

21. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

22. 149 U.S. 698, 711 (1893).

23. In the latter part of the 19th century, the "immigrant problem" intensified. An Immigration Restriction League was formed among old New England families concerned about our "unguarded gates" and the "wild motley throng" from Russia and Eastern Europe. Weisberger *supra* note 1, at 86.

24. Yamataya v. Fisher, 189 U.S. 86, 97 (1903).

25. Wong Wing v. United States, 163 U.S. 228 (1896).

26. 163 U.S. at 242.

27. *Id.*

of all persons actually arriving in our territorial jurisdiction.[28] Favorable distinctions were readily conferred upon resident aliens, individuals whose entry was lawful but who might thereafter be subject to expulsion.[29]

Other developments in legislation and case law would differentiate critically between "deportable" aliens and "excludables."[30] "Deportables" were aliens who secured entry into this country, either lawfully or illegally, without detection. Even if consigned to an illegal and undocumented status, the mere fact of their unimpeded physical arrival in the United States would typically require that any expulsion be predicated upon some form of deportation proceedings. "Excludable" aliens, on the other hand, never actually secured entry into this country, illegally or lawfully.[31] Often incarcerated by the authorities pending determination of their fate,[32] excludable aliens would often face summary or even immediate removal without the procedural safeguards of deportation. In human terms, this bifurcation reflected an attempt to deal more compassionately with "deportables," those human beings who already stood within U.S. borders. To underscore the border protection needs, however, constitutional recognition was completely denied to aliens who had not yet physically entered the country - the "excludables."[33] As one Court decision explained the traditional duality,

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after entry, irrespective of its illegality."[34] Ironically, this dichotomy conferred greater legal protection upon aliens who entered the U.S. illegally and secretly than those who attempted to seek refuge by presenting themselves unsuccessfully to the officials at ports of entry.[35]

Because aliens who illegally crossed borders in the dead of night achieved a "deportable" status while aliens detained when attempting to enter lawfully were deemed "excludables," the law rewarded those illegal and undocumented aliens who successfully avoided our laws by evading interception.

---

28. Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("... no person shall be deprived of his liberty without opportunity, at some time, to be heard... although alleged to be illegally here. No such arbitrary power can exist where the principles involved in due process of law are recognized.")

29. Bridges v. Wixon, 326 U.S. 135, 161 (1945) ("... [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders... None of these provisions acknowledges any distinction between citizen and resident aliens."); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 603 (1953) (due process required that alien who was lawful permanent resident could not be detained and deported by Attorney General's order without reasonable notice of charges and adequate hearing).

30. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

31. Garcia-Mir v. Smith, 766 F.2d 1478, 1483-1484 (11th Cir. 1985).

32. *Id.*

33. As explained by the Supreme Court, "... 'exclusion' means preventing someone from entering the United States who is actually outside of the United States or is treated as being so." Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.4 (1953).

34. Sale v. Haitian Centers Council, Inc., 596 U.S. 155, 175 (1993).

35. Augustin v. Sava, 735 F. 2d 32, 36 n. 11 (2d Cir. 1984).

In addition to fostering unfairness, the deportable/excludable analysis also spawned other analytic contradictions. Because the legal determinant was based on the fact of physical entry into the United States, cases sought a rationalization for the status of aliens who remained present within our borders in detention or other forms of custody following interception by immigration authorities. As a result, the Court developed the so-called "entry fiction," a doctrine treating as "excludables" those aliens who were within government custody on U.S. lands following interception at the border as if they had never entered the country.[36]

These principles were revalidated during the McCarthy era[37] as the Supreme Court underscored the wholesale entrustment of immigration responsibilities to the executive branch. For example, in *United States ex rel. Knauff v. Shaughnessy*,[38] the Court held that an alien spouse of a U.S. citizen could be excluded from this country based on secret information without any form of hearing, a startling view of individual rights in any other context in our country. Similarly, in *Shaughnessy v. United States ex rel. Mezei*,[39] the Court affirmed the extended detention of an alien finding that, the "right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." As a result, even though the alien had been detained on Ellis Island for twenty-one months without any allegation of criminal wrongdoing, the Court concluded that immigration actions by other branches of government are "largely immune from judicial control."[40]

As before, lawfully residing aliens were accorded far more rights. As a result, the Court held that the Constitution required a fair hearing before deportation could be effected.[41] Thus, in *United States ex rel. Accardi v. Shaughnessy*,[42] the Court found that the INS had failed to observe its own regulations in effecting the deportation of a resident alien. Because the Attorney General had publicly identified the alien subject as an undesirable, the Court reasoned that the resulting expulsion order, based on administrative proceedings conducted by an agency headed by that same Attorney General, failed to provide

36. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953); Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)

37. Because of the "fear ridden climate of McCarthysm," attempts to overhaul the immigration laws in 1952 were made but maintained the national origins quotas. Nonetheless, because of concern about refugees from China as well as Hungary in the wake of the failed anti-Soviet uprising, special dispensations were made reflecting that refugees from these countries were fleeing communism. Weisberger *supra* note 1, at 87.

38. 338 U.S. 537, 544 (1950).

39. 345 U.S. 206, 216 (1953).

40. 345 U.S. at 210.

41. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953); *See also* Rosenberg v. Fleuti, 374 U.S. 449 (1963) (stating that an "innocent," casual and "brief" trip does not constitute a new entry that would forfeit a resident alien's right to remain in this country.).

42. 347 U.S. 260 (1954).

the requisite fair and objective process. Therefore, while the Court did not validate the inherent rights of aliens to seek admission to this country, it found that when statutes and regulations provided particular safeguards, those rights should be judicially enforced based on constitutional due process.[43]

Accordingly, while Nineteenth Century doctrine continued to govern the immigrant's right to enter our country, due process reached those who had physically arrived. Resident aliens received most of the constitutional safeguards enjoyed by U.S. citizens. Even for illegally entering aliens, their status as "deportables" activated procedural due process that included the right to a fair hearing. Like other facets of immigration, though, the result of preferring illegal secret entrants to law-abiding asylum seekers was a policy of contradictory legal tenets and logistical inefficacy. Honest refugees were being dramatically penalized; illegal entry was effectively encouraged; border crossings were not substantially reduced and, if anything, more covert entries were assured.

B. The Refugee Act of 1980

Throughout the decades of inconsistency and frustration, the Congress's inaction on the issue of the alien's right to live in our country corresponded to the limited initiatives of the judiciary.[44] In fact, no federal statute delineated a right to seek asylum in this country and so the legislative vacuum was filled by executive branch regulations.[45] The legislative absenteeism was transformed, however, by a succession of international norms and conventions that reshaped the world's perspective toward refugees in the aftermath of the horrors of World War II.[46]

---

43. Described in later cases as the *Accardi* doctrine, this principle provides for judicial enforcement when an agency fails to follow its own established procedures. Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991). As described in *Montilla*, it is "premised on fundamental notions of fair play underlying the concept of due process." 926 F.2d at 167.

44. Thus, the Supreme Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977). This philosophy of expansive consignment to the other branches of government cascades across court decisions. Earlier, Justice Frankfurter wrote that, "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." Galvon v. Press, 347 U.S. 522, 531 (1954).

45. Prior to the enactment of the Refugee Act of 1980, more humane legislation was passed in 1965, the same year that saw the passage of landmark civil rights legislation and other components of the Great Society. In large part, the new immigration legislation attempted to reduce reliance on national origin quotes and instead delineated policy considerations such as the objectives of reuniting families, opening access to refugees and attracting certain skills and professions. In signing the legislation at the base of the Statue of Liberty, President Lyndon Johnson observed that, "the days of unlimited immigration are past. But those who come will come because of what they are - not because of the land from which they sprung." Weisberger *supra* note 1, at 88.

46. In addition to addressing finally the post-World War II momentum of the international community, the back drop of congressional action in 1980 included the fall of U.S. supported governments in Cambodia and South Vietnam in 1975. Those events "unleashed floods of refugees who are a special responsibility of the United States." *Id.* at 89.

In 1948, the Universal Declaration of Human Rights was issued which included recognition of each nation's duty to consider granting sanctuary to refugees fleeing persecution.[47] This broad proclamation crystallized further with the United Nations Convention Relating to the Status of Refugees in 1951 ("UN Convention").[48] The obligations owed by countries to refugees were emphasized again in the 1967 United Nations Protocol Relating to the Status of Refugees, which the U.S. signed one year later ("UN Protocol").[49] That Protocol adopted certain provisions of the U.N. Convention to define specific rights to seek asylum for refugees escaping persecution. While the United States did not become a direct party to the U.N. Convention, by signing the 1967 Protocol, it accepted by reference the duty to accept refugees "where their life or freedom would be threatened on account of their political opinion."[50]

Congress's commitment to this world-wide transformation[51] centered upon the Refugee Act of 1980, which embodied post-war norms and evolving ethics concerning refugees:

> If one thing is clear from the legislative history of the definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.[52]

---

47. Article 14 of the Universal Declaration of Human Rights provides:
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions arising from non-political crimes or other acts contrary to the purposes and principles of the United Nations.

48. The UN Convention described the world community's "profound concern for refugees" and the "social and humanitarian nature of the problem of refugees" in its preamble. In its definitional section, it set forth the standard of a "well-founded fear of being persecuted by reasons of race, religion, nationality, membership of a particular social group or political opinion," a criterion that would later be embodied in U.S. asylum laws. Article 33 thus imposed a prohibition of the involuntary return of refugees "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Art. 33(1), UN Convention.

49. 19 U.S.T. 6223; 606 U.N.T.S. 267 (1967). The UN Protocol reaffirmed the international commitment to refugees. Broadening its scope to encompass new refugee situations arising after 1951, it reincorporated Articles 2 through 34 of the treaty retaining the definition of "refugees" embodied in the UN Convention.

50. Nicosia v. Wall, 442 F.2d 1005, 1006 n.4 (5th Cir. 1971).

51. Subsequent to the passage of the 1980 Refugee Act, the international community has continued to address concerns for refugees in related contexts. The 1989 Convention on the Rights of the Child provides that participating nations:

> shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures and shall, whether accompanied or unaccompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights...

Another international compact, while not centered on refugee issues, provides that even if wrongfully abducted, a child should not be returned to the nation of origin if there is "grave risk" of "physical or psychological harm" if such repatriation would place the child "in an intolerable situation." Art. 13(b), Hague Convention On The Civil Aspects Of International Child Abduction.

52. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987).

To fulfill our nation's pledge to the refugee community, Congress enacted the right to seek asylum and required the executive branch to establish a uniform procedure for such adjudications:

> It is the intention of the Conference that the Attorney General should *immediately create a uniform procedure for the treatment of asylum claims.* Present regulations and procedures now used by the immigration service do not conform to either the spirit or to the new provisions of this Act.[53]

This enactment marked a watershed in the rights of all aliens within our nation's borders. "Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States."[54] As a result of this landmark legislation, "Congress, therefore, established for the first time a provision in federal law specifically relating to requests for asylum."[55] Along with uniformity and consistency, the Refugee Act was enacted to give "statutory meaning to our national commitment to human rights and humanitarian concerns."[56]

In validating the right to seek asylum, the congressional mandate resonated across the landscape of concepts such as "excludable," "deportable," "admitted" or "unadmitted" to reach every alien physically present in the United States:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status*, may apply for asylum in accordance with this section, or where applicable, section 1225(b) of this title.[57]

Accordingly, by its own terms, the 1980 Refugee Act discarded traditional status-based distinctions concerning the right to apply for asylum so long as the alien is "physically present in the United States."[58]

---

53. 125 Cong. Rec. 3, 759 (1979) (emphasis added).

54. *Cardoza-Fonseca*, 480 U.S. at 433.

55. Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 552 n. 8 (9th Cir. 1990).

56. S.Rep. No. 256, 96th Cong., 4, U.S. Code Cong. & Admin. News 1980, at 141. In amending the Immigration and Nationality Act, the Refugee Act of 1980 was conceived primarily "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States." Pub.L. 96-212, tit. 1. §101(b), 94 Stat. 102 (1980). In providing statutorily for a uniform asylum procedure for refugees, the Refugee Act brought U.S. laws into conformity with the treaty obligations of the U.N. Protocol. Marincas v. Lewis, 92 F.3d 195, 197 (3d Cir. 1996). Thus, in its preamble, the Act proclaimed "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

57. 8 U.S.C. §1158(a)(1) (emphasis added).

58. *Id.* The legislative history of the asylum law emphasized the necessity of requiring a uniform asylum process. "The bill requires the Attorney General to establish a uniform procedure for passing upon an asylum application." S. Rep. Number 256 at 96 Cong. 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Adm. News, 141, 149 (cited in Jean v. Nelson, 727 F. 2d 957 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985) (emphasis supplied)).

C. Modern Supreme Court Developments

The Supreme Court has yet to address the constitutional impact of the Refugee Act of 1980. Because due process reaches any "person" within the United States, it has been held, as a general proposition, that it reaches all aliens within our jurisdiction.[59] Therefore, in *Mathews v. Diaz*,[60] while rejecting the due process claim challenging a five-year residency requirement for aliens seeking federal medical benefits, the Court confirmed the Constitution's recognition of aliens. As the Court expressed the threshold issue, "Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection."[61] In 1982, the Court held in *Plyler v. Doe* that the Equal Protection Clause of the Fourteenth Amendment embraced alien school children. Although undocumented and illegal, they were constitutionally entitled to public education at the taxpayer's expense.[62]

Beyond those broad premises, however, the specific constitutional questions concerning asylum-seeking have not been examined by the Supreme Court. Even so, a broad statement from a 1982 court decision addressing reentry issues continues to influence several courts concerning asylum. In *Landon v. Plasencia,* the Court described the right of aliens to seek initial admission as a "privilege."[63] That mention represents dictum because the Court found that the alien facing deportation in that case did indeed have constitutional rights.[64] Holding that the alien continued to be a permanent resident after a trip abroad, she therefore retained her due process rights to a fair hearing when threatened with deportation. Therefore, the Court had no occasion to discuss, much less determine, whether the newly enacted Refugee Act of 1980 created a right to seek asylum with due process implications. Even so, later circuit court decisions would cite the *Landon* reference to "privilege" without acknowledging its limited force as a dictum or discussing the fact that it arose in a pre-Refugee Act setting.[65]

---

59. Mathews v. Diaz, 426 U.S. 67, 77 (1976). There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950); Wong Wing v. United States, 163 U.S. 228, 238 (1895); *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); *see also* Wang v. Reno, 81 F. 3d 808, 816-17 (9th Cir. 1996) (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)) ("However, as the *Verdugo-Urquidez* Court expressly noted, the Fifth Amendment provides protection to the "person" rather than "the people."); Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) (illegal, unadmitted alien, a "person" for due process purposes and cannot constitutionally be subjected to physical abuse).

60. 426 U.S. 67 (1976).

61. *Mathews*, 426 U.S. at 77.

62. 457 U.S. 202, 223-226 (1982).

63. 459 U.S. 21, 32 (1982), on remand, 719 F.2d 1425 (9th Cir. 1983).

64. *Landon*, 459 U.S. at 34.

65. Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (*en banc*), *aff'd on non-constitutional*

III. THE CIRCUIT SPLIT ON THE CONSTITUTIONAL RIGHT TO SEEK ASYLUM

A. The Fifth and Second Circuits Apply Due Process

In the decades following the enactment of the 1980 Refugee Act, the gaps in Supreme Court decision-making have led to dramatic divergences among the circuit courts concerning the reach of due process. The first important decision, *Haitian Refugee Center v. Smith,*[66] arose in the Fifth Circuit under facts occurring prior to the effective date of the asylum legislation. One year before the enactment of the 1980 legislation,[67] a class action of over 4,000 Haitian refugees challenged INS procedures in Miami that were tantamount to perfunctory, assembly-line rituals providing each applicant with a hearing that averaged 15 minutes of substantive dialogue.[68] With only twelve attorneys available to represent those thousands of applicants, and each asylum officer conducting 40 such proceedings daily, the applicants were frequently unrepresented because of scheduling conflicts.[69] Not surprisingly in view of these abject processes, the INS refused asylum for all of the 4,000 Haitian applicants during the course of this program.[70]

The district court found that the INS's "wide variety of defects" in the processing of Haitian asylum claims violated, among other things, the Due Process Clause of the U.S. Constitution.[71] On appeal, the Fifth Circuit reviewed the inadequate procedures of the INS and affirmed. Its starting point for analysis was the Supreme Court's recognition, in *Mathews v. Diaz,*[72] that the Fifth Amendment, like the Fourteenth Amendment, protects even illegal aliens within the jurisdiction of our country.[73] While acknowledging the broad power of Congress to exclude aliens altogether, the court found that "the executive is subject to the constraints of due process" in implementing congressional immigration policy.[74] Although observing that there are protected interests that originate in the Constitution itself, the court further recognized a separate source of liberty and property interests predicated upon state and federal laws that create "a substantive entitlement to a particular governmental benefit." Examining asylum procedure established by the INS's own regula-

---

grounds, 472 U.S. 846 (1985); *See also* Marincas v. Lewis, 92 F.3d 195, 202 (3d Cir. 1996); Amanullah v. Nelson, 811 F.2d 1, 8 (1987).

66. 676 F.2d 1023 (5th Cir. 1982)

67. The right to seek asylum prior to 1980 was established by an INS regulation, 8 C.F.R.§108.

68. *Haitan Refugee* Center, 676 F.2d at 1031.

69. *Id.* at 1031. Not infrequently, counsel for asylum applicants would confront three hearings at the same hour in different buildings.

70. *Id.*

71. *Id.* at 1036 (citing Haitian Refugee Center v. Civiletti, 503 F.Supp. 442,455 (S.D. Fla. 1980)).

72. 426 U.S. 67 (1976).

73. *Haitan Refugee Center*, 676 F.2d at 1036.

74. *Id.*

tion, in conjunction with Congress's adoption of the UN Protocol in 1967, the Court concluded that aliens had been granted a right to submit and substantiate their claim for asylum.[75] Based on the creation of that substantive entitlement, the court applied the due process doctrine of Supreme Court cases like *Morrissey v. Brewer*[76] and found that the Constitution safeguarded the right to seek asylum. Because federal law established a right to petition for asylum, this entitlement gave rise to a protectible liberty interest,[77] even if the decision to grant asylum was discretionary.[78]

Therefore, while finding no constitutional right concerning the granting of asylum itself, the court found that due process was invoked by the right to seek this remedy. "Although fragile, the right to petition is nevertheless a valuable one to its possessor."[79] Because the right to apply for asylum stood upon a foundation of procedural due process, the court found that "some form of hearing" was required, and that the hearing must be conducted "at a meaningful time and in a meaningful manner."[80] Applying the three-part test of *Mathews v. Eldridge,*[81] the court, upon weighing the private interest at stake, the likelihood of error and the government's interest, found that the Haitian deportation program violated due process.

While the aliens before the court in *Haitian Refugee Center v. Smith* were allegedly deportables who had entered South Florida illegally, the Fifth Circuit did not rely on traditional distinctions elevating the status of deportable aliens over excludables. Instead, the court found that due process reached asylum seekers based on two premises: first, that the Constitution and due process had universal application to all people within our borders, even those whose presence might be "unlawful, involuntary or transitory"[82] and, second, that the applicable INS regulation and U.S. treaty commitments established a substantive right to present an asylum claim.[83] Predicated upon these conclusions, the court applied modern due process cases concerning governmental entitlements, rather than long-standing alienage doctrine defining the constitutional rights of "deportables." Later Fifth Circuit decisions would further dispel any thesis

75. *Haitan Refugee Center*, 676 F.2d at 1037.

76. 408 U.S. 471 (1972).

77. *Haitan Refugee Center*, 676 F.2d at 1037. The Court cited the Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903), for the principle that deportation proceedings implicate the alien's liberty interest in the right to remain in the U.S.

78. *Haitan Refugee Center*, 676 F.2d at 1038.

79. *Id.* at 1039.

80. *Id.* at 1039 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)).

81. 424 U.S. 319 (1976).

82. Mathews v. Diaz, 426 U.S. at 77.

83. *Haitan Refugee Center*, 676 F.2d at 1038-39. Subsequently, the finding that the ratification of the UN Protocol conferred enforceable federal rights was rejected by the Eleventh Circuit in *Haitian Refugee Center v. Baker*, 949 F.2d 1109,1110 (11th Cir. 1991).

that *Haitian Refugee Center v. Smith* and the Due Process clause were confined to deportable aliens.[84]

Two years later, the Second Circuit expressly invoked the Refugee Act of 1980 in *Augustin v. Sava*[85] to hold that the absence of adequate translation of asylum proceedings violated the procedural due process rights of a Haitian refugee. Applying analysis that paralleled *Haitian Refugee Center v. Smith*, the court, like the Fifth Circuit, found no inherent constitutional rights in the asylum process, but reasoned that aliens "do have such statutory rights as Congress grants."[86] Because the Refugee Act of 1980 conferred upon aliens a substantive entitlement to seek asylum, the court ruled that, while a grant of asylum is discretionary, the right to apply for asylum and receive a fair hearing required adequate procedural safeguards.[87]

Reviewing the traditional distinction between "excludables" and "deportables," the Second Circuit concluded that Augustin had waived any claim of "deportable" status by failing to raise the issue below and was therefore subject to exclusion proceedings. Even so, the court criticized the doctrines that accorded illegal deportable entrants greater rights than those excludables who had properly petitioned for entry.[88]

Rather than historic alienage analysis, the court applied the broadly prevailing due process cases[89] in light of the entitlement to seek asylum established by the Refugee Act. As a result, even though the court held that Augustin was "excludable," he was still protected by due process. Addressing the merits of the due process claim, the court found that his asylum hearing had been fraught with apparent confusion and error due to inadequate translations of Augustin's native Creole. Accordingly, the court found he was denied a reasonable opportunity to present this asylum claim and remanded with directions to assure a fair hearing.

---

84. In *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987), the court found that "excludables," even illegal stowaways apprehended aboard a barge, remained within the reach of due process and could not be physically abused by port officials. "Excludable aliens are not non-persons." *See also* Zadvydas v. Underdown, 185 F.3d 279, 289 (5th Cir. 1999) (while status can affect measure of protection, "in this Circuit it is clear" that excludables are within the ambit of the Constitution).

85. 735 F.2d 32 (2d Cir. 1984). Previously, in the context of alien detention, the Second Circuit had seemingly minimized due process for excludable Haitians in *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982). That decision encompassed the issues of detention and parole of aliens, matters that are explicitly committed to the discretion of the Attorney General. By contrast, the right to seek asylum, is not a humble suggestion to the INS, but rather, represents a mandate of Congress.

86. 735 F.2d at 36.

87. *Augustin*, 735 F.2d at 37. The Second Circuit cited the Fifth Circuit's decision in *Haitian Refugee Center v. Smith*, as well as the original panel decision by the Eleventh Circuit in *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), vacated, 727 F.2d 957 (11th Cir. 1984) (en banc).

88. *Augustin*, 735 F.2d at 36 n.11.

89. *Id.* at 37 (citing Wolff v. McDonnell, 418 U.S. 539, 577 (1974)).

B. Jean v. Nelson *and the Denial of Constitutional Safeguards*

One year later, however, the *en banc* Eleventh Circuit initiated a constitutional perspective in opposition to those holdings in *Jean v. Nelson.*[90] Strikingly, the genesis of the Eleventh Circuit doctrine was not conceived upon the right to seek asylum. Instead, the *Jean* class action was brought on behalf of Haitian aliens being held in various INS detention facilities pending exclusion proceedings. Rather than the right to receive a fair asylum hearing, the center of the Fifth and Second Circuit holdings, the facts of *Jean v. Nelson* stood largely in the fundamentally different province of "challenging the government's refusal to grant them parole."[91] Because the issues in *Jean v. Nelson* did not include the actual right to seek asylum, the court had no occasion to discuss the impact of the statutory entitlement conferred by the Refugee Act of 1980. Instead, the court's opinion spoke primarily to INS responsibility for managing the detention and parole of aliens who faced pending exclusion proceedings. Unlike petitioning for asylum, an entitlement guaranteed by Congress in 1980, matters of alien detention as well as release in the form of parole[92] were explicitly delegated by statute to the discretion of the Attorney General. Undeniably, these are subjects that present a daunting array of logistical, administrative and practical issues. Like other courts, the Eleventh Circuit described the temporary release of an otherwise ineligible alien to be "an act of extraordinary sovereign generosity."[93] According to the court's comprehensive survey of federal case law, the only circuit decision to have imposed due process limits upon INS discretion over the detention of excludable aliens was a Tenth Circuit holding that invalidated the indefinite detention of Mariel refugees.[94] As a result, rather than a direct treatment of the right to seek asylum, *Jean v. Nelson* unveiled a compendium of tributes to deference to the INS centering on issues of detention and release.

---

90. 727 F.2d. 957 (11th Cir. 1984)

91. *Id.* at 962.

92. *Id.* at 963 (citing 8 U.S.C. §1182(d)(5)(a)). In the immigration context, parole represents a discretionary determination to release an alien from INS physical custody, which can encompass temporary liberty as well as a permanent discharge. One frequently disputed scenario is the detainee's obvious desire for a temporary release allowing the alien to remain at liberty pending the determination of the immigration status through administrative or judicial proceedings. Detention issues have been litigated regularly and successfully by the INS which has been accorded wide discretion in treating, for example, the status of 2,746 Mariel Cubans. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985). Even in dealing with juveniles, the Supreme Court reversed both lower courts to underscore the broad latitude of the INS in handling detention, parole and release issues. Reno v. Flores, 507 U.S. 292 (1993).

93. *Jean*, 727 F.2d at 972.

94. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). In that case, the court held an alien who had been held for more than a year in a maximum security federal prison could not be "punished" through an incarceration of limitless duration. Illustrating perhaps colorfully the necessary presence of at least minimal constitutional safeguards, the court noted that, "Surely Congress could not order the killing of Rodriguez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them." 654 F.2d at 1387.

Although not a primary focus, asylum rights did not emerge unscathed from *Jean v. Nelson*. Because the plaintiffs had claimed below that the INS was affirmatively obliged to inform aliens of their right to seek asylum, this alleged duty of notification was drawn into the analysis. Citing the declaration in *Landon v. Plasencia*[95] that an alien seeking admission invokes merely a "privilege," the Court not only rejected the theory of *Miranda*-type notification, it issued a broader opposition to due process for excludable aliens: "Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges are granted by Congress."[96] While noting that the government granted significant benefits to aliens, including the right to an asylum hearing, the court omitted any mention of the Supreme Court doctrine that imbued such entitlements with due process. From its premise of rejecting a constitutional duty to notify aliens of their asylum rights, the Court proceeded to disavow the constitutional ruling of *Haitian Refugee Center v. Smith* that had applied due process simply to assure fair hearings.[97] Even so, the Eleventh Circuit sustained certain of the alien's claims on non-constitutional grounds due to alleged failures to comply with the INS's own regulatory criteria concerning parole and detention.[98]

Because *Jean v. Nelson* arose from critically different facts than *Haitian Refugee Center v. Smith,* its sweeping reference to a lack of due process in the asylum process could have been applied restrictively by its later decisions, even reconciled with the Fifth Circuit holding. As matters would develop,[99]

---

95. 459 U.S. 21 (1982).

96. *Jean*, 727 F.2d at 968.

97. *Id.* at 976 n. 27. While dramatically undercutting the constitutional rights of excludable aliens in the asylum process, the Eleventh Circuit nonetheless recognized the extensive case law extending to others constitutional guarantees in matters ranging from criminal prosecutions, Wong Wing v. United States, 163 U.S. 228 (1896), to unlawful takings of property. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931).

98. *Jean*, 727 F.2d at 976 ("agency deviation from its own regulations and procedures may justify judicial relief").

99. The Eleventh Circuit's deepening opposition to constitutional recognition of asylum rights may have been due, at least in part, to the unique dilemma posed by criminal aliens arriving from Mariel, a minute but problematic component of the 1980 influx of some 125,000 refugees. In discussing the Mariel detainees, one court noted that, "[m]any of them were hardened convicts" whose return was refused by the Cuban government. Chi Thon Ngo v. INS, 192 F.3d 390, 395 (3d Cir. 1999). "Consequently, many of the Mariel Cubans - approximately 1,750 - still remain in INS detention because of their danger to the community." *Id.* One year after the Eleventh Circuit's opinion in *Jean v. Nelson*, that court confronted a class action on behalf of the Mariel detainees for which the district court had granted certain relief, ordering some to be released. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985). In addressing the district court's premise that the Mariel plaintiffs "should be accorded at least some of the legal protections given to those who have effected entry into this country," 766 F.2d at 1483, the Eleventh Circuit issued a resounding rejection of any notion that excludable aliens enjoy constitutional protection concerning their initial admission to the U.S. *Id.* at 1483-84. Although its constitutional discussion was addressed only to the detention issues, and the right to seek asylum under the 1980 Refugee Act was nowhere mentioned, the court relied on Jean v. Nelson to assert a broad erasure of rights concerning asylum. 766 F. 2d at 1482-84.

however, subsequent Eleventh Circuit cases would instead firmly entrench the view that due process does not reach aliens seeking refuge in this country.[100]

When *Jean v. Nelson* reached the Supreme Court in 1985, the constitutional tension among the Second, Fifth and Eleventh Circuits' due process holdings was not resolved.[101] Instead, the Court declined to reach the Fifth Amendment issue[102] and sustained the lower court findings that valid claims had been raised against the INS based on statutory and regulatory criteria. Justice Marshall dissented to the refusal to address the constitutional questions in an extensive opinion joined by Justice Brennan.[103] The dissent argued that, first, excludable aliens clearly enjoy Fifth Amendment protection in matters such as criminal prosecution; second, existing precedent precluded unlawful deprivations of an alien's property interests; and, third, denying due process to excludable aliens could not be logically supported since, for example, the Attorney General presumably could not "justify a decision to stop feeding all detained aliens."[104] Because neither the Court majority in *Jean v. Nelson* nor any later decision would address the due process issues, the dissent of Justice Marshall would remain, even today, the last words written on the subject of due process for excludable aliens by any member of the Supreme Court.[105]

---

100. In *Gonzalez v. Reno*, 215 F.3d 1243 (11th Cir. 2000), the Court summarily rejected due process for six-year-old Elian based on Jean v. Nelson. In *Richardson v. Reno*, 162 F.3d 1338, 1361 (11th Cir. 1998) the court cited *Landon v. Plasencia*, *supra*, and *U.S. ex rel Knauff v. Shaughnessy*, *supra*, to reaffirm the broad proposition that "an alien seeking admission to the United States has no constitutional rights regarding an application for admission." In another Eleventh Circuit holding to oppose the rationales of Smith, the Court held in *Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) that Haitian plaintiffs had no enforceable rights under the UN Protocol because the key provision found in Article 33 was not self-executing. *See also* Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir. 1985) (Parole and detention case in which excludable aliens were said to have no constitutional rights in the asylum process based on Jean v. Nelson). On the other hand, when a lawfully admitted alien faced deportation based on a felony conviction, the Eleventh Circuit confirmed his constitutionally protected status and overrode the INS's refusal to let him seek waiver of deportation. Yeung v. INS, 76 F.3d 337 (11th Cir. 1995).

101. 472 U.S. 846 (1985).

102. *Id.* at 854. In opting for decision on non-constitutional grounds, the Court observed: "This is a 'fundamental rule of judicial restraint." *Id.* (citing *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984)).

103. *Id.* at 856.

104. *Id. at* 874. Presumably because the core issue was detention rather than seeking asylum, the dissent did not address the Refugee Act of 1980 or the Court's modern series of procedural due process cases.

105. In *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the court addressed the rights of aliens interdicted on the high seas to seek a withholding of deportation. Because the Court's analysis centered on finding no extra-territorial application of the relevant immigration laws, its holding did not implicate asylum rights for those on U.S. lands. In *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court examined the constitutional adequacy of INS regulations governing the detention of juvenile aliens. Because the Court found that the role of due process in deportation proceedings was well-established, 507 U.S. at 306, it neither analyzed more broadly the threshold standards for activating due process nor addressed the rights of excludable aliens. *Id.*

C. The Circuit Conflict Continues To Grow

With the Supreme Court's decision not to reach the due process issues, the aftermath of *Jean v. Nelson* left the Fifth and Second Circuits in conflict with the Eleventh Circuit doctrine that would continue to reject constitutional asylum rights for excludable aliens. This divergence apparently expanded in 1987 when the First Circuit repeated the Eleventh Circuit's broad disclaimers of due process in the asylum scenario.[106] In that case, several refugees from war-torn Afghanistan had been confined in INS detention centers for months following their arrival in the U.S. through third countries, an arrival secured with the use of bogus documents. Like the en banc decision in *Jean*, *Amanullah v. Nelson* treated detention and parole for excludable aliens, not their right to a fundamentally fair asylum hearing. Even so, citing the Eleventh Circuit holding as well as the "requests a privilege" statement from *Landon v. Plasencia,* the First Circuit reiterated the general thesis that aliens seeking admission have no constitutional rights with regard to their applications and denied the refugees' due process claims.[107]

Several years later, the circuit split deepened further as the Circuit for the District of Columbia in *Maldonado-Perez v. INS*[108] followed the Fifth Circuit's analysis to recognize a procedural due process right to petition the government for political asylum.[109] Relying on *Haitian Refugee Center v. Smith*, the D.C. Circuit found that due process enfolded a Salvadoran farmer who illegally entered Texas without inspection and suffered an adverse deportation order following a hearing in absentia. While determining that due process did not create a right to asylum itself, the court ruled that it required "a meaningful or fair evidentiary hearing with a reasonable opportunity to be present."[110] Concluding that due process did indeed apply, the court found that, because the applicant had been accorded a fair opportunity to be present at his hearing, there was no constitutional violation.[111] In framing the analysis, the court did not rely on Maldonado-Perez's apparent status as a deportable alien. Instead, the court cited the Fifth Circuit's due process holding, as well as non-immigration Supreme Court decisions that define due process in broader settings, such as *Logan v. Zimmerman Brush Co.*[112] As a result, the D.C. Circuit, like the Sec-

106. Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987). Although not treating the issue of the right to seek and substantiate asylum, the sweeping language of *Amanullah* and its general adherence to *Jean v. Nelson* indicated an alignment with the Eleventh Circuit's positions concerning due process and asylum seekers.

107. 811 F.2d at 9. ("To be sure, outside the context of admission and exclusion procedures, excludable aliens do have due process rights.").

108. 275 U.S. App. D.C. 109, 865 F.2d 328 (D.C. Cir. 1989).

109. 865 F.2d at 331.

110. *Id.* at 333.

111. *Id.* at 337.

112. 455 U.S. 422, 433 (1982).

ond Circuit in *Augustin v. Sava*, relied on the Refugee Act of 1980 as the source of substantive entitlement that created the protectible interest that warranted constitutional safeguards.[113]

With five courts issuing varying declarations on opposing sides of a critical due process issue, the Third Circuit offered a third position in 1996 that was lodged in the middle of the divide. In *Marincas v. Lewis*,[114] the court addressed the asylum rights of stowaway aliens, traditionally among the least favored of immigrant asylum seekers. The alien in *Marincas*, a former soldier in the Romanian army, challenged an interview procedure for stowaways that did not provide a neutral fact-finder to hear the claim initially and lacked other basic safeguards. Observing that the INS regulations distinguished between the procedures governing stowaways and those afforded other applicants, the court found that stowaway asylum claims were not being determined by "a neutral immigration law judge with a full panoply of due process safeguards."[115] Upon analysis of the INS's procedures for stowaways, the Third Circuit found that they were legally inadequate and held that these immigrants were entitled to the same asylum procedures extended to other applicants.

The court's holding, though, did not rely on constitutional due process. Indeed, the Court specifically held that the stowaway applicants were not entitled to constitutional protection in seeking admission to the United States.[116] This finding was not detailed and was apparently premised upon a recitation of the Supreme Court's reference in *Landon v. Plasencia* to the seeking of asylum as a "privilege" rather than a constitutional right.[117] While expressly disclaiming any application of constitutional analysis,[118] the Third Circuit nonetheless relied on general due process cases decided by the Supreme Court on constitutional grounds.[119]

To construct a due process methodology upon a non-constitutional foundation, the court relied on the judicial duty to construe federal statutes like the Refugee Act consistently with congressional intent because "it can be assumed that Congress intends that procedure to be a fair one."[120] Even though basing its analysis upon tenets of statutory construction, the Third Circuit explicitly spoke in terms of due process. Thus, to effectuate the 1980 Refugee Act's mandate for an asylum procedure, as well as U.S. treaty obligations and max-

113. 865 F.2d at 337.

114. 92 F.3d 195 (3d Cir. 1996).

115. *Id.* at 200.

116. *Id.* at 203.

117. *Id.* at 203.

118. The Third Circuit did not cite *Jean v. Nelson*. Instead, while rejecting any role for constitutional due process, it cited approvingly the Second Circuit's decision in *Augustin v. Sava*.

119. *Id.* at 203 (citing Meachum v. Fano, 427 U.S. 215, 226 (1976)).

120. *Id.* at 203 (citing Califano v. Yamaski, 442 U.S. 682, 693 (1979)).

ims of fundamental fairness, the court held that the INS process had to provide "the most basic of due process."[121] Rejecting any contention that, as "excludable aliens," stowaways deserved a deprecated form of asylum hearing, the court observed that the congressional mandate for asylum procedures applied "irrespective of such alien's status."[122] In finding that stowaway applicants therefore deserved the same asylum process created for other applicants, the court required a number of safeguards, including: a hearing before a neutral immigration judge; a transcribed record of proceedings and adequate translation services; notification of the applicant's right to counsel; the availability of free legal representation; the right to submit evidence and to present and subpoena witnesses; and the right seek subsequent administrative review.[123]

Accordingly, while acknowledging the "privilege" language of *Landon v. Plasencia* and expressly gainsaying any reliance on constitutional analysis, the decision in *Marincas v. Lewis* clearly applied due process principles to override multiple procedural infirmities in the INS's asylum procedures.[124] Therefore, seemingly to reconcile the Supreme Court's 1982 reference to "privilege" with the subsequent analysis evolving under the Refugee Act, the court avoided any constitutional labeling by crafting a purely statutory thesis of due process.

In another appellate encounter with stowaway aliens, the Fourth Circuit stated a succinct but clear rationale for validating their constitutional due process right to seek asylum in the 1999 decision of *Selgeka v. Carroll.*[125] An ethnic Albanian fleeing Kosovo, Selgeka stowed away aboard a U.S. ship in January, 1996, and thus the substance of his claim arose before the effective date of the 1996 immigration legislation.[126] Besnik Selgeka claimed that he had been denied procedural due process because his right to asylum was not determined by an impartial immigration judge in a hearing with appropriate safeguards.[127] Citing decisions such as *Marincas v. Lewis*[128] and *Augustin v. Sava*[129] the

121. *Id.* at 203.

122. *Id.* at 201.

123. *Id.* at 204. Evidently, these applicants had already invoked the asylum process and, thus, any concomitant duties of notification, arguably different circumstances than those of aliens facing removal who had not yet requested asylum, the scenario found in *Jean v. Nelson.*

124. Even though indicating its conformity to the words of *Landon v. Plasencia*, the Third Circuit made approving references to *Augustin v. Sava*, 735 F.2d 32 (2d. Cir. 1984). Moreover, it applied the same methodology utilized by in the Second Circuit in relying upon the 1980 Refugee Act and other sources of federal law to define the source of statutory entitlement that should be safeguarded by due process.

125. 184 F.3d 337 (4th Cir. 1999).

126. The only feature of the Illegal Immigration Reform and Immigrant Responsibility Act relevant to *Selgeka* was the jurisdictional provision, 8 U.S.C. §1252(a), a provision which did not change the outcome of the case. *Selgeka*, 184 F.3d at 340-44.

127. *Id.* at 341-42,

128. 92 F.3d 195 (3d Cir. 1996)

129. 735 F.2d 32 (2d Cir. 1984).

court similarly found that aliens have no independent constitutional right to asylum but enjoy minimum due process concerning statutory entitlements. By virtue of the Refugee Act, the court found that Congress had spoken in no uncertain terms in directing the Attorney General to establish an asylum procedure for aliens within the United States, "irrespective of such alien's status."[130] This enactment, the court observed, underscored U.S. treaty obligations under the UN Protocol and provided legislative substance to the national commitment to refugees.[131] While placing heavy emphasis on *Marincas v. Lewis,* the Fourth Circuit made no mention of that decision's reliance on due process that was non-constitutional. Instead, the court in *Selgeka* cited *Marincas,* as well as *Augustin v. Sava* to support its constitutional due process holding.[132]

Because the majority in *Selgeka* concluded that the congressional mandate for an asylum procedure required a single, uniform process, the diminished procedural safeguards for stowaways were found to violate due process. The dissent did not challenge the alien's right to constitutional due process but disputed the premise that INS procedures for stowaways were inadequate. Accordingly, in its decision in *Selgeka v. Carroll,* the generally conservative Fourth Circuit issued a clear validation of the constitutional right of any alien on U.S. soil to seek asylum.

IV. RESOLVING THE CIRCUIT SPLIT

A. IIRIRA and the New Concepts of Admitted and Unadmitted Aliens

Resolution of this wide variance among circuit courts requires not only analysis of their rulings, but also of the impact of new immigration legislation that became effective subsequent to the events underlying those decisions. In 1996, Congress amended the Immigration and Naturalization Act by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[133] The principal substantive features of IIRIRA became effective on April 1, 1997,[134] and thus post-dated the factual circumstances giving rise to the divergent decisions among the Second, Third, Fourth, Fifth, Eleventh, and D.C. Circuits, and, potentially, the First Circuit. Significantly, the key provision for asylum purposes under pre-existing law, Section 1158(a) from the original Refugee Act, was not altered. Thus, the predicate for statutory entitlement recognized in decisions such as *Augustin v. Sava* and *Selgeka v. Carroll*

130. *Selgeka,* 184 F.3d at 342 (citing 8 U.S.C. §1158(a)).
131. *Id.* at 342.
132. *Id.* at 342-45.
133. Pub. No. 104-208, 110 Stat. 3009 (1996).
134. *Selgeka,* 184 F.3d at 341.

remains intact.[135] The long-standing definitions of "excludable" and "deportable" aliens, however, were replaced by new statutory terms and concepts. Under IIRIRA, instead of excludable aliens, the statute speaks to "inadmissable" aliens.[136] Inadmissible aliens are those who have not lawfully entered this country. Broader than the former category of "excludables," inadmissible aliens include not only immigrants detained at a port of entry, but also those who succeeded in an illegal, surreptitious entry upon U.S. soil.[137] As a result, aliens denied admission by immigration authorities ("excludables") are now equated with aliens who illegally gained physical entry ("deportables"), so that both groups are merged into the new classification of unadmitted aliens.[138] "Admitted" aliens, on the other hand, are those who were lawfully permitted to enter the country free from conditions of detention or parole. These immigrants would correspond to that component of formerly deportable aliens whose arrival was permitted by immigration authorities.

The impact of the elimination of the excludable/deportable dichotomy in favor of the unadmitted/admitted alien demarcation has not been explicitly resolved subsequent to the enactment of IIRIRA. In a decision arising since the 1997 effective date of the new law, the district court and Eleventh Circuit in *Gonzalez v. Reno*[139] both dispatched the due process claim of six-year-old Elian with a one sentence reference to the circuit court's opinion in *Jean v. Nelson.*[140] Despite its notable brevity, the rejection of due process may still be important for several reasons. Significantly, in rejecting a child's constitutional claim, the court relied on *Jean v. Nelson* rather than any contention that refugee children have a lesser constitutional status than adults. As a result, the court's approach left unchallenged the impact of *Polovchak v. Meese*[141] and *Johns v. Department of Justice,*[142] leading circuit court decisions concerning

135. *Id.* at at 342 ("The linchpin of Selgeka's case is 8 U.S.C. §1158(a)..."); *see* Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984) (noting with reference to the Refugee Act of 1980 that aliens "do have such statutory rights as Congress grants.").

136. Chi Thon Ngo v. INS, 192 F.3d 390, 395 n.4 (3d Cir. 1999).

137. *Id.*

138. 8 U.S.C. §1101(13)(A).

139. 215 F.3d 1243 (11th Cir. 2000).

140. 727 F.2d 957 (11th Cir. 1984) (*en banc*) approved on non-constitutional grounds, 472 U.S. 846 (1985).

141. 774 F.2d 731 (7th Cir. 1985). In *Polovchak,* the court recognized that at age 12, Walter Polovchak had an independent constitutional right to seek asylum, just as his parents had a constitutional right to intervene in such proceedings to insist that their son be returned to them in the Soviet Union. Since Walter entered the U.S. legally, however, the case is more significant in its inclusion of children as well as parents within the reach of due process and does not address the rights of excludable or illegally entering aliens. The Seventh Circuit continues to confirm a child's right to a hearing. DeSilva v. DiLeonardi, 125 F.3d 1110, 1115 (7th Cir. 1997).

142. 624 F.2d 522 (5th Cir. 1980). In *Johns,* the court found that the Due Process Clause protected five-year-old Cynthia, a Mexican girl subject to deportation proceedings. Due to the cross-fire between her Mexican natural mother and the U.S. husband and wife who had brought her illegally into this country when Cynthia was an infant, the court ordered the appointment of a guardian ad litem. A "deportable" under existing law, Cynthia would be an unadmitted alien under today's definitions.

the rights of immigrant children.[143]

Other consequences are more specifically signaled by *Gonzalez v. Reno.* For the first time, the Eleventh Circuit's doctrine rejecting due process for excludable aliens was applied directly to an asserted right to seek asylum, as opposed to ancillary issues such as parole, detention, and pre-asylum notification claims.[144] Second, while not explicitly addressing the impact of the 1996 passage of IIRIRA, the court's rejection of due process for Elian, an unadmitted alien, necessarily confirms that the Eleventh Circuit will apply the same constitutional standard to unadmitted aliens that previously encompassed "excludables."

As courts continue to address the right to asylum in the aftermath of IIRIRA, the decisions that have validated due process can also be expected to maintain the same constitutional course. As described earlier, the holdings of the Second,[145] Third,[146] and Fourth Circuits[147] that sustained rights for "excludables," addressed asylum-seekers who would constitute unadmitted aliens under IIRIRA. Moreover, the Fifth Circuit's original validation of due process in 1982, like the D.C. Circuit's similar holding in 1989, extended due process rights for deportable aliens who, having entered illegally, would constitute unadmitted aliens under the current definitions. Therefore, not only did the analysis of those deportable alien cases evince no reliance upon any traditional distinctions, the facts of those cases, if transplanted to the current modern statutory concepts, would similarly endorse due process rights for today's unadmitted aliens.

Moreover, because the critical asylum provision in the Refugee Act of 1980 remains undiminished by the 1996 amendments to the INA, the predicate of statutory entitlement that anchored all but one of these decisions maintains

143. Nor did the Eleventh Circuit attempt to distinguish leading Supreme Court decisions that speak to the rights of minors in other contexts. As the Supreme Court observed in its landmark proclamation of children's constitutional rights, "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In Re Gault, 387 U.S. 1 (1967); *see also* Goss v. Lopez, 419 U.S. 565, 574 (1975) ("Those young people do not 'shed their constitutional rights' at the schoolhouse door."). In another decision underscoring the separately protected rights of children, this Court said, "A child, merely on account of his minority, is not beyond the protection of the Constitution." Belloti v. Baird, 443 U.S. 622, 633 (1979). Thus, a child's well-being have long embodied societal values that the Constitution does not ignore. Prince v. Massachusetts, 321 U.S. 158 (1944) ; Jehovah's Witnesses in the State of Washington v. King's County Hospital, 278 F. Supp. 488 (W.D. Wash.), aff'd, 390 U.S. 598 (1968); *see also* Parham v. J.R., 442 U.S. 584, 607 (1979) (children being admitted to mental hospitals by parents have independent constitutional rights). In fact, even more than their parents, illegal alien children deserve enhanced constitutional protection because they are innocents concerning their presence in our country. Plyler v. Doe, 457 U.S. 202, 210 (1982).

144. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985); Jean v. Nelson, *supra.*

145. Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984).

146. Marincas v. Lewis, 92 F.3d 195 (3d Cir. 1996).

147. Selgeka v. Carroll, 184 F.3d 337 (4th Cir. 1999).

the same protectible interest in seeking asylum.[148] Also undiminished is the reach of the asylum provision to all aliens "physically present" in the United States, "irrespective of such alien's status." Just as this language sweeps across any differentiation between "excludables" or "deportables," the asylum law should be equally indifferent to distinctions that otherwise apply to unadmitted and admitted aliens. Therefore, in examining the due process decisions in light of the subsequent transition to unadmitted and admitted aliens, the facts as well as the legal analysis of those cases reflect that their constitutional outcomes should remain constant.

Accordingly, the enactment of IIRIRA should not revise the existing circuit alignment which arrays the Second, Fourth, Fifth and D.C. Circuits as proponents of Fifth Amendment due process, the Third Circuit in a middle ground of non-constitutional due process, while the Eleventh Circuit, perhaps joined by the First, rejects any such safeguards. With the Eleventh Circuit's rejection of *en banc* consideration in *Gonzalez v. Reno,* the reaffirmation of *Jean v. Nelson* by that important immigration law tribunal assures a future of unacceptable divergence concerning the human rights of millions until the constitutional issue is resolved by the Supreme Court.

148. While *Haitian Refugee Center v. Smith* cited a federal regulation that predated 8 U.S.C. §1158(a), the subsequent passage of the Refugee Act provided, if anything, an even more compelling basis for the Fifth Circuit's due process analysis.

V. THE FUTURE OF ASYLUM RIGHTS

A. Clarifying Landon v. Plasencia *and Applying Modern Due Process*

In further constitutional development of the right to seek asylum, the Court's 1982 opinion in *Landon v. Plasencia* should not continue to denigrate the asylum rights under the Fifth Amendment for countless refugees today.[149] As described earlier, *Landon v. Plasencia's* reference to "privilege" constituted dictum because the subject of that case was found to have been a lawful resident alien with undeniable constitutional rights concerning any expulsion from this country. Moreover, in critical respects, *Landon v. Plasencia* embodied outdated notions at odds with the prevailing Supreme Court directives for due process. The older case law relied on labels such as "deportables" and "excludables" that have now been erased statutorily under IIRIRA. Those words, in turn, were used to delineate whether "rights" or "privileges" were at stake, pinning one set of outmoded concepts upon a second set of conceptual antiques.

Neither mode of labeling should overcome modern concepts of basic human rights. Thus, the deportable/excludable delineation was not only mechanical, it unfairly bestowed greater constitutional rights upon some aliens even though they were illegal and undocumented.[150] Immigrants who succeeded in an unlawful, surreptitious landing were rewarded over excludable aliens who, following an unsuccessful appearance at a port of entry, might remain imprisoned in INS detention facilities for months or more.[151]

Fortunately, with the 1996 statutory elimination of the deportable/excludable definitions, the traditional basis for distinguishing between aliens with constitutional rights and those with mere privileges, has been erased. While arguably the rights and privileges duality could be reattached to the current concepts of unadmitted and admitted aliens, modern constitutional analysis discourages any further revival of the older methodology. While the Eleventh Circuit established its rule by minimizing asylum with the label of a "privilege,"[152] the premise that individuals forfeit vital safeguards whenever those safeguards are denominated "privileges" rather than "rights" has largely

149. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987).

150. That bifurcation arose from the view that by gaining entry upon U.S. lands, immigrants began to attach to the local community and therefore were gaining the practical as well as legal attributes of other residents. Because no easy standard existed for triggering the legal threshold for the development of such ties, however, aliens were elevated to deportable status simply by reaching land without interception by the authorities.

151. Augustin v. Sava, 735 F.2d 32, 36 n.11 (2d Cir. 1984).

152. *Jean*, 727 F.2d at 968.

disappeared from our jurisprudence.[153]

Thus, the "privileges" language of *Landon* and *Jean* represents a largely abandoned methodology. In discussing the interment of privilege analysis, Professor Van Alstyne recalled its long-standing and irremediable deficiency: "Thus Holmes himself readily admitted that to deny that a person had a "right" to do something was merely to announce the conclusion that a court would not give him any relief; but the denial itself provides no reason whatsoever why such relief should be denied."[154]

Thus, as modern constitutional philosophies have firmly established, "this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right'[155] or as a 'privilege' . . . ."[156] Instead, today the Supreme Court relies on constitutional standards that examine the nature of the legislatively-created rights,[157] a doctrine launched with the seminal decision of *Goldberg v. Kelly*.[158] In that case, the Court found that because the New York Legislature had created a right to receive welfare benefits, those rights could not be eliminated without complying with due process, an adherence that required a fair hearing. Other cases such as *Mathews v. Eldridge*[159] have extended and clarified due process.[160] Finding that a denial of social security benefits invoked due process safeguards, the Court announced a three-part test, balancing the private interest and the likelihood of erroneous deprivation along with the competing interest of the government.[161] In another decision, treating revocation of a convicted felon's discretionary entitlement to parole, the opinion authored by the late Chief Justice Burger similarly required a due process hearing: "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion."[162]

Thus, the Court's due process decisions established that, while legislatures may elect not to confer a particular liberty or property interest on an individual

153. ALFRED C. AMAN, JR., & WILLIAM T. MAYTON, ADMINISTRATIVE LAW, §7.3 at 157 (1998 ed.).

154. Williams W. Van Alstyne, *The Demise Of The Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1459 (1968). As Justice Holmes acknowledged long ago, "One phrase adds no more than the other to what we know about it."

155. *Id.* at 1459.

156. Elrod v. Burns, 427 U.S. 347, 361 (1976) (quoting Sugarman v. Dougall, 413 U.S. 634, 644 (1973)).

157. Morrissey v. Brewer, 408 U.S. 471 (1972). As this Court noted 28 years ago, "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable." *Id.* at 482.

158. 397 U.S. 254 (1970).

159. 424 U.S. 319 (1976).

160. *Id.* at 334-35.

161. *Id.* at 334-335.

162. *Morrissey*, 408 U.S. at 483.

once conferred, that interest should not be erased without appropriate safeguards.[163] As applied to the right to seek asylum by cases like *Selgeka v. Carroll,* this dimension of constitutional recognition is not derived directly from the Due Process Clause itself, but arises from the separate source of constitutional protection that encompasses legislatively-created enactments.[164]

Even apart from the 1982 discussion of near-obsolete labeling for rights and privileges, however, is the fact that *Landon v. Plasencia* nowhere addresses the Refugee Act of 1980, the due process linchpin of ensuing circuit court holdings. When properly viewed as a declaration of previous law, the *Landon v. Plasencia* disclaimer of constitutional rights for aliens seeking admission is consistent with an era in which no asylum entitlement had been legislated.[165] Since the statutory right to seek asylum postdated the facts underlying that decision, the Court's statement in 1982 is no obstacle to holding that the Refugee Act is a separate predicate for Fifth Amendment protection.

Although *Landon v. Plasencia* is compatible with a finding that the Refugee Act established a constitutionally protected right to seek asylum, it remains unanswered so far. As discussed earlier, the Court has never addressed the constitutional impact of the Refugee Act. Meanwhile, the circuit courts addressing that watershed legislation have understandably treaded carefully around *Landon,* declining to confront its "privilege" declaration, either as dictum or as a pronouncement supplanted by later developments. While the Fourth Circuit's treatment of *Landon* in *Selgeka v. Carroll* comes closer than others to providing a needed clarification, its discussion may be too brief to provide the level of analysis needed to resolve any lingering concerns about the current impact of this frequently cited Supreme Court decision.[166]

B. Resolving the Due Process Question: The Third Circuit's Middle Ground

In *Marincas v. Lewis*, the court apparently side-stepped the issue by acknowledging *Landon's* apparent constitutional subtractions and therefore predicating due process on statutory and treaty-based analysis. While the non-constitutional due process findings seemingly navigated a middle course between the opposing circuit alignments, the Third Circuit's apparently safe pas-

163. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 541 (1985).

164. *Prisoners' Rights—Punishments Imposed By Administrative Proceedings*, 109 HARV. L. REV. 141 (1995) (citing Sandin v. Conner, 555 U.S. 472, 479 n.4 (1995))

165. Indeed, as decisions like *Augustin v. Sava* and *Selgeka v. Carroll* have observed in sustaining due process based on 8 U.S.C. §1158(a), there is no independent or inherent right to seek asylum under the Constitution. Thus, their finding that due process must instead be based on a statutory entitlement is not incompatible with the statements in *Landon.*

166. In *Selgeka*, the court cited *Landon* for the proposition that there are no independent asylum rights and therefore applied due process upon the theory of a statutory entitlement created by the Refugee Act. *Selgeka*, 184 F.3d at 342. There was no discussion of whether *Landon*'s much quoted constitutional phrases were dictum or whether its rights/privileges dichotomy remained viable. The Fourth Circuit also stopped short of explaining that the 1982 court decision nowhere addressed the Refugee Act.

sage arguably collided with a different set of principles concerning statutory construction and judicial deference to agency interpretations.

The Third Circuit's middle ground was reached through a judicially active extrapolation of legislative intent that overrode contrary agency regulations and practices of the INS. In the modern era of judicial review of administrative actions, however, the long shadows cast by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,*[167] make such judicial overrides debatable. Indeed, judicial deference to agencies on statutory questions is the overwhelming reality in most cases, unless statutes are clear and unambiguous.[168] When statutes are "silent or ambiguous," on the other hand, agencies like the INS enjoy significant latitude to fashion procedures and results within the scope of their administrative expertise. Since the Refugee Act of 1980 did not speak directly to the nature or methods of the asylum tribunal, the various requirements imposed in *Marincas v. Lewis* arguably constituted judicial improvements upon zones of silence or ambiguity that, absent constitutional safeguards, should arguably have been controlled by INS discretion.

Commendably, the Third Circuit insisted upon fundamentally fair procedures for alien stowaways, an outcome functionally consonant with the constitutional due process holdings, while steering between the divided circuits on the constitutional issue.[169] While averting one source of decisional conflict, though, the Third Circuit's methodology arguably encounters a different controversy with respect to the measure of judicial deference to agency interpretations. Accordingly, while the Third Circuit's premise of non-constitutional due process averted any confrontation with the still resonant dictum of *Landon v. Plasencia,*[170] it did not avoid the deep entanglements of agency discretion and

---

167. 467 U.S. 837 (1984).

168. To overcome the heavy hand of Chevron deference in immigration cases, Reno v. Flores, 507 U.S. 292 (1993), the Third Circuit relied on *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) , cited at 92 F.3d at 200 for the proposition that "the judiciary is the final authority on issues of statutory construction" 467 U.S. at 843 n.9. Arguably, however, the Third Circuit overextended *Cardoza-Fonseca* because that decision is normally read to confirm the basic rule that clear expression of legislative intent will override contrary agency interpretations and is not applied as a disparagement of Chevron deference. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

169. Although the Fifth and D.C. Circuits did not rely on any distinction between "deportables" and "excludables," the facts of those cases appeared to encompass deportation proceedings. As a result, no direct confrontation with the *Landon v. Plasencia* dictum was required. In *Augustin v. Sava,* like *Marincas v. Lewis*, the court sustained the asylum rights of excludable aliens. The Second Circuit, however, did not address *Landon*, while, as discussed, the Third Circuit apparently avoided its constitutional implications through a statutory premise of due process.

170. More recently, the Third Circuit discussed approvingly the Eleventh Circuit's premise in Jean that prolonged detention of excludable aliens did not ordinarily implicate constitutional offenses. Chi Thon Ngo v. INS, 192 F.3d 390, 393 (3d Cir. 1999). The Third Circuit emphasized, though, that even an excludable alien is a person entitled to substantive due process under the Fifth Amendment. *Id.* at 396 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)). As a result, the court held that excludable aliens in detention required an "opportunity for an evaluation of the individual's current threat to the community and his risk of flight." *Id.* at 398. The court found that interim rules announced by the INS for detainees such as Chi Thon Ngo, appeared to satisfy constitutional requisites, if applied meaningfully. On the other hand, "superficial review is not satisfactory and does not offer due process." 192

presents a close question on the issue of *Chevron* deference.[171]

C. The Majority Circuit View and Constitutional Due Process

When the statutory right to seek asylum is tested against the criteria of modern Supreme Court holdings, those decisions support the outcome of the majority of circuit decisions that apply due process.[172] The starting point is recognition that by its terms, the Due Process Clause encompasses every person on U.S. soil, a basic reality underscored in *Mathews v. Diaz.*[173] From the fact that an alien, too, is undeniably a person, the analysis is driven further by the long-standing premise reiterated in *Plyler v. Doe* that the Constitution reaches each person within the sovereign territory of the United States.[174] This rule has been applied unfailingly and has assured due process protections for aliens charged with crimes[175] as well as for foreigners threatened with potential

---

F.3d at 399. Thus, by clearly extending constitutional due process to excludable aliens in detention, the Third Circuit's ruling in *Chi Thon Ngo*, in conjunction with *Marincas*, further confirms that this court is aligned more closely with the holdings of the Second, Fifth and D.C. Circuits than with the Eleventh Circuit position, even if the Third Circuit's analytic framework is not stated in the identical terms.

171. As a statutory decision based on plain meaning and legislative intent, INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n. 30, represents the foremost Supreme Court impediment to broadening of INS discretion. *See also* Rosenberg v. Fleuti, 374 U.S. 449 (1963) (overruling INS view that a permanent alien's return to the U.S. after a couple of hours departure does not constitute an "entry"). Even in statutory cases, however, the Court usually defers to the INS. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); INS v. Doherty, 502 U.S. 314 (1992); INS v. Rios-Pineda, 471 U.S. 444 (1985); INS v. Bagamasbad, 429 U.S. 24 (1976); INS v. Jong Ha Wang, 450 U.S. 139 (1981);

172. Although not dispositive of the Ninth Circuit's position on asylum issue, in *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), the court held that an excludable Chinese alien, paroled into the U.S. to assist as a government witness, was entitled to due process protection from extraordinary prosecutorial misconduct. That decision did not address asylum rights or the Refugee Act but nonetheless supports the position that even excludable aliens were within the reach of the Due Process Clause. This ruling indicates that the Ninth Circuit may be favorably disposed toward the majority circuit position concerning asylum.

173. 426 U.S. 67, 77 (1976); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (finding that the Fourth Amendment "by contrast with the Fifth and Sixth Amendment, extends its reach only to 'the people'"). Based on such analysis, this Court in *Plyler v. Doe*, 457 U.S. 202 (1982), confirmed that this principle applies to aliens, for "[w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term." *Id.* at 210; *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976). As one court explained, the Constitution necessarily reaches even excludable aliens who are physically within our border, "Surely Congress could not order the killing of Rodriguez-Fernandez and others in his status." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981). As another court explained, because the Due Process Clause of the Fifth Amendment protects each "person," its mantle enveloped even an unadmitted alien who faced serious peril if removed to China. Wang v. Reno, 81 F.3d 808, 817 (9th Cir. 1996) ("However, as the Verdugo-Urquidez Court expressly noted, the Fifth Amendment provides protection to the 'person' rather than 'the people'.") (citing United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir.1988) rev'd 494 U.S. 259 (1990)); *see also* Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) (illegal, unadmitted alien, a "person" for due process purposes and cannot constitutionally be subjected for physical abuse).

174. "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

175. The right of an unadmitted alien to Fifth Amendment due process protections at trial has been acknowledged as early as *Wong Wing v. United States*, 163 U.S. 228 (1896) and has been validated unfailingly by the lower federal courts. *See, e.g.*, United States v. Henry, 604 F.2d 908, 912-913 (5th Cir.

confiscation of their property.[176] Thus, when the Supreme Court held in *Plyler v. Doe*[177] that illegal and undocumented immigrant children cannot be denied a public education, it observed that "[w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term," and is therefore a "person" guaranteed due process of law by the Fifth and Fourteenth Amendments.[178] Therefore, because the Due Process Clause encompasses all persons - including immigrants - who are "physically present" in the U.S., they cannot be constitutionally quarantined beyond the reach of the Fifth Amendment.

Since aliens are not constitutionally invisible, the statutory entitlements conferred upon immigrants should be defined by the same due process analysis that prevails for all other "persons" in this country. Thus, as is already established in various circuits, the mantle of due process is extended to the asylum process by fusing the statutory right to seek asylum with the procedural due process doctrine of cases such as *Goldberg* and *Zimmerman Brush.* This fusion does not meld entitlements that are inherent in the Constitution but, rather, envelopes property and liberty interests with constitutional protection once they are duly conferred by substantive law. Accordingly, while there is no intrinsic constitutional duty to provide social security or welfare benefits,[179] when a government chooses to grant them, due process governs a substantial deprivation of such entitlements. In much the same fashion, the statutory grant of the right to seek asylum, standing upon decades of evolving U.S. commitments to international norms concerning refugees, readily satisfies the threshold criteria for an interest sufficient to invoke the protection of due process.[179]

In defining the protected entitlement, courts have long recognized the serious consequences of being expelled from this country, and therefore, the right to seek asylum has been characterized as a liberty interest.[180] While courts

---

1979); United States v. Casimiro-Benitez, 533 F.2d 1121 (9th Cir. 1976), cert. denied, 429 U.S. 926 (1976).

176. Even non-resident aliens cannot be subjected to unlawful takings of their property. United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981). Accordingly, in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), the Supreme Court stated, "[a]s alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country." *Id.* at 491-492.

177. 457 U.S. 202 (1982).

178. *Plyler*, 457 U.S. at 210; *see also* Wang v. Reno, 81 F.2d 808, 816 (9th Cir. 1996) (A Chinese alien paroled into this country to assist as government witness, though apparently an excludable alien entitled to due process protection from prosecutorial misconduct).

179. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970). Even in the early 1950's, courts appeared to recognize that procedures enacted by Congress implicated due process. "It has been held that 'whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.'" Han-Lee Mao v. Brownell, 93 U.S. App. D.C. 102, 107, 207 F. 2d 142, 146 (D.C. Cir. 1953) (citing Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S. Ct. 309, 313, 94 L.Ed. 317 (1950)).

180. As another court expressed the stark realities that confront an alien facing deportation:

have confirmed that asylum processes are not equatable with criminal proceedings[181] in post-World War II decisions, the Supreme Court has acknowledged solemnly that "Here the liberty of an individual is at stake . . . ." [182] In further emphasizing the grave consequences of the alien's removal from this country, the court has characterized such issues as "basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."[183] In addition to cognizance as a liberty interest, the right to bring a claim for asylum may also embody a property interest of equal or greater dignity to the unemployment benefits claim[184] or individual claim in a class action[185] that modern Supreme Court decisions have safeguarded through due process.[186]

Therefore, by applying current doctrine to the right to seek asylum conferred by the 1980 Refugee Act, the safeguards of constitutional due process should be extended to the asylum seeker. When rights ascend to constitutional recognition, they reside in the province of the judiciary and cannot be reduced through the discretion of administrative agencies.[187] Therefore, this issue is critical, not only to effectuate Congress's desire for a fair and uniform procedure, but also to assure that agency expediencies are not permitted to transcend basic constitutional rights.[188]

D. The Impact of Due Process for Asylum Seekers

Any such enlargement of judicial responsibility does not threaten the INS

If he loses, he will be removed from this country - a promised land for many. He may face deprivation, torture or even death when he is returned to his homeland. He may also lose contact with his family and friends. Padilla-Augustin v. INS, 21 F.3d 970, 978 (9th Cir. 1994) (later overruled on other grounds); *see also* Yepes-Prado v. INS, 10 F.3d 1363, 1369 n. 11 (9th Cir. 1993) ("Deportation is a drastic measure and at times the equivalent of banishment or exile.").

181. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("various protections that apply in the context of a civil trial do not apply in a deportation hearing"), Maldonado-Perez v. INS, 275 U.S. App. D.C. 109, 114, 865 F.2d 328, 333 (D.C. Cir. 1989).

182. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982) (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945) (deportation visits a great hardship on the individual and "deprives him of his right to stay and live and work in this land of freedom.")).

183. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). As one circuit court expressed this reality, while deportation is not a criminal action, "the consequences may more seriously affect the deportee than a jail sentence." Johns v. Department of Justice, 624 F.2d 522, 524 (5th Cir. 1980) ("liberty of the individual is at stake."). As one court described the equation, "deportation is a drastic measure and at times the equivalent of banishment or exile." Yepes-Prado v. INS, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993).

184. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (right to use state adjudicatory procedures a property interest for due process purposes).

185. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

186. Clearly, this Court has found claims of lesser magnitude than asylum to constitute property interests protected by due process. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 483 (1988); *see also Mullane*, 339 U.S. at 306.

187. Califano v. Sanders, 430 U.S. 99, 109 (1977).

188. *Id.*

with unmanageable new burdens. Thus, while extending due process to asylum seekers, circuit court decisions have not overwhelmed the INS by imposing a vast revision of existing procedures. Instead, the due process decisions have insisted on a minimum of procedural fairness, often borrowing safeguards already provided by the INS in one asylum context to assure fairness in others.

Thus, the features that due process requires typically would begin with the right to an adversarial hearing before a neutral fact-finder in which the applicant may, among other things, present witnesses and other evidence to substantiate the asylum claim.[189] Consistently with Supreme Court rulings, the requirement of "some form of hearing,"[190] conducted "at a meaningful time and in a meaningful manner,"[191] is integral to any adjudication secured by due process.[192]

Circuit court decisions have further mandated that adequate translation services be provided, obviously a critical need for most aliens to be able to comprehend and participate effectively in the asylum process.[193] To assure a record to afford meaningful subsequent review, hearing transcripts have been required.[194] Additionally, one court found that asylum applicants must be notified of their right to counsel, the availability of free legal representation and the right to a public hearing, as well as the opportunity to examine and object to adverse evidence, to compel testimony of witnesses by subpoena and to obtain subsequent review of the asylum hearing.[195] These procedures are neither unduly burdensome nor unreasonable. Indeed, because asylum seekers are individuals who face an adjudication with "grave and potentially irreversible consequences,"[196] such safeguards represent a minimum foundation for basic fairness and decency.

E. The Necessity for Judicial Definition of Human Rights

No court has attempted to catalogue all the features that due process might require in the asylum process, nor could it.[197] The strictures of due process necessarily vary with the circumstances.[198] But the proper constitutional inquiry must concern the scope of the constitutional rights at stake, not whether

189. Selgeka v. Carroll, 184 F.3d 337 (4th Cir. 1999); Marincas v. Lewis, 92 F.3d 195 (3d Cir. 1996).

190. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

191. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

192. The alien's right to be heard has long been recognized in deportation settings. Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[N]o person shall be deprived of his liberty without opportunity . . . to be heard . . . .").

193. Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984); *Marincas*, 92 F.3d at 203.

194. *Marincas*, 92 F.3d at 203.

195. *Id.*

196. Polovchak v. Meese, 774 F.2d 731,737 n. 10 (7th Cir. 1985).

197. *Augustin*, 735 F.2d at 37; *Marincas*, F.3d at 203.

198. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

the Due Process Clause can be invoked at all.[199] Clearly, the dramatic consequences of removal from this country compel a corresponding need to maintain realistic and effective assurances that the process is fair, consistent and neutrally determined. Thus, because he was safeguarded by the Constitution, a refugee-seeker from Kosovo, like Selgeka, could not be expelled through a short form process, which he barely understood, without access to an impartial forum. Similarly, stripped of any deference that might insulate INS procedures in non-constitutional settings, the token fifteen minute hearings at issue in *Haitian Refugee Center v. Smith* could not escape firm judicial action to impose badly needed constitutional safeguards.

Conversely, where due process was not applied, in the high-profile, controversial case of Elian Gonzalez, the INS was able to deny any form of asylum hearing, reverse fields concerning his status[200] and ultimately ignore its own official criteria announced the year before with respect to asylum claims for young children. Indeed, as the court had initially discussed in granting an injunction pending appeal, the INS Guidelines For Children's Asylum Claims envisioned that young children, even a six-year-old, "will be active and independent participants in the asylum adjudicative process."[201] Even so, the court concluded in its final opinion that the INS, in its discretion, had the authority to reject the claim of Elian's independent asylum rights based on *Chevron* deference.[202] While, at various points, the court suggested possible doubts about the

199. *Compare* Plyler v. Doe, 457 U.S. 202 (1982) (illegal alien children are innocent of parental transgressions and deserve constitutional protection), *with* Morrissey v. Brewer, 408 U.S. 471 (1972) (criminals have constitutional right to a hearing before parole can be revoked).

200. The INS's vacillating positioning was highlighted by its December 1, 1999 announcement that Elian would remain in the U.S. pending state family proceedings, followed a month later by the decision that state court proceedings were irrelevant and he should be returned to communist Cuba.

201. Order dated April 19, 2000, ("Injunction Order") Gonzalez v. Reno, later opinion at 215 F.3d 1243 (11th Cir. 2000). Emphasizing the INS's own guidelines, announced on the 50th anniversary of the Declaration of Human Rights on December 14, 1999, the INS criteria made it clear that, "asylum officers should not assume that a child cannot have an asylum claim independent of the parents." Injunction Order at 11 n.12. The court further pointed to circumstances in which the guidelines proposed methodologies for resolving parent and child conflict, "when...it appears that the will of the parents and that of the child are in conflict, the adjudicator 'will have to come to a decision as to the well foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.'" *Id.* (See Guidelines at 20 (citations omitted). The court even noted that, "the training guidelines provide an example of a statement from a six year old child and provide information which can be used to assess statements by children of that age." *Id.* Notwithstanding the overwhelming evidence of support in the INS's own guidelines for a child's independent asylum claim, the Eleventh Circuit final opinion discarded those guidelines stating that they did not have the force of law.

202. *Gonzalez*, 215 F.3d at 1244-1245. Arguably, the Eleventh Circuit accorded excessive deference to the INS action that constituted a litigation position. Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate."); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n. 30 (1987). While the Supreme Court's decision in *Christensen v. Harris Co.*, 120 S.Ct. 1655 (2000) appeared to cast doubt on according deference to agency views "contained in an opinion letter," 120 S.Ct. at 1662, both the en banc court and the Supreme Court declined to disturb the panel ruling. As a result, the measure of agency discretion accorded in *Gonzalez v. Reno* may constitute a further enlargement of already accelerating agency power.

correctness of the INS's statutory interpretation, it nonetheless concluded that it was obliged under *Chevron* to accept the INS's application of the law,[203] a deference trumpeted throughout the court's opinion.

By allowing the INS to ignore its own announced guidelines, the Eleventh Circuit may have expanded agency latitude exceeding even the broad discretion awarded in *Jean v. Nelson.*[204] Whether the rationale for such extraordinary deference is the INS's role in foreign policy or the realities of its complex and chronically unmanageable burdens, the result is striking. Manifestly, in the absence of constitutional safeguards, the INS is free to revise and reduce the calculus of the most basic human rights, even for a child.

VI. CONCLUSION

Because the definition of the rights of the individual is more properly reposed in our judiciary, the courts should accept the constitutional duty to safeguard the fundamental rights for millions of immigrant men, women and children who walk upon our lands. That duty transcends any debate over the societal impact of immigration[205] a controversy that has endured since our nation was founded.[206] The enormous, perhaps still expanding discretion of the INS wherever the Constitution is silenced, may deprecate refugees as non-persons in legal and moral terms. While such may be the fabric of many countries from which refugees flee, it should never be a principle acceptable to the American people. The troubling turnover of human rights to the INS may perhaps be understandable in the context of history and the current milieu of in-

---

203. *Id.* at 1245.

204. *Jean v. Nelson*, 727 F.2d 956 (11th Cir. 1984), had sustained claims based, in part, upon the INS's obligation to apply its own announced guidelines, *id.* at 976-978, and found that enforcing "the announced policies" of agencies are among the appropriate judicial functions, *id.* at 984. In *Gonzalez v. Reno* the court summarily disposed of the issue by saying that such criteria have no force of law.

205. Another source, the Federation for American Immigration Reform contends that, even after allowing for immigrants' contributions in taxes, the net cost of legal and illegal immigrants arriving during the last three decades is the annual expense of $65 billion ($40.5 billion from legal and $24.5 billion from illegal aliens). This yearly cost is assertedly going to rise to $108 billion by 2006. That same organization has also issued reports contending that immigrants are displacing native-born workers attributing a fifty percent of the wage-loss among low-skilled Americans to low-skilled immigrant workers. "Immigration Lower Wages for American Workers," Issue Brief, The Federation For American Immigration Reform, (http://www.fairus.org/html/04148711.htm).

In another analysis, the author concluded that the increased number of workers resulting from immigration costs native workers roughly $135 billion annually (1.9 percent of a $7 trillion economy) but creates a net gain due to the benefits accruing to employers. Those savings range from large agricultural enterprises to households who might otherwise be unable to afford domestic help. "The New Economics of Immigration," The Atlantic Monthly (Nov. 1996). (http://www.theatlantic.com/isues/96nov/immigrat/borjas/htm). The author's conclusion is that the more affluent gain from the influx of alien workers while lower income Americans are correspondingly penalized.

206. As recognized by one author, "Now that the arguments against immigration are rising again, it is well remembered that every single one of them has been heard before." Weisberger *supra* note 1, at 75.

tractable numbers and challenges. No such abdication, however, can be faithful to the traditions of a country that has always entrusted basic liberties to the federal judiciary: "In sum, our Constitution unambiguously enunciates a fundamental principal - that the 'judicial power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence."[207] Therefore, especially in light of the current breadth of *Chevron* deference, constitutional recognition of asylum rights is imperative to maintain the judiciary's "function as a check on any aggrandizing tendencies in the other branches."[208] Through constitutional recognition, human rights are not reduced by deference doctrines. Instead, the vindication of liberties under the Constitution is entrusted not to bureaucrats, but to judges, the only acceptable guardians with so much at stake.[209] Like the world community, the federal courts have repeatedly acknowledged the enormity of the consequences of removal from this country. As one court observed, "the consequences of deportation may more seriously affect the deportee than a jail sentence."[210] Indeed, in *INS v. Cardoza-Fonseca,* the Supreme Court observed[211] "Deportation is always a harsh measure. It is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."[212]

While due process validation of asylum rights for all aliens on U.S. soil may have further constitutional ramifications[213] the inevitability of other due

207. Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co., 458 U.S. 50, 60 (1982).

208. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 594 (1985). Indeed as has been recognized, further augmentation of agency power comes at the expense of access to the judicial forum. Crowell v. Benson, 285 U.S. 22, 46-47 (1932).

209. Califano v. Sanders, 430 U.S. 99, 109 (1977). Such acknowledgment is also critical in assuring that deprivation of individual rights can be judicially reviewed. McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991).

210. Johns v. Department of Justice, 624 F.2d 522, 524 (5th Cir. 1980). As the Supreme Court itself has stated in examining the impact of expulsion from this country, it visits "a great hardship on the individual and deprives him of his right to stay and live and work in this land of freedom." Bridges v. Wixon, 326 U.S. 135, 154 (1945).

211. 480 U.S. 421, 449 (1987).

212. *Id.*

213. It is beyond the scope of this article to assess whether due process rights concerning a statutory mandate for asylum would implicate constitutional protection in the parole and detention scenarios. *Compare* Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir. 1985), *with* Rodriguez-Fernandes v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (applying due process to assess the permissible limits of indefinite detention). Undoubtedly, though, the recognition that "unadmitted" aliens have due process rights concerning asylum could affect other immigration issues. Among the INS's procedures that constitutional due process could confront the expedited removal procedures enacted in 1996 as part of IIRIRA. Such procedures have been criticized by the Human Rights Watch:

> Implementation of the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) Reform and Immigration Responsibility Act (IIRIRA) continued to violate international human rights standards that apply specifically to asylum seekers, as well as the human rights of other immigrants, through detention in often inhumane conditions. The IIRIRA's expedited removal proceedings, intended to process and deport individuals who enter the United

process questions should not detain further the compelling case for constitutional recognition of asylum. Moreover, the truth is that constitutional acknowledgment of all aliens on our soil will not impair border security measures such as the interdiction of aliens on the high seas,[214] since those passages are simply not lodged within the constitutional enclosures of U.S. territory.[215] Nor is there any great difficulty in applying the appropriate standard for due process. Since the Supreme Court has firmly embraced a three-part test for defining the minimum safeguards in other constitutional provinces, extending that analysis to all immigrants within our nation will enhance, rather than reduce, the consistency of constitutional doctrine.[216]

Accordingly, whatever may be the trepidations of implicating itself further in the human, moral and legal morass of immigration, the courts should stand firm to that responsibility. Rather than surrender the definition of human rights to the INS, the judiciary should honor its traditions of protecting the constitutional rights of all human beings who stand on U.S. soil.[217] As our nation's history reflects, the ebbs and flows of immigration tides, as well as the accompanying emotion and controversy, will continue to buffet public sentiment and political decision makers. The one constant, however, since the creation of our Constitution, has been the independent federal judiciary. That sentinel must continue to assure that no controversy or temporal attitude stands taller than the great haven of the United States Constitution.

States without valid documents as quickly as possible, imperiled bona fide refugees and resulted in immigrants being detained in increasing numbers.

Human Rights Report, at 7-8.

214. Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993); Cuban American Bar Association, Inc. v. Christopher, 43 F.3d 1412, 1424 (11th Cir. 1995).

215. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

216. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The Court has not found constitutional due process to be unduly burdensome or complicated entitlement in other alienage cases. In *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602-03 (1953), the Court deemed it sufficient, for purposes of deportation confronting a lawful permanent resident, to direct that the subject be given "reasonable notice of the charges against him" and a "hearing sufficient to meet the requirements of procedural due process." In *Wong Yong Sung v. McGrath*, 339 U.S. 33, 50, (1950). In its general formulation, the Court has observed, "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

217. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality . . . .").

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

BALANCING INTERESTS: FREE SPEECH IN TODAY'S POLITICAL CLIMATE

Moderator: *Benjamin Stevenson*, Staff Attorney, ACLU of Florida

Panelists: *Daniel Aaronson*, Benjamin, Aaronson, Edinger & Patanzo, PA, Fort Lauderdale, FL

David Caicedo, Florida State Director – Vote Mob & Student Power Network

ACLU of Fla. – 2018 Lawyers Conference
Delray Beach Marriott
September 6-8, 2018
https://action.aclu.org/event/fl-2018-lawyers-conference

Balancing Interests: Free Speech in Today's Political Climate
(Friday: 10:30 am – 11:20 am)
1.0 Hours CLE

Outline

1. **Introduction of panelist & topic**

2. **First Amendment application in different forums**
   (a) Traditional public forum (streets, sidewalks, parks):
      (1) Content-based restrictions must be narrowly tailored to a compelling government interest (strict scrutiny)
      (2) Time, place, and manner content-neutral restrictions must advance substantial government interest while leaving alternative forms of communication (intermediate scrutiny)
   (b) Designated public forum (untraditional forums opened for speech): Same as traditional public forums
   (c) Limited public forum (forum reserved for intended subjects and speakers): subject to reasonable regulation
   (d) Nonpublic forum (government acts as proprietor): government may preserve property for the use to which it is lawfully dedicated
   (e) Viewpoint discrimination forbidden

3. **Exceptions**
   (a) "Fighting words" that cause a direct harm to their target and could be construed to advocate an immediate breach of the peace
   (b) Obscenity whose "dominant theme taken as a whole appeals to the prurient interest" of the "average person, applying contemporary community standards."
   (c) Defamation
   (d) Harassment

4. **Speech Types**
   (a) Pure speech
   (b) Expressive conduct v. non-expressive conduct: government may regulate non-expressive components of conduct so long as advances interests unrelated to speech and does not burden more speech than necessary

5. **Hypothetical**: White-nationalist speaker at public university rents event hall for a speaker, which is followed by an unplanned march through the campus. Counter-protesters at event hall and march.

References

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015)
Keister v. Bell, 879 F.3d 1282 (11th Cir. 2018)
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
Miller v. California, 413 U.S. 15 (1973)
Beauharnais v. Illinois, 343 U.S. 250 (1952)
Davis v. Monroe County Bd. of Educ., 524 U.S. 980 (1998)
Packingham v. North Carolina, 137 S. Ct. 1730 (2017)
Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015)
City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002)
M. H. White II & C. S. Crandall, *Freedom of racist speech: Ego and expressive threats*. 113(3) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 413 (2017), http://psycnet.apa.org/doiLanding?doi=10.1037%2Fpspi0000095

§ 1004.097, Fla. Stat.

(1) **Short title**.--This section may be cited as the "Campus Free Expression Act."

(2) **Definitions**.--As used in this section, the term:

(a) "Commercial speech" means speech in which the individual is engaged in commerce, the intended audience is commercial or actual or potential consumers, and the content of the message is commercial.

(b) "Free-speech zone" means an area on a campus of a public institution of higher education which is designated for the purpose of engaging in expressive activities.

(c) "Material and substantial disruption" means any conduct that intentionally and significantly hinders another person's or group's expressive rights. The term does not include conduct that is protected under the First Amendment to the United States Constitution and Art. I of the State Constitution, including, but not limited to, lawful protests and counter-protests in the outdoor areas of campus or minor, brief, or fleeting nonviolent disruptions that are isolated or brief in duration.

(d) "Outdoor areas of campus" means generally accessible areas of a campus of a public institution of higher education in which members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The term does not include outdoor areas of campus to which access is restricted.

(e) "Public institution of higher education" means any public technical center, state college, state university, law school, medical school, dental school, or other Florida College System institution as defined in s. 1000.21.

(3) **Right to free-speech activities**.--

(a) Expressive activities protected under the First Amendment to the United States Constitution and Art. I of the State Constitution include, but are not limited to, any lawful oral or written communication of ideas, including all forms of peaceful assembly, protests, and speeches; distributing literature; carrying signs; circulating petitions; and the recording and publication, including the Internet publication, of video or audio recorded in outdoor areas of campus. Expressive activities protected by this section do not include commercial speech.

(b) A person who wishes to engage in an expressive activity in outdoor areas of campus may do so freely, spontaneously, and contemporaneously as long as the person's conduct is lawful and does not materially and substantially disrupt the functioning of the public institution of higher education or infringe upon the rights of other individuals or organizations to engage in expressive activities.

(c) Outdoor areas of campus are considered traditional public forums for individuals, organizations, and guest speakers. A public institution of higher education may create and enforce restrictions that are reasonable and content-neutral on time, place, and manner of expression and that are narrowly tailored to a significant institutional interest. Restrictions must be clear and published and must provide1 for ample alternative means of expression.

(d) A public institution of higher education may not designate any area of campus as a free-speech zone or otherwise create policies restricting expressive activities to a particular outdoor area of campus, except as provided in paragraph (c).

(e) Students, faculty, or staff of a public institution of higher education may not materially disrupt previously scheduled or reserved activities on campus occurring at the same time.

(4) **Cause of action**.--A person whose expressive rights are violated by an action prohibited under this section may bring an action against a public institution of higher education in a court of competent jurisdiction to obtain declaratory and injunctive relief, reasonable court costs, and attorney fees.

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

ELEVENTH CIRCUIT UPDATE

Prof. Michael Masinter
Nova Southeastern University Shepard Broad Law Center

Summary of Significant Eleventh Circuit Decisions August 1, 2017 to August 30, 2018

Michael R. Masinter
Professor of Law
Nova Southeastern University
Shepard Broad College of Law
masinter@nova.edu

Introduction

The Eleventh Circuit decides too many cases to summarize, so I have limited the summary to published precedential decisions in civil litigation in 1) first, fourth, eighth and fourteenth amendment claims, principally under 42 U.S.C. § 1983, including qualified immunity where relevant; 2) modern civil rights claims; 3) standing and mootness; 4) pleading and sanctions; and 5) the Federal Arbitration Act. Because the identity of panel members matters, I list the members of each panel, beginning with the author of the opinion.

First Amendment Freedom of Speech

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, (8/22/18) (Jordan, Tjoflat, and district judge Steele) Plaintiff FLFNB holds weekly vegetarian food sharing events in a downtown public park near city government buildings. Its members share food with the homeless and the public under a banner with the logo "Food not Bombs" and the image of a fist holding a carrot. The city enacted an ordinance tightly regulating and effectively prohibiting the food sharing events, and FLFNB sued to enjoin enforcement, arguing that the events were expressive conduct protected by the first amendment. The city voluntarily stayed enforcement pending resolution of the suit, and the district court dismissed the lawsuit, holding the first amendment inapplicable, reasoning that the events were not expressive conduct since a passerby would not know the specific message of the event without reading the banner, and therefore that only weak due process protection applied and was easily satisfied. The panel applied independent review to the facts relevant to first amendment protection, and reversed, holding that as a matter of law the food sharing events were expressive conduct protected by the first amendment. Judge Jordan explained that context matters in determining whether conduct is sufficiently expressive to constitute symbolic speech protected by the free speech clause, holding the key inquiry to be whether a reasonable passerby would interpret the event as expressing "*some* sort of message," not the particularized message of FLFNB. With no doubt that a passerby would interpret the events in the park as expressive, the court held the

passerby need not be able to discern the particular message expressed, drawing an analogy to abstract art and parades viewed from a distance. Accordingly, the panel remanded for application of the *United States v. O'Brien*, standard for assessing the constitutionality of expressive conduct regulations as previously elaborated in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc) and for consideration of the heightened vagueness standards applicable to speech regulations.

Prison Legal News v. Secretary, Florida Dep't of Corrections, 890 F.3d 954 (11th Cir. 2018) (Ed Carnes, Dubina and district judge Conway) The panel held Florida did not violate the first amendment by banning distribution to prisoners of Prison Legal News. The state banned PLN because it contained some ads for forbidden three way calling services, pen pals, cash for stamps exchanges, concierge services and people locator services, applying deferential rational basis review to state's determination that the ads posed a danger to other inmates, the public and institutional security. Judge Carnes first dismissed an amicus argument that recent SCOTUS decisions undermined the degree of deference *Turney v. Safley* compels, derisively concluding in a footnote: "While we categorically reject the contention and supporting arguments of the amici, we do not mean to be unfair. The professors' brief does have good grammar, sound syntax, and correct citation form." Next, applying *Turner* deference, the panel held it irrelevant that no other correction department in the nation bans distribution of PLN. The panel reasoned the ban still left PLN adequate alternative means to communicate with inmates by sending them handbooks and books, and was not an exaggerated response since no other alternative was readily available at no cost to the state. Finally, the Judge Carnes, writing for the panel, rejected New York's practice of attaching flyers warning inmates not to use the prohibited services, stating: "Really? If all New York has to do to prevent inmate misconduct and crime is gently remind them not to misbehave, one wonders why that state's prisons have fences and walls. Why not simply post signs reminding inmates not to escape. If New York wants to engage in a fantasy about convicted criminals behaving like model citizens while serving out their sentences, it is free to do so, but the Constitution does not require Florida to join New York in la-la-land."

Stardust, 3007 LLC v. City of Brookhaven, Georgia, (8/10/18) (William Pryor, Jill Pryor, and Visiting Judge Clevenger) In an erogenous zoning case, the panel upholds a city ordinance restricting the licensing and location of adult businesses but leaving 73 locations within the city in which hypothetically such a business could operate. Under the city ordinance, a business other than a pharmacy, drug store, medical clinic, or health care facility that "regularly features sexual devices" is subject to restrictive licensing and zoning requirements. The court construed the phrase to focus on the manner in which Stardust displayed its sexual devices, held that the first amendment potentially encompasses product display, but found the restrictions constitutional under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los*

Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) based on the fiction that such restrictions are content neutral since they focus not on content but secondary effects of adult businesses and, absent a complete ban, leave adequate alternative channels for communication. If there's a lesson to be taken, it is the need to present evidence to challenge the government's contention that sexual device marketing and sales contribute to negative secondary effects.

FF Cosmetics FL, Inc. v. City of Miami Beach, 866 F.3d 1290 (11th Cir. 2017) (Dubina, Marcus, and US Court of International Trade Judge Goldberg) The panel affirmed a preliminary injunction forbidding the city from enforcing its commercial solicitation and handbilling ordinances as amended to prohibit all commercial handbilling and solicitation within defined portions of the city. Although the commercial solicitation ordinance as amended during the litigation only prohibited commercial speech, the ordinance nevertheless violated the Central Hudson narrow tailoring requirement because the city failed to consider several less burdensome alternatives to a complete ban, including the licensing and spacing limitations it applies to artists and street vendors. The anti-handbilling ordinance was overbroad because it prohibited anyone from distributing any message about any good or service provided by a business, not just commercial speech, offering as examples a PETA demonstrator handbilling about a restaurant's treatment of animals and a Rabbi distributing a list of restaurants serving kosher meals.

Barrett v. Walker County School District, 872 F.3d 1209 (11th Cir. 2017) (Rosenbaum, Carnes, and Visiting Judge Gilman, Julie Carnes concurring) Affirming a judgment and permanent injunction enjoining enforcement of a school district' policy that required member of public who wished to address the board during the public comment portion of its meeting to first meet with superintendent at a time of the superintendent's choosing and then submit a written request at least one week before the board meeting, the panel unanimously held the policy violated the first amendment. The panel unanimously held that the school board meeting was a limited public forum in which speech restrictions must be reasonable and viewpoint neutral, that the prohibition against empowering a government official with unbridled discretion to prohibit otherwise permissible speech applies to licensing speech in a limited public forum, and that by empowering the superintendent with unbridled discretion to control the timing of the required meeting, the policy invested him with unbridled discretion to deny a speaker the opportunity to speak in violation of the first amendment's prohibition against covert viewpoint discrimination. The panel majority also held that the policy operated as an unconstitutional prior restraint on speech over the objection of Judge Carnes's concurrence that argued prior restraint analysis is inapplicable to a limited public forum since conventional prior restraint doctrine requires that a permissible restraint be content neutral, a requirement inapplicable to limited public forums.

Keister v. Bell, 879 F.3d 1282 (11th Cir. 2018) (Ed Carnes, Black and district judge May) A traveling evangelist who routinely visits college campuses sought to preach at the University of Alabama on sidewalks adjoining a publicly traveled intersection located entirely within the campus, arguing that it was a traditional public forum not subject to the school's grounds use policy. The district court denied a preliminary injunction and the court affirmed, finding the intersection to be a limited purpose public forum rather than a traditional public forum because of its location within the campus. Because plaintiff did not challenge the application of the relevant level of scrutiny (viewpoint neutral content based restrictions reasonable in light of the purpose of the forum), the court affirmed denial of injunctive relief.

Fernandez v. School Board of Miami-Dade County, Florida, (8/10/18) (Marcus, Wilson, and district judge Howard) Principal and assistant principal organized a campaign to convert a public school serving students with severe disabilities into what they believed would be a better performing charter school. In retaliation, the school board disciplined them by reassigning them to lower paying and less desirable jobs. They first brought state administrative proceedings claiming improper reprisal, and recovered backpay but not reinstatement for speech the state ALJ found was pursuant to their official duties. They then sued for retaliatory demotion. Affirming summary judgment for the board, the panel held the two administrators spoke pursuant to their official duties. Restating what has become hornbook first amendment law for public employees, the court stated that courts begin by asking whether the employee spoke pursuant to official duties, or as a citizen on matters of public concern, for *Garcetti v. Ceballos*, 547 U.S. 410 (2006) treats official duty speech as government speech unprotected by the first amendment. Because Florida law vests the principal with authority to initiate charter conversion, and because the administrators' job description charged them with responsibility for education leadership and quality education, the panel held they spoke pursuant to their official duties. The panel held that *Lane v. Franks*, 134 S. Ct. 2369 (2014) (public employee testifying in response to grand jury subpoena about information acquired through performance of official duties spoke as citizen, not as employee) did not undermine its conclusion, noting that *Lane* only drew a distinction between speech pursuant to official duties and speech that relates to or concerns those duties. The panel further construed *Lane*'s inquiry into whether the employee spoke pursuant to "ordinary job duties" to focus on whether the speech was an ordinary job duty, not whether the speech and associated job duty was ordinarily or routinely performed.

Cadwell v. Kaufman, Englett and Lynd, PLLC, 886 F.3d 1153 (11th Cir. 2018) (Ed Carnes, Newsom, and visiting judge Siler). Plaintiff consulted defendant law firm for bankruptcy filing advice. Defendant law firm entered into a retainer agreement that required plaintiff to pay his initial retainer and all subsequent payments by credit card. He did. Plaintiff thereafter discharged defendant law firm and sued it for violating the Bankruptcy Abuse Prevention and

Consumer Protection Act of 2005, specifically 11 U.S.C. 526(a)(4)'s prohibition against a law firm advising a client to incur more debt to pay an attorney for bankruptcy related legal services. The law firm moved to dismiss on the grounds that the statute contained an improper purpose requirement not alleged, and that the statute violated the first amendment by prohibiting attorney speech. The trial court granted the motion and the panel reversed, holding that the statute's blanket prohibition means what it says, and therefore does not contain an improper purpose requirement. With that reading established, the law firm conceded that the statute applied to its retainer requirement of payment by credit card since that caused the plaintiff to incur more debt. Turning to the free speech argument, the court held that the statute did not improperly restrict attorney client communications or prevent a lawyer from charging a fee, and that it did not run afoul of the first amendment by prohibiting an attorney from advising a client to incur more debt for bankruptcy related representation.

Turner v. Wells, 879 F.3d 1254 (11th Cir. 2018) (Hull, Dubina and visiting International Court of Trade Judge Restani) The panel affirmed dismissal on the pleadings of a defamation claim by former Miami Dolphins football offensive line coach Norv Turner against the law firm that investigated allegations of homophobic bullying of Jonathan Martin and that concluded that Turner's unprofessional conduct contributed to the bullying. In addition to affirming dismissal based on Florida law, the panel concluded that Turner was a limited public figure who had thrust himself into the particular controversy, and that under the first amendment, he therefore he must plead facts sufficient to give rise to a reasonable inference that the allegedly defamatory statements were made with actual malice under Twombly/Iqbal pleading standards. Because in substance Turner only alleged that defendants failed to properly analyze certain information, he failed to allege facts that would support a reasonable inference that defendants knowingly or with reckless disregard published a false statement of fact as required by the first amendment (at least until President Trump "opens up libel law.")

Equal Protection

Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018) (Wilson, Jordan, and district judge Conway) The panel held that plaintiffs stated a plausible claim that Alabama enacted legislation preempting the city of Birmingham's $10.10 per hour minimum wage ordinance the day after it took effect for the purpose and with the effect of depriving the city's majority Black residents of equal employment opportunities on the basis of race. The panel affirmed dismissal of claims alleging violation of the Voting Rights Act and discriminatory exclusion from full participation in the political process. Relying on *Village of Arlington Heights v. Metropolitan Development Corp*., 429 U.S. 252 (1977), the panel held that the complaint satisfied the *Twombly / Iqbal* plausible basis in fact standard for pleading intentional race discrimination based on

circumstantial evidence. To show discriminatory impact, the complaint alleged that the state statute denied a higher percentage of black workers the preempted minimum wage than white workers, and that black workers earn on average less per hour than white workers. To show discriminatory purpose, the panel relied on "the rushed, reactionary and racially polarized nature of the legislative process" and "Alabama's historical use of state power to deny local black majorities authority over economic decision-making." The plaintiffs also documented "extensive evidence suggesting that the [preemption legislation] reflects Alabama's longstanding history 'of official actions taken for invidious purposes'" quoting *Arlington Heights*. The panel sharply criticized the district court's use of the "clearest proof" standard for testing the sufficiency of the complaint's allegations, holding that the standard, rooted in ex post facto challenges to civil statutes, has no place in equal protection law. Nota bene: On August 6, the court ordered the mandate withheld, and on August 30 the defendants moved for rehearing en banc. It would be wise to stay tuned for further developments.

Levy v. U.S. Attorney General, 882 F.3d 1364 (11th Cir. 2018) (Per Curiam Ed Carnes, Tjoflat, and William Pryor) The single parent derivative naturalization provision of 8 U.S.C. 1432(a)(3) conditioning derivative naturalization of a child born to a single naturalizing parent based upon the paternity of the child not being established by legitimation does not violate the constitution either as sex discrimination or as illegitimacy discrimination. It is not sex discrimination since it applies equally to naturalizing custodial male and female single parents, and even if it is legitimacy discrimination, it is constitutional since it substantially relates to protecting the rights of the alien parent.

Stout v. Jefferson County Bd. Of Educ., 882F.3d 988 (11th Cir. 2018) In a school district still governed by a desegregation decree, a largely white neighborhood within the largely black and hispanic district sought to secede from the district and establish its own predominately white school district. The district court found the secession plan to be racially motivated and to have a racially discriminatory effect, but approved a modified secession plan. Both parties appealed. The panel affirmed the factual findings but vacated the secession plan, ordering the district court to enjoin the secession given its racial motivation.

Morrissey v. United States, 871F.3d 1260 (11th Cir. 2017) (Newsom, Wilson, and district judge Moreno) A gay man was denied a medical care tax deduction for the cost of identifying, retaining, compensating and paying for the medical care for an egg donor and a gestational surrogate. The tax treatment of the costs did not deny him equal protection on the basis of sexual orientation since it treats heterosexual taxpayers identically for the cost of IVF related expenses and pregnancy care for non-spouse surrogates and because there is no evidence of discriminatory intent. The tax treatment does not deprive him of substantive due process because there is no fundamental right to procreate through IVF when it necessarily involves an unrelated third party egg donor and gestational surrogate.

Felon Disenfranchisement

Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018) (Marcus and William Pryor, Martin dissenting) Stay pending appeal granted of trial court final judgment and permanent injunction barring enforcement of current state clemency system and directing creation of specific and neutral criteria to direct vote restoration decisions. The panel majority held the state is likely to prevail on appeal on equal protection and due process grounds even though it operates a standardless clemency regime because section two of the fourteenth amendment permits abridgement of a felon's right to vote and because plaintiffs neither allege nor try to prove that the state system has as its purpose an unconstitutional intent to discriminate, but claim only that there is a "real risk" of impermissible purpose. The panel also held the state is likely to prevail on first amendment unbridled discretion grounds because the first amendment provides no greater protection than the fourteenth amendment, and because the fourteenth amendment's text trumps the first amendment's more generalized language, and because unbridled discretion doctrine is concerned with authority to grant or deny licenses to engage in first amendment activity rather than voting rights within the ambit of the fourteenth amendment. The panel also held that the remedy improper since it barred the state from exercising section two power and because it presumes authority to tell the state how to exercise it. Although only deciding a stay application, the order may presage resolution of the issues on the merits appeal.

Due Process -- Abortion

West Alabama Women's Center v. Williamson (8/22/18) (Ed Carnes, Dubina, and, concurring in the judgment only, district judge Abrams). Bound by SCOTUS precedent, the panel affirmed a permanent injunction forbidding Alabama from enforcing its ban on D&E abortions, but writing for himself and Judge Dubina, Judge Carnes previewed what to expect once the Senate confirms Brett Kavanaugh. From his insistent characterization of the procedure as "dismemberment abortion" "ripping apart" "an unborn child" to his expressed contempt for current SCOTUS precedent, he makes clear that the future of abortion rights will be grim once SCOTUS bolstered by Justice Kavanaugh guts what remains of the undue burden standard. Judge Dubina concurred to assert that the Supreme Court's abortion jurisprudence has no basis in the constitution. Judge Abrams, whose sister coincidentally is running for governor of Georgia, concurred only in the judgment holding the Alabama statute unconstitutional. Winter is coming.

Due Process

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) Arrested and held by municipal court policy for inability to post bail for the offense of walking while intoxicated, Walker challenged the constitutionality of a system that then required him to post secured money bail equivalent to the fine for his non-jailable offense. The day after filing suit, the municipal court amended its practice to establish a fixed bail schedule, require a judicial determination within 48 hours after arrest of whether indigency precluded an arrestee from posting secured bail, and if so provided for release on recognizance. Plaintiff was released on personal recognizance, then posted and forfeited bail equivalent to a fine. The district court certified a (b)(2) class and preliminarily enjoined enforcement of the fixed bail system, requiring the city to make bail determinations based on an arestee's affidavit of indigency within 24 hours. The panel reversed, holding the city practice did not violate procedural due process. First, applying abuse of discretion review, the panel held the *Younger* doctrine did not bar the suit since plaintiff sought only a prompt bail determination, not an intrusion into the prosecution itself. It then applied clear error review and held the municipal court bail schedule to be official city policy, triggering *Monell* liability. The panel then held that the due process and equal protection clauses provided protection beyond the eighth amendment's excessive bail clause that, under circuit precedent, was not violated simply because bail was unaffordable. But despite those victories, Walker lost as the court held rational basis review to be the governing standard under the fourteenth amendment for the additional 24 hour delay in an indigency determination, and that the 48 hour time limit was sufficient to afford procedural due process. The court held the wide latitude the due process clause affords governments in creating procedures did not require an affidavit based system rather than a hearing based system. And finally, the court held that the case was not mooted by the adoption of the new bail schedule under the relaxed *Flanigan's* rule for voluntary cessation by local governments. The court reasoned that because a single judge of the municipal court ordered the change in policy in secret, refusing to reveal why, rather than through legislation, and because in such a circumstance the court could revert to that policy were the suit dismissed, the district court could still enjoin operation of the original bail system. It dismissed the appeal from class certification for lack of pendent appellate jurisdiction.

Bush v. Secretary, FL. Dep't of Corrections, 888 F.3d 1188 (11th Cir. 2018) (Tjoflat, Marcus and district judge Steele) Although there is a procedural due process right to a trial transcript for direct appeal of a criminal conviction, the unexplained loss of a transcript does not give rise to a substantive due process violation in a Rule 3.850 proceeding for post-conviction relief.

Waldman v. Conway, 871 F.3d 1283 (11th Cir. 2017) (Per Curiam) (Tjoflat, Fay and Marcus) Classification of incarcerated inmate as a sex offender following his conviction for kidnapping a minor for ransom does not shock the conscience of the court sufficiently to constitute a deprivation of substantive due process.

Checker Cab Operators, Inc. v. Miami-Dade County (8/6/2018) (Marcus, Wilson, and district judge Howard) Taxicab medallion holders have a property interest in medallions, but the interest is only a right to offer for-hire services, not a right to exclude competitors. Accordingly, even though the county caused the value of medallions to decline by 90% when it permitted Uber and Lyft to operate in competition under less restrictive regulatory requirements, the panel held the county took no property from the medallion owners and therefore was not required to compensate them. The panel rejected under weak rational basis the due process and equal protection challenges to the less restrictive regulatory requirements for Uber and Lyft services.

McGinnis v. American Home Mortgage Servicing, Inc. (8/22/2018) (Visiting Circuit Judge Branch, Tjoflat, and Rosenbaum) In a wrongful foreclosure suit arising in a state with non-judicial foreclosure, a jury awarded $6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages. In post-trial motions, the defendant challenged as constitutionally excessive the punitive damages award. The trial court upheld the award, and exercising independent review required by *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the panel affirmed. First, the panel held the wrongful foreclosure highly reprehensible based both on the expert testimony linking it to plaintiff's depression and the repeated refusal to correct or explain seemingly incorrect charges it could not even explain at trial. Next the panel rejected the argument that the *State Farm* dicta suggesting that even single digit ratios between actual and punitive damages could be excessive, noting that prior panels have upheld a variety of awards within the single digit (maximum of 9:1) ratio approved in *State Farm* as a guidepost. Next and, importantly, the panel held that in calculating the constitutionally permissible ratio, emotional distress damages properly must be included in the calculation of actual damages, resulting here in an award of a constitutionally permissible ratio of slightly less than 6:1. Finally the court held the RESPA civil penalty for failure to provide a disclosure statement irrelevant to the constitutionality of the punitive damages award.

8th and 14th Amendment Deliberate Indifference to Arrestee's Medical Needs

Nam Dang v. Sheriff, Seminole County, Florida, 871 F.3d 1272 (11th Cir. 2017) (Visiting judge Sentelle, Rosenbaum and Black) Police stopped plaintiff's car on 12/21/2011, pulled him out,

threw him to the ground, and put a knee on his neck before releasing him. He started experiencing neck pain and headaches, went to an ER on 1/12/2012 but declined a recommended test to rule out meningitis. He was arrested 1/26/2012, and his mother advised officers he was still experiencing neck pain. He was booked, said nothing about neck pain, and had normal vitals. On 1/29 a jail nurse examined him due to his complaint of moderate to severe neck pain and a stiff neck. She ordered Motrin and put in an order for a doctor to prescribe a muscle relaxant. On 2/1 a doctor saw him, performed a brief exam, observed a temperature of 98.9 and prescribed a muscle relaxant for headaches, neck pain and neck stiffness. On 2/7 a nurse examined him and he reported headaches and neck pain and some vision and hearing problems; his temperature was still normal; he declined to see a dental mental or medical health doctor. On 2/9 he was examined by a nurse to whom he reported a headache and to whom he complained that "no one was doing anything for him." He had a fever of 101.5. The nurse encouraged him to drink fluids. Shortly thereafter he was found sitting on the floor and threatened with suicide prevention detention; he got up and walked away and later that night had a temperature of 97.9. On 2/20 he appeared to pass out and drool but the nurses believed his behavior was voluntary. He was admitted to the jail infirmary and seen by a doctor on 2/21 who concluded he had an idiosyncratic reaction to muscle relaxants. On 2/22 he was rocking back and forth in his hard plastic bed. On 2/23 a nurse observed white patches on his tongue, his persistent headache, and unsteadiness when attempting to stand; she also noted that he was incontinent and very weak. She asked a doctor to examine him right away; he was then transported to the ER and diagnosed with meningitis which caused multiple strokes and permanent injuries. The court held that even assuming he manifested the requisite serious medical need, none of the nurses or the physician were deliberately indifferent and affirmed summary judgment for all defendants.

Eleventh Amendment State Sovereign Immunity

Cassady v. Hall, 892 F.3d 1150 (11th Cir. 2018) (per curiam Tjoflat, William Pryor and Anderson) The eleventh amendment barred a post-judgment garnishment action filed against the Georgia Dep't of Administrative Services to enforce a $200,000 section 1983 sexual assault judgment against a state correction officer still employed by the state. The panel reasoned that because the garnishment sought to compel the state to pay plaintiff rather than the employee, it was in substance a claim against the state. Because the state has not consented to suit in federal court, the panel held the only remedy available to the successful plaintiff is an action in state court to enforce the federal judgment.

Lewis v. Governor of Alabama, (7/25/18) (Wilson, Jordan, and district judge Conway) Reversing a trial court's contrary ruling in a challenge to state legislation preempting the City of Birmingham's minimum wage ordinance, the panel held that Section Two of the Voting Rights Act constitutionally strips states of eleventh amendment immunity from suit. The panel then held the complaint failed to state a claim cognizable under the VRA. See separate discussions of the case under Standing and especially under the Equal Protection Clause

Standing

Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018) (Wilson, Jordan, and district judge Conway) (see Equal Protection for merits analysis) Reversing the trial court, the panel held that plaintiffs had standing to sue the Attorney General of Alabama to enjoin enforcement of state legislation preempting the city of Birmingham's $10.10 per hour minimum wage. The panel reasoned that lost wages paid by third party employers covered by the ordinance were an injury in fact fairly traceable to the "sweeping authority" of the attorney general to enforce state laws, citing his recent exercise of that authority to sue the city to prevent the erection of a plywood barrier around a confederate monument. The panel reasoned that injunctive relief, if granted, likely would redress plaintiff's economic injuries.

Georgia Republican Party v. SEC, 888 F.3d 1198 (11th Cir. 2018) The Financial Industry Regulatory Authority adopted a rule prohibiting placement agents from soliciting or coordinating to make payments to a political party of a state with which the covered member is engaging or seeking to engage in distribution or solicitation activities on behalf of an investment advisor. The Georgia Republican party joined with the Tennessee and New York republican parties to mount an APA challenge in a petition to the Eleventh Circuit. The court held the Georgia Republican Party failed to establish standing as an entity or on behalf of its members, and ordered the petition of the other state parties transferred to the D.C. Circuit. Although the party asserted the rule would hinder its ability to fundraise, it offered no evidence beyond a conclusory allegation to support the allegation. Similarly, it failed to offer evidence beyond a conclusory allegation that it would be harmed by having to divert resources to advise state and local office holders about the rule. And although it asserted standing on behalf of its members, it failed to make specific allegations that at least one identified member of the party has suffered or will suffer harm; the panel stated: "We cannot accept an organization's 'self-description of [its] membership…regardless of whether it is challenged" quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). With the Georgia party having failed to establish standing, venue was improper in the Eleventh Circuit, and the court transferred the petition without addressing standing of the out of circuit parties.

Mootness

Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 1326 (2018) (Anderson) Married couples with disabilities and a vendor challenged a city ordinance prohibiting the sale of devices used primarily for genital stimulation, seeking declaratory and injunctive relief and nominal damages. Due to the prior panel rule, plaintiffs lost before the district court and a panel of the Eleventh Circuit, but the panel invited rehearing en banc to reconsider the earlier circuit precedent. The court granted rehearing en banc, and the parties briefed and argued the case, after which the city repealed the ordinance. The court dismissed the appeal as moot. It first held repeal of the ordinance mooted claims for declaratory and injunctive despite the rule that voluntary cessation of illegal conduct ordinarily does not moot such claims. The court approved application of a more lenient exception from the rule for governmental defendants, overruling past precedent to the extent it treated timing of repeal as controlling, and reframed the inquiry as whether there is a reasonable likelihood that the same or similar ordinance will be reenacted. The majority concluded there was little likelihood of reenactment even though the city defended the ordinance's constitutionality through oral argument before the en banc court and repealed it only after questioning portended a likely adverse outcome. Even more importantly, the en banc court overruled past panel decisions to hold that repeal also mooted the claim for nominal damages despite contrary holdings from six other circuits and the seemingly binding decision in *Carey v. Piphus*, 435 U.S. 247 (1978). The majority reasoned that permitting nominal damage claims to circumvent mootness would force courts to decide claims that could have no practical effect on the rights or obligation of parties; it distinguished *Carey* on the basis that the *Carey* plaintiffs sought both actual and nominal damages but were not entitled to actual damages. Judge Wilson, joined by Judges Martin, Jordan, Rosenbaum, and Jill Pryor dissented from the nominal damages mootness holding.

*Gagliardi v. TJCV Land Trus*t, 889 F.3d 728 (11th Cir. 2018) (Marcus, Fay and Hull) The court affirmed dismissal of plaintiffs' claim that the City of Boca Raton violated the Establishment Clause by approving construction of a Chabad religious facility near their homes. The panel held a post-filing state court judgment barring the construction of the center rendered their claims for injunctive relief moot. Although plaintiffs had also sought compensatory and punitive damages, they abandoned economic remedies on appeal. The court observed that plaintiffs had not sought nominal damages, but that even had they done so, a claim for nominal damages would not prevent the claim from becoming moot, citing the en banc holding in *Flanigan's*

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) See discussion of and rejection of mootness claim based on voluntary cessation pursuant to *Flanigan's* under Due Process.

Haynes v. Hooters of America, LLC, 893 F.3d 781 (11th Cir. 2018) (District judge Ross, Ed Carnes, and Marcus) Plaintiff, who is blind, sued claiming www.hooters.com was not accessible for users of screenreader software, and therefore violated the ADA; he sought an order compelling the creation of an accessible website and that the site be continually updated to ensure full accessibility. A different plaintiff previously brought a nearly identical lawsuit, and entered into a settlement agreement with Hooters that required it to conform to WCAG 2.0, the industry accessibility standard, by September, 2018. The district court dismissed Haynes' lawsuit as moot. The court of appeals reversed, reasoning that Hooters had not proven that it had made its website compliant with the earlier settlement, and that even had it done so, the case would not be moot for two reasons – 1) Haynes, who sought an order he could enforce, did not as a nonparty to the earlier settlement have the power to enforce that settlement, and 2) Haynes seeks an order that requires continued updating, a requirement not part of the earlier settlement. The court held that the test for whether an independent settled lawsuit will moot a claim for injunctive relief only if it grants the precise relief sought by the plaintiff in this case." The court did not opine on the merits question of whether the ADA requires the website to be accessible.

Hall v. Secretary, State of Alabama, 8/29/18 (Anderson and William Pryor, Jill Pryor dissenting) Alabama requires an independent candidate running for a House seat to file a petition signed by at least 3% of the number of district voters who last voted for governor in a general election, a provision held constitutional as applied to general elections. Plaintiff challenged the 3% requirement as applied to a special election to fill a newly vacant House seat claiming the short time to gather signatures for special elections rendered the requirement unconstitutional. The trial court denied preliminary relief, but finding the capable of repetition yet evading review exception applicable, entered judgment for plaintiff after the election. After a long discussion of whether the *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam) "same complaining party" rule governed ballot access claims, the panel vacated the judgment as moot. The panel reasoned the case was moot because in its view Hall was unlikely to have an opportunity to run in another special election in his lifetime and because he did not sue on behalf of a class. Judge Jill Pryor dissented, reasoning that Hall submitted sufficient evidence of his intent to run again (Hello Harold Stassen).

Younger v. Harris and other Abstention

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) See discussion of and rejection of *Younger* abstention in a challenge to a pretrial bail system under Due Process.

Fourth Amendment – Excessive Force, Probable Cause and Qualified Immunity

Cozzi v. City of Birmingham, 892 F.3d 1288 (11th Cir. 2018) (Jill Pryor, Rosenbaum and visiting district court judge Bartle) is rare case upholding denial of qualified immunity on summary judgment for fourth amendment wrongful arrest claim. On two consecutive days, man wearing partial face mask robbed or tried to rob pharmacies of drugs. Two witnesses id'd X from photo lineup, but he was in jail on days of robbery. Then video shown on Crime Stoppers tv show, and anonymous tipster said Cozzi "resembled the subject, had a tattoo that said "Lori" on his right hand, and lived in Center Point. CI also id'd Cozzi because of unique walking style, hat, shoes, and face mask similar to one Cozzi used to paint cars. CI also claimed Cozzi had Lortab addiction and drove purple pickup truck. Officer Thomas obtained search warrant for Cozzi home based only on two tips. No mask, note or clothing matching videos, but plastic bag containing 32 loose pills. Thomas showed roommates pictures of robber; one pointed out he could not be Cozzi because robber had tattoos up and down arm, but Cozzi had only one tattoo; other later said (after arrest) that Cozzi looked like the robber in the photo. Cops never looked at Cozzi's arm, arrested him, took him to station, released him next day. The pills were over the counter medicine for heartburn and pain. Held that Thomas lacked arguable probable cause for warrantless arrest because clearly established law from 2004 held he could not "unreasonably disregard[] certain pieces of evidence" by "choosing to ignore information that has been offered to him or her" or "elect[ing] not to obtain easily discoverable facts" that would exculpate suspect. The visible tattoos on the photos clearly exculpated Cozzi, the refusal to examine his arm and the weak tip evidence were insufficient to establish arguable probable cause since Thomas knew nothing of reliability of either tipster; even though the two tips were corroborative, they only corroborated resemblance, but eyewitnesses id'd someone else, undermining value of tip. Address and vehicle matched one tip, but they are "quintessential examples of innocent and easily observable facts." Plastic bag of pills did not resemble what was stolen, and at most gave reason to continue investigating, not arguable probable cause to arrest, and no evidence found to match anything taken or shown on video. Since all Thomas had to do was examine arm, he could not even have arguable probable cause.

Montanez v. Carvajal, 889 F.3d 1202 (11th Cir. 2018) (Ed Carnes, Newsom, Circuit Judge Siler) Cop cruising neighborhood with rash of daytime burglaries sees nervous man talking on cell

phone who walked down side street toward back of dwelling (co-owned by Montanez and mother), saw another man "huddling" nearby, radioed for backup describing burglary in progress. With guns drawn, seized two men (on street?) near back door of house, cuffed them, and entered home's back door into small vestibule with second door ajar. Shouted and received no answer, then went back outside, searched arrestees and found 2 kitchen knives. Back door had pry marks. Neither arrestee had addresses for the house. More cops arrived, and then they all entered house, each saying to check "for additional perpetrators or victims." House owned by Found in marijuana and associated drug paraphernalia in plain view. Several more warrantless entries followed, then obtained search warrant and found 18,500 in cash and assorted drugs and paraphernalia. No charges ever filed against arrestees or Montanez apparently because cops couldn't figure out to whom the drugs belonged; the money was returned to Montanez after determination he lawfully owned it. Montanez and two arrestees sued in state court, removed, trial court granted summary judgment on claims by arrestees but denied summary judgment on claim by Montanez based on warrantless entry into home. Held that first two warrantless entries complied with fourth amendment exigent circumstances exception under broad rule – "we hold that if police have probable cause to suspect a residential burglary – whether they believe the crime is currently afoot or recently concluded – they may, without further justification, conduct a brief warrantless search of the home to look for suspects and potential victims." Cops had probable cause to suspect a burglary, additional perp wouldn't have answered shout, neither would unconscious victim, so bingo – exigent circumstances and no fourth amendment violation. Later warrantless entries did not violate fourth amendment even though exigent circumstances had passed because homeowner already had lost any reasonable expectation of privacy in the areas already lawfully searched. And even if we're wrong, no clearly established law to contrary. Lesson – don't leave a joint in plain view even in any room inside your house, apartment, trailer or boat.

Gates v. Khokhar, 884 F.3d 1290 (11th Cir. 2018) Julie Carnes and Edmondson, district judge Williams dissenting) Plaintiff was arrested during a Ferguson shooting protest in Atlanta for violating Georgia's anti-mask statute after multiple warnings to remove a "V for Vendetta" full face mask. The arresting officers moved to dismiss on the basis of qualified immunity, the district court denied the motion, and the panel reversed, holding that the officers had actual probable cause, and if not, had arguable probable cause despite two Georgia supreme court decisions limiting the statute's application to circumstances in which the wearer intended to conceal his identity and either intended to threaten or intimidate provoke violence or with reckless disregard for the reasonable foresight that his conduct would threaten, intimidate or cause the apprehension of violence, and holding that "it would be absurd to interpret the statute to prevent non-threatening political mask wearing." The panel majority reasoned that the mere fact the march took place at night and the mask covered the entire face might suffice to suggest an intent to intimidate, but that inference was reinforced by the repeated refusal to remove the mask -- "an objective officer could reasonably have interpreted Plaintiff's refusal to

comply with multiple orders to remove the mask as a gesture intended to intimidate." Addressing the clearly established law prong of qualified immunity, the panel held the relevant inquiry was clearly established law under the particular circumstances Defendants encountered. (emphasis in original). Finding no case that clearly established "beyond debate" the unlawfulness of an arrest in the circumstances presented, the court held defendants entitled to qualified immunity even if they lacked probable cause to arrest. The court did not enter judgment and issue its mandate until July 16, so a petition for certiorari remains possible.

Simmons v. Bradshaw, 879 F.3d 157 (11th Cir. 2018) (District judge Robreno and Tjoflat, Wilson dissenting) A dashcam video shows that a sheriff deputy Lin stopped Dontrell Stephens for riding a bicycle on the wrong side of the street while clearly holding a cell phone to his ear, and that Stephens dismounted his bike, walked slowly toward Lin in a non-threatening and compliant manner with his cell phone still visible. Seconds later, Lin shot Stephens, who was unarmed, four times, including a final shot in the back that rendered him paraplegic. Stephens brought section 1983 claims against Lin individually for using excessive force and Sheriff Bradshaw in his official capacity asserting a *Monell* claim based on his alleged custom of tolerating and acting with deliberate indifference to claims of excessive force as well as Florida law claims. The trial court granted summary judgment for the defense on the *Monell* claim but denied Lin's summary judgment motion challenging the excessive force claim. Lin appealed the denial of qualified immunity and an earlier panel affirmed, concluding that a reasonable jury could find Lin used excessive force in violation of then clearly established law. On remand, Lin moved for reconsideration of the earlier summary judgment ruling on the *Monell* claim, offering deposition testimony and expert reports from several other excessive force claims against the Sheriff in which district courts denied summary judgment on *Monell* custom and usage liability. The court denied reconsideration without written explanation. A jury trial on the claim against Lin followed, and the jury awarded 22,431,892.05 in damages. Both parties appealed, Stephens arguing that the trial court erred by granting summary judgment on the *Monell* claim and Lin arguing that he was entitled to a new trial because the trial court refused to give a special interrogatory asking whether Lin made an objectively reasonable mistake and because it refused to give a jury instruction that the jury must assess reasonableness "at the time of the events, not from hindsight." Although it found no error in either the denial of the special interrogatory or the requested instruction, the panel majority nevertheless ordered a new trial based on the failure of the district court to give jury instructions and special interrogatories that neither party requested and to whose absence neither party objected, and which Lin never argued in his brief, observing in a footnote that the errors were fundamental. The majority held that the trial court should have required the jury to decide potentially disputed historical facts that might have borne on qualified immunity even though there were no material facts in dispute about any of the historical facts the court identified as potentially disputed in a footnote; the only disputed historical fact, already decided by the jury, was whether Lin reasonably could have mistaken the cell phone visible in the dashcam video for a

firearm. The panel majority also held the trial court properly granted summary judgment on the *Monell* claim and did not abuse its discretion in denying reconsideration of that ruling on remand. Judge Wilson dissented from both rulings. The panel withheld the mandate pending disposition of a still undecided petition for rehearing and rehearing en banc filed in early February.

Crocker v. Beatty, 886 F.3d 1132 (11th Cir. 2018) (per curiam by Tjoflat, Jill Pryor and Fay) In a rare opinion affirming the denial of summary judgment based on qualified immunity, the panel held that a deputy's warrantless seizure of a traffic accident scene bystander's cell phone then being used to record a video of the scene violated clearly established fourth amendment law notwithstanding the deputy's belief that it might contain evidence. The court held no reasonable officer could believe exigent circumstances justified an otherwise per se unlawful warrantless merely because the device was a cell phone even though no prior case applied the inapplicability of the exigent circumstances doctrine to cell phones based on the "obvious clarity" of the principle from prior exigent circumstances caselaw.

Hammett v. Paulding County, 875 F.3d 1036 (11th Cir. 2017) (Black and Julie Carnes, district judge Wiliams dissenting) The court panel affirmed summary judgment for police officers in an excessive force claim who fired two shots at and killed an unarmed occupant of a house during the execution of a search warrant after entering a darkened house with guns drawn and seeing him move toward one of the officers despite forensic evidence showing that the fatal shot entered his back after an earlier shot ended any perceived threat. The court also rejected a substantive due process claim against the officer who shot at but missed the decedent. The dissenting judge objects to the majority's reliance on the absence of contradictory eyewitness testimony and its willingness to disregard inferences drawn from forensic evidence as incompatible with summary judgment practice, arguing that it establishes that "no matter how many inconsistent accounts of an incident an officer gives and no matter what viable theory is supported by forensic evidence, a fourth-amendment claim arising out of a deadly shooting will never survive summary judgment, unless a third party eyewitness can support Plaintiff's narrative or plaintiff survives the shooting." The conundrum Judge Williams identified was well summed up by a ninth circuit judge this way: "Nobody likes a game of "he said, she said," but far worse is the game of "we said, he's dead." *Cruz v. City of Anaheim*, 65 F.3d 1076 (2014) (9th Cir. 2014)(reversing summary judgment in fatal excessive force claim noting "In the deadly force context, we cannot "simply accept what may be a self-serving account by the police officer") and requiring consideration of "whether the officer's story is internally consistent" and consistent with other known facts." Id.; see also *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794–95 (9th Cir.2014) (en banc). This includes "circumstantial evidence that, if believed, would tend to discredit the police officer's story.")

Brand v. Casal, 877 F.3d 1253 (11th Cir. 2017), *judgment vacated* May 1, 2018. The panel held that officers who tased an unarmed woman for no reason during the execution of a warrant and who handcuffed her with her breasts exposed for over one hour and who left them exposed as she was taken to jail and booked were not entitled to qualified immunity. The court vacated the judgment when, after issuance of the opinion but before issuance of the mandate, the parties reached a monetary settlement, one more way in which all too rare good caselaw disappears. See *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1336 (11th Cir. 2016).

Manners v. Cannella, 891 F.3d 959 (11th Cir. 2018) (Marcus, Fay and Hull) The court affirmed summary judgment for arresting officers who stopped plaintiff for running a red light, an offense he denied committing, because they had probable cause to arrest him for fleeing an officer when, at 3:00 a.m. they signaled him to pull over but he continued to drive for three blocks at slow speed for 14 seconds before pulling into a well-lit gas station because, even though, per his testimony, he was in fear for his life as a black male and despite his argument that as construed the flight statute was unconstitutional for vagueness because a general fear of law enforcement is not enough to show real, imminent impending danger. When he questioned the arrest and moved back into his car, officers were entitled to use force to effect the arrest, and therefore to tase and punch him in order to subdue him because no clearly established law said otherwise. None of the panel members who proclaimed that black men need not fear stopping on a dark, unlit street were black.

Shaw v. City of Selma, 884 F.3d 1093 (11th Cir. 2018) (Ed Carnes, Black, and district judge May) Officers called to the scene of a disturbance found a familiar mentally ill man in an abandoned laundromat. They attempted to coax him out, and he bent down and picked up a hatchet. He walked away from them, they followed him with weapons drawn, and when, after he repeatedly ignored commands to drop the hatchet and turned to walk toward them shouting "shoot it, shoot it" they were entitled to and did use deadly force by shooting him to death under current fourth amendment law. Accordingly, the court affirmed summary judgment for all defendants on the estate's excessive force claim.

Blue v. Lopez, 8/28/18 (Rosenbaum, Jill Pryor, and district judge Bartle) Under Georgia law, a trial court's denial of a motion for directed verdict in a criminal case conclusively establishes probable cause, foreclosing the acquitted criminal defendant from suing for the state law tort of malicious prosecution. After acquittal in a state criminal prosecution, plaintiff brought a section 1983 malicious prosecution claim against the officer responsible for his arrest. The district court dismissed, ruling that under Georgia law, the denial of his earlier directed verdict motion established probable cause, foreclosing his claim. The panel reversed, holding the

earlier denial of a directed verdict in the criminal trial does foreclose the federal claim or establish probable cause to arrest because, in denying a directed verdict motion, the criminal trial judge assessed only the sufficiency, not the credibility or weight of the evidence in submitting the case to a jury.

Qualified Immunity and the First Amendment

Gaines v. Wardynski, 871 F.3d 1203 (11th Cir. 2017) (district Judge Vinson, Jordan and Julie Carnes) Gaines, a public school teacher, was the daughter of a county commissioner who made critical comments about the city school board and the superintendent, Wardynski. Gaines alleged Wardynski denied her a promotion because of her father's statements in violation of her right to freedom of speech and intimate association under the first amendment. Wardynski moved to dismiss on the basis of qualified immunity, the district court denied the motion, and refused to stay the trial pending appeal. A previous panel granted a stay, and the panel reversed. After noting that it can be "particularly difficult" to overcome qualified immunity in the first amendment context, the court held that no clearly established law protected a public employee from retaliation based on a relative's speech. Although *Thompson v. North American Stainless*, 562 U.S. 170 (2011) extends Title VII protection from retaliation based on the protected activity of a fiancée, that cannot clearly establish first amendment retaliation protection since Title VII protection of public employees can and does exceed fourteenth amendment protection. Similarly, the first amendment right of intimate association, though well recognized at a general level, has never before been applied in this circumstance. Judge Jordan, writing only for himself, concurred, concluding that the first amendment does indeed prohibit firing a public employee because of a relative's speech on a matter of public concern, but agreeing that no case previously had so held, entitling the defendant to qualified immunity.

Qualified Immunity and the DPPA

Baas v. Fewless, 886 F.3d 1088 (11th Cir. 2018) (Wilson, Black, and district judge Schlesinger) Sheriff's officers pulled driver license photos of motorcycle club members for use by lobbyist in apparent violation of Driver's Privacy Protection Act, in order that lobbyist could show them to legislative committee members considering open carry legislation. The court held that lobbying came within the governmental function exception to the DPPA, and alternatively that all defendants were entitled to qualified immunity since there was no clearly established law to the contrary. Judge Black concurred on qualified immunity grounds without reaching the DPPA question.

Section 1983 Claims and *Heck v. Humphrey*

Dixon v. Hodges, 887 F.3d 1235 (11th Cir. 2018) (Per curiam, Tjoflat, Marcus and Rosenbaum) Proceeding pro se, a prisoner sued a guard for violating the eighth amendment by slamming him to a concrete floor and repeatedly kicking him, causing fractured ribs, a bruised sternum, a concussion, a severely swollen face, impaired vision, and temporary inability to walk. Because in prison disciplinary proceedings the plaintiff was found to have committed battery on the guard by lunging at the officer with a closed fist and punished by loss of gain time, the district court dismissed the complaint on the basis *of Heck v. Humphrey*, 512 U.S. 477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997). It reasoned that a claim, if successful, would logically contradict with and necessarily imply the invalidity of the loss of gain time for assault. The panel reversed, holding that as a general rule, a finding of assault by the plaintiff and excessive force by the defendant in response can logically coexist. It therefore held dismissal on the pleadings is proper only in the narrow class of cases in which the allegations of the complaint "*both* necessarily implies the earlier decision is invalid *and* is necessary to the success of the section 1983 suit itself." (emphasis in original). The court noted that the claimed injuries were disputed.

Statutory Antidiscrimination Law – Title VII, ADA, Section 504, Title IX, FMLA

Bostock v. Clayton County Board of Comm'rs, 894 F.3d 1335 (11th Cir. 2018) (denying rehearing en banc, Rosenbaum and Jill Pryor dissenting), Petition for certiorari filed, No. 17-1618 (June 1, 2018). The court refused to reconsider en banc *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (Title VII does not protect gay and lesbian individuals from discrimination) decided ten years before *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and despite two recent en banc decisions in other circuits, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), petition for certiorari filed, No. 17-1623 (May 25, 2018) and *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc). In addition to the cert. petitions pending in *Bostock* and in *Zarda*, *EEOC v. R.G. and G.R. Funeral Homes, Inc*., 884 F.3d 560 (6th Cir. 2018) (petition for certiorari filed, No. 18-107, July 24, 2018) challenges the application of Title VII's prohibition against sex discrimination to transgender employees.

Jefferson v. Sewon America, Inc., 891 F.3d 911 (11th Cir. 2018) (William Pryor, Julie Carnes and district judge Corrigan) Plaintiff, a full-time probationary clerk in the finance department who was taking IT classes, applied for a transfer to the employer's IT department. Although her

department manager initially was supportive, a higher level manager informed her he wanted someone someone with five years' experience and "that he wanted a Korean in that position." Plaintiff then complained of discrimination to the HR manager, received a poor evaluation, and was fired a week later. She sued under Title VII for race and national origin discrimination in the denial of transfer and for retaliatory discharge. Reversing summary judgment for her employer, the court reaffirmed the rule that direct evidence of discriminatory intent generally forecloses summary judgment for an employer, and that denial of a transfer to a more prestigious position at the same pay can be an adverse employment action, while offering some interesting other doctrine. Mincing no words, the court characterizes as "Nonsense" the argument made by amicus Professor Suja Thomas that summary judgment practice violates the seventh amendment right to a jury trial. Although it does not affect the outcome of the case, the court also opines that individual claims of discrimination can proceed only under section 703(a)(1) of Title VII, reserving section 703(a)(2) for claims targeting policies of general applicability, otherwise known as disparate impact or pattern and practice claims. Again, without affecting the outcome, the court upheld the exclusion of so much of an affidavit submitted by plaintiff in which one of the employer's HR specialists opined that plaintiff's termination was retaliatory because the affidavit indicated the affiant did not participate in the termination and failed to offer any basis that his conclusion was based on personal knowledge, but reversed the district court's conclusion that plaintiff's complaint of discrimination that triggered her allegedly retaliatory termination was not protected conduct even if she was not qualified for the promotion. The short seven day interval between her complaint of discrimination and her discharge was sufficient to create a jury question on whether the poor evaluation, a legitimate nondiscriminatory reason for her discharge, was a pretext for retaliation. Finally, the court held that plaintiff's characterization in briefs of her direct evidence as circumstantial evidence did not deprive her of the benefit of the favorable treatment of direct evidence claims, noting that "parties cannot waive the application of the correct law or stipulate to an incorrect legal test."

EEEOC v. Catastrophe Management Solutions, 852 F.3d 1018 (11th Cir. 2016) (Jordan, Julie Carnes, and district judge Robeño), petition for rehearing en banc denied, 876 F.3d 1273 (11th Cir. 2017) (Jordan concurring, Martin, Rosenbaum and Jill Pryor and dissenting), Motion to Intervene denied, 136 S. Ct. 2015 (mem) (2018). Jones applied for and was hired at CMS, only to have her job offer rescinded because she wore her hair in dreadlocks, a hair style about which the company representative said "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about." Suing on her behalf, EEOC alleged race discrimination through the application of a company policy requiring professional hairstyles and forbidding "excessive hairstyles." The district court dismissed the case on the pleadings, and the eleventh circuit affirmed, reasoning that Title VII's prohibitions only extend to immutable characteristics of race, that dreadlocks are only a "cultural practice" that Jones could alter. The panel also reasoned that under Twombly/Iqbal, EEOC had failed to allege a plausible basis in

fact for inferring that the policy did not apply equally to hairstyles of all races. After the court denied rehearing en banc, EEOC declined to file a petition for certiorari, and the Supreme Court denied Ms. Jones' motion to intervene in order to file a petition for writ of Certiorari on May 14, 2018, bringing the case to a close.

Lewis v. City of Union City, 877 F.3d 1000 (11th Cir. 2017), judgment vacated and rehearing en banc granted,893 F.3d 1352 (2018) This circumstantial evidence employment discrimination wrongful discharge case arose from a police officer's refusal to be tasered in taser training, asserting claims of race and disability discrimination. The district court granted summary judgment for failure to establish a prima facie case, the panel reversed, and the en banc court directed the parties to brief this question for en banc review: "To make out prima facie case under Title VII and the equal protection clause, plaintiff must prove, among other things, she was treated differently from another "similarly situated" individual. What standard does "similarly situated" impose on plaintiff: (1) "same or similar," (2) "nearly identical," or (3) some other standard."

Hicks v. City of Tuscaloosa, Ala., 870 F.3d 1253 (11th Cir. 2017) (Wilson, Newsom, and district judge Wood). After plaintiff won a jury verdict in a Pregnancy Discrimination and FMLA reassignment and constructive discharge case, the panel affirmed denial of the city's post-trial motions. Although plaintiff had received positive performance reviews before taking FMLA leave to give birth, upon her return a new supervisor referring to her as "that bitch" and "that stupid cunt" because she had taken 12 weeks of leave and recommended her transfer from the narcotics division, where officers were not required to wear a ballistic vest all day, to patrol where she would be required to wear one, lose the use of her vehicle and weekends off. The department refused her request for a desk job that would permit her to take breaks to breastfeed, and offered her the choice of going without a vest or wearing a vest that was too large, leaving gaping holes exposed to gunfire. She resigned. The court held the evidence sufficient to show pregnancy discrimination even though she offered no comparator evidence, reasoning that once a case has been fully tried, consideration of prima facie case requirements gives way to whether there was enough evidence to permit the jury to infer discrimination. The court also held that lactation is encompassed by the PDA, and that while employers do not have to provide special accommodations to breastfeeding mothers, they must treat them equally, and since other employees with temporary injuries were given alternate duty, the city was obliged to treat her equally by giving her alternate duty. The court also held the evidence sufficient to support the jury's constructive discharge finding.

Wilcox v. Corrections Corp. of America, 892 F.3d 1283 (11th Cir. 2018 (Visiting Judge Branch, Tjoflat, and Rosenbaum) The panel affirmed JMOL for employer overturning a jury verdict for

plaintiff in coworker sexual harassment claim under Title VII. Coworker slapped plaintiff on her ass twice on July 10, she filed a formal complaint with employer on the same day, and employer told coworker not to be around or associate with plaintiff. He engaged in intimidating behavior towards her but did not touch her, and she filed a second complaint two weeks later. After an investigation completed on September 9, employer fired coworker on September 14. Employee sued under Title VII, the district court first granted summary judgment for employer on the basis that the harassment was not severe or pervasive, and the 11th Circuit previously reversed on the basis that a triable issue of fact remained on that question because she alleged he had before her complaint hugged her daily for months and harassed other coworkers. A jury trial followed and the jury awarded 4K compensatory and 100K punitives, but the district court entered JMOL for employer. Respecting the pre-complaint harassment, the court held the employer was not liable; an employer is charged with knowledge of coworker harassment only if 1) employee complains or 2) she proves constructive knowledge. The panel held that the employer cannot be charged with constructive knowledge of pre-complaint harassment if it has an "antidiscrimination policy that is comprehensive, well-known to employees, vigorously enforced, and provides alternative avenues of redress." With regard to whether the company policy was vigorously enforced through prompt remedial action after her July 10 complaint, the panel held that since the instruction to the harassing coworker to refrain from touching was effective to stop the touching, the only remaining issue was whether the 6 week delay from the initial complaint to his firing was too long. Because the investigation uncovered lots of other harassment and had lots of moving parts, as a matter of law 6 weeks not too long.

J.S. III v. Houston County Bd. Of Educ., 877 F.3d 979 (11th Cir. 2017) (Per Curiam, William Carnes, Jordan and visiting judge Ripple) Reversing summary judgment for a public school board, the panel held that a claim for damages for disability discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act by a cognitively impaired and physically disabled child removed by a teacher's aid from a classroom for discriminatory reasons unrelated to his education is a claim cognizable under the ADA and section 504 as a form of segregation and not merely a claim for denial of a FAPE under IDEA. Borrowing from Title IX caselaw, the court held that to establish the requisite deliberate indifference by the board, the plaintiff must identify an official with actual notice and authority to remedy the discrimination, and among those identified by plaintiff with that notice and power were the school principal. More importantly, the panel also held that two teachers with supervisory authority over the aid can serve as an appropriate person, and that they could be found to have acted with deliberate indifference. Respecting a related claim arising from the aid's physical abuse of the plaintiff, the court held the evidence, though sufficient to show teachers or the principal knew of the improper removal, was insufficient to apprise them with notice that the aid was physically abusing the child.

Durbrow v. Cobb County School District, 887 F.3d 1182 (11th Cir. 2018) (Marcus, Newsom and district judge Moore) A public school student with a disability cannot repackage as a section

504 or ADA disability discrimination claim to avoid the IDEA exhaustion requirement if the gravamen or essence of the complaint is that he was denied a FAPE. Accordingly, the district court properly dismissed on the pleadings the disability discrimination claims. The panel affirmed the judgment below for the school district on the administratively exhausted IDEA claims of a student with ADHD because the school district found that his overall academic performance did not demonstrate a need for special education, and because his failure to complete some work was attributable neglect of studies rather than ADHD. The panel observed that "special education is generally ill-suited for students who are making academic progress while neglecting to complete their work."

EEOC v. Exel, Inc., 884 F.3d 1326 (11th Cir. 2018) (Jill Pryor, district Judge Moody concurring, Tjoflat dissenting) EEOC won a jury trial on behalf of a plaintiff who claimed to have been denied a promotion because her sex, recovering monetary relief including punitive damages. Defendant moved for JMOL; the district court denied it except for striking the punitive damages award. Both EEOC and the employer appealed. On liability and the inevitable issue of the sufficiency of the evidence of pretext, the majority held circumstantial evidence of the decisionmaker's bias was sufficient to support the jury verdict. The concurring judge agreed although indicating he would have decided for the employer were he the factfinder, but that his view was not the only reasonable view of the evidence possible. Judge Tjoflat predictably dissented, arguing that circumstantial evidence of the decisionmaker's bias against women was insufficient to show pretext (even though he wrote Lockheed. In an important ruling affirming the striking of the punitive damages award, all three panel members joined in Judge Pryor's opinion holding that *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1423 (11th Cir. 1999) (higher management made or countenanced the discriminatory decision) was not displaced by *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (decisionmaker acted in a managerial capacity with discriminatory intent). Since the discriminating supervisor was not a member of high management, and since no higher ranking employees were aware of the denied promotion, plaintiff could not recover punitive damages. On a better record in an alternate universe with a Justice Garland, the conflict over punitive damages would be worthy of further litigation.

Bowen v. Manheim Remarketing, Inc., 882 F.3d 1358 (11th Cir. 2018) (Wilson, Jordan and Rosenbaum) The panel reversed summary judgment for an employer in a Title VII and Equal Pay Act claim for sex based unequal pay. Although the employer sought to justify the higher pay for a comparable male employee on the basis of prior salary and experience, it bore the burden of persuasion under the Equal Pay Act and a jury could find that those factors alone did not account for pay differences because an HR Manager's affidavit showed the employer set a male predecessor's salary at the midpoint of the compensation range while setting the plaintiff's at the bottom, and because the HR Manager reported sex based pay disparities to higher management who failed to act. Treating the plaintiff's Title VII claim as a mixed motive claim,

the court found that a jury could reasonably find that that sex was a motivating factor in the identified pay disparity.

Boyle v. City of Pell City, 866 F.3d 1280 (11th Cir. 2017) (Fay, Julie Carnes, and Court of international Trade judge Goldberg) After plaintiff suffered a back injury that prevented him from continuing to work as a heavy equipment operator, the city permitted him to work as a street department foreman, albeit at the lower heavy equipment operator rate, while it continued to pay the incumbent foreman a foreman's rate. A new superintendent removed plaintiff from the foreman position, replaced him with the incumbent foreman, and reassigned plaintiff to two other jobs, neither of which he could perform. Plaintiff's physician opined that he was totally incapacitated for both jobs, and that no accommodation would permit him to perform either job. Plaintiff demanded to be returned to the foreman position, the superintendent refused, and he resigned. He sued under the ADA and the Rehabilitation Act, the district court granted summary judgment to the city, and the panel affirmed, reasoning that he could not satisfy his burden to identify a reasonable accommodation that would permit him to perform either job, and that although the city was not required to continue to carry two employees to perform the foreman job or to discharge or demote the other foreman to create a position for the plaintiff. The court characterized the past practice of carrying both employees as a foreman as an act of kindness not required by law.

Batson v. The Salvation Army, 897 F.3d 1320 (11th Cir. 2018) (Jill Pryor, Rosenbaum and district judge Ripple) Plaintiff worked for more than a decade, earning promotions and positive evaluations until she developed multiple sclerosis. She requested FMLA leave and minor accommodations, and in addition, a reduced travel schedule and the ability to occasionally telecommute. The employer granted the minor accommodations, but told her that it would not offer her a reduced travel schedule and telecommuting. When she returned from FMLA leave, her employer informed her that it had eliminated her job, required her to apply for a position she had previously held and for which she was qualified, and questioned her repeatedly during her interview about her doctor's appointments and ability to travel, and hired someone else because of a poor interview and poor job performance. She filed a charge of discrimination marking disability discrimination failure to accommodate, and an EEOC intake also stating retaliation. She later sued claiming a violation of the ADA's reasonable accommodation requirement and the ADA and FMLA prohibitions against retaliation, and interference with her right to return to her previous position after taking FMLA leave. The district court granted summary judgment for the employer on all claims. The panel analyzed the claims separately, first affirming summary judgment on the failure to accommodate claim because the plaintiff had never needed either the reduced travel schedule or the opportunity to telecommute; the court reasoned that because the employer never denied any specific request when needed, she could not establish a failure to accommodate claim based on its intention to do so. Turning to the ADA retaliation claim, the panel reversed summary judgment based on

the employer's refusal to rehire, holding that her failure to accommodate EEOC charge was sufficient to cover her retaliation claim since it was sufficiently related to retaliation and was inextricably linked to it. Turning to the merits of both retaliation claims, the panel held the plaintiff offered sufficient evidence that the employer's reasons for declining to hire her were pretextual; there was evidence the employer decided not to hire her before her interview, expressed concerns about her health before the interview, asked repeated questions about her health, and had regularly given her good performance reviews. Finally, the court held that her FMLA interference claim entitled her to judgment unless the employer proved affirmatively that it would have eliminated her previous job regardless of her request for or use of FMLA leave.

A.L. v. Walt Disney Parks and Resorts U.S., Inc., (8/17/18) (Hull, Newsom, and district judge Royal) Does Title Three of the ADA require the Disney theme parks to offer on request accommodations passes that allow individuals who have severe autism spectrum disorder and their accompanying families to bypass ride waits at the busiest rides as often as they wish? Disney defended both on the ground that the proposed accommodation was unnecessary, and that it would constitute an undue burden and fundamental alteration. The district court granted summary judgment to Disney, ruling that plaintiffs, whose children had endured travel for hours in cars and airplanes to reach the park, had failed to offer sufficient evidence that such accommodations were necessary to provide access to a like experience of the park. The trial court did not separately rule on the Disney affirmative defense of undue burden and fundamental alteration. The court of appeals reversed summary judgment on the narrow question of whether any individual plaintiff could prove necessity, leaving for another day the factual determination of whether such accommodations were necessary, and if so, whether they would fundamentally alter the park experience or impose an undue burden on Disney. However, the panel affirmed summary judgment for Disney, rejecting a challenge to the current Disney accommodation system as unlawful. That system permits visitors with a disability immediate access to all rides with less than a fifteen minute wait time and also permits them to book in advance three specific and likely busy rides each day with a guarantee of less than a fifteen minute wait time. However, that system does not permit an individual with autism to bypass lines to ride repeatedly the same busy ride. Disney insisted that its earlier experience with a more permissive system of accommodation led to widespread fraud, with large numbers of individuals marketing their services to families who wished to avoid wait times, making the accommodation the plaintiffs sought an undue burden and fundamental alteration. But the panel refused Disney's invitation to affirm on that alternative ground, reasoning that the trial court should first consider it.

Fair Labor Standards Act

Rodriguez Asalde v. First Class Parking Systems LLC, 898 F.3d 1136 (11th Cir. 3018) (Jordan and Jill Pryor, district judge Duffey dissenting) Reversing summary judgment for employer in FLSA claim by valet parking attendants, the court held that FLSA coverage extends to valet parking attendants under enterprise prong of FLSA if they handle goods or materials that moved in interstate commerce. Although circuit precedent excludes cars from handling clause under "ultimate consumer" exception since car owner, not employer is ultimate consumer of cars, valet tickets (and perhaps other items that originate out of state) may be found by a jury to be materials within the meaning of the FLSA that, based on the label language, may be found bya jury to have originated outside of Florida and therefore to have moved in interstate commerce. Hence entitled to go to trial on minimum wage and overtime claims. Earlier withdrawn opinion reached same conclusion regarding uniforms, but no comparable reference in superseding opinion, suggesting problem with summary judgment record.

Class Actions

Love v. Wal-Mart Stores, Inc., 865 F.3d 1322 (11th Cir. 2017) Plaintiffs first were part of an earlier certified class in litigation in which certification was later reversed. Plaintiffs next became part of a timely filed putative class action. The putative class was never certified, the case settled only as to named plaintiffs, and the current plaintiffs did not move to intervene in the settled putative class action until more than 30 days after it was settled and by stipulation dismissed with prejudice. They appealed from both the dismissal and from the denial of their motion to intervene. The court held the appeal from the dismissal was untimely. It next held that although the appeal from the later denied motion to intervene was timely, it was an appeal from a case that no longer existed, and is therefore moot. To have preserved their individual rights, the absent putative class members in the subsequent class action must, at a minimum, have moved to intervene within 30 days of the entry of the stipulation of dismissal, and arguably even before dismissal. Note as well that the first class action tolled applicable statutes of limitations for absent class members until class certification was reversed, but that the second class action did not.

Truesdell v. Thomas, 889 F.3d 719 (11th Cir. 2018) (William Pryor, Jill Pryor, and Visiting Circuit Judge Clevenger) As a sergeant in the Marion County sheriff's office, Thomas unlawfully accessed the driver license database for personal information concerning Truesdell, also accessed the database for information on thousands of other people. Truesdell brought a class action for injunctive relief, statutory, compensatory and punitive damages under the Drivers Privacy Protection Act and under section 1983 against both Thomas and the sheriff. Truesdell

moved to certify a class of some 42,000 individuals, but the district court denied the motion on commonality and typicality grounds both because Thomas may have had different reasons for accessing each individual's information and because each class member would be tasked with litigating his/her individual damage claim. The case went to trial, and the jury denied Truesdell compensatory damages, but awarded $5,000 in punitive damages against the sheriff in his official capacity and $100 in punitive damages against Thomas individually. The district court also assessed $5,000 in liquidated damages against the two defendants jointly and severally for their two violations at the statutory rate of $2500. Truesdell then moved for class wide liquidated damages, and a new trial on punitive damages, and the court denied both motions. The defendants moved to reduce the liquidated damages to $2500 arguing that liquidated damages should not be awarded for each violation, but rather only for each injured party, and to strike the official capacity punitive damages award. The panel affirmed all rulings, reasoning that it was not an abuse of discretion to refuse class certification on commonality and typicality grounds given that Thomas may have accessed some of the individuals' information for lawful reasons, and that the DPPA authorizes punitive damages against governmental entities.

Prison Litigation Reform Act

Whatley v. Smith, 898 F.3d 1072 (11th Cir. 2018) (Rosenbaum, Jill Pryor, and district judge Ripple) The panel reversed for the second time the dismissal under the PLRA of a prisoner's eighth amendment claim for damages for failure to exhaust prison administrative remedies. The panel ruling illustrates how states have structured prisoner grievance procedures to keep prisoner suits out of court, yet still sometimes fail. Georgia has a three step grievance procedure, requiring 1) the filing of an informal grievance within 10 days, 2) request and file a formal grievance within 5 days of receipt of the form, and 3) appeal within 5 days of adverse result to commissioner's office and limits each grievance to a single complaint. Although plaintiff violated the procedural requirements for his formal grievance, the commissioner's office did not rely on that ground when it denied his appeal, and therefore the panel held he fully exhausted his grievance resolution process. The panel held the prison must explicitly rely on procedural grounds rather than address merits to preserve the PLRA exhaustion defense.

Federal Arbitration Act

Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230 (11th Cir. 2018) (Tjoflat, Jordan, and district judge Steele) The Federal Arbitration Act continues to wreak havoc, this time in consumer class action litigation. Plaintiffs, all of whom entered into consumer banking agreements with arbitration clauses in contracts that also included class action waivers, sued the bank for various

claims arising from the bank's practice of processing debit card transactions to maximize overdraft fees. Believing its arbitration agreement with the individual plaintiffs then to be unenforceable under the California supreme court's *Discover Bank* rule that treated all contractual waivers of the right to bring a class action as unconscionable, the bank did not move to compel arbitration of the individual claims, but reserved its right to compel arbitration as to absent class members. During class related discovery, SCOTUS held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) that the FAA preempts state law insofar as it voids class waivers in contracts containing arbitration clauses, and the bank moved to compel the named plaintiffs to arbitrate their claims. The district court denied the motion, finding that by participating in litigation the bank had waived its right to compel the named plaintiffs to arbitrate, and in an earlier ruling, the court of appeals affirmed. On remand, the district court certified a (b)(3) class, and the next day the bank, which had opposed class certification, moved to compel absent class members to arbitrate. The district court denied the motion to compel arbitration, again finding the bank waived arbitration, and the bank appealed. The court of appeals reversed and ordered arbitration of the claims of absent class members, reasoning that the bank could not have waived arbitration as to absent class members before a class was certified because until certification, absent class members were not parties over whom the court could exercise the power to compel arbitration. In short, the panel held that the district court lacked jurisdiction even to consider a motion to compel absent class members to arbitrate until the class was certified.

Hernandez v. Acosta Tractors, Inc., (8/8/18) (Martin, William Pryor, and Hall) After plaintiff sued under the FLSA, defendant moved to compel and the court ordered arbitration. As arbitration proceeded, arbitration costs mounted, allegedly exceeding $100,000 in this and two related FLSA arbitrations. Defendant moved to reopen the litigation and lift the stay pending arbitration because of the excessive cost of arbitration it was obliged to pay; the court denied the motion. Defendant refused to pay the arbitrator, who then formally terminated the arbitration. Defendant again moved to reopen the litigation; the court denied the motion and instead entered a default judgment for the $7,293 in unpaid overtime requested. The panel reversed and remanded for reconsideration of whether a default was an appropriate remedy for failure to pay the arbitrator, suggesting that the standard should be bad faith, and that a finding of bad faith might turn on whether the defendant could not afford the arbitration, and whether it may have abandoned the arbitration because of adverse rulings in an effort to forum shop. This is not the first case in which a defendant, having secured an enforceable employment arbitration agreement, came to rue its choice because of the cost or outcome of arbitration.

Spirit Airlines, Inc. v. Maizes, (8/15/2018) (Martin, Wiiliam Pryor, and district judge Wood) In a twist on the usual arbitration dispute, Maizes and others invoked class-wide arbitration to

challenge certain practices of Spirit said to violate its 9$ Fare Club agreement. The agreement provided for arbitration pursuant to AAA rules, but said nothing about class-wide arbitration. Spirit sued the complainants for a declaratory judgment that the arbitration agreement prohibited class-wide arbitration and an injunction to prohibit class-wide arbitration from going forward. The district court dismissed, reasoning that the agreement's invocation of AAA rules committed the question of whether the agreement authorized class-wide arbitration to the arbitrator. The panel assumed the question went to whether the dispute was arbitrable, and, therefore under SCOTUS precedent, only "clear and unmistakable evidence" would esetablish that the parties agreed to submit the question of arbitrability arbitration. Because the AAA rules provide for a determination by the arbitrator of whether to permit class-wide arbitration, the court held that the adoption of AAA rules constituted the requisite "clear and unmistakable evidence to submit arbitrability, and therefore class-wide arbitration to the arbitrator, not the court. In so ruling, the court rejected the conclusion of four circuits that a heightened showing beyond the adoption of the AAA rules is necessary to satisfy the "clear and unmistakable evidence" standard for committing the question of arbitrability to the arbitrator. Watch to see whether this rare, albeit preliminary consumer victory on class-wide arbitration survives a likely petition for certiorari based on the circuit split.

Pleading and Sanctions

Jackson v. Bank of America, (8/3/2018) (Tjoflat, Julie Carnes and district judge Bloom) Judge Tjoflat's two decade war against shotgun pleadings claims its first casualty. Plaintiff's counsel filed *in state court* various state and federal claims against several defendants arising from a foreclosure sale. The complaint alleged 14 claims in 109 paragraphs of allegations; the claims were not defendant specific and incorporated all previous allegations. Defendants removed and moved for a more definite statement, in part because the complaint was a shotgun pleading. After several extensions, counsel filed an amended complaint with 123 paragraphs, two additional counts, and identified for each count the defendant sued but again incorporated all previous allegations into each count. All but one defendant moved to dismiss; the motion was referred to the magistrate and the remaining defendant answered but included failure to state a claim as a defense. The magistrate's R&R addressed the merits of each claim and recommended dismissal for failure to state a claim, and the answering defendant moved for judgment on the pleadings. Plaintiff objected to the R&R, and moved to file a second amended complaint. The district court adopted the R&R and denied leave to amend and plaintiff stipulated to dismissal with prejudice as to the remaining defendant in order to obtain a final judgment from which to appeal. The panel affirmed dismissal with prejudice without considering the merits; instead it affirmed because the complaint was an impermissible

shotgun pleading in violation of Rule 8. Writing for the panel, Judge Tjoflat opens "This appeal involves an abuse of process engineered to delay or prevent execution of a foreclosure judgment," explains that "[b]y attempting to prosecute an incomprehensible pleading to judgment, the plaintiffs obstructed the due administration of justice," notes in a footnote that "[w]ere we to parse the amended complaint in search of a potentially valid claim, we would give the appearance of lawyering for one side of the controversy and, in the process, cast our impartiality in doubt" and asserts: "Tolerating such behavior constitutes toleration of obstruction of justice." Instructing district courts, the panel writes that when faced with a shotgun pleading, the district court "should strike the pleading" "even when the other party does not move to strike the pleading" and if the offending party fails to comply "by filing a repleader with the same deficiency – the court should strike his pleading, or, depending on the circumstances, dismiss the complaint and consider the imposition of monetary sanctions." The court reiterates that a district court must give the plaintiff one opportunity to plead properly before dismissing with prejudice, but that no more is required, and that dismissal with prejudice then will not be an abuse of discretion. Rejecting counsel's explanation during oral argument that his pleading would have been deemed sufficient in state court, the court ordered him to show cause under FRAP 38 for why he should not be required to pay appellees double costs and their expenses, including attorney's fees. Judge Bloom concurred, emphasizing that the reason for the court's ruling was "his plainly deficient pleading, refiled and appealed, that marshalled substantial unnecessary resources and that leads to the Court's finding today."

Silva v. Pro Transport, Inc., (8/10/18) (per Curiam) (William Pryor, Jill Pryor, Anderson) The panel reversed Rule 11 sanctions imposed jointly on counsel and plaintiff for filing a Fair Labor Standards Act claim after having previously failed to disclose it in a bankruptcy proceeding, reasoning the claim was frivolous. The trial court first held the failure to disclose the claim as an asset before the bankruptcy court barred the lawsuit on the ground of judicial estoppel and dismissed it. Defendants then moved for Rule 11 sanctions, and while the sanctions proceedings were ongoing, the court of appeals decided *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc), overruling prior panel decisions that mandated a finding of judicial estoppel for failure to disclose, holding instead that the failure to disclose only triggers dismissal for judicial estoppel if the district court finds it was "calculated to make a mockery of the judicial system," not when the result of "inadvertence or mistake," and therefore that district courts invoking judicial estoppel must make a factual finding on whether the nondisclosure in bankruptcy proceedings reflected a deliberate intention to mislead. Because Silva sought and obtained leave to correct his bankruptcy filing based on confusion and lack of sophistication, the panel held the finding below that Silva took a frivolous position with no chance of success left them with a definite and firm conviction that the district court made a mistake in concluding Silva had no reasonable chance to avoid judicial estoppel. Accordingly, the panel reversed rather than vacated and remanded the order imposing sanctions.

AEDPA Second Petition Denials As Substantive Law Precedent

*In re William*s 898 F.3d 1098) (per curiam, Wilson, Martin and Jill Pryor; Wilson, Martin and Pryor concurring, Martin, Wilson, and Pryor concurring) AEDPA requires a prisoner seeking leave to file a second habeas petition to obtain permission from the court of appeals by making a prima facie showing that he satisfies the limited grounds for such a filing. The panel denies leave to file, but all three members join in two concurring opinions objecting to the holding in *U.S. v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018) that published orders denying leave that construe the underlying merits of the claim establish binding precedent on all subsequent panels, including those reviewing direct appeals even though orders denying leave to file cannot be reviewed by SCOTUS and cannot be the subject of a petition for en banc rehearing and are made based on pro se filings limited to space provided on a single page form. No other circuit accords first panel precedential status to orders denying leave to file a second petition.

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

KEYNOTE LUNCHEON

THE ROLE OF COURTS, LAWYERS, AND CIVIL SOCIETY IN THE DEFENSE OF LIBERTY IN THE TRUMP ERA

Introduction: *Prof. JoNel Newman*,
University of Miami School of Law

David Cole, National Legal Director, ACLU

The New York Times

Liberals, Don't Lose Faith in the First Amendment

By David Cole
Mr. Cole, a lawyer, has argued five First Amendment cases before the Supreme Court.

Aug. 1, 2018

Have conservatives hijacked the First Amendment?

Critics are increasingly making this claim, maintaining that under Chief Justice John G. Roberts Jr., the First Amendment, once an important safeguard for progressive speech, has become a boon to corporations, conservatives and the powerful.

But in most instances, the First Amendment doesn't favor speech of the right or the left; it simply takes the government out of the business of controlling speakers by virtue of what they say. It often empowers the powerless. And most important, it helps check official abuse.

To be sure, conservatives and corporations are invoking the First Amendment, and sometimes winning. In Citizens United v. Federal Election Commission, the Roberts court deployed the First Amendment to guarantee that corporations can engage in unlimited campaign spending. A recent study found that the Roberts court has more often protected conservative than liberal speakers.

Justice Elena Kagan herself, dissenting in Janus v. American Federation of State, County and Municipal Employees, accused her conservative colleagues of "weaponizing the First Amendment" when they ruled that public sector unions cannot charge nonmembers "agency fees" because it amounts to compelled speech.

But these developments should not lead liberals or progressives to lose faith in the First Amendment. For starters, the amendment's core requirement is that the government must remain neutral regarding the content and viewpoint of speech. As a result, a decision protecting conservative speech will equally support liberal speech.

When the Roberts court ruled that the First Amendment prohibited holding the Westboro Baptist Church liable for displaying anti-gay signs outside a military funeral, its rationale would equally protect Revolutionary Communist Party demonstrators holding anti-Christian signs outside the Westboro Baptist Church.

Some argue that the First Amendment's very neutrality is problematic, because in an unequal society, the amendment will favor the haves over the have-nots. We all have a formally equal right to speak, but only George Soros, the Koch brothers and a handful of others can spend hundreds of millions of dollars advancing their preferred candidates or positions.

But this argument proves too much. All rights are more valuable for the rich. The rights to have an abortion, to send your children to private school, to exclude others from your property or to hire your own criminal defense lawyer are all more fully enjoyed by people with resources. Social inequality may be a reason to support progressive taxation or robust equal protection guarantees; it's not a reason to retreat from free speech principles.

In a more fundamental sense, the First Amendment favors people without power and influence. In a democracy, the rich and those in the majority don't need constitutional protections; they can generally enact their desires through ordinary political processes. The targets of censorship are typically dissidents, outsiders, the marginalized.

History illustrates the point. The Constitution's speech protections did not emerge fully formed when the nation was founded. During World War I, for example, the Supreme Court upheld long prison sentences for merely criticizing the war. Over many years, anarchists, communists, labor unions and civil rights activists fought for and earned the speech rights we know and take for granted today.

Nor is the First Amendment outmoded. The need for its protections are as urgent as ever. In just the last year or so, my organization, the American Civil Liberties Union, has invoked the First Amendment to defend high school students disciplined for walking out from school to call for gun control, as well as other students penalized for posting pictures of guns on social media; a student newspaper denied funding after publishing a satire of "safe spaces," as well as fans of a hip-hop band labeled gang members; Milo Yiannopoulos and the animal rights group People for the Ethical Treatment of Animals, both of whom were denied permission to advertise on the subway by the Washington Metro Authority; and anti-Trump as well as pro-Trump demonstrators. We've defended flag desecraters, union organizers, and citizens blocked from their representatives' Facebook sites for their criticism. And that's just the beginning.

As even this very partial list shows, government officials continue to be tempted to silence people for their views. Some of our clients are liberal, others conservative, but all have been singled out because they have upset those in power.

Not every First Amendment argument is justified, of course. The A.C.L.U. supported the public sector union in the Janus case, for example, saying that charging workers for services that the union is required to provide to them is not a First Amendment violation, any more than requiring people to pay taxes for government policies they oppose. But even if conservatives sometimes win free speech cases they should lose, now is not the time for anyone to dismiss the First Amendment as a tool of conservatives.

Since Donald Trump's election in November 2016, Americans have been exercising their First Amendment rights to engage in resistance: demonstrating, calling their representatives, associating with like-minded citizens in defense of core values, shedding light on official abuse through the free press, and expressing themselves on social media.

When one party controls all three branches of the federal government, the checks and balances have to come from the people. It's on us. And it's the First Amendment that gives us the tools to act — including the rights to speak, associate, petition the government and enjoy a free press.

The fact that conservatives benefit from the First Amendment is not something to bemoan. It is part of the constitutional bargain. It simply means the First Amendment is operating as it should, neutrally preserving the lifeblood of democracy.

David Cole (@DavidColeACLU) is the national legal director of the American Civil Liberties Union.

A version of this article appears in print on Aug. 2, 2018, on Page A25 of the New York edition with the headline: Trust the First Amendment

The Supreme Court Looks Away

David Cole

Brendan Smialowski/AFP/Getty Images

President Donald Trump listening as Supreme Court Justice Anthony Kennedy spoke in the Rose Garden of the White House, Washington, D.C., April 10, 2017

At the close of his opinion upholding President Donald Trump's ban on immigrants from five predominantly Muslim countries, Chief Justice John Roberts proclaimed on Tuesday that "*Korematsu* has nothing to do with this case." He went on to write that *Korematsu* v. *United States*, the 1944 decision that backed the internment of Japanese citizens and immigrants based on their race, "was gravely wrong the day it was decided, has been overruled in the court of history and—to be clear—has no place in law under the Constitution."

Strong words. But actions speak louder. Even as he acknowledged the court's error in *Korematsu*, Roberts repeated it, virtually verbatim, in *Trump* v. *Hawaii*. Here, as in *Korematsu*, the president targeted a vast group of people based on prejudice. Here, as in *Korematsu*, the president defended his action by citing national security, but offered no evidence to support the assertion. And here, as in *Korematsu*, the court accepted those unsubstantiated national security concerns without question, applied only the most anemic

judicial review, and rubber-stamped the president's actions. Just as the court would in no other context accept such blatant racial discrimination as that imposed on Japanese Americans during World War II, so the court would in no other setting accept the rampant bias President Trump showed toward the Muslim faith in the travel ban. In both cases, the court deferred to the prejudice of the powerful and abdicated its duty to protect the rights of the vulnerable.

Indeed, as one commenter on Twitter noted, if *Korematsu* really had nothing to do with *Trump* v. *Hawaii*, the court could just as well have announced its overruling of the 1944 decision in its antitrust ruling the day before. But, of course, *Korematsu* had everything to do with the travel ban case. That's why Roberts felt compelled to try, unpersuasively, to distinguish it. But if anything, the distinctions cut the other way, making the court's blessing of the travel ban even less explicable. The internment—and the decision allowing it—was the product of a true wartime national emergency. Today, the permanent "war on terror" lingers on, but there is no threat to the US that is equivalent to those posed by Nazi Germany or Imperial Japan in the 1940s.

When the Trump administration sought to identify persons who had come from the banned countries and engaged in terrorism, it was able to cite one sole suspect who came from Somalia and was eventually convicted of providing material support to a terrorist group. But he came to the US when he was a toddler and was convicted a decade and a half later. That's hardly evidence of a national security crisis.

By contrast, the evidence that the ban was targeted at Muslims was overwhelming; the president openly admitted as much on the campaign trail, and pursued that purpose once in office. Indeed, no one on the court even disputed that the president had acted with anti-Muslim animus; the only real dispute was about the legal implications of that intent. The lower courts had ruled that the ban violated the Establishment Clause, which requires government to maintain strict neutrality among religions and deems invalid any government action that a "reasonable observer," aware of all the publicly available facts, would view as intended to promote or denigrate a particular religion.

In the Supreme Court, the Trump administration lawyers urged the court to ignore the president's many statements exhibiting anti-Muslim animus. They argued that the court should consider only the formal "proclamation" issued by the president (and written by his lawyers). Since that proclamation did not mention Muslims but merely named countries that are overwhelmingly Muslim, the government argued, the court should not even consider the evidence that the president implemented this ban in order to target Muslims.

Chief Justice Roberts, joined by his four conservative colleagues, did not accept wholesale the government's arguments. Roberts's opinion dutifully recounted the evidence of

Trump's bias—although, as Justice Sonia Sotomayor's dissent reveals, he omitted many damning details. He "assumed" that the court could consider this evidence, and made no attempt to deny that a reasonable observer would see the ban as anti-Muslim. Instead, he reasoned that because the president was exercising the immigration power in the name of national security, the court would ask not whether a "reasonable observer" would perceive religious prejudice, but only whether there was any other "plausible" basis for the president's action. He went on to conclude that there was at least a plausible basis for the order, on the grounds that the targeted countries either failed to provide sufficient information to guide visa decisions or were themselves supporters of terrorism.

So, if Roberts did not close his eyes, he certainly looked away. Two points are especially noteworthy. He did not dispute that the order was anti-Muslim in intent. And he did not affirm that the order was genuinely based on national security concerns: it was enough that it might be "plausible." That's a low bar. On this test, it would not have mattered if the president, upon signing the proclamation, had looked up and said, "I'm doing this because we are a Christian country and Muslims are not welcome here." As long as it's "plausible" that national security might be at issue, the court gives the president a pass on even the most venomous prejudice.

Justice Sotomayor, joined by Justice Ruth Bader Ginsburg, wrote a blistering dissent. (Justices Elena Kagan and Stephen Breyer also dissented, on narrower grounds.) Sotomayor castigated the court for failing to live up to its duty: "Our Constitution demands, and our country deserves, a judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments." The majority "failed in that respect," she maintained, by "ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the proclamation inflicts upon countless families and individuals." She concluded that the president's proclamation violated the Establishment Clause because it was "contaminated by impermissible discriminatory animus against Islam and its followers."

Justice Anthony Kennedy, who announced his retirement from the court the following day, offered, in his last opinion as a Supreme Court justice, a two-page concurrence. In it, he explained that he joined Chief Justice Roberts's decision in full, but wrote to say that the mere fact that the court was affirming President Trump's actions doesn't mean the president is "free to disregard the Constitution and the rights it proclaims and protects."

Among those rights, he insisted, are the free exercise of religion and the protections of the Establishment Clause. He continued:

> It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the

> Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

In essence, Kennedy urged Trump to behave himself—good luck with that. But Kennedy's plea for presidential self-restraint is in fact an abdication. When a government official violates the Constitution, it is the court's responsibility to hold him accountable, not to lecture him about manners. Kennedy knew this. In *Boumediene* v. *Bush*, he provided the deciding vote and wrote the court's opinion insisting, against the will of the president and of Congress, that those detained at Guantánamo Bay Naval Base as "enemy combatants" had a right to go to court to challenge their detentions. Here, too, Kennedy had the potential to hold the president accountable. In his final opinion as a justice, he failed to do so.

It's not fair to blame the result on Justice Kennedy alone. Not a single justice disputed that President Trump's order was infected by anti-Muslim animus, yet all five justices in the majority nonetheless declined to protect the constitutional rights of the vulnerable in the face of blatant prejudice. Any of the five could have stood between the president and the Constitution they are pledged to uphold, and protected the millions of Muslims affected. Instead, they all joined Chief Justice Roberts in looking the other way.

That the court was unwilling to rule against the president in such egregious circumstances does not portend well for the future of the separation of powers. As a legal matter, lawyers in future cases will be able to argue that this case's reasoning should be limited to national security measures invoked to deny entry, and should not extend further. The courts have long given the political branches wide leeway regarding who may enter the country. And, of course, the "war on terror" cases aside, the court's record in checking the executive when it asserts national security concerns is generally underwhelming. So if Trump violates the Constitution through measures that don't involve entry decisions and national security, the courts may still be a viable safeguard.

The president's inhumane policy of separating children from parents seeking asylum, for example, involves people within the United States, and presents no discernible national security issues. And the administration's constitutionally doubtful actions in denying undocumented teenagers access to abortion, in excluding transgender individuals from the military, and in penalizing states that choose not to enforce federal immigration laws, should all be subject to ordinary constitutional review—and that leaves open the possibility, at least, of the court's finding in favor of plaintiffs in these cases, as lower courts already have.

More broadly, though, the court has sent a signal to the president. Perhaps it wouldn't let him get away with standing in the middle of Fifth Avenue and shooting someone, but it

will look away when he targets some 150 million Muslims because of the faith they practice. That is exactly the wrong message to send this president.

And with Justice Kennedy's retirement, the willingness of the Supreme Court to support the powerless against the powerful seems to be in even greater doubt. Despite his disappointing vote in *Trump* v. *Hawaii*, Kennedy had shown a capacity to stand with the marginalized. He authored critical decisions that recognized gay rights, prohibited the death penalty for juvenile offenders, preserved the right to abortion, and permitted affirmative action. His four conservative colleagues, by contrast, have typically shown more solicitude for states' rights, big business, and government officials sued for violating people's rights than for people themselves. If Trump gets away with nominating another doctrinaire conservative justice, *Trump* v. *Hawaii* may be only the beginning of the Supreme Court's looking away.

July 2, 2018, 7:00 am

RELATED

The Muslim Ban in Court
David Cole

Why This Isn't Watergate
Andrew Cohen

Tipping the Scales
Noah Feldman

SUPREME COURT THE RIGHT EDITORIAL JULY 30-AUGUST 6, 2018, ISSUE

Why Anthony Kennedy Was a Moderating Force on the Supreme Court

He was a conservative, but he had an open mind—and he was receptive to the concept of an evolving Constitution.

By David Cole

JULY 3, 2018

Supreme Court Associate Justices Anthony Kennedy, right, and Stephen Breyer testify before a House Committee on Financial Services hearing to review the 2016 budget. *(AP Photo / Manuel Balce Ceneta)*

The first case I litigated before Justice Anthony Kennedy, who announced his retirement on June 27 after more than 30 years on the Supreme Court, was *Texas v. Johnson*, the 1989 case that established that the First Amendment protects flag-burning. Kennedy, a mild-mannered Reagan appointee, was no flag-burner. But he provided the crucial fifth vote to strike down Texas's law.

A few years later, I invited him to guest-teach my constitutional-law class at Georgetown. I said he could talk about anything; he chose the flag-burning case. But his real subject was judging. In his hour with the students, he not only stressed the importance of having an open mind, but exemplified it in his openness to the students themselves. Not all judges are like this; Justice Antonin Scalia was always absolutely certain about his views when speaking to students (or to anyone else, for that matter).

I remember arguing to a colleague, a noted gay-rights scholar, that this characteristic meant that Kennedy might be persuaded to vote in favor of other progressive causes. My colleague dismissed the idea, sure that Kennedy would play to type and vote consistently conservative.

Yet it was Kennedy who wrote every one of the Court's decisions protecting gay and lesbian rights, including pathbreaking decisions striking down a Colorado referendum that barred protection against discrimination on the basis of sexual orientation, and invalidating a Texas law making same-sex "sodomy" a crime. And most importantly, he wrote the majority opinions in *United States v. Windsor* and *Obergefell v. Hodges*, both 5–4 decisions extending

constitutional protection to the marriage of same-sex couples. In these and other decisions, he saw in anti-LGBTQ measures a direct affront to the equal dignity of all persons.

Justice Kennedy's role in these cases is often overstated. The Court's recognition of gay rights, and especially marriage equality, was largely attributable to changes outside the Court—in the world at large and the American public in particular. And the champions of those changes were the individuals and organizations that fought for equal respect for gay and lesbian people and relationships for decades, in city-council meetings, corporate boardrooms, state courts and legislatures, ballot-initiative campaigns, and, of course, the streets. But Kennedy, an unlikely ally, was open to acknowledging that the world had changed.

To do so, Kennedy also had to be receptive to the concept of an evolving Constitution, not limited to the specific (and historically constrained) ideas of those who adopted it more than 200 years ago. As he wrote in *Obergefell*:

> *The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.*

Still, Kennedy was a conservative. One study identified him as the 10th most conservative justice since 1937. On business cases, he almost always sided with corporations. He also cast crucial votes to gut the Voting Rights Act in *Shelby County v. Holder*, to strike down portions of the Affordable Care Act, to nullify campaign-finance restrictions on corporations in *Citizens United v. FEC*, and often to uphold states' immunity from individuals seeking remedies for violations of their rights. This term, he voted with the conservatives in all 14 of the Court's 5–4 decisions, including decisions upholding the Muslim ban and state voter purges and gravely undermining public-sector unions and workers' rights to pursue their grievances collectively in arbitration. And probably most consequentially, he voted down the line with the Republicans in *Bush v. Gore* to stop the recount and ensure George W. Bush's election in 2000—which in turn brought us the appointments of John Roberts and Samuel Alito.

But Kennedy's dual commitment to an open mind and an evolving Constitution meant that he not infrequently ruled in favor of liberty for the marginalized. He wrote historic opinions banning the death penalty and sentences of life without parole for juvenile offenders, and, in *Boumediene v. Bush*, extending habeas corpus to Guantánamo detainees—and the rule of law to the War on Terror.

Because he was open to persuasion, Kennedy could also change his mind—much to Justice Scalia's dismay. Despite having voted with the conservatives on a number of abortion-rights and affirmative-action cases, when directly confronted with the question of whether *Roe v. Wade* should be overruled or affirmative action ended, he voted with his liberal colleagues to reaffirm their proper place. In 1992, in

Planned Parenthood v. Casey, he joined Justices Sandra Day O'Connor and David Souter in preserving *Roe v. Wade*, and thus abortion rights. And in 2016, in *Fisher v. University of Texas*, he voted with his liberal colleagues to preserve affirmative action, over dissents that would have declared it unconstitutional.

Kennedy was, above all, a moderating force. Largely because of his votes, the Court remained within the mainstream of American opinion. Chief Justice Roberts and Justices Alito, Clarence Thomas, and Neil Gorsuch are deeply and reliably conservative; they only rarely join their liberal counterparts in closely divided cases. If President Trump names another rigidly right-wing justice, the Court risks becoming an outlier, far more conservative than the country at large. And that would put in peril many rights that hang by a one-vote margin, including abortion rights, affirmative action, LGBTQ equality, and freedom from the establishment of religion. We should demand that any successor show the same open mind, the same moderating temperament, and the same sensitivity to equal dignity for all that Justice Kennedy displayed.

David Cole David Cole, national legal director of the ACLU, is legal affairs correspondent for *The Nation* and a professor at Georgetown University Law Center. He is the author, most recently, of *Engines of Liberty: How Citizen Movements Succeed* (April 2016).

Leave a Comment

TRENDING TODAY

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

ELECTION PROTECTION IN 2018 AND GEARING UP FOR THE 2020 REDISTRICTING CYCLE

Moderator: *Nancy G. Abudu*, Legal Director, ACLU of Florida

Panelists: *Daniel A. Smith*, Ph.D., Chair and Professor, University of Florida, Department of Political Science

Kira Romero-Craft, Associate Counsel at LatinoJustice PRLDEF

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, CASA DE MARYLAND, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, and MAKE THE ROAD NEW YORK, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, and BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau, Defendants.	Civil Action No.

COMPLAINT

1. On March 26, 2018, Secretary of Commerce Wilbur Ross ordered that the 2020 Decennial Census include a question about the citizenship of all U.S. residents for the first time since 1950. The Secretary provided no legitimate reason for this decision, let alone any justification for taking such action without any of the customary and essential preparatory testing for adding questions to the Decennial Census. There is no legitimate explanation. Rather, the addition of the citizenship question is a naked act of intentional discrimination directed at immigrant communities of color that is intended to punish their presence, avoid their recognition, stunt their growing political power, and deprive them and the communities in which they live of economic benefits.

2. As Secretary Ross recently testified, adding a citizenship question will lead to a "decline" in participation in the Decennial Census—which Ross estimated at 1 percent of the population (or more than 3 million people)—because there are "folks who may not feel comfortable answering" the citizenship question.

3. The "folks" Secretary Ross referenced are members of immigrant communities of color who have been the target of a series of tactics by the Trump Administration designed to foment fear. These tactics—fueled by the Trump Administration's undisputed and undisguised animus directed towards these communities—have included draconian sweeps and other immigration enforcement actions at sensitive places such as schools and courthouses, the forced separation of parents from their children, and executive actions ending the legal status of entire categories of immigrants who have resided in the United States for years. All these actions have discouraged members of these communities from interacting with government agents or availing themselves of government services.

4. Against this backdrop, the addition of a citizenship question to the Decennial Census—in essence, a door-to-door government inquiry as to the citizenship status of every member of every household in the United States—will sow enormous fear in immigrant communities of color that will deter participation in the 2020 Census, as Secretary Ross admitted. This will only exacerbate the Decennial Census' long-standing problem of undercounting immigrants of color, and Latinos in particular. The resulting undercount will impact both non-citizens and U.S. citizens of color, including family members of non-citizens and those who live in mixed status households with non-citizens.

5. Because the Decennial Census is the basis for allocating a wide range of federal resources and apportioning political power, reduced census participation by members of immigrant communities of color will result in these communities losing government funding as well as political power and representation in the United States

Congress, the Electoral College, and state legislatures. This is not an unintended consequence of Defendants' decision; it is the very purpose. President Trump, Attorney General Sessions, and their senior advisers have made no secret of their fear of the growing political power of immigrant communities of color.

6. Indeed, Defendants' discriminatory goals do not stop there. Even though the Constitution requires that all residents of each state be counted in apportionment calculations, proponents of adding a citizenship question to the Decennial Census maintain the express goal of using the citizenship information obtained from the Decennial Census to exclude non-citizens from legislative apportionment calculations. Defendants thus seek to facilitate the dilution of the constitutionally prescribed voting power for communities with higher percentages of non-citizens.

7. The process that led to Defendants' addition of the citizenship question lays bare their illicit motives. Secretary Ross has publicly endorsed the Administration's anti-immigrant initiatives, and Secretary Ross and the Department of Commerce engaged in extraordinary violations of procedural and substantive regulations and guidelines governing the development of questions for the Decennial Census—regulations and guidelines that exist specifically to ensure that questions on the Decennial Census advance, rather than impede, the purpose of providing an actual enumeration of the U.S. population. And Secretary Ross and the Department of Commerce ignored the advice of the Census Bureau's professional staff, its scientific advisory committee, and six previous Census directors from both Republican and Democratic administrations, all of whom warned that adding such a question would exacerbate existing problems with lower response rates among certain communities.

8. The sole justification that Defendants have mounted for their decision is transparently pretextual. Defendants claim that the addition was necessary because the Department of Justice ("DOJ") purportedly needs better data to enforce the Voting Rights Act ("VRA"). The VRA has been enforced by the government and private parties for

more than 50 years, with ***no*** citizenship question on the short-form Decennial Census. And for that same 50 plus years, DOJ has ***never*** had access to individual-level citizenship data. DOJ has provided no explanation, let alone any detailed analysis, as to why gathering citizenship data through the Decennial Census is suddenly necessary to enforcing the Voting Rights Act. It is not.

9. The addition of the citizenship question will result in an inaccurate Decennial Census that will undermine and fail to achieve its constitutional objective: an actual enumeration of the United States' population. In his unprecedented abandonment of his constitutional mandate to conduct an actual enumeration of all people in the United States, Secretary Ross has violated and otherwise failed to abide by Constitutional, statutory, and regulatory mandates, as well as Census Bureau policy.

10. The Decennial Census should not be weaponized to target disfavored groups. But that is exactly what the Trump Administration has done by adding a citizenship question. Because this decision was motivated by invidious discrimination, is inconsistent with the Constitution's mandate of an actual enumeration of the population, and is irrational, arbitrary, and capricious, the Court should declare it in violation of the Constitution and the Administrative Procedures Act and enjoin the inclusion of any citizenship question on the 2020 Decennial Census.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

12. The declaratory and injunctive relief sought is authorized under 28 U.S.C. §§ 2201 and 2202.

13. Venue in this district is proper under 28 U.S.C. § 1391(e)(1)(C) because Secretary Ross is a Defendant and is an Officer or Employee of the United States. As such, a civil action may be brought in any venue where "the plaintiff resides if no real property is involved in the action." This matter does not involve real property, and the

Plaintiff the New York Immigration Coalition has its principal place of business in the district of the United States District Court for the Southern District of New York.

PARTIES

A. Plaintiffs

14. The New York Immigration Coalition ("NYIC") is an umbrella policy and advocacy organization for more than 200 groups in New York State, representing the collective interests of New York's diverse immigrant communities and organizations. It has its principal place of business at 131 West 33rd St, New York, NY 10001.

15. NYIC's mission is to unite immigrants, members, and allies so that all New Yorkers can thrive. It envisions a New York state that is stronger because all people are welcome, treated fairly, and given the chance to pursue their dreams. NYIC pursues solutions to advance the interests of New York's diverse immigrant communities and advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups. It seeks to build the power of immigrants and the organizations that serve them to ensure their sustainability, improve people's lives, and strengthen New York State.

16. NYIC's 200-plus members are dues-paying, 501(c)(3), nonprofit organizations that are committed to advancing work on immigrant justice, empowerment, and integration. NYIC's members are located throughout New York State and beyond. These member groups include grassroots community groups, social services providers, large-scale labor and academic institutions, and organizations working in economic, social, and racial justice. A number of NYIC's member organizations receive funding from a variety of local, state, and federal government sources to carry out social service,

health, and education programs. Many of these organizations receive governmental funding that is directly tied to the Decennial Census.[1]

17. The differential undercount[2] caused by the addition of the citizenship question in the 2020 Decennial Census will reduce the amount of federal funds that are distributed to the states and localities within the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure a number of NYIC's member organizations that receive funding to carry out social service, health, and education programs in these areas.

18. As an organization, NYIC also has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For example, NYIC partnered with the New York Community Media Alliance to launch an outreach campaign to boost immigrant participation in the 2010 Decennial Census. As part of that effort, NYIC coordinated public service announcements in 24 languages that appeared in 69 newspapers. NYIC also held at least two press briefings with elected officials. These efforts helped to increase New York City's mail-in 2010 Decennial Census participation rate by approximately 3%.

19. For the 2020 Decennial Census, NYIC has already begun its outreach efforts. Since the beginning of 2018, it has helped form New York Counts 2020, a growing, non-partisan coalition of more than 50 diverse organizational stakeholders across New York to advocate for a fair and complete 2020 Decennial Census enumeration. This broad-based coalition, which was formally launched in March 2018, is composed of racial, ethnic, immigrant, religious, health, education, labor, housing, social

[1] U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* 10 (2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf.

[2] The Census Bureau describes the undercounting of particular racial and ethnic groups as a "differential undercount," as distinct from a "net undercount" of the entire population.

services, and business groups working in partnership with state and local government officials.

20. NYIC is investing resources to solidify the work and reach of New York Counts 2020 through robust advocacy, outreach, and mass educational forums. It has already begun disseminating online petitions, petitioning Community Boards to pass resolutions for a fair and accurate count, and co-convening an all-day statewide conference, "Making New York Count in 2020." NYIC will continue coordinating the working committees of New York Counts 2020, including by: coordinating "train the trainer" sessions throughout the state to equip leaders with tools to educate their communities on the importance of the Decennial Census; devising effective messaging to convince hard-to-reach communities to participate; empowering coalition members to assist their communities in completing the Decennial Census online; and advocating to ensure that there are no unnecessary barriers impeding marginalized communities from being counted while also ensuring their privacy is protected.

21. In its extensive Decennial Census outreach, NYIC has already faced, and will continue to face, a much more difficult environment due to New York immigrant communities' heightened fear of interacting with government workers which will be increased by the addition of the citizenship question. This fear extends not only to undocumented immigrants or non-citizens with legal status, but also to family and household members of non-citizens who will be concerned that participating might endanger their loved ones.

22. Because of the heightened fear and suspicion created by the citizenship question, NYIC will be forced to expend more resources on their outreach efforts to try to reduce the effect of this question on the response rate in the immigrant communities they serve. Specifically, due to this strain on resources, NYIC is already fundraising to try to support its 2020 Decennial Census work. NYIC will need to apply for additional grants to sustain the increased need for Decennial Census outreach, further diverting its resources

that would otherwise be spent on trying to obtain grants for other areas. Further, NYIC has already, and will continue to, divert resources from its other organizational priorities, including its work on health care and language access issues.

23. Plaintiff CASA de Maryland, Inc. ("CASA") is a nonprofit membership organization headquartered in Langley Park, Maryland. It has offices in Maryland, Virginia and Pennsylvania.

24. CASA's mission is to create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment, and legal services to immigrant communities. CASA serves nearly 20,000 people a year through its offices and provides support to additional clients over the phone and through email.

25. CASA has more than 90,000 members in Maryland, Virginia and Pennsylvania, making it the largest membership-based immigrant rights organization in the Mid-Atlantic region. Over 32,000 of CASA's members reside in Prince George's County, Maryland, a jurisdiction where both the Latino and Central American immigrant population exceed both the national and state average. The differential undercount that will result from adding the citizenship question to the 2020 Decennial Census will result in a lower percentage of federal funding allocated to this jurisdiction, injuring CASA members who reside there. For example, CASA's members in Prince George's County include parents with children enrolled in Title I schools, and truck drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

26. The differential undercount that will result from adding the citizenship question to the 2020 Decennial Census will also diminish the political power and influence of CASA's members in jurisdiction such as Prince George's County. In jurisdictions such as Prince George's County where immigrant populations of color exceed both the national and state average, the differential undercount will cause immigrants of color to be placed in malapportioned congressional and state legislative

districts that have greater population than other districts in the same state. These communities, moreover, will comprise a lesser percentage of the total population of the congressional or state legislative district than they would but-for the differential undercount.

27. CASA as an organization also receives governmental funding that is directly tied to the Decennial Census. Among other things, CASA receives Community Development Block Grant (CDBG) funds that are allocated based on population and demographics determined by the Decennial Census, including poverty levels. The differential undercount that will result from adding the citizenship question to the 2020 Decennial Census will result in a lower percentage of CDBG funds allocated to the areas that CASA serves, and therefore CASA will receive less of such funds as a result.

28. CASA has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. In the months leading up to and during the 2010 Decennial Census, CASA conducted outreach and engagement work with the immigrant community in its region concerning census participation. That work consisted of educating constituents about the Decennial Census, its importance to the community, and assisting individuals in answering the census questionnaire.

29. For the 2020 Decennial Census, once again CASA plans on participating in outreach and education work and hopes to receive outside funding to help support this work. This time, however, CASA's efforts will be undermined by the Trump Administration's intentional effort to instill heightened fear of interacting with government workers among immigrant communities of color, including through the addition of the citizenship question. This fear extends not only to undocumented immigrants or non-citizens with legal status but also to family members of non-citizens, who will be concerned that participating in the Decennial Census might endanger their loved ones.

30. Because of the heightened fear and suspicion created by the citizenship question, CASA will be forced to expend more resources on its Decennial Census outreach efforts to try to reduce the effect of this question on the response rate in the immigrant communities of color it serves. Specifically, CASA intends to invest more resources in communications, including through social media and videos to engage more people. Despite these efforts, CASA still expects it will need to interact with community members multiple times to answer questions and try to convince them to participate in the 2020 Decennial Census.

31. CASA expects it will need to spend more resources to reach the same number of people as it did in 2010, and that ultimately it will be less successful in convincing its constituents to participate in the 2020 Decennial Census due in large part to the presence of the citizenship question.

32. Because of the need to increase the time and money spent on Decennial Census outreach due to the addition of the citizenship question, CASA will need to divert resources from other areas critical to its mission, including job training and health outreach. Indeed, CASA has already had to divert resources from these areas in order to address concerns from its constituents stemming from the announcement of the citizenship question.

33. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending and promoting the rights and liberties of Arab-Americans and other persons of Arab heritage. ADC is the largest American-Arab grassroots civil rights organization in the United States.

34. Founded in 1980 by former Senator James Abourezk, ADC's objectives include combating stereotypes and discrimination against and affecting the Arab-American community in the United States, serving as a public voice for the Arab-American community in the United States on domestic and foreign policy issues, and educating the American public in order to promote greater understanding of Arab history

and culture. ADC advocates, educates, and organizes to defend and promote human rights and civil liberties of Arab-Americans and other persons of Arab heritage.

35. ADC has several thousand dues-paying members nationwide, including members in all 50 states. Its members are also active through ADC's 28 local chapters, located in 20 states and the District of Columbia. ADC has members in states likely to either lose a congressional seat or not receive an additional congressional seat that the state otherwise would have gained during the post-2020 Decennial Census apportionment process as a result of the increased differential undercount that will occur in those states due to the addition of the citizenship question. These states include Texas, Arizona, and Florida, each of which has significant Latino, Arab-American, and immigrant populations.

36. ADC also has members who live in states that use unadjusted Decennial Census figures to determine congressional and/or state legislative allocations. In jurisdictions such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, the differential undercount will cause ADC's members to be placed in malapportioned congressional and state legislative districts that have greater population than other districts in the same state. These communities, moreover, will comprise a lesser percentage of the total population of the congressional or state legislative district than they would but-for the differential undercount.

37. The differential undercount caused by the addition of the citizenship question in the 2020 Decennial Census will reduce the amount of federal funds that are distributed to the states and localities within the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure ADC members who reside in these areas, such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, Kings County, New York, and Prince George's County, Maryland. Its members will be harmed by the loss of federal funding tied to the Decennial Census due

to an increased differential undercount in these areas caused by the addition of the citizenship question, as all of these jurisdictions have Latino and immigrant populations greater than their respective state averages. For example, ADC has members in these jurisdictions with children enrolled in Title I schools and members who use the roads on a regular basis and thus depend in part on federal highway funds for their upkeep.

38. As an organization, ADC is also committed to promoting engagement in the Decennial Census among its members and constituents. In the months leading up to and during the 2010 Decennial Census, ADC conducted outreach and engagement work with the Arab-American community concerning census engagement. That work consisted of creating messaging about participating in the Decennial Census that was focused on the Arab-American community, and efforts to "get out the count" in that community as well. Part of the financial support for conducting this outreach came from the federal government.

39. For the 2020 Decennial Census, ADC has already begun its engagement work within the Arab-American community. In 2017, it focused on educating community members about the Decennial Census and its importance. This year, ADC will hold focus groups to test messaging about Decennial Census participation and will follow up with polling afterwards. As the Decennial Census draws nearer, ADC will conduct training for census enumerators, run advertisements encouraging participation, and hold a strategy symposium, among other activities.

40. During the 2020 Decennial Census, ADC will face a much more difficult environment due to increased fear of interacting with government workers among the Arab-American community, a fear which will be heightened by the addition of the citizenship question. This fear extends not only to undocumented immigrants or non-citizens with legal status, but also to family and household members of non-citizens, who fear that participating in the Decennial Census might endanger their loved ones.

41. Because of the heightened fear and suspicion created by the citizenship question, ADC will be forced to invest more resources in its Decennial Census outreach efforts to try to reduce the effect of the citizenship question on the response rate in the communities it serves. Specifically, ADC intends to invest more resources in messaging and communications to engage more people, but still expects that it will require increased interactions and contacts to try to convince its constituents to participate in the 2020 Decennial Census.

42. ADC expects that if the citizenship question is introduced, it will need to spend more resources to reach the same number of people as it did in prior Decennial Censuses and that ultimately, it will be less successful in convincing its constituents to participate due to the presence of the citizenship question.

43. Because of the need to increase the time and money spent on Decennial Census outreach caused by the addition of the citizenship question, ADC will need to divert resources from other areas critical to its mission, including organizing, issue advocacy efforts and educational initiatives. ADC has already had to divert resources from these areas to address an increase in concern from its constituents stemming from the announcement of the citizenship question.

44. Plaintiff ADC Research Institute ("ADCRI") is a 501(c)(3) corporation founded in 1982 by former Senator James Abourezk. ADCRI sponsors public programs and initiatives in support of the constitutional and First Amendment rights of Arab-Americans, as well as research studies, publications, seminars, and conferences that document discrimination faced by Arab-Americans in the workplace, schools, media and government agencies. These programs also promote a better understanding of Arab cultural heritage by the public and policy makers.

45. ADCRI is also committed to promoting engagement in the Decennial Census among its constituents. In the months leading up to and during the 2010 Decennial Census, ADCRI conducted outreach and engagement work with the Arab-

American community concerning census engagement. ADCRI has already begun such engagement work for the 2020 Decennial Census.

46. This time, however, ADCRI will face a much more difficult environment due to increased fear in the Arab-American community of interacting with government workers due in part to the addition of the citizenship question. Because of this heightened fear and suspicion created by the citizenship question, ADCRI will be forced to invest more resources in its outreach efforts to try to reduce the effect of this question on the response rate in the communities it serves. As a result, ADCRI expects it will need more resources to reach the same number of people as it did in 2010 and that ultimately, it will be less successful in convincing its constituents to participate in the 2020 Decennial Census due in large part to the presence of the citizenship question.

47. Because of the need to increase the time and money spent on Decennial Census outreach due to the addition of the citizenship question, ADCRI will need to divert resources from other areas critical to its mission, including its engagement with public school teachers and other educational issues. ADCRI has already needed to divert resources from these areas to address increased concerns by its constituents stemming from the announcement of the citizenship question.

48. Plaintiff Make the Road New York ("Make the Road New York") is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains.

49. Make the Road New York's mission is to build the power of immigrant and working class communities to achieve dignity and justice. To achieve this mission, they engage in four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation.

50. Make the Road New York has more than 22,000 members who reside in New York City, Long Island and Westchester County. These members lead multiple organizing committees across numerous issues and program areas of concern to the

organization. Members take on leadership roles in the campaigns, determine priorities, and elect the representatives who comprise most of the Board of Directors.

51. The jurisdictions where Make the Road New York members reside, including New York City, have Latino immigrant populations that exceed the national and state averages. Make the Road New York also has members who live in jurisdictions with similar demographics in more suburban areas outside of New York City. Its members in these jurisdictions rely on a number of government services whose funding is allocated based on population and demographics determined by the Decennial Census. This includes parents with children enrolled in Title I schools, and drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

52. The differential undercount caused by the addition of the citizenship question in the 2020 Decennial Census will reduce the political power of individual residing in area where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, and will reduce the amount of federal funds that are distributed to the states and localities within the states where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. Make the Road New York members reside in these areas, and thus its members will be deprived of political influence and funding to which they would be entitled by a more accurate census.

53. One of the many Make the Road members who will suffer injury due to the addition of a citizenship question is Perla Lopez. Ms. Lopez is a resident of Queens County, NY, where she works as a Youth Organizer. Because the number of Latino and immigrant residents of Queens County far exceeds the New York state average, the differential undercount will cause Ms. Lopez and other Make the Road New York members in Queens to lose out on political power and funding that will instead go to other areas of New York State.

54. As an organization, Make the Road New York receives governmental funding that is tied to the Decennial Census. For example, Make the Road New York receives funding through the Community Services Block Grant ("CSBG") program to fund adult literacy programs and legal services and outreach. Make the Road New York also receives funding to promote access to health care and education. The differential undercount that will result from adding the citizenship question to the 2020 Decennial Census will result in a relative reduction in funds allocated to areas that Make the Road New York serves, and therefore Make the Road will receive a comparative reduction of such funds.

55. Make the Road New York has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. In the months leading up to and during the 2010 Decennial Census, Make the Road New York conducted outreach and engagement work with the immigrant community in its region concerning census participation. That work consisted of educating constituents about the Decennial Census and its importance to the community.

56. For the 2020 Decennial Census, Make the Road New York once again plans on participating in outreach and education work and hopes to receive outside funding to help support this work. This work will include, among other things, general education programs, workshops for members and door-to-door outreach. This time, however, Make the Road New York will face a much more difficult environment due to its constituents' heightened fear of interacting with government workers, which will be increased by the addition of the citizenship question. This fear extends not only to undocumented immigrants or non-citizens with legal status, but also to family and household members of non-citizens, who will be concerned that participating in the Decennial Census might endanger their loved ones. Make the Road New York has confirmed from conversations with several of its members that some of them would be

fearful of responding to the Decennial Census questionnaire if the citizenship question is added.

57. Because of the heightened fear and suspicion created by the citizenship question, Make the Road New York will be forced to expend more resources on their Decennial Census outreach efforts to try to reduce the effect of this question on the response rate in the immigrant communities of color it serves. Additionally, because of the climate of fear that is being exacerbated by the addition of the citizenship question, Make the Road New York has started its census education work earlier than originally anticipated. Despite these efforts, Make the Road New York still expects it will need to interact with its constituents multiple times to answer questions and try to convince them to participate in the 2020 census.

58. Make the Road New York expects that it will need to spend more resources to reach the same number of people and that ultimately it will be less successful in convincing its constituents to participate in the 2020 Decennial Census than in 2010 due in large part to the presence of the citizenship question.

59. Because of the need to increase the time and money spent on Decennial Census outreach due to the addition of the citizenship question, Make the Road New York will need to divert resources from other areas critical to its mission including civic engagement, and providing legal services. Indeed, Make the Road New York has already had to divert resources from other areas in order to address concerns from its constituents stemming from the announcement of the citizenship question.

B. Defendants

60. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the

meaning of 5 U.S.C. § 552(f). The Commerce Department is responsible for planning, designing, and implementing the 2020 Decennial Census.[3]

61. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He oversees the Bureau of the Census ("Census Bureau") and is thus responsible for conducting the Decennial Census of the population.[4] He is sued in his official capacity.

62. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce.[5] The Census Bureau is the agency responsible for planning and administering the Decennial Census.

63. Defendant Ron S. Jarmin is the Associate Director of the Census Bureau who is currently performing the nonexclusive functions and duties of the Director of the Census Bureau. He is sued in his official capacity.

FACTS

A. Background on the Decennial Census

1. The Constitutional and Statutory Framework around the Decennial Census

64. The U.S. Constitution requires the federal government to conduct a Decennial Census counting the total number of "persons"—regardless of citizenship status—residing in each state. The Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," U.S. Const. art. I, cl. 2, § 3; which requires "counting the whole number of persons in each State," *id.* amend. XIV, § 2. To ensure fair representation among the states, the Constitution requires that this count be an "actual Enumeration" conducted every ten years.

[3] 13 U.S.C. § 4.
[4] 13 U.S.C. § 141(a).
[5] 13 U.S.C. § 2.

65. Through the Census Act, Congress has assigned the responsibility of making this enumeration to the Secretary of Commerce, and created the Census Bureau within the Department of Commerce to spearhead this effort.[6] The Secretary has delegated authority for establishing procedures to conduct the census to the Census Bureau. The central constitutional purpose of the Census Bureau in taking the Decennial Census is to conduct an accurate enumeration of the population.

66. Under these provisions, the Secretary of Commerce is charged with the responsibility to take a Decennial Census to create an actual enumeration of the United States population.[7] The Secretary's discretion in performing the census, however, is not without limits —the Secretary must comply with legal requirements established by the Constitution, statutes, and regulations governing the census. For example, the Secretary's decisions must be consistent with the "constitutional goal of equal representation" and that bear a "reasonable relationship to the accomplishment of any actual enumeration of the population."[8]

67. To enable a person-by-person count, the Census Bureau sends a questionnaire to virtually every housing unit in the United States. The questionnaire is directed to every resident in the United States and, under 13 U.S.C. § 221, residents are legally required to respond. The Census Bureau then counts responses from every household to determine the population count in each state.

68. The Census Bureau's constitutional obligation requires that the Census Bureau obtain as accurate an enumeration as possible by ensuring the maximum participation in the Decennial Census.

[6] 13 U.S.C. §§ 2, 4, 5, 141(a).
[7] 13 U.S.C. § 141(a).
[8] *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

2. The Decennial Census' Role in the Apportionment of Political Representation and the Distribution of Federal Resources

69. The population data collected through the Decennial Census determines the apportionment of seats in the U.S. House of Representatives among the states. Such apportionment is "based on total population," including both citizens and non-citizens.[9]

70. The population data collected through the Decennial Census also determines the number of electoral votes each state has in the Electoral College.

71. States also use Decennial Census data to draw congressional, state, and local legislative districts.

72. All states use Decennial Census data to draw their congressional districts.[10] When drawing these districts, states must adhere to the U.S. Constitution's one-person, one-vote requirement that congressional districts within a state be equal in population.[11] Consequently, when a local community is disproportionately undercounted in the Decennial Census, the community will be placed in a malapportioned congressional district that has greater population than other congressional districts in the same state. The community, moreover, will comprise a lesser percentage of the total pop the community will be placed in a malapportioned congressional district that has greater population than other congressional districts in the same state. The community, moreover, will comprise a lesser percentage of the total population of the congressional district than it would but-for the differential undercount.

73. Most states, including Florida, Texas, and New York, also use Decennial Census data to draw state legislative districts. Some states have state constitutional provisions prohibiting their state legislature from adjusting census data in drawing state legislative districts consistent with one-person, one-vote requirements.[12] And some

[9] *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2016).

[10] *Id.* at 1124.

[11] *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[12] *See* Fla. Const. art. X § 8; Tex. Const. art III; § 26; *see also Reynolds v. Sims*, 377 U.S. 533, 559, 577 (1964); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

municipalities, including New York City, use Decennial Census data to apportion municipal legislative districts. Consequently, when a local community in any of these states is disproportionately undercounted in the Decennial Census, the community will be placed in a malapportioned legislative district that has greater population than other legislative districts in the same state. The community, moreover, will comprise a lesser percentage of the total population of the legislative district than it would but-for the differential undercount.

74. The federal government also uses Decennial Census data to allocate hundreds of billions of dollars in public funding each year, including to states and local governments. A total of approximately $700 billion is distributed annually to nearly 300 different census-guided federal grant and funding programs. These funds determine the ability of state and local governments to provide for quality education, public housing, transportation, health care and other services, for all their residents, citizens and non-citizens alike.

B. The Decennial Census' Undercount of Immigrant Communities of Color and Past Practice of Excluding a Question Concerning Citizenship

1. The Decennial Census' Historical Undercount of Immigrant Communities of Color

75. Some demographic groups have proven more difficult to count than others. The Census Bureau refers to these groups as "hard-to-count." Racial and ethnic minorities, immigrant populations, and non-English speakers have historically been some of the hardest groups to count accurately in the Decennial Census due to issues such as language barriers and distrust of government.

76. The Census Bureau itself has determined that Latinos are at a greater risk of not being counted. Recent data shows that of the estimated 56.5 million Latinos living

in the United States, "roughly one in three live in hard-to-count census tracts [i.e., communities]."[13]

77. Individuals identifying as Hispanic were undercounted by almost 5% in the 1990 Decennial Census, and though the number has decreased some over the past two censuses, it remains significant. The 2010 Decennial Census failed to count more than 1.5 million Hispanic and African-American individuals. Other immigrant communities, including Asian-Americans and Arab-Americans, have historically been undercounted as well.

78. The Census Bureau describes the undercounting of particular racial and ethnic groups as a "differential undercount," as distinct from a "net undercount" of the entire population.[14] Indeed, the population of the United States as a whole is typically over-counted. For example, in 2010, the total U.S. population was over-counted by approximately .01%, due mostly to duplicate counts of whites owning multiple homes.[15]

79. Over time, the Census Bureau has developed a range of strategies to address the differential undercount of "hard-to-count" populations—including targeted marketing and outreach efforts, partnerships with community organizations, deployment of field staff to follow up with individuals who do not respond, and retention of staff with foreign language skills. In conjunction with prior Decennial Censuses, the Census Bureau designed and implemented public advertising campaigns to reach hard-to-count immigrant communities, including using paid media in over a dozen different languages to improve responsiveness.

80. For the 2000 and 2010 Decennial Censuses, the Census Bureau partnered with local businesses, faith-based groups, community organizations, elected officials, and

[13] The Leadership Conference Education Fund, *Will You Count? Latinos in the 2020 Census* 1 (April 2018).

[14] *See* Coverage Measurement Definitions, Census.gov (last visited Jun. 2, 2018), https://www.census.gov/coverage_measurement/definitions/.

[15] Associated Press, *2010 Census Missed 1.5 Million Minorities*, CBS News, May 22, 2012, https://www.cbsnews.com/news/2010-census-missed-15-million-minorities/.

ethnic organizations to reach these communities and improve the accuracy of the count. These efforts and increased investment of resources in the 2000 and 2010 Decennial Censuses reduced the undercount of all populations, including hard-to-count populations.

2. The Census Bureau's Decades-Long Opposition to the Inclusion of a Citizenship Question on the Decennial Census

81. For decades, the Census Bureau opposed the inclusion of a question about citizenship status on the Decennial Census questionnaire based on its longstanding expert conclusion that the inclusion of such a question would impair accuracy, and exacerbate the undercounting of immigrant communities of color.

82. The question concerning citizenship did not appear on the short-form Decennial Census questionnaire sent to every household in the United States, in 1960, 1970, 1980, 1990, 2000, or 2010.

83. Prior to the 1980 Decennial Census, an interagency council tasked with examining the census questionnaire recommended that a citizenship question not be included on the 1980 Decennial Census questionnaire sent to every household in the United States.[16]

84. Similarly, in 1980, the Census Bureau opposed adding a citizenship question, stating that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. . . . Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate."[17]

85. Prior to the 1990 Decennial Census, the Census Bureau once again opposed the addition of inquiries into immigration status in the Decennial Census.[18] The

[16] Aff. of Daniel B. Levine, Deputy Dir. of the Census Bureau at ¶ 5, Ex. A to Defs.' Mot. To Dismiss the Action or, in the Alt., for Summ. J., *Fed'n for Am. Immigr. Reform v. Klutznick*, No. 79-3269 (D.D.C. Jan. 9, 1983).

[17] *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

[18] *See* Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv., 101st Cong. 43–45, 59 (1989) (statement of C. Louis Kincannon, Deputy

then-Director of the Bureau testified before Congress that asking about citizenship or legal status could cause the Census Bureau to be "perceived as an enforcement agency" and that doing so would have "a major effect on census coverage."[19] He also told Congress that the Census Bureau believed that the addition of a citizenship question would cause immigrants and legal residents to "misunderstand or mistrust the census and fail or refuse to respond."[20]

86. Similarly, the Census Bureau declined to include a question on citizenship in the 2000 and 2010 Censuses. In 2005, former Census Bureau Director Kenneth Prewitt testified that adding a citizenship question would reduce response rates by non-citizens and the accuracy of counts for both citizens and non-citizens would be worse if the question was included.[21]

87. In 2009, eight former Census Bureau Directors—from both political parties—issued a statement in response to a congressional attempt to add a question on citizenship and immigration status to the 2010 Decennial Census. The former directors raised concerns that the Census Bureau would not have enough time to determine the effect of suggested questions concerning citizenship and immigration status on data quality and about the potential impact on participation in the 2010 Decennial Census of

---

Director, Census Bureau); Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv., 100th Cong. 50–51 (1988) (testimony of John Keane, Director, Census Bureau) (hereinafter "Keane Testimony 1988").

[19] Enumeration of Undocumented Aliens in the Decennial Census: Hr'g Before the Subcomm, on Energy, Nuclear Proliferation, and Gov't Processes of the S. Comm. on Governmental Affairs, 99th Cong. 16, 23, 32 (1985) (statement of John Keane, Dir., Bureau of the Census).

[20] Keane Testimony 1988, *supra* n.18, at 50.

[21] Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?: H'rg Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform, 109th Cong. 72-73, 76-78 (2005) (statement of Kenneth Prewitt).

both legal and undocumented immigrants, particularly in mixed immigration status households.[22]

88. In 2010, the Director of the Census Bureau explained that "we don't ask citizenship or documentation status" on the Decennial Census and that the form does not include "things that may make some people uncomfortable."[23]

89. As recently as 2016, four former Census Bureau Directors appointed by presidents of both political parties filed a Supreme Court amicus brief in which they explained that "a [person-by-person] citizenship inquiry would invariably lead to a lower response rate to the Census in general," and would "seriously frustrate the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states."[24]

90. The almost 70-year long practice of not inquiring about citizenship on the Decennial Census has ensured that the Census Bureau has the best opportunity to achieve the constitutional mandate of a complete count of every person—both citizens and non-citizens—in the United States.

3. Reliable Citizenship Data Gathered by the Census Bureau through Means Other than the Decennial Census Questionnaire

91. Of course, the Census Bureau is able to gather citizenship data through surveys, but it does so separate and apart from the Decennial Census' actual enumeration of the population.

---

[22] Vincent P. Barabba, et al., *Statement of Former Census Directors on Adding a New Question to the 2010 Census* (Oct. 16, 2009), https://reformimmigrationforamerica.org/wp-content/uploads/2009/10/thecensusproject.org_letters_cp-formerdirs-16oct2009.pdf.

[23] *Video of Robert Groves*, C-SPAN (Mar. 26, 2010), https://www.c-span.org/video/?292743-6/2010-us-census&start=1902.

[24] Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

92. Through the 2000 Decennial Census, the Census Bureau also used a second, "long form" questionnaire, which was sent to approximately one in six households, and which contained additional questions. From 1970 to 2000, one of the questions on the long form questionnaire concerned citizenship status.

93. Beginning in 2010, the long form Decennial Census questionnaire was discontinued. Its functions were replaced by the American Community Survey ("ACS"), which began operating in 2000 and was at full sample size for housing units in 2005, and for group quarters in 2006. The ACS is a yearly survey of approximately 2% of households across the United States (about 3.5 million). Unlike the Decennial Census, the ACS is not a hard count, but rather a sample that is used to generate statistical estimates, and which can be adjusted to correct for an undercount. Although the ACS survey is conducted annually, ACS data from individual years can also be aggregated in multi-year estimates (referred to as "3-year" or "5-year" estimates," depending on the number of years of data aggregated together) to produce greater levels of statistical precision for estimates concerning smaller geographical units.

94. As the Census Bureau points out, the Decennial Census and ACS "serve different purposes." While the Decennial Census is intended to "provide an official count of the entire U.S. population to Congress," the ACS is intended to provide information on the social and economic needs of communities.[25]

95. A question concerning citizenship status currently appears as among one of more than 50 questions on the detailed 28-page ACS questionnaire. The citizenship question that appears on the ACS is not a simple binary yes/no question. Rather, for U.S. citizens, it also asks more detailed information about a person's place of birth; and for some U.S. citizens, it also requests information about the citizenship status of their

[25] *ACS and the 2020 Census*, U.S. Census Bureau (last updated Jan. 12, 2018), https://www.census.gov/programs-surveys/acs/about/acs-and-census.html.

parents, and whether they became a U.S. citizen by naturalization. The ACS citizenship question appears as follows:

96. The citizenship information gathered through the ACS surveys has been, and continues to be, used by a wide array of local, state, and federal agencies, as well as civic organizations and researchers.

97. The inclusion of a citizenship question on the ACS questionnaire does not implicate the same concerns as including a citizenship question on the Decennial Census. The highly detailed ACS questionnaire, which is sent only to a smaller representative sample of the population, does not carry the same appearance as a federal door-to-door inquiry of the entire population of the United States. Moreover, unlike the Decennial Census, which is a hard count of the population that cannot be adjusted statistically to account for non-respondents, population data from the ACS is based on a sample that may be adjusted statistically to produce reliable estimates for the larger population.

C. Advocacy Efforts by Members and Associates of the Trump Administration to Add a Citizenship Question to the Decennial Census in Response to the Growing Political Power of Immigrant Communities of Color

98. For years, individuals who are now members and associates of the Trump Administration have expressed concern about the presence and growth of immigrant communities of color in this country and their attendant political power, and have

advocated adding a citizenship question to the Decennial Census for the express purpose of facilitating efforts to reduce the political clout of those communities.

99. For example, when Christopher Stanley, President Trump's Census Bureau Chief of Congressional Affairs, served as a senior legislative aide to former Senator David Vitter, Vitter sponsored legislation in 2010, 2012, and again in 2014 seeking to add a citizenship question to the Decennial Census. Vitter said he wanted to prevent "large populations of illegals [from being] rewarded" in congressional apportionment.[26]

100. Trump Administration advisors on the issues of elections and voting—including members of President Trump's appointees to his now-defunct Presidential Commission on Election Integrity ("PCEI"), made repeated statements to the same effect. For example, PCEI Commissioner Hans von Spakovsky said adding the citizenship question was "essential,"[27] and criticized inclusion of non-citizens in the census, complaining that it "dilutes the votes of citizens by including large numbers of ineligible individuals such as noncitizens . . . [in] redistricting, allowing them to manipulate and gerrymander legislative districts."[28]

101. President Trump's PCEI Vice-Chair, Kansas Secretary of State Kris Kobach, is an anti-immigrant zealot who says that he proposed to President Trump that he add a citizenship question to the Decennial Census "shortly after he was inaugurated"

---

[26] Jonathan Tilove, *Census Bureau knocks Sen. David Vitter's proposal to ask about immigration status*, Times-Picayune, Oct. 13, 2009, http://www.nola.com/politics/index.ssf/2009/10/census_bureau_knocks_sen_david.html.

[27] Hans A. von Spakovsky, *Commentary: Citizenship Question Essential for Accurate U.S. Census*, Orlando Sentinel, Feb. 19, 2018, http://www.orlandosentinel.com/opinion/os-ed-accurate-census-important-front-burner-20180214-story.html.

[28] Hans A. von Spakovsky, *Evenwel v. Abbott: Destroying Electoral Equality and Eroding "One Person, One Vote,"* CATO SUPREME COURT REVIEW 2016, https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2016/9/2016-supreme-court-review-chapter-4.pdf.

in January 2017. Kobach reports that President Trump "absolutely was interested in this."[29]

102. In January 2018, Kobach blogged that adding a citizenship question to the Decennial Census was for the express purpose of draining political representation from immigrant communities. He complained that currently when "congressional districts are drawn up . . . not only are legal aliens counted, but illegal aliens are counted too," and that having this information was necessary "so Congress [can] consider excluding illegal aliens from the apportionment process" and reduce the political power of those communities, as well as to provide the government "information about the movement of people in and out of the country."[30] Kobach's blog post did not mention VRA enforcement as any reason for adding a citizenship question to the Decennial Census.

103. And at about the same time as Kobach was pitching the citizenship question to President Trump, Chair of the White House Domestic Policy Council, Andrew Bremberg, released a draft Executive Order proposing census questions to determine immigration and citizenship status.[31]

104. The Administration's hostility towards immigrants is motivated by animus toward people of color and is in response to the growing political power of immigrant communities of color. The vast majority of immigrants in the United States—approximately 86.7%—are people of color and 44.9% are of Latino origin.[32]

---

[29] Bryan Lowry, *That citizenship question on the 2020 Census? Kobach says he pitched it to Trump*, Kansas City Star, Mar. 27, 2018, http://www.kansascity.com/news/politics-government/article207007581.html.

[30] Kris Kobach, Exclusive—Kobach: Bring the Citizenship Question Back to the Census, Breitbart, Jan. 30, 2018, http://www.breitbart.com/big-government/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/.

[31] Bremberg, Memorandum for the President, Subject: Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility (Jan. 23, 2017), http://apps.washingtonpost.com/g/documents/national/draft-executive-orders-on-immigration/2315/.

[32] 2016 State Immigration Data Profiles, Migration Policy Institute (June 1, 2018), https://www.migrationpolicy.org /data/state-profiles/state/demographics/US.

105. The goal of reducing the political representation of immigrant communities of color is consistent with xenophobic rhetoric that immigration should be restricted because of the political consequences.[33] For example, Mark Krikorian, the Executive Director of the Center for Immigration Studies—a leading source for Trump Administration immigration policy and personnel—warned in 2015 that:

> immigrants and their adult children are disproportionately big-government liberal who vote heavily Democrat because that party's policies accord with their own views and interests…. Note that better control over illegal immigration—walls, mass deportations, whatever— isn't going to fix this. Most immigration is legal immigration and that's where change is most needed.[34]

106. President Trump has similarly complained about the growth of immigrant communities of color. For example, on August 21, 2015, then-candidate Trump tweeted, "How crazy - 7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop. Unaffordable and not right!"[35] Just weeks before the election, candidate Trump similarly lamented that immigrants "as a share of national population is set to break all records."[36]

107. More recently, on April 5, 2018, President Trump criticized current U.S. immigration policy because in his view, it enhanced the political power of immigrant communities of color, saying:

> we cannot let people enter our country… through chain migration….This is what the Democrats are doing to you. And they like it because they think they're going to vote Democratic….

---

[33] *See* Jason Richwine, *More Immigration Would Mean More Democrats*, National Review (Oct. 3, 2017) https://www.nationalreview.com/2017/10/immigration-democratic-party-republican-party-dream-act-party-affiliation-conservatives-limited-government-traditional-values/; *and* Gillian Edevane, *Trump Laments People In Migrant Caravan: Immigrants All 'Vote For Democrats,'* Newsweek, Apr. 30, 2018, http://www.newsweek.com/trump-laments-caravan-immigrants-vote-democrats-906220.

[34] Mark Krikorian, *Mass Legal Immigration Will Finish Conservatism*, National Review, Aug. 31, 2015, https://www.nationalreview.com/2015/08/real-threat-conservatism-isnt-trump-mark-krikorian/.

[35] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[36] Los Angeles Times Staff, *Transcript: Donald Trump's full immigration speech, annotated*, L.A. Times, Aug. 31, 2016, http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html.

> A lot of them aren't going to be voting. A lot of times it doesn't matter, because in places, like California, the same person votes many times. You probably heard about that. They always like to say. 'Oh, that's a conspiracy theory.' Not a conspiracy theory, folks. Millions and millions of people.[37]

108. Again, on April 28, 2018, President Trump said:

> If a person puts their foot over the line, we have to take them into our country. We have to register them.… And you know, one of the reasons they do it is because the Democrats actually feel and they are probably right, that all of these people that are pouring across are going to vote for Democrats, they're not going to vote for Republicans, they're going to vote no matter what we do, they're going to vote.[38]

109. President Trump's repeated statements lamenting the growth of immigrant communities of color and their attendant political power dovetail with his repeated denigration of non-white immigrants; characterizing them as violent criminals and terrorists, animals, and deadbeats; and calling for steps that would prevent immigrants of color from entering and/or to reduce their numbers within the United States. To take just a few examples:

- In launching his presidential campaign, Trump said: "When Mexico sends its people. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from more than Mexico. It's coming from all over South and Latin America."[39]

- Repeatedly over the course of his campaign, Trump characterized the U.S. citizen children of immigrants as "anchor babies" [40] and vowed to seek an end to "birthright citizenship."[41]

---

[37] Donald Trump, Remarks by President Trump at a Roundtable Discussion on Tax Reform (Apr. 5, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-tax-reform/.

[38] Draft Transcript, Donald Trump, Make America Great Again Rally in Washington, Michigan (Apr. 28, 2018), https://factba.se/transcript/donald-trump-speech-maga-rally-washington-michigan-april-28-2018

[39] Full text: Donald Trump announces a presidential bid, Wash. Post, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?noredirect=on&utm_term=.0a30b7ba1f8a.

[40] Reena Flores, *Donald Trump: "Anchor babies" aren't American citizens*, CBS News, Aug. 19, 2015, https://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens/.

- Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad. . ."[42]

- On February 27, 2017, during a meeting with his advisors on the night before he would deliver his first address to Congress, President Trump "recited a few **made-up Hispanic names** and described potential crimes they could have committed, such as rape or murder." His advisors "[Stephen] Miller and [Jared] Kushner laughed."[43]

- On January 11, 2018, in a meeting with members of Congress, President Trump questioned why immigrants were being admitted from El Salvador, Haiti, and Africa, asking "why are we having all these people **from shithole countries** come here." In contrast, Trump said he preferred **immigrants "from places like Norway**."[44]

- As to the immigration diversity lottery, which provides visas to immigrants from countries with low rates of immigration to the U.S., President Trump stated in February 2018 that those selected "turn out to be horrendous. . . . They're **not giving us their best people**, folks."[45]

- On May 16, 2018, President Trump said "We have people coming into the country, or trying to come in. . . You wouldn't believe how bad these people are. These aren't people, these are **animals** …."[46]

---

[41] C. Brodesser-Akner & B. Johnson, *Trump: I'll sue to revoke birthright citizenship*, NJ.com, Aug. 22, 2015, http://www.nj.com/politics/index.ssf/2015/08/trump_revoke_us_citizenship_from_those_with_undocu.html

[42] Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* Wash. Post., Dec. 7, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.49b5e0e287f7.

[43] Josh Dawsey and Nick Miroff, *The Hostile Border between Trump and the Head of DHS*, Wash. Post, May 25, 2015, https://www.washingtonpost.com/politics/were-closed-trump-directs-his-anger-over-immigration-at-homeland-security-secretary/2018/05/24/4bd686ec-5abc-11e8-8b92-45fdd7aaef3c_story.html?utm_term=.fa5ec642b4a3.

[44] Ryan Teague Beckwith, *President Trump Called El Salvador, Haiti 'Shithole Countries'; Report*, TIME Magazine, Jan. 11, 2018, http://time.com/5100058/donald-trump-shithole-countries/.

[45] Dara Lind, *"The Snake": Donald Trump brings back his favorite anti-immigrant fable at CPAC*, Vox, Feb. 23, 2018, https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac.

[46] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

110. Consistent with his rhetoric, the Trump Administration has undertaken to reduce the number of immigrants of color in this country. Its actions include:

- Banning individuals from six majority Arab and/or Muslim countries from entering the United States;
- Rescinding the Deferred Action for Childhood Arrivals ("DACA") program, which allowed 800,000 individuals brought to this country as children to legally reside and work in the United States. Over 90% of the participants in the program were Latino;
- Rescinding Temporary Protected Status programs for individuals from El Salvador, Honduras, Nicaragua, Haiti, and Nepal. These programs had allowed over 310,000 individuals from these countries to reside legally in the United States.
- Calling to end the diversity visa lottery. Over 40 % of individuals admitted to the United States through the diversity visa program are from Africa, while another 30% are from Asia.
- Proposing to end family-based immigration. The countries that send the highest number of immigrants to the United States through family-based migration are in Latin America and Asia.

D. The Trump Administration's Addition of a Citizenship Question to the 2020 Decennial Census Questionnaire Was Motivated by Discriminatory Animus against Immigrant Communities of Color

111. The primary purpose of the Administration's unnecessary last-minute addition of a citizenship question was to harm Latinos and immigrants of color by reducing their political representation and access to federal resources. The evidence, just from public sources, is overwhelming. It includes: (1) the impact of adding the citizenship question on immigrant communities of color, both in terms of stoking fears of government among immigrants of color and reducing the political representation and access to resources in their communities; (2) the historical background of the decision to add the citizenship question, including other decisions by Secretary Ross to undermine measures that the Census Bureau has typically taken to mitigate the differential undercount; (3) the rushed and highly unusual sequence of events that led to the decision, including departures from procedural and substantive guidelines to test census questions

before implementation, ensure the overall accuracy of the Decennial Census enumeration, and protect the census from undue political influence; and (4) contemporaneous public statements by Trump Administration officials, allies, and the Trump campaign indicating that the purpose of adding a citizenship question to the Decennial Census was to reduce the political clout of immigrant communities of color.[47]

1. The Impact of Adding a Citizenship Question to the Decennial Census on Immigrant Communities of Color

112. As described, *supra*, for decades under both Republican and Democratic administrations, the Census Bureau has consistently opposed the addition of a citizenship question to the Decennial Census questionnaire due to concerns that such a question would deter participation among Latinos and immigrants, and thereby undermine the accuracy of the Decennial Census enumeration. The overwhelming consensus of professional demographers, political scientists, and statisticians is that the inclusion of a question on citizenship in the Decennial Census will cause many Latinos and immigrants of color not to respond to the questionnaire, exacerbating the differential undercount, and thus reducing the political representation and access to resources for members of these groups and others who live in the same communities.

a. *The Climate of Fear of Government among Latino and Immigrant Communities Created by the Trump Administration*

113. Particularly when coupled with the toxic anti-immigrant environment the Trump Administration has fomented, adding a citizenship question to the Decennial Census will sow significantly more fear among Latinos and other immigrant communities of color.

114. For example, the Trump Administration has engaged in a series of high profile immigration enforcement actions— sweeps, raids, and high profile arrests—

[47] *See Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977) (setting forth the factors for assessing claims alleging invidious purpose).

deliberately intended to promote fear in and among immigrant communities of color. These include:

- Starting on February 6, 2017, less than three weeks after President Trump's inauguration, ICE conducted a nationwide sweep by its Los Angeles, Atlanta, Chicago, New York and San Antonio field offices, resulting in 680 detentions.

- In September 2017, the Administration launched "Operation Safe City" which involved mass arrests of 450 individuals in Baltimore, Chicago, Denver, Los Angeles, New York, Philadelphia, Seattle, Washington, D.C., and Massachusetts.

- In April 2018, ICE raided a meatpacking plant in Morristown, Tennessee and detained 97 individuals, the largest workplace raid in a decade. According to press reports, during the raids ICE indiscriminately detained numerous Latino individuals who had authorization to work.

115. The Trump Administration's enforcement actions specifically target Latinos and immigrants of color. Of the 226,119 ICE removals during FY 2017, 93.48% of individuals deported were from Latin American countries.[48]

116. The Trump Administration's enforcement actions also target immigrants during interactions with government agencies. For example, Immigration and Customs Enforcement ("ICE") has begun summarily deporting individuals who reported for routine check-ins—even where they had received stays of deportation—and making "collateral arrests" of individuals ICE encountered during operations targeting other individuals.

117. As one of his first actions following his confirmation as Secretary of the Department of Homeland Security ("DHS"), on February 20, 2017, John Kelly issued a memorandum providing that DHS will "no longer afford Privacy Act rights and

[48] Fiscal Year 2017 ICE Enforcement and Removal Operations Report, U.S. Immigration and Customs Enforcement (June 1, 2018), https://www.ice.gov sites/default/files/documents/Report/2017/ iceEndOfYearFY2017.pdf.

protections to persons who are neither U.S. citizens nor lawful permanent residents."[49] Previous DHS policy and numerous DHS programs expressly provided assurances to immigrants and applicants that their personal data would be protected and could not be used for immigration enforcement purposes.

118. ICE has also engaged in high profile arrests of immigrants in "sensitive locations," including government venues previously considered safe spaces, including detaining:

- Parents after they drop off their children at schools;
- A ten-year-old child who was seeking medical care in a hospital;
- A woman in a hospital who was awaiting emergency surgery for brain cancer;
- Patients as they leave hospitals after seeking medical care;
- People in courthouses, including victims of domestic violence seeking protective orders or appearing at a custody hearing;

119. The Immigrant Defense Project documented a 1,200% increase in ICE arrests at courthouses in New York State between 2016 and 2017.[50]

120. These enforcement activities in sensitive spaces have been accompanied by the Trump Administration's public statements reinforcing the message that immigrant communities of color should fear the government. For example:

- On June 13, 2017, Acting ICE Director Thomas Homan testified in front of the House Appropriations Committee's Subcommittee on Homeland Security that "every immigrant in the country without papers . . . should be uncomfortable. You should look over your

[49] JOHN KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST at 5 (Feb. 20, 2017), *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (hereinafter "Kelly, Enforcement of Immigration Laws").

[50] Immigrant Defense Project, *IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017*, (Dec. 31, 2017), https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf.

shoulder. And you need to be worried. . . . No population is off the table. . . ."[51]

- On August 22, 2017, Homan again stated: "The message is clear: If you're in the United States illegally, if you happen to get by the Border Patrol, someone is looking for you. And that message is clear."[52]

- On May 7, 2018, Attorney General Sessions announced a "zero tolerance" policy, including separating children from parents who cross the border unlawfully.[53]

- On May 22, 2018, Secretary of Education Betsy DeVos testified in Congress that public schools can choose to call ICE to report potentially undocumented students, describing it as a "local community decision."[54]

121. These actions and statements by the Trump Administration have been successful in instilling fear among Latinos and other immigrant communities of color. Immigrants of color more broadly are now avoiding interactions with public institutions, even when it concerns their own personal health or safety or the well-being of their children.

122. For example, a 2017 survey of judges, law enforcement personnel, prosecutors, and victims' advocates conducted by the American University National Immigrant Women's Advocacy Project found marked increases in fear among

[51] Hearing on the ICE and CBP F.Y. 2018 Budget Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations, 115th Cong. (2017) 2017 WLNR 18737622.

[52] Press Release, The White House Office of the Press Secretary, Press Gaggle by Director of Immigration and Customs Enforcement Tom Homan et al. (June 28, 2017).

[53] *See* Jeff Sessions, Attorney General Sessions Delivers Remarks to the Association of State Criminal Investigative Agencies 2018 Spring Conference (May 7, 2018), available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-association-state-criminal-investigative; *see also* Jeff Sessions, Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions; *see generally* Sari Horwitz and Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children From Their Parents*, Wash. Post, May 7, 2018, https://www.washingtonpost.com/world /national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html?utm_term=.9d4809c83868.

[54] Rebecca Klein, *Betsy DeVos Stirs Uproar By Saying Schools Can Call ICE On Undocumented Kids*, Huffington Post, May 23, 2018, https://m.huffpost.com/us/entry/us_5b05a297e4b05f0fc8441ce3/amp.

immigrants resulting in a decline in immigrant willingness to cooperate in criminal prosecutions and immigrant victims seeking protection from the legal system.[55] The report's findings included that:

- The "vast majority (88% to 94%)" of judges "reported being concerned about the impact increased immigration enforcement could have on access to justice for immigrant." Judges similarly reported "that fear of coming to court, worry, and distrust of the police, courts, justice system, and getting involved with any government agencies impedes access to justice for immigrants."

- Law enforcement officials reported "seeing the decline in cooperation and a rise in fear of law enforcement" among immigrant communities "because they believe local law enforcement have the authority (and in some cases, the desire) to deport these individuals." 51% of law enforcement officials reported "fear of deportation" and 42% reported "[p]erpetrator threatened to turn victim in to immigration officials if [they] cooperated" as reasons for non-cooperation.

- Prosecutors reported that immigrants were less likely to cooperate in sexual assault and domestic violence cases than in prior years. Approximately 70% reported that the fear "that the perpetrator will have the victim deported" and "the perpetrator's direct threats to deport the victim" played a role in victims' unwillingness to cooperate.

- Victims' advocates report that "[p]rimary among the reasons for [immigrants] not seeking help from police or courts and not following through with these agencies" are "fear of deportation", "fear that the perpetrator will retaliate by calling immigration enforcement officials."

123. Numerous police chiefs and prosecutors from across the country have confirmed that the Trump Administration's actions have created deep insecurity and fear

[55] National Immigrant Women's Advocacy Project, Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey, May 3, 2018, http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf.

among immigrant communities, stopping many from coming to court or calling the police in the first place. For example:

- Los Angeles Police Chief Charlie Beck stated that reports of sexual assault and domestic violence made by Latino residents fell 25% and 10% respectively between 2016 and 2017 amidst deportation concerns.[56]

- Houston Police Chief Art Acevedo stated that the number of Hispanics reporting rape decreased 42.8% between 2016 and 2017.[57] In comparison, the same study showed an 8.2% increase in non-Hispanic victims reporting rapes and 11.7% increase in non-Hispanics reporting violent crimes generally.[58]

- In Denver, crime reports among non-Latinos increased 3.6% in the first three months of 2017 compared with the same period in 2016, and crime reports generally fell 12% among Latinos.[59] This drop occurred disproportionately in immigrant-heavy neighborhoods.[60]

- Denver City Attorney Kristen Bronson reported that, in the months following the release of a videotape of ICE waiting in a courthouse to make an arrest, thirteen victims of physical and violent assault were "not willing to proceed with the case for fear that they would be spotted in the courthouse and deported."[61]

- In Philadelphia, crime reports by non-Latinos declined by 1.0%, while they fell 4.3% among Latinos.[62] As in Denver, this drop occurred disproportionately in immigrant-heavy neighborhoods.[63]

---

[56] Los Angeles Police Dep't, DECLINE IN REPORTING OF CRIME AMONG HISPANIC POPULATION (March 21, 2017), *available at* http://www.lapdonline.org/newsroom/news_view/61998.

[57] Brooke A. Lewis, *HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year*, Houston Chronicle, Apr. 6, 2017, http://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php.

[58] *Id*.

[59] Rob Arthur, *Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight, May 18, 2017, https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/.

[60] *Id*.

[61] Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, N.P.R., Mar. 21, 2017, http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver.

[62] Rob Arthur, *Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight, May 18, 2017, https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/.

124. Similarly, a survey of advocates and attorneys in New York found that many had clients who were declining to pursue legal remedies due to fears of immigration enforcement: 67% reported clients who declined to seek help from the courts; 3% reported clients who declined to pursue an order of protection; 48% reported victims who declined to seek custody of their children or visitation rights; and 46% reported working with immigrant survivors of domestic violence who feared serving as a complaining witness.[64]

125. Service providers also report a significant drop in immigrant victims contacting law enforcement or pursuing legal protection or redress. In a nationwide survey, 78% of organizations said that immigrant survivors of domestic violence or sexual assault had concerns contacting the police; 75% reported that immigrant survivors are concerned about going to court in a matter related to the abuser; and 43% reported immigrant victims who had dropped civil or criminal cases due to immigration-related fears.[65] Additionally, immigrants self-report that they are too afraid to enter domestic violence shelters or courts.

126. Immigrants are even avoiding contact with welfare programs for which they are legally eligible for fear of retribution or even deportation.[66] This includes programs such as Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") and Supplemental Nutrition Assistance Program ("SNAP"). For example, counties in New Jersey with large immigrant communities collectively saw

---

[63] *Id*.

[64] *ICE in New York State Courts Survey*, Immigrant Defense Project (last accessed July 26, 2017), https://www.immigrant defenseproject.org/ice-courts-survey/.

[65] TAHIRIH JUSTICE CENTER, 2017 ADVOCATE AND LEGAL SERVICE SURVEY REGARDING IMMIGRANT SURVIVORS, http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf.

[66] Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, N.Y. Times, Mar. 6, 2018, https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html.

their food bank participation cut in half. SNAP enrollment in New Jersey fell by 8.1%, Florida WIC participation fell by 9.6%, and Texas WIC enrollment fell by 7.4%.

b. *The Census Bureau's Findings that the Climate of Fear Created by the Trump Administration Will Negatively Impact Census Participation by Latinos and Immigrants of Color*

127. The climate of fear in immigrant communities caused by the Trump Administration has exacerbated concerns about participating in the Decennial Census. Since the start of the Trump Administration, numerous researchers within the Census Bureau itself have found that survey respondents from "hard to count" groups have expressed concern about the potential misuse of census data by the government.

128. For example, in September 2017, the Census Bureau's own Center for Survey Measurement ("CSM") published a memorandum in which it noted a "recent increase in respondents spontaneously expressing concerns about confidentiality in some of our pretesting studies conducted in 2017."[67] The memorandum explained that "CSM researchers heard respondents express new concerns about topics like the 'Muslim ban,' discomfort 'registering' other household members by reporting their demographic characteristics, the dissolution of the 'DACA' . . . repeated references to Immigration and Customs Enforcement (ICE)," and reported that "respondents' fears, particularly among immigrant respondents, have increased markedly this year."

129. Specifically, "Spanish-speakers brought up immigration raids, fear of government, and fear of deportation."[68] The memorandum also recounts a report by an interviewer: "A Spanish-speaking respondent answered that he was not a citizen, and then appeared to lie about his country of origin. When the [Field Respondents] started

[67] Memorandum, U.S. Census Bureau, Respondent Confidentiality Concerns, Sept. 20, 2017, https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf.

[68] *Id.* at 3.

asking about his year of entry into the U.S., he 'shut down' and stopped responding to her questions. He then walked out and left her alone in the apartment, which had never happened to her during an interview before." Some pre-testing interviewees appeared to move out of their homes after being approached by census interviewers.

130. Respondents reported being told by community leaders not to open the door without a warrant signed by a judge, and CSM researchers observed respondents falsifying names, dates of birth, and other information on household rosters. They noted specific immigration-related fears among Spanish-speakers, Chinese-speakers, and Arabic-speakers. These fears included repeated requests for reassurances about data privacy and security, especially in the context of immigration enforcement.

131. CSM described these findings as "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse," and cited the importance of pretesting questions in addressing these concerns. The memo also highlighted that this degree of non-participation, falsification, and unprompted exclamation of concern is both "unprecedented in the usability interviews that CSM has been conducting since 2014" and likely to be higher during the actual census-taking process because interviewees during pre-testing are financially incentivized and work with an interviewer with whom they have familiarity.[69]

132. CSM thus recommended "systematically collecting data on this phenomenon, and development and pretesting of new messages to avoid increases in nonresponse among hard-to-count populations for the 2020 Census."[70]

133. On November 2, 2017, the National Advisory Committee on Racial, Ethnic, and Other Populations ("NAC"), a census advisory board, published a slide deck titled "Respondent Confidential Concerns and Possible Effects on Response Rates and

[69] *Id.*
[70] *Id.*

Data Quality for the 2020 Census," which includes evidence of pre-existing anxieties in immigrant communities and communities of color. Focus groups at NAC reported fear that census data would be used by other agencies such as ICE and of resulting deportation.[71] According to the NAC report, pre-testing respondents, focus group participants, and interviewers said:

- "The possibility that the Census could give my information to internal security and immigration could come and arrest me for not having documents terrifies me" (Spanish interview);
- "Particularly with our current political climate, the Latino community will not sign up because they will think that Census will pass their information on and people can come looking for them" (Spanish interview);
- "They say, 'Never open the door!'" and "This alert has been spread everywhere now" (Korean Focus Group);
- "In light of the current political situation, the immigrants, especially the Arabs and Mexicans, would be so scared when they see a government interviewer at their doorsteps" (Arabic Focus Group);
- "The immigrant is not going to trust the Census employee when they are continuously hearing a contradicting message from the media every day threatening to deport immigrants" (Arabic Focus Group);
- "This may just be a sign of the times, but in the recent several months before anything begins, I'm being asked times over, does it make a difference if I'm not a citizen?" (Interviewer).

134. At a May 2018 conference, Census Bureau officials presented on the topic of "Respondent Confidentiality Concerns in Multilingual Pretesting Studies and Possible Effects on Response Rates and Data Quality for the 2020 Census."[72] In that presentation,

[71] National Advisory Committee on Racial, Ethnic, and Other Populations, Respondent Confidential Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census at 9, 12 (Nov. 2, 2017), *available at* https://www.documentcloud.org/documents/4424705-Census-Confidentiality-Presentation.html.

[72] Mikelyn Meyers and Patricia Goerman, Respondent Confidentiality Concerns in Multilingual Pretesting Studies and Possible Effects on Response Rates and Data Quality for the 2020 Census (May 2018), *available at* https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/aapor/aapor-presentation-confidentiality.pdf.

Census Bureau officials discussed findings that showed fear across various language focus groups, finding that these "concerns may have a disproportionate impact on an already 'hard to count' population: immigrants."

135. The May 2018 presentation also noted specific statements from Spanish-speaking groups about "many people who are afraid of giving their information because they are illegally in this country...so they are afraid of being deported," with one respondent stating that they "didn't include like 4 or 5 people on the household roster."[73] The CSM found an "unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants."[74]

136. The CSM reported that these concerns may "present a barrier to participation in the 2020 Census," could "impact data quality and coverage for the 2020 Census," and are "[p]articularly troubling due to the disproportionate impact on hard-to-count populations."[75]

137. Upon information and belief, the Census Bureau recently conducted at least forty focus groups about the questions on the 2020 Decennial Census. Many of these focus groups were conducted after the citizenship question was announced, and the groups discussed the new question. Respondents in these focus groups showed serious concern about the citizenship question, including non-citizen legal residents who told the Census Bureau personnel conducting the focus groups that they would not fill out the Decennial Census in response to the question. The Department of Commerce was briefed on the results of these focus groups, but has not publicly acknowledged their existence or content.

---

[73] *Id.*

[74] Mikelyn Meyers, Center for Survey Management, U.S. Census Bureau, Presentation on Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census, presented at National Advisory Committee on Racial, Ethnic, and Other Populations Fall Meeting 15 (Nov. 2, 2017), https://www.documentcloud.org/documents/4424705-Census-Confidentiality-Presentation.html.

[75] *Id.*

138. Upon information and belief, in the weeks following the announcement of the addition of the citizenship question to the 2020 Decennial Census response rates to other surveys conducted by the Census Bureau noticeably decreased according to some field survey takers.

139. Furthermore, press reports indicate that an ongoing "End-to-End" test of the 2020 Decennial Census being conducted in Providence County, Rhode Island is struggling to get Latinos and immigrants to participate. As the press has reported, "fear of the census among undocumented immigrants is rippling out to their relatives who have green cards or U.S. Citizenship . . . many are afraid of giving their information to the federal government." And a test participant, explaining why he declined to complete the survey asked "what if our information is misused and lands in the hands of immigration? . . . you never know if it's ICE or police knocking. No one wants to open the door."[76]

c. *The Heightened Impact of Adding a Citizenship Question to the Decennial Census in the Anti-Immigrant Environment Created by the Trump Administration*

140. Despite the longstanding consensus of Census Bureau professionals that the addition of a citizenship question would have deleterious effects on participation among Latinos and other immigrants, as well as the Census Bureau's more recent determination that the Trump Administration has created a toxic anti-immigrant environment that already threatens participation by the same groups, Secretary Ross nevertheless ordered the addition of a citizenship question to the Decennial Census. That decision will sow significantly more fear among Latinos and immigrants of color and further decrease their willingness to interact with government agencies or make use of government services to which they are legally entitled.

[76] Hansi Lo Wang and Marisa Penaloza, *Many Noncitizens Plan To Avoid The 2020 Census, Test Run Indicates*, NPR, May 11, 2018, https://www.npr.org/2018/05/11/610492880/many-noncitizens-plan-to-avoid-the-2020-census-test-run-indicates?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social.

141. The impact in this environment of adding the citizenship question to the Decennial Census on reducing participation by Latinos and Immigrants of color is known.

142. Former Deputy Assistant Attorney General for Civil Rights Justin Levitt recently testified in Congress that the "way that the federal government is currently perceived with respect to asking questions about citizenship is particularly fraught," and not only for undocumented immigrants. Many legal permanent residents and citizens have "connections to those perceived to be at risk," and "many others will not find reason to distinguish between personal experiences of discrimination . . . and the federal government's Census enumerator at the door."[77]

143. Arturo Vargas, the executive director of NALEO Educational Fund, who also serves as a member of the Census Bureau's National Advisory Committee on Racial, Ethnic, and other Populations, warned that: "If a citizenship question is added to the decennial census, then this fear people have is going to result in less people wanting to respond to the census, which will produce a very inaccurate census and will actually increase the Census Bureau's cost and budget to conduct the census."[78]

144. In recent testimony before Congress, Secretary Ross acknowledged that "there will be some decline" due to the new citizenship question because "certain parts of the population might find it challenging" and that there may be some "folks who may not feel comfortable answering [the question]."[79]

---

[77] Testimony of Professor Justin Levitt Before the United States House of Representatives Committee on Oversight and Government Reform, Progress Report on the 2020 Census 6 (May 8, 2018) (emphasis in original), https://oversight.house.gov/wp-content/uploads/2018/05/Levitt-Testimony-2020-Census-Hearing-05082018.pdf.

[78] Priscilla Alvarez, *The Controversial Question DOJ Wants to Add to the U.S. Census*, The Atlantic (Jan. 10, 2018), https://www.theatlantic.com/politics/archive/2018/01/the-controversial-question-doj-wants-to-add-to-the-us-census/550088/.

[79] Hearing to Review the FY2019 Budget Request for the U.S. Department of Commerce, Hr'g Before U.S. S. Subcomm. on Commerce, Justice, Science and Related Agencies, 115 Cong. (May 10, 2018) (testimony by Wilbur Ross, Sec. of Commerce), *video available at*

145. Acting Census Bureau Director Ron Jarmin also acknowledged in recent congressional testimony that there would be an impact on the "response rates of subgroups."[80]

146. Thus, the addition of a citizenship question—which would be controversial under almost any circumstances—is particularly charged in this context, and will reduce responses to the Decennial Census among immigrants, and thus reduce the political representation of and resources available to immigrant communities of color. These injuries include:

a. The loss of congressional seats and Electoral College votes in states where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population;

b. The malapportionment of congressional and state legislative districts within states, to the detriment of immigrant communities of color; and

c. The reduction in the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

d. ***Background Decisions by Secretary Ross that Set the Stage for an Increased Differential Undercount of Immigrant Communities of Color***

147. The decision to add a citizenship question was made against the backdrop of a concerted effort by Secretary Ross to undermine longstanding efforts by Census Bureau professionals to address the differential undercount of immigrant communities of color, and thus exacerbate the underrepresentation of those communities in the political process.

---

https://www.appropriations.senate.gov/hearings/review-of-the-fy2019-budget-request-for-the-us-dept-of-commerce.

[80] FY 2019 Budget Hearing - Bureau of the Census, U.S. House of Representative Committee on Appropriations (April 18, 2018), https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=395239 (timestamp 1:42:30).

148. Secretary Ross has publicly supported the Trump Administration's anti-immigrant agenda. In October 2017, Secretary Ross applauded Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse, and chain migration."[81]

149. In furtherance of the administration's anti-immigrant agenda, Secretary Ross has taken tangible steps that will exacerbate the undercount in immigrant communities of color. In January 2018, the Census Bureau departed from precedent by announcing that it would not hire census enumerators who are not U.S. citizens for the 2020 Decennial Census, despite shortfalls in workers. In 2010, 3,487 census takers were non-citizens, the majority of whom possessed hard-to-find language skills and familiarity with hard-to-count immigrant communities.[82]

150. Secretary Ross's funding decisions will further imperil the Census Bureau's efforts to conduct education and outreach to hard-to-count populations. The cost for the Decennial Census has roughly doubled each decade from 1970 to the present. Notwithstanding that, Congress has directed that the budget for the 2020 Decennial Census not exceed the cost of the 2010 Decennial Census, and Ross's budgetary submissions do not call for the funding necessary to conduct the Decennial Census. As a result, the Census Bureau has had to scale back critical planning, delayed opening six Regional Census Centers and has canceled a number of 2020 field tests and "End-to-End" dress rehearsal tests. Indeed, the budget for the 2020 Decennial Census has been so

[81] Press Release, Commerce Dep't, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps.

[82] Tara Bahrampour, *Non-citizens won't be hired as census-takers in 2020, staff is told*, Wash. Post, Jan. 23, 2018, https://www.washingtonpost.com/local/social-issues/non-citizens-wont-be-hired-as-census-takers-in-2020-staff-is-told/2018/01/30/b327c8d8-05ee-11e8-94e8-e8b8600ade23_story.html.

uncertain that in 2017 the Government Accountability Office cited that fact, among other reasons, in rating the 2020 Decennial Census as "high-risk."[83]

2. The Highly Irregular Sequence of Events Leading to the Eleventh-Hour Decision to Add a Citizenship Question to the Decennial Census

151. The decision to break with 60 years of Census Bureau practice and add an untested question to the Decennial Census just two years before the census will be administered is a serious deviation from the Census Bureau's carefully calibrated procedures and timeline for the development of questions for the Decennial Census questionnaire. Due to this last minute nature of this decision, the citizenship question has never been tested, and no large-scale testing of the full Decennial Census questionnaire with the citizenship question will be conducted.

a. *The rigorous statutory and regulatory framework governing the development of questions for the Decennial Census questionnaire*

152. The development and content of the Decennial Census questionnaire is subject to an extensive statutory and regulatory framework and is to be conducted pursuant to an extensive, multi-year testing regimen. These statutory and regulatory provisions provide discernible standards that allow assessment of whether the Census Bureau and Commerce Department are abiding by their legal obligations. And the extensive testing regimen allows the Census Bureau to determine the impact of modifications to the Decennial Census questionnaire. In other words, among other things, the testing regimen makes the effect of a change to the questionnaire knowable.

153. Federal law requires "the integrity, objectivity, impartiality, [and] utility" of all information collected for statistical purposes, including the Decennial Census.[84] Relevant policy guidance from the Office of Management and Budget ("OMB") and the

[83] U.S. Government Accountability Office, High-Risk Series 225 (Feb. 2017), https://www.gao.gov/assets/690/682765.pdf.

[84] 44 U.S.C. § 3504(e)(1)(B).

Census Bureau similarly prohibit undue political influence. *See* OMB Statistical Policy Directive No. 1 (requiring that federal statistical agencies' independence be protected "from political and other undue external influence in developing. Producing, and disseminating statistics"); Census Bureau Statement of Commitment to Scientific Integrity (stressing that the Bureau must ensure "the separation of the statistical agency from the parts of its department that are responsible for policy-making").[85]

154. OMB also requires federal statistical agencies, including the Census Bureau, to design statistical surveys in a manner that will ensure the "highest practical rate of response," and to "minimize respondent burden while maximizing data quality."[86] OMB therefore directs federal statistical agencies to "build and sustain trust" with survey respondents.[87] The Census Bureau also prioritizes high response rates as of paramount importance for accurate data collection and its guidelines mandate pre-testing of the Decennial Census questionnaire.

155. In order to ensure high response rates to surveys, Census Bureau guidelines require "extensive testing, review, and evaluation" whenever a question is revised or a new question is proposed. This process ensures that "[f]inal proposed questions result from extensive cognitive and field testing." [88] As a result, the Census Bureau's Operational Plans for the 2020 Decennial Census included "pretesting questionnaire content . . . prior to making final decisions on questionnaire topics and wording[.]"[89]

---

[85] Statement of Commitment to Scientific Integrity by Principal Statistical Agencies, https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/scientificintegrity/Scientific_Integrity_Statement_of_the_Principal_Statistical_Agencies.pdf.

[86] OMB, Standards and Guidelines for Statistical Surveys (Sept. 2016).

[87] OMB Statistical Policy Directive No. 1, 79 Fed. Reg. 71,610.

[88] U.S. Census Bureau, Jan. 26, 2018 Program Mgmt. Review Tr. at 20, https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/01-26-2018/transcript-2018-01-26-pmr.pdf.

[89] U.S. Census Bureau, 2020 Census Operational Plan 70 (Nov. 2015), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan.pdf.

156. In accordance with this need for extensive testing under real-world conditions, the Census Bureau began testing for the 2020 Decennial Census questionnaire in 2007. This process continued in 2008, when the Census Bureau began its research on ways to rephrase questions on race and ethnicity as a way to reduce the undercounts of minority groups, and began testing this in 2010. The Census Bureau conducted annual tests to prepare for the 2020 Decennial Census in 2013 and 2014 and in 2015 conducted the National Content Test which reached approximately 1.2 million people. The Census Bureau also traditionally conducts three end-to-end tests of the Decennial Census. For the 2020 Decennial Census, the address canvassing portion of the 2018 Census Test took place at three sites: Bluefield-Beckley-Oak Hill, WV; Providence County, RI; and Pierce County, WA. Due to underfunding, however, the full end-to-end test is only being conducted in Providence County.

157. None of this decade-long testing for the 2020 Decennial Census questionnaire included a question relating to citizenship.

158. The Census Bureau has also constituted various advisory panels of academics and other professional social scientists, specifically to advise it on the content of the questionnaire. These advisory panels include the National Advisory Committee on Racial, Ethnic, and Other Populations, which focuses on increasing census participation and reducing the differential undercount and the Census Scientific Advisory Committee, which advises on a wide range of Census Bureau activities, including survey methodology and census tests.

159. At no point did the Census Bureau ask either of these advisory panels to review any proposal to include a citizenship question. In fact, the Scientific Advisory Committee voiced its strong opposition to adding such a question. It cited the "flawed

logic" behind the decision, stating that it could "threaten the accuracy and confidentiality" of the count and make it more expensive to conduct.[90]

160. As a result of the need for extensive pre-testing of the Decennial Census, the last minute addition of the citizenship question ignored all timelines for finalizing the content of the questionnaire, including those enshrined in federal law.

161. In accordance with 13 U.S.C. § 141(f)(1-2), the Secretary of Commerce must submit to Congress the subjects that will be included on the Decennial Census at least three years in advance and the questions at least two years in advance. After this information is sent to Congress, the Secretary may not modify the subjects or questions on the Decennial Census questionnaire unless the Secretary submits a report to Congress after finding that "new circumstances exist" which necessitate this change.[91]

162. In order to meet this statutory requirement, the Census Bureau set deadlines for completion of the content creation portion of the 2020 Decennial Census, which called for Federal agencies to provide the Census Bureau with their expected data needs by July 1, 2016, content topics to be finalized by December 2016, and for the final questionnaire wording to be completed by December 2017.

163. In accordance with this timeline, Secretary Ross submitted the topics for the 2020 Decennial Census to Congress in March 2017. His submission did not include citizenship as a topic. Similarly, the Census Bureau's 2020 Census Operational Plan that was released in September 2017 stated that it had already "finalized the subjects planned for the 2020 Census."[92]

---

[90] Michael Wines, *Census Bureau's Own Expert Panel Rebukes Decision to Add Citizenship Question*, N.Y. Times, March 30, 2018, https://www.nytimes.com/2018/03/30/us/census-bureau-citizenship.html.

[91] 13 U.S.C. § 141(f)(3).

[92] U.S. Census Bureau, *2020 Census Operational Plan (version 2.0)* 70 (Sept. 2016) , https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan2.pdf.

b. *The rushed and politicized process leading to the addition of a citizenship question on the Decennial Census questionnaire*

164. On December 12, 2017, DOJ requested that a citizenship question be added to the Decennial Census questionnaire. On that day, Arthur E. Gary, General Counsel of the Justice Management Division at DOJ, sent a letter to Acting Census Bureau Director Defendant Jarmin requesting that "the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship."[93]

165. In addition to violating the Census Bureau's deadline for federal agencies to submit data needs, the December 2017 DOJ request was clearly a last minute political decision. Up until this point, the Census Bureau had followed its well-honed internal processes to prepare for a successful Decennial Census, and now is allowing the Trump Administration to inject the citizenship issue into the mix.

166. Moreover, upon information and belief, although OMB Statistical Policy Directives seek to protect the Census Bureau from "political and other under external influence,"[94] and Census Bureau guidelines further stress that the Bureau must ensure "the separation of the statistical agency from the parts of its department that are responsible for policy-making,"[95] this letter was ghost-written by Acting Assistant Attorney General and political appointee John Gore. In private practice, Gore represented defendants in voting rights litigation adverse to racial minorities.

---

[93] Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Department of Justice to Dr. Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau, Re: Request to Reinstate Citizenship Question on 2020 Census Questionnaire (Dec. 12, 2017), https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html.

[94] OMB Statistical Policy Directive No. 1, 79 Fed. Reg. 71,610.

[95] Statement of Commitment to Scientific Integrity by Principal Statistical Agencies, https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/scientificintegrity/Scientific_Integrity_Statement_of_the_Principal_Statistical_Agencies.pdf.

167. In his recent congressional testimony, Gore declined to answer questions about who initiated the DOJ request and whether he consulted with career Civil Rights Division employees before making it.

168. In the letter, Gore claimed that adding a question concerning citizenship on the Decennial Census questionnaire was "critical to the Department's enforcement of Section 2 of the Voting Rights Act," because "the Department needs a reliable calculation of the citizen voting-age population." He also asserted that the "Department believes that Decennial Census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than ACS citizenship estimates."[96]

169. The letter does not explain why citizenship data from the Decennial Census is "critical," or how DOJ had been able to enforce the VRA, which was enacted in 1965—for more than 50 years without such information.

170. The letter did not explain why this request was being made so long after both the deadline for agency requests and the submission to Congress of the topics for the 2020 Decennial Census.

171. On March 26, 2018, Secretary Ross issued a memo indicating that he had "determined that reinstatement of a citizenship question on the 2020 Decennial Census is necessary to provide complete and accurate data in response to the DOJ request."[97]

172. In violation of his obligation under 13 U.S.C. § 141(f)(3), Secretary Ross's submission to Congress did not include any explanation for why citizenship was

[96] Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Department of Justice to Dr. Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau, Re: Request to Reinstate Citizenship Question on 2020 Census Questionnaire (Dec. 12, 2017), https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html.

[97] Wilbur Ross, Sec. of Commerce, *Reinstatement of a Citizenship Question on the 202 Decennial Census Questionnaire* (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf (hereinafter "Ross Memo").

being added as a topic or a finding that "new circumstances exist" that would warrant such a change.[98]

173. Secretary Ross downplayed any adverse effects of the citizenship question by stating there was no empirical evidence that there would be an adverse effect. Yet the reason the Census Bureau has no empirical information is that—contrary to years of established administrative practice—it never tested the possible inclusion of a citizenship question on the Decennial Census.

174. Secretary Ross did not address how a citizenship question will affect response rates of U.S. citizens, especially those who have non-citizen family members and live in mixed status households and, in light of the Trump Administration's stated views towards non-citizens, are likely to be fearful of the potential consequences of their participation in the census for their family members or immediate community.

175. Although Secretary Ross acknowledged that "the Decennial Census has differed significantly in nature from the sample surveys" like the ACS, he denied that adding a citizenship question to the Decennial Census is novel or needs testing, because it was used in the ACS (and on the long-form Decennial Census before that).[99]

176. One of the only pieces of evidence Ross's memo does cite is the supposed opinion of rating company Nielsen, which purportedly told Ross that it had not experienced disparate response rates when asking about citizenship in its surveys. Nielsen, however, has stated that it "does not support the inclusion of a question on citizenship for the 2020 U.S. census because [it] believe[s] its inclusion could lead to inaccuracies in the underlying data."[100] And, in any event, relying upon the reaction of a

[98] U.S. Census Bureau, *Questions Planned for the 2020 Census and American Community Survey* 7 (Mar. 29, 2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf.

[99] *Id.* at 3, 7 (emphasis added).

[100] Jeffrey Mervis, Trump Officials Claim They Can Avoid 2020 Census Problems Caused By Controversial Citizenship Question. Experts Are Very Skeptical, Science, Apr. 13, 2018,

private company concerned with television ratings, using unknown methodology, and at different points in time, only underscores what little analysis of the likely impact of his decision Ross actually performed.

177. Thomas Brunell, whom President Trump had at one point planned to appoint as Census Director, but who withdrew his name after bipartisan opposition, recently stated that the decision to add a citizenship question to the Decennial Census questionnaire was not based on social science needs, but rather was "a political decision. And they have every right to do that, because they won the election."[101]

3. Contemporaneous Statements by Members and Associates of the Trump Administration Regarding the Addition of a Citizenship Question to the Decennial Census Indicative of Discriminatory Intent

178. Shortly after the decision was announced, President Trump's reelection campaign stated that President Trump expressly ordered the Commerce Department to add a citizenship question to the Decennial Census, and when Secretary Ross announced it would be added, celebrated its addition. Indeed, less than two days after Secretary Ross announced his decision to add the citizenship question, the Trump campaign sent an email to supporters with the subject: "GOOD NEWS: We are asking about citizenship." In the message, the campaign stated that "President Trump has officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens." Similarly, an email the Trump campaign sent just before the announcement told supporters that the "President wants the 2020 United States Census to ask people whether or not they are citizens." It continued: "In another era, this would be COMMON SENSE… but ***19 attorneys general*** said they will fight the President if he dares to ask

---

http://www.sciencemag.org/news/2018/04/trump-officials-claim-they-can-avoid-2020-census-problems-caused-controversial.

[101] Jeffrey Mervis, *Exclusive: The would-be U.S. census director assails critics of citizenship question*, Science (May 16, 2018), http://www.sciencemag.org/news/2018/05/exclusive-would-be-us-census-director-assails-critics-citizenship-question.

people if they are citizens. The President wants to know if you're on his side." Neither Trump campaign email made any mention of the purported need for improved VRA enforcement.

179. J. Christian Adams, another former PCEI Commissioner, praised the decision, noting that it will reduce representation of Hispanic populations and lead to lower numbers of Hispanic-majority districts under the Voting Rights Act.[102] Adams also stated that "[o]nly citizens should be given political power," and added that it is "critical that the next redistricting cycle account for the citizen residents of districts so urban centers do not unfairly profit from the political subsidy that higher noncitizen populations provide."[103]

180. Former Ohio Secretary of State Ken Blackwell, a senior member of President Trump's transition team in charge of domestic policy and another PCEI Commissioner, also praised the decision to add a citizenship question to the Decennial Census, noting that it would enable states to reapportion their legislative districts using only the number of citizens. Blackwell did not mention VRA enforcement as a purpose of adding the citizenship question.

181. Similarly, President Trump's ally Congressman Steve King of Iowa said he supported the decision because "[o]nly U.S. citizens should be represented in Congress," and if "we counted only citizens for redistributing seats, California would give up several congressional seats to states that actually honor our Constitution and federal law."[104]

---

[102] *See* J. Christian Adams, *Adams: Trump Census Citizenship Question Helps Black Americans*, TheACRU.org (March 30, 2018), http://www.theacru.org/adams-trump-census-citizenship-question-helps-black-americans/.

[103] Press Release, Publ. Int. Legal Foundation (March 27, 2018), https://publicinterestlegal.org/blog/j-christian-adams-praises-inclusion-of-citizenship-question-in-2020-census/.

[104] Emily Baumgaertner, *A Citizenship Question on the Census May Be Bad for Your Health*, N.Y. Times, Feb. 14, 2018, https://www.nytimes.com/2018/02/14/us/politics/citizenship-question-census-public-health.html.

182. At least one state has already considered taking advantage of citizenship information from the Decennial Census to do precisely that. In May 2018, a bill was introduced in Missouri to conduct the state's intra-state apportionment solely using citizen population.

E. The Trump Administration's Stated Rationale for Adding a Citizenship Question Is Blatantly Pretextual

183. The rationale that adding a citizenship question to the Decennial Census questionnaire is necessary for enforcement of the VRA is a pretext for Defendants' discriminatory intent. For more than 50 years, DOJ has successfully enforced the VRA without citizenship information from the Decennial Census, suggesting that the facilitation of VRA enforcement was not the purpose of this disastrous last-minute change to the Decennial Census questionnaire.

184. VRA enforcement is not a priority of the Trump Administration. Upon information and belief, the Trump Administration has initiated only a single lawsuit under Section 2 of the Voting Rights Act, which was investigated and developed during the previous administration.

185. Upon information and belief, the DOJ's VRA enforcement efforts have never been impaired due to a lack of Citizen Voting Age Population ("CVAP") data from the Decennial Census. To the extent that courts have needed CVAP data in order to enforce the VRA, they have recognized that citizenship data from the ACS "is routinely relied upon in § 2 cases."[105]

186. Voting rights experts, including former DOJ officials tasked with enforcing the VRA, have repeatedly stated that citizenship data from the Decennial Census is not necessary to successfully enforce the VRA. For example, Vanita Gupta, former head of the DOJ Civil Rights Division, has stated that "[r]igorous enforcement of

[105] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash. 2014).

the Voting Rights Act has never required the addition of a citizenship question on the census form sent to all households" and that "data from the ongoing American Community Survey was sufficient for us to do our work."[106]

187. When asked during recent congressional testimony, the ghost writer of the DOJ letter, Acting Assistant Attorney General John Gore, could not identify a single case litigated by DOJ in which a court declined to accept ACS citizenship data. He did identify a single district court case addressing the adequacy of ACS citizenship data, but it concerned an effort to use one-year ACS estimates in a small municipality, rather than more reliable five-year ACS data aggregated from a larger sample.[107]

188. DOJ has not considered whether—given the reduction in response rates likely to result from the inclusion of a citizenship question on the Decennial Census—citizenship data obtained through the Decennial Census will be sufficiently reliable for purposes of VRA enforcement. Indeed, John Gore recently admitted in testimony to Congress that DOJ had no data as to how adding this question would affect response rates when DOJ proposed adding it.[108]

189. Moreover, in the past, the Census Bureau has not cited VRA enforcement as a reason for including a citizenship question on the ACS. When the Census Bureau submitted its list of planned topics for the Decennial Census and ACS in March 2017, it only cited a need for the data for "agencies and policymakers setting and evaluating immigration policies and laws, seeking to understand the experience of different

---

[106] Vanita Gupta, *The Bitter Lie Behind the Census Bureau's Citizenship Question*, Wash. Post, Mar. 29, 2018, https://www.washingtonpost.com/opinions/the-bitter-lie-behind-the-censuss-citizenship-question/2018/03/29/f2991020-32cc-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.3dedbb3898f2

[107] *See* Progress Report on the 2020 Census, Hearing Before the U.S. House of Representatives Comm. on Oversight & Gov't Reform (May 18, 2018), https://oversight.house.gov/hearing/progress-on-the-2020-census-continued/ (timestamp 1:19:50)

[108] *See* Progress Report on the 2020 Census, Hearing Before the U.S. House of Representatives Comm. on Oversight & Gov't Reform (May 18, 2018), https://oversight.house.gov/hearing/progress-on-the-2020-census-continued/ (timestamp 1:40:50–1:42:42).

immigrant groups, and enforcing laws, policies, and regulations against discrimination based on national origin."[109]

190. Indeed, the Decennial Census will use the ACS citizenship question and thus ask about citizenship in a far broader way than is needed for VRA enforcement purposes. Rather than merely asking respondents whether or not they are a U.S. citizen, it also requests, for some individuals, information about place of birth; the citizenship status of one's parents; and naturalization. This information has no use for purposes of VRA enforcement.

191. As a matter of both process and substance, the rushed addition of an untested and unnecessary citizenship question to the Decennial Census stands in stark contrast to the Census Bureau's extensive testing regarding potential changes to the race and ethnicity questions—which would have enhanced VRA enforcement. Based on years of testing and research, the Census Bureau had concluded that it would obtain better response rates by updating the Decennial Census form to combine race and ethnicity into a single category with multiple checkbox options, as well as adding a new "Middle Eastern or North African" option. These changes would have improved VRA enforcement by allowing the Census Bureau to provide more accurate group-based counts of various groups protected under the VRA. Nonetheless, Secretary Ross overruled the Census Bureau and decided not to make the change to the race and ethnicity questions, citing the purported need for more even more extensive testing before making such a substantial change to the Decennial Census questionnaire.

192. Finally, Attorney General Sessions undermined his own agency's request when he recently publicly stated that people concerned about the citizenship question

[109] U.S. Census Bureau, *Subjects Planned For The 2020 Census and American Community Survey* 51 (Mar. 28, 2017), https://www2.census.gov/library/publications/decennial/2020/operations/planned-subjects-2020-acs.pdf.

should simply decline to answer it.[110] Refusing to answer a question on the Decennial Census questionnaire, however, would violate 13 U.S.C. § 221 and subject non-respondents to a fine. Moreover, if DOJ truly needed CVAP data from the Decennial Census for VRA enforcement, the Attorney General presumably would not publicly encourage behavior that will lead to an inaccurate citizenship count.

CAUSES OF ACTION

I. Intentional Discrimination/Equal Protection (Fifth Amendment)

193. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

194. The Fifth Amendment of the U.S. Constitution requires that the federal government not deny people the equal protection of its laws and prohibits the federal government from discriminating against individuals living in the United States on the basis of race, ethnicity, national origin, and citizenship.

195. Defendants acted with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census. Defendants maintain animus toward these groups and intend, *inter alia*, to diminish the political power and influence of these groups and to reduce the levels of federal and state funding, benefits, and other resources that these groups receive.

196. Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color will suffer discriminatory effects due to the differential undercount that will result from including the citizenship question.

197. The discriminatory effects will include, *inter alia*:

[110] Stephen Dinan, *People Worried About Census Citizenship Question 'Don't Have To Answer,'* Wash. Times (Apr. 25, 2018), https://www.washingtontimes.com/news/2018/apr/25/sessions-americans-dont-have-answer-citizenship/.

a. The loss of congressional seats and Electoral College votes in states where these groups constitute significant portions of the population. Based on recent population growth trends, absent the differential undercount , there is a substantial likelihood that Florida and Texas would each gain at least an additional congressional seat following the 2020 Decennial Census, among other possible changes in the appointment of congressional seats. Upon information and belief, the differential undercount caused by the addition of the citizenship question in the 2020 Census will result in at least these two states losing at least one of these additional seats.

b. The malapportionment of immigrant communities of color in congressional and state legislative districts because all states use Decennial Census data in drawing congressional districts and most states also use Decennial Census data in drawing state legislative districts, including states such as Florida and Texas whose state constitutions prohibit adjusting Decennial Census data in drawing districts. The differential undercount will cause immigrant communities of color in jurisdictions such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, to live in congressional and state legislative districts that have greater populations than other congressional and state legislative districts in the same state.

c. The diminishment of political and voting power and influence of immigrant communities of color within congressional and state legislative districts, because members of these groups will constitute a lower percentage of a district's total population than they would absent the differential undercount. These effects will occur in immigrant communities of color such as those in Prince Georges' County, Maryland, New York City, New York, San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida.

d. The reduction in the amount of federal funds that are distributed to the states and localities within the states where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the

population because the Federal Government uses population data from the Decennial Census to allocate billions of dollars of federal funding involving numerous federal programs. This includes funding for federal transportation and highway funding, Medicaid, and a wide range of other programs, such as Head Start, home energy assistance and supplemental nutrition programs for women, infants and children. For example:

i. The Federal Medical Assistance Percentage ("FMAP") is calculated annually for each state and based in part on its Decennial Census count. The FMAP guides the allocation of the hundreds of billions of dollars of annual federal funding among the states for health programs, including Medicaid. Furthermore, Medicaid relies on "per capita income" information calculated with decennial data to determine the amount of the reimbursement for each state for medical assistance payments. 43 U.S. C. §§1301, 1396(d). A differential undercount will impact the calculation of the FMAP, and thus will reduce the federal funding for health programs such as Medicaid in those states using the FMAP where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, such as Florida and Texas.

ii. Federal programs provide financial support for planning, construction, maintenance and operation of essential infrastructure projects, including the Highway Trust Fund program, the Urbanized Area Formula Funding program, the Metropolitan Planning Program and the Community Highway Safety Grant program. The funds for these programs are allocated, at least in part, on population figures collected through the Decennial Census. 23 U.S.C. §104(d)(3); 49 U.S.C. §§5305,5307,5340; 23 U.S.C. § 402. A differential undercount, therefore, will reduce the federal transportation funding distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

198. In addition to the other damages described herein, this intentional discrimination will cause ongoing harm to Plaintiffs and their members because, as explained, their members are immigrants of color and live in communities where immigrants of color constitute significant portions of the populations; and provide services to immigrant communities of color, and as such, these violations will deprive

them of the political influence and funding to which they would be entitled by a more accurate census.

199. The decision to add a citizenship question was without any rational basis, let alone any important or compelling governmental interest.

200. The justification that citizenship data from all U.S. residents is needed to better enforce Section 2 of the VRA is a pretext—and a poor one at that—for Defendants' discriminatory intent.

II. Census Clause (Article I, Section II, Clause 3 of the Constitution, as amended by the Fourteenth Amendment)

201. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

202. Article I of the U.S. Constitution, in conjunction with the Fourteenth Amendment, requires that the federal government conduct an "actual Enumeration" of the national population every ten years by determining the "whole number of persons" in the United States and within each state for the purpose of apportioning members of the House of Representatives to the respective states according to their population. U.S. Const. art. I, § 2, cl. 3; id. amend. XIV, § 2.

203. Congress has delegated this duty to the Secretary of Commerce, who must conduct the census in a manner consistent with the constitutional goal of equal representation and bearing a "reasonable relationship to the accomplishment of an actual enumeration of the population."

204. "The population" that the census must enumerate includes all persons living in the United States, and not only U.S. citizens.

205. Adding a citizenship question to the 2020 Decennial Census does not bear a "reasonable relationship to the accomplishment of an actual enumeration of the population."

206. The citizenship question will in fact harm the accomplishment of an actual enumeration of the population. It will produce a significant and systemic undercount of certain groups within "the population" of the United States, including Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color.

207. Defendants' Constitutional violations will cause ongoing harm to Plaintiffs and their members because, as explained, their members are immigrants of color and live in communities where immigrants of color constitute significant portions of the populations; and provide services to immigrant communities of color, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

III. Administrative Procedure Act (APA)

208. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

209. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), prohibits federal agencies from taking any action that is arbitrary, unconstitutional, and contrary to statute.

210. Defendants' decision to add a citizenship question is contrary to the Census Clause as well as the Fifth Amendment, and therefore violates the APA as an unconstitutional agency action.

211. Defendants' decision is also arbitrary and capricious for multiple independent reasons. These reasons include:

a. Defendants violated 13 U.S.C. § 141(f);

b. Defendants violated 44 U.S.C. § 3504(e);

c. Defendants violated OMB Statistical Policy Directive No.1;

d. Defendants violated OMB Statistical Policy Directive No. 2;

e. Defendants violated the Census Bureau Statistical Quality Guidelines and the Census Bureau Statement of Commitment to Scientific Integrity;

f. Defendants failed to follow key provisions of the 2020 Census Operational Plan;

g. Defendants failed to consult with their advisory panels, including the National Advisory Committee on Racial, Ethnic, and Other Populations and the Census Scientific Advisory Committee;

h. Defendants failed to adequately explain why adding a citizenship question is necessary for enforcement of the VRA, which is the purported purpose of adding the question;

i. Defendants' stated purpose of adding the citizenship question to help enforce the VRA is pre-textual;

j. Defendants' inclusion of the citizenship question will actually undermine enforcement of the VRA because it will produce skewed and inaccurate race and ethnicity data;

k. Defendants failed to adequately study and assess the impact of adding a citizenship question, in contravention of Defendants' policies, historical practices, and legal obligations.

l. Defendants failed to adequately explain why the citizenship question is being added to the 2020 Decennial Census when it has not been included on a Decennial Census since 1950; and

m. Defendants' decision was contrary to the evidence before them, which is that adding the citizenship question will produce a significant increase in the undercount of persons living in the United States, and particularly among Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color that have historically been undercounted;

212. Defendants' APA violations cause ongoing harm to Plaintiffs and their members because as explained their members are immigrants of color and live in communities where immigrants of color constitute significant portions of the populations; and provide services to immigrant communities of color, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

i. Declare that Defendants' addition of a citizenship demand to the questionnaire for the 2020 Decennial Census is unauthorized by and contrary to the Constitution and laws of the United States;

ii. Declare that the Defendants' decision to add a citizenship question to the 2020 Decennial Census is not in accordance with law, is beyond statutory authority, and is arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706;

iii. Preliminarily and permanently enjoin Defendants and all those acting on their behalf from adding a citizenship question to the 2020 Decennial Census.

iv. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

v. Award such additional relief as the court deems proper.

Dated: June 6, 2018

Respectfully Submitted,

/s/ Dale Ho
Dale Ho
David Hausman*
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693
dho@aclu.org
dhausman@aclu.org

Sarah Brannon* **
Davin Rosborough**
Ceridwen Cherry*
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org
drosborough@aclu.org
ccherry@aclu.org

/s/ Andrew Bauer
Andrew Bauer
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-7669
Andrew.Bauer@arnoldporter.com

/s/ John A. Freedman
John A. Freedman
David P. Gersch*
Peter T. Grossi, Jr*
R. Stanton Jones*
Eric A. Rubel*
David J. Weiner*
Robert N. Weiner*
Barbara H. Wootton*
Elisabeth S. Theodore*
Daniel F. Jacobson*

Arthur N. Eisenberg
Christopher T. Dunn
Perry M. Grossman
New York Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 607-3300
aeisenberg@nyclu.org
cdunn@nyclu.org
pgrossman@nyclu.org

Caroline D. Kelly*
Christine G. Lao-Scott*
Jay Z. Leff*
Chase R. Raines*
Dylan S. Young*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001-3743
(202) 942-5000
John.Freedman@arnoldporter.com

Samer E. Khalaf*
American-Arab Anti-Discrimination Committee
1705 DeSales Street, N.W., Suite 500
Washington, DC 20036
202-244-2990
skhalaf@adc.org

Nicholas Katz*
CASA de Maryland
8151 15th Avenue
Hyattsville, MD 20783
(240) 491-5743
nkatz@wearecasa.org

* designates *pro hac vice* application forthcoming.
** Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R. 49(c)(3).

138 S.Ct. 1916
Supreme Court of the United States

Beverly R. **GILL**, et al., Appellants
v.
William **WHITFORD**, et al.

No. 16–1161.
|
Argued Oct. 3, 2017.
|
Decided June 18, 2018.

Synopsis
Background: Democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that state legislative redistricting plan drafted and enacted by Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that systematically diluted voting strength of Democratic voters statewide based on their political beliefs, in violation of Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in a few districts that they won by overwhelming margins. After trial before a three-judge panel of the United States District Court for the Western District of Wisconsin, Ripple, Circuit Judge, sitting by designation, 218 F.Supp.3d 837, judgment was entered for plaintiffs, an injunction was entered, 2017 WL 383360, and plaintiffs' motion to amend the judgment was granted, 2017 WL 2623104. Consideration of jurisdiction for direct appeal was postponed by the Supreme Court, and the judgment was stayed.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] voters' allegations, that the redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not support Article III standing;

[2] evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address the effect that a gerrymander had on the votes of particular citizens, as required for injury-in-fact element for Article III standing; but

[3] Supreme Court would not direct dismissal of voters' claims, and instead would remand the case so voters would have opportunity to prove concrete and particularized injuries.

Vacated and remanded.

Justice Kagan filed a concurring opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

West Headnotes (18)

[1] **Federal Civil Procedure**
In general; injury or interest
Federal Civil Procedure
Rights of third parties or public

A plaintiff seeking relief in federal court must first demonstrate that he has Article III standing to do so, including that he has a personal stake in the outcome, distinct from a generally available grievance about government. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[2] **Federal Civil Procedure**
In general; injury or interest

The threshold requirement for Article III standing, under which a plaintiff must have a personal stake in the outcome, distinct from a generally available grievance about government, ensures that federal courts act as judges, and do not engage in policymaking properly left to

elected representatives. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[3] **States**
Ratio between districts and percentage represented by majority

Taking political considerations into account in fashioning a state legislative reapportionment plan is not sufficient to invalidate it as a partisan gerrymander, because districting inevitably has and is intended to have substantial political consequences.

Cases that cite this headnote

[4] **Constitutional Law**
Political Questions

Failure of political will does not justify unconstitutional remedies, because the power of federal judges to say what the law is rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity, for Article III jurisdiction, of resolving, according to legal principles, a plaintiff's particular claim of legal right. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[5] **Federal Civil Procedure**
In general; injury or interest

To ensure that the Federal Judiciary respects the proper and properly limited role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[6] **Federal Civil Procedure**
In general; injury or interest
Federal Civil Procedure
Rights of third parties or public

A federal court is not a forum for generalized grievances, and the requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy ensures that courts exercise power that is judicial in nature. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[7] **Federal Civil Procedure**
In general; injury or interest
Federal Civil Procedure
Causation; redressability

The requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy is enforced by insisting that a plaintiff satisfy a three-part test for Article III standing: (1) he suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6 Cases that cite this headnote

[8] **Federal Civil Procedure**
In general; injury or interest

Foremost among the requirements for Article III standing is injury in fact, which requires a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff in a personal and individual way. U.S.C.A. Const. Art. 3, § 2, cl.

1.

2 Cases that cite this headnote

[9] **Election Law**
Persons entitled to bring contest

A person's right to vote is individual and personal in nature, and thus, voters who allege facts showing disadvantage to themselves as individuals have Article III standing to sue to remedy that disadvantage. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[10] **States**
Judicial review and control

To extent that vote dilution was Wisconsin Democratic voters' alleged harm from Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan, that injury was district specific because the disadvantage to a voter as an individual resulted from the boundaries of the particular district in which he resided, and thus, a voter's remedy had to be limited to the inadequacy that produced his injury in fact as element for Article III standing, which remedy would be revision of the boundaries of the voter's own district. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[11] **Constitutional Law**
Elections

A plaintiff who alleges that he is the object of a racial gerrymander, i.e., a drawing of legislative district lines on the basis of race, has Article III standing to assert only that his own district has been so gerrymandered. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Elections

A plaintiff who complains of racial gerrymandering, but who does not live in a gerrymandered district, asserts only a generalized grievance against governmental conduct of which he or she does not approve, which is not sufficient to support Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[13] **States**
Judicial review and control

Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed district-by-district.

Cases that cite this headnote

[14] **States**
Judicial review and control

Allegation of Wisconsin Democratic voters, that Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not involve individual and personal injury of the kind required for Article III standing; such allegation presented an undifferentiated, generalized grievance. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[15] **States**
Judicial review and control

At pleading stage, Wisconsin Democratic voters sufficiently alleged particularized harm, as required for injury-in-fact element for Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, by alleging that the plan diluted the influence of their votes as a result of packing or cracking in their legislative districts. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[16] **States**
Judicial review and control

Assuming that Wisconsin Democratic voters' partisan gerrymandering claims were justiciable, injury in fact, as element for voters' Article III standing, depended on effect of Republican-controlled Wisconsin legislature's state legislative redistricting plan, not mapmakers' intent, and required a showing of a burden on plaintiffs' votes that was actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[17] **States**
Judicial review and control

Assuming that Democratic voters' partisan gerrymandering claims, arising from Republican-controlled Wisconsin legislature's state legislative redistricting plan, were justiciable, evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address effect that a gerrymander had on votes of particular citizens, as required for injury-in-fact element for Article III standing; partisan-asymmetry metrics such as efficiency gap measured something else entirely, i.e., effect that a gerrymander had on the fortunes of political parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2 Cases that cite this headnote

[18] **Federal Courts**
Particular cases
States
Judicial review and control

Supreme Court, upon determining that Wisconsin Democratic voters had failed to demonstrate their Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, would not direct dismissal of voters' claims, and instead would remand the case to three-judge District Court so that voters would have opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes; the case was unusual because it concerned an unsettled kind of claim the Court had not agreed upon, for which contours and justiciability were unresolved, and four voters alleged that they lived in districts in which Democrats like them had been packed or cracked. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

***1919** *Syllabus*[*]

Members of the Wisconsin Legislature are elected from single-member legislative districts. Under the Wisconsin Constitution, the legislature must redraw the boundaries of those districts following each census. After the 2010 census, the legislature passed a new districting plan known as Act 43. Twelve Democratic voters, the plaintiffs in this case, alleged that Act 43 ***1920** harms the Democratic Party's ability to convert Democratic votes

into Democratic seats in the legislature. They asserted that Act 43 does this by "cracking" certain Democratic voters among different districts in which those voters fail to achieve electoral majorities and "packing" other Democratic voters in a few districts in which Democratic candidates win by large margins. The plaintiffs argued that the degree to which packing and cracking has favored one political party over another can be measured by an "efficiency gap" that compares each party's respective "wasted" votes—*i.e.,* votes cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win—across all legislative districts. The plaintiffs claimed that the statewide enforcement of Act 43 generated an excess of wasted Democratic votes, thereby violating the plaintiffs' First Amendment right of association and their Fourteenth Amendment right to equal protection. The defendants, several members of the state election commission, moved to dismiss the plaintiffs' claims. They argued that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative district in which they vote. The three-judge District Court denied the defendants' motion and, following a trial, concluded that Act 43 was an unconstitutional partisan gerrymander. Regarding standing, the court held that the plaintiffs had suffered a particularized injury to their equal protection rights.

Held : The plaintiffs have failed to demonstrate Article III standing. Pp. 1926 – 1934.

(a) Over the past five decades this Court has repeatedly been asked to decide what judicially enforceable limits, if any, the Constitution sets on partisan gerrymandering. Previous attempts at an answer have left few clear landmarks for addressing the question and have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury. See *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298, *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85, *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546, and *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609. Pp. 1926 – 1929.

(b) A plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. That requirement ensures that federal courts "exercise power that is judicial in nature," *Lance v. Coffman,* 549 U.S. 437, 439, 441, 127 S.Ct. 1194, 167 L.Ed.2d 29. To meet that requirement, a plaintiff must show an injury in fact—his pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.,* which "affect[s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351.

The right to vote is "individual and personal in nature," *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506, and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage, *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs here alleged that they suffered such injury from partisan gerrymandering, which works through the "cracking" and "packing" of voters. To the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is ***1921** district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635.

The plaintiffs argue that their claim, like the claims presented in *Baker* and *Reynolds,* is statewide in nature. But the holdings in those cases were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362. Here, the plaintiffs' claims turn on allegations that their votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has

established." *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606.

The plaintiffs argue that their legal injury also extends to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. To date, however, the Court has not found that this presents an individual and personal injury of the kind required for Article III standing. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. The harm asserted by the plaintiffs in this case is best understood as arising from a burden on their own votes. Pp. 1928 – 1932.

(c) Four of the plaintiffs in this case pleaded such a particularized burden. But as their case progressed to trial, they failed to pursue their allegations of individual harm. They instead rested their case on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence. First, they presented testimony pointing to the lead plaintiff's hope of achieving a Democratic majority in the legislature. Under the Court's cases to date, that is a collective political interest, not an individual legal interest. Second, they produced evidence regarding the mapmakers' deliberations as they drew district lines. The District Court relied on this evidence in concluding that those mapmakers sought to understand the partisan effect of the maps they were drawing. But the plaintiffs' establishment of injury in fact turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife*, 504 U.S., at 560, 112 S.Ct. 2130. Third, the plaintiffs presented partisan-asymmetry ***1922** studies showing that Act 43 had skewed Wisconsin's statewide map in favor of Republicans. Those studies do not address the effect that a gerrymander has on the votes of particular citizens. They measure instead the effect that a gerrymander has on the fortunes of political parties. That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. Pp. 1931 – 1934.

(d) Where a plaintiff has failed to demonstrate standing, this Court usually directs dismissal. See, *e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589. Here, however, where the case concerns an unsettled kind of claim that the Court has not agreed upon, the contours and justiciability of which are unresolved, the case is remanded to the District Court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ——, ——, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314. Pp. 1933 – 1934.

218 F.Supp.3d 837, vacated and remanded.

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

Attorneys and Law Firms

Misha Tseytlin, for Appellants.

Erin E. Murphy, for Wisconsin State Senate, et al. as amici curiae supporting appellants.

Paul Smith, Washington, DC, for Appellees.

Brad D. Schimel, Attorney General, Kevin M. LeRoy, Deputy Solicitor General, State of Wisconsin, Department of Justice, Madison, WI, Misha Tseytlin, Solicitor General, Ryan J. Walsh, Chief Deputy Solicitor General, Amy C. Miller, Assistant Solicitor General, Brian P. Keenan, Assistant Attorney General, for Appellants.

Jessica Ring Amunson, Jenner & Block LLP, Paul M. Smith, J. Gerald Hebert, Danielle M. Lang, Campaign Legal Center, Washington, DC, Michele Odorizzi, Mayer Brown, LLP, Nicholas O. Stephanopoulos, University of Chicago Law School, Ruth M. Greenwood, Annabelle E. Harless, Campaign Legal Center, Chicago, IL, Douglas M. Poland, Rathje & Woodward, LLC, Madison, WI, Peter G. Earle, Law Office of Peter G. Earle, Milwaukee, WI, for Appellees.

Kathryn Cahoy, Covington & Burling LLP, Redwood Shores, CA, KeAndra Barlow, Covington & Burling LLP, Los Angeles, CA, Mark W. Mosier, Ryan Mowery, Alec Webley, Covington & Burling LLP, Washington, DC, for Amicus Curiae.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries of the State's legislative districts. A group of ***1923** Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

[1] [2] But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), distinct from a "generally available grievance about government," *Lance v. Coffman,* 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*). That threshold requirement "ensures that we act *as judges,* and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry,* 570 U.S. 693, 700, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

I

Wisconsin's Legislature consists of a State Assembly and a State Senate. Wis. Const., Art. IV, § 1. The 99 members of the Assembly are chosen from single districts that must "consist of contiguous territory and be in as compact form as practicable." § 4. State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district. See § 5; Wis. Stat. § 4.001 (2011).

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. Art. IV, § 3. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the Legislature and the Governor—split on party lines—were unable to agree on new districting plans. The Legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic Legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. See 1983 Wis. Laws ch. 4. In 2011, a Republican Legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. See Wis. Stat. §§ 4.009, 4.01–4.99; 2011 Wis. Laws ch. 4. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote. 218 F.Supp.3d 837, 853 (W.D.Wis.2016).

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." 1 App. 32, Complaint ¶ 15. They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" ***1924** Democratic voters around Wisconsin. *Id.,* at 28–30, ¶¶ 5–7. As they explained:

> "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." *Id.,* at 29, ¶ 5.

Four of the plaintiffs—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—alleged that they lived in State Assembly districts where Democrats have been cracked or packed. *Id.,* at 34–36, ¶¶ 20, 23, 24, 26; see *id.,* at 50–53, ¶¶ 60–70 (describing packing and cracking in Assembly Districts 22, 26, 66, and 91). All of the plaintiffs also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly." *Id.,* at 33, ¶ 16.

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted"

votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. *Id.,* at 28–29, ¶ 5. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. *Id.,* at 30, ¶ 7. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." *Id.,* at 31, ¶ 10. They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action. *Id.,* at 36, ¶¶ 28–30.

The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court, see 28 U.S.C. § 2284(a), denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." *Whitford v. Nichol,* 151 F.Supp.3d 918, 924 (W.D.Wis.2015). It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, ... they should be permitted to bring a statewide claim." *Id.,* at 926.

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map—their Demonstration Plan—the projected Democratic share ***1925** of the Assembly vote in Whitford's district would be 82%. 147 Record 35–36. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." *Id.,* at 37. Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." *Ibid.* As he explained, "[t]he only practical way to accomplish my policy objectives is to get a majority of the Democrats in the Assembly and the Senate ideally in order to get the legislative product I prefer." *Id.,* at 33.

The plaintiffs also presented the testimony of legislative aides Adam Foltz and Tad Ottman, as well as that of Professor Ronald Gaddie, a political scientist who helped design the Act 43 districting map, regarding how that map was designed and adopted. In particular, Professor Gaddie testified about his creation of what he and the District Court called "S curves": color-coded tables of the estimated partisan skew of different draft redistricting maps. See 218 F.Supp.3d, at 850, 858. The colors corresponded with assessments regarding whether different districts tilted Republican or Democratic under various statewide political scenarios. The S curve for the map that was eventually adopted projected that "Republicans would maintain a majority under any likely voting scenario," with Democrats needing 54% of the statewide vote to secure a majority in the legislature. *Id.,* at 852.

Finally, the parties presented testimony from four expert witnesses. The plaintiffs' experts, Professor Kenneth Mayer and Professor Simon Jackman, opined that—according to their efficiency-gap analyses—the Act 43 map would systematically favor Republicans for the duration of the decade. See *id.,* at 859–861. The defendants' experts, Professor Nicholas Goedert and Sean Trende, opined that efficiency gaps alone are unreliable measures of durable partisan advantage, and that the political geography of Wisconsin currently favors Republicans because Democrats—who tend to be clustered in large cities—are inefficiently distributed in many parts of Wisconsin for purposes of winning elections. See *id.,* at 861–862.

At the close of evidence, the District Court concluded—over the dissent of Judge Griesbach—that the plaintiffs had proved a violation of the First and Fourteenth Amendments. The court set out a three-part test for identifying unconstitutional gerrymanders: A redistricting map violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Id.,* at 884.

The court went on to find, based on evidence concerning the manner in which Act 43 had been adopted, that "one of the purposes of Act 43 was to secure Republican

control of the Assembly under any likely future electoral scenario for the remainder of the decade." *Id.*, at 896. It also found that the "more efficient distribution of Republican voters has allowed the Republican Party to translate its votes into seats with significantly greater ease and to achieve—and preserve—control of the Wisconsin legislature." *Id.*, at 905. As to the third prong of its test, the District Court concluded that the burdens the Act 43 map imposed on Democrats could not be explained by "legitimate state prerogatives [or] neutral factors." *Id.*, at 911. The court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban ***1926** centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process," but found that this inherent geographic disparity did not account for the magnitude of the Republican advantage. *Id.*, at 921, 924.

Regarding standing, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." *Id.*, at 928. It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." *Ibid*. The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced ... is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." *Id.*, at 930.

Judge Griesbach dissented. He wrote that, under this Court's existing precedents, "partisan intent" to benefit one party rather than the other in districting "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches." *Id.*, at 939. He observed that the plaintiffs had not attempted to prove that "specific districts ... had been gerrymandered," but rather had "relied on statewide data and calculations." *Ibid*. And he argued that the plaintiffs' proof, resting as it did on statewide data, had "no relevance to any gerrymandering injury alleged by a voter in a single district." *Id.*, at 952. On that basis, Judge Griesbach would have entered judgment for the defendants.

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U.S.C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction. 582 U.S. ——, 137 S.Ct. 2268, 198 L.Ed.2d 698 (2017).

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.

[3] Our first consideration of a partisan gerrymandering claim came in *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). There a group of plaintiffs challenged the constitutionality of a Connecticut redistricting plan that "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.*, at 738, 93 S.Ct. 2321. To that end, the redistricting plan broke up numerous towns, "wiggl[ing] and joggl[ing]" district boundary lines in order to "ferret out pockets of each party's strength." *Id.*, at 738, and n. 3, 752, n. 18, 93 S.Ct. 2321. ***1927** The plaintiffs argued that, notwithstanding the rough population equality of the districts, the plan was unconstitutional because its consciously political design was "nothing less than a gigantic political gerrymander." *Id.*, at 752, 93 S.Ct. 2321. This Court rejected that claim. We reasoned that it would be "idle" to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," because districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 752–753, 93 S.Ct. 2321.

Thirteen years later came *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Unlike the

bipartisan gerrymander at issue in *Gaffney*, the allegation in *Bandemer* was that Indiana Republicans had gerrymandered Indiana's legislative districts "to favor Republican incumbents and candidates and to disadvantage Democratic voters" through what the plaintiffs called the "stacking" (packing) and "splitting" (cracking) of Democrats. 478 U.S., at 116–117, 106 S.Ct. 2797 (plurality opinion). A majority of the Court agreed that the case before it was justiciable. *Id.*, at 125, 127, 106 S.Ct. 2797. The Court could not, however, settle on a standard for what constitutes an unconstitutional partisan gerrymander.

Four Justices would have required the *Bandemer* plaintiffs to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127, 106 S.Ct. 2797. In that plurality's view, the plaintiffs had failed to make a sufficient showing on the latter point because their evidence of unfavorable election results for Democrats was limited to a single election cycle. See *id.*, at 135, 106 S.Ct. 2797.

Three Justices, concurring in the judgment, would have held that the "Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147, 106 S.Ct. 2797 (opinion of O'Connor, J.). Justice O'Connor took issue, in particular, with the plurality's focus on factual questions concerning "statewide electoral success." *Id.*, at 158, 106 S.Ct. 2797. She warned that allowing district courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.*, at 160, 106 S.Ct. 2797.

Justice Powell, joined by Justice Stevens, concurred in part and dissented in part. In his view, the plaintiffs' claim was not simply that their "voting strength was diluted statewide," but rather that "certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates." *Id.*, at 162, 169, 106 S.Ct. 2797. Thus, he would have focused on the question "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165, 106 S.Ct. 2797.

Eighteen years later, we revisited the issue in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). In that case the plaintiffs argued that Pennsylvania's Legislature had created "meandering and irregular" congressional districts that "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to provide an advantage to Republican candidates for Congress. *Id.*, at 272–273, 124 S.Ct. 1769 (plurality opinion) (brackets omitted).

The *Vieth* Court broke down on numerous lines. Writing for a four-Justice plurality, Justice Scalia would have held that the plaintiffs' claims were nonjusticiable ***1928** because there was no "judicially discernible and manageable standard" by which to decide them. *Id.*, at 306, 124 S.Ct. 1769. On those grounds, the plurality affirmed the dismissal of the claims. *Ibid.* Justice KENNEDY concurred in the judgment. He noted that "there are yet no agreed upon substantive principles of fairness in districting," and that, consequently, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden" on constitutional rights. *Id.*, at 307–308, 124 S.Ct. 1769. He rejected the principle advanced by the plaintiffs—that "a majority of voters in [Pennsylvania] should be able to elect a majority of [Pennsylvania's] congressional delegation"—as a "precept" for which there is "no authority." *Id.*, at 308, 124 S.Ct. 1769. Yet Justice KENNEDY recognized the possibility that "in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens" representational rights. *Id.*, at 312, 124 S.Ct. 1769.

Four Justices dissented in three different opinions. Justice Stevens would have permitted the plaintiffs' claims to proceed on a district-by-district basis, using a legal standard similar to the standard for racial gerrymandering set forth in *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). See 541 U.S., at 335–336, 339, 124 S.Ct. 1769. Under this standard, any district with a "bizarre shape" for which the only possible explanation was "a naked desire to increase partisan strength" would be found unconstitutional under the Equal Protection Clause. *Id.*, at 339, 124 S.Ct. 1769. Justice Souter, joined by Justice GINSBURG, agreed that a plaintiff alleging unconstitutional partisan gerrymandering should proceed on a district-by-district basis, as "we would be able to call more readily on some existing law when we defined what is suspect at the district level." See *id.*, at 346–347, 124 S.Ct. 1769.

Justice BREYER dissented on still other grounds. In his view, the drawing of single-member legislative districts—even according to traditional criteria—is "rarely ... politically neutral." *Id.*, at 359, 124 S.Ct. 1769. He therefore would have distinguished between gerrymandering for passing political advantage and gerrymandering leading to the "unjustified entrenchment"

of a political party. *Id.*, at 360–361, 124 S.Ct. 1769.

The Court last took up this question in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*). The plaintiffs there challenged a mid-decade redistricting map passed by the Texas Legislature. As in *Vieth*, a majority of the Court could find no justiciable standard by which to resolve the plaintiffs' partisan gerrymandering claims. Relevant to this case, an *amicus* brief in support of the *LULAC* plaintiffs proposed a "symmetry standard" to "measure partisan bias" by comparing how the two major political parties "would fare hypothetically if they each ... received a given percentage of the vote." 548 U.S., at 419, 126 S.Ct. 2594 (opinion of KENNEDY, J.). Justice KENNEDY noted some wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *Id.*, at 420, 126 S.Ct. 2594. Aside from that problem, he wrote, the partisan bias standard shed no light on "how much partisan dominance is too much." *Ibid.* Justice KENNEDY therefore concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Ibid.*

Justice Stevens would have found that the Texas map was a partisan gerrymander ***1929** based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. *Id.*, at 466–467, 471–473, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and Justice GINSBURG, noted that he would not "rule out the utility of a criterion of symmetry," and that "further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.*, at 483–484, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part).

B

[4] At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must* : The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Tr. of Oral Arg. 62. Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." *Clinton v. City of New York*, 524 U.S. 417, 449, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (KENNEDY, J., concurring). Our power as judges to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

[5] [6] [7] [8] To ensure that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." *Baker*, 369 U.S., at 204, 82 S.Ct. 691. A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." *Lance*, 549 U.S., at 439, 441, 127 S.Ct. 1194. We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. ——, ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.*, which "affect [s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[9] We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker*, 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs in ***1930** this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28–29, 32–33, Complaint ¶¶ 5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts

deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.*, at 32–33, ¶ 15.

[10] To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[ ]," *Baker*, 369 U.S., at 206, 82 S.Ct. 691 therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

[11] [12] [13] For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered. See *United States v. Hays*, 515 U.S. 737, 744–745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Id.*, at 745, 115 S.Ct. 2431. Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed "district-by-district." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ——, ——, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015).

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds*, which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." Brief for Appellees 29. But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds*, 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker*, 369 U.S., at 206, 82 S.Ct. 691.

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds*, 377 U.S., at 561, 84 S.Ct. 1362; see, *e.g.*, *Moss v. Burkhart*, 220 F.Supp. 149, 156–160 (W.D.Okla.1963) (directing the county-by-county reapportionment of the Oklahoma Legislature), aff'd *sub nom. Williams v. Moss*, 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964) (*per curiam*).

Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their ***1931** votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be. Cf. *Alabama Legislative Black Caucus*, 575 U.S., at ——, 135 S.Ct., at 1265. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S., at 357, 116 S.Ct. 2174.

[14] The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549 U.S., at 442, 127 S.Ct. 1194. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (*per curiam*).

We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. Justice KAGAN's concurring opinion endeavors to address "other kinds of constitutional harm,"

see *post,* at 1938, perhaps involving different kinds of plaintiffs, see *post,* at 1938 – 1939, and differently alleged burdens, see *ibid.* But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. See *Public Workers v. Mitchell,* 330 U.S. 75, 90, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (noting that courts must "respect the limits of [their] unique authority" and engage in "[j]udicial exposition ... only when necessary to decide definite issues between litigants"). The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

[15] Four of the plaintiffs in this case—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their votes as a result of packing or cracking in their legislative districts. See 1 App. 34–36, Complaint ¶¶ 20, 23, 24, 26. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. See *Defenders of Wildlife,* 504 U.S., at 561, 112 S.Ct. 2130. As the proceedings in the ***1932** District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial—and their arguments before this Court—on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. 147 Record 37. His testimony points merely to his hope of achieving a Democratic majority in the legislature—what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Brief for Appellees 32. Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances." *Lance,* 549 U.S., at 439, 441, 127 S.Ct. 1194.

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." 218 F.Supp.3d, at 891. Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. *Ibid.* The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," *id.,* at 893; 2 App. 344, or which would result in "Statistical Pick Ups" for Republicans. 218 F.Supp.3d, at 893 (alterations omitted). And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost." *Ibid.*

[16] The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effect of the maps they were drawing." *Id.,* at 895. That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130.

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies similar to those discussed in *LULAC.* The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." Brief for Appellees 37. In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry—the "efficiency gap" of wasted votes. See *supra,* at 1923 – 1924. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit. See Stephanopoulos & McGhee, ***1933** Partisan Gerrymandering and the

Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015); McGhee, Measuring Partisan Bias in Single–Member District Electoral Systems, 39 Leg. Studies Q. 55 (2014).

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." 1 App. 28–29, Complaint ¶ 5 (emphasis deleted). That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. See Brief for Eric McGhee as *Amicus Curiae* 6, and n. 3. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny. See Brief for Appellees 52–53, and n. 17.

[17] The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just "a pencil and paper or a hand calculator"—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. Brief for Heather K. Gerken et al. as *Amici Curiae* 27 (citing Wang, Let Math Save Our Democracy, N.Y. Times, Dec. 5, 2015). We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative—even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

[18] In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. See, *e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). This is not the ***1934** usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus*, 575 U.S., at ——, 135 S.Ct., at 1266 (remanding for further consideration of the plaintiffs' gerrymandering claims on a district-by-district basis). We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury. *Cuno*, 547 U.S., at 353, 126 S.Ct. 1854.

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice

BREYER, and Justice SOTOMAYOR join, concurring.

The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. See *ante,* at 1929 – 1932. The Court also holds that none of the plaintiffs here have yet made that required showing. See *ante,* at 1931 – 1932.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts, see *ante,* at 1933 – 1934. I write to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing—that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury—an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim—from standing on down to remedy—would be statewide in nature.

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic ***1935** principles." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. ——, ——, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015) (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 292, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); alterations omitted). More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. See *ante,* at 1930 – 1931 ("Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted"); see also *ante,* at 1929 – 1930, 1931 – 1932. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." *Ante,* at 1931. And the mechanism used to wreak that harm is "packing" and "cracking." *Ante,* at 1929 – 1930. In a relatively few districts, the mapmakers packed supermajorities of Democratic voters—well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters—spreading them sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes. *Ibid.*

The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); see *ante,* at 1930 – 1931. It arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. *Wesberry v. Sanders,* 376 U.S. 1, 7, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself]

as [an] individual [ ]": Her vote counted for less than the votes of other citizens in her State. *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); see *ante,* at 1930 – 1931. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim—in the one-person, one-vote context or any other—always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." *Wesberry*, 376 U.S., at 7, 84 S.Ct. 526. And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. See *ante,* at 1931 – 1932. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Cf. *Voinovich v. Quilter*, 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (explaining ***1936** that packing or cracking can also support racial vote dilution claims). Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map. See *ante,* at 1929 – 1930, 1931. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)); see *ante,* at 1931 – 1932.

In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. Cf. *Ante,* at 1933 (suggesting how an alternative map may shed light on vote dilution or its absence); *Easley v. Cromartie,* 532 U.S. 234, 258, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (discussing the use of alternative maps as evidence in a racial gerrymandering case); *Cooper v. Harris,* 581 U.S. ——, —— – ——, 137 S.Ct. 1455, 1478–1482, 197 L.Ed.2d 837 (2017) (same); Brief for Political Geography Scholars as *Amici Curiae* 12–14 (describing computer simulation techniques for devising alternative maps). For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

Here, the Court is right that the plaintiffs have so far failed to make such a showing. See *ante,* at 1931 – 1933. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. See *ante,* at 1932, 1931 – 1933. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, see *infra,* at 1937 – 1939, Whitford is not "among the injured" in a vote dilution challenge. *Lujan,* 504 U.S., at 563, 112 S.Ct. 2130 (quoting *Sierra Club,* 405 U.S., at 735, 92 S.Ct. 1361). Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. See *ante,* at 1931 – 1932. So they too did not show the injury—a less valuable vote—central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." *Ante,* at 1934. That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. ***1937** Recall that the plaintiffs here alleged—and the District Court found, see 218 F.Supp.3d 837, 896 (W.D.Wis.2016)—that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district (see, *e.g., Benisek v. Lamone,* No. 17–333) or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and

award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent—a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State—and that they graded draft maps according to the amount of advantage those maps conferred on Republicans. See 218 F.Supp.3d, at 890–896. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[ ] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ——, ——, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015). And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." *Id.*, at ——, 135 S.Ct., at 1267. The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be." *Ante*, at ——. But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." *Ibid.* (emphasis added). Not necessarily—but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

II

Everything said so far relates only to suits alleging that a partisan gerrymander ***1938** dilutes individual votes. That is the way the Court sees this litigation. See *ante*, at 1929 – 1932. And as I'll discuss, that is the most reasonable view. See *infra*, at 1939 – 1940. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

Justice KENNEDY explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546. "Representative democracy," Justice KENNEDY pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. *Id.*, at 314, 124 S.Ct. 1769 (opinion concurring in judgment) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000)). That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." 541 U.S., at 314, 124 S.Ct. 1769. Such action "burden[s] a group of voters' representational rights." *Ibid.*; see *id.*, at 315, 124 S.Ct. 1769 (similarly describing the "burden[ ] on a disfavored party and its voters" and the "burden [on] a group's representational rights"). And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views." *Id.*, at 314–315, 124 S.Ct. 1769.

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This is the kind of "burden" to "a group of voters' representational rights" Justice KENNEDY spoke

of. *Id.*, at 314, 124 S.Ct. 1769. Members of the "disfavored party" in the State, *id.*, at 315, 124 S.Ct. 1769 deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). See *Anderson v. Celebrezze*, 460 U.S. 780, 791–792, and n. 12, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on ... associational rights"). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). Cf. *California Democratic Party*, 530 U.S., at 586, 120 S.Ct. 2402 (holding that a state law violated state political parties' First Amendment rights of association). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies. Standing, we have long held, "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm ***1939** alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. See *ante,* at 1929 – 1932; *supra,* at 1935 – 1936. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. See *supra,* at 1937 – 1939. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." 1 App. 61, Complaint ¶ 91. Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of ... their association with a political party." Brief for Appellees 36 (internal quotation marks omitted). And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used, see *infra,* at 1939 – 1940). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them. *Ante,* at 1933.

In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose—although as noted above, it could easily have supported the alternative theory of associational harm, see *supra,* at 1939. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes, see *supra,* at 1937 – 1939. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Brief for Appellees 29–30. Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's ***1940** opinion is about a suit challenging a partisan gerrymander on a particular ground—that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." *Ante,* at 1931. And in particular, it leaves for another day the theory of harm advanced by Justice KENNEDY in *Vieth* : that a partisan gerrymander interferes with the vital "ability of citizens to

band together" to further their political beliefs. 541 U.S., at 314, 124 S.Ct. 1769 (quoting *California Democratic Party*, 530 U.S., at 574, 120 S.Ct. 2402). Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." *Ante*, at 1931. A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. *Vieth*, 541 U.S., at 315, 124 S.Ct. 1769 (opinion of KENNEDY, J.); see *supra*, at 1937 – 1939. And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too—as to standing, liability, and remedy alike.

III

Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth*, 541 U.S., at 316, 124 S.Ct. 1769 (opinion of KENNEDY, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.*, at 317, 124 S.Ct. 1769 (internal quotation marks omitted). It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around." *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2677 (quoting Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005)).

And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences. The congressional brief describes a "cascade of negative results" from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems. Brief for Bipartisan Group of Current and Former Members of Congress as *Amici Curiae* 4; see *id.*, at 10–23. The state legislators tell a similar story. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal [ ]." Brief for Bipartisan Group of 65 Current and Former State Legislators as *Amici Curiae* 6, 25.

I doubt James Madison would have been surprised. What, he asked when championing the Constitution, would make the House of Representatives work? The House must be structured, he answered, to instill in its members "an habitual recollection of their dependence on the people." The Federalist No. 57, p. 352 (C. Rossiter ed. 1961). Legislators must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Ibid.* When that moment does not come—when legislators can entrench themselves in office despite the people's will—the foundation ***1941** of effective democratic governance dissolves.

And our history offers little comfort. Yes, partisan gerrymandering goes back to the Republic's earliest days; and yes, American democracy has survived. But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). See Brief for Political Science Professors as *Amici Curiae* 28. Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record. *Id.*, at 3. The technology will only get better, so the 2020 cycle will only get worse.

Courts have a critical role to play in curbing partisan gerrymandering. Over fifty years ago, we committed to providing judicial review in the redistricting arena, because we understood that "a denial of constitutionally protected rights demands judicial protection." *Reynolds*, 377 U.S., at 566, 84 S.Ct. 1362. Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms. Of course, their dire need provides no warrant for courts to disregard Article III. Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. *E.g.*, *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); *United States v. Hays*, 515 U.S. 737, 747, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). The Court departs from our usual practice because this is supposedly "not the usual case." *Ante*, at 1933 – 1934. But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. See *ante*, at 1929 – 1932. After a year and a half of litigation in the District Court, including a 4–day trial, the plaintiffs had a more-than-ample opportunity to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

All Citations

138 S.Ct. 1916, 86 USLW 4415, 18 Cal. Daily Op. Serv. 5845, 2018 Daily Journal D.A.R. 5768, 27 Fla. L. Weekly Fed. S 373

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

138 S.Ct. 1833
Supreme Court of the United States

Jon **HUSTED**, Ohio Secretary of State, Petitioner
v.
A. PHILIP **RANDOLPH** INSTITUTE, et al.

No. 16–980.
|
Argued Jan. 10, 2018.
|
Decided June 11, 2018.

Synopsis

Background: Advocacy groups and a resident of Ohio brought action for declaratory and injunctive relief against Ohio Secretary of State, alleging violations of National Voter Registration Act (NVRA) and Help America Vote Act (HAVA), relating to state's process for removing inactive registrants from state's registered voter rolls and state's return-card notice for registrants whose residence had changed. The United States District Court for the Southern District of Ohio, George C. Smith, J., 2016 WL 3542450, denied plaintiffs' request for permanent injunction and entered judgment for Secretary. Plaintiffs appealed. The United States Court of Appeals for the Sixth Circuit, Clay, Circuit Judge, 838 F.3d 699, reversed and remanded, and on remand, the District Court, George C. Smith, J., 2016 WL 6093371, granted in part and denied in part both Secretary's motion to implement remedy and plaintiffs' motion for temporary restraining order (TRO). Certiorari was granted.

[Holding:] The Supreme Court, Justice Alito, held that failure-to-vote clause in NVRA does not prohibit Ohio's supplemental process for identifying and removing from registered voter rolls those voters who have lost their residency qualification.

Reversed.

Justice Thomas filed a concurring opinion.

Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.

Justice Sotomayor filed a dissenting opinion.

West Headnotes (8)

[1] **Election Law**
Correction of lists

Phrase "by reason of the person's failure to vote" in failure–to–vote clause of National Voter Registration Act (NVRA), which clause provides that a state program must not result in the removal of the name of any person from registered voter roll by reason of the person's failure to vote, does not categorically preclude the use of nonvoting as part of a test for removal, because one of NVRA's requirements for a State's removal of a voter from registered voter roll is the voter's failure to vote during a period covering two general federal elections, and the Help America Vote Act (HAVA) adds to the clause an explanation that nothing in the prohibition of removal from registered voter roll by reason of person's failure to vote may be construed to prohibit a State from using NVRA's procedures to remove an individual from official list of eligible voters based on change of residence. National Voter Registration Act of 1993, § 8(b)(2), (c, d), 52 U.S.C.A. § 20507(b)(2), (c, d).

2 Cases that cite this headnote

[2] **Election Law**
Correction of lists

Ohio's supplemental process for identifying and removing from registered voter rolls those voters who have lost their residency qualification, under which a voter's lack of voter activity for two consecutive years triggers the sending of a preaddressed, postage prepaid return-card notice to the voter for address verification, and the voter's failure to return the card and failure to vote in any election for four more years creates presumption that voter has moved out of registration district, resulting in voter's removal from rolls, complies with provision of National Voter Registration Act

(NVRA) directly addressing procedures that a State must follow before removing a registrant from voter rolls on change-of-residence grounds. National Voter Registration Act of 1993, § 8(d), 52 U.S.C.A. § 20507(d); R.C. §§ 3503.01(A), 3503.21(B)(2).

2 Cases that cite this headnote

[3] **Election Law**
Correction of lists

Failure-to-vote clause in National Voter Registration Act (NVRA), which generally prohibits States from removing people from voter registration rolls by reason of a person's failure to vote, does not prohibit Ohio's supplemental process for identifying and removing from registered voter rolls those voters who have lost their residency qualification, under which a voter's lack of voter activity for two consecutive years triggers the sending of a preaddressed, postage prepaid return-card notice to the voter for address verification, and voter's failure to return the card and failure to vote in any election for four more years creates presumption that voter has moved out of registration district, resulting in voter's removal from rolls; clause as originally enacted, and as clarified by Help America Vote Act (HAVA), simply forbids use of nonvoting as sole criterion for removing a registrant. National Voter Registration Act of 1993, § 8(b)(2), (d), 52 U.S.C.A. § 20507(b)(2), (d); Help America Vote Act of 2002, § 303(a)(4)(A), 52 U.S.C.A. § 21083(a)(4)(A); R.C. §§ 3503.01(A), 3503.21(B)(2).

1 Cases that cite this headnote

[4] **Election Law**
Correction of lists

A State violates the failure–to–vote clause in the National Voter Registration Act (NVRA), which generally prohibits States from removing people from the voter registration rolls by reason of a person's failure to vote, only if it removes registrants for no reason other than their failure to vote. National Voter Registration Act of 1993, § 8(b)(2), (d), 52 U.S.C.A. § 20507(b)(2), (d); Help America Vote Act of 2002, § 303(a)(4)(A), 52 U.S.C.A. § 21083(a)(4)(A).

2 Cases that cite this headnote

[5] **Statutes**
Statute as a Whole; Relation of Parts to Whole and to One Another

If possible, the court must interpret a statute to give effect to all provisions.

Cases that cite this headnote

[6] **Statutes**
Particular Words and Phrases

The phrase "by reason of" in a statute denotes some form of causation.

Cases that cite this headnote

[7] **Torts**
Proximate cause

When a statutory provision includes an undefined causation requirement, the court looks to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause.

Cases that cite this headnote

[8] **Election Law**
Correction of lists

National Voter Registration Act (NVRA) does not demand that a State have some particular quantum of evidence of a registered voter's change of residence before sending a registrant a preaddressed, postage prepaid return-card notice for address verification, and so long as the trigger for sending such notices is uniform, nondiscriminatory, and in compliance with the Voting Rights Act (VRA), States can use whatever plan they think best. National Voter Registration Act of 1993, § 8(b)(1), (d), 52 U.S.C.A. § 20507(b)(1), (d).

2 Cases that cite this headnote

West Codenotes

Validity Called into Doubt
Ohio Const. art. 5, § 1; Haw. Rev. Stat. § 11-17(a); Idaho Code Ann. § 34-435; Minn. Stat. Ann. § 201.171

Prior Version's Validity Called into Doubt
N.J. Stat. Ann. 19:31-5; 26 Okla. St. Ann. § 4-120.2

***1835** *Syllabus*[*]

The National Voter Registration Act (NVRA) addresses the removal of ineligible voters from state voting rolls, 52 U.S.C. § 20501(b), including those who are ineligible "by reason of" a change in residence, § 20507(a)(4). The Act prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds, §§ 20507(b), (c), (d). The most relevant of these are found in subsection (d), which provides that a State may not remove a name on change-of-residence grounds unless the registrant either (A) confirms in writing that he or she has moved or (B) fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content and then fails to vote in any election during the period covering the next two general federal elections.

In addition to these specific change-of-residence requirements, the NVRA also contains a general "Failure–to–Vote Clause," § 20507(b)(2), consisting of two parts. It first provides that a state removal program "shall not result in the removal of the name of any person ... by reason of the person's failure to vote." Second, as added by the Help America Vote Act of 2002 (HAVA), it specifies that "nothing in [this prohibition] may be construed to prohibit a State from using the procedures" described above—sending a return card and removing registrants who fail to return the card and fail to vote for the requisite time. Since one of the requirements ***1836** for removal under subsection (d) is the failure to vote, the explanation added by HAVA makes clear that the Failure–to–Vote Clause's prohibition on removal "by reason of the person's failure to vote" does not categorically preclude using nonvoting as part of a test for removal. Another provision makes this point even more clearly by providing that "no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

Respondents contend that Ohio's process for removing voters on change-of-residence grounds violates this federal law. The Ohio process at issue relies on the failure to vote for two years as a rough way of identifying voters who may have moved. It sends these nonvoters a preaddressed, postage prepaid return card, asking them to verify that they still reside at the same address. Voters who do not return the card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.

Held : The process that Ohio uses to remove voters on change-of-residence grounds does not violate the Failure–to–Vote Clause or any other part of the NVRA. Pp. 1836 – 1844.

(a) Ohio's law does not violate the Failure–to–Vote Clause. Pp. 1841 – 1848.

(1) Ohio's removal process follows subsection (d) to the letter: It does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years. See § 20507(d)(1)(B). Pp. 1841 – 1842.

(2) Nonetheless, respondents argue that Ohio's process violates subsection (b)'s Failure–to–Vote Clause by using a person's failure to vote twice over: once as the trigger for sending return cards and again as one of the two requirements for removal. But Congress could not have meant for the Failure–to–Vote Clause to cannibalize subsection (d) in that way. Instead, the Failure–to–Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. The phrase "by reason of" in the Failure–to–Vote Clause denotes some form of causation, see *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119, and in context sole causation is the only type of causation that harmonizes the Failure–to–Vote Clause and subsection (d). Any other

reading would mean that a State that follows subsection (d) nevertheless can violate the Failure–to–Vote Clause. When Congress enacted HAVA, it made this point explicit by adding to the Failure–to–Vote Clause an explanation of how the clause is to be read, *i.e.,* in a way that does not contradict subsection (d). Pp. 1842 – 1844.

(3) Respondents' and the dissent's alternative reading is inconsistent with both the text of the Failure–to–Vote Clause and the clarification of its meaning in § 21083(a)(4). Among other things, their reading would make HAVA's new language worse than redundant, since no sensible person would read the Failure–to–Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Nor does the Court's interpretation render the Failure–to–Vote Clause superfluous; the clause retains meaning because it prohibits States from using nonvoting both as the ground for removal and as the sole evidence for another ground for removal (*e.g.,* as the sole evidence that someone has died). Pp. 1843 – 1845.

(4) Respondents' additional argument—that so many registered voters discard ***1837** return cards upon receipt that the failure to send cards back is worthless as evidence that an addressee has moved—is based on a dubious empirical conclusion that conflicts with the congressional judgment found in subsection (d). Congress clearly did not think that the failure to send back a return card was of no evidentiary value, having made that conduct one of the two requirements for removal under subsection (d). Pp. 1845 – 1846.

(b) Nor has Ohio violated other NVRA provisions. Pp. 1845 – 1848.

(1) Ohio removes the registrants at issue on a permissible ground: change of residence. The failure to return a notice and the failure to vote simply serve as *evidence* that a registrant has moved, not as the ground itself for removal. Pp. 1845 – 1846.

(2) The NVRA contains no "reliable indicator" prerequisite to sending notices, requiring States to have good information that someone has moved before sending them a return card. So long as the trigger for sending such notices is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," § 20507(b)(1), States may use whatever trigger they think best, including the failure to vote. Pp. 1846 – 1848.

(3) Ohio has not violated the NVRA's "reasonable effort" provision, § 20507(a)(4). Even assuming that this provision authorizes federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and strike down a state law that does not meet some standard of "reasonableness," Ohio's process cannot be unreasonable because it uses the change-of-residence evidence that Congress said it could: the failure to send back a notice coupled with the failure to vote for the requisite period. Ohio's process is accordingly lawful. Pp. 1847 – 1848.

838 F.3d 699, reversed.

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

Attorneys and Law Firms

Eric E. Murphy, Columbus, OH, for Petitioner.

Noel J. Francisco, Solicitor General, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Paul M. Smith, for Respondents.

Michael Dewine, Attorney General of Ohio, Eric E. Murphy, State Solicitor, Michael J. Hendershot, Chief Deputy Solicitor, Steven T. Voigt, Principal Assistant Attorney General, Columbus, OH, for Petitioner Jon Husted, Ohio Secretary of State.

Stuart C. Naifeh, Naila S. Awan, Cameron A. Bell, Dēmos, Dale E. Ho, Sophia Lin Lakin, Theresa J. Lee, Cecillia D. Wang, Julie A. Ebenstein, T. Alora Thomas, Rachel Wainer Apter, American Civil Liberties Union Foundation, New York, NY, Brenda Wright, Dēmos, Newton, MA, Freda Levenson, Daniel P. Tokaji, Paul Moke, Richard Saphire, ACLU of Ohio, Cleveland, OH, David D. Cole, American Civil Liberties Union Foundation, Washington, DC, for Respondents.

Opinion

***1838** Justice ALITO delivered the opinion of the Court.

It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. Pew Center on the States, Election Initiatives Issue Brief (Feb. 2012). And about 2.75 million people are said to be registered to vote in more than one State. *Ibid.*

At issue in today's case is an Ohio law that aims to keep the State's voting lists up to date by removing the names of those who have moved out of the district where they are registered. Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls. We are asked to decide whether this program complies with federal law.

I

A

Like other States, Ohio requires voters to reside in the district in which they vote. Ohio Rev. Code Ann. § 3503.01(A) (West Supp. 2017); see National Conference of State Legislatures, Voting by Nonresidents and Noncitizens (Feb. 27, 2015). When voters move out of that district, they become ineligible to vote there. See § 3503.01(A). And since more than 10% of Americans move every year,[1] deleting the names of those who have moved away is no small undertaking.

For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened. The NVRA "erect[s] a complex superstructure of federal regulation atop state voter-registration systems." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013). The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls. See § 2, 107 Stat. 77, 52 U.S.C. § 20501(b).

To achieve the latter goal, the NVRA requires States to "conduct a general program that makes a reasonable effort to remove the names" of voters who are ineligible "by reason of" death or change in residence. § 20507(a)(4). The Act also prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds. §§ 20507(b), (c), (d).

The most important of these requirements is a prior notice obligation. Before the NVRA, some States removed registrants without giving any notice. See J. Harris, Nat. Munic. League, Model Voter Registration System 45 (rev. 4th ed. 1957). The NVRA changed that by providing in § 20507(d)(1) that a State may not remove a registrant's name on change-of-residence ***1839** grounds unless either (A) the registrant confirms in writing that he or she has moved or (B) the registrant fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content. This card must explain what a registrant who has not moved needs to do in order to stay on the rolls, *i.e.*, either return the card or vote during the period covering the next two general federal elections. § 20507(d)(2)(A). And for the benefit of those who have moved, the card must contain "information concerning how the registrant can continue to be eligible to vote." § 20507(d)(2)(B). If the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds. See § 20507(d)(1).[2]

While the NVRA is clear about the need to send a "return card" (or obtain written confirmation of a move) before pruning a registrant's name, no provision of federal law specifies the circumstances under which a return card may be sent. Accordingly, States take a variety of approaches. See Nat. Assn. of Secretaries of State (NASS) Report: Maintenance of State Voter Registration Lists 5–6 (Dec. 2017). The NVRA itself sets out one option. A State may send these cards to those who have submitted "change-of-address information" to the United States Postal Service. § 20507(c)(1). Thirty-six States do at least that. See NASS Report, *supra*, at 5, and n. v (listing States). Other States send notices to every registered voter at specified intervals (say, once a year). See, *e.g.*, Iowa Code § 48A.28.3 (2012); S.C. Code Ann. §§ 7–5–330(F), 7–5–340(2)–(3) (2017 Cum. Supp.); see also S. Rep. No. 103–6, p. 46 (1993). Still other States, including Ohio, take an intermediate approach, see NASS Report, *supra*, at 5–6, such as sending notices to those who have turned in their driver's licenses, *e.g.*, Ind. Code §§ 3–7–38.2–2(b)(2), (c)(4) (2004), or sending notices to those who have not voted for some period of time, see, *e.g.*, Ga. Code Ann. § 21–2–234 (Supp. 2017); Ohio Rev. Code Ann. § 3503.21(B)(2); Okla. Admin. Code § 230:15–11–19(a)(3) (2016); Pa. Stat. Ann., Tit. 25, § 1901(b)(3) (Purdon 2007); Wis. Stat. Ann. § 6.50(1) (2017 West Cum. Supp.).

When a State receives a return card confirming that a registrant has left the district, the State must remove the

voter's name from the rolls. §§ 20507(d)(1)(A), (3). And if the State receives a card stating that the registrant has not moved, the registrant's name must be kept on the list. See § 20507(d)(2)(A).

What if no return card is mailed back? Congress obviously anticipated that some voters who received cards would fail to return them for any number of reasons, and it addressed this contingency in § 20507(d), which, for convenience, we will simply call "subsection (d)." Subsection (d) treats the failure to return a card as *some evidence*—but by no means conclusive proof—that the voter has moved. Instead, the voter's name is kept on the list for a period covering two general elections for federal office (usually about four years). Only if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district (*e.g.*, by updating address information ***1840** online) may the registrant's name be removed. § 20507(d)(2)(A); see §§ 20507(d)(1)(B), (3).

In addition to these specific change-of-residence requirements, the NVRA also imposes two general limitations that are applicable to state removal programs. First, all such programs must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." § 20507(b)(1). Second, the NVRA contains what we will call the "Failure–to–Vote Clause." See § 20507(b)(2).

At present, this clause contains two parts. The first is a prohibition that was included in the NVRA when it was originally enacted in 1993. It provides that a state program "shall not result in the removal of the name of any person ... by reason of the person's failure to vote." *Ibid.* The second part, added by the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, explains the meaning of that prohibition. This explanation says that "nothing in [the prohibition] may be construed to prohibit a State from using the procedures described in [§§ 20507](c) and (d) to remove an individual from the official list of eligible voters." § 20507(b)(2).

[1] These referenced subsections, §§ 20507(c) and (d), are the provisions allowing the removal of registrants who either submitted change-of-address information to the Postal Service (subsection (c)) or did not mail back a return card and did not vote during a period covering two general federal elections (subsection (d)). And since one of the requirements for removal under subsection (d) is the failure to vote during this period, the explanation added by HAVA in 2002 makes it clear that the statutory phrase "by reason of the person's failure to vote" in the Failure–to–Vote Clause does not categorically preclude the use of nonvoting as part of a test for removal.

Another provision of HAVA makes this point more directly. After directing that "registrants who have not responded to a notice and ... have not voted in 2 consecutive general elections for Federal office shall be removed," it adds that "no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

B

Since 1994, Ohio has used two procedures to identify and remove voters who have lost their residency qualification.

First, the State utilizes the Postal Service option set out in the NVRA. The State sends notices to registrants whom the Postal Service's "national change of address service" identifies as having moved. Ohio Rev. Code Ann. § 3503.21(B)(1). This procedure is undisputedly lawful. See 52 U.S.C. § 20507(c)(1).

But because according to the Postal Service "[a]s many as 40 percent of people who move do not inform the Postal Service,"[3] Ohio does not rely on this information alone. In its so-called Supplemental Process, Ohio "identif [ies] electors whose lack of voter activity indicates they may have moved." Record 401 (emphasis deleted). Under this process, Ohio sends notices to registrants who have "not engage[d] in any voter activity for a period of two consecutive years." *Id.*, at 1509. "Voter activity" includes "casting a ballot" in any election—whether general, primary, or special and whether federal, state, or ***1841** local. See *id.*, at 1507. (And Ohio regularly holds elections on both even and odd years.) Moreover, the term "voter activity" is broader than simply voting. It also includes such things as "sign [ing] a petition," "filing a voter registration form, and updating a voting address with a variety of [state] entities." *Id.*, at 295, 357.

After sending these notices, Ohio removes registrants from the rolls only if they "fai[l] to respond" and "continu[e] to be inactive for an additional period of four consecutive years, including two federal general elections." *Id.*, at 1509; see Ohio Rev. Code Ann. § 3503.21(B)(2). Federal law specifies that a registration may be canceled if the registrant does not vote "in an election during the period" covering two general federal elections after notice, § 20507(d)(1)(B)(ii), but Ohio rounds up to "four consecutive years" of nonvoting after

notice, Record 1509. Thus, a person remains on the rolls if he or she votes in any election during that period—which in Ohio typically means voting in any of the at least four elections after notice. Combined with the two years of nonvoting before notice is sent, that makes a total of six years of nonvoting before removal. *Ibid.*

C

A pair of advocacy groups and an Ohio resident (respondents here) think that Ohio's Supplemental Process violates the NVRA and HAVA. They sued petitioner, Ohio's Secretary of State, seeking to enjoin this process. Respondents alleged, first, that Ohio removes voters who have not actually moved, thus purging the rolls of *eligible* voters. They also contended that Ohio violates the NVRA's Failure–to–Vote Clause because the failure to vote plays a prominent part in the Ohio removal scheme: Failure to vote for two years triggers the sending of a return card, and if the card is not returned, failure to vote for four more years results in removal.

The District Court rejected both of these arguments and entered judgment for the Secretary. It held that Ohio's Supplemental Process "mirror[s] the procedures established by the NVRA" for removing people on change-of-residence grounds and does not violate the Failure–to–Vote Clause because it does not remove anyone "*solely* for [their] failure to vote." App. to Pet. for Cert. 43a, 57a, 69a–70a.

A divided panel of the Court of Appeals for the Sixth Circuit reversed. 838 F.3d 699 (2016). It focused on respondents' second argument, holding that Ohio violates the Failure–to–Vote Clause because it sends change-of-residence notices "based 'solely' on a person's failure to vote." *Id.,* at 711. In dissent, Judge Siler explained why he saw the case as a simple one: "The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do [that]." *Id.,* at 716.

We granted certiorari, 581 U.S. ——, 137 S.Ct. 2188, 198 L.Ed.2d 254 (2017), and now reverse.

II

A

[2] As noted, subsection (d), the provision of the NVRA that directly addresses the procedures that a State must follow before removing a registrant from the rolls on change-of-residence grounds, provides that a State may remove a registrant who "(i) has failed to respond to a notice" and "(ii) has not voted or appeared to vote ... during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice" (about four years). 52 U.S.C. § 20507(d)(1)(B). Not only are States allowed to remove registrants who satisfy ***1842** these requirements, but federal law makes this removal mandatory. § 20507(d)(3); see also § 21083(a)(4)(A).

Ohio's Supplemental Process follows subsection (d) to the letter. It is undisputed that Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years.

B

[3] Respondents argue (and the Sixth Circuit held) that, even if Ohio's process complies with subsection (d), it nevertheless violates the Failure–to–Vote Clause—the clause that generally prohibits States from removing people from the rolls "by reason of [a] person's failure to vote." § 20507(b)(2); see also § 21083(a)(4)(A). Respondents point out that Ohio's Supplemental Process uses a person's failure to vote twice: once as the trigger for sending return cards and again as one of the requirements for removal. Respondents conclude that this use of nonvoting is illegal.

We reject this argument because the Failure–to–Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. Instead, as permitted by subsection (d), Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice.

[4] When Congress clarified the meaning of the NVRA's Failure–to–Vote Clause in HAVA, here is what it said: "[C]onsistent with the [NVRA], ... no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). The meaning of these words is straightforward. "Solely" means "alone." Webster's Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And "by reason of" is a "quite formal" way of saying "[b]ecause of." C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed. 2013). Thus, a State violates the Failure–to–Vote Clause only if it removes registrants for no reason other than their failure to vote.

[5] This explanation of the meaning of the Failure–to–Vote Clause merely makes explicit what was implicit in the clause as originally enacted. At that time, the clause simply said that a state program "shall not result in the removal of the name of any person from the [rolls for federal elections] by reason of the person's failure to vote." 107 Stat. 83. But that prohibition had to be read together with subsection (d), which authorized removal if a registrant did not send back a return card and also failed to vote during a period covering two successive general elections for federal office. If possible, "[w]e must interpret the statute to give effect to both provisions," *Ricci v. DeStefano,* 557 U.S. 557, 580, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009), and here, that is quite easy.

[6] [7] The phrase "by reason of" denotes some form of causation. See *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Thus, the Failure–to–Vote Clause applies when nonvoting, in some sense, causes a registrant's name to be removed, but the law recognizes several types of causation. When a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause. See *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 265–268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). Cf. ***1843** *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 692–693, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011).

Which form of causation is required by the Failure–to–Vote Clause? We can readily rule out but-for causation. If "by reason of" in the Failure–to–Vote Clause meant but-for causation, a State would violate the clause if the failure to vote played a necessary part in the removal of a name from the list. *Burrage v. United States,* 571 U.S. 204, 211, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). But the removal process expressly authorized by subsection (d) allows a State to remove a registrant if the registrant, in addition to failing to send back a return card, fails to vote during a period covering two general federal elections. So if the Failure–to–Vote Clause were read in this way, it would cannibalize subsection (d).

Interpreting the Failure–to–Vote Clause as incorporating a proximate cause requirement would lead to a similar problem. Proximate cause is an elusive concept, see *McBride, supra,* at 692–693, 131 S.Ct. 2630, but no matter how the term is understood, it is hard to escape the conclusion that the failure to vote is a proximate cause of removal under subsection (d). If a registrant, having failed to send back a return card, also fails to vote during the period covering the next two general federal elections, removal is the direct, foreseeable, and closely connected consequence. See *Paroline v. United States,* 572 U.S. 434, 444–445, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014); *Bridge v. Phoenix Bond & Indemnity Co.,* 553 U.S. 639, 654, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008).

By process of elimination, we are left with sole causation. This reading harmonizes the Failure–to–Vote Clause and subsection (d) because the latter provision does not authorize removal solely by reason of a person's failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card.

For these reasons, we conclude that the Failure–to–Vote Clause, as originally enacted, referred to sole causation. And when Congress enacted HAVA, it made this point explicit. It added to the Failure–to–Vote Clause itself an explanation of how it is to be read, *i.e.,* in a way that does not contradict subsection (d). And in language that cannot be misunderstood, it reiterated what the clause means: "[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). In this way, HAVA dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.

That is exactly what Ohio's Supplemental Process does. It does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

C

Respondents and the dissent advance an alternative interpretation of the Failure–to–Vote Clause, but that reading is inconsistent with both the text of the clause and the clarification of its meaning in § 21083(a)(4)(A). Respondents argue that the clause allows States to consider nonvoting only to the extent that subsection (d) requires—that is, only *after* a registrant has failed to mail back a notice. Any other use of the failure to vote, including as the trigger for mailing a notice, they ***1844** claim, is proscribed. In essence, respondents read the language added to the clause by HAVA—"except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)"—as an exception to the general rule forbidding the use of nonvoting. See Brief for Respondents 37. And the Sixth Circuit seemed to find this point dispositive, reasoning that " 'exceptions in statutes must be strictly construed.' " 838 F.3d, at 708 (quoting *Detroit Edison Co. v. SEC,* 119 F.2d 730, 739 (C.A.6 1941)).

We reject this argument for three reasons. First, it distorts what the new language added by HAVA actually says. The new language does not create an exception to a general rule against the use of nonvoting. It does not say that the failure to vote may not be used "except that this paragraph does not prohibit a State from using the procedures described in subsections (c) and (d)." Instead, it says that "nothing in this paragraph *may be construed* " to have that effect. § 20507(b)(2) (emphasis added). Thus, it sets out not an exception, but a rule of interpretation. It does not narrow the language that precedes it; it clarifies what that language means. That is precisely what Congress said when it enacted HAVA: It added the "may not be construed" provision to "[c]larif[y]," not to alter, the prohibition's scope. § 903, 116 Stat. 1728.

Second, under respondents' reading, HAVA's new language is worse than superfluous. Even without the added language, no sensible person would read the Failure–to–Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Yet according to respondents, that is all that the new language accomplishes. So at a minimum, it would be redundant.

But the implications of this reading are actually worse than that. There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows. So if the new language were an exception, it would seem to follow that prior to HAVA, the Failure–to–Vote Clause *did* outlaw what subsections (c) and (d) specifically authorize. And that, of course, would be nonsensical.

Third, respondents' reading of the language that HAVA added to the Failure–to–Vote Clause makes it hard to understand why Congress prescribed in another section of the same Act, *i.e.,* § 21083(a)(4)(A), that "no registrant may be removed solely by reason of a failure to vote." As interpreted by respondents, the amended Failure–to–Vote Clause prohibits any use of nonvoting with just two narrow exceptions—the uses allowed by subsections (c) and (d). So, according to respondents, the amended Failure–to–Vote Clause prohibits much more than § 21083(a)(4)(A). That provision, in addition to allowing the use of nonvoting in accordance with subsections (c) and (d), also permits the use of nonvoting in any other way that does not treat nonvoting as the sole basis for removal.

There is no plausible reason why Congress would enact the provision that respondents envision. As interpreted by respondents, HAVA would be like a law that contains one provision making it illegal to drive with a blood alcohol level of 0.08 or higher and another provision making it illegal to drive with a blood alcohol level of 0.10 or higher. The second provision would not only be redundant; it would be confusing and downright silly.

Our reading, on the other hand, gives the new language added to the Failure–to–Vote Clause "real and substantial effect." *Husky Int'l Electronics, Inc. v. Ritz,* 578 U.S. ——, ——, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016) (internal quotation ***1845** marks omitted). It clarifies the meaning of the prohibition against removal by reason of nonvoting, a matter that troubled some States prior to HAVA's enactment. See, *e.g.,* FEC Report on the NVRA to the 106th Congress 19 (1999).

Respondents and the dissent separately claim that the Failure–to–Vote Clause must be read to bar the use of nonvoting as a trigger for sending return cards because otherwise it would be "superfluous." *Post,* at 1858 – 1859 (opinion of BREYER, J.); see Brief for Respondents 29. After all, subsection (d) already prohibits States from removing registrants because of a failure to vote alone. See § 20507(d)(1). To have meaning independent of subsection (d), respondents reason, the Failure–to–Vote Clause must prohibit other uses of the failure to vote, including its use as a trigger for sending out notices.

This argument is flawed because the Failure–to–Vote Clause has plenty of work to do under our reading. Most important, it prohibits the once-common state practice of removing registered voters simply because they failed to vote for some period of time. Not too long ago, "[c]ancellation for failure to vote [was] the principal

means used ... to purge the [voter] lists." Harris, Model Voter Registration System, at 44. States did not use a person's failure to vote as evidence that the person had died or moved but as an independent ground for removal. See *ibid.*[4] Ohio was one such State. Its Constitution provided that "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Art. V, § 1 (1977).

In addition, our reading prohibits States from using the failure to vote as the sole cause for removal on *any* ground, not just because of a change of residence. Recall that subsection (d)'s removal process applies only to change-of-residence removals but that the Failure–to–Vote Clause applies to *all* removals. Without the Failure–to–Vote Clause, therefore, States could use the failure to vote as conclusive evidence of ineligibility for some reason other than change of residence, such as death, mental incapacity, or a criminal conviction resulting in prolonged imprisonment.

D

Respondents put forth one additional argument regarding the Failure–to–Vote Clause. In essence, it boils down to this. So many properly registered voters simply discard return cards upon receipt that the failure to send them back is worthless as evidence that the addressee has moved. As respondents' counsel put it at argument, "a notice that doesn't get returned" tells the State "absolutely nothing about whether the person has moved." Tr. of Oral Arg. 41, 58. According to respondents, when Ohio removes registrants for failing to respond to a notice and failing to vote, it functionally "removes people solely for non-voting" unless the State has additional "reliable evidence" that a registrant has moved. *Id.*, at 49, 71.

This argument is based on a dubious empirical conclusion that the NVRA and HAVA do not allow us to indulge. Congress clearly did not think that the failure to send back a return card was of no evidentiary value because Congress made ***1846** that conduct one of the two requirements for removal under subsection (d).

Requiring additional evidence not only second-guesses the congressional judgment embodied in subsection (d)'s removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State's Supplemental Process. The Constitution gives States the authority to set the qualifications for voting in congressional elections, Art. I, § 2, cl. 1; Amdt. 17, as well as the authority to set the "Times, Places and Manner" to conduct such elections in the absence of contrary congressional direction, Art. I, § 4, cl. 1. We have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a return card. See *Inter Tribal*, 570 U.S., at 16–19, 133 S.Ct. 2247; see also *id.*, at 36–37, 133 S.Ct. 2247 (THOMAS, J., dissenting); *id.*, at 42–43, 46, 133 S.Ct. 2247 (ALITO, J., dissenting).

For all these reasons, we hold that Ohio law does not violate the Failure–to–Vote Clause.

III

We similarly reject respondents' argument that Ohio violates other provisions of the NVRA and HAVA.

A

Respondents contend that Ohio removes registered voters on a ground not permitted by the NVRA. They claim that the NVRA permits the removal of a name for only a few specified reasons—a person's request, criminal conviction, mental incapacity, death, change of residence, and initial ineligibility. Brief for Respondents 25–26; see 52 U.S.C. §§ 20507(a)(3), (4).[5] And they argue that Ohio removes registrants for other reasons, namely, for failing to respond to a notice and failing to vote.

This argument plainly fails. Ohio simply treats the failure to return a notice and the failure to vote as evidence that a registrant has moved, not as a ground for removal. And in doing this, Ohio simply follows federal law. Subsection (d), which governs removals "on the ground that the registrant has changed residence," treats the failure to return a notice and the failure to vote as evidence that this ground is satisfied. § 20507(d)(1).

If respondents' argument were correct, then it would also be illegal to remove a name under § 20507(c) because that would constitute removal for submitting change-of-address information to the Postal Service.

Likewise, if a State removed a name after receiving a death certificate or a judgment of criminal conviction, that would be illegal because receipt of such documents is not listed as a permitted ground for removal under § 20507(a)(3) or § 20507(a)(4). About this argument no more need be said.

B

Respondents maintain, finally, that Ohio's procedure is illegal because the State sends out notices without having any "reliable indicator" that the addressee has moved. Brief for Respondents 31. The "[f]ailure to vote for a mere two-year period," they argue, does not reliably "indicate that a registrant has moved out of the jurisdiction." *Id.*, at 30; see also, *e.g.*, Brief for State of New York et al. as *Amici Curiae* 13–28.

This argument also fails. The degree of correlation between the failure to vote for ***1847** two years and a change of residence is debatable, but we know from subsection (d) that Congress thought that the failure to vote for a period of two consecutive general elections was a good indicator of change of residence, since it made nonvoting for that period an element of subsection (d)'s requirements for removal. In a similar vein, the Ohio Legislature apparently thought that nonvoting for two years was sufficiently correlated with a change of residence to justify sending a return card.

[8] What matters for present purposes is not whether the Ohio Legislature overestimated the correlation between nonvoting and moving or whether it reached a wise policy judgment about when return cards should be sent. For us, all that matters is that no provision of the NVRA prohibits the legislature from implementing that judgment. Neither subsection (d) nor any other provision of the NVRA demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card. So long as the trigger for sending such notices is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," § 20507(b)(1), States can use whatever plan they think best. That may be why not even the Sixth Circuit relied on this rationale.

Respondents attempt to find support for their argument in subsection (c), which allows States to send notices based on Postal Service change-of-address information. This provision, they argue, implicitly sets a minimum reliability requirement. Thus, they claim, a State may not send out a return card unless its evidence of change of residence is at least as probative as the information obtained from the Postal Service. See Tr. of Oral Arg. 56.

Nothing in subsection (c) suggests that it is designed to play this role. Subsection (c) says that "[a] State may meet" its obligation "to remove the names" of ineligible voters on change-of-residence grounds by sending notices to voters who are shown by the Postal Service information to have moved, but subsection (c) does not even hint that it imposes any sort of minimum reliability requirement for sending such notices. §§ 20507(a)(4), (c). By its terms, subsection (c) simply provides one way—the minimal way—in which a State "*may* meet the [NVRA's] requirement[s]" for change-of-residence removals. § 20507(c) (emphasis added). As respondents agreed at argument, it is not the only way. Tr. of Oral Arg. 53.

C

Nothing in the two dissents changes our analysis of the statutory language.

1

Despite its length and complexity, the principal dissent sets out only two arguments. See *post*, at 1853 – 1854 (opinion of BREYER, J.). The first is one that we have already discussed at length, namely, that the Failure–to–Vote Clause prohibits any use of the failure to vote except as permitted by subsections (c) and (d). We have explained why this argument is insupportable, *supra*, at 1856 – 1858, and the dissent has no answer to any of the problems we identify.

The dissent's only other argument is that Ohio's process violates § 20507(a)(4), which requires States to make a "reasonable effort" to remove the names of ineligible voters from the rolls. The dissent thinks that this provision authorizes the federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and to strike down any state law that does not meet their own standard of "reasonableness." But see Brief for United States as *Amicus Curiae* 28–29. The dissent ***1848** contends that Ohio's system violates this supposed "reasonableness"

requirement primarily because it relies on the failure to mail back the postcard sent to those who have not engaged in voter activity for two years. Based on its own cobbled-together statistics, *post,* at 1856 – 1857, and a feature of human nature of which the dissent has apparently taken judicial notice (*i.e.,* "the human tendency not to send back cards received in the mail," *post,* at 1856), the dissent argues that the failure to send back the card in question "has no tendency to reveal accurately whether the registered voter has changed residences"; it is an "irrelevant factor" that "shows nothing at all that is statutorily significant." *Post,* at 1856 – 1857, 1858 – 1859.

Whatever the meaning of § 20507(a)(4)'s reference to reasonableness, the principal dissent's argument fails since it is the federal NVRA, not Ohio law, that attaches importance to the failure to send back the card. See §§ 20507(d)(1)(B)(i), (d)(2)(A). The dissenters may not think that the failure to send back the card means anything, but that was not Congress's view. The NVRA plainly reflects Congress's judgment that the failure to send back the card, coupled with the failure to vote during the period covering the next two general federal elections, is significant evidence that the addressee has moved.

It is not our prerogative to judge the reasonableness of that congressional judgment, but we note that, whatever the general "human tendency" may be with respect to mailing back cards received in the mail, the notice sent under subsection (d) is nothing like the solicitations for commercial products or contributions that recipients may routinely discard. The notice in question here warns recipients that unless they take the simple and easy step of mailing back the preaddressed, postage prepaid card—or take the equally easy step of updating their information online—their names may be removed from the voting rolls if they do not vote during the next four years. See Record 295–296, 357. It was Congress's judgment that a reasonable person with an interest in voting is not likely to ignore notice of this sort.

2

Justice SOTOMAYOR's dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of "ignor[ing] the history of voter suppression" in this country and of "uphold[ing] a program that appears to further the ... disenfranchisement of minority and low-income voters." *Post,* at 1865 – 1866. Those charges are misconceived.

The NVRA prohibits state programs that are discriminatory, see § 20507(b)(1), but respondents did not assert a claim under that provision. And Justice SOTOMAYOR has not pointed to any evidence in the record that Ohio instituted or has carried out its program with discriminatory intent.

* * *

The dissents have a policy disagreement, not just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio's Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.

The judgment of the Sixth Circuit is reversed.

It is so ordered.

THOMAS, J., concurring.

I join the Court's opinion in full. I write separately to add that respondents' proposed interpretation of the National Voter ***1849** Registration Act (NVRA) should also be rejected because it would raise significant constitutional concerns.

Respondents would interpret the NVRA to prevent States from using failure to vote as evidence when deciding whether their voting qualifications have been satisfied. Brief for Respondents 25–30. The Court's opinion explains why that reading is inconsistent with the text of the NVRA. See *ante,* at 1841 – 1847. But even if the NVRA were "susceptible" to respondents' reading, it could not prevail because it "raises serious constitutional doubts" that the Court's interpretation avoids. *Jennings v. Rodriguez,* 583 U.S. ——, ——, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018).

As I have previously explained, constitutional text and history both "confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied." *Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. 1, 29, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013) (THOMAS, J., dissenting). The Voter–Qualifications Clause provides that, in elections for the House of Representatives, "the Electors in each State shall have the Qualifications

requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const., Art. I, § 2, cl. 1. The Seventeenth Amendment imposes an identical requirement for elections of Senators. And the Constitution recognizes the authority of States to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2; see *Inter Tribal Council of Ariz.,* 570 U.S., at 35, n. 2, 133 S.Ct. 2247 (opinion of THOMAS, J.). States thus retain the authority to decide the qualifications to vote in federal elections, limited only by the requirement that they not " 'establish special requirements' " for congressional elections " 'that do not apply in elections for the state legislature.' " *Id.,* at 26, 133 S.Ct. 2247 (quoting *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 865, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (THOMAS, J., dissenting)). And because the power to establish requirements would mean little without the ability to enforce them, the Voter Qualifications Clause also "gives States the authority ... to verify whether [their] qualifications are satisfied." 570 U.S., at 28, 133 S.Ct. 2247.

Respondents' reading of the NVRA would seriously interfere with the States' constitutional authority to set and enforce voter qualifications. To vote in Ohio, electors must have been a state resident 30 days before the election, as well as a resident of the county and precinct where they vote. Ohio Rev. Code Ann. § 3503.01(A) (Lexis 2015); see also Ohio Const., Art. V, § 1. Ohio uses a record of nonvoting as one piece of evidence that voters no longer satisfy the residence requirement. Reading the NVRA to bar Ohio from considering nonvoting would therefore interfere with the State's "authority to verify" that its qualifications are met "in the way it deems necessary." *Inter Tribal Council of Ariz., supra,* at 36, 133 S.Ct. 2247. Respondents' reading thus renders the NVRA constitutionally suspect and should be disfavored. See *Jennings, supra,* at ——, 138 S.Ct., at 836.

Respondents counter that Congress' power to regulate the "Times, Places and Manner" of holding congressional elections includes the power to impose limits on the evidence that a State may consider when maintaining its voter rolls. See Brief for Respondents 51–55; see also Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the ***1850** Places of chusing Senators"). But, as originally understood, the Times, Places and Manner Clause grants Congress power "only over the 'when, where, and how' of holding congressional elections," not over the question of who can vote. *Inter Tribal Council of Ariz., supra,* at 29, 133 S.Ct. 2247 (opinion of THOMAS, J.) (quoting T. Parsons, Notes of Convention Debates, Jan. 16, 1788, in 6 Documentary History of the Ratification of the Constitution 1211 (J. Kaminski & G. Saladino eds. 2000) (Massachusetts ratification delegate Sedgwick)). The " 'Manner of holding Elections' " was understood to refer to "the circumstances under which elections were held and the mechanics of the actual election." 570 U.S., at 30, 133 S.Ct. 2247 (quoting Art. I, § 4, cl. 1). It does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met. See 570 U.S., at 29–33, 133 S.Ct. 2247. The Clause thus does not change the fact that respondents' reading of the NVRA is constitutionally suspect.

The Court's interpretation of the NVRA was already the correct reading of the statute: The NVRA does not prohibit a State from considering failure to vote as evidence that a registrant has moved. The fact that this reading avoids serious constitutional problems is an additional reason why, in my view, today's decision is undoubtedly correct.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Section 8 of the National Voter Registration Act of 1993 requires States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant." § 8(a)(4), 107 Stat. 82–83, 52 U.S.C. § 20507(a)(4). This case concerns the State of Ohio's change-of-residence removal program (called the "Supplemental Process"), under which a registered voter's failure to vote in a single federal election begins a process that may well result in the removal of that voter's name from the federal voter rolls. See *infra,* at 1853 – 1854. The question is whether the Supplemental Process violates § 8, which prohibits a State from removing registrants from the federal voter roll "by reason of the person's failure to vote." § 20507(b)(2). In my view, Ohio's program does just that. And I shall explain why and how that is so.

I

This case concerns the manner in which States maintain federal voter registration lists. In the late 19th and early 20th centuries, a number of "[r]estrictive registration laws and administrative procedures" came into use across the United States—from literacy tests to the poll tax and from strict residency requirements to "selective purges." H.R. Rep. No. 103–9, p. 2 (1993). Each was designed "to keep certain groups of citizens from voting" and "discourage participation." *Ibid.* By 1965, the Voting Rights Act abolished some of the "more obvious impediments to registration," but still, in 1993, Congress concluded that it had "unfinished business" to attend to in this domain. *Id.*, at 3. That year, Congress enacted the National Voter Registration Act "to protect the integrity of the electoral process," "increase the number of eligible citizens who register to vote in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained." § 20501(b). It did so mindful that "the purpose of our election process is not to test the fortitude and determination of the ***1851** voter, but to discern the will of the majority." S. Rep. No. 103–6, p. 3 (1993).

In accordance with these aims, § 8 of the Registration Act sets forth a series of requirements that States must satisfy in their "administration of voter registration for elections for Federal office." § 20507. Ohio's Supplemental Process fails to comport with these requirements; it erects needless hurdles to voting of the kind Congress sought to eliminate by enacting the Registration Act. Four of § 8's provisions are critical to this case: subsections (a), (b), (c), and (d). The text of each subsection is detailed and contains multiple parts. Given the complexity of the statute, readers should consult these provisions themselves (see Appendix A, *infra,* at 1860 – 1862) and try to keep the thrust of those provisions in mind while reading this opinion. At the outset, I shall address each of them.

A

1

We begin with subsection (a)'s "Reasonable Program" requirement. That provision says that "each State shall":

> "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant, in accordance with subsections (b), (c), and (d)." § 20507(a)(4).

This provision tells each State that it must try to remove ineligible voters from the rolls, that it must act reasonably in doing so, and that, when it does so, it must follow the rules contained in the next three subsections of § 8—namely, subsections (b), (c), and (d).

2

Subsection (b)'s "Failure–to–Vote" Clause generally forbids state change-of-residence removal programs that rely upon a registrant's failure to vote as a basis for removing the registrant's name from the federal voter roll. Before 1993, when Congress enacted this prohibition, many States would assume a registered voter had changed his address, and consequently remove that voter from the rolls, simply because the registrant had failed to vote. Recognizing that many registered voters who do not vote "may not have moved," S. Rep. No. 103–6, at 17, Congress consequently prohibited States from using the failure to vote as a proxy for moving and thus a basis for purging the voter's name from the rolls. The Failure–to–Vote Clause, as originally enacted, said:

> "Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office ... shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 107 Stat. 83; see § 20507(b)(2).

As I shall discuss, Congress later clarified that "using the procedures described in subsections (c) and (d) to remove an individual" from the federal voter roll is permissible and does not violate the Failure–to–Vote Clause. See § 8(b)(2) of the National Voter Registration Act, 107 Stat. 83, and as amended, 116 Stat. 1728, 52 U.S.C. § 20507(b)(2).

3

Subsection (c), which is entitled "Voter Removal Programs," explains how "[a] State may meet the requirement of subsection (a)(4)." § 20507(c)(1). Because subsection (a)(4) itself incorporates all of the ***1852** relevant requirements of subsections (b), (c), and (d) within it, see § 20507(a)(4), subsection (c) sets forth one way a State can comply with the basic requirements of § 8 at issue in this case (including subsection (b)). A State's removal program qualifies under subsection (c) if the following two things are true about the program:

> "(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and
>
> "(B) if it appears [that] the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address." § 20507(c)(1).

The upshot is that subsection (c) explains one way a State may comply with subsection (a)'s Reasonable Program requirement without violating subsection (b)'s Failure–to–Vote prohibition. It is a roadmap that points to a two-step removal process. At step 1, States first *identify* registered voters whose addresses may have changed; here, subsection (c) points to one (but not the only) method a State may use to do so. At step 2, subsection (c) explains, States must "*confirm* the change of address" by using a special notice procedure, which is further described in subsection (d).

4

Subsection (d) sets forth the final procedure, which Ohio refers to as the "Confirmation Procedure." Brief for Petitioner 7. The statute makes clear that a State must use the Confirmation Procedure to "confirm" a change of address in respect to any registered voter it initially identifies as someone who has likely changed addresses. It works as follows: the State must send the registrant identified as having likely moved a special kind of notice by forwardable mail. That notice must warn the registrant that his or her name will be removed from the voter roll unless the registrant either returns an attached card and confirms his or her current address in writing or votes in an election during the period covering the next two federal elections. In a sense, the notice a State is required to send as part of the Confirmation Procedure gives registered voters whom the State has identified as likely ineligible a "last chance" to correct the record before being removed from the federal registration list. The Confirmation Procedure is mandatory for all change-of-residence removals, regardless of the method the State uses to make its initial identification of registrants whose addresses may have changed. In particular, subsection (d) says:

> "A State shall not remove the name of a registrant from the official list of eligible voters ... on the ground that the registrant has changed residence unless the registrant [either]—
>
> "(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
>
> "(B)(i) has failed to respond to a notice described in [subsection (d)(2)]; and (ii) has not voted [in two subsequent federal elections]." § 20507(d)(1).

Subsection (d)(2) then goes on to describe (in considerable detail) the "last chance" notice the State must send to the registrant. In particular, the notice must be sent by *forwardable* mail so that the notice will reach the registrant even if the registrant has changed addresses. It must include a postage-prepaid, preaddressed "return card" that the registrant may send back to the State to confirm or correct the State's record of his or her ***1853** current address. And, the notice must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

* * *

In sum, § 8 tells States the following:

- In general, establish a removal-from-registration program that "makes a reasonable effort" to remove voters who become ineligible because they change residences.
- Do not target registered voters for removal from the registration roll because they have failed to vote. However, "using the procedures described in subsections (c) and (d) to remove an individual"

from the federal voter roll is permissible and does not violate the Failure–to–Vote prohibition.

• The procedures described in subsections (c) and (d) consist of a two-step removal process in which at step 1, the State uses change-of-address information (which the State may obtain, for instance, from the Postal Service) to identify registrants whose addresses may have changed; and then at step 2, the State must use the mandatory "last chance" notice procedure described in subsection (d) to confirm the change of address.

• The "last chance" confirmation notice must be sent by forwardable mail. It must also include a postage-prepaid, preaddressed "return card" that the registrant may send back to the State verifying his or her current address. And it must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

B

The Supplemental Process, Ohio's program for removing registrants from the federal rolls on the ground that the voter has changed his address, is much simpler. Each of Ohio's 88 boards of elections sends its version of subsection (d)'s "last chance" notice to those on a list "of individuals who, according to the board's records, have not engaged in certain kinds of voter activity"—including "casting a ballot"—for a period of "generally two years." Record 1507. Accordingly, each board's list can include registered voters who failed to vote in a single federal election. And anyone on the list who "continues to be inactive" by failing to vote for the next "four consecutive years, including two federal elections," and fails to respond to the notice is removed from the federal voter roll. *Id.,* at 1509. Under the Supplemental Process, a person's failure to vote is the sole basis on which the State identifies a registrant as a person whose address may have changed and the sole reason Ohio initiates a registered voter's removal using subsection (d)'s Confirmation Procedure.

II

Section 8 requires that Ohio's program "mak[e] a reasonable effort to remove" ineligible registrants from the rolls because of "a change in the residence of the registrant," and it must do so "in accordance with subsections (b), (c), and (d)." § 20507(a)(4)(B). In my view, Ohio's program is unlawful under § 8 in two respects. It first violates subsection (b)'s Failure–to–Vote prohibition because Ohio uses nonvoting in a manner that is expressly prohibited and not otherwise authorized under § 8. In addition, even if that were not so, the Supplemental Process also fails to satisfy subsection (a)'s Reasonable Program requirement, since using a registrant's failure to vote is not a ***1854** reasonable method for identifying voters whose registrations are likely invalid (because they have changed their addresses).

First, as to subsection (b)'s Failure–to–Vote Clause, recall that Ohio targets for removal registrants who fail to vote. In identifying registered voters who have likely changed residences by looking to see if those registrants failed to vote, Ohio's program violates subsection (b)'s express prohibition on "*[a]ny* State program or activity [that] result[s] in the removal" of a registered voter "by reason of the person's failure to vote." § 20507(b)(2) (emphasis added). In my view, these words are most naturally read to prohibit a State from considering a registrant's failure to vote as part of any process "that is used to start, or has the effect of starting, a purge of the voter rolls." H.R. Rep. No. 103–9, at 15. In addition, Congress enacted the Failure–to–Vote Clause to prohibit "the elimination of names of voters from the rolls solely due to [a registrant's] failure to respond to a mailing." *Ibid*. But that is precisely what Ohio's Supplemental Process does. The program violates subsection (b)'s prohibition because under it, a registrant who fails to vote in a single federal election, fails to respond to a forwardable notice, and fails to vote for another four years may well be purged. Record 1508. If the registrant had voted at any point, the registrant would not have been removed. See *supra,* at 1853 – 1854; *infra,* at 1855 – 1857.

Ohio does use subsection (d)'s Confirmation Procedure, but that procedure alone does not satisfy § 8's requirements. How do we know that Ohio's use of the Confirmation Procedure alone cannot count as statutorily significant? The statute's basic structure along with its language makes clear that this is so.

In respect to language, § 8 says that the function of subsection (d)'s Confirmation Procedure is "to *confirm* the change of address" whenever the State has already

"identif[ied] registrants whose addresses may have changed." §§ 20507(c)(1)(A), (d)(2). The function of the Confirmation Procedure is *not* to make the initial identification of registrants whose addresses may have changed. As a matter of English usage, you cannot *confirm* that an event happened without already having some reason to believe at least that it might have happened. Black's Law Dictionary 298 (6th ed. 1990) (defining "confirm" as meaning "[t]o complete or establish that which was imperfect or uncertain").

Ohio, of course, says that it has a ground for believing that those persons they remove from the rolls have, in fact, changed their address, but the ground is the fact that the person did not vote—the very thing that the Failure–to–Vote Clause forbids Ohio to use as a basis for removing a registered voter from the registration roll.

In respect to structure, two statutory illustrations make clear what the word "confirm" already suggests, namely, that the Confirmation Procedure is a *necessary* but not a *sufficient* procedure for removing a registered voter from the voter roll. The first illustration of how the Confirmation Procedure is supposed to function appears in subsection (c), which describes a removal process under which the State first *identifies* registrants who have likely changed addresses and then "*confirm[s]* " that change of residence using the Confirmation Procedure and sending the required "last chance" notice. § 20507(c)(1) (emphasis added). The identification method subsection (c) says a State may use is "change-of-address information supplied by the Postal Service." § 20507(c)(1)(A). A person does not notify the Postal Service that he is moving unless he is likely to move or has already moved. And, as the Registration Act says, "if it ***1855** appears from change-of-address provided by the Postal Service that ... the registrant has moved to a different residence not in the same registrar's jurisdiction," the State has a reasonable (hence acceptable) basis for "us[ing] the notice procedure described in subsection (d)(2) to confirm the change of address." § 20507(c)(1)(B).

The second illustration of how the Confirmation Procedure is supposed to function appears in a portion of the statute I have not yet discussed—namely, § 6 of the National Voter Registration Act, which sets out the rules for voter registration by mail. See § 6, 107 Stat. 80, 52 U.S.C. § 20505. In particular, § 6(d), entitled "Undelivered Notices," says that, "[i]f a notice of the disposition of a mail voter registration application ... is sent by *non* forwardable mail and is returned undelivered," at that point the State "may proceed in accordance with section 8(d)," namely, the Confirmation Procedure, and send the same "last chance" notice that I have just discussed. § 20505(d) (emphasis added).

Note that § 6(d) specifies a *non*forwardable mailing—and not a *forwardable* mailing, like one specified in § 8(d). This distinction matters. Why? If a person moves, a forwardable mailing will be sent along (*i.e.,* "forwarded") to that person's new address; in contrast, a *non*forwardable mailing will not be forwarded to the person's new address but instead will be returned to the sender and marked "undeliverable." And so a *non*forwardable mailing that is returned to the sender marked "undeliverable" indicates that the intended recipient may have moved. After all, the Postal Service, as the majority points out, returns mail marked "undeliverable" if the intended recipient has moved—not if the person still lives at his old address. *Ante,* at 1840, and n. 3.

Under § 6(d), the Registration Act expressly endorses *non*forwardable mailings as a reasonable method for States to use at step 1 to identify registrants whose addresses may have changed *before* the State proceeds to step 2 and sends the *forwardable* notice required under subsection (d)'s Confirmation Procedure. Specifically, § 6(d) explains that, if a State sends its registrants a mailing by *non*forwardable mail (which States often do), and if "[that mailing] is returned undelivered," the State has a fairly good reason for believing that the person has moved and therefore "may proceed in accordance with" § 8(d) by sending the "last chance" *forwardable* notice that the Confirmation Procedure requires. § 20505(d). In contrast to a *non*forwardable notice that is returned undeliverable, which tells the State that a registrant has likely moved, a *forwardable* notice that elicits no response whatsoever tells the State close to nothing at all. That is because, as I shall discuss, most people who receive confirmation notices from the State simply do not send back the "return card" attached to that mailing—whether they have moved or not.

In sum, § 6(d), just like §§ 8(a) and 8(c), indicates that the State, as an initial matter, must use a reasonable method to identify a person who has likely moved and then must send that person a confirmatory notice that will in effect give him a "last chance" to remain on the rolls. And these provisions thus tend to deny, not to support, the majority's suggestion that somehow sending a "last chance" notice is itself a way (other than nonvoting) to identify someone who has likely moved.

I concede that some individuals who have, in fact, moved do, in fact, send a return card back to the State making clear that they have moved. And some registrants do send

back a card saying that they have *not* moved. Thus, the Confirmation ***1856** Procedure will sometimes help provide *confirmation* of what the initial identification procedure is supposed to accomplish: finding registrants who have probably moved. But more often than not, the State fails to receive anything back from the registrant, and the fact that the State hears nothing from the registrant essentially proves nothing at all.

Anyone who doubts this last statement need simply consult figures in the record along with a few generally available statistics. As a general matter, the problem these numbers reveal is as follows: Very few registered voters move outside of their county of registration. But many registered voters fail to vote. Most registered voters who fail to vote also fail to respond to the State's "last chance" notice. And the number of registered voters who both fail to vote and fail to respond to the "last chance" notice exceeds the number of registered voters who move outside of their county each year.

Consider the following facts. First, Ohio tells us that a small number of Americans—about 4% of *all* Americans—move outside of their county each year. Record 376. (The majority suggests the relevant number is 10%, *ante,* at 1838 – 1839, but that includes people who move within their county.) At the same time, a large number of American voters fail to vote, and Ohio voters are no exception. In 2014, around 59% of Ohio's registered voters failed to vote. See Brief for League of Women Voters et al. as *Amici Curiae* 16, and n. 12 (citing Ohio Secretary of State, 2014 Official Election Results).

Although many registrants fail to vote and only a small number move, under the Supplemental Process, Ohio uses a registrant's failure to vote to identify that registrant as a person whose address has likely changed. The record shows that in 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Record 475. Ohio then sent those 1.5 million registered voters subsubsection (d) "last chance" confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, "You are right, Ohio. I have, in fact, moved." *Ibid.* In addition, Ohio received back about 235,000 return cards which said, in effect, "You are *wrong,* Ohio, I have *not* moved." In the end, however, there were *more than 1,000,000 notices*—the vast majority of notices sent—to which Ohio received back *no* return card at all. *Ibid.*

What about those registered voters—more than 1 million strong—who did not send back their return cards? Is there any reason at all (other than their failure to vote) to think they moved? The answer to this question must be no. There is no reason at all. First, those 1 million or so voters accounted for about 13% of Ohio's voting population. So if those 1 million or so registered voters (or even half of them) had, in fact, moved, then vastly more people must move each year in Ohio than is generally true of the roughly 4% of *all* Americans who move to a different county nationwide (not all of whom are registered voters). See *Id.*, at 376. But there is no reason to think this. Ohio offers no such reason. And the streets of Ohio's cities are not filled with moving vans; nor has Cleveland become the Nation's residential moving companies' headquarters. Thus, I think it fair to assume (because of the human tendency not to send back cards received in the mail, confirmed strongly by the actual numbers in this record) the following: In respect to change of residence, the failure of more than 1 million Ohio voters to respond to *forwardable notices* ***1857** (the vast majority of those sent) shows nothing at all that is statutorily significant.

To put the matter in the present statutory context: When a State relies upon a registrant's failure to vote to initiate the Confirmation Procedure, it violates the Failure–to–Vote Clause, and a State's subsequent use of the Confirmation Procedure cannot save the State's program from that defect. Even if that were not so, a nonreturned confirmation notice adds nothing to the State's understanding of whether the voter has moved or not. And that, I repeat, is because a nonreturned confirmation notice (as the numbers show) cannot reasonably indicate a change of address.

Finally, let us return to § 8's basic mandate and purpose. Ohio's program must "mak[e] *a reasonable effort* to remove the names of ineligible voters" from its federal rolls on change-of-residence grounds. § 20507(a)(4) (emphasis added). Reasonableness under § 8(a) is primarily measured in terms of the program's compliance with "subsections (b), (c), and (d)." § 20507(a)(4)(B). That includes the broad prohibition on removing registrants because of their failure to vote. More generally, the statute seeks to "protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." §§ 20501(b)(3), (4). Ohio's system adds to its non-voting-based identification system a factor that has no tendency to reveal accurately whether the registered voter has changed residences. Nothing plus one is still one. And, if that "one" consists of a failure to vote, then Ohio's program also fails to make the requisite "reasonable effort" to comply with subsection (a)'s statutory mandate. It must violate the statute.

III

The majority tries to find support in two provisions of a different statute, namely, the Help America Vote Act of 2002, 116 Stat. 1666, the pertinent part of which is reprinted in Appendix B, *infra,* at 1862 – 1863. The first is entitled "Clarification of Ability of Election Officials To Remove Registrants From Official List of Voters on Grounds of Change of Residence." § 903, *id.,* at 1728. That provision was added to the National Voter Registration Act's Failure–to–Vote Clause, subsection (b)(2), which says that a State's registrant removal program "shall not result in the removal of the name of any person from the official list ... by reason of the person's failure to vote." § 20507(b)(2); see *supra,* at 1851. The "Clarification" adds:

> "except that nothing in this paragraph may be construed to prohibit a State *from using the procedures described in subsections (c) and (d)* to remove an individual from the official list of eligible voters if the individual—(A) has not either notified the applicable registrar (in person or in writing) or responded ... to the [confirmation] notice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office." § 903, *id.,* at 1728 (emphasis added).

This amendment simply clarified that the use of nonvoting specified in subsections (c) and (d) does not violate the Failure–to–Vote Clause. The majority asks why, if the matter is so simple, Congress added the new language at all. The answer to this question is just what the title attached to the new language says, namely, Congress added the new language for purposes of *clarification*. And the new language clarified any confusion States may have had about the relationship between, on the one hand, subsection (b)'s ***1858** broad prohibition on any use of a person's failure to vote in removal programs and, on the other hand, the requirement in subsections (c) and (d) that a State consider whether a registrant has failed to vote at the end of the Confirmation Procedure. This reading finds support in several other provisions in both the National Voter Registration Act and the Help America Vote Act, which make similar clarifications. See, *e.g.,* § 20507(c)(2)(B) (clarifying that a particular prohibition "shall not be construed to preclude" States from complying with separate statutory obligations); see also §§ 20510(d)(2) (similar rule of construction), 21081(c)(1), 21083(a)(1)(B), (a)(2)(A)(iii), (b)(5), (d)(1)(A)-(B); 21084.

The majority also points out that another provision of the Help America Vote Act, § 303. See § 303(a)(4), 116 Stat. 1708, 52 U.S.C. § 21083(a)(4). That provision once again reaffirms that a State's registration list-maintenance program must "mak[e] a *reasonable effort* to remove registrants who are ineligible to vote" and adds that "*consistent with the National Voter Registration Act of 1993* ... registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added).

The majority tries to make much of the word "solely." But the majority makes too much of too little. For one thing, the Registration Act's Failure–to–Vote Clause under subsection (b) does not use the word "solely." And § 303 of the Help America Vote Act tells us to interpret its language (which includes the word "solely") "consistent with the" Registration Act. § 21083(a)(4)(A). For another, the Help America Vote Act says that "nothing in this [Act] may be construed to authorize or require conduct prohibited under [the National Voter Registration Act], or to supersede, restrict or limit the application of ... [t]he National Voter Registration Act." § 21145(a)(4).

The majority's view of the statute leaves the Registration Act's Failure–to–Vote Clause with nothing to do in respect to change-of-address programs. Let anyone who doubts this read subsection (d) (while remaining aware of the fact that it requires the sending of a confirmation notice) and ask himself or herself: What *else* is there for the Failure–to–Vote Clause to do? The answer is nothing. Section 8(d) requires States to send a confirmation notice for all change-of-address removals, and, in the majority's view, failing to respond to that forwardable notice is always a valid cause for removal, even if that notice was sent by reason of the registrant's initial failure to vote. Thus the Failure–to–Vote Clause is left with no independent weight since complying with subsection (d) shields a State from violating subsection (b). To repeat the point, under the majority's view, the Failure–to–Vote Clause is superfluous in respect to change-of-address programs: subsection (d) already accomplishes everything the majority says is required of a State's removal program—namely, the sending of a notice.

Finally, even if we were to accept the majority's premise that the question here is whether Ohio's system removes

registered voters from the registration list "solely by reason of a failure to vote," that would not change anything. As I have argued, Part II, *supra,* the failure to respond to a forwardable notice is an irrelevant factor in terms of what it shows about whether that registrant changed his or her residence. To add an irrelevant factor to a failure to vote, say, a factor like having gone on vacation or having eaten too large ***1859** a meal, cannot change Ohio's sole use of "failure to vote" into something it is not.

IV

Justice THOMAS, concurring, suggests that my reading of the statute " 'raises serious constitutional doubts.' " *Ante,* at 1849 (quoting *Jennings v. Rodriguez,* 583 U.S. ——, ——, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018)). He believes that it "would seriously interfere with the States' constitutional authority to set and enforce voter qualifications." *Ante,* at 1849. At the same time, the majority "assume[s]" that "Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest." *Ante,* at 1846, n. 5. But it suggests possible agreement with Justice THOMAS, for it makes this assumption only "for the sake of argument." *Ibid.*

Our cases indicate, however, that § 8 neither exceeds Congress' authority under the Elections Clause, Art. I, § 4, nor interferes with the State's authority under the Voter Qualification Clause, Art. 1, § 2. Indeed, this Court's precedents interpreting the scope of congressional authority under the Elections Clause make clear that Congress has the constitutional power to adopt the statute before us.

The Elections Clause states:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Art. I, § 4, cl. 1.

The Court has frequently said that "[t]he Clause's substantive scope is broad," and that it "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. 1, 8, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013). We have long held that "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.' " *Id.,* at 9, 133 S.Ct. 2247 (quoting *Ex parte Siebold,* 100 U.S. 371, 392, 25 L.Ed. 717 (1880)).

The words " 'Times, Places, and Manner,' " we have said, are " 'comprehensive words' " that " 'embrace authority to provide a complete code for congressional elections.' " *Tribal Council, supra,* at 8–9, 133 S.Ct. 2247 (quoting *Smiley v. Holm,* 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932)). That "complete code" includes the constitutional authority to enact "regulations relating to 'registration.' " *Ibid.*; see also *Cook v. Gralike,* 531 U.S. 510, 524, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (same); *Roudebush v. Hartke,* 405 U.S. 15, 24–25, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972). That is precisely what § 8 does.

Neither does § 8 tell the States "*who* may vote in" federal elections. *Tribal Council,* 570 U.S., at 16, 133 S.Ct. 2247. Instead, § 8 considers the *manner* of registering those whom the State itself considers qualified. Unlike the concurrence, I do not read our precedent as holding to the contrary. But see *id.,* at 26, 133 S.Ct. 2247 (THOMAS, J., dissenting). And, our precedent strongly suggests that, given the importance of voting in a democracy, a State's effort (because of failure to vote) to remove from a federal election roll those it considers otherwise qualified is unreasonable. Cf. *Carrington v. Rash,* 380 U.S. 89, 91–93, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (State can impose "reasonable residence restrictions on the availability of the ***1860** ballot" but cannot forbid otherwise qualified members of military to vote); see also *Kramer v. Union Free School Dist. No. 15,* 395 U.S. 621, 625, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) ("States have the power to impose *reasonable* citizenship, age, and residency requirements on the availability of the ballot" (emphasis added)); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor").

For these reasons, with respect, I dissent.

APPENDIX A

The National Voter Registration Act of 1993

"SEC. 2. FINDINGS AND PURPOSES.

"(a) FINDINGS.—The Congress finds that—
"(1) The right of citizens of the United States to vote is a fundamental right;

"(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

"(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation ..., including racial minorities.

"(b) PURPOSES.—The purposes of this Act are—
"(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

"(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

"(3) to protect the integrity of the electoral process; and

"(4) to ensure that accurate and current voter registration rolls are maintained." 107 Stat. 77.

"SEC. 5. SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER'S LICENSE.
"(d) CHANGE OF ADDRESS.—Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes." *Id.,* at 79.

"SEC. 6. MAIL REGISTRATION.
"(d) UNDELIVERED NOTICES. If a notice of the disposition of a mail voter registration application under section 8(a)(2) is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 8(d)." *Id.,* at 80.

"SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.
"(a) IN GENERAL—In the administration of voter registration for elections for Federal office, each State shall—

"(1) ensure that any eligible applicant is registered to vote in an election—

. . . . .

"(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

"(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

"(A) at the request of the registrant;

***1861** "(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

"(C) as provided under paragraph (4);

"(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

"(A) the death of the registrant; or

"(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

. . . . .

"(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

"(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

"(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's

failure to vote.

"(c) VOTER REMOVAL PROGRAMS.—(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

"(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

"(B) if it appears from information provided by the Postal Service that—

"(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

"(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

"(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

"(B) Subparagraph (A) shall not be construed to preclude—

"(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

"(ii) correction of registration records pursuant to this Act.

"(d) REMOVAL OF NAMES FROM VOTING ROLLS.—"(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

"(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

"(B)(i) has failed to respond to a notice described in paragraph (2); and

"(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day ***1862** after the date of the second general election for Federal office that occurs after the date of the notice.

"(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

"(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

"(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

"(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection." *Id.,* at 82–84.

APPENDIX B

The Help America Vote Act of 2002

"SEC. 303. COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS AND

REQUIREMENTS FOR VOTERS WHO REGISTER BY MAIL.
"(a) COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS.—

. . . . .

"(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS.—The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

"(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

"(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 116 Stat. 1708–1710.

"SEC. 903. CLARIFICATION OF ABILITY OF ELECTION OFFICIALS TO REMOVE REGISTRANTS FROM OFFICIAL LIST OF VOTERS ON GROUNDS OF CHANGE OF RESIDENCE.
"Section 8(b)(2) of the National Voter Registration Act of 1993 ... is amended by striking the period at the end and inserting the following: ", except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

"(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in ***1863** subparagraph (B) to the notice sent by the applicable registrar; and then

"(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office." *Id.,* at 1728.

"SEC. 906. NO EFFECT ON OTHER LAWS.
"(a) IN GENERAL.—... [N]othing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws [including]:

. . . . .

"(4) The National Voter Registration Act of 1993." *Id.,* at 1729.

Justice SOTOMAYOR, dissenting.

I join the principal dissent in full because I agree that the statutory text plainly supports respondents' interpretation. I write separately to emphasize how that reading is bolstered by the essential purposes stated explicitly in the National Voter Registration Act of 1993 (NVRA) to increase the registration and enhance the participation of eligible voters in federal elections. 52 U.S.C. §§ 20501(b)(1)-(2). Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against.

Concerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an unfortunate feature of our country's history. See *Schuette v. BAMN,* 572 U.S. 291, 337–338, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting). As the principal dissent explains, "[i]n the late 19th and early 20th centuries, a number of '[r]estrictive registration laws and administrative procedures' came to use across the United States." *Ante,* at 1850 (opinion of BREYER, J.). States enforced "poll tax [es], literacy tests, residency requirements, selective purges, ... and annual registration requirements," which were developed "to keep certain groups of citizens from voting." H.R. Rep. No. 103–9, p. 2 (1993). Particularly relevant here, some States erected procedures requiring voters to renew registrations "whenever [they] moved or failed to vote in an election," which "sharply depressed turnout, particularly among blacks and immigrants." A. Keyssar, The Right To Vote 124 (2009). Even after the passage of the Voting Rights Act in 1965, many obstacles remained. See *ante,* at 1850 (opinion of BREYER, J.).

Congress was well aware of the "long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens" when it enacted the NVRA. S.

Rep. No. 103–6, p. 18 (1993). Congress thus made clear in the statutory findings that "the right of citizens of the United States to vote is a fundamental right," that "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation ... and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a). In light of those findings, Congress enacted the NVRA with the express purposes of "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens ***1864** as voters." §§ 20501(b)(1)-(2). These stated purposes serve at least in part to counteract the history of voter suppression, as evidenced by § 20507(b)(2), which forbids "the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Ibid.*

Of course, Congress also expressed other objectives, "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." §§ 20501(b)(3)-(4).* The statute contemplates, however, that States can, and indeed must, further all four stated objectives. As relevant here, Congress crafted the NVRA with the understanding that, while States are required to make a "reasonable effort" to remove ineligible voters from the registration lists, § 20507(a)(4), such removal programs must be developed in a manner that "prevent[s] poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register" and "prevent[s] abuse which has a disparate impact on minority communities," S. Rep. No. 103–6, at 18.

Ohio's Supplemental Process reflects precisely the type of purge system that the NVRA was designed to prevent. Under the Supplemental Process, Ohio will purge a registrant from the rolls after six years of not voting, *e.g.,* sitting out one Presidential election and two midterm elections, and after failing to send back one piece of mail, even though there is no reasonable basis to believe the individual actually moved. See *ante,* at 1857 – 1858 (BREYER, J., dissenting). This purge program burdens the rights of eligible voters. At best, purged voters are forced to "needlessly reregister" if they decide to vote in a subsequent election; at worst, they are prevented from voting at all because they never receive information about when and where elections are taking place.

It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, *amici* point to an investigation that revealed that in Hamilton County, "African–American–majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity" since 2012, as "compared to only 4% of voters in a suburban, majority-white neighborhood." Brief for National Association for the Advancement of Colored People et al. as *Amici Curiae* 18–19. *Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process. See Brief for Asian Americans Advancing Justice | AAJC et al. as *Amici Curiae* 15–26; Brief for National Disability Rights Network et al. as *Amici Curiae* 17, 21–24, 29–31; Brief for VoteVets Action Fund as *Amicus Curiae* 23–30. See also Brief for Libertarian ***1865** National Committee as *Amicus Curiae* 19–22 (burdens on principled nonvoters).

Neither the majority nor Ohio meaningfully dispute that the Supplemental Process disproportionately burdens these communities. At oral argument, Ohio suggested that such a disparate impact is not pertinent to this case because respondents did not challenge the Supplemental Process under § 20507(b)(1), which requires that any removal program "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act." Tr. of Oral Arg. 23. The fact that respondents did not raise a claim under § 20507(b)(1), however, is wholly irrelevant to our assessment of whether, as a matter of statutory interpretation, the Supplemental Process removes voters "by reason of the person's failure to vote" in violation of § 20507(b)(2). Contrary to the majority's view, *ante,* at 1848, the NVRA's express findings and purpose are highly relevant to that interpretive analysis because they represent "the assumed facts and the purposes that the majority of the enacting legislature ... had in mind, and these can shed light on the meaning of the operative provisions that follow." A. Scalia & B. Garner, Reading Law 218 (2012). Respondents need not demonstrate discriminatory intent to establish that Ohio's interpretation of the NVRA is contrary to the statutory text and purpose.

In concluding that the Supplemental Process does not violate the NVRA, the majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was

enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate. States, though, need not choose to be so unwise. Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote. The majority of States have found ways to maintain accurate voter rolls without initiating removal processes based solely on an individual's failure to vote. See App. to Brief for League of Women Voters of the United States et al. as *Amici Curiae* 1a–9a; Brief for State of New York et al. as *Amici Curiae* 22–28. Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by. Today's decision forces these communities and their allies to be even more proactive and vigilant in holding their States accountable and working to dismantle the obstacles they face in exercising the fundamental right to vote.

All Citations

138 S.Ct. 1833, 86 USLW 4376, 18 Cal. Daily Op. Serv. 5619, 2018 Daily Journal D.A.R. 5570, 27 Fla. L. Weekly Fed. S 323

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 United States Census Bureau, CB16–189, Americans Moving at Historically Low Rates (Nov. 16, 2016), available at https://www.census.gov/newsroom/press-releases/2016/cb16-189.html (all Internet materials as last visited June 8, 2018). States must update the addresses of even those voters who move within their county of residence, for (among other reasons) counties may contain multiple voting districts. Cf. *post,* at 1856 –1857 (BREYER, J., dissenting). For example, Cuyahoga County contains 11 State House districts. See House District Map, Ohio House Districts 2012–2022, online at http://www.ohiohouse.gov/members/district-map.

2 The principal dissent attaches a misleading label to this return card, calling it a " 'last chance' notice." *Post,* at 1852 - 1853, 1854 - 1856 (opinion of BREYER, J.). It is actually no such thing. Sending back the notice does not represent a voter's "last chance" to avoid having his or her name stricken from the rolls. Instead, such a voter has many more chances over a period of four years to avoid that result. All that the voter must do is vote in any election during that time. See 52 U.S.C. § 20507(d)(1)(B).

3 U.S. Postal Service, Office of Inspector Gen., MS–MA–15–006, Strategies for Reducing Undeliverable as Addressed Mail 15 (2015); see also Brief for Buckeye Institute as *Amicus Curiae* 10. Respondents and one of their *amici* dispute this statistic. See Tr. of Oral Arg. 46; Brief for Asian Americans Advancing Justice et al. as *Amici Curiae* 27–28.

4 See, *e.g.,* Haw. Rev. Stat. § 11–17(a) (1993); Idaho Code Ann. § 34–435 (1981); Minn. Stat. § 201.171 (1992); Mont. Code Ann. § 13–2–401(1) (1993); N.J. Stat. Ann. § 19:31–5 (West Supp. 1989); Okla. Stat., Tit. 26, § 4–120.2 (1991); Utah Code § 20–2–24(1)(b) (1991).

5 We assume for the sake of argument that Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest.

* The majority characterizes these objectives as ones to "remov[e] ineligible persons from the States' voter registration rolls," *ante,* at 1850 – 1851, but maintaining "accurate" rolls and "protecting the integrity of the electoral process" surely encompass more than just removing ineligible voters. An accurate voter roll and fair electoral process should also reflect the continued enrollment of eligible voters. In this way, the NVRA's enhanced-participation and accuracy-maintenance goals are to be achieved simultaneously, and are mutually reinforcing.

314 F.Supp.3d 1205
United States District Court, N.D. Florida.

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al., Plaintiffs,
v.
Kenneth W. DETZNER, in his official capacity as the Florida Secretary of State, Defendant.

Case No. 4:18-CV-2§51-MW/CAS
|
Signed 07/24/2018

Synopsis

Background: **University** students and voting rights organizations brought action against Secretary of State, claiming that fundamental right to vote was violated by Secretary's opinion that prevented **university** building from being an in-person **early** **voting** site. Students and organizations moved for a preliminary injunction.

Holdings: The District Court, Mark E. Walker, Chief Judge, held that:

[1] Secretary's opinion imposed significant burdens on **university** students;

[2] Secretary failed to articulate sufficiently weighty or important regulatory interests with any precision;

[3] Secretary's opinion was intentionally discriminatory on account of age, and thus violated Twenty-Sixth Amendment rights;

[4] students and organizations demonstrated irreparable injury;

[5] threatened injury to fundamental voting rights outweighed proposed injunction's damage to Secretary; and

[6] injunction would serve public interest.

Motion granted.

West Headnotes (30)

[1] **Federal Courts**
Elections, voting, and political rights

District court was not precluded from considering **university** students' and voting rights organizations' challenge to Secretary of State's opinion that prevented in-person **early** **voting** sites from being located on **university** property, despite contention that federal court would be addressing state claims; students and organizations explicitly claimed Secretary's opinion violated federal Constitution's right to vote, and they did not seek federal court to interpret and enjoin Secretary on basis of state law. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[2] **Federal Courts**
State constitutions, statutes, regulations, and ordinances

Federal courts can review state or local laws alleged to be unconstitutional.

Cases that cite this headnote

[3] **Federal Courts**
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.

Cases that cite this headnote

[4] **Federal Courts**
State constitutions, statutes, regulations, and ordinances

A federal court can review a state official's interpretation of, or gloss over, state law when it is alleged to violate the United States Constitution.

Cases that cite this headnote

[5] **Injunction**
Grounds in general; multiple factors

A district court can only grant a motion for preliminary injunction if the moving party shows that (1) it has a substantial likelihood of success on the merits, (2) irreparable injury will be suffered unless the injunction issues, (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) if issued, the injunction would not be adverse to the public interest.

Cases that cite this headnote

[6] **Injunction**
Extraordinary or unusual nature of remedy
Injunction
Clear showing or proof

Although a preliminary injunction is an extraordinary and drastic remedy, it nonetheless should be granted if the movant clearly carries the burden of persuasion as to the prerequisites.

Cases that cite this headnote

[7] **Constitutional Law**
Voting rights and suffrage in general

Courts examine alleged violations of the First and Fourteenth Amendment fundamental right to vote under the *Anderson-Burdick* balancing test. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[8] **Constitutional Law**
Voters, candidates, and elections

Courts examine states' election laws and regulations impacting the First and Fourteenth Amendment fundamental right to vote under a sliding-scale balancing analysis where the scrutiny varies with the effect of the regulation at issue. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[9] **Constitutional Law**
Voting rights and suffrage in general

When examining states' election laws, courts must first consider the character and magnitude of the asserted injury to the voting rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[10] **Constitutional Law**
Voting rights and suffrage in general

When First and Fourteenth Amendment voting rights are subjected to severe restrictions, the state regulation must be narrowly drawn to advance a state interest of compelling importance. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[11] **Constitutional Law**
Voting rights and suffrage in general

When First and Fourteenth Amendment voting rights are subjected to reasonable, nondiscriminatory restrictions then the state's important regulatory interests are generally sufficient to justify the restrictions. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[12] **Constitutional Law**
Voting rights and suffrage in general

However slight the burden on First and Fourteenth Amendment voting rights may appear, it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[13] **Constitutional Law**
Voting rights and suffrage in general
Election Law
Early voting in person

Secretary of State's opinion that prevented in-person **early voting** sites from being located on **university** property imposed significant burdens on **university** students, as element of *Anderson-Burdick* balancing test for alleged violation of First and Fourteenth Amendment fundamental right to vote; opinion did not result in mere inconvenience to students, but rather prohibited discrete class of overwhelmingly young voters from even possibility of alternative, reasonable **early voting** location, and only class facing prohibition was class of individuals who lived and worked on public **university** communities. U.S. Const. Amends. 1, 14; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

[14] **Election Law**
Location

Voters are not entitled to have every polling place be precisely located such that no group had to spend more time traveling to vote than did any other.

Cases that cite this headnote

[15] **Constitutional Law**
Voting rights and suffrage in general

Disparate impact matters under the *Anderson-Burdick* balancing test for alleged violations of the First and Fourteenth Amendment fundamental right to vote. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[16] **Constitutional Law**
Constitutional Rights in General
Constitutional Law
Reasonableness or rationality

Constitutional problems emerge when conveniences are available for some people but affirmatively blocked for others; once a unit of government has decided to administer a benefit or impose a burden, it must do so rationally and equitably, without offense to independent constitutional prohibitions.

Cases that cite this headnote

[17] **Constitutional Law**
Voting rights and suffrage in general

Election Law
Early voting in person

Secretary of State failed to articulate sufficiently weighty or important regulatory interests with any precision, as required under *Anderson-Burdick* balancing test to justify burden on **university** students' First and Fourteenth Amendment voting rights, created by Secretary's opinion that prevented in-person **early voting** sites from being located on **university** property; even though Secretary claimed that he had interest in following state law, preventing parking issues, and avoiding on-**campus** disruption, state law did not prohibit **early voting** sites on **college campuses**, large populations went to **campus** daily despite scarce parking, and **early voting** would have alleviated disruption that existed on election day at voting sites. U.S. Const. Amends. 1, 14; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

[18] **Constitutional Law**
Voting rights and suffrage in general

Generally, a state law or policy might claw back some expansions of its access to the ballot, arguably burdening some segment of the voting population's First and Fourteenth Amendment right to vote; in doing so, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[19] **Constitutional Law**
Voting rights and suffrage in general

A state's important regulatory interests must be precise to justify reasonable, nondiscriminatory restrictions on the First and Fourteenth Amendment right to vote. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[20] **Constitutional Law**
Voting rights and suffrage in general

Restrictions that may appear to create even slight burdens on the First and Fourteenth Amendment right to vote must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[21] **Election Law**
Early voting in person
Election Law
Age

Secretary of State's opinion that prevented in-person **early voting** sites from being located on **university** property was intentionally discriminatory on account of age, and thus violated **university** students' Twenty-Sixth Amendment rights; even though opinion did not identify **college** students by name, opinion revealed stark pattern of discrimination that was unexplainable on grounds other than age because it bore so heavily on younger voters than all other voters, and opinion was only contraction in context of expansion and easier access to ballot. U.S. Const. Amend. 26; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

[22] **Election Law**
Age

The impact of the official action, whether it bears more heavily on one age-group than another, provides an important starting point in determining whether the action on voting rights violates the Twenty-Sixth Amendment because

it is discriminatory on account of age. U.S. Const. Amend. 26.

Cases that cite this headnote

[23] **Election Law**
Age

Absent a "stark" pattern, unexplainable on grounds other than age, impact of the official action alone is not determinative of whether the action on voting rights violates the Twenty-Sixth Amendment because it is discriminatory on account of age. U.S. Const. Amend. 26.

Cases that cite this headnote

[24] **Election Law**
Age

The Twenty-Sixth Amendment must protect from those blatant and unnecessary burdens and barriers on young voters' rights. U.S. Const. Amend. 26.

Cases that cite this headnote

[25] **Injunction**
Conduct of elections

University students and voting rights organizations demonstrated irreparable injury, as required to receive preliminary injunction to prevent Secretary of State from prohibiting placement of **early voting** sites on **college** or **university campuses**; students would have had to travel longer and farther to vote early, if they were even able to, some students would have needed to take multiple buses or ride-sharing service to cast ballot, and organizations' members would have had to expend more resources and time to assist voters in accessing off-**campus early voting**. U.S. Const. Amends. 1, 14; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

[26] **Injunction**
Irreparable injury

An injury is "irreparable," as required for a preliminary injunction, only if it cannot be undone through monetary remedies.

Cases that cite this headnote

[27] **Injunction**
Irreparable injury
Injunction
Adequacy of remedy at law

The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm, as required for a preliminary injunction.

Cases that cite this headnote

[28] **Injunction**
Irreparable injury

Irreparable injury, as required for a preliminary injunction, is presumed when a restriction on the fundamental right to vote is at issue. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[29] **Injunction**
Conduct of elections

Threatened injury to **university** students'

fundamental voting rights outweighed proposed injunction's damage to Secretary of State, as required for students to receive preliminary injunction to prevent Secretary from prohibiting placement of **early voting** sites on **college** or **university campuses**; threatened injury was violation of constitutional rights of nearly 830,000 public **college** and **university** students, and invalidation of Secretary's opinion banning **early voting** sites on **campuses** only restored supervisors' of elections discretion in designating **early voting** sites. U.S. Const. Amends. 1, 14, 26; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

[30] **Injunction**
Conduct of elections

Preliminary injunction to prevent Secretary of State from prohibiting placement of **early voting** sites on **college** or **university campuses** would serve public interest, as required for district court to issue injunction; injunction vindicated **university** students' First, Fourteenth, and Twenty-Sixth Amendment rights regarding their right to vote, and allowing for easier and more accessible voting for all segments of society served the public interest. U.S. Const. Amends. 1, 14, 26; Fla. Stat. Ann. § 101.657(1)(a).

Cases that cite this headnote

Attorneys and Law Firms

***1208** Abha Khanna, Perkins Coie LLP, Seattle, WA, Amanda R. Callais, Elisabeth C. Frost, Pro Hac Vice, Alexi Machek Velez, Jacki L. Anderson, John Michael Geise, Marc E. Elias, Perkins Coie LLP, Washington, DC, Frederick Stanton Wermuth, King Blackwell Zehnder Etc PA, Orlando, FL, for Plaintiff.

David Andrew Fugett, Jesse Craig Dyer, Florida Department Of State Office Of General Counsel, Tallahassee, FL, Gary Vergil Perko, Malcolm Noble Means, Mohammad Omar Jazil, Hopping Green & Sams PA, Tallahassee, FL, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Mark E. Walker, Chief United States District Judge

***1209** Florida is home to 12 public universities and 28 state and community colleges. ECF No. 24, Ex. I, at 7 ("Rodden Report"). Four of the 10 largest public universities in the United States are in Florida. *Id.* For example, the University of Florida ("UF") in Gainesville—revered by many as Florida's first and finest institution of higher education—enrolls more than 52,000 students, 9,000 of whom live on the campus's three centrally located square miles. *Id.* at 11, 18–19. Nearly 68 percent of Gainesville's voting-age population is affiliated with UF and nearby Santa Fe College. *Id.* at 9; ECF No. 24, Ex. H, at 2.

Across Florida, more than 1.1 million young men and women were enrolled in institutions of higher learning in 2016; nearly 830,000 were enrolled at public colleges or universities. ECF No. 24, Ex. P, at 6 ("Levine, et al. Report"). Almost 107,000 staff members worked at these public institutions. *Id.* Put another way, the number of people who live and work on Florida's public college and university campuses is greater than the population of Jacksonville, Florida—or the populations of North Dakota, South Dakota, Alaska, Vermont, Wyoming, and the District of Columbia.

In November 2016, 2.4 million men and women under the age of 30 were registered to vote in Florida. ECF No. 24, Ex. B., at 7 ("Smith Report"). They comprised more than one quarter of the 9.5 million Floridians who voted that election. *Id.* at 6. Many of them chose to vote early, a popular form of voting in Florida.[1] In 2012, roughly 2.4 million Floridians of all ages—or 28.1 percent of the electorate—voted early. Smith Rep., at 5. That number rose in 2016 to more than 3.9 million Floridians of all ages—or approximately 40.3 percent of all those who voted—who cast their ballots at an **early voting** site. *Id.* at 4.

Early voting is especially popular among **college**

students. They vote early at a higher rate in Florida than the national average. In the 2012 election, 16 percent of college students across the country voted early; that number increased to 18 percent in 2016. Levine, et al. Rep., at 14. In Florida, 29 percent of college students voted early in 2012. *Id.* In 2016, 43 percent of Florida's college students voted early. *Id.*

Despite early voting's popularity among Florida's college students, no early voting site can exist on a college or university campus. As a direct result of Secretary of State Kenneth Detzner's ("Defendant") Opinion DE 14-01 (the "Opinion"), ECF No. 24, Ex. A,[2] issued through the Division of Elections, *none* of the nearly 830,000 students enrolled in a public university or college can vote early on campus. And *none* of the 68 percent of Gainesville residents affiliated with UF or Santa Fe College ***1210** can vote early where they work, study, or, for thousands of students, live.

This Court has considered, after hearing on July 16, 2018, Plaintiffs' motion for preliminary injunction. ECF No. 22. The issue is whether the Secretary of State's Opinion that categorically bars early voting on any university or college campus violates the First, Fourteenth, and Twenty-Sixth Amendments to the U.S. Constitution. It does. The motion is **GRANTED**.

I

More lines, more problems. In November 2012, many Florida voters "found themselves waiting in line for hours to cast a ballot both during the early voting period and on Election Day," according to Defendant's post-election report intended to improve the state's election administration. ECF No. 24, Ex. C, at 4. Supervisors of elections attributed these "excessive and unreasonable waiting times" to several factors, including "inadequate voting locations." *Id.* Under Florida law, supervisors of elections have discretion to designate certain eligible locations as early voting sites. Fla. Stat. § 101.657(1)(a) ("The supervisor *may* also designate ...") (emphasis added). In 2012, however, supervisors of elections could only designate their offices, city halls, or public libraries as early voting sites. ECF No. 24, Ex. C, at 7–8.

Defendant recommended that Florida's legislature amend its early voting statute to expand what qualifies as an eligible early voting site. *Id.* at 7. "If given the flexibility to choose more and larger sites, supervisors could more effectively select early voting locations that meet the geographic needs of their voters and reduce the wait times at these locations," Defendant urged. *Id.* at 5.

The legislature obliged. In May 2013, the Governor signed into law a provision (the "Early Voting Statute") that permits supervisors of elections to "designate any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center as early voting sites." Fla. Stat. § 101.657(1)(a). The Early Vote Statute did not include language from a proposed amendment that would have added "any ... Florida College System institution facility" as an early voting site. ECF No. 24, Ex. D. Nor did the legislature pass other proposed bills that, among other things, explicitly identified universities and colleges as eligible early voting sites. *See* ECF No. 24, Exs. K, L, & M.

In January 2014, Defendant, through the Division of Elections, issued the Opinion in response to Gainesville's City Attorney's question whether the J. Wayne Reitz Union, located on UF's campus, fit within the "government-owned community center" or "convention center" language in the Early Voting Statute. ECF No. 61, Ex. 1. A group of UF students had approached the Gainesville City Commission about placing an early voting site on campus, prompting the City Attorney to seek clarification from Defendant. *Id.*

Defendant's answer was a resounding "no." He declared that "[t]he Reitz Union is a structure designed for, and affiliated with, a specific educational institution. It is part of the University of Florida." ECF No. 24, Ex. A, at 3. He then interpreted the Early Voting Statute to exclude as "convention center" and "government-owned community center" the Reitz Union and "any other college- or university-related facilities" as an early voting site. *Id.* Defendant reasoned that because the Florida legislature declined to include explicit language identifying colleges and universities as early voting sites, "the terms 'convention center' and 'government-owned community center' cannot be construed so ***1211** broadly" as to include college or university facilities such as the Reitz Union. *Id.* Besides citing the unadopted amendment to the Early Voting Statute and other unadopted bills, Defendant offered no other rationale.

Plaintiffs are six university students and two organizations, the League of Women Voters and the Andrew Goodman Foundation.[3] Megan Newsome is a 22-year-old recent graduate of the University of Florida

who serves as a Puffin Democracy Fellow of the Andrew Goodman Foundation in addition to her on-campus research job. ECF No. 30, at ¶¶ 2–3. Ms. Newsome has voted early in past elections. *Id.* at ¶ 7. Amol Jethwani is a 21-year-old University of Florida student who has voted early in past elections and has experience arranging rides for fellow students to voting sites in Gainesville. ECF No. 29, at ¶¶ 3, 6–9, 12. Mary "Jamie" Roy is a 20-year-old University of Florida student who serves as a Student Ambassador to the Andrew Goodman Foundation and has voted both early and on Election Day in past elections. ECF No. 32, at ¶¶ 3, 5. Dillon Boatner is a 21-year-old University of Florida student who is a student member of the League of Women Voters. ECF No. 26, at ¶ 3. Alexander Adams is a 19-year-old student at the Florida State University; he has never voted before and intends to vote for the first time in the 2018 election. ECF No. 25, at ¶¶ 3, 8. Anja Rmus is a 19-year-old University of Florida student who has voted both early and on Election Day in past elections. ECF No. 31, at ¶¶ 3, 5.

Plaintiffs Newsome, Jethwani, Roy, and Rmus are residents of and registered to vote in Alachua County. ECF No. 30, at ¶ 2; ECF No. 29, at ¶ 2; ECF No. 32, at ¶ 2; ECF No. 31, at ¶ 2. Plaintiff Boatner is currently registered to vote in Volusia County but intends to change his registration this fall to Alachua County, where he spends the academic year. ECF No. 26, at ¶ 2. Plaintiff Adams is a resident of and registered voter in Leon County. ECF No. 25, at ¶ 2.

Defendant is Florida's Secretary of State. Under Florida law, the Secretary of State is the "chief election officer." Fla. Stat. § 97.012. He is required to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." Fla. Stat. § 97.012(1). He provides "written direction and opinions to the supervisors of elections on the performance of their official duties." Fla. Stat. § 97.012(16). The supervisors of elections treat Defendant's opinions as "authoritative" and follow them "absent contrary directive." ECF No. 33, at ¶ 16.

All individual Plaintiffs assert various burdens to their own and their peers' voting rights because of Defendant's Opinion. For instance, Mary "Jaime" Roy does not own a car and is dependent on Gainesville's public transportation system. ECF No. 32, at ¶ 5.[4] In one municipal election, they had to travel on two buses from their home to their voting location, which took between 40 and 60 minutes each way. *Id.* at ¶ 7.

Megan Newsome has helped organize a one-day shuttle program between campus and the polling place during the early voting period. ECF No. 30, at ¶ 8. Using the shuttle involved multiple waiting points for participants—waiting for the shuttle to fill before leaving, waiting in line to vote, waiting for all individuals to finish voting, and then driving back to campus. *Id.* Each trip took approximately one hour. *Id.* Some ***1212** students were unable to use the shuttle because they did not have an hour to spare in their schedules on that day or they sought the shuttle out after the shuttle program ended. *Id.* at ¶ 9. In other elections, Ms. Newsome has asked other people for rides or hired Uber cars for the round-trip from campus to the early voting location. *Id.* at ¶ 10. Amol Jethwani, meanwhile, helped coordinate rides to voting locations, exerting significant effort in identifying drivers, coordinating riders, and synchronizing suitable times for the rides. ECF No. 29, at ¶¶ 9–10. All individual Plaintiffs emphasize that an early voting site on-campus would lighten the burdens on their voting rights. *Id.* at ¶ 20; ECF No. 25, at ¶ 17; ECF No. 26, at ¶ 23; ECF No. 30, at ¶ 19; ECF No. 31, at ¶ 15; ECF No. 32, at ¶ 11.

II

Before reaching the merits of Plaintiffs' motion, this Court addresses some threshold issues.

[1]First, this Court rejects Defendant's argument that the *Pennhurst* doctrine precludes this Court from considering this case. Defendant conjures Plaintiffs' federal claims into state claims. *See* ECF No. 45, at 2 ("The Plaintiffs have now put this Court in a position of interpreting *state* law and then requiring *state* officials ... to follow that *federal* interpretation of *state* law.") (emphases in original). This attempt to scurry out of federal court is a swing and a miss.

Plaintiffs have brought forth federal claims. "Since the plaintiff has alleged a violation of the federal Constitution, *Pennhurst* does not apply." *Brown v. Georgia Dep't of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989). This Court would be on thinner ice if Plaintiffs were asking this Court to compel Defendant to abide by a federal judge's interpretation of the Early Voting Statute—and then this Court charged ahead and did so.

Here, this Court is on rock-solid ground. Plaintiffs are explicit in their federal claims. ECF No. 36, at 13 & 29; *see also* ECF No. 47, at 1–2. They discuss state law only to the extent it has informed Defendant's interests—or lack thereof—in promulgating the Opinion. ECF No. 36,

at 26–29. They do not seek this Court to interpret and enjoin Defendant on the basis of state law. ECF No. 47, at 1.

[2] [3]It is axiomatic that federal courts can review state or local laws alleged to be unconstitutional. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 636, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (invalidating District of Columbia's ban on possession of handguns in the home as a violation of the Second Amendment); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (invalidating Virginia law restricting marriage based on racial classifications as a violation of the Fourteenth Amendment). It is also "beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160–62, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *see also Armstrong v. Exceptional Child Cent.*, —— U.S. ——, 135 S.Ct. 1378, 1384, 191 L.Ed.2d 471 (2015) (citing *Osborn v. Bank of United States*, , 22 U.S. (9 Wheat.) 738, 838–39, 6 L.Ed. 204 (1824) *and Ex parte Young*, 209 U.S. at 150–51, 28 S.Ct. 441) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.").

[4]That this Court is reviewing a state officer's interpretation of state law—an interpretation that has the effective force of ***1213** a state law or policy—presents an added wrinkle that is quickly ironed out. Simply stated, a federal court can review a state official's interpretation of—or gloss over—state law when it is alleged to violate the United States Constitution. Otherwise, state legislatures could pass ambiguous statutes, giving cover for state officers to interpret vague laws in manners contrary to the U.S. Constitution. Barred in federal courts, challenges to these interpretations in state court could then fade under state courts' deference to state interpretations of state law.[5]

The best analogues are those federal invalidations of restrictive interpretations of state election laws. In 2012, a federal judge examined Ohio election statutes and the Ohio Secretary of State's interpretations of those statutes, which created different deadlines for military and non-military early voters. *Obama for Am. v. Husted*, 888 F.Supp.2d 897, 899–902 (S.D. Ohio 2012). The court enjoined the state from enforcing those laws as a violation of the First and Fourteenth Amendments. *Id.* at 911. The Sixth Circuit affirmed. *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). In affirming, the Sixth Circuit described how the Secretary "construed" Ohio law "to apply the more generous [early voting] deadline ... to military and overseas voters." *Id.* at 427. This resulted in "particularly high" burdens on the impacted non-military voters. *Id.* at 431 (internal quotation marks omitted).

Similarly, a federal judge determined the Georgia Secretary of State's interpretation of a state statute violated federal law and enjoined her from acting pursuant to her interpretation. *Charles H. Wesley Educ. Found. v. Cox*, 324 F.Supp.2d 1358, 1369 (N.D. Ga. 2004). The Georgia law detailed how "a person may apply to register to vote by completing and mailing" an application form. *Id.* at 1366. The Secretary, however, interpreted the law to require how " 'a person' may register by sending *one* application in an individual envelope" to the Secretary. *Id.* (emphasis added). Plaintiff, a non-profit organization engaging in voter-registration drives, submitted more than one application in a bundle, which the Secretary rejected. *Id.* at 1360–61. The district court construed the Secretary's interpretation as a state policy, *id.* at 1366, and determined the Secretary violated federal law in rejecting the bundled registrations. *Id.* at 1368.

This Court is reviewing Defendant's Opinion. It has the effective force of state law or official policy. While Defendant emphasizes the advisory nature of his opinions and their limited reach, ECF No. 45, at 7, these characterizations are unpersuasive.[6] According to the undisputed declarations of Ion Sancho, who served as Leon County's Supervisor of Election for 27 years, ECF No. 33, at ¶ 2, the Florida State Association of Supervisors of Elections "and Florida's Supervisors of Election[s] generally treat written opinions of the Division ... as authoritative and follow such opinions, absent contrary directive by a court, by statute, or by the Secretary of State." *Id.* at ¶ 16. Supervisors of elections "give broad and substantial deference" to such opinions. ECF No. 53, at ¶ 6. They do not act contrary to the opinions because, as a practical matter, "it takes enough effort to administer elections without adding controversy"—such as acting, or being ***1214** perceived to act, inconsistent with the Secretary's opinion. *Id.* Even more, the Secretary of State sends copies of opinions to supervisors of elections, which "do not contain qualifying language to suggest the advisory opinions are narrowly limited in their application." *Id.* at ¶ 4. Therefore, the supervisors reasonably understand the state's chief election officer's opinions as how he "interpret[s] and [is] likely to enforce Florida's election laws." *Id.* That all supervisors of elections follow Defendant's opinions is no surprise.

Turning now to the Opinion's scope and language, this

Court first examines what prompted it. A group of UF students approached the City Commission and requested an **early voting** site be placed on **campus**. ECF No. 61, Ex. 1, at 1. The Gainesville City Attorney, writing to Defendant, explained the Commission "desires to provide for **early voting** as allowed by state law." *Id.* She then asked: "Would the Reitz Union on the **University** of Florida **campus** qualify as a government-owned community center or a convention center for purposes of **early voting** under the recently amended Section 101.657, Florida Statutes?" *Id.* at 2.

Defendant's answer—the Opinion—was broader than the question. In concluding that "[t]he terms 'convention center' and 'government-owned community center' cannot be construed so broadly as to include the Reitz Union or any other **college**- or **university**-related facilities that were rejected by the Legislature as additional **early voting** sites," Defendant looked only to unadopted legislation—legislation that referenced **colleges** or **universities** *as a whole* and *without* any limiting language on the types of permissible or impermissible on-**campus** facilities. ECF No. 61, at 2; *see also* ECF No. 24, Exs. D, K, L & M (the unadopted amendment and unadopted proposed legislation). As a result, Defendant's rationale for rejecting the Reitz Union as an **early voting** site was precisely *because* it "is a structure designed for, and affiliated with, a specific educational institution." ECF No. 61, at 2.[7] Put another way, because "[i]t is part of the **University** of Florida," the Reitz Union cannot be an **early voting** site. *Id.* This reasoning means that *any* on-**campus** facility cannot be an **early voting** site, including stadiums or permanent public library facilities, which are permissible **early voting** sites under the **Early Voting** Statute. Fla. Stat. § 101.657(1)(a).[8]

III

Plaintiffs move for preliminary injunction, seeking this Court to enjoin Defendant from prohibiting county supervisors of elections from placing **early voting** sites ***1215** on **college** or **university campuses** and to require Defendant to issue a directive to the supervisors of elections informing them of this Court's order and its effects. ECF No. 22, at 2.

[5] [6]A district court can only grant a motion for preliminary injunction "if the moving party shows that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). Although a "preliminary injunction is an extraordinary and drastic remedy," it nonetheless should be granted if "the movant 'clearly carries the burden of persuasion' as to the four prerequisites." *United States v. Jefferson Cty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)).[9]

A

[7]Courts examine alleged violations of the First and Fourteenth Amendment's fundamental right to vote under a balancing test—the so-called *Anderson-Burdick* test.

Voting is the beating heart of democracy. It is a "fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). Voting also requires extensive administration, planning, and logistics. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

[8] [9] [10] [11] [12]With these interests in mind, courts examine states' election laws and regulations under what has been termed "a sliding-scale balancing analysis" where "the scrutiny varies with the effect of the regulation at issue." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 210, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (Scalia, J., concurring). Courts " 'must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Burdick*, 504 U.S. at 434,

112 S.Ct. 2059 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)). When rights are subjected to " 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)). When rights are subjected to "reasonable, nondiscriminatory restrictions" then "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. "However slight ***1216** that burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (controlling op.) (quoting *Norman*, 502 U.S. at 288–89, 112 S.Ct. 698).

This Court assumes for the purpose of the following First and Fourteenth Amendment analysis that Defendant's Opinion is a "reasonable, nondiscriminatory restriction[ ]." *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. As explained *infra*, at 30–34, 87 S.Ct. 1817, the Opinion is facially discriminatory on account of age. But even after construing it under a more deferential "reasonable, nondiscriminatory" lens, the Opinion falters under *Anderson-Burdick* because it disparately imposes significant burdens on Plaintiffs' rights weighted against imprecise, insufficiently weighty government interests.

1. Defendant's Opinion Imposes Significant Burdens on Plaintiffs.

[13]Contrary to Defendant's characterizations, Plaintiffs' burdens are more than *de minimis*. Defendant's Opinion imposes significant burdens on Plaintiffs' First and Fourteenth Amendment rights.

[14]At first blush, Plaintiffs' burdens appear slight. Indeed, some courts have characterized administrative burdens like waiting in line and commuting as not severe. In a challenge to Indiana's voter identification requirement, for example, the Supreme Court explained "[f]or most voters" the process of document-gathering, traveling to a state office, and obtaining a voter identification "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198, 128 S.Ct. 1610 (controlling op.). Drawing from this language, a federal court recently described a group of plaintiffs' logistical burdens in early voting at the only allowable early voting site in the county as "nonsevere, nonsubstantial, or slight." *Common Cause Ind. v. Marion Cty. Election Bd.*, 2018 WL 1940300, at *12 (S.D. Ind. Apr. 25, 2018).[10] And so courts have acknowledged there are differences between "disparate inconveniences that voters face when voting to the denial or abridgement of the right to vote." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016). Voters are not entitled to have "every polling place ... be precisely located such that no group had to spend more time traveling to vote than did any other." *Id.* Conceivably, then, a **college** student having to travel to vote early would perhaps not face a substantial burden under *Anderson-Burdick* because of her commute.

But those are not the facts here. Florida's public **college** and **university** students are *categorically prohibited* from on-**campus** **early** **voting** because of Defendant's Opinion. This is not a "nonsevere, nonsubstantial, or slight burden." *Common Cause Ind.*, 2018 WL 1940300, at *12. This is not a mere inconvenience.

[15]The Opinion lopsidedly impacts Florida's youngest voters. Disparate impact matters under *Anderson-Burdick*. A majority of the *Crawford* Court determined that "[i]t 'matters' in the *Anderson-Burdick* analysis ... whether the effects of a facially neutral and nondiscriminatory law are unevenly distributed across identifiable groups." *Common Cause of Ind.*, 2018 WL 1940300, at *13 (quoting *Crawford*, 553 U.S. at 216, 128 S.Ct. 1610 (Souter, J., dissenting)); *see also id.* at n. 18 ***1217** (identifying six-justice *Crawford* majority agreeing that disparate effects across identifiable groups matter).

The Opinion has the effect of creating a secondary class of voters who Defendant prohibits from even seeking early voting sites in dense, centralized locations where they work, study, and, in many cases, live. This effect alone is constitutionally untenable. *See Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *and Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("[I]t is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

[16]Admittedly, the **Early** **Voting** Statute authorizes **early** **voting** as "a convenience to the voter." Fla. Stat. § 101.657. Constitutional problems emerge, however, when

conveniences are available for some people but affirmatively blocked for others. "Once a unit of government has decided to administer a benefit or impose a burden, it must do so rationally and equitably, without offense to independent constitutional prohibitions." *Common Cause of Ind.*, 2018 WL 1940300, at *11. Defendant does not do this.

Defendant's Opinion prohibits a discrete class of individuals—nearly 830,000 individuals who live and work on public **college** and **university** communities, i.e. overwhelmingly young voters—from even the possibility of an alternative, reasonable **early voting** location. Further, this class of voters is the *only* class in Florida facing such a prohibition. Defendant's Opinion transforms these "mere inconvenience[s]" to an abridgment of the right to vote. ECF No. 45, at 25.

Dr. Rodden's report scrutinizes in great detail the Opinion's lopsided effects on **college** students. *See generally* Rodden Rep.[11] He first examines the travel times within communities with large **universities** using the census block group as the basis for comparison. Dr. Rodden summarizes that in eight of these communities there is "a pronounced difference in travel times between dorm-dominated [and student-dominated] block groups" and the at-large community. *Id.* at 64. Travel times to the nearest **early voting** site are "significantly longer" from census block groups with large **college**-student populations than those census block groups without such populations. *Id.* at 2. He then compares those travel times to similar communities without large **universities**. "[C]ommunities with dorm populations always have greater inequalities in travel times across neighborhoods than their 'non-dorm' matches." *Id.* at 73–74.

These longer travel times are even more glaring when considered in conjunction with three additional data-based conclusions. First, college students' residences are generally clustered on or near campus. *Id.* at 20, Fig. 1 (showing concentration of Gainesville's college population, including six census block groups where more than ***1218** 75 percent of residents live in dorms); 30, Fig. 5 (Tallahassee); 37, Fig. 9 (Miami); 44, Fix. 13 (Orlando); *and* 52, Fig. 17 (Tampa).

Second, these areas contain some of the most densely populated areas of a community.[12] *Id.* at 21, Fig. 2 (Gainesville's population density); 31, Fig. 6 (Tallahassee); 38, Fig. 10 (Miami), 45, Fig. 14 (Orlando); *and* 53, Fig. 18 (Tampa).

Third, individuals living in these dense campus-centered areas are disproportionately without access to cars.[13] *Id.* at 22 (Gainesville's car access); 32, Fig. 7 (Tallahassee); 39, Fig. 11 (Miami); 46, Fig. 15 (Orlando); *and* 54, Fig. 19 (Tampa). Moreover, Dr. Rodden draws from credible data in explaining that commuting by biking is "quite rare in Florida," accounting for between one and five percent of all commutes—not to mention the relatively high levels of bicycle injuries and deaths located near Florida's **university campuses** that may dissuade the average commuter. ECF No. 49, at 5.

This Court is not persuaded by Defendant's response to Dr. Rodden. In particular, Defendant measures the walking and biking distance between the nearest **early voting** site and UF from the *very edge* of **campus**. ECF No. 45, at 9–10 (showing a 24-minute one-way walk and an eight-minute one-way bike ride to the **early voting** site according to Google Maps). The **University** of Florida is like Hogwarts, which proscribes on-**campus** apparating—or instantaneous teleportation. Students do not and cannot apparate within the **campus**. Rather, UF students would begin their treks to the **early voting** site in downtown Gainesville from various points across **campus**. For example, it is a 2.5-mile distance from the center of **campus** at a dormitory like Hume Hall to the **early voting** site. Rodden Rep. at 26.

What is more, the Opinion's effects fall on a class of voters particularly invested in **early voting** for multiple reasons detailed in the record. Despite Defendant's Opinion and its effects, approximately 43 percent of Florida's **college** students voted early in 2016—more than the 18 percent of **college** students who voted early nationally that year. Levine, et al. Rep., at 14. And nearly half a million of the 1.2 million Floridians aged 18 to 29 (including non-**college** students) in 2016 voted at an **early voting** site. Smith Rep., at 5–6.

Plaintiffs' experts offer credible explanations on why younger voters turn toward **early voting**. Convenience is an unsurprising factor. *See* Levine, et al. Rep., at 8 ("[T]he convenience of voting is a significant factor in an individual's decision to vote, as it affects the cost side of the implicit cost/benefit calculation that each prospective voter makes."); Smith Rep., at 10 ("When it comes to deciding whether to vote an absentee mail ballot, vote early in-person, or vote on Election Day, younger registrants, like their older peers, often seek to maximize convenience."). Political scientists have long recognized voting's cost-benefit nature. *Id.* at 10–11 n.6; Levine, et al. Rep., at 8 n.6. Costs decrease when voters face fewer restrictions to, or at, a polling location.

Moreover, the alternatives to early voting are fraught with potential pitfalls. Younger voters casting their ballots on

Election Day disproportionately face information costs—"Where is my local polling ***1219** location? What valid ID do I need to bring? ... How do I get there?" Smith Report, at 13 (citing multiple academic articles studying the costs of voting). Younger voters are more likely to have their provisional ballots rejected because they have showed up at the wrong precinct, a not uncommon miscalculation for people who move at least once a year from dorm-to-dorm, dorm-to-apartment, house-to-dorm, apartment-to-apartment, Greek-house-to-house, among others. *Id.* at 14. In Florida, voters aged 18 to 21 had provisional ballots rejected "at a rate more than *four times higher* than the rejection rate for provisional ballots cast by voters between the ages of 45 to 64." *Id.* (emphasis added); *see also id.* at 15 (displaying table of rejected provisional ballots by age group).

Additionally, on-campus voting locations on Election Day are crowded. Dillon Boatner describes "very long lines to vote at the Reitz Student Union, which wrapped through several hallways" on November 8, 2016. ECF No. 26, at ¶ 5. Some "student voters had to wait in line for as long as an hour and a half to cast their ballots." *Id.* Ion Sancho describes similar scenes at Florida State University, where "a disproportionately high number of voters (mostly students)" appearing at on-campus voting sites had "changed residential addresses and required time-consuming assistance to update their voter registration," thereby "lead[ing] to delays that slow the rate" for other people to vote. ECF No. 33, at ¶ 8; *see also* ECF No. 53, at ¶ 8 (noting historically high volume of voters on Election Day on campuses). In Alachua County, two of the top three—and three of the top six—precincts with the largest number of registered voters are located on UF's campus. Smith Rep., at 17. On-campus Election Day voting can be, in Defendant's counsel's words, "difficult" and "a madhouse." ECF No. 62, at 66.

Mail-in ballot statistics are even starker. Vote-by-mail is convenient, but "a voter 18 to 21 years old is roughly *eight-times more likely* to have her vote by mail ballot rejected than an absentee voter over 65 years old." *Id.* at 12 (emphasis added). Put another way, 8,522 absentee ballots from voters aged 18 to 29 were rejected out of 243,409 cast; only 5,796 absentee ballots from voters aged 65 or more were rejected out of 1,229,279 cast. *Id.* at 13.

All the individual Plaintiffs live some distance away from their closest early voting site.[14] So do many other people. What is different about Plaintiffs is that Defendant's Opinion categorically prevents them from an alternative site on a dense, centralized location where they work, study, and, in many cases, live. This prohibition creates significant burdens.

2. Defendant Articulates No Precise Interests Sufficiently Weighty to Justify Plaintiffs' Burdens on Their Right to Vote.

[17]Contrast the lopsided burdens that Defendant's Opinion imposes on Plaintiffs with Defendant's interests in it.

[18] [19] [20]Generally, a state law or policy might claw back some expansions of its access to the ballot, "arguably burden[ing] ***1220** some segment of the voting population's right to vote." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016). In doing so, the "state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. Those interests must be "precise" to justify the burden. *Id.* at 789, 103 S.Ct. 1564. Restrictions that "may appear" to create even "slight" burdens "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610 (controlling op.) (quoting *Norman*, 502 U.S. at 288–89, 112 S.Ct. 698).

Here, Defendant fails to articulate "sufficiently weighty," *id.* or "important regulatory interests," *Anderson*, 460 U.S. at at 788, 103 S.Ct. 1564, with any "precis[ion]" to explain why it is "necessary to burden the plaintiff's rights." *Id.* at 789, 103 S.Ct. 1564. On the contrary, one must squint hard to identify Defendant's "important regulatory" and "precise" interests. *Id.* at 788–89, 103 S.Ct. 1564.

As best as this Court determined during the preliminary injunction hearing, Defendant articulates three interests in the Opinion: following state law, preventing parking issues, and avoiding on-**campus** disruption that an **early**-**voting** **campus** site could create. ECF No. 62, at 65–66.

Defendant's claimed interest in following state law fails because the **Early** **Voting** Statute does not prohibit **early** **voting** sites on **college** **campuses**.[15] State law authorizes a supervisor of election to designate "any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center as **early** **voting** sites." Fla. Stat. § 101.657(1)(a). Defendant interprets this statute based on amendments that were not adopted and

bills not passed—that is, language not appearing anywhere near the statute. Justice Scalia is more than instructive here. "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590, 128 S.Ct. 2783.

As written, the law does not *require* supervisors of elections to designate such sites. Nor does the law *prohibit* supervisors of elections from designating such sites. The law grants discretion to supervisors of elections. The Opinion is a broad answer to a narrow question, effectively inserting a prohibition into an otherwise flexible authorizing statute. *See supra*, at 13–14. Slapping a gloss over a statute is not the same as following the statute.

Defendant also claims an interest in alleviating parking difficulties that an on-**campus** **early** **voting** site might create. ECF No. 62, at 63 & 65–66; ECF No. 45, at 14 & 24. This interest is neither precise nor sufficiently weighty. First, a local supervisor of elections is in a better position to evaluate the parking situation at potential sites than Defendant. For example, Ion Sancho states that an **early** **voting** site at FSU "would help alleviate the disproportionate burdens on voting, including transportation issues and administrative delay." ECF No. 33, at ¶ 10. He also explains how the "large, concentrated population of voting-age individuals" come to **campus** daily anyway despite "the scarcity of parking." *Id.* at ¶ 11. Second, common sense suggests ***1221** that adding an additional **early** **voting** site would alleviate long lines and parking problems at other **early** **voting** locations. *See, e.g.*, ECF No. 29, at ¶ 12 (describing how closest **early** **voting** site to UF **campus** had "influx of students using the various shuttle programs" which "created congestion and resulted in longer wait times").

The above rationales extend to Defendant's third claimed interest in the Opinion—avoiding on-**campus** disruption. A supervisor of elections is the more appropriate authority to evaluate the potential disruption an **early** **voting** site would create. Moreover, an **early** **voting** site would alleviate some of the disruption that exists on Election Day voting sites on **campuses**. *See supra*, at —— (describing long lines and crowds that accompany on-**campus** voting sites on Election Day).

Defendant's lack of precise interests is all the more glaring when weighted against Plaintiffs' significant burdens. While a significant burden could be weighed against, and justified by, precise, sufficiently weighty government interests, Defendant has failed to articulate precise and sufficiently weighty interests in the Opinion to justify Plaintiffs' significant burdens on their voting rights. Plaintiffs have established a substantial likelihood of success on the merits of their First and Fourteenth Amendment claims.

B

[21]Defendant's Opinion also violates Plaintiffs' Twenty-Sixth Amendment rights because it is intentionally discriminatory on account of age. The Twenty-Sixth Amendment states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. CONST. amend. XXVI.

Courts considering Twenty-Sixth Amendment claims have acknowledged the "dearth of guidance on what test applies." *N.C. State Conference of the NAACP v. McCrory*, 182 F.Supp.3d 320, 522 (M.D.N.C. 2016), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016); *see also Nashville Student Org. Comm. v. Hargett*, 155 F.Supp.3d 749, 757 (M.D. Tenn. 2015) ("[T]here is no controlling caselaw ... regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote."). A consensus has been emerging, however, as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims. *One Wis. Inst., Inc. v. Thomsen*, 198 F.Supp.3d 896, 926 (W.D. Wis. 2016); *Lee v. Va. State Bd. of Elections*, 188 F.Supp.3d 577, 609 (E.D. Va. 2016), *aff'd*, *Lee*, 843 F.3d 592 (4th Cir. 2016).

This Court agrees with the *Thomsen* court's reasoning on applying this standard. The Amendment's text is "patterned on the Fifteenth Amendment ... suggest[ing] that *Arlington Heights* provides the appropriate framework" and *Anderson-Burdick* likely is unfitting because applying it would indicate the Twenty-Sixth Amendment " 'contributes no added protection to that already offered by the Fourteenth Amendment.' " *Thomsen*, 198 F. Supp. 3d at 926 (quoting *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975)).[16] Accordingly, this Court applies the *Arlington Heights* framework to Plaintiffs' Twenty-Sixth Amendment claim.

***1222** [22] [23]"The impact of the official action—whether

it 'bears more heavily on one [age-group] than another,' ... may provide an important starting point." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). "Sometimes a clear pattern, unexplainable on grounds other than [age] emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* Absent a "stark" pattern, "impact alone is not determinative." *Id.*

Simply put, Defendant's Opinion reveals a stark pattern of discrimination. It is unexplainable on grounds other than age because it bears so heavily on younger voters than all other voters. Defendant's stated interests for the Opinion (following state law, avoiding parking issues, and minimizing on-campus disruption) reek of pretext.[17] *Cf. Veasey v. Abbott*, 830 F.3d 216, 235–36 (5th Cir. 2016) (discussing pretextual characteristics in racially discriminatory election law). While the Opinion does not identify college students by name, its target population is unambiguous and its effects are lopsided. The Opinion is intentionally and facially discriminatory.

This Court does not lightly compare contemporary laws and policies to more shameful eras of American history. But addressing intentional discrimination does not require kid gloves. In 1910, Oklahoma amended its constitution to create exemptions to the state's literacy test; namely, anyone or his descendant who could vote on January 1, 1866—the so-called grandfather clause—"or who was at that time resided in some foreign nation" need not take a literacy test. *Guinn v. United States*, 238 U.S. 347, 356, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). January 1, 1866 was no coincidence—the overwhelming majority of African-Americans could not vote prior to that day because of, among other reasons, slavery and the absence of the Fifteenth Amendment's protections. While the Court acknowledged that Oklahoma's amendment "contains no express words" targeting African-Americans, "the standard itself inherently brings that result into existence." *Id.* at 364, 35 S.Ct. 926. Despite "seek[ing] in vain for any ground which would sustain any other interpretation" of the amendment, the Court unanimously determined the provision violated the Fifteenth Amendment because it intentionally targeted a discrete group seeking the vote. *Id.*

So too here. This Court has "s[ought] in vain for any ground which would sustain" a non-discriminatory interpretation of the Opinion both under the flexible *Anderson-Burdick* standard and now the Twenty-Sixth Amendment. *Id.* But the Opinion's scope and effects are clear abridgements of voting rights justified by, at best, weak interests. While Oklahoma in 1910 abridged voting rights by choosing an invidious date to exclude African-Americans from voting, Florida in 2014 limited places to stymie young voters from early voting.

Even more, "[t]he historical background of the decision" is another source to reveal "invidious purposes." *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. In 2013, ***1223** Florida's leading policymakers were expanding ballot access across the board. Defendant even recommended expanding early voting sites and giving supervisors of elections more flexibility. ECF No. 24, Ex. C, at 5 & 7–8. Defendant's Opinion stands as a shady contraction in a context of expansion and easier access—the *only* contraction, in fact.

To Defendant's credit, there is no evidence that the "specific sequence of events leading up to the challenged decision" was problematic. *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. Nor did Defendant "[d]epart[ ] from the normal procedural sequence" in issuing the Opinion. *Id.* But following procedural formalities to intentionally discriminate on account of age does not automatically attach constitutionality to a law or policy.

[24]If a unanimous Senate, near-unanimous House of Representatives, and 38 ratifying states intended the Twenty-Sixth Amendment to have any teeth, then the Amendment must protect those blatant and "unnecessary burdens and barriers" on young voters' rights. *Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325, 345 (1972).[18] This Court can conceive of fewer ham-handed efforts to abridge the youth vote than Defendant's affirmative prohibition of on-**campus** **early** **voting**.

Because the Opinion is unexplainable on grounds other than age, Plaintiffs have established a substantial likelihood of success on the merits of their Twenty-Sixth Amendment claim.

III

[25]Plaintiffs must also demonstrate they will suffer irreparable injury without a preliminary injunction. *Siegel*, 234 F.3d at 1176 (citing *McDonald's Corp.*, 147 F.3d at 1306). They have.[19]

[26] [27] [28]"An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987) (quoting *Cate*

v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Accordingly, irreparable injury is presumed when "[a] restriction on the fundamental right to vote" is at issue. *Obama for Am.*, 697 F.3d at 436. Once the election comes and goes, "there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). As this Court explained in another elections-related preliminary injunction order, "[t]his isn't golf: there are no mulligans." *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1258 (N.D. Fla. 2016).

Here, Plaintiffs have all articulated irreparable injury to their voting rights that will follow a denial of their motion for preliminary injunction. Individual Plaintiffs will have to travel longer and farther to vote early, if they are even able to. *See supra* at ——, n.14. Some will need to take multiple buses or an Uber to cast a ballot. ***1224** ECF No. 30, at ¶ 10; ECF No. 32, at ¶ 7. The organizational Plaintiffs' will suffer irreparable injury because their members will have to expend more resources and time to assist voters in accessing off-**campus** **early** **voting**. ECF No. 27, at ¶ 14; ECF No. 28, at ¶ 18. Those members will also be injured in having an on-**campus** **early** **voting** site affirmatively prohibited by Defendant's Opinion. ECF No. 27, at ¶ 15; ECF No. 38, at ¶ 18.

Considering the constitutional injuries and the one-shot nature of elections, Plaintiffs have established irreparable injury would follow a denial of their motion.

IV

[29]This Court next considers whether "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party." *Siegel*, 234 F.3d at 1176. This is not a close call. On the one hand, the threatened injury is the violation of Plaintiffs' First, Fourteenth, and Twenty-Sixth Amendment rights—and the First, Fourteenth, and Twenty-Sixth Amendment rights of nearly 830,000 public **college** and **university** students across Florida.

On the other hand, Defendant's far-reaching, discriminatory Opinion would no longer have any effect. That is hardly inequitable "damage" to Defendant. *Id.* After all, the Opinion's invalidation only restores supervisors' of elections discretion in designating **early** **voting** sites according to the **Early** **Voting** Statute. While Florida's 67 election supervisors must finalize a list of all **early** **voting** sites by July 29, 2018 for the August primary, Florida's supervisors could also not do so. Defendant could very well be correct that "adding one more task ... could have a disruptive, cascading effect on [the supervisors'] well-planned timeline[s]" and they could decline to designate any on-**campus** **early** **voting** sites. ECF No. 45, at 27. They might agree that adding additional **early** **voting** sites "would inject unnecessary confusion and uncertainty." *Id.* at 3. But the benefits of barring supervisors from having that choice pales in comparison to the voting rights of 830,000 young voters.[20]

[30]Finally, an injunction is unquestionably in the public interest. "The vindication of constitutional rights ... serve[s] the public interest almost by definition." *League of Women Voters of Fla. v. Browning*, 863 F.Supp.2d 1155, 1167 (N.D. Fla. 2012). Quite simply, allowing for easier and more accessible voting for all segments of society serves the public interest. "Cementing unconstitutional obstacles to 'that right strike at the heart of representative government.' " *Fla. Democratic Party*, 215 F.Supp.3d at 1258 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)).

Voter turnout in the United States is at less than impressive levels. Younger voters turn out at noticeably lower rates than older voters—53 percent for those Florida voters aged 18 to 29 versus 70 percent for all registered Florida voters in 2016. Smith Rep., at 7–8. Throwing up roadblocks in front of younger voters does not remotely serve the public interest. Abridging voting rights never does.

V

This Court is not the **Early**-**Voting** Czar. Except for the invalidation of Defendant's ***1225** Opinion, nothing must change because of this Order. This Court does not order the supervisors of elections to designate a single **early** **voting** site on a single **college** **campus**; rather, this Order removes the handcuffs from Florida's supervisors of elections and restores their discretion in setting **early** **voting** sites.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' Motion for Preliminary Injunction, ECF No. 22, is **GRANTED**.

2. The Secretary of State is preliminary enjoined from implementing or enforcing the **Early Voting** Statute in any way prohibiting or discouraging the use of any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center for **early voting** because that facility is related to, designed for, affiliated with, or part of a **college** or **university**, including through the use of the Secretary of State's powers to obtain and maintain uniformity in the interpretation and implementation of Florida's election laws;

3. The Secretary of State shall issue a directive to the supervisors of elections advising them that the interpretation of the **Early Voting** Statute that excludes from consideration as **early voting** sites any facilities related to, designed for, affiliated with, or part of a **college** or **university**, is unconstitutional and, accordingly, the supervisors of elections retain discretion under the **Early Voting** Statute to place **early voting** sites at any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center, including any such site as may be related to, designed for, affiliated with, or part of a **college** or **university**. The Secretary shall include in the directive a copy of this Order.

4. The Secretary of State shall file in this Court's electronic case filing system a Notice of Compliance with the above paragraphs on or before Friday, July 27, 2018.

5. The preliminary injunction set out above will take effect upon the posting of security in the amount of $500 for costs and damages sustained by a party found to have been wrongfully enjoined. Plaintiffs will immediately notify Defendant when the bond has been posted and thereafter file proof of such notice in this Court's electronic case files systems.

SO ORDERED on July 24, 2018.

All Citations

314 F.Supp.3d 1205

Footnotes

1 This case is about **early voting**. This Court uses the term "**early voting**" or "vote early" as synonyms for "in-person **early voting**." This is different than absentee or mail-in voting. It is also different than voting on Election Day; on-**campus** polling places are permissible on Election Day.

2 This Court refers to the Opinion throughout this Order as Defendant's Opinion even though Maria I. Matthews, the Director of the Division of Elections, signed the Opinion. The Division is part of the Florida Department of State, the body through which the Secretary of State issues "formal opinions on the interpretation of election laws." ECF No. 33, at ¶ 14.

3 Plaintiffs have standing. This Court addresses Defendant's standing arguments in its Order Denying Defendant's Motion to Dismiss. ECF No. 64, at 12–14.

4 Plaintiff Roy identifies as gender-queer and prefers the use of the gender-neutral pronoun "they." ECF No. 16, at ¶ 19.

5 This Court is persuaded by Judge O'Neill's characterization: "[I]n deciding a question of federal law, I am not bound to follow a state agency's interpretation of state law." *United States v. Lansdowne Swim Club*, 713 F.Supp. 785, 795 n.22 (E.D. Pa. 1989).

6 In an accompanying Order Denying Defendant's Motion to Dismiss, this Court determined Defendant's arguments regarding the limited scope of the Opinion to be disingenuous and therefore unpersuasive. ECF No. 64, at 9–10.

7 Defendant's counsel ably and understandably attempted to narrow the Opinion's scope as merely interpretations of "convention center" and "government-owned community center." ECF No. 62, at 85–87. Doing so requires ignoring the whole Opinion, including Defendant's rationale.

8 Defendant's Opinion reflects the following logic. A questioner asks whether it is permissible to do X. Answerer responds it is not permissible to do X because of Y reason. The Y reason can reasonably be understood as answerer's policy. Consider the following definitely hypothetical situation. A law clerk asks this Court if he can have a stuffed pony in his office for a decorative purpose, despite a federal regulation prohibiting "dogs or other animals on Federal property for other than official purposes." 41 C.F.R. § 102–74.425. This Court answers in the negative, reasoning that prohibiting non-official animals on federal property extends to stuffed animals. The dismayed law clerk would then reasonably conclude that no stuffed or live animals of any kind—a stuffed lion, a stuffed tiger, or a live bear—would be permitted in his office. What is more, this Court's authoritative answer to one law clerk would extend to other law clerks, whose plans for office decorations would be unceremoniously scuttled.

9 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

10 The district court respectfully made this characterization "without intending any denigration" to the plaintiffs in that case. 2018 WL 1940300, at *12. There, Plaintiffs had to drive between 25 and 30 minutes to the **early** **voting** site or had to pay for public transportation. They also faced parking difficulties and long lines. *Id.* at *5.

11 This Court finds Dr. Rodden's report to be credible. His methodology is sound. His data originates from the most recent Five-Year American Community Surveys, the Florida Department of State, Google Maps (for analyzing travel times), U.S. News and World Report (for analyzing parking and car usage), and the National Center for Education Statistics. Rodden Rep., at 6–7.

12 This Court is mindful that some dorm-dominated census block tracks may not be among the most densely-populated area of a community but surrounding census block tracks, populated by students living off-campus, remain among some of the most densely populated areas. *Id.* at 38, Fig. 10 (Miami), *and* at 53, Fig. 18 (Tampa).

13 As best as Dr. Rodden could determine from available data from surveys and **universities**.

14 Alexander Adams lived one mile from the closest **early** **voting** site, though he expects his dormitory assignment to change this upcoming semester. ECF No. 25, at ¶¶ 6 & 14. Other individual Plaintiffs live even farther away from their closest **early** **voting** site: Dillon Boatner, five miles, ECF No. 26, at ¶ 20; Amol Jethwani, 1.5 miles, ECF No. 29, at ¶ 18; Megan Newsome, five miles, ECF No. 30, at ¶ 15; Anja Rmus, two miles, ECF No. 31, at ¶ 13. All individual Plaintiffs explain that an on-**campus** **early** **voting** site will significantly ease the burdens on their voting rights. ECF No. 25, at ¶ 16; ECF No. 26, at ¶ 21; ECF No. 29, at ¶ 17; ECF No. 30, at ¶ 16; ECF No. 31, at ¶ 15; ECF No. 32, at ¶ 11.

15 At the risk of beating a dead horse, this Court emphasizes that it is not ordering Defendant to comply with a federal court's interpretation of state law. *Pennhurst*, 465 U.S. at 106, 104 S.Ct. 900. This Court is examining the Early Voting Statute for the limited purpose of evaluating Defendant's claimed interests in following state law, an evaluation *Anderson-Burdick* necessitates.

16 The parties concede that *Arlington Heights* is an acceptable framework for Plaintiffs' Twenty-Sixth Amendment claim. ECF No. 36, at 33 n.15; ECF No. 62, at 67.

17 This Twenty-Sixth Amendment analysis differs from this Court's *Anderson-Burdick* analysis, which requires a balancing of burdens and governmental interests. In balancing Plaintiffs' burdens and Defendant's interests, this Court presumed the Opinion was nondiscriminatory. *Supra*, at ——. This Court concluded that Defendant's interests were, to understate, weak, meaning Plaintiffs' significant burdens outweighed Defendant's interests in the Opinion. In the Twenty-Sixth Amendment context, this Court is more willing to call out a pretextual rationale—or "a banana a banana," in Plaintiffs' counsel's words. ECF No. 62, at 72.

18 The House of Representatives voted in favor of the Amendment 401-19. 117 CONG. REC. H7569 (Mar. 23, 1971). The Senate voted in favor of the Amendment 94-0. 117 CONG. REC. S5830 (Mar. 10, 1971). Soon afterwards, three-fourths of the States ratified the Amendment. 36 Fed. Reg. 12725 (July 7, 1971). Additional states have ratified the Amendment since its passage. Florida has not.

19 This Court addresses Defendant's redressability-related arguments—that granting Plaintiffs' motion will not guarantee Plaintiffs an on-**campus** **early** **voting** site—in its Order Denying Defendant's Motion to Dismiss. ECF No. 64, at 7-12.

20 Defendant also makes an argument that Plaintiffs' lawsuit is too late because the Opinion is more than four years old. ECF No. 45,

at 26–28. Individual Plaintiffs persuasively point out that none of them could vote in 2014; in fact, Alexander Adams is voting for the first time in 2018. ECF No. 47, at 11. It is up to the supervisors of elections to determine if it is "too late" to add on-**campus early voting** site for the 2018 elections. ECF No. 45, at 28.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

MARTA VALENTINA RIVERA MADERA, on behalf of herself and all others similarly situated; FAITH IN FLORIDA, HISPANIC FEDERATION, MI FAMILIA VOTA EDUCATION FUND, UNIDOSUS, and VAMOS4PR, PLAINTIFFS, v. KEN DETZNER, in his official capacity as Secretary of State for the State of Florida; and KIM A. BARTON, in her official capacity as Alachua County Supervisor of Elections, on behalf of herself and similarly-situated County Supervisors of Elections, DEFENDANTS.	Case No. 1:18-cv-00152

CLASS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is an action for injunctive and declaratory relief, including immediate preliminary injunctive relief before Florida's November 6, 2018 general election, seeking to enjoin Defendants to comply with Section 4(e) of the federal Voting Rights Act of 1965 ("VRA"), 52 U.S.C. §10303(e), by providing Spanish-language ballots, registration and other election materials, and assistance in the

following thirty-two (32) Florida counties for the November 6, 2018 election and future elections: Alachua, Bay, Brevard, Charlotte, Citrus, Clay, Columbia, Duval, Escambia, Flagler, Hernando, Highlands, Indian River, Jackson, Lake, Leon, Levy, Manatee, Marion, Martin, Monroe, Okaloosa, Okeechobee, Pasco, Putnam, St. Johns, St. Lucie, Santa Rosa, Sarasota, Sumter, Taylor, and Wakulla Counties (hereinafter, "the Counties").

2. Section 4(e) of the VRA protects the voting rights of American citizens educated in Spanish-speaking Puerto Rican schools. 52 U.S.C. §10303(e). Section 4(e) requires that Spanish-language ballots, registration, and election materials, instructions, and assistance be provided to these citizens so that they may effectively exercise their right to vote. *See id*.

3. Section 4(e)'s protections apply to thousands of Spanish-speaking Puerto Ricans who reside and are eligible to vote in the Counties. But Defendants intend to conduct the upcoming 2018 general election in the Counties entirely or predominantly in English, in direct contravention of those protections.

4. Accordingly, Plaintiff Marta Valentina Rivera Madera, an individual resident of the Counties who will be unable to meaningfully exercise her right to vote unless Spanish-language materials and assistance are provided, as well as Plaintiffs Faith in Florida, Hispanic Federation, Mi Familia Vota Education Fund, UnidosUS, Vamos4PR (collectively, "Organizational Plaintiffs"), bring this action

seeking preliminary injunctive relief to require Defendants to comply with the VRA and provide Spanish-language ballots, other registration and election materials, and assistance for the upcoming November 6, 2018 general election, as well as declaratory relief and permanent injunctive relief covering subsequent elections.

5. Plaintiff Rivera seeks to bring this action on behalf of herself and a class of all others similarly situated, pursuant to Federal Rule of Civil Procedure 23(b)(2).

6. Plaintiff Mi Familia Vota Education Fund brings this action on its own behalf and also on behalf of its members, who include members of the proposed plaintiff class.

7. Plaintiffs Faith in Florida, Hispanic Federation, UnidosUS, and Vamos4PR each bring this action on their own behalf. (Plaintiff Rivera and the Organizational Plaintiffs are collectively referred to as "Plaintiffs").

8. Plaintiffs bring their claims against Florida's chief election officer, Defendant Secretary of State Ken Detzner, and against a proposed defendant class consisting of the thirty-two (32) Supervisors of Elections in the Counties, represented by Defendant Alachua County Supervisor of Elections Kim A. Barton.

JURISDICTION AND VENUE

9. This action for declaratory and injunctive relief arises under the Voting Rights Act of 1965 as amended, 52 U.S.C. §§10101 et seq., and the Civil Rights Act of 1871, 42 U.S.C. §1983.

10. This Court has subject matter jurisdiction under 28 U.S.C. §1331 because this action arises under the laws of the United States, under 52 U.S.C. §10101(d) because this action arises under the Voting Rights Act, and under 28 U.S.C. §§1343(a)(3)-(4) and 1357 because this action seeks equitable and other relief pursuant to an act of Congress providing for the protection of the right to vote.

11. This Court has authority to issue declaratory relief under 28 U.S.C. §§2201 and 2202.

12. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because, among other things, a substantial part of the events or omissions giving rise to the claim have occurred and will continue to occur in this District, because Plaintiff Rivera resides in this district, and because Defendants Ken Detzner and Kim A. Barton have their principal places of business in this District.

13. Under N.D. Fla. Local Rule 3.1(A)-(B), this case is properly filed in the Gainesville Division of this District because, among other things, a substantial part of the events or omissions giving rise to the claim have occurred and will

continue to occur in counties included in the Gainesville Division, because Plaintiff Rivera resides in a county included in the Gainesville Division, and because Defendant Alachua County Supervisor of Elections Kim A. Barton has her principal place of business in a county included in the Gainesville Division.

PARTIES

Plaintiffs

14. Plaintiff MARTA VALENTINA RIVERA MADERA is an adult U.S. citizen who is a resident of Alachua County, Florida. Ms. Rivera is eligible to vote in Alachua County, Florida. Ms. Rivera attended elementary through high school in San Juan, Puerto Rico, in which the predominant classroom language was Spanish. Spanish is Ms. Rivera's primary language, and she cannot read, speak, or understand English well. She wants and intends to vote in Florida's November 6, 2018 general election. She is not able to exercise her right to vote effectively in an English-only election.

15. Plaintiff FAITH IN FLORIDA is a statewide, nonpartisan, community organizing and advocacy nonprofit organization based in Florida. Ensuring voters within Faith in Florida's member congregations, including Puerto Rican, Spanish-speaking members, are able to vote effectively is an important part of Faith in Florida's organizational mission. In furtherance of that mission, Faith in Florida has a nonpartisan voter engagement campaign which visits Latino faith

congregations, including in the Counties, to provide voter education and materials to Spanish-language voters and to help register Spanish-language voters. As a result of Defendants' and defendant class members' failure to ensure the provision of Spanish-language election materials and assistance to Spanish-speaking Puerto Ricans, including in the Florida 2018 general election, Faith in Florida will divert a portion of its limited resources to translate election information and provide support for Spanish-speaking voters within the Counties.

16. Plaintiff HISPANIC FEDERATION is a nonpartisan, nonprofit community organizing and advocacy organization, with an office in Florida, whose purpose is to empower and advance the Hispanic community, including by promoting and facilitating increased civic engagement. In furtherance of that mission, Hispanic Federation has a voter engagement advocacy program that works to mobilize and educate Spanish-speaking Floridians, including those within the Counties, to ensure those who are eligible and want to vote are able to do so. As a result of Defendants' and defendant class members' failure to ensure the provision of Spanish-language election materials and assistance to Spanish-speaking Puerto Ricans, including in the Florida 2018 general election, Hispanic Federation will divert a portion of its limited resources to providing Spanish language services to the Latino community within the Counties, including through

community educational forums and support at the polls for Spanish-language voters.

17. Plaintiff MI FAMILIA VOTA EDUCATION FUND is a nonpartisan, nonprofit civic engagement organization, with offices in Florida, dedicated to empowering and engaging the Latino community in the democratic process. Mi Familia Vota Education Fund's mission is to facilitate civic engagement by the Latino community. In furtherance of that mission, Mi Familia Vota Education Fund, among other things, is one of the leading Latino outreach voter registration groups in Florida, and conducts voter registration efforts, education, and citizen workshops throughout Florida, including within the Counties. Mi Familia Vota Education Fund has members within the Counties who are eligible to vote, attended school in Puerto Rico in which the predominant classroom language was Spanish, and cannot vote effectively in English. As a result of Defendants' and defendant class members' failure to ensure the provision of Spanish-language election materials and assistance to Spanish-speaking Puerto Ricans, including in the Florida 2018 general election, Mi Familia Vota Education Fund will divert a portion of its limited resources to translating voting materials into Spanish, staffing a Spanish-language hotline, and providing one-on-one support for affected Spanish-language speakers within the Counties. Mi Familia Vota Education Fund

brings this suit on its own behalf and on behalf of its members, in order to ensure that they are not denied their right to vote.

18. Plaintiff UNIDOSUS is a nonprofit organization and the nation's largest Latino civil rights and advocacy organization. UnidosUS has offices in Florida and has 15 member organizations in Florida, including member organizations based or working in the Counties. UnidosUS works to build a stronger America by creating opportunities for Latinos, including by conducting a voter engagement campaign to mobilize and educate Spanish-speaking potential voters in the Counties and throughout Florida. As a result of Defendants' and defendant class members' failure to ensure the provision of Spanish-language election materials and assistance to Spanish-speaking Puerto Ricans, including in the Florida 2018 general election, UnidosUS is diverting its limited resources from other projects to translate voting materials and provide other Spanish-language assistance to Spanish-language voters within the Counties.

19. Plaintiff VAMOS4PR is a project of the Center for Popular Democracy, a nonpartisan, nonprofit organization. Vamos4PR is a national coalition, with offices in Florida, dedicated to empowering and engaging the Puerto Rican community in the democratic process. In furtherance of that mission, Vamos4PR works to ensure that Spanish-speaking voters in Florida have access to the necessary information and can exercise their right to vote. As a result of

Defendants' and defendant class members' failure to ensure the provision of Spanish-language election materials and assistance to Spanish-speaking Puerto Ricans, including in the Florida 2018 general election, Vamos4PR will divert some of its limited resources to providing Spanish-language voter education materials to voters in the Counties.

20. If Defendants and the proposed defendant class comply with Section 4(e) of the VRA and provide Spanish-language ballots, election materials, and assistance, Plaintiffs Faith in Florida, Hispanic Federation, Mi Familia Vota Education Fund, UnidosUS, and Vamos4PR could and would expend their resources on other voting rights and/or civic engagement projects leading up to the 2018 election.

21. Plaintiff Rivera brings this action on behalf of herself and the following proposed plaintiff class:

> American citizens who attended some school in Puerto Rico, who have no or limited proficiency in English, and who are eligible to vote in any of the following Florida counties: Alachua, Bay, Brevard, Charlotte, Citrus, Clay, Columbia, Duval, Escambia, Flagler, Hernando, Highlands, Indian River, Jackson, Lake, Leon, Levy, Manatee, Marion, Martin, Monroe, Okaloosa, Okeechobee, Pasco, Putnam, St. Johns, St. Lucie, Santa Rosa, Sarasota, Sumter, Taylor, and Wakulla Counties.

22. The proposed plaintiff class is adequately defined by objective criteria that are not vague, ambiguous, or amorphous.

23. The proposed plaintiff class is so numerous that separate joinder of all members is impracticable. A conservative estimate is that the proposed class includes more than 30,000 members.

24. There are questions of law or fact common to the proposed plaintiff class. Defendants and the proposed defendant class have engaged in a standardized course of conduct against all plaintiff class members by conducting English-only elections without providing sufficient Spanish-language materials or assistance. That course of conduct affects all class members in the same way by making voting more difficult or effectively impossible. In addition, at least the following questions of law or fact are amenable to class-wide resolution, and therefore common to the class:

a. Whether Plaintiffs are entitled to relief under Section 4(e) of the VRA requiring Defendant Secretary of State Ken Detzner ("Secretary") to take action, including but not limited to issuing directives and other orders, to ensure that the Florida counties in which class members reside will provide Spanish-language election materials, including but not limited to ballots, sample ballots, voting guides, and registration materials, and will make available bilingual assistance for voter registration in advance of the voter registration deadline and bilingual

poll workers to assist voters with absentee voting, at early voting sites, and on election day;

b. Whether Plaintiffs are entitled to relief under Section 4(e) of the VRA requiring Supervisors of Elections in Florida counties in which class members reside to provide Spanish-language election materials, including but not limited to ballots, sample ballots, voting guides, and registration materials, and to make available bilingual assistance for voter registration in advance of the voter registration deadline and bilingual poll workers to assist voters with absentee voting, at early voting sites, and on election day;

c. Whether the Court should provide declaratory relief holding that Section 4(e) of the VRA requires the provision of Spanish-language ballots, registration and other election materials to Spanish-speaking Puerto Rican voters and requires that bilingual assistance with voter registration in advance of the voter registration deadline and bilingual assistance during early voting, with absentee voting, and on election day be provided in the Florida counties in which class members reside; and

d. Whether the Court should enter preliminary and permanent injunctive relief requiring the Secretary and the Supervisors of Elections in the

counties in which class members reside to ensure the provision of Spanish-language election materials, including but not limited to ballots, sample ballots, voter guides, and registration materials, and to ensure the provision of bilingual Spanish-language assistance with voter registration, with absentee voting, and at the polls.

25. Plaintiff Rivera's claims are typical of the claims of the proposed plaintiff class. Plaintiff Rivera's claims arise from the same pattern or practice of Defendants and the proposed defendant class failing to provide sufficient Spanish-language election materials and assistance and are based on the exact same legal theory under Section 4(e) of the VRA.

26. Plaintiff Rivera will fairly and adequately represent the interests of the plaintiff class. Plaintiff Rivera has no conflicts with the proposed plaintiff class, and has retained qualified and experienced litigators to represent her.

27. A plaintiff class is appropriate under Federal Rule of Civil Procedure 23(b)(2) because Defendants and the proposed defendant class have acted on grounds that apply generally to the class, so that final injunctive relief or declaratory relief is appropriate respecting the plaintiff class as a whole. A single injunction or declaratory judgment will provide relief to each member of the proposed plaintiff class. If the Court orders Defendants and the proposed defendant class to ensure that Spanish-language election materials and assistance

are provided in the counties where plaintiff class members reside, that order would provide relief to every plaintiff class member and eliminate a barrier to each plaintiff class member's ability to effectively exercise his or her right to vote.

Defendants

28. Defendant KEN DETZNER is sued in his official capacity as Secretary of State of Florida ("Secretary"). The Secretary is the chief election officer of the state of Florida and is charged with supervising and administering the election laws. Fla. Stat. §§15.13, 97.012. The Secretary is responsible for issuing regulations to ensure the "proper and equitable … implementation of" the election laws. Fla. Stat. §97.012(1). The Secretary's regulations require that "[b]allots shall be translated into other languages that are required by law or court order." Fla. Admin. Code R. 1S-2.032(3)(b). The Secretary has the authority to advise County Supervisors of Elections as to the proper methods for conducting elections and to direct County Supervisors of Elections to perform specific duties. Fla. Stat. §97.012(14), (16). The Secretary is also expressly authorized to enforce the County Supervisors of Elections' performance of their election duties and compliance with the Secretary's rules in state court. Fla. Stat. §97.012(14). The Secretary has the authority to direct and require that the County Supervisors of Elections comply with Section 4(e) of the VRA, translate and provide ballots and other election materials in Spanish, and implement any orders issued by this Court.

29. Defendant KIM A. BARTON is sued in her official capacity as Alachua County Supervisor of Elections. Supervisor Barton is sued on her own behalf and as a representative of all other similarly-situated County Supervisors of Elections in the Counties. As the Alachua County Supervisor of Elections, Supervisor Barton is responsible for the administration of elections in Alachua County. Like all County Supervisors of Elections, her responsibilities in that regard include printing ballots, translating ballots, preparing sample ballots and voter guides, and hiring poll workers. Fla. Stat. §§101.20, 101.21, 102.012, 102.014; Fla. Admin. Code R. 1S-2.033, 1S-2.032(3).

30. In addition to bringing claims against Defendant Secretary Detzner and Defendant Supervisor Barton, Plaintiffs also bring this proceeding as a class action against the following proposed defendant class, as represented by Defendant Supervisor Barton:

> Supervisors of Elections for the following counties, in their official capacities: Alachua, Bay, Brevard, Charlotte, Citrus, Clay, Columbia, Duval, Escambia, Flagler, Hernando, Highlands, Indian River, Jackson, Lake, Leon, Levy, Manatee, Marion, Martin, Monroe, Okaloosa, Okeechobee, Pasco, Putnam, St. Johns, St. Lucie, Santa Rosa, Sarasota, Sumter, Taylor, and Wakulla Counties.

31. The proposed defendant class is adequately defined by objective criteria. The members of the defendant class are specific elected officials easily identifiable from government records.

32. The proposed defendant class is so numerous that separate joinder of all members is impracticable. Joining 32 individual County Supervisors of Elections from across the state would cause inefficient and duplicative proceedings that would be difficult and impracticable to manage.

33. There are questions of law or fact common to the proposed defendant class. The proposed defendant class members have all engaged in and intend to engage in the same course of conduct against Plaintiffs: conducting English-only elections without providing sufficient Spanish-language materials or assistance. That common course of conduct gives rise to several questions of law or fact that are amenable to class-wide resolution, including the questions listed *supra* in paragraph 24.

34. Defendant Supervisor Barton's defenses are typical of the claims or defenses of the proposed defendant class. Defendant Supervisor Barton and the class member County Supervisors of Elections are public officers with identical public duties under Florida election law and regulations and Section 4(e) of the VRA.

35. Defendant Supervisor Barton will fairly and adequately represent the interests of the defendant class. Because Defendant Supervisor Barton is empowered with the same election law enforcement and oversight functions as every other county Supervisor of Elections, she can fairly and adequately protect

the interests of the Defendant class of Supervisors. As a public officer, Defendant Supervisor Barton can be expected to litigate this action with the vigor and forthrightness required of a representative party.

36. A defendant class is appropriate under Federal Rule of Civil Procedure 23(b)(1)(A) because the prosecution of separate lawsuits against each county's Supervisor of Elections would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for voters as well as the County Supervisors of Elections. Such separate actions would create a substantial risk of incompatible standards for the provision of Spanish-language election materials and assistance that vary depending upon the county in which voters and Supervisors reside. Different standards for voters in different counties would raise equal protection issues. *See Bush v. Gore*, 531 U.S. 98, 104 (2000); *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1185 (11th Cir. 2008).

37. A defendant class is independently appropriate under Federal Rule of Civil Procedure 23(b)(1)(B) because adjudications with respect to individual class members, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede the ability of the other nonparty members to protect their interests. All of the proposed defendant class members have identical election-related

responsibilities, and all serve counties where a significant number of voters protected by Section 4(e) reside. Thus, if this case were brought only against Defendant Supervisor Barton, *all* County Supervisors of Elections in the proposed defendant class would risk running afoul of federal law if they failed to provide Spanish-language election materials and assistance in a manner consistent with any court order in this case.

38. A defendant class is also independently appropriate under Federal Rule of Civil Procedure 23(b)(2), because the relief Plaintiffs and the proposed plaintiff class seek—namely, a declaratory judgment and order to provide Spanish-language election materials and assistance—is identical as to each member of the defendant class, thereby making appropriate preliminary and final injunctive and corresponding declaratory relief with respect to the defendant class as a whole.

LEGAL BACKGROUND

39. Section 4(e) of the Voting Rights Act of 1965 (52 U.S.C. §10303(e)) protects the voting rights of persons educated in "American-flag schools" in languages other than English, by prohibiting the States from conditioning the right to vote of such individuals on the ability to read or understand English.

40. Section 4(e) provides that no one who completed sixth grade in any "school in … any state, territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than

English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language." 52 U.S.C. §10303(e)(2).

41. Congress's main purpose in enacting Section 4(e) was to protect the rights of Spanish-speaking Puerto Ricans to vote stateside. *Katzenbach v. Morgan*, 384 U.S. 641, 645 & n.3, 652 (1966).

42. Congress later eliminated the sixth-grade education requirement from Section 4(e). *See* 52 U.S.C. §10501(a); *Arroyo v. Tucker*, 372 F. Supp. 764, 766 (E.D. Pa. 1974).

43. As a result, Section 4(e) now applies to all "persons who attended any number of years of school in Puerto Rico." *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973) ("*Kusper II*").

44. Under Section 4(e), States must provide Spanish-language voting materials and assistance to all persons who attended school in Puerto Rico and are unable to vote effectively in English. *United States v. Berks Cty.*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003) (collecting cases).

FACTUAL ALLEGATIONS

45. Plaintiff Rivera, plaintiff class members, and members of Mi Familia Vota Education Fund were educated in schools in Puerto Rico in which the classroom language was predominately Spanish.

46. Although Plaintiff Rivera, plaintiff class members, and members of Mi Familia Vota Education Fund now reside in the Counties, they do not understand, read, speak, or write English sufficiently to be able to vote effectively in an English-only election.

47. Plaintiff Rivera, plaintiff class members, and members of Mi Familia Vota Education Fund are eligible – and many want and intend – to vote in Florida's elections, including in the upcoming November 6, 2018 general election.

48. But unless registration and election instructions, ballots, voter education and outreach materials, and assistance are provided in the Spanish language, Plaintiff Rivera, plaintiff class members, and members of Mi Familia Vota Education Fund will be unable to vote effectively.

49. The Counties are each home to a substantial population of citizens who are eligible to vote, attended school in Puerto Rico in which the classroom language was predominately Spanish, and are unable to vote effectively in English.

50. The U.S. Census Bureau's 2011-2015 American Community Survey (ACS) estimated that 143,559 adults aged 18 years-old and over of Puerto Rican heritage reside in the Counties. An estimated 97,355 of these adults of Puerto Rican heritage speak Spanish at home. Among these Puerto Rican adults who speak Spanish at home, an estimated 30,302 are not proficient in English, meaning

they are "unable to speak or understand English adequately enough to participate in the electoral process." 52 U.S.C. §10503(b)(3)(B).

51. Many of these individuals attended at least some school in Puerto Rico in which the primary language of instruction was not English, because "[t]he primary language of classroom instruction in Puerto Rico is Spanish." *Berks Cty*., 277 F. Supp. 2d at 574; *see* P.R. Regs. DE REG. 8115, Art. III, §B.

52. In addition, data from the Florida Division of Elections reflects that more than 36,500 registered voters in the Counties identified themselves on their voter registration forms as being born in Puerto Rico. The Counties include many more adults who were born in Puerto Rico and are eligible to vote, but who have not yet registered, as well as additional registered Puerto Ricans who did not volunteer their birthplace because it is not required on the registration form. Many of these individuals have limited English proficiency.

53. The Counties' first-generation Puerto Rican population has increased significantly in the wake of Hurricane Maria in September 2017.

54. Most of those recently-arrived residents were educated at Spanish-language schools in Puerto Rico, and many are not proficient in English.

55. Like Plaintiff Rivera and members of Mi Familia Vota Education Fund, the plaintiff class of thousands of Spanish-speaking Puerto Ricans who currently reside and are eligible to vote in the Counties but who are not proficient

in English will not be able to vote effectively unless they have access to Spanish-language ballots, election materials, and assistance.

56. The "right to vote means the right to effectively register the voter's political choice." *Puerto Rican Org. For Political Action v. Kusper*, 350 F. Supp. 606, 610 (N.D. Ill. 1972) ("*Kusper I*"), *aff'd, Kusper II*, 490 F.2d 575, 580 (7th Cir. 1973).

57. If the Counties' registration materials and assistance, voting guides, voting instructions, ballots or ballot labels on voting machines, and other election materials are provided only in English, the ability to vote effectively of Plaintiff Rivera, members of Mi Familia Vota Education Fund, and the class of similarly-situated citizens who have limited or no English proficiency will be seriously impaired.

58. Plaintiff Rivera, members of Mi Familia Vota Education Fund, and all other similarly-situated class members in the Counties are therefore entitled to such materials and assistance as may be necessary to enable them to vote effectively, including bilingual ballots, registration and other election materials, and assistance.

59. The Counties in the defendant class conduct English-only elections and do not provide Spanish-language ballots, or sufficient other Spanish-language election materials or assistance.

60. By not providing Spanish-language ballots or sufficient other Spanish-language election materials and assistance, the Counties condition the right to vote of plaintiff class members on their ability to read, write, understand, or interpret the English language.

61. Although many of the Counties have been repeatedly requested to do so, the Counties will not and/or have not made binding commitments to provide Spanish-language ballots or sufficient Spanish-language registration and other election materials or assistance at the polls for the upcoming November 2018 general election.

62. In April 2018, Plaintiffs Mi Familia Vota Education Fund, UnidosUS, Vamos4PR, and a coalition of other groups sent letters to the Supervisors of Elections of 13 of the largest Counties in the defendant class, including Defendant Supervisor Barton, with copies to Defendant Secretary Detzner and to the President of the Florida State Association of Supervisors of Elections, Inc., demanding that they provide Spanish-language materials and assistance under Section 4(e) for the upcoming 2018 elections.

63. In June 2018, Plaintiffs Mi Familia Vota Education Fund, UnidosUS, Vamos4PR, and the other members of the coalition sent follow-up letters to the Supervisors of Election of those 13 Counties, including Defendant Supervisor

Barton, with copies to Defendant Secretary Detzner and to the President of the Florida State Association of Supervisors of Elections, Inc., reiterating that demand.

64. Despite these efforts, the Counties have stated that they will not provide Spanish-language ballots for the 2018 elections. In addition, none of the Counties has formally committed to provide sufficient Spanish-language election materials and assistance for the 2018 elections.

65. If the Counties do not provide Spanish-language ballots, other election materials, and assistance for the 2018 and subsequent Florida elections, Plaintiff Rivera, members of Mi Familia Vota Education Fund, and all similarly-situated individuals in the plaintiff class will effectively be disenfranchised.

66. The right to vote is a precious and fundamental right that is the heart of our democracy. The loss of that right for the 2018 general election, and any subsequent elections, for Plaintiff Rivera, members of Mi Familia Vota Education Fund, and the members of the proposed plaintiff class, is an irreparable injury.

67. The Organizational Plaintiffs' diversion of resources, including staff and volunteer time, during the run-up to the November 6, 2018 elections to support plaintiff class members who are entitled to Spanish-language materials and assistance under Section 4(e) are also irreparable injuries. Even if those Plaintiff organizations could be compensated for their expenditures, they will not be able to regain the opportunity to use their resources to educate and mobilize voters prior to

the 2018 election. The Organizational Plaintiffs will suffer similar irreparable injury for every election in which Spanish-language materials and assistance are not provided as required by Section 4(e) of the VRA.

68. Because the registration deadline for the 2018 general election is October 9, 2018, and the election is November 6, 2018, the irreparable injury to Plaintiff Rivera, affected members of Mi Familia Vota Education Fund, and plaintiff class members is imminent.

69. Requiring Defendants to ensure that the Counties provide Spanish-language ballots, materials, and election assistance for the 2018 general and other upcoming elections serves the public's strong interest in ensuring that every qualified voter is able to participate equally in the electoral process.

70. The irreparable injuries and fundamental right to vote of Plaintiff Rivera, affected members of Mi Familia Vota Education Fund, and the thousands of members of the plaintiff class far outweigh any hardship that Defendants might contend they face in ensuring the provision of Spanish-language election materials and assistance.

CAUSES OF ACTION

COUNT I
(Violation of the Voting Rights Act, 52 U.S.C. §10303(e))

71. Plaintiffs repeat and reallege the allegations in all the preceding paragraphs as if fully set forth herein.

72. Section 4(e) of the Voting Rights Act, 52 U.S.C. §10303(e), prohibits denying the right to vote to any person who attended a school in Puerto Rico in which the predominant classroom language was other than English, because of his or her inability to read, write, understand, or interpret any matter in the English language.

73. Plaintiff Rivera, members of Mi Familia Vota Education Fund, and the thousands of members of the plaintiff class attended school in Puerto Rico in which the predominant classroom language was other than English, and are not able to vote effectively in English.

74. Defendant Secretary Detzner authorizes and permits the Counties to provide English-only ballots, registration and election materials, instructions, and assistance, and does not require the Counties to provide bilingual ballots or Spanish-language election materials, instructions, or assistance.

75. Defendant Supervisor Barton and the members of the defendant class have failed to provide Spanish-language ballots, and fail to provide sufficient other Spanish-language election materials and assistance.

76. By failing to require and provide Spanish-language ballots and sufficient Spanish-language registration and election materials and assistance to Plaintiff Rivera, affected members of Mi Familia Vota Education Fund, and plaintiff class members, Defendants Detzner, Barton, and the members of the

defendant class are denying these thousands of American citizens the right to vote because of their inability to read, write, understand, or interpret any matter in the English language, in violation of 52 U.S.C. §10303(e).

77. Defendants' and defendant class members' conduct disenfranchises Plaintiff Rivera, affected members of Mi Familia Vota Education Fund, and the members of the plaintiff class. Absent this Court's intervention, Plaintiff Rivera, affected members of Mi Familia Vota Education Fund, and the thousands of plaintiff class members will suffer irreparable harm as a result of Defendants' and the defendant class members' conduct.

78. To avoid imminent and irreparable harm, Defendants' and the defendant class members' conduct must be preliminarily and permanently enjoined and Defendants and the defendant class members must be ordered to comply with 52 U.S.C. §10303(e) forthwith, as set forth *infra* in the Prayer for Relief.

PRAYER FOR RELIEF

THEREFORE, Plaintiffs pray that the Court order the following relief and remedies:

1. Declare and adjudge that Defendants' and the defendant class members' conducting of English-only elections in the Counties violates 52 U.S.C. §10303(e).

2. Grant a preliminary and permanent injunction (a) enjoining Defendants and the defendant class from conducting or allowing the conducting of elections without Spanish-language ballots and sufficient Spanish-language election materials and assistance in the Counties and (b) requiring Defendants and the defendant class to issue directives and take all other measures necessary to ensure that all election materials provided in English in the Counties—including but not limited to paper ballots, voting machine ballots, sample ballots, absentee ballots, voting guides, voting instructions, registration materials, polling place signage, and websites—are also provided in Spanish for the 2018 general election and all subsequent elections; and that Spanish-speaking poll workers are provided at the polls to assist voters during the 2018 general election and all subsequent elections, and Spanish speakers are made available to assist with voter registration and absentee voting before the 2018 general election and all subsequent elections.

3. Award Plaintiffs' attorneys' fees and costs, including pursuant to 52 U.S.C. §10310(e) and 42 U.S.C. §1988; and

4. Award all such other and further relief as the Court deems to be just and equitable.

Dated: August 16, 2018

Respectfully submitted,

By: */s/ Kira Romero-Craft*
Kira Romero-Craft

KIRA ROMERO-CRAFT
(FL SBN 49927)
LatinoJustice PRLDEF
523 West Colonial Drive
Orlando, FL 32804
(321) 418-6354
kromero@latinojustice.org

ESPERANZA SEGARRA
(FL SBN 527211)
JACKSON CHIN
(*pro hac vice forthcoming*)
LatinoJustice PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360
esegarra@latinojustice.org
jchin@latinojustice.org

Attorneys for Plaintiffs

CHIRAAG BAINS*
(*pro hac vice forthcoming*)
Demos
740 6th Street NW, 2nd Floor
Washington, DC 20001
cbains@demos.org

* Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R. 49(c)(3).

STUART NAIFEH
(*pro hac vice forthcoming*)
Demos
80 Broad St., 4th Floor
New York, NY 10004
(212) 485-6055
snaifeh@demos.org

Attorneys for Plaintiffs

STEPHEN P. BERZON
(*pro hac vice forthcoming*)
STACEY M. LEYTON
(*pro hac vice forthcoming*)
MATTHEW J. MURRAY
(*pro hac vice forthcoming*)
CORINNE F. JOHNSON
(*pro hac vice forthcoming*)
MEGAN C. WACHSPRESS
(*pro hac vice forthcoming*)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sberzon@altber.com
sleyton@altber.com
mmurray@altber.com
cjohnson@altber.com
mwachspress@altber.com

Attorneys for Plaintiffs

KATHERINE ROBERSON-YOUNG
(FL SBN 38169)
Service Employees International Union
11687 NE 18th Dr.
North Miami, FL 33181-3278
(954) 804-2710
katherine.roberson-young@seiu.org

NICOLE G. BERNER
(pro hac vice forthcoming)
Service Employees International Union
1800 Massachusetts Ave, NW
Washington, D.C. 20036
(202) 730-7383
nicole.berner@seiu.org

Attorneys for Plaintiffs Mi Familia Vota Education Fund and Vamos4PR

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

ADDITIONAL AND LESS EXPLORED FRONTIERS IN ADVANCING LGBTQ RIGHTS

Moderator: *Daniel Tilley*, Staff Attorney, ACLU of Florida

Panelists: *Alison Foley-Rothrock*, Attorney and Firm Owner, Foley Immigration Law, Inc.

Landon (LJ) Woolston, MSW, Homeless Youth Programs & Services Manager, Pridelines

Mary Greenwood, Managing Attorney, Brandon Family Law Center, LLC

CONCURRING OPINIONS

The Law, the Universe, and Everything

CIVIL RIGHTS / FAMILY LAW / FEMINISM AND GENDER

0

Family Law After Obergefell

BY JANA SINGER · SEPTEMBER 20, 2016

The Supreme Court's 2015 decision in *Obergefell v. Hodges* marked a sea change in family law. While the immediate impact of the decision is clear – same-sex couples now have the right to marry in every state – the implications of the decision for family law and for practicing family lawyers are considerably broader. Recognition of marriage equality has created new issues for courts deciding divorce and parenting cases, and for lawyers advising clients

FOLLOW:

NEXT STORY

FAN 124 (First Amendment News) Ellen DeGeneres raises First Amendment defense in defamation case

PREVIOUS STORY

A Forthcoming Book to Recommend

To search type and hit enter

GENERAL LAW

Robert Cover and Bushrod Washington

31 AUG, 2018

GENERAL LAW

about issues related to family formation and family break-up. This post will highlight the family law implications of *Obergefell* and explore some of the issues that are likely to arise in future cases involving the rights and obligations of same-sex couples.

Same-sex divorce, American style

According to the Williams Institute, close to 400,000 same-sex couples were already married at the time *Obergefell* was decided. A recent Gallup poll estimates that more than 120,000 additional same-sex couples have married since that time. But not all marriages endure. About 40% of heterosexual marriages now end in divorce, and it is reasonable to anticipate that the divorce rate for same-sex couples will be roughly comparable. Indeed, access to the financial and parenting remedies associated with divorce is one of the important benefits of marriage. But same sex divorces are likely to raise some challenging legal issues.

Parenthood and the impact of the marital presumption

When an opposite sex couple divorces, legal parentage generally is not disputed. In part, this is due to the operation of the "marital presumption"

Call for Submissions
31 AUG, 2018

CONSTITUTIONAL LAW / FIRST AMENDMENT / GENERAL LAW
FAN 199.7 (First Amendment News) ACLU Targets Panhandling Laws Across the Nation
29 AUG, 2018

GENERAL LAW
The Reason For the Privileges and Immunities Dicta in Corfield
28 AUG, 2018

— the legal rule that identifies the husband of a married woman as the legal father of any children born (or conceived) during the marriage. At one time, the presumption was nearly irrebutable. More recently, courts in a number of states have allowed divorcing parties to rebut the presumption based on genetic evidence of non-paternity.

Courts and legislatures have already begun to grapple with the application of the marital presumption to same-sex couples. Although the language of the presumption is usually gendered — specifying both a *husband* and a married *woman* — some courts have interpreted the statutory reference to husband to apply as well to a female spouse. Other courts have declined to interpret their statutes broadly, but have invoked equal protection principles to extend the marital presumption to same-sex partners. *See, e.g.*, *Gartner v Iowa Department of Public Health*, 830 N.W.2d 335 (Iowa 2013). Still others have refused to apply the presumption to same-sex relationships, citing its biological underpinnings or opining that such a step is a matter for the legislature, not the judiciary.

Even if courts apply the marital presumption to same-sex couples, questions remain about its impact. In

most states, the presumption is now rebuttable, and genetic evidence of non-paternity is often (albeit not always) sufficient grounds to rebut the presumption. But should genetic evidence be relevant to parentage in a same-sex marriage, where both spouses know from the outset that one parent will not be genetically related to the child. And how, if at all, should the presumption apply to gay male marriages, in which neither spouse is a "married woman" and where the woman who gives birth is generally not an intended parent? These questions, of course, raise the broader issue of whether parentage should be understood as a biological fact, or (primarily) as a legal and social construct. And, if parentage is primarily a legal construct, what role (if any) should marriage play?

Moreover, as its name indicates, the marital presumption applies only to children born (or conceived) during a marriage. But many same-sex couples today are co-parenting children who were born to one spouse before their marriage, perhaps during a prior heterosexual union. The marital presumption is of no use here, just as it provides no basis for step-parents to assert legal parentage in the absence of an adoption. Other doctrines such as *de*

CATEGORIES

Categories

Select Category

facto parenthood, discussed in Professor Murphy's last post, may be available to establish parental rights, but establishing parenthood under those doctrines in fact-specific and uncertain, and the doctrine has been criticized as insufficiently protective of the autonomy of biological parents.

Moreover, while many states now recognize some form of *de facto* parenthood, others do not, and, in the absence of a judicial decree, states are not required to respect each other's parentage rules. Thus, a same-sex partner who is recognized as a legal parent in one state may not be recognized in another. For this reason, many family lawyers continue to advise same-sex spouses to secure parental rights through adoption, even where a couple is married at the time their child is born. But adoption can be both expensive and intrusive, and many same-sex couples understandably assume that their marriage renders adoption unnecessary, only to find upon dissolution that the law is far less settled than they imagined. Judicial declarations of parentage, obtained at the time a child is born, could provide an alternative means of interstate recognition, but existing state procedures are not designed for same-sex couples, whether married or not.

Divorce-related financial remedies

The dissolution of same-sex marriages presents other challenges as well. Current standards for both property distribution and post-divorce spousal support depend significantly on the length of the marriage in question; the longer the financial interdependence associated with marriage, the more robust the post-divorce sharing rules. But many of today's same-sex marriages were preceded by lengthy periods of non-marital cohabitation, particularly in states that refused to allow same-sex marriage prior to *Obergefell*. If such a couple divorces after a relatively short marriage, can a court base a property or a support award on the lengthy period of pre-marital cohabitation? Many courts have refused to do so in cases involving opposite-sex couples who cohabited prior to marriage, noting that the applicable statutory language refers specifically to the length of the *marriage*, not to the length of the relationship. Should these decisions apply to same-sex couples? Other courts have relied on their on their equitable powers to consider non-marital cohabitation as a factor in fixing the financial consequences of divorce. Some commentators have suggested using common law marriage as a solution to this problem. But common law marriage

has traditionally required that individuals have the legal capacity to marry each other at the time the relevant conduct took place and that the parties held themselves out as married in one of the handful of states that allow couples to contract a common law marriage. Both of these requirements are likely to post problems for most same-sex couples.

And how should *Obergefell* affect the treatment of cohabitation relationships that break up without a marriage? Prior to *Obergefell*, a number of states had begun to apply principles of equity or implied contract to redistribute assets accumulated in one partner's name at the end of a long-term cohabitation relationship. Many of these cases involved same-sex couples, and the couple's inability to marry may well have influenced the court's decision. The American Law Institute's Principles of Family Dissolution took these developments a step further by extending status-based property and support remedies to unmarried partners who "for a significant period of time share a primary residence and a life together as a couple." How should *Obergefell's* recognition of marriage equality affect the viability of these doctrines? Does the availability of same-sex marriage weaken claims based

on non-marital cohabitation on the theory that a couple's decision not to marry is an indication that they (or at least one of them) prefer *not* to be bound by marital sharing principles? Is this a preference that the law should respect, even if, in hindsight, it turns out to be a bad deal for one of the parties? Or should courts continue to apply functional, as well as formal criteria, to determine the appropriateness of post-relationship financial sharing?

Wither Civil Unions and Domestic Partnerships

More generally, how should the availability of same-sex marriage affect other legal statuses, such as domestic partnerships and civil unions? Should states that previously recognized such unions automatically convert them to marriages unless a couple explicitly "opts out?" Or should states require that domestic partners affirmatively "opt in" to marriage? What should be the legal default? Will private companies that previously provided benefits to same-sex domestic partners now restrict such benefits to married couples? And, if so, has the "right" to marry celebrated in *Obergefell* become an obligation to do so – a possibility that Professor Kathrine Franke cautioned

against in her 2015 book, Wedlocked: The Perils of Marriage Equality.

More broadly, should states retain these alternative legal statuses as a form of "marriage lite" or have they outlived their utility now that both same-sex and opposite-sex couples have access to marriage? And if states choose to retain these alternatives, do constitutional equality principles require that they be made available to opposite-sex as well as same-sex couples? To non-romantic partners such as siblings or other relatives? Now that marriage is available to same-sex as well as opposite sex, couples, how much should it matter?

Beyond Marriage and Divorce

Marriage equality is also likely to affect legal developments in contexts beyond divorce and parenting disputes. In her recent article, *Inheritance Law and the Marital Presumption After Obergefell*, my colleague, Paula Monopoli, examines the impact of *Obergefell* on inheritance law; she argues that important policy goals support extending a conclusive marital presumption to all nonbirth/nongenetic spouses for purposes of inheritance law, and suggests that the presumption be unmoored from its biological roots and re-conceptualized as resting on the presumed consent of the

nonbirth/nongenetic spouse to be the parent of any child born during a marriage. In a broader frame, Douglas NeJaime, argues in his recent Harvard Law Review article, *Marriage Equality and the New Parenthood*, that marriage equality was both enabled by – and, in turn, enables — significant shifts in the law's understanding of parenthood and in its ongoing construction of families. Without a doubt, this is a construction project that should capture the imagination and engage the efforts of both legal scholars and practicing family lawyers for many years to come.

Tags: Family Law same sex marriage

YOU MAY ALSO LIKE...

Carol Sanger Replies to Rachel Rebouche: Images, Imagination and Ideology

Can We Lean Anything from Brazil about Remediating the Lingering Consequences of

Affirmative Action and Merit

3 OCT, 2012

2 MAY, 2017 Racial Discrimination?

29 APR, 2013

- Home
- About
  - Comment Policy
- Books
- Contact
  - Publicity Guidelines

RECENT POSTS

- Robert Cover and Bushrod Washington
- Call for Submissions
- FAN 199.7 (First Amendment News) ACLU Targets Panhandling Laws Across the Nation
- The Reason For the Privileges and Immunities Dicta in Corfield
- Why is Anything Named for Senator Richard Russell?

5 Things to Know About HIV Criminalization

HIV CRIMINALIZATION is the unwarranted use of the criminal law to address a public health issue. HIV criminalization laws target people living with HIV for prosecution and excessive punishment in an effort to make them solely responsible for the sexual risk behaviors of others. Under Florida law, a person living with HIV could be sent to prison as a felon and sex offender(!) for 30 years, even if their conduct posed little to no risk of transmission and they had no intent to harm anyone. Other things you should know about HIV criminalization:

HIV criminalization laws DON'T work as intended

- Not a single study or peer-reviewed paper—nor any credentialed public health expert—asserts HIV criminalization has actually reduced HIV transmission in any jurisdiction where it exists.

HIV criminalization laws DO work against public health

- Punish those who learn their status and privileges those who remain unaware.
- Creates mistrust of health professionals, making people who test HIV positive less likely to cooperate with partner notification, treatment adherence and other prevention programs.
- Place HIV-negative people in harm's way by making them believe they can engage in risky behaviors without the risk.

HIV criminalization laws DON'T align with current science

- Harder to transmit HIV sexually than most people believe, with a less than 2% per-act risk of transmission arising from even the riskiest of sexual activities.
- Person on effective treatment with a suppressed viral load is incapable of transmitting HIV.
- HIV-negative person who engages in risk behaviors can take medications to dramatically reduce their chances of acquiring HIV.
- Person newly-diagnosed and provided with treatment can expect to live a near-normal lifespan.

HIV criminalization laws DO increase stigma & discrimination

- Exacerbate the already overwhelming social stigma that accompanies an HIV diagnosis, which experts agree is one of the biggest obstacles to ending the HIV epidemic.
- Forced disclosure of one's HIV-positive status carries significant risks, including potential intimate partner violence, loss of housing or custody of one's children, and other forms of discrimination.
- Most strongly affects disenfranchised, who comprise disproportionate portion of people living with HIV.

HIV criminalization laws DON'T make sense for our justice system

- Florida's assault statutes address situations in which a person acts with the malicious intent to harm another person—special laws for a particular group of people are unnecessary and counterproductive.
- Incarcerating individuals whose conduct is best addressed via a public health approach comes at a significant cost to the state.

The American Medical Association, American Nursing Association, National Alliance of State and Territorial AIDS Directors, HIV Medicine Association, Association of Nurses in AIDS Care, U.S. National HIV/AIDS Strategy, Presidential Advisory Council on HIV/AIDS, U.S. Conference of Mayors, American Psychological Association, the U.S. Department of Justice and many other public health, legal and public policy organizations have called for an end to HIV criminalization.

You care about HIV criminalization, you just don't know it yet. HIV is NOT a crime.

Florida HIV Justice Coalition | The SERO Project 2016

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

REIYN KEOHANE,

Plaintiff,

v. **Case No. 4:16cv511-MW/CAS**

JULIE JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant.
_____/

ORDER ON THE MERITS

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

This case involves an individual immersed in the process of transitioning gender roles when she[1] found herself in jail after a violent argument with her roommate. Reiyn Keohane was born anatomically male, but she began identifying as female around age eight. She says she's always had an "internal sense" of being

[1] Out of respect for Ms. Keohane, this Court uses female pronouns when referring to her—a courtesy not all of Defendant's agents have extended, though Defendant is endeavoring to remedy this slight (among others).

female.[2] Since age fourteen, Ms. Keohane has worn women's clothing, makeup, and hair styles, adopted a feminine name, and used female pronouns at school and with family and friends. In short, she's lived as a woman in all aspects of her life since her early teens.

Ms. Keohane was formally diagnosed with gender dysphoria at age sixteen, and as soon as she was permitted—and it was safe to do so—she began a hormone therapy regimen to ease her dysphoria and feminize her body. But shortly thereafter, she was arrested and cut off from the treatment she needed, including hormone therapy and the ability to dress and groom as a woman.

Ms. Keohane continuously grieved her denial of care during the first two years in Defendant's custody, but she faced roadblocks every step of the way.[3] At times, her untreated dysphoria caused such extreme anxiety that she says she's attempted to kill herself and to castrate herself to rid her body of its testosterone source.

Ms. Keohane's testimony at trial demonstrates the lengths to which she'll go to feel better in her own skin. On one occasion, she said she tied a rubber band around her scrotum to reduce circulation and cut down the center line in a place she

[2] "I know who I am, and have always felt this is who I am. I am a girl, female." ECF No. 145 at 22.

[3] The Defendant in this case is Julie Jones, sued in her official capacity as Secretary of the Florida Department of Corrections. "Since official-capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent," *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978), this Court refers to Secretary Jones and the Florida Department of Corrections interchangeably as "Defendant" throughout this order.

estimated would lessen the chance of excessive blood loss. After breaking the skin, she said she tried to squeeze one of her testicles out of her body in what she perceived to be an attempt at self-castration, but her hands were shaking so badly from the pain that she couldn't finish the job.[4] No matter though for Defendant. Even this deafening call for help didn't cause a reevaluation in the way it was treating Ms. Keohane.

It wasn't until Ms. Keohane found a lawyer willing to take her case that things changed for the better. Defendant was staring down the barrel of a federal lawsuit when it suddenly changed course by securing hormone therapy and amending its policy formerly prohibiting new treatment for inmates with gender dysphoria—all within a matter of months after Ms. Keohane filed her complaint.

This case has been a moving target from the beginning, morphing with Defendant's shifting explanations for the denial of hormone treatment and access to female clothing and grooming standards. But the essential issues before this Court can be distilled down to these; namely, was Defendant deliberately indifferent to Ms. Keohane's gender dysphoria—which both sides agree is a serious medical need—when it denied her hormone therapy for two years? Should this Court enter an

[4] Defendant disputes whether Ms. Keohane actually intended to remove her testicles. Instead, Defendant contends she made only a superficial cut to gain attention. But even so, this doesn't change the fact that Ms. Keohane took a razor to her scrotum because she was denied treatment for her gender dysphoria—some of which even Defendant now concedes is medically necessary.

injunction ordering Defendant to provide the requested treatment? Part and parcel to this second inquiry is whether Defendant's provision of hormone therapy and amendment to its policies has sufficiently remedied Ms. Keohane's injuries. And lastly, is the parallel treatment for gender dysphoria—namely, social transitioning through access to Defendant's female clothing and grooming standards—necessary to treat Ms. Keohane's gender dysphoria such that Defendant's refusal to provide treatment amounts to deliberate indifference?

When it comes to medical care in prison, reasonable minds may differ. One can be negligent, even grossly negligent, when treating an inmate without offending the United States Constitution. *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). But while the standard for establishing deliberate indifference is high, it is not impossible to meet. And if Ms. Keohane's treatment in Defendant's custody isn't deliberate indifference, then surely there is no such beast. Ultimately, this case is about whether the law, and this Court by extension, recognizes Ms. Keohane's humanity as a transgender woman. The answer is simple. It does, and I do.

I

Ms. Keohane is a transgender woman. Her assigned sex at birth was male—she was born with and still has male genitalia—but she identifies as a woman. ECF No. 133 at ¶¶ F. 5, 19. When she was fourteen years old, Ms. Keohane told her parents about her gender identity. ECF No. 145 at 24. Thereafter until her

incarceration at age nineteen, Ms. Keohane wore girls' or women's clothing and makeup, and grew her hair to a longer, traditionally feminine length. *Id*. at 25. She adopted a feminine name—Jamie—and preferred using female pronouns. *Id*. Later, Ms. Keohane legally changed her first name to Reiyn "to bring [it] into conformity with [her] gender identity." ECF No. 3-1 at ¶ 6. And at age sixteen, Ms. Keohane was formally diagnosed with gender identity disorder—now known as gender dysphoria. ECF No. 133 at ¶ F. 8, 9.

A

Gender dysphoria generally "refers to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth." ECF No. 3-16 at 4. It is a psychiatric diagnosis in the Diagnostic and Statistical Manual for Mental Disorders published by the American Psychiatric Association, and manifests as "a set of symptoms that include anxiety, irritability, depression, and this sense of incongruence or mismatch between one's sex of assignment at birth and internally felt[] gender identity." ECF No. 145 at 144.

Ms. Keohane's expert at trial, Dr. George R. Brown, identified three criteria for a gender dysphoria diagnosis. First, a patient must have "experienced a significant incongruity between their sex of assignment at birth, their anatomy, and their internal sense of their gender for a minimum of six months." *Id*. at 145. Second, a patient must meet a combination of several specific criteria such as "having a

strong disgust or repulsion of one's own genitals, a desire to be rid of those genitals, [or] a desire to have treatment to approximate the other gender." *Id*. The third requirement considers whether the first two criteria are "distressing enough or . . . cause enough dysfunction in your life and important areas of your functioning that they are clinically relevant." *Id*. at 146. "[I]t's important that people have a level of distress . . . or dysfunction . . . otherwise the diagnosis is not legitimate." *Id*.

In short, transgender people may feel some dysphoria, or anxiety, about their bodies and their gender identity. But not all transgender people are formally diagnosed with gender dysphoria—indeed, this Court recognizes that many transgender people may be perfectly at ease and even rejoice in their own skin. A formal diagnosis of gender dysphoria results only if a person's symptoms of dysphoria are severe enough and persist for so long that they become "clinically relevant." ECF No. 145 at 146. Pursuant to their pretrial stipulation, the parties agree and this Court finds that Ms. Keohane has been diagnosed, and is currently diagnosed, with gender dysphoria—a serious medical need. ECF No. 133 at ¶¶ F. 6-7.

B

At trial, this Court heard testimony about established standards of care for treating gender dysphoria, including those published by the World Professional Association for Transgender Health ("WPATH"), "an international,

multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect in transsexual and transgender health." ECF No. 3-16 at 2. WPATH has published standards of care ("WPATH Standards") for treating gender dysphoria in its "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7." *See generally id*. These standards are "intended for worldwide use," *id*. at 3, and are recognized by the American Medical Association, American Psychiatric Association, American Psychological Association, and the American College of Obstetricians and Gynecologists. ECF No. 145 at 157. Accordingly, this Court finds the WPATH Standards authoritative in the treatment of gender dysphoria.

The WPATH Standards "are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender-nonconforming people." ECF No. 3-16 at 2. They confirm that treatment requires an individualized approach. "The number and type of interventions applied and the order in which these take place may differ from person to person." *Id*. at 7. Defendant's own expert, Dr. Stephen Levine, generally agrees with this approach, opining at trial that determining the proper treatment for a person with gender dysphoria should be a deliberate and thoughtful process. ECF No. 146 at 90.

Dr. Brown explained at trial that several treatment options can alleviate a person's gender dysphoria. They primarily include psychotherapy, "hormonal

management," and "surgical interventions . . . like genital confirmation surgery or sex reassignment surgery." *Id*. at 146-47. And aside from these "three main domains," social transitioning is another option for treating gender dysphoria. ECF No. 145 at 147.

Social transitioning can include "changing identity documents, changing one's name, [and] changing one's gender role presentation."[5] *Id*. at 147-48. For purposes of this order, "social transitioning" refers only to Ms. Keohane's request for access to Defendant's clothing and grooming standards for female inmates. To be clear, Ms. Keohane is not requesting permission to wear stiletto heels or costume jewelry while in Defendant's custody. Instead, she's only ever sought to be treated like any other female inmate in this state. This includes the ability to possess and wear the same bras, panties, hairstyles, and makeup items permitted in Defendant's female facilities. *See*, *e.g.*, ECF No. 129-1 at 40 (female inmates have access to bras and sports bras); *id*. at 229 (female inmates may possess makeup and purchase it through their commissary); *see also* Fla. Admin. Code R. 33-602.101(2)(a) (female inmate uniforms include a "bra or athletic bra" and "panties"). All inmates, male and female, are severely limited when it comes to self-expression. For Ms. Keohane, aside from using the appropriate pronouns, the *only* way she can express her gender

[5] The WPATH Standards also include "[c]hanges in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity)," as an option for treating gender dysphoria. ECF No. 3-16 at 7.

identity in prison is by wearing women's undergarments and grooming like a woman.

Hormone therapy involves taking prescribed male or female hormones consistent with one's gender identity. In male-to-female patients like Ms. Keohane, hormone therapy can cause physiological changes including the redistribution of body fat to create a more feminine physique, erectile dysfunction, and the development of breasts. ECF No. 145 at 72-73, 151; *see also* ECF No. 133 at ¶ F. 18. In addition, hormone therapy may have beneficial psychological effects including a perceived reduction in the patient's anxiety or depression. ECF No. 145 at 152.

Treatment for gender dysphoria is multimodal. That is, the WPATH Standards recognize "[s]ome patients may need hormones, a possible change in gender role, but not surgery; others may need a change in gender role along with surgery but not hormones." ECF No. 3-16 at 7. But while some patients benefit from fewer than all primary treatment options, Dr. Brown opined that providing hormone therapy while denying the ability to socially transition is not only "medically and logically inconsistent," but also "potentially harmful." ECF No. 145 at 164-65. Moreover, Defendant's own expert, Dr. Levine, opined at trial that allowing "a person to express themselves outwardly as a female" is a "compassionate accommodation," if that person "is on hormones, and growing breasts, and shedding hair, and physically

changing." ECF No. 146 at 71. Though Dr. Levine generally takes exception to the term "medically necessary" for semantic reasons, he agreed that social transitioning is a beneficial component for Ms. Keohane's individual treatment plan.

C

Around September 22, 2013, Ms. Keohane was charged with attempted second-degree murder and was taken into custody at the Lee County Jail. ECF No. 3-1 at ¶ 8. Only about six weeks earlier, she had started hormone therapy under the care of her pediatric endocrinologist to treat her gender dysphoria. *Id*. at ¶ 7. But when she was taken into custody in September, the jail refused her request to continue treatment. *Id*. at ¶ 8. Ultimately, in July 2014, she pled no contest to the charge and was sentenced to fifteen years in Defendant's custody. *Id*.

After ten months in jail without hormone therapy, Ms. Keohane was transferred to Defendant's custody on July 17, 2014. *Id*. at ¶ 9. She began her commitment at the South Florida Reception Center. *See* ECF No. 137-12 at 2. Over the next three years, Ms. Keohane was transferred to various facilities throughout the state. *Id*. During this time, Ms. Keohane persistently requested treatment for her gender dysphoria, including hormone therapy, access to female undergarments including bra and panties, and access to female grooming standards including longer hair and makeup. *See* ECF No. 3-6. Her efforts have been largely unsuccessful.

Ms. Keohane was in Defendant's custody for less than a month when she filed her first grievance requesting to resume hormone therapy. *See id.* at 1. Her grievance was returned on August 21, 2014, noting that medical would consult with Ms. Keohane's outside provider and obtain her health information to determine the best course of action. *Id*. She filed her second grievance on September 1, 2014, noting she had not yet received hormone treatment. *Id*. at 2. This grievance was denied the following day because Ms. Keohane had apparently canceled a November 2013 appointment with her pediatric endocrinologist. *Id*. Ms. Keohane filed a third grievance on September 12, 2014, explaining that she couldn't show up for her November 2013 appointment because she was *in jail* at the time. *Id*. at 3. On September 24, 2014, Defendant again denied this grievance. At this point, Defendant showed its hand. The September 24 denial stated that "You have not received hormone treatment since 2013. You will not be placed on hormonal therapy while incarcerated in the Florida State Dept. of Corrections." ECF No. 3-6 at 3. Following this denial, Ms. Keohane grieved her medical treatment at every new facility to which she was transferred with similar results. *See generally id*. at 1-17.

This denial of care—premised on the notion that Ms. Keohane would not receive hormone therapy because she wasn't *already* receiving hormone therapy when she arrived in Defendant's custody—flows from the legally untenable "freeze-frame policy" in place at the time. *See* ECF No. 3-15 at 6. The policy provided in

part that "[i]nmates who have undergone treatment for [gender dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department." *Id*. Ultimately, Defendant did not permit Ms. Keohane to resume hormone therapy until September 2016, more than *two years* after she was committed to Defendant's custody and, notably, shortly after she filed her complaint and preliminary-injunction motion in this case. ECF No. 133 at ¶¶ F. 20-21.

D

For purposes of this litigation, Defendant's medical vendor, Wexford, arranged for an evaluation of Ms. Keohane's need for access to female clothing and grooming standards after she filed her complaint. *Id*. at ¶¶ 30-31. Wexford's regional psychiatrist, Dr. Jose Santeiro, evaluated Ms. Keohane on September 27, 2016, specifically to determine whether she had a medical need to socially transition in prison. *Id*. at ¶¶ 31-32, 34. He concluded that Ms. Keohane had no medical need for access to female clothing and grooming standards. *Id*. at ¶ 35. But this Court finds Dr. Santeiro's conclusions suspect for several reasons, including his admitted lack of experience treating gender dysphoria in prison, his lack of knowledge about the standards of care, and the limited information upon which he based his conclusion.

Dr. Santeiro's opinion helps Defendant not one bit, for his testimony is offered neither as an expert nor as a treating physician. Moreover, like all of Defendant's witnesses, Dr. Santeiro's testimony focuses on the infeasibility of transitioning in

prison based on security concerns instead of articulating any medical opinion as to whether social transitioning should be part of Ms. Keohane's treatment plan in addition to hormone therapy and counseling.

As far as this Court can discern from the record before it, nobody on Ms. Keohane's treatment team (composed of medical personnel employed through Wexford) has made a final treatment decision regarding access to female clothing and grooming standards. The primary rationale for not recommending such treatment or seeking an exception to Defendant's security policies is that those same policies—namely, Defendant's clothing and grooming standards—preclude social transitioning in prison. But Defendant's own expert witness, Dr. Levine, testified that *it is* appropriate or "psychologically helpful" to allow a transgender woman who is taking hormones—like Ms. Keohane—to outwardly express herself as a woman. ECF No. 146 at 71-72, 117-18. Dr. Levine went so far as to describe social transitioning as a "*minor accommodation* to ease some of the unfortunate distress of the transgender person." *Id*. at 72 (emphasis added).

Without access to female clothing and grooming standards, Ms. Keohane must conform to Defendant's security policies for male inmates. These policies require inmates housed in male facilities to wear their hair above the ears and shirt collar. ECF No. 133 at ¶ F. 16. Inmates are not permitted to purchase or wear makeup in Defendant's male facilities, though they are permitted to do so in Defendant's

female facilities. *Id*. at ¶¶ 37-38. And female undergarments, including bras and panties, are provided to inmates in male facilities only if a medical professional determines they're medically necessary. ECF No. 129-1 at 218-19.

On several occasions, Defendant forcibly shaved Ms. Keohane's head after she protested Defendant's hair-length policy. ECF No. 145 at 48-50. And Defendant has confiscated Ms. Keohane's self-made bras and panties, labeling those items as contraband. *Id*. at 33-34. These disciplinary actions have almost always contributed to the feelings of anxiety, disgust, and hopelessness accompanying Ms. Keohane's gender dysphoria, leading her to consider or attempt to harm herself.[6]

II

As a preliminary issue, Defendant asserts now that Ms. Keohane is receiving hormone therapy and Defendant has amended its policies to drop the "freeze-frame" language for the treatment of inmates with gender dysphoria, Ms. Keohane's claims for injunctive relief are moot to the extent they address both the old policy and the denial of hormone therapy. But in so doing, Defendant "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Wooten*, 747 F. 3d 1317, 1322 (11th Cir.

[6] For example, Ms. Keohane's self-described castration attempt promptly followed the confiscation of her female undergarments and a suicide attempt. ECF No. 145 at 36-37; *see also id*. at 51 (describing feelings after forced haircuts as "[t]errible. Extremely depressed. Suicidal. Extremely . . . angry, upset that this could happen. I felt . . . disgusted with myself every time I would look at myself.").

2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Considering the circumstances of this case, this Court finds Defendant has failed to meet its burden. Ms. Keohane's claims pertaining to the provision of hormone therapy and Defendant's "freeze-frame" policy are not moot.

"Because of the unique characteristics of public defendants," courts "often give[] governmental actors 'more leeway than private parties in the presumption that they are unlikely to resume illegal activities.'" *Wooten*, 747 F. 3d at 1322 (citations omitted). The Eleventh Circuit has labeled "this leeway that we extend to government actors a 'rebuttable presumption,' or a 'lesser burden.'" *Id*. (citations omitted). The "presumption is particularly warranted in cases where the government repealed or amended a challenged statute or policy—often a clear indicator of unambiguous termination." *Id*. But "the government actor is entitled to this presumption only *after* it has shown unambiguous termination of the complained of activity." *Id*. "[O]nce a government actor establishes unambiguous termination of the challenged conduct, the controversy 'will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.'" *Id*. (quoting *Troiano v. Supervisor of Elections*, 328 F. 3d 1276, 1285 (11th Cir. 2004)).

In its proposed order following the bench trial in this case, Defendant turns the voluntary cessation standard on its head. Defendant asserts Ms. Keohane must

"overcome the rebuttable presumption necessary to establish the voluntary cessation doctrine." ECF No. 150 at 19. Not quite. Though courts have described Defendant's burden as a "rebuttable presumption," it's still *Defendant's burden* to show it's "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Wooten*, 747 F. 3d at 1322. Moreover, it bears repeating that Defendant, as a government actor, is only entitled to a "lesser burden" or "rebuttable presumption" once it's established an "unambiguous termination" of the challenged activity. This Defendant has not done.

In evaluating whether an unambiguous termination has occurred, this Court may consider several non-exhaustive factors, including "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction," and "whether the government has 'consistently applied' a new policy or adhered to a new course of conduct." *Wooten*, 747 F. 3d at 1323 (quoting *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F. 3d 525, 531-32 (11th Cir. 2013)). In addition, "[t]he timing and content of the cessation decision are relevant in evaluating whether the defendant's stopping of the challenged conduct is sufficiently unambiguous." *Id*. This Court may be "'more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a continuing practice or was otherwise deliberate.'" *Id*. (quoting *Atheists of Fla., Inc. v. City of Lakeland*, 713 F. 3d 577, 594 (11th Cir. 2013)). But again, "[t]hese factors

are not exhaustive," and this Court's analysis may change "depending on the facts and circumstances of a particular case." *Id*. (citing *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

The challenged practice in this case is Defendant's refusal to provide hormone therapy based on a "freeze-frame" policy stating that inmates who've been treated for gender dysphoria "will be maintained only at the level of change that existed at the time they were received by [Defendant]." ECF No. 3-15 at 6. When Ms. Keohane originally entered Defendant's custody, Defendant denied her request for hormone therapy because she had "not received hormone treatment since 2013." ECF No. 3-6 at 3. Citing this gap in treatment, the denial further noted Ms. Keohane "will not be placed on hormone therapy while incarcerated in the Florida State Dept. of Corrections." *Id*. Her additional requests for treatment continued to be denied or slow-walked until she filed her complaint in this case. Within a month of filing suit, Defendant finally arranged for Ms. Keohane to see an outside endocrinologist and began providing the long-sought-after hormone treatment. And within about two months, Defendant formally amended its policies to remove the "freeze-frame" provision.

As evidence that Defendant has inconsistently applied its amended policy, Ms. Keohane points to the fact that at least one other inmate has been denied hormone treatment apparently based on the "freeze-frame" policy after it was

amended in October 2016. *See, e.g.*, ECF No. 137-13. But this Court is hard pressed to find that evidence of one mistake in applying old policies—or, perhaps, one rogue doctor acting contrary to protocol—is sufficient to prevent Defendant from overcoming its burden. Nonetheless, this drop of evidence only adds to the tidal wave of other circumstances crashing down on Defendant's mootness argument.

While often a clear indicator of an unambiguous termination, the change in official policy is little help for Defendant given the other circumstances before this Court. Defendant's rationale for the amended policy is simply that it was "[b]ased on case law . . . of practices . . . and by review of the general counsel[.]" ECF No. 129-1 at 24. Defendant asserts the "case law" supporting the change had apparently come about after the "freeze-frame" language was added in December 2013. *Id*. Defendant cites no additional evidence detailing who may have suggested or initiated the change or what the "case law" necessitating the change entailed. There are no minutes, memoranda, or testimony from any person knowledgeable about the change to show Defendant engaged in substantial deliberation in amending this policy. Zero. None. Moreover, the law has *never* been that Defendant can have a blanket ban on medically necessary treatment if an inmate didn't receive that treatment before entering the state's custody. If that were the case, the law would essentially permit a de facto death sentence to any inmate diagnosed with cancer after incarceration.

Defendant also fails to provide *any* explanation for the swift course correction regarding Ms. Keohane's visit to an outside endocrinologist and subsequent provision of hormone therapy soon after she filed her complaint. Though some witness testimony indicates a referral to an endocrinologist was in the works as early as February 2016, Defendant has not explained why it took more than *eighteen months* to reach this point. Nor does Defendant provide an explanation as to why it took Defendant at least *another five months* to show some urgency in finalizing the referral for Ms. Keohane to be evaluated for hormone therapy. The timing of the referral to the endocrinologist, the provision of hormone therapy, and the amended policy, was "late in the game" and only "creates ambiguity," ultimately weighing against a finding of unambiguous termination. *Rich*, 716 F. 3d at 532 (quotation marks omitted) (quoting *Harrell v. The Fla. Bar*, 608 F. 3d 1241, 1266-67 (11th Cir. 2010)).

Defendant's actions are too little too late to moot Ms. Keohane's claims. Defendant chose to right some wrongs only *after* it was faced with a lawsuit in federal court. Even with this course correction, Defendant isn't automatically entitled to the rebuttable presumption that it's unlikely to resume its illegal activities. Instead, this Court finds Defendant's voluntary cessation was an attempt to manipulate jurisdiction—certainly *not* the result of substantial deliberation. Indeed, in its motion to dismiss (filed shortly after Ms. Keohane was referred to the outside

endocrinologist), Defendant asserted in summary fashion that Ms. Keohane's claims for relief regarding the denial of hormone therapy were rendered moot by its provision of hormone therapy. ECF No. 21 at 5-6.

Though Defendant asserts it intends to allow Ms. Keohane to continue hormone therapy as long as it's not contraindicated, Defendant has never promised not to re-enact its "freeze-frame" policy following the termination of this litigation. What's more, Defendant has argued at length throughout its papers that hormone therapy isn't even constitutionally required for treating gender dysphoria, *see, e.g.*, *id*. at 19; ECF No. 44 at 9; ECF No. 124 at 30-31.

Given that Defendant's "freeze-frame" policy and denial of Ms. Keohane's hormone therapy constituted a deliberate practice during her first two years in Defendant's custody, the late-in-the-game timing and content of Defendant's decision to amend its policy and provide for hormone treatment, the lack of any evidence of "substantial deliberation" giving rise to the policy amendment, and at least one instance of inconsistent application of the new policy, this Court finds Defendant has failed to establish an "unambiguous termination" of the challenged "freeze-frame" policy and the denial of hormone treatment. As such, Defendant is *not* entitled to the rebuttable presumption that it's unlikely to resume its challenged conduct. And based on these same circumstances, it's plain to this Court that Defendant has failed to meet its "formidable burden" to show it's "absolutely clear

the allegedly wrongful behavior could not reasonably be expected to recur." *Wooten*, 747 F. 3d at 1322. Accordingly, Ms. Keohane's claims for injunctive relief based on the denial of hormone therapy and Defendant's "freeze-frame" policy aren't mooted by Defendant's voluntary cessation of the challenged conduct.

III

Ms. Keohane seeks, among other relief, a permanent injunction prohibiting Defendant from enforcing its "freeze-frame" policy limiting treatment for inmates diagnosed with gender dysphoria. As this Court just explained, this claim wasn't mooted by Defendant's amendment to the policy language or by Defendant's after-the-fact provision of hormone therapy. Indeed, Defendant has failed to demonstrate there's no reasonable basis to believe its challenged policy is likely to recur—i.e., nothing limits Defendant from adding the "freeze-frame" language back to its policies following termination of this case.

To start, this Court recognizes hormone therapy is only one of many options available for treating gender dysphoria. But in this case, Defendant agrees, and this Court finds, that hormone therapy is necessary to treat Ms. Keohane's serious medical need. *See* ECF No. 133 at ¶¶ F. 20-23; ECF No. 145 at 9 ("We have no plans for discontinuing the hormone therapy treatment whatsoever."); *see also* ECF No. 129-11 at 60 ("She should [have been receiving hormone therapy]. First of all, she

was getting the hormone therapy, according to her, before she came in. And according to what we read and researched, she should have continued.").

Both sides' experts and members of Ms. Keohane's treatment team agreed at trial that treatment plans for inmates with gender dysphoria must be individually tailored to each patient. But Defendant's "freeze-frame" policy effectively prevented this. The policy states:

> Inmates who have undergone treatment for [gender dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department. Access to necessary physical and mental health evaluations and treatment will be provided to assist an inmate with suspected [gender dysphoria] in adaptive functioning and preparation for re-entry upon release.

ECF No. 3-15 at 6.

On its face, the policy proscribed treatment options unless an inmate was receiving such treatment at the time they came into Defendant's custody. And Ms. Keohane's own treatment team leader understood the policy to mean if inmates "come in on hormone treatment, they are afforded hormone treatment. If they're not, they're not supposed to get it. Yada, yada, yada." ECF No. 129-7 at 103.

This Court finds Defendant applied this "freeze-frame" policy to Ms. Keohane when it denied her requests for hormone therapy during her first two years in Defendant's custody. From the start, Defendant cited the fact that Ms. Keohane was not receiving hormone therapy upon entering Defendant's custody as a basis for denying her grievances seeking such care. *See* ECF No. 3-6 at 3 ("You have not

received hormone treatment since 2013. You will not be placed on hormone therapy while incarcerated in the Florida State Dept. of Corrections."). And, again, the leader of her mental health treatment team, Dr. Arnise Johnson, testified that she understood DOC policy on this issue to mean that if Ms. Keohane received hormone therapy prior to incarceration, she should have received it during incarceration and vice versa. ECF No. 129-7 at 62.

Other courts have found similar policies banning specific treatments for inmates with gender dysphoria—often hormone therapy or certain surgical procedures—to be facially invalid. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) (holding state-law ban on hormone therapy and sexual reassignment surgery for inmates with gender dysphoria unconstitutional and comparing it to a hypothetical law allowing only therapy and pain killers to treat inmates with cancer); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 247 (D. Mass. 2012) ("[T]he policy is flawed in that it creates blanket prohibitions on some types of treatment that professional and community standards indicate may sometimes be necessary for the adequate treatment of [gender dysphoria] . . . [and] is exactly the type of policy that was found to violate Eighth Amendment standards in other cases both in this district and in other circuits."). *See also Kosilek v. Spencer*, 774 F. 3d 63, 91 (1st Cir. 2014) ("DOC has specifically disclaimed any attempt to create a blanket policy [banning sexual reassignment surgery]. We are confident that the DOC will abide by this

assurance, as any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs.").

In this case, rather than targeting a specific treatment option (like hormone therapy or surgery), Defendant's policy banned any new treatment not already prescribed to an inmate upon landing in Defendant's custody. Defendant's reason for enacting the policy was grounded only in a review of recent "case law"—essentially the same reason Defendant provided for its amendment after the start of this case. But it bears repeating. The law has *never* been that the state can impose a blanket ban on medically necessary treatment for inmates, regardless of the diagnosis.

Like the Seventh Circuit found in *Fields* (a case involving gender dysphoria that preceded Defendant's enactment and subsequent amendment of the "freeze-frame" policy *and* Ms. Keohane's incarceration), Defendant's policy equates to a hypothetical rule prohibiting an inmate with cancer from receiving medically necessary chemotherapy or radiation treatments if that inmate wasn't already receiving such treatment upon entering Defendant's custody. Absurdly, had Defendant applied this policy to all ailments instead of singling out gender dysphoria, inmates diagnosed with HIV, cancer, or pneumonia after entering custody might not be allowed treatment at all. That Defendant targeted only inmates diagnosed with gender dysphoria doesn't mitigate the absurdity of such an approach

to medical care. Indeed, this targeting only reinforces this Court's suspicion that bigotry and ignorance swayed Defendant's decision making for treating (or, rather, not treating) Ms. Keohane's gender dysphoria. This Court unsurprisingly concludes that Defendant's "freeze-frame" policy is unconstitutional as a blanket ban on medically necessary care.

IV

Turning to the denial of hormone treatment, this Court previously considered whether Defendant's decision to provide hormones mooted Ms. Keohane's claim for injunctive relief. During the bench trial, Defendant's counsel assured this Court that Defendant will continue to provide Ms. Keohane's hormone therapy so long as it's deemed necessary to treat her serious medical condition. But perched against a backdrop of Defendant's deliberate policy to deny such treatment, a two-year delay in care, and the late-in-the-game decision to finally arrange for a referral to an outside endocrinologist, this Court finds such assurances insufficient to moot Ms. Keohane's claim.

Which leads this Court to conclude that the denial of Ms. Keohane's hormone therapy based on reasons divorced from medical judgment constitutes deliberate indifference to her serious medical need in violation of the Eighth Amendment. This Court again recognizes that hormone therapy is one of many treatment options for individuals diagnosed with gender dysphoria. Not everyone diagnosed with gender

dysphoria wants or needs hormone therapy. Defendant's expert, Dr. Levine, whose testimony this Court credits, noted as much during trial. *See* ECF No. 146 at 57-58.

But for individuals like Ms. Keohane, for whom mental health counseling is not enough to treat their dysphoria, hormone therapy can be effective in diminishing the distress and anxiety associated with the diagnosis. Even members of Ms. Keohane's treatment team conceded as much. ECF 129-7 at 52-53, 86, 90-91; *see also* ECF No. 40-1 at 81 ("Q. Do you believe that it's medically necessary for plaintiff to be provided hormone therapy? A. At this moment I think so. Yes, I agree.").[7]

Ms. Keohane's own testimony, which this Court credits, provides a first-hand account of what life was like for her without access to hormone treatment. After a few months in Defendant's custody, Ms. Keohane attempted suicide, *see* ECF No. 3-1 at 5, and continued to experience "significant distress" every day without hormone therapy, *id*. at 13.

[7] Another member of Ms. Keohane's treatment team, Mr. Andre Rivero-Guevara, testified about negative outcomes for patients whose gender dysphoria is left untreated. According to him, "[s]ome people work hard at it and do change it, and some people want to do it but they can't do it, and they suffer through life because they can't do it." ECF No. 129-11 at 35. As to the kind of suffering an individual may face, Mr. Rivero added, "Well, you're talking about a person that is uncomfortable with who they are and they want to be somebody else and they can't do it, for whatever reason, and those are the ones who are going to suffer the most because they can't do anything about it. They can't do it. So yes, I would think that it's very uncomfortable for them." *Id*.

At trial, Ms. Keohane testified in detail about her suicide attempts and her attempt to castrate herself to remove her body's testosterone source. On one occasion, Ms. Keohane informed her escorting officer that she was going to kill herself, so he placed her in a shower cell wearing nothing but boxer shorts and with her hands cuffed behind her back. ECF No. 145 at 34. Ms. Keohane managed to get her hands out of the cuffs and fashioned a noose from her shorts. *Id*. Her escorting officer was able to cut her down before she suffered injuries beyond bruises and abrasions on her neck. *Id*. at 34-35. She was subsequently placed on suicide observation. *Id*. at 35. And after this attempt, Ms. Keohane says she informed nursing staff, security officers, and the psych staff that she tried to kill herself because she wasn't getting treatment. *Id*.

Thereafter, Ms. Keohane testified that she attempted to castrate herself to remove her body's source of testosterone. This Court already noted that Defendant disputes whether Ms. Keohane actually intended to cut out her own testicles. But even so, she still took a razorblade to her own scrotum to either "treat" herself by removing a part of her body that causes her such extreme anxiety *or* to gain some attention in an effort to obtain treatment from Defendant.

After Defendant began providing hormone therapy, Ms. Keohane experienced a short disruption in receipt of her medication. *See* ECF No. 105-1 at 2. Due to this disruption, she again attempted suicide twice in three days. *Id*. at 2-3. Ms. Keohane

also suffered "severe withdrawal symptoms," including "depression, fatigue, hot flashes, cold flashes, stomach cramps, diarrhea, and [loss of appetite]." *Id*. at 4.

It's beyond dispute—in fact, Defendant stipulates—that Ms. Keohane has been diagnosed with gender dysphoria, a serious medical need. ECF No. 133 at ¶¶ F. 6-7, G. 2. More importantly, *nobody* is arguing anymore that hormone therapy isn't necessary to treat her gender dysphoria. Indeed, Ms. Keohane testified to the benefits that she's personally experienced from her hormone treatment, including changes in fat distribution, body hair loss, and breast development—physical changes that have feminized her body—and improved mental clarity and mood. ECF No. 145 at 72-73; *see also* ECF No. 129-8 at 73-75. But Defendant's newfound recognition of the medical necessity for hormone treatment doesn't explain or absolve the denial of care for Ms. Keohane's first two years in Defendant's custody. Indeed, nobody has provided a sufficient explanation for this delay in treatment.

The leader of Ms. Keohane's treatment team, Dr. Johnson, testified that she met Ms. Keohane on August 6, 2014, and signed off on an initial diagnosis of gender identity disorder on August 13, 2014. ECF No. 129-7 at 57. She was aware of Ms. Keohane's request for hormone treatment as early as August 2014, *id*. at 58-59, but the only discussions she had at that point about treatment concerned whether Ms. Keohane met Defendant's criteria for receiving hormone therapy in prison—including documentation of prior treatment, an apparent reference to the "freeze-

frame" policy in effect at the time. *Id*. at 86. From that point, nobody from the mental health side discussed anything with the medical team about Ms. Keohane's hormones until February 2016—*eighteen months after Ms. Keohane entered Defendant's custody*. *Id*. at 85.

Of course, Defendant could not have forgotten about Ms. Keohane's request for treatment during the interim with all the grievances she was filing. *See, e.g.*, ECF No. 3-6. Defendant's inertia on hormone treatment ended temporarily in February 2016, when Ms. Keohane was transferred to the Everglades facility and a referral to an outside endocrinologist was noted in her medical records. *See* ECF No. 129-11 at 67. But, again, nothing happened with this referral until *six months later*—that is, *after* Ms. Keohane filed this lawsuit.

The testimony of the Everglades facility's medical director, Dr. Dieguez, only goes to show how uncomplicated this process could have been had Defendant shown some urgency earlier. *See* ECF No. 40-1 at 81 ("After the lawsuit, I, you know, I talk to them and before I has been talking to them, but we are, you know, working in the process to do what we can do for the person. Then . . . I listen [to] the opinion of the endocrinologist that recommended the hormones. I think that, why not? So that's it. So I agree that the hormones will be helping him to feel a little better."). So, *why not?* Defendant has no answer for this delay in treatment.

The Eighth Amendment prohibits the government from inflicting "cruel and unusual punishments" on inmates. *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). The Supreme Court has interpreted this prohibition to encompass "deprivations . . . not specifically part of [a] sentence but . . . suffered during imprisonment." *Id.* at 297. Accordingly, an inmate who suffers "deliberate indifference" to her "serious medical needs" may state a claim for a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

It's well established in this circuit that "an official acts with deliberate indifference when he or she knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." *McElligott v. Foley*, 182 F. 3d 1248, 1255 (11th Cir. 1999) (quoting *Lancaster v. Monroe Cty. Ala.*, 116 F. 3d 1419, 1425 (11th Cir. 1997)). Delaying treatment, "even for a period of hours," can amount to deliberate indifference. *Id*. (listing cases). And "deliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment." *Id*.

Despite Defendant's knowledge of Ms. Keohane's gender-dysphoria diagnosis, her continued requests for treatment, her self-harm, and her suicide attempts, Defendant initially denied, then delayed, treatment for two years—treatment which it now agrees is medically necessary. This Court finds this prolonged denial of hormone treatment under Defendant's "freeze-frame" policy

constitutes deliberate indifference to Ms. Keohane's gender dysphoria. Defendant's decision to deny hormone therapy was based on an unconstitutional rule with no foundation in medical judgment. Moreover, the minimization of Ms. Keohane's condition and the slow-walking of her treatment by those in charge of her care only goes to show how inexperience and ignorance can needlessly prolong an inmate's suffering. Accordingly, so long as Ms. Keohane's hormone therapy is not medically contraindicated, Defendant is enjoined to continue providing her with hormone therapy as prescribed by her treating endocrinologist.

V

Defendant's policies (and the resulting approach its medical personnel have taken to treatment) have essentially, and needlessly, denied Ms. Keohane medically necessary care—including hormone therapy[8] *and* access to female clothing and grooming standards.[9] A lot can explain the denial of care in this case, starting at the top with ignorance and bigotry.[10] But medicine does not yield to ignorance or

[8] Treatment Defendant now concedes is medically necessary.

[9] Treatment Defendant's own expert opined would be "psychologically helpful" in alleviating Ms. Keohane's gender dysphoria.

[10] For example, at trial, Defendant's expert witness on prison security, Mr. James. R. Upchurch, was downright baffled over the differences between transgender people, gay people, and people diagnosed with gender dysphoria. *See* ECF No. 146 at 164 ("I've heard more in the last two days about differentiating between transgender, homosexual, gender dysphoria. It's been very educational. But I don't think there are a lot of people out there who know or would know who is what, and I don't think there are a lot of inmates out there who really know if they are one or the other."); *see also id*. at 165 ("There's homosexual activity in prison. That I assume involves—would involve transgender inmates, but also involves non-transgender, assuming that—

bigotry. And while differences in medical judgment often serves as a valid defense to a claim of deliberate indifference, ignorance and bigotry is no defense—nor, for that matter, is blind deference to security policies in the absence of any exercise in medical judgment. As to Ms. Keohane's request for access to female clothing and grooming standards, this Court finds Defendant's denial of care based on "security concerns" constitutes deliberate indifference to her gender dysphoria.

A

The WPATH Standards note that each patient should be assessed and provided treatment for their gender dysphoria according to their individual needs. *See* ECF No. 3-16. Defendant's own expert, Dr. Levine, agrees, testifying at trial that "[t]he treatment of gender dysphoria in the community is driven by the patient . . . . So there are people who have gender dysphoria who do not want hormones[, and t]here are people who have gender dysphoria who do not want to have sex reassignment surgery." ECF No. 146 at 57-58. Ultimately, Dr. Levine opined that "the hallmark of good treatment [is] that it varies from person to person." *Id*. at 64.

depending on what that definitional line cutoff is."). Mr. Upchurch also admitted he had "never heard of gender dysphoria" before this case, and he assumed "a number of inmates who are homosexuals . . . would like to have long hair," which might result in further litigation if Ms. Keohane succeeds in this case. *Id*. at 163-64; *see also* ECF No. 129-15 at 31 ("Quite honestly I'm not real clear on the relationship between gender dysphoria and transgender and homosexuality, a lot of these kinds of things."); *id*. at 32 ("I couldn't give you an estimate on transgender women only because that would mean I would have to make a distinction between effeminate homosexual males as defined as—transgender category. I've never—that's not something that I have—that I would be able to quantify.").

The WPATH Standards recommend several treatment options, including social transitioning. These standards *theoretically* should apply *inside* prisons as well as outside. But according to Defendant's chief medical officer, Dr. Timothy Whalen, Defendant isn't currently implementing the WPATH Standards in its prisons. ECF No. 129-1 at 179; *see also* ECF No. 146 at 9.

At trial, Dr. Whalen wasn't shy about his qualms with the WPATH Standards or some of the mainstream medical organizations that find these standards authoritative in the treatment of gender dysphoria. ECF No. 146 at 46 ("It's the only process that I'm aware of where we go against nature to help somebody. And while I'm trying to grasp that, I still have trouble making that leap."); *see also* ECF No. 129-1 at 170 ("I don't know what [the American Medical Association and American Psychiatric Association] would believe. They are basically political arms . . . [o]f physicians and psychiatrists.").

When pressed, Dr. Whalen admitted he was "evolving" on the issue of whether hormone therapy is proper treatment for gender dysphoria, though he once flippantly compared it to "offering diets to anorexics." ECF No. 146 at 48. What's more, Dr. Whalen thinks there's a possibility gender dysphoria just doesn't exist at all. ECF No. 129-1 at 119-20. And Dr. Whalen says he's "sure that [his] religion enters into" his views concerning transgender people in general, but he claims he temper[s] that with what [he] see[s] and deal[s] with on a day-to-day basis." *Id*. at

163. But this Court finds this claim dubious based on some of Dr. Whalen's other unenlightened comments.[11]

Luckily for Ms. Keohane, Dr. Whalen is not a member of her treatment team. ECF No. 146 at 25. But as Defendant's chief medical officer, Dr. Whalen is the "final decision-maker" when it comes to granting exceptions to Defendant's policies for medical reasons. ECF No. 129-1 at 148. His testimony makes plain that he sees no reason to grant such exceptions for inmates with gender dysphoria.

Dr. Whalen testified that, in his view, the only proper treatment for gender dysphoria is psychotherapy and psychiatric medication. *Id*. at 119; ECF No. 146 at 15. In addition, he testified that if a mental-health clinician came to him requesting a pass for Defendant's hair-length policy for an inmate with gender dysphoria, it would be a "hard sell" for him to grant an exception based on a finding of medical necessity. ECF No. 129-1 at 111. This is so even though Dr. Whalen admittedly doesn't know one way or the other if social transitioning is helpful in treating gender dysphoria. *Id*. at 116.

Dr. Whalen also testified at trial that it's *Defendant's* opinion that longer hair, access to makeup, and access to female undergarments is not medically necessary

[11] For example, though Dr. Whalen thinks treating gender dysphoria by encouraging the transition of gender roles "goes against nature," he doesn't think we should also medically try to convert gay people to straight people because "[t]hat's a sexual preference . . . . That is their choice[.]" ECF No. 146 at 47.

for treating gender dysphoria. ECF No. 146 at 14-15. He explained that to him, based on his experience as an emergency room doctor, "[m]edical necessity . . . is somewhat limited." *Id*. at 21. Accordingly, Dr. Whalen "break[s] things down according to loss of life, limb, or one of the senses for emergencies, and then urgent, and nonurgent." *Id*. For Dr. Whalen, social transitioning falls into the "nonurgent category" of medical treatment. *Id*.

Of course, the Constitution doesn't command only the provision of emergency treatment to avoid violating an inmate's Eighth Amendment rights. Dr. Whalen is sorely mistaken if he believes "nonurgent" treatment cannot also be "medically necessary" in a constitutional sense. *See*, *e.g.*, *Sands v. Cheesman*, 339 F. App'x 891, 894-96 (11th Cir. 2009) (unpublished) (finding severe periodontitis, or gum infection, constituted serious medical need though it was not an emergency condition).

Dr. Whalen's opinion regarding medically necessary treatment raises one of many red flags contributing to this Court's finding that Defendant has a blanket policy of denying social transitioning for inmates diagnosed with gender dysphoria. Moreover, Dr. Whalen's admitted lack of knowledge concerning accepted standards of care and his limited experience in treating gender dysphoria further contributes to this Court's finding that Defendant denied Ms. Keohane access to minimally competent medical personnel capable of determining her treatment needs.

B

The chronology of Ms. Keohane's treatment in Defendant's custody is marred with delays, rigidities, and shifting explanations regarding her request for social transitioning. To start, as this Court already noted, the leader of her mental health team, Dr. Johnson, met Ms. Keohane as early as August 2014—within a few weeks of Ms. Keohane's transfer to Defendant's custody. ECF No. 129-7 at 53. At that point, Dr. Johnson testified that Ms. Keohane wasn't requesting social transitioning yet, but she signed off on a treatment plan diagnosing Ms. Keohane with gender identity disorder. *Id*. at 53, 57; *see also id*. at 82 (conceding Ms. Keohane was diagnosed with gender dysphoria as early as August 2014).

On December 11, 2014, Ms. Keohane filed her first grievance requesting "an appointment to discuss the psychological necessity of . . . dressing as a female, and the availability of a pass for this way of dressing." ECF No. 3-6 at 9. A few days after filing this grievance, Ms. Keohane had two personal sports bras and three sets of female underwear confiscated as contraband. *Id*. at 12. She filed a grievance concerning their confiscation, but Defendant's response was only that "[a]t a male institution only T-shirts, Boxers, Pants and Blue shirts are authorized. Any other clothing is unauthorized." *Id*. Similarly, on May 4, 2016, Ms. Keohane filed another grievance requesting, among other things, hormone therapy and the ability to socially transition. ECF No. 3-6 at 14. This grievance was denied. *Id*. And a

subsequent, similar grievance was returned without action a few weeks later. *Id*. at 16-17.

Almost *two years* after entering Defendant's custody, Dr. Johnson signed off on Ms. Keohane's March 2016 treatment plan, which noted that Ms. Keohane had indicated a desire to socially transition. ECF No. 129-7 at 63-64. But Dr. Johnson testified that she wasn't aware of this request because she didn't read that part of the plan before she signed it. *Id*. According to Dr. Johnson, Ms. Keohane's treatment team didn't discuss her request to grow out her hair until August 2016 and didn't discuss other aspects of social transitioning until after Ms. Keohane filed suit. *Id*. at 82-83, 94-95. This is so despite: (1) Dr. Johnson's knowledge of Ms. Keohane's attempts at suicide and self-harm, and (2) her general knowledge that *any* patient whose gender dysphoria is left untreated may be at increased risk of suicide and self-harm. *See* ECF No. 129-7 at 30-31, 95.

Another member of Ms. Keohane's treatment team, Ms. Sonel Baute, testified that she doesn't think *anyone* has made a final decision regarding Ms. Keohane's request for social transitioning. ECF No. 129-3 at 30. Ms. Baute became Ms. Keohane's mental health counselor in March 2016 after Defendant transferred Ms. Keohane to the Everglades facility. *Id*. at 26-27. From the beginning, Ms. Keohane notified Ms. Baute of her grievances requesting access to female clothing and grooming standards. *Id*. at 27-28. And like Dr. Johnson, Ms. Baute is well aware of

Ms. Keohane's history of self-harm. ECF No. 129-3 at 18-19, 50-51. Indeed, Ms. Baute testified that she believes Ms. Keohane attempted suicide because of the hopelessness she felt from "[b]eing in prison and not having what she felt like she needed," with respect to her gender dysphoria. *Id*. at 51.

But even with this knowledge, Ms. Baute has never assessed whether Ms. Keohane has a mental-health need for longer hair or access to female undergarments because, she says, Defendant's policies prohibit these things. *Id*. at 66. Nor does she think Defendant would permit a medical pass for social transitioning. *Id*. at 65 ("I don't think there's a medical pass for social transition."). Instead, her therapy with Ms. Keohane is focused on coping *without* access to this particular treatment. *Id*. at 61 ("For now, yeah. It's how she can be okay with what she has at the time.").

The third member of Ms. Keohane's mental health team, Mr. Andre Rivero-Guevara, testified that at some point, the team did discuss whether Ms. Keohane should have access to female clothing. But they concluded "it is out of our hands, that we understand, but there's nothing we can do," because Defendant makes that decision. ECF No. 129-11 at 73. But Mr. Rivero now agrees Ms. Keohane needs a bra—though, he thinks it's only because her breasts are growing from hormone therapy, not because she has a psychological or psychiatric need for female undergarments. *Id*. at 69. In addition, Mr. Rivero admitted he's also aware of Ms. Keohane's history of attempted suicide while in Defendant's custody. *Id*. at 69.

What's clear from the treatment team's testimony is that everybody knows Ms. Keohane has harmed herself and attempted suicide, but still, *nobody* has requested *any* exceptions to Defendant's male grooming and clothing policies to treat her gender dysphoria. *See* ECF No. 129-7 at 99. Moreover, the mental health team never evaluated whether Ms. Keohane has a medical or mental-health need for access to female clothing and grooming standards—despite Ms. Keohane's persistent requests—because they believe Defendant's security policies prohibit such treatment. The treatment team failed to make this assessment despite their shared knowledge that treatment for gender dysphoria includes social transitioning[12] and the failure to treat can lead to self-harm and suicide.[13]

[12] Ms. Baute testified that she understands treatment can include individual therapy, social transitioning, hormones, and surgery. ECF No. 120-3 at 17. She further testified that social transitioning is part of treatment because "[i]t allows you to express yourself in the gender that you feel yourself to be . . . . [and i]t helps with self-esteem, it helps with expression, [and] it helps with . . . emotions." *Id*. at 18. Dr. Johnson similarly testified that she understands "appropriate treatment protocols" for gender dysphoria include "anything from psychotherapy to hormone treatment to surgery . . . . [a]nd assistance from the . . . clinician with the individual's social transitioning." ECF No. 129-7 at 52. Mr. Rivero also understands treatment includes social transitioning—even though he admitted he's not familiar with the WPATH Standards. ECF No. 129-11 at 23. But he also thinks it's more appropriate "in a different setting," and not in prison because "there's a lot of men [in prison] that are violent and . . . you have this person that is, you know, more feminine and more fragile[.]" *Id*.

[13] Dr. Johnson acknowledged that an individual with untreated gender dysphoria might hurt themselves or attempt suicide because of their dysphoria. ECF No. 129-7 at 30-31. Ms. Baute was aware of the same. ECF No. 129-3 at 19-20. Mr. Rivero, on the other hand, recognized that patients whose gender dysphoria is left untreated may "become unglued and . . . suffer for little things," while others may be "stoic," but "it depends on the person." ECF No. 129-11 at 35-36.

The mental health team's testimony also raises several red flags over Ms. Keohane's medical treatment. For example, at least two of the mental health team members, including the team leader, were entirely inexperienced in treating inmates with gender dysphoria before they met Ms. Keohane.[14] Though Mr. Rivero testified to having some experience with transgender patients during his time in private practice, his patients had already fully transitioned at the time. ECF No. 129-11 at 11-12. Granted, everyone seems to have taken a continuing education course about gender dysphoria that Wexford offered in the spring of 2016. *See* ECF No. 129-3 at 22; 129-7 at 15, 48-49; 129-11 at 25-26. But this course only goes so far in compensating for an otherwise complete lack of training and experience.

Another red flag is the team's confusion about whether they could request exceptions or "passes" to Defendant's security policies concerning hair length and female undergarments. Nobody seems to think providers on the mental health side can request or recommend exceptions to Defendant's policies. *See* ECF No. 129-3 at 65 ("I don't think there's a medical pass for social transition."); ECF No. 129-7 at 98 (An inmate "would not be able to have [access to female clothing and grooming standards]," under DOC policy.). Instead, only providers on the medical side have

[14] Neither Ms. Baute nor Dr. Johnson had ever treated someone for gender dysphoria before Ms. Keohane.

this authority. ECF No. 129-11 at 46 ("Like I said, we do not give passes. Passes are given by medical.").

The treatment team's understanding of Defendant's policies belies Dr. Whalen's testimony that any physician or licensed clinician—on the medical *or* mental health side of things—can request exceptions to Defendant's policies for medically necessary care. ECF No. 129-1 at 151 ("[A] clinical psychologist would know that they can do that, because in the mental health world the licensed clinical psychologists are on an even par with the physicians."). Even so, Dr. Whalen's testimony that a request for social transitioning would be a "hard sell" for him leads this Court to infer and ultimately conclude that he wouldn't grant such an exception as a matter of policy. But even setting this aside, it's clear Dr. Whalen has never decided this issue, nor has he been presented with any medical request for any exceptions to security policies to allow for social transitioning. But still—he's prejudged the matter. This Court suspects Dr. Whalen's prejudgment is born of his ignorance of gender dysphoria and bigotry toward transgender individuals in general. This is especially clear in light of Defendant's own expert's opinion that social transitioning would be psychologically helpful for Ms. Keohane while she's undergoing hormone therapy in Defendant's custody.

Lastly, some members of Ms. Keohane's treatment team arbitrarily differentiate between "wants" and "needs" when it comes to her medical treatment.

Dr. Johnson testified that "[p]er [her] definition" of "medical necessity," social transitioning is not necessary because it's not a "life and death medical intervention." ECF No. 129-7 at 94-95. She also testified that she doesn't know if Ms. Keohane *needs* access to female clothing and grooming standards, nor does she think she's capable of making such a determination, though she knows Ms. Keohane *wants* those things. *Id*. at 104. Mr. Rivero similarly testified that he thinks a "[n]eed is when you need something to live, to be able to continue, you know[.]" ECF No. 129-11 at 16. "Anything else is something you want, which is okay, too." *Id*.

But again, the law does not require an inmate to be at death's door before the failure to provide medical treatment constitutes deliberate indifference. "A medical condition need not be life-threatening to be serious; rather, it could be a condition that would result in further significant injury or unnecessary and wanton infliction of pain if not treated." *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010) (citing *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999)).

And though it may "not rest on any established sinister motive or 'purpose' to do harm," Defendant's provision of *some* treatment "is undercut by a composite of delays, poor explanations, missteps, changes in position and rigidities—common enough in bureaucratic regimes but here taken to an extreme." *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011). These red flags support this Court's conclusion that the care Defendant afforded Ms. Keohane was based on unreasonable

professional judgment—that is, ignorance to accepted standards of care and the concomitant blanket deference to Defendant's security policies over the exercise of medical judgment. Moreover, the treatment team's testimony concerning their failure to assess Ms. Keohane's need for social transitioning (despite their knowledge that social transitioning is an accepted treatment option *and* that Ms. Keohane had a history of self-harm) further contributes to this Court's conclusion that Defendant denied Ms. Keohane access to medical personnel capable of evaluating her treatment needs.

C

Apparently recognizing the gap in Ms. Keohane's medical record, Wexford's counsel arranged for its regional psychiatrist, Dr. Santeiro, "to evaluate Plaintiff's need for access to female clothing and grooming standards," after she filed her lawsuit. ECF No. 133 at ¶ F. 30. Dr. Santeiro testified that he met with Ms. Keohane for "a little over an hour" to evaluate her. ECF No. 129-12 at 17. After the meeting, the doctor concluded that Ms. Keohane has gender dysphoria but didn't presently have a need for access to female clothing or grooming standards. *Id*. at 14, 33.

Remarkably, this was the first time Dr. Santeiro evaluated anyone in prison to determine a medical need for access to clothing or grooming standards to treat gender dysphoria. *Id*. at 78. Dr. Santeiro typically only evaluates inmates for psychiatric medications. *Id*. at 77. But Ms. Keohane hasn't been on *any* psychiatric

medications while in Defendant's custody, nor did Dr. Santeiro conclude that she needed to be. *Id*. He even admitted recommending access to social transitioning is something that would typically be left for Wexford's psychologists to make—not for a psychiatrist like himself. *Id*.

This Court finds Dr. Santeiro's conclusions about Ms. Keohane's treatment needs unhelpful—both to this Court and for Defendant's case—for several reasons. To start, Defendant offers his testimony neither as an expert nor as a treating physician. Accordingly, his opinions aren't the sort of dueling-expert testimony that could demonstrate a difference-in-medical-opinion defense to Ms. Keohane's claim.

Curiously, Dr. Santeiro had very little discussion with Ms. Keohane about her request to socially transition despite Wexford's assertion that determining this need was the whole purpose of the evaluation. Dr. Santeiro testified that he didn't bring up the subject of the forced haircuts Ms. Keohane has experienced in Defendant's custody—that he "didn't open that can of worms"—and that they only briefly discussed Ms. Keohane's request for female clothing and grooming standards at the start of their meeting. ECF No. 129-12 at 117.

In addition, Dr. Santeiro testified that his conclusions were based on whether Ms. Keohane has a "physical" need to socially transition, not a "mental-health" need. *Id*. at 91-92. In distinguishing between mind and body, Dr. Santeiro conceded it may be beneficial to Ms. Keohane's mental health to socially transition, but her physical

body doesn't require such treatment. Based on this flawed conception of "medically necessary" treatment, Dr. Santeiro concluded Ms. Keohane had no medical need to access female clothing and grooming standards. *See Steele v. Shah*, 87 F.3d 1266, 1269 (11th Cir. 1996) ("In this circuit, it is established that psychiatric needs can constitute serious medical needs and that the quality of psychiatric care one receives can be so substantial a deviation from accepted standards as to evidence deliberate indifference to those serious psychiatric needs.").

Dr. Santeiro is also aware that untreated gender dysphoria may lead to suicide and self-castration, but he concluded that Ms. Keohane just didn't seem psychologically distressed enough "to overwhelm the risk" of social transitioning in prison. ECF No. 129-12 at 57, 92. Had she shown "any kinds of imminent risks or severe distress," Dr. Santeiro testified that he "would have made some communications with the Department of Corrections to see what could be done." *Id*. at 101. But he made this observation without having fully reviewed Ms. Keohane's medical records and without knowledge of her past suicide attempts. *Id*. at 80-81, 83.

Indeed, Dr. Santeiro only reviewed the psychiatry notes in Ms. Keohane's medical chart before conducting the evaluation. *Id*. at 81 ("I only look at the psychiatry section and I only looked at the psychiatry provider. I did not even read most of the counseling notes 'cause there's too many notes to read."). But there

wasn't much to read since Ms. Keohane has never taken psychiatric medication while in Defendant's custody. *Id*. at 81-82.

Contrary to what the WPATH Standards recommend, Dr. Santeiro applied a separate treatment standard to Ms. Keohane because she's in prison. He recognizes social transitioning is a "very appropriate" way to treat gender dysphoria "in the community" but claims it's "not as easy" in prison. ECF No. 129-12 at 99-100. Had he evaluated Ms. Keohane as a patient in the community, he says he probably would have agreed with or encouraged social transitioning. *Id*. at 100. However, for "safety" reasons, he claims it's "extremely difficult" to allow an inmate to socially transition in the general population of a male prison. *Id*. at 101. Even so, Dr. Santeiro ultimately agreed that if Defendant was already providing Ms. Keohane with a bra, she might as well be provided female underwear too. ECF No. 129-13 at 50 ("Once they open that door, might as well have the other parts.").[15]

As the factfinder in this case, this Court places little, if any, weight on Dr. Santeiro's testimony. Defendant has offered his testimony not as an expert witness

[15] To be clear, although Dr. Santeiro's testimony alludes to some balance between security interests and an alternative form of treatment that can minimize security concerns, there has been no balancing in this case. That decision has never been made. Instead, Ms. Keohane's treatment team has limited her treatment in blanket deference to Defendant's security policies. In any event, Dr. Santeiro's opinion about security concerns is simply irrelevant given Defendant's stipulation that if such treatment is deemed medically necessary, it will be provided with added security measures taken. Ultimately, Defendant's constant injection of security concerns throughout this litigation is just another red herring—another example of how this case and Defendant's shifting explanations have been moving targets from the start.

nor as a treating physician, his "medical conclusions" are flawed in that they defer to security concerns and apply a separate standard to Ms. Keohane based on her status as an inmate, and he's internally inconsistent given his assumption that underwear may not, in fact, pose such a risk now that Ms. Keohane has access to a bra for breast support. Moreover, Dr. Santeiro's findings—grounded in large part on Ms. Keohane's status as an inmate—also raise grave doubts concerning his competency in evaluating and treating gender dysphoria. [16]

D

Defendant's own expert's testimony is infinitely more persuasive than Dr. Santeiro's suspect findings and the treatment team's deference to Defendant's security policies. At trial, Dr. Levine offered his opinion as an expert on transgender issues and the treatment of gender dysphoria. After explaining the historical context for the term "medically necessary," and the reasons for his own hesitation in labeling treatment as such, Dr. Levine opined that he thinks the term "is a euphemism or . . . a cover term for . . . what might be psychologically pleasing to the patient, what

[16] Ms. Keohane's treating endocrinologist, Dr. Eugenio Angueira-Serrano, to whom Defendant eventually referred Ms. Keohane for hormone therapy even testified that he was "surprised" when he learned Dr. Santeiro decided social transitioning wasn't necessary while Ms. Keohane was taking hormones. Dr. Angueira opined that he thinks allowing Ms. Keohane to grow out her hair and wear female undergarments "is helpful for the patient," and he "would expect that to be something that would help the patient with transition." ECF No. 129-2 at 19; *see id*. at 19-20 ("I mean, once you're having body changes, I think it would be uncomfortable to have the breast developing and you couldn't wear a bra.").

might be psychologically helpful to the patient, and what may diminish the person's internal distress." ECF No. 146 at 74.

In Dr. Levine's opinion, which this Court credits, a compassionate part of treating an inmate with gender dysphoria who is taking hormones would include making certain "accommodations within [the prison] setting . . . to ease [the inmate's] anxiety." *Id*. at 75. Without hesitation, Dr. Levine opined that these accommodations should include providing a bra to an inmate who is growing breasts as a result of hormone therapy. *Id*. at 76. And he testified that allowing Ms. Keohane to wear female underwear and to grow out her hair would be both "psychologically comforting" and "psychologically pleasing" to her.[17] *Id*. at 117-18.

Dr. Levine believes if Ms. Keohane were to be taken off hormone treatment, she would be "very distressed." *Id*. at 118-19. And if Defendant continues to deny her access to female clothing and grooming standards, Dr. Levine opined that "[Ms. Keohane] could be vulnerable to acute decompensation." *Id*. at 119. Indeed, Dr. Levine agreed with this Court that it would be "readily apparent" to a similarly trained doctor that the failure to treat an inmate's gender dysphoria would cause the

[17] As to the benefits of social transitioning as a form of treatment, Dr. Levine testified that he thinks "it's a very useful phenomenon to see whether the fantasy that I am a woman can be translated into living or portraying myself as a woman and what problems will I have, what comfort and joy will I have in transforming what originally was a fantasy into a new partial sense of reality. That's why it's useful. And if you want to call that medically necessary to further ascertain in the mind of the patient whether this was a wise decision or not, it's useful." ECF No. 146 at 119-20.

inmate to suffer. *Id*. at 126. He testified that if he "treated this as though this wasn't a legitimate source of mental pain, then [he] would . . . be adding to the desperation of that person." *Id*. In Dr. Levine's opinion, "it's *destructive* to ignore this mental complaint of gender dysphoria." *Id*. at 129 (emphasis added).

But that's what Defendant has done from the start when it comes to providing constitutionally adequate treatment for Ms. Keohane. Defendant was subjectively aware of the risk of serious harm to Ms. Keohane because Defendant knew she was diagnosed with gender dysphoria as early as August 2014. Indeed, Defendant "wisely do[es] not deny" that Ms. Keohane has a serious medical need based on her diagnosis. *Brown v. Johnson*, 387 F. 3d 1344, 1351 (11th Cir. 2004) ("A serious medical need is considered 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'"). And Ms. Keohane put Defendant on notice of her continued suffering with each grievance, attempted suicide, and self-harm attempt during her first two years in custody. Even so, Defendant ignored Ms. Keohane's mental complaint of gender dysphoria and her parallel need to socially transition in prison, citing "security concerns," and later, Dr. Santeiro's suspect evaluation, to deny her care. [18]

[18] As this Court has described at length, Dr. Santeiro offers no competing medical opinion—nor is this Court weighing his opinion against that of Dr. Brown's or Dr. Levine's or any other qualified expert in this case. Defendant offers his testimony as neither an expert in the treatment

E

To establish deliberate indifference, Ms. Keohane must show Defendant was not only aware of a risk of serious harm, but also that Defendant disregarded the risk by conduct that is more than mere negligence. *See Hoffer v. Jones*, 290 F. Supp. 3d 1292, 1299 (N.D. Fla. 2017) (citing *Goebert v. Lee Cty.*, 510 F. 3d 1310, 1326-27 (11th Cir. 2007)). As this Court noted in *Hoffer*, the Eleventh Circuit recognizes several examples of conduct that is considered more than mere negligence, including

> (1) knowledge of a serious medical need and a failure or refusal to provide care; (2) delaying treatment for non-medical reasons; (3) grossly inadequate care; (4) a decision to take an easier but less efficacious course of treatment; or (5) medical care that is so cursory as to amount to no treatment at all.

Baez v. Rogers, 522 F. App'x 819, 822 (11th Cir. 2013). And just because Defendant provides some care, like counseling and hormones, doesn't mean this suffices as constitutionally adequate treatment. *De'lonta v. Johnson*, 708 F. 3d 520, 526 (4th Cir. 2013); *see also Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1126 (M.D. Ala. 2016) ("Although the Eighth Amendment is not violated merely because a prisoner receives less than ideal health care, the Eleventh Circuit has repeatedly recognized that even when some care is provided, 'deliberate indifference may be established

---

of gender dysphoria nor a treating physician, and this Court has given it the consideration it deserves.

by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment.'" (listing cases)).

Ms. Keohane asserts Defendant has been deliberately indifferent to her gender dysphoria because of its blanket denial to provide social transitioning based on Defendant's security policies, and because Defendant's medical providers lack competence in treating gender dysphoria or otherwise failed to meet community standards of care. This Court agrees. As set out above, the record at trial is replete with evidence to support this conclusion.

1

Experts on both sides agreed at trial that Defendant should allow Ms. Keohane access to female clothing and grooming standards to treat her gender dysphoria.[19] Accordingly, this Court finds such treatment is necessary to treat Ms. Keohane's serious medical need. Moreover, this Court finds Ms. Keohane's treatment team was aware of Ms. Keohane's serious medical need but ignored a substantial risk of harm to her mental and physical health in reliance on Defendant's clothing and grooming policies. For example, Ms. Baute testified that she's been focusing her counseling sessions with Ms. Keohane on coping *without* treatment rather than addressing her

[19] Plaintiff's expert, Dr. Brown, opined that "social transition in its elements, like the appropriate pronouns, like the ability to present within the confine of the prison environment, oneself as a female prisoner, is part of the medically necessary components for the treatment of gender dysphoria." ECF No. 145 at 169. Similarly, Defendant's own expert, Dr. Levine, "recognize[d] that if Reiyn wants to wear panties, then that would be psychologically pleasing to Reiyn," as would growing out her hair. ECF No. 146 at 117-18.

underlying diagnosis because she thinks she can't request exceptions to Defendant's security policies for social transitioning.

Defendant's contracted medical providers understand Defendant's security policies effectively ban social transitioning in prison without exception. And in light of Dr. Whalen's disingenuous testimony, this Court finds Defendant would not permit an exception even if a clinician sought one based on a sincere belief that her patient posed a substantial risk of harm to him or herself without the ability to socially transition in custody. As to Ms. Keohane, this denial of care only serves to prolong her mental suffering without any legitimate penological purpose.

The evidence at trial demonstrates that Ms. Keohane's treatment team clutches to Defendant's male clothing and grooming policies to explain their failure to even assess whether Ms. Keohane has a treatment need to socially transition in prison. In their minds, Ms. Keohane *simply can't transition* because Defendant does not permit inmates housed in its male facilities access to the clothing and grooming standards it applies to female inmates. The treatment team couldn't even fathom requesting an exception to those policies even if the inability to socially transition drives a patient to suicide.

Mr. Rivero's testimony illustrates this point. He testified that he would place a suicidal inmate diagnosed with gender dysphoria in special housing and provide psychiatric medication rather than request a pass for social transitioning. In effect,

Mr. Rivero would treat the inmate's depression and suicidal ideation—two devastating symptoms of gender dysphoria—instead of the underlying psychiatric diagnosis. ECF No. 129-11 at 47 ("I cannot do anything for the hair length. I, however, can put the patient in [special housing], so the patient will not harm themselves. And after a certain amount of time that the patient is in [special housing], if the patient wants to take medication, I would help them with medication."). Instead of addressing the underlying medical need, Mr. Rivero would simply medicate and isolate the inmate until they're momentarily talked down from the metaphorical ledge. As Dr. Brown testified at trial, this is like "putting a Band-Aid over a wound that requires significant intervention and the Band-Aid isn't sufficient." ECF No. 145 at 168.

Similarly, Wexford's Regional Medical Director, Dr. Marlene Hernandez, declared that she is not permitted to authorize any exceptions to Defendant's policies.[20] ECF No. 24-1 at ¶ 8. She did testify about requesting several medical exceptions to Defendant's policies for accommodations like low bunk passes, hats, long sleeves, and sunblock. ECF No. 42-1 at 32. But when it comes to exceptions to permit social transitioning, Dr. Hernandez testified that "[t]hat's a security question." *Id*. at 31.

[20] It's worth noting that Dr. Hernandez had no prior experience with treating gender dysphoria or knowledge of the standards of care for treating gender dysphoria before reviewing Ms. Keohane's medical records. ECF No. 42-1 at 46.

Other courts have found this approach to treating gender dysphoria constitutionally inadequate. *See Soneeya*, 851 F. Supp. 2d at 248 ("While the DOC has offered to treat any depression or anxiety that might occur as a result of the denial of [sexual reassignment surgery], treating the symptoms is not a substitute for treating Ms. Soneeya's underlying condition. The DOC cannot, therefore, claim that Ms. Soneeya is receiving adequate treatment for her serious medical needs because it has not performed an individual medical evaluation aimed solely at determining the appropriate treatment for her [gender dysphoria] under community standards of care."). This Court finds this summary deference to Defendant's clothing and grooming policies and asserted security concerns effectively functions as a blanket ban on Ms. Keohane's ability to socially transition—a form of medically necessary care to treat her gender dysphoria.

2

In addition, this Court finds the care Ms. Keohane received while in Defendant's custody has deviated from accepted standards of care for the treatment of gender dysphoria. Even Defendant's own expert, Dr. Levine, agrees that allowing Ms. Keohane to dress and groom as a woman would be "psychologically helpful" in treating her gender dysphoria. But Defendant doesn't recognize or permit social transitioning in its facilities—nor does it follow the WPATH Standards, which this Court finds authoritative in the treatment of gender dysphoria.

"Deliberate indifference to serious medical needs is shown when . . . an inmate is denied access to medical personnel capable of evaluating the need for treatment." *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (quoting *Ramos v. Lam*, 639 F.2d 559, 575 (10th Cir. 1980)). Defendant's own chief medical officer admitted he's not implementing the WPATH Standards in Defendant's facilities, nor would he grant an exception allowing an inmate to socially transition despite the substantial risks flowing from a denial of care. Moreover, Ms. Keohane's own treatment team has had little—if any—prior experience treating inmates with gender dysphoria. Their inexperience led them to apply a different, limited standard of care to Ms. Keohane because she's in prison, despite their knowledge of her serious medical need. *See Loosier v. Unknown Medical Doctor*, 435 F. App'x 302, 306 (5th Cir. 2010) (unpublished) (allegation of doctor's failure to treat plaintiff based on inmate status rather than medical judgment sufficient to state claim for deliberate indifference). But "[m]inimally adequate care usually requires minimally competent physicians." *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991). Indeed, "access to medical staff is meaningless unless that staff is competent and can render competent care." *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (internal quotation marks omitted) (quoting *Cabrales v. Cty. of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988)). In this case, Defendant denied Ms. Keohane access to medical personnel capable of determining whether she has a

treatment need for social transitioning. Ms. Keohane's team leader even admitted that she didn't know if she was capable of determining this need. ECF No. 129-7 at 104. Defendant's ignorance toward the treatment of gender dysphoria, its failure to implement accepted standards of care, and the resulting denial of access to minimally competent medical personnel has only served to prolong Ms. Keohane's suffering.

3

Finally, Ms. Keohane has demonstrated that Defendant has a causal connection to her alleged constitutional harm. *See Hoffer*, 290 F. Supp. 2d at 1303 (quoting *Goebert*, 510 F.3d at 1327)). Defendant is Secretary of the Florida Department of Corrections ("FDC") and "is ultimately responsible for FDC's policies and practices." *Id*. (citing § 20.315(3), Fla. Stat.). Accordingly, because Ms. Keohane's claim is based on FDC's policies and their implementation, she's satisfied the causation element. *Id*. (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) ("[T]he causal connection may be established when a supervisor's custom or policy … result[s] in deliberate indifference to constitutional rights …." (alteration in original) (internal quotation marks omitted)).

4

This Court recognizes that no inmate is automatically entitled to the most state-of-the-art medical treatment while in the state's custody. But that's not what

Ms. Keohane is seeking. Though she truly sees herself as a warrior queen[21] in this fight, Ms. Keohane is not demanding that Defendant bow down with offerings of frilly dresses, fancy shoes, or other frivolous badges of stereotypical femininity. Given the severe constraints placed on self-expression for male *and* female inmates, the *only* way it's even feasible for Ms. Keohane to express her gender identity is through pronouns, undergarments, and grooming. She's simply asking Defendant to see her and treat her as she is; namely, a woman stuck in a male body that's stuck in a cage for the foreseeable future. Even Defendant's own expert agrees that allowing for social transitioning is a compassionate part of Ms. Keohane's treatment plan.

Now that Defendant is permitting hormone therapy, Ms. Keohane's body is changing, feminizing, and becoming more in tune with her internal sense of self. But still, Defendant is forcing Ms. Keohane to live outwardly as a man in ways that, though seemingly banal to some, strike at the heart of what it means to be perceived as a man or woman.[22] Ultimately, Defendant has chosen an easier course of treatment to maximize "uniformity," and ease "security concerns," by ignoring the

[21] At trial, Ms. Keohane aptly compared herself to Daenerys Targeryen—"a queen and a warrior who has been through hardship and has learned how to survive it, who not only stands up for herself, but for other people and who values . . . human dignity and believes that all people should be able to have it." ECF No. 145 at 95-96.

[22] For example, former Maricopa County Sheriff Joe Arpaio didn't overlook the power of gendered undergarments when he forced male inmates housed in his jail to wear pink underwear. *See Arizona pink underwear inmate case to be settled:lawyer*, REUTERS (Sept. 8, 2014, 7:47 PM), https://www.reuters.com/article/us-usa-arizona-underwear/arizona-pink-underwear-inmate-case-to-be-settled-lawyer-idUSKBN0H32GO20140908. "In 2012, the federal 9th U.S. Circuit Court

substantial risk of harm to Ms. Keohane's mental health that results from denying such "minor accommodations" as panties and access to Defendant's female grooming standards. This ends now.

Defendant has stipulated "that if having longer hair or female undergarments or makeup were deemed to be medically necessary for an inmate with gender dysphoria, then the accommodation would be provided, with additional security measures taken if necessary." ECF No. 133 at ¶ F. 17. This Court finds such treatment is medically necessary to alleviate Ms. Keohane's gender dysphoria, and Defendant's denial of such treatment constitutes deliberate indifference. Defendant's deliberate denial of care—that is, the denial of access to female clothing and grooming standards despite its knowledge of her diagnosis and her history and risk of self-harm—has caused Ms. Keohane to continue to suffer unnecessarily and poses a substantial risk of harm to her health. Accordingly, Defendant is enjoined to permit Ms. Keohane access to the same undergarments, hair-length policy, and makeup items available for inmates housed in Defendant's female facilities so that she can socially transition to treat her gender dysphoria.

---

of Appeals ruled that Arpaio's policy may be unconstitutional when applied to prisoners who had not been convicted of a crime." *Id*.; *see also* Gabrial Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 904-05 (2012) (describing use of "non-dominant gendering" of prison clothing "as a form of punishment, humiliation, and control").

VI

In addition to seeking injunctive relief, Ms. Keohane requests nominal damages against Defendant. But Ms. Keohane hasn't demonstrated that such a monetary award is "incidental to or intertwined with" the injunctive relief granted in this case. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990). And it certainly isn't "restitutionary" in any sense. Accordingly, Eleventh Amendment immunity bars this claim for damages against Defendant. *See Doe v. Univ. of Ala. in Huntsville*, 177 F. Supp. 3d 1380, 1395 (N.D. Ala. 2016) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

VII

Defendant misdirects this Court to one red herring after another to justify the denial of care in this case, including Dr. Santeiro's suspect evaluation, the suggestion that Ms. Keohane's narcissism is driving this case, several witnesses' commentary on what constitutes a feminine haircut, and even condemning Ms. Keohane for any security concerns that may arise from her transition in prison. But the fact remains that both Defendant's "freeze-frame" policy and its security policies governing clothing and grooming trumped the exercise of medical judgment when it came to treating Ms. Keohane's gender dysphoria.

While now recognizing Ms. Keohane's mental-health need for hormone therapy, Defendant persists in suggesting she is to blame for any victimization

coming her way based on her gender role presentation. But after denying treatment based on its security policies—and offering expert witnesses to testify to myriad security concerns—Defendant abandoned this red herring on the eve of trial with its stipulation that if the requested treatments are medically necessary, they'll be provided with added security measures. Having so stipulated, Defendant is now put to that task. Ms. Keohane is not an animal. She is a transgender woman. Forthwith, Defendant shall treat her with the dignity the Eighth Amendment commands.

Accordingly,

IT IS ORDERED:

1. This Court declares that Defendant's "freeze-frame" policy, Former Procedure 602.053, ECF No. 3-15, is unconstitutional. Defendant is permanently enjoined from reenacting and enforcing this policy.
2. Defendant must provide Ms. Keohane with hormone therapy so long as it is not medically contraindicated while she remains in Defendant's custody.
3. To treat Ms. Keohane's gender dysphoria, Defendant must permit Ms. Keohane to socially transition by allowing her access to female clothing and grooming standards consistent with Defendant's security policies governing female inmates' hair length, possession and purchase of makeup, and possession of female undergarments including bras, sports bras, and panties.

4. The Clerk is directed to enter judgment in favor of Plaintiff stating:

"This Court **DECLARES** Defendant's Former Procedure 602.053, ECF No. 3-15, is unconstitutional as a blanket ban on medical treatment for inmates diagnosed with gender dysphoria. Defendant is **PERMANENTLY ENJOINED** from reenacting and enforcing this policy. This Court further enters a **PERMANENT INJUNCTION** against Defendant requiring it to permit Ms. Keohane access to Defendant's female clothing and grooming standards and requiring Defendant to continue to provide Ms. Keohane with hormone therapy so long as it is not medically contraindicated and while Ms. Keohane remains in Defendant's custody."

5. This Court reserves jurisdiction to entertain any motion for attorney's fees and costs.

6. The Clerk shall close the file.

SO ORDERED on August 22, 2018.

s/Mark E. Walker
Chief United States District Judge

887 F.3d 1225
United States Court of Appeals, Eleventh Circuit.

Che Eric SAMA, Petitioner,
v.
U.S. ATTORNEY GENERAL, Respondent.

No. 17-10711
|
(April 19, 2018)

Synopsis

Background: Alien, a native and citizen of Cameroon, filed petition for review of decision of the Board of Immigration Appeals (BIA), No. A088-023-457, which denied his applications for asylum, and for withholding of removal under Immigration and Nationality Act (INA) and Convention Against Torture.

Holdings: The Court of Appeals, William Pryor, Circuit Judge, held that:

[1] substantial evidence supported BIA's finding that alien did not suffer past persecution by Cameroonian police;

[2] substantial evidence supported BIA's finding that alien lacked well-founded fear of future persecution by Cameroonian police; and

[3] BIA afforded alien due process.

Petition denied.

***1227** Petition for Review of a Decision of the Board of Immigration Appeals, Agency No. A088-023-457

Attorneys and Law Firms

Ronald Darwin Richey, Law Office of Ronald D. Richey, Rockville, MD, for Petitioner.

Erica B. Miles, Daniel Shieh, OIL, U.S. Department of Justice, Civil Division, Office of Immigration Litigation, Washington, DC, Alfie Owens, DHS/ICE Office of Chief Counsel—ATL, Atlanta, GA, for Respondent.

Before WILLIAM PRYOR and JULIE CARNES, Circuit Judges, and ANTOON, [*] District Judge.

Opinion

WILLIAM PRYOR, Circuit Judge:

***1228** This petition for review requires us to decide whether substantial evidence supports the decision of the Board of Immigration Appeals that Che Eric Sama did not suffer past persecution by the Cameroonian police and that he lacked a well-founded fear of future persecution. Sama, a native and citizen of Cameroon, filed the petition to review the denial of his applications for asylum, 8 U.S.C. § 1158, and for withholding of removal under the Immigration and Nationality Act, *id.* § 1231(b)(3), and under the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 8 C.F.R. § 208.16. Sama contends that the record compels findings that he suffered persecution and that he had a well-founded fear of being singled out for future persecution for associating with two gay friends and posting a message in a university publication condemning the treatment of gay individuals. But we disagree. The Board was entitled to find that any mistreatment that Sama suffered did not rise to the level of persecution, to find that the police investigated his mistreatment, and to rely on country reports published by the State Department that state that conditions in Cameroon are improving for gay individuals. Sama also argues that the Board denied him due process when it weighed his evidence. But due process required only notice and an opportunity to be heard, and Sama received both. We deny Sama's petition for review.

I. BACKGROUND

This appeal arises from Che Eric Sama's most recent attempt to enter the United States. He testified that he has applied for various kinds of visas "about five times" and that he "was banned from applying again" because he submitted a bank statement that "was not original." This time, he came to the United States seeking asylum, 8 U.S.C. § 1158, and withholding of removal under the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 8 C.F.R. § 208.16, after a friend in Nigeria

told him that he "could get out of the country and apply for asylum where [he] w[ould] be safe."

In 2015, Sama posted a message in a university publication in Cameroon "supporting homosexuality and asking for equal rights for homosexuals." He testified that he protested the expulsion of two friends, Fai David and David's partner, and wrote: "They kick them out and they are all created by God. Why, why don't you allow their rights?" In response, the police issued a warrant for Sama's arrest that charged him with "[t]he posting of an article on [g]ay right[s] on the [s]chool [b]oard" and "[c]arrying out [h]omosexual [a]ctivities."

According to Sama, an "anti-gay group" attacked him at the end of November because he posted "homosexual things." While he was walking home after class, four men pushed him to the ground, "cut [his] neck," and warned him that he "should stop [his] homosexual activities." The men told him that, "if [he] d[id] [not] stop ..., they [we]re going to kill [him] next time they s[aw] [him.]"

Fellow students secured transportation for Sama to a hospital, where he was treated for "[w]ounds and a big cut on [his] neck," a "[h]ead ache and [s]wollen face," "[s]erious[ ] [b]leeding," and other symptoms of an "assault." While he was being treated, the hospital called the police, who came to the hospital and took a statement from Sama about the attack. Although the warrant for his arrest remained outstanding, ***1229** the police did not arrest him then. But his attackers were never found, which led Sama to conclude in his application for asylum that "[no] investigation was done."

On November 25, 2015, the hospital discharged Sama, and he went to live with his cousin "on the outskirts" of town. On December 6, he returned to his mother's house to retrieve some belongings. While he was collecting his things, an unknown individual threw a brick through the window of his room. The brick was inscribed with the message "we don't want gays in our community." Sama did not testify that he reported this incident to the police.

Two days later, the police attempted to execute the warrant for his arrest at his mother's house. When his mother refused to tell the police where Sama was, they arrested and detained her. She was released after "about two days."

At some point, news sources reported that David was murdered. According to the news, the police were "making no efforts to find his killers." And Sama speculated that David's partner might have been kidnapped and that "he or his body has not been found."

On December 7, Sama began his journey to the United States. He first flew to Nigeria, but he left after a friend warned him that he would not be safe there. Sama then traveled to Mexico, where his passport was stolen, and took a bus and a taxi to the United States border. The Department of Homeland Security charged Sama as an alien seeking admission without a valid entry document, *see* 8 U.S.C. § 1182(a)(7)(A)(i)(I), and Sama sought asylum.

At his removal hearing, Sama introduced evidence to support his claims of persecution. He testified that he left Cameroon because his "life was in danger." He stated that "[t]he police were looking for [him] and the anti-gay group wanted to kill [him] and [he] was not safe at all." He also explained that "homosexuals are treated badly," "are not recognized by the community," and "are perceived as evil" in Cameroon. And Sama testified that he is not gay but that he was perceived as gay in Cameroon because of his post and his friendships.

He submitted statements from his friends and family. Nubende Pual, a fellow student, stated that "[t]he popular theory going around the school campus [wa]s that [Sama] was attacked because he was friendly to homosexuals and had publicize[d] comments that were homosexual friendly." He stated that "[b]eing homosexual or supporting homosexuals in Cameroon is a taboo that is highly punishable by law enforcement agents and antigay groups." Sama's cousin, Bangeng Gideon Sama, declared that Sama had "been warned against returning ... because of the significant likelihood that he will be arrested and tortured to dea[th] because of the previous incident and his belie[f]s." Another classmate of Sama's, Nutella Nelda, recounted visiting him in the hospital, where Sama told her and her boyfriend that his attackers asked why he posted the message in the university publication. Nelda also stated that Sama told them that he could not report the incident to the police because they were looking for him. And she stated that "because the police are ... searching for him and the anti gay/lesbian mob is still at-large, there is a very high possibility that if [Sama] return[s] to Cameroon he will be hurt again and possibly kill[ed]." Her

boyfriend submitted a similar declaration. And Sama's uncle, Che Godlove, stated that he "believe[s] [Sama] can't come back to Cameroon because the authority, anti-gay [*sic*] are presently looking for him."

***1230** Sama also submitted several documents, including two newspaper articles and country reports by the Department of State and Amnesty International. A 2013 State Department report stated that consensual homosexual activity is illegal and punishable by a prison sentence of six months to five years and a fine between $41 and $410 in American dollars. The report explains that, before 2013, the police "actively enforced the law and arrested, tried, jailed, and beat alleged [lesbian, gay, bisexual, and transgender] individuals," and police officers "cooperated with vigilante groups to entrap and arrest them." According to the report, lesbian, gay, bisexual, and transgender individuals "regularly faced social stigmatization and mob violence, which sometimes resulted in their deaths."

More recent reports explain that the situation in Cameroon is improving for gay individuals. For example, the 2015 State Department report concluded that "[h]arassment of and discrimination against members of the lesbian, gay, bisexual, transgender, and intersex ... community" was "less than in recent years," although the report found that it still "continued." Same-sex sexual activity remained illegal, but "reports of arrests dropped dramatically," and human rights organizations were advocating for decriminalization as well as defending those prosecuted. The report also stated that "[u]nlike in previous years, there were few reports that [lesbian, gay, bisexual, transgender, and intersex] individuals who sought protection from authorities were extorted or arrested." And the report described an instance in which "[a] passing law enforcement officer rescued" a "transvestite individual" from a group of assailants "us[ing] sticks and stones to beat her."

After reviewing this and other evidence, the immigration judge ruled that Sama was not "eligible for the relief of asylum" and that, because he relied on the same evidence to support his claims for withholding of removal and protection under the Convention, Sama was also not eligible for those forms of relief. Although the immigration judge ruled that Sama was credible, she found that he failed to prove past persecution. She found that Sama had not established that he had been persecuted by the Cameroonian government or that the government was "unwilling or unable to protect him." She found that the police took his statement about the street assault and that "the failure by the police to arrest [his attackers] does not indicate that the police failed to investigate." She found "no indication that the police made any comment to [Sama] indicating that they would not investigate his claim, as opposed to having insufficient evidence to locate the perpetrators." The immigration judge also found that Sama never reported the vandalism to his mother's house and that there was no indication that the vandalism was "officially sponsored."

The immigration judge also found that Sama failed to establish a well-founded fear of future persecution. She found that "[w]hile the record suggests [that] the group that attacked [Sama] remains at large, there is no convincing evidence that any private citizens have continued searching for [Sama], or even if they are, that the police cannot or will not protect him as they did in the past." She acknowledged that a warrant for his arrest was issued in 2015, that his mother was detained for two days because she refused to tell the police where Sama was, and that Sama's friends and relatives expressed concern for him. But she found that "no Cameroonian authorities ever stopped or arrested [Sama]"—even though the police took his statement at the hospital after the warrant issued. Indeed, the police never "returned [to] the hospital to search for [Sama] or seek to arrest him" during his 15-day convalescence ***1231** despite the close proximity of the hospital to the "region ... where the warrant was issued." In addition, the immigration judge found that the 2015 State Department report evidences that "Cameroonian authorities are willing and able to protect [lesbian, gay, bisexual, transgender, and intersex] persons and their allies." In sum, Sama "ha[d] not shown that he has an objectively reasonable fear of persecution in Cameroon." So the immigration judge ruled that Sama did not qualify for asylum or any other form of relief.

The Board of Immigration Appeals dismissed Sama's appeal. It agreed with the immigration judge that Sama failed to prove that he had been persecuted or had a well-founded fear of "future harm in Cameroon on account of [his] support of, or association with, homosexuals ... carried out by groups or individuals the government of Cameroon is unable or unwilling to control." The Board found it persuasive that the police "came to take [Sama's] statement when called by hospital personnel" and that

the officers did not take advantage of the opportunity to arrest him. It also relied on the 2015 country report, which "discusse[d] an incident in which police came to the aid of a member of the [lesbian, gay, bisexual, transgender, and intersex] community." And it relied on the immigration judge's conclusion that, although "homophobia is pervasive in Cameroon, incidents of arrest and extortion by [the] authorities [a]re decreasing."

II. STANDARD OF REVIEW

[1] **[2]** **[3]** **[4]** We review the decision of the Board. *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 947–48 (11th Cir. 2010). We review legal conclusions *de novo*, but our review of the factual findings is "limited" by "the highly deferential substantial evidence test." *Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1236–37 (11th Cir. 2006). "We must affirm" if the decision of the Board "is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.' " *Id.* at 1237 (quoting*Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1230 (11th Cir. 2005)). "We view the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision." *Id.* at 1236 (alteration adopted) (quoting *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc)). "[W]e may not reweigh the evidence from scratch," and we may reverse "only when the record compels a reversal." *Id.* (citations and internal quotation marks omitted).

III. DISCUSSION

We divide our discussion into two parts. First, we explain that substantial evidence supports the finding of the Board that Sama was not eligible for asylum and, as a result, that he was not entitled to withholding of removal or relief under the Convention. Second, we explain that Sama received due process of law.

A. Substantial Evidence Supports the Decision of the Board that Sama Was Not Eligible for Asylum.

[5] Sama argues that he is eligible for asylum because the record compels a finding that he both experienced past persecution and has a well-founded fear of future persecution. "To establish asylum eligibility based on ... [a] protected ground, the alien must, with credible evidence, establish (1) past persecution on account of ... [a] protected ground, or (2) a 'well-founded fear' that ... [a] protected ground will cause future persecution." *Sepulveda*, 401 F.3d at 1230–31 (quoting 8 C.F.R. § 208.13(a), (b)). The applicant must also link that persecution to the government by showing that the persecution is either "by ***1232** government forces" or "by non-government groups that the government cannot control." *Ayala*, 605 F.3d at 948 (quoting *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1257 (11th Cir. 2006)).

We reject Sama's arguments. Substantial evidence supports the findings of the Board that Sama did not experience past persecution and does not have a well-founded fear of future persecution. And because he is not eligible for asylum, he is necessarily not entitled to withholding of removal or relief under the Convention. *See Zheng v. U.S. Att'y Gen.*, 451 F.3d 1287, 1292 (11th Cir. 2006). We address each argument in turn.

1. Substantial Evidence Supports the Finding that Sama Did Not Suffer Past Persecution.

Sama argues that he was persecuted on account of two protected grounds. It is undisputed that Sama expressed a political opinion and is an imputed member of a protected group—namely, the gay community—because others allegedly perceive him to be gay. *See Al Najjar v. U.S. Att'y Gen.*, 257 F.3d 1262, 1289 (11th Cir. 2001) (explaining that an imputed characteristic, "whether correctly or incorrectly attributed, may constitute a ground for a well-founded fear of ... persecution" (citation and internal quotation marks omitted)). But the parties dispute whether substantial evidence supports the finding that he did not experience persecution by the police.

[6] **[7]** The record does not compel a finding of past persecution by the police. "[P]ersecution is an extreme concept" that requires evidence of "more than a few isolated incidents of ... harassment or intimidation." *Sepulveda*, 401 F.3d at 1231 (citation and internal quotation marks omitted). Sama never alleged that he was physically harmed by the police. Indeed, the police expressed an interest in bringing Sama's attackers to justice when they visited the hospital to take his statement about the attack. And Sama has not suggested that he was afraid to speak with the officers at the hospital. True,

the police issued a warrant for his arrest because of the message he posted at his school, and they detained his mother on the basis of that warrant. But the warrant issued before he was attacked, the police did not execute the warrant when they visited him at the hospital, and the police released his mother after "about two days" without demanding Sama's surrender. Sama admitted that the police never questioned him about his sexuality or support for gay rights, that he has never been arrested or questioned by the Cameroonian police for any reason, and that he has never spent any time in a Cameroonian jail. These incidents do not amount to "more than a few isolated incidents of ... harassment or intimidation." *Id.* at 1231 (citation and internal quotation marks omitted). This evidence does not "*compel*[ ] a reversal." *Silva*, 448 F.3d at 1236 (emphasis added) (quoting *Adefemi*, 386 F.3d at 1026).

2. Substantial Evidence Supports the Finding that Sama Does Not Have a Well-Founded Fear of Future Persecution.

[8] **[9]** Sama also contends that he established a well-founded fear of future persecution. An applicant alleging fear of future persecution bears the burden of proving "(1) 'a subjectively genuine and objectively reasonable' fear of persecution that is (2) on account of a protected ground." *Id.* (internal citation and quotation marks omitted). Although Sama's "credible testimony that he ... genuinely fears persecution" was sufficient to satisfy the subjective component of the standard, ***1233** he also had to establish that his fear was "objectively reasonable." *Al Najjar*, 257 F.3d at 1289. And he had to "establish a nexus between a statutorily protected ground and the feared persecution." *Mehmeti v. U.S. Att'y Gen.*, 572 F.3d 1196, 1200 (11th Cir. 2009). He could satisfy his burden "by presenting 'specific, detailed facts showing a good reason to fear that he ... will be *singled out* for persecution on account of' [a protected] ground," *id.* (quoting *Sepulveda*, 401 F.3d at 1231), or that there exists "a pattern or practice of persecution of a group of which he is a member," *id.*

[10] Substantial evidence supports the finding that Sama lacked a well-founded fear of future persecution by the Cameroonian police. Sama argues that the police still have a warrant for his arrest, but the record does not compel a finding that he will be arrested when he returns to Cameroon. To be sure, the police attempted to execute the warrant and arrested Sama's mother shortly before he left the country. But the police did not attempt to arrest Sama when they visited him in the hospital or at any other point during his 15-day convalescence. Sama also points to statements from his friends and family that they believe he faces a continued threat of persecution by the police. For example, his cousin stated that he "believe[s] [Sama] can't go back to Cameroon because [the cousin] ha[d] talk[ed] to friends and family members," who told him that the police "[we]re still looking for [Sama.]" And Sama's uncle similarly stated that he "believe[d]" the police were "looking for" Sama. But the speculative beliefs of Sama's friends and family do not "necessarily" establish that he will be persecuted upon his return. *Djonda v. U.S. Att'y Gen.*, 514 F.3d 1168, 1176 (11th Cir. 2008). And even if the record "suggests that [an applicant] will be detained upon his return, it does not compel the conclusion that [he] has a well-founded fear that his treatment will rise to the level of persecution." *Id.* at 1175; *see also Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1353 (11th Cir. 2009) (discussing mistreatment that does not amount to persecution and explaining that we have "ruled that evidence that an alien [who] had been detained for five days, forced to watch reeducation videos, [forced to] stand in the sun for two hours, and [required to] sign a pledge to no longer practice his religion ... did not compel a finding that the alien had been persecuted").

Sama argues that he introduced evidence that established that "Cameroonian authorities persecute [gay] activists and look away when they are persecuted, attacked, or even killed," but recent country reports explain that conditions are improving. And "the Board is 'entitled to rely heavily on' country reports." *Djonda*, 514 F.3d at 1175 (quoting *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004)). The 2015 State Department report explained that "reports of arrests [of lesbian, gay, bisexual, transgender, and intersex individuals have] dropped dramatically," and that, "[u]nlike in previous years, there were few reports that [lesbian, gay, bisexual, transgender, and intersex] individuals who sought protection from authorities were extorted or arrested." The 2015 report also described the rescue of a transvestite individual by a passing law enforcement officer. And that report explained that human rights and health organizations advocated on behalf of lesbian, gay, bisexual, transgender, and intersex Cameroonians. Although "the inferences [Sama] draws from h[is] version of events [may be] reasonable," *Silva*, 448 F.3d at 1237, the record does not

"compel[ ]," *id.* at 1236 (quoting *Adefemi*, 386 F.3d at 1027), the conclusion that Sama will be singled out for persecution or that ***1234** there is a pattern or practice of persecution against gay individuals in Cameroon.

[11] Sama also failed to prove that the record compels the finding that the Cameroonian police are unable or unwilling to control private actors. If an applicant alleges persecution by a private actor, he must prove that he is "unable to avail h[im]self of the protection of h[is] home country." *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007). Sama never tried to report that a brick was thrown through his window. And when the hospital called the police after the street assault, officers came and interviewed him. True, his attackers were never found. But contrary to Sama's argument, the failure to make an arrest does not prove that the police did not investigate. Although Sama argues that the police "interrogated his classmates and friends about [Sama's] perceived homosexuality and his pro-homosexual views," the immigration judge found that "it is not established whether the police [we]re investigating the arrest warrant against [Sama] or his attackers." The immigration judge was also entitled to rely on the country reports to find that the Cameroonian authorities have been increasingly responsive to threats against gay individuals. *See Djonda*, 514 F.3d at 1175 ("[T]he substantial evidence test does not allow us to 'reweigh from scratch' the importance to be placed on [a State Department] Report." (alteration adopted) (quoting *Mazariegos v. U.S. Att'y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001))). Under the "highly deferential" substantial-evidence standard, *Silva*, 448 F.3d at 1237, we cannot disturb the findings of the Board that the police were willing and able to investigate the crimes against Sama and that he is not "unable to avail h[im]self of the protection of h[is] home country." *Lopez*, 504 F.3d at 1345

B. The Board Afforded Sama Due Process.

[12] Sama argues that the Board violated his due process rights "when it ignored the arguments in [his] brief and failed to properly review all of the evidence he submitted." In essence, he disputes the weight the Board gave to different portions of the record, and reprises his same arguments that substantial evidence supports the findings of the Board. He argues that "the immigration court ... failed to examine the evidence in light of [his] credibility and the Board employed language that clearly lessened the weight of [his] evidence." According to him, "[h]e is entitled to the right to have all of the evidence he submitted be given due weight and consideration." We are not persuaded.

[13] **[14]** Sama's argument that he was denied due process fails. "To establish due process violations in removal proceedings, aliens must show that they were deprived of liberty without due process of law, and that the asserted errors caused them substantial prejudice." *Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341–42 (11th Cir. 2003). "Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings." *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010). But Sama received notice and an opportunity for a hearing.

[15] **[16]** **[17]** To the extent that Sama argues that the Board violated his right to due process by not considering the evidence he presented, he is incorrect. The Board complied with its statutory requirements. *Cf. Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331 (11th Cir. 2003) (rejecting a due-process challenge to an affirmance without opinion by the Board when it complied with the governing regulations). The Board needs only give "reasoned consideration to [a] petition" and "announce its decision in terms sufficient ***1235** to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Tan v. U.S. Att'y Gen.*, 446 F.3d 1369, 1374 (11th Cir. 2006) (citations and internal quotation marks omitted). Although the Board must "consider all evidence introduced by the applicant," it is not required to "address specifically each claim the petitioner made or each piece of evidence the petitioner presented." *Id.* (citations and internal quotation marks omitted); *see also Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1292 (11th Cir. 2014) ("Neither the immigration judge nor the Board had to address each piece of evidence presented by [the petitioner.]"). And we have explained time and time again that "the substantial evidence test [is] 'deferential,' and ... we may not 'reweigh the evidence' from scratch." *Mazariegos*, 241 F.3d at 1323 (quoting *Lorisme v. Immigration & Naturalization Serv.*, 129 F.3d 1441, 1444–45 (11th Cir. 1997)). "Our inquiry is whether there is substantial evidence for the findings made by the [Board], *not* whether there is substantial evidence for some *other* finding that could have been, but was not, made." *Id.* at 1324.

The Board explicitly considered at least some of the evidence that Sama argues that it ignored. For example, Sama argues that the Board overlooked evidence that he did not call the police to inform them of the street assault. But the Board expressly acknowledged that the hospital called the police. Additionally, the immigration judge considered that there was a warrant for his arrest, that Sama was in the hospital after an assault by private actors, that he reported the incident when the police visited him, that he testified that he was "most afraid" of private actors, that his mother had been briefly detained, that he was never questioned in connection with the warrant, that Sama's witnesses attested that the police were questioning students believed to be close to Sama, and that recent country reports suggest that the Cameroonian police can offer some protection to gay individuals. Because we may not "re-weigh the evidence from scratch," we cannot make new findings. *Mazariegos*, 241 F.3d at 1323 (quoting *Lorisme*, 129 F.3d at 1445).

IV. CONCLUSION

We **DENY** Sama's petition for review.

All Citations

887 F.3d 1225, 27 Fla. L. Weekly Fed. C 815

Footnotes

* Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

Lambda Legal
making the case for equality

KNOW YOUR **RIGHTS**

WORKING WITH HOMELESS LGBTQ YOUTH

Lesbian, gay, bisexual, transgender and questioning (LGBTQ) youth become homeless at rates that should alarm anyone working in the child welfare and shelter care systems.
Many LGBTQ youth feel compelled to run away from their families or child welfare placements after their physical and emotional safety is jeopardized. Others are thrown out of their homes with nowhere to go but the streets.
Still others have aged out of the child welfare system, unprepared to support themselves and without a permanent place to live. If the out-of-home systems of care are not safe and appropriate for LGBTQ youth, these young people attempt to forge a life on the streets rather than seek services and supports from these systems.
If you are a professional who works with homeless LGBTQ youth, here's what you can do:
Understand how homeless and runaway youth shelters are failing LGBTQ youth.
Between 20% and 40% of all homeless youth in the United States identify as LGBTQ. Frequently rejected by their families or fleeing abusive longterm placements, these youth are too often misunderstood and mistreated by the staff and other residents at temporary shelters. Homeless and runaway LGBTQ youth too often are misunderstood and mistreated by the staff and other residents at temporary shelters. Harassment, assault and even rape within these facilities are common experiences. The data is sobering: half of a sampling of lesbian and gay youth who had been in out-of-home care settings reported that they had spent periods of time living on the streets in preference to the hostile environments they had found in these settings.
Understand the risks faced by homeless LGBTQ youth.
Being homeless imperils a young person's physical and emotional security. According to a 2002 study by the University of Washington, LGBTQ homeless youth are physically or sexually victimized on average by seven more people than non-LGBTQ homeless youth. With nowhere to go and no means of support, some may be forced to engage in survival behaviors that place them at significantly higher risk for mental health problems, substance abuse and exposure to sexually transmitted infections. Some of these survival activities, such as sex work, are illegal, leading many LGBTQ homeless youth to encounters with the juvenile justice and delinquency systems. It's important that child welfare and shelter care services acknowledge these risks and prevent young people from feeling as though they have no other choice but to take them.
Provide safe and supportive child welfare services to youth thrown out of or fleeing abusive families.

Many LGBTQ homeless and runaway youth have sought assistance from the police and child welfare systems after their families have abused them because they are LGBTQ, but have been turned away due to a lack of sensitivity about the serious issues they are facing. Some are even forced by social workers and police officers to return home to unsafe environments. If placed in care, many find that they are not safe in their placements. A 2006 study found that 65% of 400 homeless LGBTQ youth reported having been in a child welfare placement in the past. The large number of homeless LGBTQ youth in part reflects that the child welfare system is failing these young people.

Ensure the safety of LGBTQ youth in homeless shelters and child welfare facilities.

Given the number of LGBTQ youth cycling between the child welfare and shelter systems of care, it's critically important that all shelters and child welfare facilities take immediate steps to ensure the safety of these young people. Every agency providing shelter care and services should adopt and enforce LGBTQ-inclusive nondiscrimination policies, provide training on LGBTQ issues for all staff and display visible signs of support for LGBTQ people. It's crucial to send a clear message throughout each facility that anti-LGBTQ harassment and discrimination will not be tolerated.

Respond to the special needs of homeless transgender youth.

Transgender homeless youth often are especially unsafe at shelters that require them to be assigned to beds according to their sex assigned at birth and not gender identity. These insensitive shelter policies may cause a transgender youth who identifies as female to be placed in a male facility, where she is at increased risk of abuse and rape. Furthermore, sex-segregated bathrooms, locker rooms and dressing areas within these facilities are often inappropriate and unsafe for transgender youth. As is the case with lesbian, gay, bisexual and questioning youth, transgender youth who are unsafe in shelters are more likely to run away. On the streets they frequently find a thriving, often dangerous underground market for hormones and other medical procedures as they seek to align their physical bodies with their gender identities. Those providing care and services to homeless transgender youth should link these youth with appropriate medical service providers in their communities to reduce the risk that they will take their healthcare into their own hands on the streets.

Make appropriate individualized classification and housing decisions.

Don't make housing decisions within homeless youth shelters based on myths and stereotypes about LGBTQ people. For example, LGBTQ youth are not more likely to engage in sexual behaviors than their heterosexual peers, and they are not at higher risk of committing sexual offenses. Therefore, don't unnecessarily isolate or segregate LGBTQ young people, or prohibit them from having roommates, as a means to ensure their safety. While this may be motivated by good intentions, it will only deprive LGBTQ youth of opportunities to interact with their peers and will compound their feelings of isolation.

Create community connections for homeless LGBTQ youth.

Help homeless LGBTQ youth to access community services and supportive adult mentors, and stand up for them if they encounter negative biases and discrimination. Develop an up-to-date list of LGBTQ resources in the community and distribute it to everyone in the agency, including to youth who may wish to contact community resources privately.

Display LGBTQ-supportive signs and symbols.

By displaying LGBTQ-supportive images such as pink triangles, rainbows or safe zone stickers, shelter care facilities send the clear message to all youth and staff that LGBTQ youth are welcomed and affirmed. LGBTQ youth are quick to pick up on these cues from their environment; it often makes an enormous difference just seeing them displayed.

Adapted from *Getting Down to Basics: Tools to Support LGBTQ Youth in Care*, Child Welfare League of Am. & Lambda Legal (2006, revised 2012). This and other fact sheets for adults who work with or care for youth in out-of-home settings are available at www.lambdalegal.org/publications/getting-down-to-basics.

Additional resources:

National Recommended Best Practices for Serving LGBT Homeless Youth, co-authored by Lambda Legal and other national organizations, offers agencies guidance to improve care for homeless LGBT youth. Free copies can be downloaded at *www.lambdalegal.org/issues/youth-in-out-of-home-care* or ordered from Lambda Legal at 1-866-LGBTeen (toll free) or 212-809-8585.

The National Gay and Lesbian Task Force and the National Coalition for the Homeless have partnered to co-author two publications regarding LGBT homeless populations. Their initial report, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* (2003) discuss the difficulties faced by transgender people in homeless shelters and offers nondiscrimination resolution and guidance on necessary staff trainings and best practices regarding this population.

Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness (2006) takes a broader look at LGBT youth as a whole and explores the reasons why so many of these youth are homeless and the risks they face in shelters and on the street. Both publications are available for download at www.thetaskforce.org.

The National Alliance to End Homelessness (www.endhomelessness.org) offers resources and information about homelessness among LGBT youth and in general, including a one-page solutions brief entitled *Supporting Homeless Transgender and Gender Non-Conforming Youth* (2012).

The particular challenges faced by transgender and gendernonconforming youth in congregate care settings, including homeless shelters, are examined in depth in the 2011 publication *A Place of Respect: A Guide for Group Care Facilities Serving Transgender and Gender Non-Conforming Youth* (Jody Marksamer, Dean Spade & Gabriel Arkles, Nat'l Ctr. for Lesbian Rights & Sylvia Rivera Law Project, available at *www.nclrights.org/site/DocServer/A_Place_Of_Respect.pdf?docID=8301*).

Sources:

Nicholas Ray, Nat'l Gay & Lesbian Task Force Policy Inst. & Nat'l Coal. for the Homeless, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness* (2006), available at *www.thetaskforce.org/downloads/HomelessYouth.pdf*.

Gerald P. Mallon, *We Don't Exactly Get the Welcome Wagon: Th e Experience of Gay and Lesbian Adolescents in Child Welfare Systems* (1998).

Bryan N. Cochran, Angela J. Stewart, Joshua A. Ginzler & Ana Mari Cauce, *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 Am. J. Pub. Health 773 (2002).

Heather M. Berberet, *Putting the Pieces Together for Queer Youth, 85 Child Welfare* 261 (2006).

Lambda Legal | 120 Wall Street, 19th Floor, New York, NY 10005 | P - 212-809-8585

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

PROSECUTORS & PUBLIC DEFENDERS: STRATEGIC PARTNERSHIPS FOR CRIMINAL JUSTICE REFORM

Moderator: *Melba Pearson*, Deputy Director, ACLU of Florida

Panelists: *Aramis Donell Ayala*, State Attorney
Ninth Judicial Circuit Court of Florida

Carlos Martinez, Public Defender
Eleventh Judicial Circuit Court of Florida

BEYOND THE ADVERSARIAL SYSTEM: ACHIEVING THE CHALLENGE

Association of Prosecuting Attorneys

Safety + Justice Challenge

Supported by the John D. and Catherine T. MacArthur Foundation

NLADA
National Legal Aid & Defender Association

Contents

Executive Summary

The Association of Prosecuting Attorneys ("APA") and the National Legal Aid and Defender Association ("NLADA") are pleased to serve as strategic allies in the Safety and Justice Challenge ("SJC" or "Challenge"), which is a $100 million investment by the John D. and Catherine T. MacArthur Foundation aimed at changing the way America thinks about and uses jails. As strategic allies in the SJC, APA and NLADA are committed to supporting jurisdictions in fulfilling their criminal justice reform goals. SJC defenders and prosecutors alike support the Challenge's twin goals of decreasing unnecessary criminal justice involvement and reducing racial and ethnic disparities to promote justice and create safer communities. They recognize that sustainable change requires collaboration from all criminal justice system stakeholders, including those who are traditionally adversaries in the courtroom, such as defenders and prosecutors. The traditional opposing roles must be respected while embracing collaboration to create positive system change as paramount in ensuring a more just and fair U.S. criminal justice system. While the Safety and Justice Challenge's ambitious effort requires regular meetings and collaboration, both prosecutors and defenders voiced the realization that the adversarial nature of courtroom advocacy creates complex challenges to effective collaboration outside of the courtroom context.

Accordingly, on April 10-11, 2017, APA and NLADA hosted a joint meeting that brought together four chief defenders and four prosecutors from across the country who are participating in the SJC. The prosecutors and defenders from four SJC sites made group presentations on how they were collaborating to achieve SJC goals and implementing corresponding changes in their respective offices.The goal of the meeting was to share information regarding effective collaboration strategies and develop new ideas on how to best leverage the respective roles and expertise of defenders and prosecutors to address systemic issues that contribute to jail incarceration.

Recommendations

The April 2017 meeting revealed concrete, practical steps that are beneficial to productive working relations. From there, the prosecutors and defenders who attended the April 10 meeting, developed the following recommandations aimed at promoting and improving successful collaborations between prosecutors and defenders (or other traditionally adversarial system leaders).

To foster collaboration in their own jurisdictions, defenders and prosecutors should:

Recommendation 1.

Come to the table with reasonable goals and points of agreement. Defenders and prosecutors share many goals and encounter some of the same obstacles in achieving them. Identifying common goals and starting a conversation here signals that each side understands and respects the other's position.

Recommendation 2.

Avoid blame. Beginning a discussion by pointing fingers will trigger defensiveness.

Recommendation 3.

Work together on local criminal justice coordinating councils and state administering agencies responsible for promulgating criminal justice grants and information. These groups, when properly resourced and structured, provide a neutral forum for all stakeholders to discuss the science, practice, and messaging of improving their criminal justice systems.

Work together on local criminal justice coordinating councils and state administering agencies responsible for promulgating criminal justice grants and information.

Recommendation 4.

Enlist outside experts to facilitate conversations. A strategic planning facilitator can help define shared values and goals. A social scientist can inform policy discussions and help set measurable benchmarks for success. An expert in implicit bias can help identify and recommend solutions without assigning blame.

Recommendation 5.

Use data to promote stakeholder buy-in. Defenders, prosecutors, and other stakeholders in the criminal justice system (as well key partners in other government and non-profit sectors) may be more open to a policy change that is supported by objective analysis. Data can also provide political cover for decision-making.

Recommendation 6.

Communicate with the media about data showing positive results & create a unified response plan to get out in front of a potential crisis. A key benefit of collaboration is the ability to create a strong, unified message about the value of reform. An essential component to preparing for a potential communications crisis is to proactively and positively engage with the media and work with them to raise public awareness when reform is going well. Prosecutors and defenders should bring in a media expert on crisis communications to help develop a unified response plan in case of an event that could cast a negative light on reform. By doing this, system actors can get out in front of any potential crisis with one unified voice, and they can educate the public before a crisis occurs.

Recommendation 7.

Commit to culture change by engaging all staff in collaborative efforts. The representatives of defender and prosecutor agencies who participate in reform conversations must communicate with the rest of their agencies about the value of this collaboration. When agency leaders are the people at the table, they should ensure that their deputies and mid-level managers are informed and engaged.

Recommendation 8.

Be responsive to respective constituencies. Both defenders and prosecutors have obligations to serve segments of the public. Even when these are largely the same people, defenders and prosecutors have different ethical obligations to them. Defenders and prosecutors should include their client or voter bases in the collaboration process and assure that those constituencies' needs are met.

Recommendation 9.

Be intentional about building positive relations. Both defenders and prosecutors are people first, and the same basic approaches that facilitate human interaction outside of the confines of any particular profession apply. In addition to team work, find time for one-on-one or smaller group interactions. Small steps such as committing to a standing conversation, or having lunch or a cup of coffee on occasion, can help develop and strengthen relations.

Why Collaboration is Key

Criminal justice system stakeholders are constantly navigating the balance of keeping communities safe while limiting unnecessary justice involvement for those who are accused of crimes, all while responding to constituent concerns. When key players in the criminal justice system work together, the system becomes more efficient, more effective, and more just.

Collaboration is essential to advancing sustainable system-wide reform. Despite the often uncoordinated efforts of justice system agencies, the reality is that anything that significantly affects any criminal justice function will also impact each of the others. Efforts that do not incorporate unified approaches are doomed to limited success, if not failure. The benefits of integrative efforts are numerous. Integrated data systems, for example, provide a more complete analysis, and are better able to demonstrate success and drive policy. Funding sources can be most successfully leveraged when supporting multi-disciplinary networks in which the members have common objectives. Thus, such efforts strengthen the system as a whole.

Research reveals that when provided with a project to tackle, diverse teams will produce a higher quality product than when the same task is provided to a homogenous group. Similarly, when system actors share their expertise and think

> When system actors share their expertise and think beyond individual cases, and beyond their individual agencies, to broader criminal justice system reform they are able to ferret out potential weaknesses throughout the system, discover new resources, and reach collective solutions.

beyond individual cases, and beyond their individual agencies, to broader criminal justice system reform they are able to ferret out potential weaknesses throughout the system, discover new resources, and reach collective solutions. When that knowledge is combined with the skills brought by researchers, victims, and professionals in disciplines outside of the field of criminal justice such as behavioral health or social work, such teams are better positioned to address underlying issues relating to community health, safety, and prosperity that contribute to involvement in the criminal justice system for a large number of people. Including members of the public in the work will also expand the diversity of views and build support for the reform. Such approaches often result in prioritizing treatment and resolving problems in a manner that disrupts entry into the criminal justice system. [Recommendation 1]

Working together is imperative for distributing as well as minimizing risk. Getting system stakeholders on the same message, grounded in data and collective expertise, and factoring in a jurisdiction's political environment, is extremely important when discussing criminal justice reform efforts. This way, system actors can get out in front of any potential crisis with one unified voice, and they can educate the public before a crisis occurs. [Recommendation 6]

Developing Trust

Communication and trust are paramount when it comes to prosecutors and defenders working together on criminal justice reform efforts. In order to develop trust, prosecutors and defenders need to have professional but frank and open discussions. If there is a disagreement, arguments should be framed in terms of efficacy, safety and fairness by providing concrete examples. These meetings should promote honesty and self-reflection. It is crucial that there not be finger-pointing unless that finger is pointing back at the person speaking in the spirit of self-assessment and acknowledging what he or she can do better. [Recommendation 2]

Jurisdictions may benefit from an objective facilitator who is not a stakeholder in the criminal justice system. [Recommendation 4] A facilitator can help determine mutually agreed upon objectives. Jurisdictions that have engaged in this kind of intervention discovered new insight and substantial benefits. Officials in one jurisdiction, for example, brought in county and city administrators, who were experienced in management but did not have experience with the criminal justice system, to serve as facilitators. The neutral, objective facilitators prompted frank and difficult discussions that resulted in respectful responses on sensitive issues and an opportunity for reflection.

It is imperative to have the hard conversations about policies that create racial and ethnic disparities (R.E.D.) within the criminal justice system. Discussions about race can often be difficult, but stakeholders nonetheless need to acknowledge that R.E.D. exist and are attributable to many different factors. Bringing in external and national voices to local gatherings to discuss racial issues can help break the ice and make it easier for system actors to continue the discussion afterwards. Using third parties with a particular disciplinary expertise is another method that has been utilized to help establish trust and collaboration on criminal justice improvement.

For example, for risk assessment tools, look for nearby universities to seek experts who can assist in tool creation and implementation. Their credentials and approaches may calm some fears and limit pushback. Also, bring in a media expert on crisis communications to help develop a unified response plan in case of an event that could cast a negative light on reform. [Recommendation 6] Have an organized conversation with healthcare treatment providers in order to fully understand addiction and mental health illnesses. In sum, conversations that are grounded in science and evidence-based practices can play a key role in establishing trustful relationships. With these tools, teams learn together about what they are doing right, as well as promote unified solutions to what they can do better.

Shifting to a problem-solving framework helps foster collaboration and create a supportive environment conducive to allowing prosecutors and defenders to work together for the safety of the community as a whole.

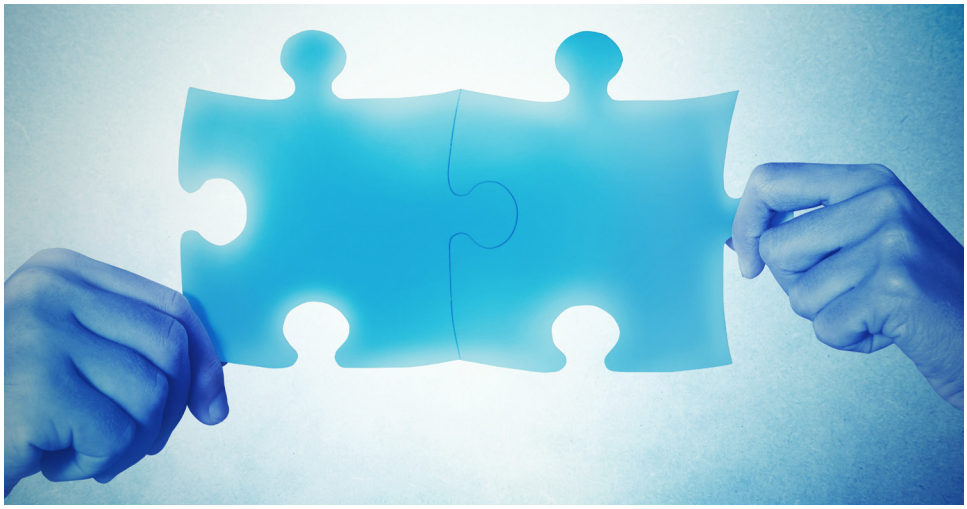
In many instances, strong collaboration between prosecutors and defenders has been fueled by personal relationships. Prosecutors and defenders who were law school classmates, for example, or whose children play on the same sports teams. In some jurisdictions, defenders and prosecutors are co-located, and proximity supports friendly interaction. In the absence of such naturally occurring circumstances, such opportunities can be created to deepen professional relations through human interaction. [Recommendation 9] Trust also requires showing empathy, such as understanding the secondary effects of trauma on professionals such as prosecutors and defenders who handle cases involving situations that often reflect some of the darkest aspect of humanity on a daily basis. Establishing stable, trusting relationships at the leadership level is necessary, but not sufficient to lasting reform. Thereafter, mutually agreed upon ideas should be brought to managers, and other internal staff. [Recommendation 7] New, front-end-loaded services require changing the cultures of both prosecutor and defender offices. Mid-level managers frequently have the most contact with those who are engaged

in the daily work that makes system runs and can have a great influence on change management and implementation. It is also important to identify ways to secure support for change at the deputy level, which may even entail restructuring offices to dedicate additional resources there. In sum, communication is key to developing trust. Assigning a liaison to the public defender's office and prosecutor's office can assist in providing a direct line of communication between the two offices. By having professional yet honest and open conversation, prosecutors and defenders can move beyond the adversarial system and work together to create system change.

Challenges to Collaboration

Defenders and prosecutors are central players in the courtroom and can achieve great progress when they have mutual goals. While encouraging collaboration between these two key stakeholder groups, we recognize that there are legitimate challenges to collaboration. Both defenders and prosecutors have valid concerns about public perceptions. [Recommendation 8] Defenders must be concerned about ensuring that their clients have confidence in their loyalty to them, and don't want to be perceived as "working with the prosecutors" rather than for their clients. Similarly, prosecutors' role is to seek justice, and they must be concerned about protecting victims' rights to feel protected and be heard in the courtroom. Prosecutors and defenders must continually navigate through such complex perceptions when participating in system-wide reform.

> CJAG meetings provide an opportunity to step back from traditional roles and look at the system from a broader data and policy perspective.



There has to be a recognition and appreciation for the traditional and necessary roles that the two sides play in the adversarial process. Both must be sensitive to the others' ethical constraints and requirements. For example, while a diversion program may be created and implemented in a largely collaborative fashion, such programs can raise legal issues that either side may feel compelled to pursue.

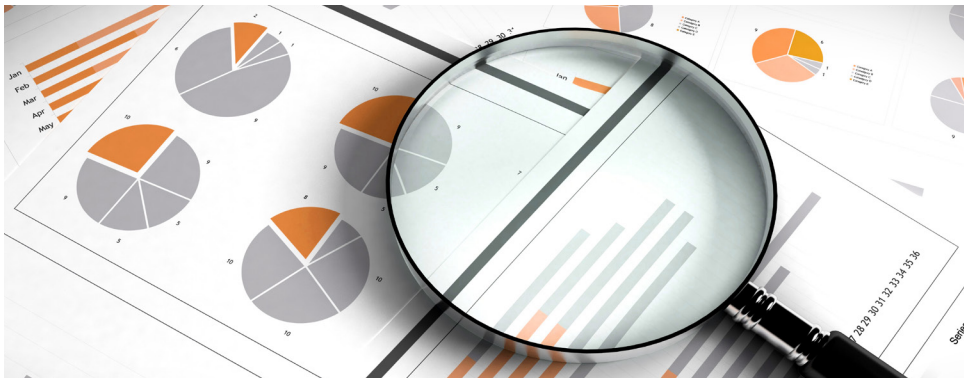
In sum, the adversarial system still remains in place. Despite the sometimes paradoxical environment in which collaboration among adversaries exists, the current, unique opportunity for system-wide criminal justice reform will not be fully leveraged without effective interaction. Society recognizes that we need to eliminate unnecessary criminal justice involvement. There is also mounting interest in data-driven and collaborative strategies. Communities are paying attention and demanding change. Shifting to a problem-solving framework helps foster collaboration and create a supportive environment conducive to allowing prosecutors and defenders to work together for the safety of the community as a whole.

Examples of Collaboration

Prosecutors and defenders in the Safety and Justice Challenge are navigating beyond the apparent constraints of an adversarial system to help drive System-wide improvements. They are lobbying local and state government together for resources, advocating for data driven policies and practices, and working together on community engagement.

In Arizona, Pima County's Jail Reduction plan seeks to improve public safety,

> The Public Defender and District Attorney in Milwaukee, Wisconsin learned that addressing the severity of their racial disparities must be a priority after looking at their numbers.



lower jail costs by reducing the jail population, prevent crime by lowering the rate of recidivism, and eliminate racial and ethnic disparities. Their strategies include looking at programs like the "Court System Innovations and Treatment Alternatives," which implements pretrial risk screening as well as substance abuse and mental health screening. Other strategies entail preventing and resolving failure to appear warrants, as well as post-conviction alternatives to jail, such as electronic monitoring. The collaboration between the offices of the District Attorney and Public Defense Services is critical to achieving these reforms in Pima County.

The Mecklenburg County (North Carolina) District Attorney and Public Defender are working together through their local Criminal Justice Advisory Group (CJAG). CJAG meetings provide an opportunity to step back from traditional roles and look at the system from a broader data and policy perspective. [Recommendation 3] Through CJAG convenings, the Public Defender and District Attorney have been able to work together on the Home, Street, Neighborhood, and Community Initiatives to increase public safety in their community.

Data is a critical component to successful collaborative models between prosecutors and defenders, especially when addressing difficult areas of reform such as race. [Recommendation 5] The Public Defender and District Attorney in Milwaukee, Wisconsin learned that addressing the severity of their racial disparities must be a priority after looking at their numbers. The data in Milwaukee showed that black residents were almost twenty times more likely to be in prison than white residents. Those numbers (compiled and reported by Researcher Pamela Oliver, PhD, University of Wisconsin) and are serving as a guide to the Safety and Justice Challenge work.

In Washington State, Spokane County's Public Defender and District Attorney are working together through the Safety and Justice Challenge to implement the Spokane Assessment for Evaluation of Risk (SAFER) pretrial tool, as well as SAFER-Pro (probation version) tool. Through their work, they offer the following helpful tips for creating successful collaboration:

- Finding the "small wins"
- Making sure line-staff are also engaging in increased levels of collaboration
- Establishing standing meetings to address challenges and to celebrate successes

Conclusion

Prosecutors and defenders, who are traditional adversaries in the courtroom, are now faced with an historic opportunity to improve America's criminal justice system through collaborative reform efforts. Both stakeholders share many common goals for improved system outcomes, and many of these goals are practically impossible to accomplish without cooperation between these stakeholder groups, which represent two thirds of the adjudicatory actors. By following these recommendations, prosecutors and defenders in Pima County, Mecklenburg County, Milwaukee County, and Spokane County are forging and strengthening relations that are demonstrate the potential for successful reforms.

04.17.2017

COMMENTARY

Law Partners

A prosecutor on what his wife, a defense attorney, taught him about justice.

JESSE WEINSTEIN

SOMETIMES IN A marriage, a heated discussion can feel like a court case. That may be truer in my marriage than others. My wife is a defense attorney and I'm a prosecutor.

My wife works at a New York City-based nonprofit that represents young people ages 16 to 24 who have become entangled in the criminal justice system. I work for the Bronx District Attorney's office and prosecute individuals 16 and older who stand accused of misdemeanor and felony crimes. Undeniably, our union comes with its challenges.

A simple "how was your day?" can turn quickly into an all-out debate over the fine points of the U.S. criminal justice system. These exchanges, which usually erupt over dinner, often boil down to how each of us regards the system; she believes it is fundamentally flawed and I tend to defer to the judicial process. Overall, though, our opposing roles in the courtroom have created opportunities to test the calculations we make as lawyers.

Jesse Weinstein and his wife, Saskia Valencia. COURTESY OF JESSE WEINSTEIN

A mental health therapist prior to her career in law, my wife often shares with me stories of her clients navigating the system while struggling with mental illness. One story that sticks with me involved a client with severe anxiety who had an open arrest warrant. Homeless, the woman worried that if she were sent to jail she would lose her place in a shelter. She agonized over who would care for her kids while she awaited arraignment.

Prosecutors, of course, come into contact with all of the same people that defense attorneys do, but rarely are we presented with their full stories and the nuances of their lives beyond the circumstances that brought them to the attention of the law. In the case of the homeless mother, it turned out that her warrant was a clerical error. Still, those dinner-table debates prompted me to ponder how prosecutors should handle cases like that. Prosecutors are charged with representing the state. In making our decisions we must factor in public safety and, of course, the law. That duty leads us too often, however, to inflict undue harm on those we prosecute—especially when career-minded prosecutors start considering anything short of a conviction a loss.

To be sure, criminal convictions, jail sentences, and their collateral consequences are often inevitable. The law limits the discretion of prosecutors. Nonetheless, with time on the job and conversations with my wife, I've learned to question how a case impacts a defendant's life and, when possible, to seek outcomes that give defendants a meaningful opportunity to contribute to society once their case is over.

For example, late last year I was assigned the case of a woman who had been arrested for drunk driving after crashing her car at a busy intersection in the Bronx. She blew well above the legal limit during a police Breathalyzer test and had, in fact, injured another driver. I had every reason to charge her with Driving While Intoxicated, an unclassified misdemeanor that could mean up to a year in prison.

A conversation with her attorney convinced me otherwise. The defense attorney explained to me that his client was an active member of her community, had a clean record and was deeply sorry for what she had done. She worked for the City of New York and a misdemeanor conviction could mean termination from her job and effectively end her career as a civil servant.

It was clear to me that the collateral consequences of a misdemeanor conviction were too high, that they could ruin the woman's life and make her more likely to reoffend in the future. The driver she crashed into —and my superiors—agreed. I offered her a plea to Driving While Ability Impaired, a violation that carries a fine and license suspension. It was an outcome that I felt would impress upon her the seriousness of her actions while also allowing her to continue as a contributing member of society.

That night, I sat down for dinner eager to share the success with my wife. She approved of the resolution, but pushed back, as is her custom. Such compromises, she said, should be considered regardless of whether the offender has a spotless record.

I imagine our justice system would be more just if prosecutors talked more to defense attorneys. Unfortunately, most interactions we have during the pre-trial stage are brief and rigid. If both parties are able to make the time to meet, the conversation is essentially a declaration of intentions, with the defense making requests and prosecution agreeing or refusing. Rarely is there any discussion of the client's life or of the most appropriate outcome for the defendant.

What we should do instead is make time to meet at the earliest stage of a case, or at least arrange a phone conversation, to consider simple questions like how the case will affect an individual's employment status, family, or living arrangements. Defense attorneys could share what they know about their clients and hear from prosecutors about the options on the table. Then both sides could weigh what a charge and conviction might mean for a defendant, and for the public.

In the best cases, with patience and open minds, our discussions can lead to greater justice. At worst, they'll simmer until it's time to wash the dishes.

Jesse Weinstein is an assistant district attorney in Bronx County, New York.

Courtroom Adversaries; Policy Reform Allies

MacArthur Safety and Justice Challenge Brings Defenders and Prosecutors Together to Address Jail Reform

"One of the biggest challenges to collaborative advocacy is the notion that prosecutors and defense attorneys are on opposing sides, which leads to a fear of working together."

Criminal justice system reform has become a priority on both sides of the political aisle and within our communities as America's over-reliance on incarceration and racialized patterns of injustice are brought into sharper focus. The John D. and Catherine C. MacArthur Foundation Safety and Justice Challenge has brought still greater urgency to this conversation, and is promoting models of reform in 20 jurisdictions across the country in order to change the way America thinks about and uses jails. Designing meaningful reform that will create lasting change requires participation and collaboration from all justice system stakeholders, even — and especially — those that are more used to approaching one another in an adversarial capacity.

Cornerstone spoke to leaders from two "Strategic Allies" of the Safety and Justice Challenge, David LaBahn and Jo-Ann Wallace, about why these partnerships are important. LaBahn is President and CEO of the Association of Prosecuting Attorneys (APA), and Wallace is President and CEO of the National Legal Aid & Defender Association (NLADA).

While defenders and prosecutors may have opposing perspectives in the courtroom, we often have many common goals when it comes to criminal justice reform. What would you say are a few of the most important shared objectives?

Jo-Ann Wallace: There are more than 2 million people behind bars in the United States, and we all recognize that this is unsustainable. The Safety and Justice Challenge is focused on our country's jails, where almost half a million people are detained each year despite having never been found guilty of a crime. Many of those individuals pose no real flight risk or danger to community. The starting point for shared objectives are the Safety and Justice Challenge goals themselves: eliminating the unnecessary use of jails and racial disparities in the justice system. On the defender side, a sincere desire to make substantial progress toward those objectives is what has brought us to the table. It seems the same is true of the prosecutors on the teams. Incarceration is expensive and too often unnecessary and ineffective. Its imposition on such a vast scale is engendering mistrust in the justice system as well as harming individuals, families and communities. I believe a shared desire

for fair justice systems is also motivating both defenders and prosecutors to pursue better solutions.

David LaBahn: Both prosecutors and defenders understand that our work in the courtroom is caused by conditions outside of our control. Recidivism rates are high, and individuals who enter the criminal justice system often don't receive the treatment or resources needed in order to improve their circumstances.

Both prosecutors and defenders agree that the criminal justice system should aim to assist and rehabilitate individuals. We believe that having treatment alternatives to incarceration is key. Those suffering need to have access to effective treatment that will combat both mental health and substance use. Through implementation of diversion and deflection programs, defenders and prosecutors can work together to achieve the most successful results, and ultimately make our communities safer.

What are some of the challenges to collaborative advocacy between defenders and prosecutors on these issues? How can they be resolved?

DL: One of the biggest challenges to collaborative advocacy is the notion that prosecutors and defense attorneys are on opposing sides, which leads to a fear of working together. However, collaborations need to take place between defenders and prosecutors in order to stomp out that stigma. Prosecutors and defenders agree on many issues surrounding criminal justice reform, and they can work together to see positive changes that occur from these reform efforts.

In order for collaborative advocacy to take place, the parties involved need to understand that it's alright to agree to disagree. Instead of focusing on opposing viewpoints, prosecutors and defense attorneys can work together to ensure that the individual's sentencing is tailored to their circumstances.

JW: Defenders face additional pressures. A public defender's most important duty is to advocate zealously for his or her clients, and this requires having their complete confidence. Unfortunately, clients are sometimes so mistrustful of the justice system that they even view their attorney with suspicion. The fact that public defenders are often considered by the public, including clients, as "government attorneys," who are paid by the same entity that pays the prosecutors' salaries, is a further challenge toward gaining a client's confidence. The perception of a close relationship with the prosecution can damage that trust even further.

Defenders can take a variety of different steps to help their clients understand that collaboration on policy issues does not undermine their ability or their ethical duty to provide effective client representation in the courtroom. As a new attorney with the Public Defender Service in D.C., I was trained to talk to our clients about the reasons for having positive relationships with prosecutors. Later as the director of the agency, I had to have similar conversations with the staff about the role that I played at policy tables and why it was important to our clients for me to be there.

"...prosecutors and defense attorneys realize that the most effective change occurs on the ground."

Collaboration on the ground looks different from collaboration at policy tables in Washington. How can defenders and prosecutors work together on the ground to make diversion programs or alternative sentencing more effective? What is your role in preventing crime, and in reducing recidivism?

DL: While it is important to advocate for criminal justice reform legislation, prosecutors and defense attorneys realize that the most effective change occurs on the ground. Diversion programs are only successful if a host of multi-disciplinary professionals work together to benefit the individuals attending these programs, which in due course benefits the community at large. These professionals should not only be comprised of defenders and prosecutors, but also judges, probation and parole officers, mental health and substance abuse professionals, as well as members of the community. The success of these programs should also be measured through data, and the professionals involved should not be afraid to change the program to best fit the needs of the individuals who are participating. Together, these alternative sentencing programs will be successful.

With respect to deflection, some prosecutor's offices determine which individuals are considered a danger to the public and should enter the criminal justice system, and which individuals should participate in a rehabilitative or community services. By deflecting low-risk individuals out of the criminal justice system, individuals would get the assistance they need. This would lead to a shift in resources, which would focus on expanding programming to concentrate efforts for those most in need leading to successful outcomes.

JW: Effective public defenders know their clients and the people with whom they are connected — their loved ones, their employers and their community. They also know the social service providers and other resources in the community. Moreover, because of the attorney-client privilege individuals who trust their attorneys will provide a lot of information, including, for instance, information about issues relating to substance use or mental illness, and the effectiveness or ineffectiveness of treatment programs in which they may have participated. While defenders are bound by the privilege to protect individual client information, this knowledge translates into a collective expertise that can be shared and relied upon to help shape effective programs. The growing focus on holistic defense, advocacy aimed at improving the client's overall life outcomes and which encourages active community engagement, has only increased this expertise.

A well-resourced defense team can also have a more immediate impact, particularly with the assistance of dedicated social workers or sentencing advocates and often by working with local diversion and social programs, by designing alternative sentencing plans. These alternative programs offer justice to all parties while promoting public safety and — crucially — not contributing to the crisis of over-incarceration.

Many in the defender community believe that the justice system is broken. Do you agree, and can it be fixed with improvements to the existing system or are there some fundamental flaws that require comprehensive reform? If so, what are they?

DL: While our criminal justice system has many successful components, such as effective apprehension of criminals, public hearings, adjudication of cases based on the merits, and keeping our communities safe through maintaining order, however, there is definitely room for improvement.

Prosecutors and defenders agree that there is an over reliance on incarceration, and we support the use of deflection and diversion programs, especially for low-risk individuals. People with substance abuse and mental health issues must have access to treatment readily available. Prosecutors and defenders alike realize that data-driven and evidence-based proof should be used in creating model practices for successful diversion programs.

By working together, prosecutors and defenders can collaborate to advocate for an increase in programming through prison reform legislation, and help to decrease racial disparities. I know there is a lot of work to be done, but by working together, the criminal justice system can assist individuals who need help, and make our communities safer.

JW: Our criminal justice system is dealing with social problems that it is not equipped to address. For example, many individuals with mental illnesses should not encounter the justice system at all, but should be diverted directly into the healthcare system. As a result, it is bloated like our jails and prisons, beyond the point of effectiveness in many instances and resources are stretched too thin. The overwhelming workload has created a system that is more focused on processing cases than dealing with human beings.

The MacArthur Safety and Justice Challenge teams are exploring what is driving their jail populations and working to develop strategies to reduce them, and also presents a model for a larger reassessment of how we approach social issues and the role of our criminal justice system. Until we get there, two additional small but significant changes would make a world of difference. First, every criminal justice stakeholder (judge, defense counsel, prosecutor, etc.) should commit to treating clients and their families as they would want their loved ones to be treated — with respect and dignity — and refuse to define them only by their worst mistake. Second, these same stakeholders should receive high quality training on implicit bias.

With a narrower focus however, there are parts of our system that do need to be torn down and rebuilt differently. I believe it is time to eliminate cash bail systems, for example, which put liberty at a price only the wealthy can afford. Improvements can help – the presence of defense counsel at bail hearings dramatically reduces the average bail set and improves the chance a defendant will be released on recognizance – but the system itself remains unjust.

"Competent defense counsel is vital to maintaining the faith of the client — and the public at large — in our institutions of justice."

What would you like prosecutors to know about the defender community, and vice versa, and its role in making our justice system fairer and our communities safer?

DL: It is the role and the duty of the prosecutor as the "minister of justice" to ensure that we have a just system, which focuses on public safety. We recognize that the system needs improvements, and we are striving to work with all parties involved to make a difference in their communities. Here at APA, we are fortunate enough to work with many prosecutors who are creating successful changes in the criminal justice arena. What we have seen is when prosecutors and defenders work together, they will be successful in steering individuals towards rehabilitation, and improving their circumstances. I believe that this will create safer communities, as well as just outcomes for all involved in the criminal justice system.

JW: While it is not the responsibility of public defense to reduce crime, the fact of the matter is that many of the activities of defense counsel, the manner in which they carry out their work, and the defense role itself promotes crime reduction and public safety. Positive perceptions of procedural justice are known to be associated with reduced recidivism. In other words, if a person feels that they have been treated fairly and with respect by the justice system, that they understand the court proceedings, and that their voice was heard during the adjudicative process, they are significantly less likely to become involved with the justice system again.

Everyone in court must take some responsibility for this, but no one else in the system has the responsibilities written into their job descriptions as extensively as a client's dedicated advocate. Competent defense counsel is vital to maintaining the faith of the client — and the public at large — in our institutions of justice.

Indeed, a substantial body of research identifies fairness as a deeply engrained American value, and nowhere is this sentiment stronger than in the public defense community. Prosecutors certainly identify with "justice," and I suspect that for most this concept is inclusive of fairness. Thus, we have a more common starting point than we sometimes perceive. Like prosecutors and the general public, defenders have children and families and others that we love and want to be safe. If defenders and prosecutors approach each other looking for common ground, in the same manner that defenders urge everyone to see their clients — as people first — we can work together to create policies and practices that protect public safety while upholding procedural and substantive justice.■

For more information about the Safety and Justice Challenge, visit www.safetyandjusticechallenge.org.

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

PREVAILING OVER PRISONS: LITIGATION AND POLICY STRATEGIES FOR REFORM

Moderator: *Jacqueline Azis*, Staff Attorney, ACLU of Florida

Panelists: *Lisa Graybill*, Deputy Legal Director, Southern Poverty Law Center

Sabarish ("Sab") Neelakanta, General Counsel and Litigation Director, Human Rights Defense Center

Randall ("Randy") Berg, Executive Director, Florida Justice Institute

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Florida

Prevailing Over Prisons: Litigation and Policy Strategies for Reform

Moderator: Jacqueline Azis, Staff Attorney, ACLU of Florida

Panelists:

- **Lisa Graybill**, Deputy Legal Director of Southern Poverty Law Center
- **Sabarish ("Sab") Neelakanta**, General Counsel and Litigation Director of Human Rights Defense Center
- **Randall ("Randy") Berg**, Executive Director of Florida Justice Institute

Format: 9:00-10:20 a.m.; 1 hour of panel discussion, 20 minutes Q&A

1. Introduction of panelists, organizations, current prison work (litigation and policy). Any significant results/cases to report?

2. What are the pitfalls and benefits to dealing with prison and jail reform through litigation or advocacy? How do you decide whether to litigate an issue or advocate in another way?

3. What is more effective in forcing policy change of the Florida Department of Corrections-- public embarrassment or driving up the cost of incarceration?

4. Privatization of Prisons:
    - What obstacles or legal challenges do you foresee regarding prison litigation against private entities?
    - What impact have you seen of private prison and jail contracts for traditional government-run services like visitation?

5. What do think is the most effective strategy to force Florida's policymakers to reconsider Florida's over-reliance on mass incarceration?

FLORIDA JUSTICE INSTITUTE

100 S.E. Second Street
Suite 3750
Miami, FL 33131
305.358.2081 – Fax 305.358.0910
www.FloridaJusticeInstitute.org

CORRECTIONS DOCKET

Filed/Active Cases

- *Copeland, et al. v. Jones and Corizon*, Case No. 4:15-CV-00452-RH-CAS, N.D. Fla., statewide class action challenging the failure of the Florida Department of Corrections (FDC) and Corizon to provide hernia surgeries to inmates with painful or symptomatic hernias. Case settled at mediation for a change in policy, damages, and attorneys' fees for $2.1 million. First distribution of damages is completed. The second round of damages from remaining funds will soon be completed. Actively monitoring FDC's compliance with the Consent Decree. Please refer inmates with symptomatic hernias (painful) to FJI after grieving need to see a surgeon.

- *Disability Rights Florida v. Jones*, Case No. 4:16-cv-00047-RH/CAS, N.D. Fla. On July 7, 2017, FJI settled for Disability Rights Florida, Inc., its lawsuit against the FDC over its systemic failure to comply with the federal laws protecting individuals with physical disabilities incarcerated throughout Florida's 151 correctional facilities. The 43 page Settlement Agreement (plus 242 pages of exhibits)[1] requires the FDC to make sweeping architectural changes, update its policies, and improve its practices for providing accommodations to prisoners who are deaf/hard of hearing, blind/visually impaired, or have mobility impairments, so that those prisoners can have equal access to programs, services, and activities in the prison system. Fees and expenses settled for $2 million. FJI, DRF and Morgan & Morgan are involved in extensive monitoring of the Settlement Agreement which is expected to continue until 2021.

[1] https://www.floridajusticeinstitute.org/wp-content/uploads/2017/08/Settlement-Agreement-no-exhibits-searchable-07148878xB3B17.pdf

- *Hoffer, et al. v. Jones*, Case No. 4:17-cv-214-MW/CAS, N.D. Fla. This is a statewide class action brought May 9, 2017 by a class of thousands of inmates with hepatitis C who were being denied medical treatment using direct acting antiviral drugs (DAA) which have over a 95% cure rate. The court certified the class and entered a preliminary injunction in December 2017. FDC did not appeal the class certification and preliminary injunction orders requiring the DAA treatment of inmates with hep C. Despite the FDC's desire to end the litigation and move on, the Department refuses to enter into a Consent Decree. As a result, discovery and litigation continued. The case should be resolved on pending cross motions for summary judgment.

- *Prison Legal News v. Jones*, Case No. 4:12-cv-00239-MW-CAS, N.D. Fla., and Case No. 15-14220, 11th Circuit. This is the second rodeo for FJI representing PLN for FDC's censorship of PLN based on advertising content. The first lawsuit in 2004 resulted in the FDC agreeing at trial to stop censorship. The district court held in 2005 the First Amendment claim moot despite the FDC flip-flopping three times, and the 11th Circuit affirmed. In 2009 the FDC started censoring the publication again, and a second lawsuit commenced. After trial in January 2015, the district court found that the FDC censorship did not violate the First Amendment but the FDC was violating PLN's due process rights for not giving it adequate notice of its censorship. The 11th Circuit affirmed the district court's decision. PLN is seeking cert. FJI is handling the fees' motions and will contribute to the cert petition and arranging amici. The appeal was handled by former Solicitor General Paul Clement who is also handling the cert petition.

- *Scott Tillman, et al. v. Claude Miller, et al.*, Case No. 83-199-CIV-ORL-22, M.D. Fla. This is a near 4 decades old jail class action against the Brevard County Jail which settled years ago, and the Jail has slowly but surely come into compliance with all aspects of the Consent Decree the exception of crowding. Defendant is attempting to bring the numbers down from the low 1700's to 1446 so the case can be closed. FJI is monitoring compliance and working with Defendants in bringing the population down.

- *Estate of Anthony Vidal v. FDC*. This is a wrongful death lawsuit concerning the FDC's failure to protect Mr. Vidal from a known violent and psychotic inmate at Dade Correctional Institution. DCI is under a federal Consent Decree for its failure to adequately treat mentally ill inmates.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CARL HOFFER, RONALD MCPHERSON, and ROLAND MOLINA, individually and on behalf of a Class of persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.
JULIE L. JONES, in her official capacity as Secretary of the Florida Department Corrections,	)	
Defendant.	)	

VERIFIED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1. The Florida Department of Correction (FDC) is refusing to provide life-saving treatment to thousands of incarcerated people with hepatitis C. This policy, practice, and custom has resulted in the suffering and probable death of numerous prisoners, and puts tens of thousands of other prisoners at serious risk of experiencing pain, liver failure, cancer, and death—despite the fact that there are medications that will cure almost all hepatitis C patients with little to no side effects,

and the fact that the medical standard of care requires treatment for all such patients. The failure to provide treatment also creates the potential for further spreading of the disease to the general public. These actions amount to deliberate indifference to the serious medical needs of FDC prisoners with hepatitis C, in violation of the Eighth Amendment to the United States Constitution, and discrimination on the basis of disability, in violation of the Americans with Disabilities Act and Rehabilitation Act. Accordingly, Plaintiffs seek declaratory and injunctive relief on behalf of all FDC prisoners with hepatitis C, so that they can receive the treatment that they desperately need.

Jurisdiction and Venue

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 in that this is a civil action arising under the Constitution of the United States.

3. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1343(a)(3) in that this action seeks to redress the deprivation, under color of state law, of rights secured to the Plaintiffs by the Constitution and laws of the United States.

4. Plaintiffs' claims for relief are predicated, in part, upon 42 U.S.C. § 1983, which authorizes actions to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution and laws of the United States, and upon 42 U.S.C. § 1988, which authorizes the award of attorneys'

fees and costs to prevailing plaintiffs in actions brought pursuant to 42 U.S.C. § 1983. Plaintiffs' claims are also brought pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and the Rehabilitation Act (RA), 29 U.S.C. § 794, and pursuant to 42 U.S.C. § 12205, and 29 U.S.C. § 794a, which authorize an award of attorneys' fees and costs to the prevailing plaintiffs.

5. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, as well as Federal Rule of Civil Procedure 65.

6. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) and § 1391(c), as Defendant does business in this judicial district and division, and many of the events or omissions giving rise to the claims occurred in this judicial district and division.

7. Plaintiffs seek a preliminary and permanent injunction pursuant to Rule 65, Federal Rules of Civil Procedure.

Parties

8. Plaintiff Carl Hoffer is incarcerated in the FDC system, and was at all relevant times. He suffers from hepatitis C but has not been treated for it.

9. Plaintiff Ronald McPherson is incarcerated in the FDC system, and was at all relevant times. He suffers from hepatitis C but has not been treated for it.

10. Plaintiff Roland Molina is incarcerated in the FDC system, and was at all relevant times. He suffers from hepatitis C but has not been treated for it.

11. Plaintiffs have exhausted all available administrative remedies.

12. Defendant Julie L. Jones is the Secretary of the Florida Department of Corrections (FDC). As such, she is responsible for the overall operation of the FDC, including the operation of Florida's prison system and compliance with the Constitution and federal laws. Defendant Jones has a non-delegable duty to provide constitutionally adequate medical care to all persons in her custody. She is sued in her official capacity for injunctive and declaratory relief. Defendant Jones may be referred to herein as the Florida Department of Corrections or FDC.

13. Defendant Jones has statutory authority to implement the relief sought in the Compliant. *See* Fla. Stat. § 20.315.

14. The actions of Defendant Jones and her agents were performed under color of state law and constitute state action.

15. All staff members mentioned herein were employees or agents of Defendant and acted within the scope of their employment or agency at all relevant times.

16. The FDC is a public entity under Title II of the ADA, and receives federal financial assistance within the meaning of the RA, and has at all relevant times.

General Factual Allegations

Hepatitis C and Its Symptoms

17. Hepatitis C is a blood borne disease caused by the hepatitis C virus (HCV). The virus causes inflammation that damages liver cells, and is a leading cause of liver disease and liver transplants.

18. HCV is transmitted by infected blood via several methods, including intravenous drug use and tattooing using shared equipment, blood transfusions with infected blood (typically before regular screening of donated blood began), and sexual activity. Intravenous drug use is the most common means of HCV transmission in the United States.

19. HCV can be either acute or chronic. In people with *acute* HCV, the virus will spontaneously clear itself from the blood stream within six months of exposure. *Chronic* HCV, on the other hand, is defined as having a detectable HCV viral level in the blood at some point six months after exposure. Fifty-five to eighty-five percent of infected people will develop chronic HCV.

20. Liver inflammation caused by chronic HCV can significantly impair liver function and damage its crucial role in digesting nutrients, filtering toxins from the blood, fighting infection, and conducting other metabolic processes in the body. Liver inflammation can also cause fatigue, weakness, muscle wasting, skin rashes, and arthritis.

21. People with chronic HCV develop *fibrosis* of the liver, a process by which healthy liver tissue is replaced with scarring. Scar tissue cannot perform the job of normal liver cells, so fibrosis reduces liver function and results in the same symptoms mentioned above, but with greater intensity. Fibrosis can also lead to hepatocellular carcinoma (liver cancer).

22. When scar tissue begins to take over most of the liver, this extensive fibrosis is termed *cirrhosis*. Of those with chronic HCV, the majority will develop chronic liver disease and approximately 20% will develop cirrhosis in a 20-year timeframe.

23. Cirrhosis causes additional painful complications, including widespread itching, kidney disease, jaundice, fluid retention with edema, internal bleeding, varices (enlarged veins that develop in the esophagus or intestines, which can burst), easy bruising, ascites (fluid accumulation in the legs and abdomen), encephalopathy (mental confusion and disorientation), lymph disorders, increased

risk of infection, seizures, and extreme fatigue. Most of these complications can occur before cirrhosis. If they go untreated, some can cause death, often from infection, bleeding, and fluid accumulation.

24. Abdominal ascites can require paracentesis, a procedure wherein a needle is inserted into the abdomen to drain the fluid. Without this periodic procedure, the fluid accumulation can decrease the available space for the patient's lungs, thus causing shortness of breath and difficulty breathing.

25. Moreover, once an HCV patient's liver has cirrhosis, it may not be reversible. Some patients with cirrhosis may have too much scar tissue in the liver, even if the liver can heal to some degree once the virus is eliminated by treatment. If scar tissue persists, the patient may still experience the complications of cirrhosis, including liver cancer.

26. Cirrhosis that is accompanied by serious complications is known as *decompensated* cirrhosis. Cirrhosis without serious complications is called *compensated* cirrhosis.

27. Thus, HCV is a physiological disorder or condition that affects one or more body systems, including but not limited to the digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems, and is therefore a physical impairment. This physical impairment substantially limits one or more major life

activity, including but not limited to eating, walking, bending, lifting, concentrating, thinking, and communicating; the operation of major bodily functions such as digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems; and the operation of the liver.

28. For all FDC prisoners who have been diagnosed with HCV, there is a record of their impairment.

29. The FDC regards all prisoners with HCV as having a physical impairment that substantially limits one or more major life activity.

30. HCV is a serious medical need.

General Prevalence of Hepatitis C

31. Approximately 2.7 to 3.9 million Americans have chronic HCV.

32. In 2000, the United States Surgeon General called HCV a "silent epidemic," and estimated that as much as two percent of the adult U.S. population had HCV.

33. In 2013, HCV caused more deaths than sixty other infectious diseases combined, including HIV, pneumococcal disease, and tuberculosis.

34. Approximately 19,000 people die of HCV-caused liver disease every year in the United States.

35. HCV is the leading indication for liver transplants in the United States.

Hepatitis C in Prison

36. The prevalence of HCV in prison is much higher than in the general population. It is estimated that between 16% and 41% of the United States jail and prison population has HCV. Thus, incarceration is a risk factor for HCV.

37. The FDC has reported to the media and researchers that 5,000 to 5,272 of its approximately 98,010 prisoners have HCV. As of August 8, 2016, the FDC listed 4,797 prisoners as having HCV in its internal records.

38. Because the FDC does not conduct routine opt-out testing for HCV, upon information and belief, FDC is undercounting the number of prisoners with HCV.

39. In fact, because it is estimated that between 16% and 41% of incarcerated people have HCV, it is likely that between 14,700 and 40,184 FDC prisoners have HCV. The true number is likely at the higher end of that spectrum because of the high prevalence of HCV in Florida: Between 2009 and 2013, rates of acute HCV in Florida increased by 133%.

Standard of Care for HCV

40. For many years, there were no universally safe and effective treatments for HCV. The standard treatment prior to 2011, which included the use of interferon and ribavirin medications, sometime required injections, had a long treatment

duration (up to 48 weeks), failed to cure most patients, and was associated with numerous side effects, including psychiatric and autoimmune disorders, flulike symptoms, gastrointestinal distress, skin rashes, and severe anemia. Moreover, not all drug regimens worked for all types of HCV, and many could not be given to patients with other comorbid diseases.

41. In 2011, however, the Food and Drug Administration (FDA) began approving new oral medications, called direct-acting antiviral (DAA) drugs, which have proven to work more quickly, cause fewer side effects, and treat chronic HCV much more effectively. At first, they were designed to work in tandem with the old treatment regimen. But beginning in 2013, the FDA began to approve DAA drugs that can be taken alone.

42. These DAA drugs—currently Sovaldi (sofosbuvir), Olysio (simeprevir), Harvoni (sofosbuvir/ledipasvir), Viekira Pak (ombitasvir/paritaprevir/ritonavir/dasabuvir), Daklinza (daclatasvir), Technivie (ombitasvir/paritaprevir/ritonavir), Zepatier (elbasvir/grazprevir), and Epclusa (sofosbuvir/velpatasvir)—have far fewer side effects, dramatically greater efficacy, a shorter treatment duration (12 weeks), and are administered orally (commonly a once-daily pill) rather than by injections. They have truly revolutionized the way HCV is treated.

43. Most importantly, 90 to 95% of HCV patients treated with any of these DAA drugs are cured, whereas the old treatment regime only helped roughly one third of patients.

44. For HCV, a "cure" is defined as a sustained virologic response (SVR)—i.e., no detectable HCV genetic material in the patient's blood—for three months following the end of treatment.

45. In response to the revolutionary DAA medications, the American Association for the Study of Liver Diseases (AASLD) and the Infectious Disease Society of America (IDSA) formed a panel of experts to conduct an extensive, evidence-based review of the testing, management, and treatment of HCV. The results of that review have been published in a comprehensive document called the HCV Guidance, which is updated regularly and is available at www.hcvguidelines.org. The Centers for Disease Control and Prevention (CDC) encourages health care professionals to follow the evidence-based standard of care developed by the IDSA/AASLD.

46. The IDSA/AASLD guidelines set forth the medical standard of care for the treatment of HCV, which is now well-established in the medical community.

47. The IDSA/AALSD panel, through the HCV Guidance, recommends immediate treatment with DAA drugs for all persons with chronic HCV. This is the

standard of care for the treatment of HCV, and it reflects the continuing medical research showing the safety, tolerability, efficacy, and dramatic benefits of the DAA drugs.

48. The Florida Department of Children and Families (DCF), the agency responsible for administering the Medicaid program in Florida, recently confirmed that, in determining what is medically necessary and therefore covered by the Medicaid program, DAA medications for HCV should be approved for all adult patients with an HCV diagnosis. DCF also specifically eliminated any requirement that there be any evidence of hepatic fibrosis before covering treatment. Thus, DCF has recognized that the standard of care for HCV is to provide immediate treatment with DAA drugs to all patients with HCV, regardless of the stage of the disease.

49. Under this standard of care, treatment with DAA drugs is expected to cure nearly all infected persons.

50. The benefits of immediate treatment include immediate decrease in liver inflammation, reduction in the rate of progression of liver fibrosis, reduction in the likelihood of the manifestations of cirrhosis and associated complications, a 70% reduction in the risk of liver cancer, a 90% reduction in the risk of liver-related mortality, and a dramatic improvement in quality of life.

51. Treatment must be provided timely to ensure efficacy. Delay in treatment increases the risk that the treatment will be ineffective.

Screening, Diagnosis, and Monitoring of HCV

52. Under the IDSA/AASLD guidelines, all persons with risk factors for HCV infection should be offered testing for HCV. This includes all persons born between 1945 and 1965 and all persons who were ever incarcerated.

53. A person is generally diagnosed with HCV through a rapid blood test in which the blood is examined for HCV antibodies. A follow-up blood test determines whether the genetic material of HCV remains in the blood. A third blood test can determine which variation, or genotype, of HCV a person has.

54. Although the standard of care is to treat all persons with chronic HCV with DAA drugs, it is still useful to determine the progression of fibrosis and/or cirrhosis in the liver to choose the appropriate DAA drug, to treat other conditions or complications a person may be experiencing, to screen for liver cancer, to advise patients about contraindications and drugs to avoid, and to determine whether liver transplantation is necessary.

55. There are several methods used to determine the level of cirrhosis or fibrosis, along with an evaluation of the patient's symptoms. One such method is a liver biopsy, which is a surgery wherein a small sample of liver tissue is removed

and histologically assessed. A typical biopsy evaluation method is a system called Metavir, which assigns a number corresponding to the amount of scar tissue on the liver, with 0 meaning no fibrosis and 4 meaning severe fibrosis or cirrhosis. A score of 2 or greater is considered significant fibrosis. Liver biopsies are generally regarded as the most accurate measure of fibrosis and cirrhosis, but they are not routinely recommended because they are invasive and potentially dangerous, and also because they are generally unnecessary, as the standard of care is to treat all HCV patients, regardless of disease progression.

56. Other methods of assessing fibrosis and cirrhosis include blood tests, such as the APRI (AST to Platelet Ratio Index) score. This score is a ratio derived by comparing the level of an enzyme in the blood called aspartate aminotransferase (AST) with the usual amount of AST in the blood of a healthy person and the number of platelets in the affected person's blood. Generally, an APRI score greater than 0.7 indicates significant fibrosis, and a score of 1.0 or greater indicates cirrhosis. But as explained below, a low APRI score does not necessarily indicate the absence of fibrosis.

57. Another blood test is called the FIB-4, which is a ratio derived using the level of two enzymes in the blood, AST and alanine aminotransferase (ALT), as well as platelet count and the person's age.

58. Standard ultrasounds or sonograms of the liver are unreliable indicators of the level of fibrosis, as advanced fibrosis may not be detected by these scans. But there is a more accurate version called FibroScan, which is a type of ultrasound known as transient elastography that uses sound waves to determine the amount of fibrosis present in the liver.

59. In assessing the level of fibrosis or cirrhosis, the entire clinical picture must be taken into account. There is no one blood test, scan, or symptom that will accurately determine the extent of liver damage, and therefore relying solely on strict numerical cutoffs of any test result is inappropriate. Any abnormal test result or symptom should be taken as a sign of fibrosis or cirrhosis, but normal results in isolation cannot rule out fibrosis or cirrhosis.

60. Relying solely on the APRI score to make treatment decisions is not adequate or appropriate because APRI has significant limitations. First, when an APRI score is extremely high, it has good diagnostic utility in predicting severe fibrosis or cirrhosis, but low and mid-range scores may miss many people who have significant fibrosis or cirrhosis. In fact, in more than 90% of HCV cases, an APRI score of at least 2.0 indicates that a person has cirrhosis, but more than half of people with cirrhosis will not have an APRI score of at least 2.0. Second, where a person has been diagnosed with cirrhosis or advanced fibrosis through some other means, a

low APRI score does not negate the diagnosis—it should be presumed the patient has cirrhosis. Third, because AST levels fluctuate from day to day, a decreased or normalized level does not mean the condition has improved, and even a series of normal readings over time may fail to accurately show the level of fibrosis or cirrhosis.

61. A health care provider must also evaluate a patient's symptoms and determine whether the liver disease is compensated or decompensated. Once liver disease has advanced, scoring of the clinical degree of liver dysfunction is done using the Childs-Pugh (C-P) score, also termed the Child-Turcotte-Pugh score (CPT). Variables include the serum albumin and bilirubin, ascites, encephalopathy, and prothrombin time (a measure of how well the blood clots). The score ranges from 5 to 15. Patients with a score of 5 or 6 have CPT class A cirrhosis (well-compensated cirrhosis), those with a score of 7 to 9 have CPT class B cirrhosis (significant functional compromise), and those with a score of 10 to 15 have CPT class C cirrhosis (decompensated cirrhosis).

62. Once cirrhosis has developed, patients should also be followed with twice yearly alfa fetoprotein (AFP) screens, which is a serum marker for the development of liver cancer. Increases in AFP indicate the possible presence of liver cancer.

63. Individuals with comorbid HIV (or other immune disorders) and HCV are at a much greater risk for more rapidly progressive liver disease, and should be treated and closely followed.

FDC's Unlawful Policy and Practice of Denying Treatment for HCV

64. Despite the clear agreement in the medical community that all persons with chronic HCV should be treated with DAA drugs, the FDC does not provide these lifesaving medications to FDC prisoners with HCV. Instead, Defendant has a policy, custom, and practice of not providing DAA medications to prisoners with HCV, in contravention of the prevailing standard of care and in deliberate indifference to the serious medical needs of prisoners with HCV.

65. This policy, practice, and custom has caused, and continues to cause, the unnecessary and wanton infliction of pain and an unreasonable risk of serious damage to the health of FDC prisoners with HCV.

66. Although Defendant has a policy governing the treatment of prisoners with HCV, which is outlined in Supplement #3 to Health Service Bulletin (HSB) 15.03.09 and was promulgated on June 27, 2016, in practice almost no prisoners receive DAA medications. Instead, Defendant simply enters the names of prisoners with known HCV infection into a database and enrolls them in a gastrointestinal

clinic—which means blood draws are taken every six to twelve months—but does not actually treat them.

67. Although the HSB states that "all patients with chronic HCV infection may benefit from treatment," it does not require treatment for anyone. Rather, the HSB recommends treatment based on priority levels.

68. In Priority Level 1 ("highest priority") are patients with decompensated cirrhosis measured as a 7-9 on the CTP scale, liver transplant candidates or recipients, patients with hepatocellular carcinoma and other serious comorbid medical conditions, and patients on immunosuppressant medication. In Priority Level 2 ("high priority") are patients with an APRI score greater than 2, advanced fibrosis shown on a liver biopsy, or other comorbid diseases and infections. In Priority Level 3 ("intermediate priority") are patients with Stage 2 fibrosis shown on a liver biopsy, an APRI score greater than 1.5, and patients with porphyria or diabetes. In Priority Level 4 ("routine") are patients with stage 1 fibrosis shown from a liver biopsy and all others with HCV infection. There is no further guidance in the policy regarding which priority levels receive treatment, or when. And again, despite this written policy of prioritization, in practice FDC provides almost no treatment with medications.

69. Liver biopsies are generally not performed for FDC prisoners with HCV.

70. Because the standard of care is to treat everyone, without regard to the stage of the disease, Defendant's written policy (even if it was followed) of only providing treatment to patients with the most advanced stages of the disease amounts to deliberate indifference to serious medical needs, in violation of the Eighth Amendment. It is not consistent with the standard of care. Delaying treatment until a patient is extremely sick has the perverse effect of withholding treatment from the patients who could benefit the most from it, because the treatment is less effective for patients with the most advanced stages of the disease.

71. But even if the policy were adequate, the FDC does not follow it because it provides treatment to almost none of the HCV-positive prisoners in its custody. Indeed, despite the fact that Defendant knows of at least 4,790 patients with chronic HCV, as of July 6, 2016, Defendant has treated *only five* with DAA drugs. Upon information and belief, Defendant also knows, based on national estimates and the fact that FDC does not routinely test for HCV, that it is very likely that at least 14,700, and as many as 40,184 FDC prisoners have HCV.

72. In fact, the FDC's treatment rate is among the lowest in the country for which there is reported data.

73. And since 2013, the year the FDA approved DAA medications that cure HCV, at least 160 FDC prisoners have died of chronic liver disease, cirrhosis, and other diseases of the digestive system. Since HCV is the most common cause of liver failure in the United States, it is likely that most of these deaths were due to chronic HCV. Upon information and belief, past and current practices of the Defendant are resulting in deaths that could have been prevented through treatment of HCV.

74. Furthermore, assuming that prioritization were appropriate, Defendant's policy is also inadequate because it relies on strict numerical cutoffs (and almost exclusively on the APRI score) rather than a holistic evaluation of the entire clinical picture to determine the level of fibrosis.

75. And assuming that using numerical cutoffs were appropriate, FDC has set them so high that it precludes treatment for all but the most advanced cases of cirrhosis and fibrosis.

76. Further, assuming that numerical cutoffs were appropriate and were set at appropriate levels, FDC is not even following them. Of the 4,790 patients identified by FDC as having chronic HCV, an analysis of their APRI scores and platelet counts indicates that almost 400 have probable cirrhosis, over 1,000 likely have advanced fibrosis, and over 1,700 likely have significant fibrosis. At the very

least, all of these prisoners should receive treatment. Yet, only five have been treated.

77. The FDC also unjustifiably delays providing HCV treatment, even though the standard of care requires treatment as early as possible. If DAA treatment is delayed until a patient has advanced fibrosis or cirrhosis (generally, the first two FDC priority levels), these medications can be significantly less effective. Moreover, if DAA treatment is delayed until a patient develops decompensated cirrhosis (generally, the first FDC priority level), a liver transplant preceded or followed by DAA treatment is the only way to cure the patient.

78. In practice, the FDC delays treatment for virtually all patients with HCV, regardless of their disease progression, until the patient is released from prison or dies.

79. Moreover, Defendant's policy does not address liver transplantation, the only possible cure for people with decompensated cirrhosis. Even if given DAA treatment, many of these patients will likely die without liver transplants.

80. Defendant's policy does not address the need for liver cancer screening, which is standard medical practice once individuals have progressed to advanced fibrosis or cirrhosis. Unless there is regular surveillance to find cancers early and remove them surgically, liver cancer has a very dismal prognosis. Contrary to the

proper and necessary medical procedures and the community standard of care, Defendant has not been screening Plaintiffs, and, upon information and belief, other HCV-positive FDC prisoners with advanced fibrosis and cirrhosis, for liver cancer.

81. The HSB does not include routine opt-out testing for HCV (i.e., requiring the test unless the prisoner affirmatively opts out). Thus, FDC does not know the full number of FDC prisoners who have HCV, even though, upon information and belief, it knows the number to be much higher based on national estimates.

82. Defendant categorically withholds treatment from FDC prisoners with HCV, but does not categorically withhold treatment from prisoners with other similar diseases or conditions (such as HIV) or from other prisoners without similar diseases or conditions.

83. The FDC has enforced the above-described policies, practices, and customs despite knowing that the failure to provide DAA medications to prisoners with HCV subjects those prisoners to an unreasonable risk of pain, liver failure, cancer, permanent damage to their health, and even death. Defendant has acted with deliberate indifference to the serious medical needs of FDC prisoners with chronic HCV.

84. Defendant will continue its course of conduct unless enjoined by this Court. Plaintiffs have no adequate remedy at law.

Public Health Benefits of Treatment in Prison

85. Providing expanded HCV screening and DAA treatment in Florida's prisons would greatly reduce the number of new HCV cases in the community. Curing the disease while people are in prison would prevent prisoners from transmitting it when released, and testing would diagnose numerous individuals who were unaware they were infected, thus allowing them to seek treatment once released.

86. Studies have shown that providing DAA treatment to everyone with chronic HCV increases long term cost-savings. One study even found that restricting DAA treatment access until patients were in the later stages of fibrosis actually results in higher per-patient costs because, while it may be initially less expensive to delay administering DAAs, over the course of treatment, the follow-up care outweighs the initial costs.

87. Thus, early DAA treatment has the potential to both drastically reduce the incidence of HCV in the general population and also to reduce the costs associated with serious complications from untreated HCV, such as liver transplants and liver cancer.

Allegations Regarding Named Plaintiffs

Plaintiff Carl Hoffer

88. Plaintiff Carl Hoffer has been incarcerated in the FDC system since 1988. He is 70 years old. He has chronic HCV and decompensated cirrhosis.

89. His chronic HCV is a physiological disorder or condition that affects one or more of his body systems, including but not limited to the digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems, and is therefore a physical impairment. This physical impairment substantially limits one or more major life activity, including but not limited to walking, bending, sitting, lifting, and thinking; the operation of major bodily functions such as his digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems; and the operation of his liver.

90. Mr. Hoffer has a record of having an impairment that substantially limits one or more major life activity, as he has a history of such an impairment, and the FDC has diagnosed him with HCV, records some of his symptoms in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

91. Mr. Hoffer is regarded by FDC as has having an impairment that substantially limits one or more major life activity, as FDC perceives him as having such an impairment, has diagnosed him with HCV, records some of his symptoms

in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

92. Mr. Hoffer meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by FDC, including but not limited to medical services.

93. Mr. Hoffer first learned he had contracted HCV around 1999, while at Florida State Prison. Mr. Hoffer requested treatment for HCV then, and was told that he did not meet the requirements for treatment.

94. Mr. Hoffer continued to request treatment at every annual checkup, but to no avail. He was told that he was not sick enough to be treated.

95. About eight years ago, while at Jackson Correctional Institution, Mr. Hoffer noticed that his ankles and calves were beginning to swell painfully. Chronic swelling of the legs and feet is a symptom of HCV.

96. Mr. Hoffer repeatedly requested treatment for this painful swelling and for HCV, but his requests were ignored. His condition continued to worsen.

97. In May and June of 2015, Mr. Hoffer's feet, ankles, calves, knees, thighs, testicles, and stomach became painfully swollen. His shins were cracked and leaking white liquid.

98. In June of 2015, FDC staff transferred Mr. Hoffer to the prison clinic, where he was put on antibiotics and a liquid diet. He had developed severe ascites. Mr. Hoffer remained there for approximately 28 days until his symptoms diminished.

99. Since then, while housed at Suwanee Correctional Institution, two doctors have told Mr. Hoffer that they would recommend treatment for him for HCV. However, he has never received treatment for HCV.

100. Mr. Hoffer has filed numerous grievances, complaining of his symptoms and requesting treatment, and appealed them to the Defendant Secretary's Office, yet they have all been denied.

101. In August of 2016, Mr. Hoffer was sent to the emergency room at Memorial Hospital Jacksonville. He was diagnosed with ascites, cirrhosis of the liver, and chronic hepatitis C. Paracentesis was performed to drain the fluid, and Mr. Hoffer stayed in the hospital for 19 days.

102. Mr. Hoffer's condition has continued to worsen. His feet, ankles, and calves are swelling again. His liver is failing. Further grievances have been denied.

103. Mr. Hoffer uses a wheelchair because of the swelling and pain associated with end stage liver disease caused by HCV. Sometimes it hurts Mr.

Hoffer to walk or even just to sit. Mr. Hoffer also has problems remembering names, facts, and people. Mental confusion is associated with late-stage HCV.

104. If Mr. Hoffer does not receive treatment for HCV, he will likely die of liver disease. He has an approximately 10% chance of dying each year. Mr. Hoffer needs a liver transplant and DAA treatment to save his life.

105. Despite all of this, FDC's response to Mr. Hoffer's latest grievance, signed April 11, 2017, by the FDC Health Services Director, states that his "treatment is being deferred at this time until it becomes clinically indicated."

106. The FDC's deliberate indifference to Mr. Hoffer's serious medical needs caused his liver to decompensate as early as June 2014, and his condition has been getting worse ever since. Despite Mr. Hoffer being so sick that he now qualifies as "Priority 1" for HCV treatment under FDC's own guidelines, he continues to be denied treatment.

107. He will continue to suffer, and will likely die of liver disease, unless he receives the DAA drug treatment and a liver transplant.

Plaintiff Ronald McPherson

108. Ronald McPherson has been incarcerated in the FDC system since July of 2013. He is 53 years old. He has chronic HCV.

109. His chronic HCV is a physiological disorder or condition that affects one or more of his body systems, including but not limited to the digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems, and is therefore a physical impairment. This physical impairment substantially limits one or more major life activity, including but not limited to performing manual tasks, walking, bending, lifting, concentrating, working, and eating; the operation of major bodily functions such as his digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems; and the operation of his liver.

110. Mr. McPherson has a record of having an impairment that substantially limits one or more major life activity, as he has a history of such an impairment, and the FDC has diagnosed him with HCV, records some of his symptoms in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

111. Mr. McPherson is regarded by FDC as has having an impairment that substantially limits one or more major life activity, as FDC perceives him as having such an impairment, has diagnosed him with HCV, records some of his symptoms in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

112. Mr. McPherson meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by FDC, including but not limited to medical services.

113. At his initial physical exam in prison in July of 2013, Mr. McPherson reported to medical staff that he had HIV and HCV. Subsequent tests at Reception and Medical Center in Lake Butler confirmed this. He receives treatment for HIV, which is well-controlled.

114. Mr. McPherson has not been seen by an HCV specialist since being incarcerated in July of 2013. He has not been informed by FDC medical staff about the stage of his HCV.

115. Beginning in May of 2014 and continuing through the present, Mr. McPherson has filed numerous grievances and appeals, complaining about his HCV related symptoms and requesting treatment. They have all been denied.

116. Mr. McPherson experiences acute weakness, dizziness, chest pains, muscular spasms, nausea, and memory loss. He is anemic and bruises easily. He has difficulty eating due to his medical condition. His lab tests and medical records indicate that he has cirrhosis and is likely in liver failure.

117. In August of 2016, Nurse Juliann Dwares recommended that Mr. McPherson be treated with Harvoni (a DAA drug) for twelve weeks, due to his

genotype, low platelet levels, APRI score of over 2.0, and HIV co-infection. But he never received the treatment.

118. In December of 2016 or January of 2017, Mr. McPherson filed another formal grievance asking for HCV treatment. It was denied and Mr. McPherson filed a timely appeal.

119. On February 10, 2017, Mr. McPherson was seen by Nurse Dwares at Columbia Correctional Institution. She again recommended that Mr. McPherson be treated for HCV.

120. On February 13, 2017, Mr. McPherson was seen by Dr. Cruz at Baker Correctional Institution. Dr. Cruz did not refer Mr. McPherson for HCV treatment and said that the only thing they would do is continue monitoring his illness. Dr. Cruz "recommended" that Mr. McPherson avoid injuries in order to maintain his health.

121. In the last six months, Mr. McPherson has passed out four times. His platelet levels are dangerously low, as is his pulse. Mr. McPherson's blood doesn't clot properly.

122. Despite the recommendations for DAA medication, Mr. McPherson has still not received HCV treatment. The delay in treating Mr. McPherson's HCV has

caused cirrhosis of his liver and has significantly decreased the possibility that the DAA drugs (if given to him) will be effective.

123. The FDC's deliberate indifference to Mr. McPherson's serious medical needs caused his quality of life to substantially deteriorate, has likely caused his liver to fail, and has caused him to experience the numerous symptoms described above. He is at risk for developing further symptoms, further advanced liver failure, and even death. He may not survive his five-year prison sentence. Despite Mr. McPherson qualifying for HCV treatment under FDC's own guidelines, he continues to be denied treatment.

124. He will continue to suffer, and his liver disease will continue to advance, unless he receives the DAA drug treatment.

Plaintiff Roland Molina

125. Roland Molina has been incarcerated in the FDC system since 2004. He is 51 years old. He has chronic HCV, which he contracted by donating blood.

126. His chronic HCV is a physiological disorder or condition that affects one or more of his body systems, including but not limited to the digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems, and is therefore a physical impairment. This physical impairment substantially limits one or more major life activity, including but not limited walking and standing; the

operation of major bodily functions such as his digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems; and the operation of his liver.

127. Mr. Molina has a record of having an impairment that substantially limits one or more major life activity, as he has a history of such an impairment, and the FDC has diagnosed him with HCV, records some of his symptoms in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

128. Mr. Molina is regarded by FDC as has having an impairment that substantially limits one or more major life activity, as FDC perceives him as having such an impairment, has diagnosed him with HCV, records some of his symptoms in his medical records, and has enrolled him in the gastrointestinal chronic illness clinic.

129. Mr. Molina meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by FDC, including but not limited to medical services.

130. In January of 2013, Mr. Molina told FDC staff that he had been diagnosed with hepatitis 15 year ago. A hepatitis panel was ordered and Mr. Molina was diagnosed with HCV. Thereafter, FDC staff began monitoring Mr. Molina's HCV through biannual blood draws, but has not treated his underlying disease.

131. Mr. Molina has suffered from abnormally low platelet levels since at least 2013, caused by his untreated HCV. The low platelet levels have caused Mr. Molina to have surface bleeding, which can be seen in red blotches just underneath his skin. The condition is very painful. On a scale of one to ten, Mr. Molina would rate it a seven or eight. Mr. Molina also bruises very easily.

132. Mr. Molina's platelet levels were so dangerously low in February of 2015 that the doctor had to order Prednisone. That caused his platelet levels to increase slightly, but within a couple of months they were at dangerously low levels again.

133. In January 2016, Mr. Molina filed a grievance asking for HCV treatment, but it was denied. He appealed the denial, but it was also denied.

134. In May of 2016, Mr. Molina's labs indicated his APRI score was 2.652, indicating cirrhosis.

135. Mr. Molina should be found eligible for treatment under the FDC's own guidelines due to his low platelet levels and APRI scores, which indicate liver cirrhosis.

136. In addition to suffering from surface bleeding and jaundice, Mr. Molina gets easily tired. Mr. Molina is only 51 years old and has always exercised and taken

care of himself. However, his doctor has told him not to exercise due to his low platelet levels.

137. Mr. Molina suffers from numbness and a brown discoloration in his legs, feet, and toes. A nurse told Mr. Molina that he has cryoglobulinemia, a complication of HCV. Mr. Molina experiences severe pain through his legs, feet, and toes. The pain is constant and on a scale of one to ten, it sometimes reaches a ten.

138. The FDC's deliberate indifference to Mr. Molina's serious medical needs caused his quality of life to substantially deteriorate and his liver to be scarred with cirrhosis. He suffers from the above symptoms and is at serious risk for developing more symptoms, and experiencing further serious liver failure and death. Despite Mr. Molina qualifying for HCV treatment under FDC's own guidelines, he continues to be denied treatment.

139. He will continue to suffer, and his liver disease will continue to advance, unless he receives the DAA drug treatment.

Class Action Allegations

140. Pursuant to Federal Rule of Civil Procedure 23(b)(2), Plaintiffs seek to certify a class of all current and future prisoners in FDC custody who have been diagnosed, or will be diagnosed, with chronic HCV (the "Plaintiff Class").

141. Upon information and belief, Defendant has the ability to identify all such similarly situated class members, through medical and other records in Defendant's possession.

142. The requirements of Rule 23(a) are satisfied:

a. *Numerosity.* The class is so numerous that joinder of all members is impracticable. The FDC has identified approximately 5,000 FDC prisoners with HCV. But national estimates suggest there are likely at least 14,700 FDC prisoners with HCV, and as many as 40,184.

b. *Commonality.* There are questions of law or fact common to the class, including but not limited to: 1) whether HCV is a serious medical need; 2) whether Defendant's policy and practice of not providing HCV treatment constitutes deliberate indifference to serious medical needs in violation of the Eight Amendment; 3) whether Defendant has knowingly failed to provide the necessary staging of HCV patients in accordance with the prevailing standard of care, including the pretreatment testing to determine the severity of the disease; 4) whether Defendant has knowingly employed policies and practices that unjustifiably delay or deny treatment for HCV; 5) whether Defendant has permitted cost considerations to improperly interfere with the treatment of HCV; 6) whether HCV is a disability under the ADA; 7) whether medical

services in prison are a program or service under the ADA; and 8) whether Defendant has discriminated against FDC prisoners with HCV on the basis of their disability by categorically denying them medical treatment, while providing treatment for other diseases and conditions such as HIV.

c. *Typicality.* The claims or defenses of the class representatives are typical of the claims or defenses of the class. The class representatives have been diagnosed with chronic HCV but have been refused treatment, and suffer from the same kind of complications and substantial risk of serious harm that the class members suffer from.

d. *Adequacy.* The class representatives and class counsel will fairly and adequately protect the interests of the class. The class representatives are committed to obtaining declaratory and injunctive relief that will benefit themselves as well as the class by ending Defendant's unconstitutional policy and practice. Their interests are consistent with and not antagonistic to the interests of the class. They have a strong personal interest in the outcome of this case and have no conflicts with class members. They are represented by experienced counsel who specialize in civil rights and class action litigation on behalf of prisoners.

143. The requirements of Rule 23(b)(2) are satisfied, as the party opposing the class has acted and refused to act on grounds generally applicable to the class so that final declaratory and injunctive relief would be appropriate to the class as a whole. Injunctive relief will end the policy and practice for all class members, allowing them to receive proper medical evaluation and treatment for HCV.

CAUSES OF ACTION

COUNT I
Eighth Amendment to the U.S. Constitution
via 42 U.S.C. § 1983

144. Defendant and its policymakers know about and enforce the policies and practices described herein. Defendant and its policymakers know of Plaintiffs' and the Plaintiff Class's serious medical needs, yet Defendant has intentionally failed and refused to provide treatment that will address those serious medical needs, knowing that those actions have resulted, and will continue to result, in Plaintiffs and the Plaintiff Class's continued suffering and exposure to liver failure and its symptoms, liver cancer, and death.

145. Defendant has caused the wanton infliction of pain upon FDC prisoners with HCV, and has exhibited deliberate indifference to the serious medical needs of Plaintiffs and the Plaintiff Class, in violation of the Eighth Amendment.

146. Defendant knows, and has known, of the substantial risk of serious harm, and actual harms, faced by FDC prisoners with chronic HCV. Yet Defendant has disregarded, and continues to disregard, those risks and harms by failing to provide the very medication that would alleviate those risks and harms. Defendant has been deliberately indifferent to the substantial risk of serious harm to FDC prisoners with chronic HCV.

147. By denying Plaintiffs and the Plaintiff Class their medically needed HCV treatment, Defendant has imposed punishment far in excess of that authorized by law, contrary to the Eighth Amendment.

148. Defendant's denial of Plaintiffs and the Plaintiff Class's medically necessary HCV treatment violates all standards of decency, contrary to the Eighth Amendment.

149. Defendant's actions with respect to Plaintiffs and the Plaintiff Class amount to grossly inadequate care.

150. Defendant's actions with respect to Plaintiffs and the Plaintiff Class is medical care so cursory as to amount to no medical care at all.

151. As a direct and proximate cause of this pattern, practice, policy, and deliberate indifference, Plaintiffs and the Plaintiff Class have suffered, and continue

to suffer from harm and violation of their Eighth Amendment rights. These harms will continue unless enjoined by this Court.

COUNT II
Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.

152. This count is brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. and 42. U.S.C. § 12131 – 12134, and its implementing regulations.

153. Defendant FDC is a "public entity" within the meaning of 42 U.S.C. § 12131(1) and 28 C.F.R. § 35.104.

154. All Plaintiffs and the Plaintiff Class have chronic HCV, which is a physiological disorder or condition that affects one or more body systems, including but not limited to the digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems, and is therefore a physical impairment. 42 U.S.C. § 12102(1) & (2); 28 C.F.R. § 35.108(a) & (b). This physical impairment substantially limits one or more major life activity, including but not limited to eating, walking, bending, lifting, concentrating, thinking, and communicating; the operation of major bodily functions such as digestive, gastrointestinal, immune, circulatory, cardiovascular, and hemic systems; and the operation of the liver. 42 U.S.C. § 12102(2); 28 C.F.R. § 35.108(c).

155. All Plaintiffs and the Plaintiff Class have a record of having an impairment that substantially limits one or more major life activity, as they have a history of such an impairment. 42 U.S.C. § 12102(1)(B); 28 C.F.R. § 35.108(a)(1)(ii) & (e).

156. All Plaintiffs and the Plaintiff Class are regarded by FDC as has having an impairment that substantially limits one or more major life activity, as FDC perceives them as having such an impairment. 42 U.S.C. § 12102(1)(C) & (3); 28 C.F.R. § 35.108(a)(1)(iii) & (f). Defendant FDC has subjected them to a prohibited action because of an actual or perceived physical impairment.

157. All Plaintiffs and the Plaintiff Class are qualified individuals with a disability because they meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by FDC, including but not limited to medical services. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104.

158. By withholding medical treatment from those with HCV, but not withholding medical treatment from those with other disabilities or those who are not disabled, Defendant FDC excludes Plaintiffs and the Plaintiff Class from participation in, and denies them the benefits of FDC services, programs, and activities (such as medical services), by reason of their disability. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

159. By withholding medical treatment from those with HCV, but not withholding medical treatment from those with other disabilities or those who are not disabled, Defendant FDC subjects Plaintiffs and the Plaintiff Class to discrimination. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

160. Defendant FDC fails to provide Plaintiffs and the Plaintiff Class with equal access and enjoyment of effective medical services. 28 C.F.R. § 35.130(b)(1).

161. Defendant FDC utilizes criteria or methods of administration that have the effect of subjecting Plaintiffs and the Plaintiff Class to discrimination and that defeat or substantially impair accomplishment of the objectives of medical treatment for HCV. 28 C.F.R. § 35.130(b)(3).

162. Defendant has known about the violations noted herein but has failed to correct them, thereby exhibiting deliberate indifference to the rights of Plaintiffs and the Plaintiff Class.

163. As a direct and proximate cause of these actions and omissions, Plaintiffs and the Plaintiff Class have suffered and continue to suffer from harm and violation of their ADA rights. These harms will continue unless enjoined by this Court.

COUNT III
Rehabilitation Act, 29 U.S.C. §§ 791 – 794a

164. This count is brought under Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 701, et seq. and 29 U.S.C. §§ 791 – 794, et seq., and it implementing regulations.

165. Defendant FDC is a program or activity receiving federal financial assistance. 29 U.S.C. § 794.

166. Defendant FDC excludes Plaintiffs and the Plaintiff Class—all qualified individuals with disabilities—from participation in, and denies those individuals the benefits of programs or activities, solely by reason of the individuals' disabilities. 29 U.S.C. § 794(a); 28 C.F.R. § 42.503(a).

167. Defendant FDC subjects Plaintiffs and the Plaintiff Class—all qualified individuals with disabilities—to discrimination. 29 U.S.C. § 794(a).

168. Defendant FDC denies Plaintiffs and the Plaintiff Class—all qualified handicapped persons—the opportunity accorded others to participate in programs or activities. 28 C.F.R. § 42.503(b)(1).

169. Defendant FDC utilizes criteria or methods of administration that either purposely or in effect discriminate on the basis of handicap, and defeat or substantially impair accomplishment of the objectives of Defendant's programs or activities with respect to handicapped persons. 28 C.F.R. § 42.503(b)(3).

170. Defendant has known about the violations noted herein but has failed to correct them, thereby exhibiting deliberate indifference to the rights of Plaintiffs and the Plaintiff Class.

171. As a direct and proximate cause of this exclusion, Plaintiffs and the Plaintiff Class have suffered and continue to suffer from harm and violation of their RA rights. These harms will continue unless enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand the following relief:

A. An order certifying this case as a class action, with the class defined under Rule 23(b)(2) as all current and future prisoners in FDC custody who have been, or will be, diagnosed with chronic HCV.

B. A judgment declaring that the Defendant has exhibited deliberate indifference to the serious medical needs of Plaintiffs and the Plaintiff Class and have violated Plaintiffs and the Plaintiff Class's right to be free from Cruel and Unusual Punishment, as secured by the Eighth Amendment to the U.S. Constitution;

C. A judgment declaring that Defendant has violated the rights of Plaintiffs and the Plaintiff Class under the Americans with Disabilities Act and the Rehabilitation Act;

D. A preliminary and permanent injunction ordering Defendant to, among other things, 1) immediately provide direct-acting antiviral medications to Plaintiffs Carl Hoffer, Ronald McPherson, and Roland Molina, 2) immediately place Plaintiff Carl Hoffer on a liver transplant list, and 3) develop and adhere to a plan to provide direct-acting antiviral medications to all FDC prisoners with chronic HCV, consistent with the standard of care;

E. A preliminary and permanent injunction requiring Defendant to, among other things, 1) properly screen, evaluate, monitor, and stage FDC prisoners with HCV (including screening for liver cancer where appropriate); 2) provide routine opt-out testing for HCV to all FDC prisoners; 3) develop and adhere to a policy allowing FDC prisoners with chronic HCV to obtain liver transplants if needed; and 4) modify the exclusions from HCV treatment based on life expectancy and time remaining on sentence to reflect an appropriate individual assessment;

F. An order enjoining Defendant from taking any action to interfere with Plaintiffs' right to maintain this action, or from retaliating in any way against Plaintiffs for bringing this action;

G. An order retaining jurisdiction over this matter to ensure that the terms of any injunction are fully implemented;

H. An award of Plaintiffs' attorneys' fees, costs, and litigation expenses under 42 U.S.C. § 12205, 29 U.S.C. § 794a, and 42 U.S.C. § 1988; and

I. Such other relief as the Court may deem equitable and just under the circumstances.

Respectfully submitted,

Randall C. Berg, Jr., Esq.
Fla. Bar No. 0318371
RBerg@FloridaJusticeInstitute.org
Dante P. Trevisani, Esq.
Florida Bar No. 72912
DTrevisani@FloridaJusticeInstitute.org
Erica Selig, Esq.
ESelig@FloridaJusticeInstitute.org
Florida Bar No. 120581
FLORIDA JUSTICE INSTITUTE, INC.
100 S.E. 2nd Street
3750 Miami Tower
Miami, Florida 33131-2309
305-358-2081
305-358-0910 (FAX)

By: *s/Randall C. Berg. Jr.*
Randall C. Berg, Jr., Esq.

s/Dante P. Trevisani
Dante P. Trevisani, Esq.

s/Erica Selig
Erica Selig, Esq.

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CARL HOFFER, RONALD MCPHERSON, and ROLAND MOLINA, individually and on behalf of a Class of persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.
JULIE L. JONES, in her official capacity as Secretary of the Florida Department Corrections,	)	
Defendant.	)	

DECLARATION OF CARL HOFFER

I, Carl Hoffer, pursuant to 28 U.S.C. § 1746, make this Unsworn Declaration Under Penalty of Perjury, and declare that the statements made below are true, and state:

My name is Carl Hoffer. I have reviewed the Verified Complaint set forth above and I find the facts contained therein which pertain to me to be true and accurate to the best of my knowledge and belief.

I understand that a false statement in this declaration will subject me to penalties for perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Date: May 10, 2017

s/ Carl Hoffer
Carl Hoffer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CARL HOFFER, RONALD MCPHERSON, and ROLAND MOLINA, individually and on behalf of a Class of persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.
JULIE L. JONES, in her official capacity as Secretary of the Florida Department Corrections,	)	
Defendant.	)	

DECLARATION OF RONALD MCPHERSON

I, Ronald McPherson, pursuant to 28 U.S.C. § 1746, make this Unsworn Declaration Under Penalty of Perjury, and declare that the statements made below are true, and state:

My name is Ronald McPherson. I have reviewed the Verified Complaint set forth above and I find the facts contained therein which pertain to me to be true and accurate to the best of my knowledge and belief.

I understand that a false statement in this declaration will subject me to penalties for perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Date: May 10, 2017

s/Ronald McPherson
Ronald McPherson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CARL HOFFER, RONALD MCPHERSON, and ROLAND MOLINA, individually and on behalf of a Class of persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.
JULIE L. JONES, in her official capacity as Secretary of the Florida Department Corrections,	)	
Defendant.	)	

DECLARATION OF ROLAND MOLINA

I, Roland Molina, pursuant to 28 U.S.C. § 1746, make this Unsworn Declaration Under Penalty of Perjury, and declare that the statements made below are true, and state:

My name is Roland Molina. I have reviewed the Verified Complaint set forth above and I find the facts contained therein which pertain to me to be true and accurate to the best of my knowledge and belief.

I understand that a false statement in this declaration will subject me to penalties for perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Date: May 10, 2017

s/ Roland Molina
Roland Molina

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL HOFFER, et al.,

***Plaintiffs*,**

v. **Case No. 4:17cv214-MW/CAS**

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant.
_____/

ORDER GRANTING
MOTION FOR A PRELIMINARY INJUNCTION

The Florida Department of Corrections ("FDC") is charged with the care of over 98,000 inmates. At least 7,000 of those inmates—and perhaps as many as 20,000—are infected with the Hepatitis C virus ("HCV"). The issue in this case is whether FDC is screening, evaluating, and treating HCV-infected inmates in a manner that comports with constitutional requirements.

After holding a five-day hearing (including testimony from expert witnesses, FDC officials, and FDC inmates), this Court finds that FDC has not treated HCV-infected inmates as required by the Constitution. Moreover, although FDC has tried to moot

this case by promising to change its practices going forward, this Court finds that a preliminary injunction is necessary to ensure that inmates with HCV receive medical care in a timely manner consistent with constitutional requirements. Accordingly, Plaintiffs' motion for a preliminary injunction is **GRANTED**.

I. Findings of Fact[1]

A. Hepatitis C and the Progression of Liver Disease

HCV "is a viral infection, which is spread by exposure to blood or blood products." Pls.' Ex. 28, at 3.[2] The most common way of contracting HCV is through intravenous drug use, but a person can also get infected through tattooing or blood transfusions. *Id.* "The principal consequence of [HCV] infection is infection of the liver, which causes inflammation that in turn may result in scarring of the liver (fibrosis)." *Id.*

---

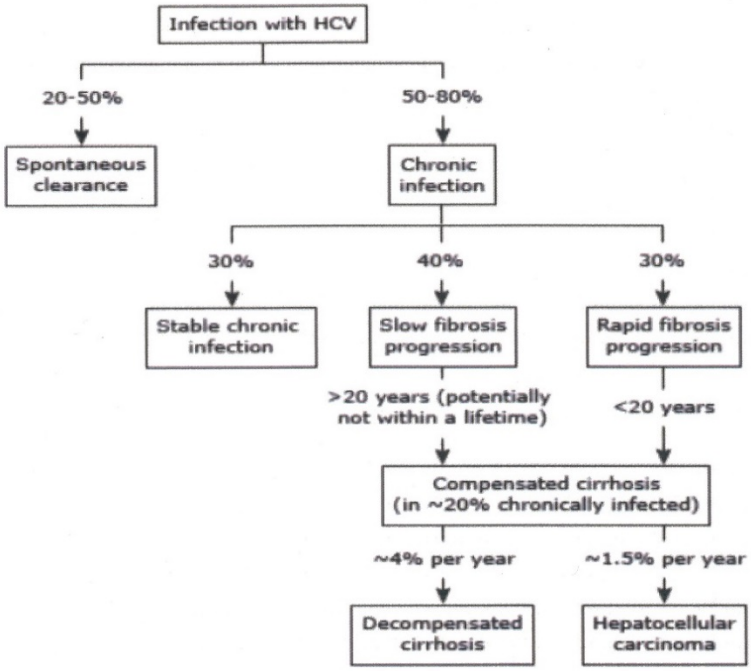
[1] This Court held a five-day evidentiary hearing on Plaintiffs' motion for a preliminary injunction. The factual statements in this section represent this Court's findings of fact. To the extent this Court cites or quotes exhibits or testimony, it is because this Court finds said exhibits and testimony to be credible and useful references. Many of these factual statements are sourced from the declarations and in-court testimony of the parties' expert witnesses, Dr. Koziel and Dr. Dewsnup. For the most part, the parties' experts were in agreement with each other. Due to the expedited nature of these proceedings, this Court has not obtained certified transcripts of each witness's testimony. Where necessary, this Court has relied on its own notes and recollection of the testimony. Consequently, certain citations do not include pincites.

[2] Plaintiffs' Exhibit 28 is the "First Amended Unsworn Declaration of Dr. Margaret Koziel."

Unlike a scar on your skin, scarring of the liver can have severe consequences. "Liver scarring can significantly impair liver function and damage its crucial role in filtering toxins from the blood, as well as making proteins involved in liver clotting and fighting infections." *Id.* Moreover, liver scarring places patients "at risk of liver failure or liver cancer." *Id.* Liver failure carries with it a host of serious symptoms, including bleeding from any site, fluid accumulation in the legs or abdomen, life-threatening infections, and failure of other organs such as the kidneys. *Id.* Liver cancer is essentially untreatable, and "has a very dismal prognosis." *See id.*

The amount of liver scarring a patient has is usually measured on the METAVIR scale. *Id.* at 7–8. On this scale, a person can be classified F0 (no fibrosis), F1 (mild fibrosis), F2 (moderate fibrosis), F3 (severe fibrosis), or F4 (cirrhosis). ECF No. 138, at 166.[3] The rate at which patients progress along this scale differs among the population. Defendant's Exhibit 1 includes a useful flowchart demonstrating this difference in progression:

[3] ECF No. 138 is a certified transcript of Dr. Koziel's testimony at the evidentiary hearing.



Def.'s Ex. 1.

As can be seen in the flowchart, about 20–50% of people infected with HCV spontaneously clear the virus within six months of infection. ECF No. 138, at 58. The remaining 50–80% who don't clear the virus are referred to as having chronic HCV. *Id.*

Among those with chronic HCV, about 30% of patients maintain a stable chronic infection, 40% suffer from slow fibrosis progression, and 30% suffer from rapid fibrosis progression. *See* Test. of Dr. Dewsnup.[4] Patients with a stable chronic infection usually only reach F1 (mild fibrosis) as long as they maintain other healthy habits such as abstaining from alcohol. *See* Test. of Dr.

[4] According to Dr. Dewsnup, as many 6,000 Florida inmates may suffer from rapid fibrosis progression. *See* Test. of Dr. Dewsnup.

Dewsnup. Patients with a slow fibrosis progression may take upwards of 20 years to reach F4 (cirrhosis). *Id.* Finally, patients with a rapid fibrosis progression may reach cirrhosis within as short a timeframe as one year. *Id.*

The extent of liver scarring a patient has does not necessarily correlate with the symptoms they are suffering. For instance, "[s]omebody can be completely asymptomatic and present with cirrhosis." ECF No. 138, at 51. Nor do "symptoms have anything to do with what the risk is of liver failure." *Id.* at 113.

Once a person reaches F4 (cirrhosis), they are further classified based on whether they are suffering from HCV-related symptoms/complications. A patient with cirrhosis and no related complications is referred to as having compensated cirrhosis. *Id.* at 49. On the other hand, a patient with cirrhosis that is accompanied with complications is referred to as having decompensated cirrhosis. *Id.* The distinction between these two groups is important because their survival rates are markedly different. Whereas the five-year survival rate for someone with compensated cirrhosis is 91%, the five-year survival rate for someone with decompensated cirrhosis is only 50%. Pls.' Ex. 28, at

6–7. Once a person has decompensated cirrhosis "their liver has truly failed." ECF No. 138, at 99. At that point, "the only true curative treatment is a liver transplant." Pls.' Ex. 28, at 11.

B. Treatment of Hepatitis C

Historically, HCV has been "difficult to treat." *Id.* at 9. One old method of treatment involved the drugs Interferon and Ribavirin. ECF No. 138, at 62–63. That treatment required weekly injections and could take as long as twelve months to complete. *Id.*; Pls.' Ex. 28, at 9. The side effects were "terrible." ECF No. 138, at 62. Taking the treatment was akin to "having the flu for a year." *Id.* "People's hair fell out, they had rashes, they had chest pain, they felt suicidal, [and] some committed suicide." *Id.* at 63. Despite these side effects, doctors still prescribed the treatment when patients had a high level of liver scarring because "the likelihood of getting to cure, which was still only about 30 percent, was better than those terrible side effects." *Id.*

But in late 2013 a new class of drugs known as direct-acting antivirals ("DAAs") were released to market. *Id.* These DAAs proved to be "a revolution in medicine." *Id.* Treatment with DAAs consists of taking a pill once or twice a day. *See id.*; *see also* Pls.' Ex. 28, at 10. The treatment period with DAAs is only about

twelve-weeks long. ECF No. 138, at 64. Moreover, DAAs have "very few" side effects. *Id.* Most importantly, about 95% of patients who take DAAs are cured of HCV. *Id.*

Unfortunately, this revolution in medicine came with a price. DAAs "are very expensive." *Id.* at 74. In September of 2016, a single course of treatment with DAAs cost approximately $50,000 to $75,000. ECF No. 151, at 34.[5] Even though prices have been going down as new DAAs are released, a single course of treatment may still cost $37,000 today. *Id.* at 45.

Despite the high cost of DAAs, the present-day standard of care is to treat chronic-HCV patients with DAAs as long as there are no contraindications or exceptional circumstances. It is inappropriate to only treat those with advanced levels of fibrosis. ECF No. 138, at 66–67, 73; *see also* Test. of Dr. Dewsnup. The HCV Guidance—a resource developed by the American Association for the Study of Liver Diseases (AALSD) and the Infectious Diseases Society of America (IDSA)—recommends giving DAAs to any

[5] ECF No. 151 is a certified transcript of a portion of Mr. Reimers's testimony at the evidentiary hearing.

patient with chronic HCV (absent certain contraindications). *See* Pls.' Ex. 6.[6]

C. The Plaintiffs

The named Plaintiffs in this case are Carl Hoffer, Ronald McPherson, and Roland Molina. All three are inmates in FDC custody and are infected with HCV. Mr. Hoffer currently suffers from decompensated cirrhosis, and Mr. McPherson and Mr. Molina have compensated cirrhosis. ECF No. 138, at 136–42.

FDC has known about the Plaintiffs' conditions for years. Mr. Hoffer likely had cirrhosis as early as 2012 and likely developed decompensated cirrhosis "around the midpoint of 2014." *Id.* at 136. Mr. Hoffer needs to be referred for a liver transplant evaluation. *Id.* at 138. Mr. Hoffer should have been treated "as early as 2012 or certainly by 2014." *Id.* at 137.

Mr. McPherson has HIV in addition to having chronic HCV. *Id.* at 139. Doctors realized that Mr. McPherson had cirrhosis during a gallbladder surgery in 2015. *Id.* Mr. McPherson should have been treated as soon as doctors realized he had cirrhosis. *Id.*

[6] Plaintiffs' Exhibit 6 is a copy of the HCV Guidance dated September 21, 2017.

Mr. Molina likely had cirrhosis as early as 2013. *See id.* at 141. Although an ultrasound in April of 2016 showed that his liver was normal, doctors failed to account for his enlarged spleen, which is indicative of cirrhosis. *Id.*

All three Plaintiffs have been complaining about their lack of treatment for years. *See* Pls.' Ex. 1; Pls.' Ex. 2; Pls.' Ex. 3.[7] But they could only complain for so long. On May 11, 2017, Plaintiffs initiated this lawsuit against the Secretary of FDC. ECF No. 1. After months of litigating, FDC has finally begun to treat Plaintiffs with DAAs. ECF No. 138, at 136–42.

Even though Plaintiffs are receiving the treatment they want, this case is not yet over. In addition to seeking relief for themselves, Plaintiffs also moved to certify a class of "all current and future prisoners in FDC custody who have been diagnosed, or will be diagnosed, with chronic hepatitis C virus (HCV)." ECF No. 10, at 2. This Court has already granted Plaintiffs' motion for class certification. ECF No. 152. Accordingly, this case may proceed with Plaintiffs seeking relief for the class. *See, e.g.*, *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 968 n.28 (11th Cir. 2008) ("A

[7] Plaintiffs' Exhibits 1, 2, and 3 are composites of their FDC administrative grievances and appeals.

class representative can have standing to continuing prosecuting a class action for relief on behalf of the class members even though he has settled his claim against the defendant and his own case is therefore moot."), *abrogation on other grounds recognized by LaCroix v. W. Dist. Ky.*, 627 F. App'x 816, 818 (11th Cir. 2015).

D. FDC's Long and Sordid History of Failing to Treat HCV

Like prison systems in many other states, FDC decided some time ago to outsource its provision of medical care to private contractors. ECF No. 151, at 5. In 2013, those contractors were Corizon and Wexford. *Id.* Under FDC's contracts with Corizon and Wexford, there were two ways that doctors could obtain drugs. Most drugs were listed on an FDC-approved list, referred to as the formulary. *Id.* at 6. Those drugs were readily available to doctors and were paid for directly by FDC. *Id.* Drugs not listed on the formulary had to be specially requested. *See* Test. of Dr. Maier. Specially requested drugs were paid for by Corizon or Wexford. *Id.*

When DAAs came out in late 2013, they were not included on the formulary. ECF No. 151, at 6–7. Nevertheless, Dr. Scott Kennedy (who worked for Corizon at the time) decided to assemble twelve inmates (the "Kennedy 12") with the goal of treating them with DAAs. *See* Test. of Dr. Maier. By the end of 2014, the Kennedy

12 had been assembled and thoroughly evaluated. *Id.* But the Kennedy 12 were never given any DAAs because the necessary funds were not available. *Id.* This was so despite the fact that all twelve inmates showed signs of advanced liver damage. *Id.*

As the years went on, FDC officials recognized that inmates were dying from HCV because they were not being treated. *Id.* (discussing conversations with Dr. Long Do). Similarly, Mr. Reimers, the FDC administrator responsible for overseeing the contractors, recognized that inmates with HCV were not being treated and found the lack of treatment to be unacceptable. *See* ECF No. 151, at 10, 40–43. Again, the reason why inmates weren't being treated was because of a lack of funding. *See id.* at 40.

By mid-2016, FDC had updated its HCV-treatment policy to acknowledge that prescribing DAAs was the standard of care. *See* Def.'s Ex. 8, at 6–7.[8] But again, the funding was not available to treat anyone. In 2015, Mr. Reimers prepared a legislative budget request of $6.5 million to obtain DAAs for the 2016–17 fiscal year, but the request never made it out of FDC (i.e., someone in FDC denied it). *See* ECF No. 151, at 44–45. In 2016, Mr. Reimers

[8] Defendant's Exhibit 8 is FDC's HCV-treatment policy dated June 27, 2016.

prepared a $29 million request for the 2017–18 fiscal year, but that too never made it out of FDC. *Id.* at 46–47.

Eventually, Corizon and Wexford's contracts with FDC ended, and FDC began a new contract with Centurion. *Id.* at 7. But the change in contractor did not come with a change in behavior; inmates with HCV were still not being treated. Indeed, to date only thirteen inmates have been treated with DAAs (three of those being the named Plaintiffs in this case).[9] *Id* at 47–48; *see also* Pls.' Ex. 11.[10]

II. Analysis

Presently before this Court is Plaintiffs' motion for a preliminary injunction. ECF No. 11. To obtain a preliminary injunction, Plaintiffs must clearly show that: (A) they have a substantial likelihood of success on the merits of their claims; (B) an injunction is necessary to prevent irreparable injury; (C) the threatened injury outweighs the harm that an injunction would

[9] To put that number in context, FDC knows of at least 7,000 inmates in its custody who have HCV. ECF No. 151, at 52–53. Furthermore, FDC's own expert testified that the true number is likely closer to 20,000. *See* Test of. Dr. Dewsnup.

[10] Plaintiffs' Exhibit 11 is FDC's drug utilization list of DAAs for the period of May 1, 2013 to June 30, 2017.

cause to Defendant; and (D) an injunction would not be adverse to the public interest. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). This Court finds that Plaintiffs have met the necessary requirements.[11]

A. Substantial Likelihood of Success on the Merits[12]

The Eighth Amendment to the United States Constitution prohibits the government from inflicting "cruel and unusual punishments" on convicts. *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). The Supreme Court has interpreted this prohibition to encompass "deprivations . . . not specifically part of [a] sentence but . . . suffered during imprisonment." *Id.* at 297. Accordingly, an inmate who suffers "deliberate indifference" to his "serious medical

[11] It is not a close call, particularly in light of the testimony of Defendant's own expert.

[12] To determine Plaintiffs' likelihood of success on the merits, this Court must consider the individual elements of each of Plaintiffs' claims. Plaintiffs raise three separate claims about FDC's policies and practices for HCV treatment: (1) deliberate indifference to serious medical needs in violation of the Eighth Amendment; (2) discrimination on the basis of disability in violation of the Americans with Disabilities Act ("ADA"); and (3) discrimination on the basis of disability in violation of the Rehabilitation Act ("RA"). ECF No. 1. This Court finds that Plaintiffs have a substantial likelihood of success on their Eighth Amendment claim; accordingly, this Court will not address Plaintiffs' ADA and RA claims at this stage of the case. *See*, *e.g.*, *Arval Serv. Lease S.A. v. Clifton*, No. 3:14-cv-1047-J-39MCR, 2014 WL 12614422, at *15 (M.D. Fla. Nov. 21, 2014) ("Because the Court determines that Plaintiffs are entitled to a preliminary injunction based upon [their first claim], the Court need not address the remaining claims at this time.").

needs" may state a claim for a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Plaintiffs argue that FDC's policies and practices for HCV treatment constitute deliberate indifference to their (and the class's) serious medical needs. ECF No. 1, at 37–39. To prevail on this claim, Plaintiffs must show (1) a serious medical need, (2) Defendant's deliberate indifference to that need, and (3) causation between Defendant's indifference and Plaintiffs' injuries. *Goebert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007). This Court finds that Plaintiffs have a substantial likelihood of proving each element.

1. *Serious Medical Need*

"A serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009) (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994)). "In the alternative, a serious medical need is determined by whether a delay in treating the need worsens the condition." *Id.* "In either case, 'the medical need must be one that, if left unattended, poses a substantial risk of serious

harm.'" *Id.* (quoting *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003)).

Plaintiffs (by diagnosis) and Plaintiffs' class (by definition) all suffer from chronic HCV. As a consequence, Plaintiffs and Plaintiffs' class are faced with substantial risks of serious harm, including, but not limited to, bleeding from any site in the body, accumulation of fluid in the legs or abdomen, life-threatening infections, significant pain or discomfort, organ failure, liver cancer, and death. *See* Pls.' Ex. 28, at 3–4. Accordingly, it is not surprising that Plaintiffs' expert describes HCV as "a serious medical need." *Id.* at 4. Nor should it be surprising that this Court finds chronic HCV to be a serious medical need.[13] *Cf. Loeber v. Andem*, 487 F. App'x 548, 549 (11th Cir. 2012) (unpublished) ("That Hepatitis C presents a serious medical need is undisputed."); *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) ("HIV and hepatitis meet either of the[] definitions [of serious medical need]. The defendants wisely do not deny that [plaintiff] has serious medical needs.").

[13] Even Defendant conceded that a subclass of HCV-infected inmates have a serious medical need within the meaning of deliberate-indifference jurisprudence.

2. *Deliberate Indifference*

To satisfy the deliberate-indifference prong, Plaintiffs must show Defendant's subjective knowledge of a risk of serious harm and Defendant's disregard of that risk by conduct that is more than mere negligence. *See Goebert*, 510 F.3d at 1326–27. There is no question that Defendant has knowledge of a risk of serious harm—Defendant knows that Plaintiffs and Plaintiffs' class are diagnosed with HCV. *Cf. Brown*, 387 F.3d at 1351 (finding that subjective-knowledge requirement was met because "[t]he defendants were aware of [plaintiff's] diagnosis with HIV and hepatitis"). As such, the only issue is whether Defendant has disregarded that risk by conduct that is more than mere negligence.

The Eleventh Circuit has listed several examples of conduct that is considered more than mere negligence:

> (1) knowledge of a serious medical need and a failure or refusal to provide care; (2) delaying treatment for non-medical reasons; (3) grossly inadequate care; (4) a decision to take an easier but less efficacious course of treatment; or (5) medical care that is so cursory as to amount to no treatment at all.

Baez v. Rogers, 522 F. App'x 819, 821 (11th Cir. 2013) (unpublished). According to Plaintiffs, "Defendant has been deliberately indifferent under nearly every formulation of the

standard." ECF No. 11, at 17. This Court agrees. The record is replete with evidence to support this conclusion.

This Court has already explained that FDC has a long and sordid history of failing to treat HCV-infected inmates. *See supra*, at 10–12. And this Court finds as a matter of fact that FDC's failure to treat was due to a lack of funding. The record is filled with evidence demonstrating as much[14]:

- Dr. Carl Maier testified extensively about funding issues. *See* Test. of Dr. Maier. In 2014, Dr. Maier worked for Corizon as the medical director at the FDC prison where the Kennedy 12 were being assembled. *Id.* Dr. Maier testified that the reason why the Kennedy 12 weren't given DAAs is because there was no funding. *Id.*

- Mr. Reimers testified about funding issues. In 2015, Mr. Reimers was employed by FDC as the Director of Health Services Administration. ECF No. 151, at 5. Part of his responsibilities at that time was "contract monitoring of Corizon and Wexford." *Id.* During this time, Mr. Reimers spoke with a Wexford official about funding issues related to DAAs. *Id.* at 40–42. Mr. Reimers knew that HCV-infected inmates weren't being treated and told the official that that was "not acceptable." *Id.* Thereafter, Mr. Reimers began trying to specifically procure funds for DAAs, but those requests were denied from within FDC. *Id.* at 44–47.

[14] Dr. Whalen testified that there were no funding issues. *See* Test. of Dr. Whalen. This Court finds Dr. Whalen's testimony particularly incredible given other statements he made in sworn declarations. *See* Pls.' Ex. 26, at 3 ("[T]reatment with DAA drugs . . . will be provided as resources are available."); *see also* ECF No. 46-1, at 1 ("Mr. Molina and Mr. McPherson may be eligible for treatment with direct acting antiviral ("DAA") drugs in the first wave of prisoners provided the treatment *pending funding for the drugs*." (emphasis added)).

- Defendant's own expert, Dr. Dewsnup, also testified about funding issues. *See* Test. of Dr. Dewsnup. Dr. Dewsnup is employed by Centurion and is intimately familiar with HCV treatment. *See id.* When Centurion took over medical care for FDC, Dr. Dewsnup encouraged doctors working with FDC to refer HCV-infected inmates for DAA treatment. *Id.* But those doctors were unable to do so because of FDC funding issues.

Here, funding is no excuse for FDC's failure to provide treatment.[15] Accordingly, there is no question that Defendant has been deliberately indifferent the serious medical needs of Plaintiffs and the class. But FDC's past failures do not entitle Plaintiffs to a

[15] *See, e.g.*, *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("We do not agree that 'financial considerations must be considered in determining the reasonableness' of inmates' medical care to the extent that such a rationale could ever be used by so-called 'poor states' to deny a prisoner the minimally adequate care to which he or she is entitled. . . . We are aware that systemic deficiencies in medical care may be related to a lack of funds allocated to prisons by the state legislature. Such a lack, however, will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment."); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); *but see Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) (Posner, C.J.) ("[T]he civilized minimum [of public concern for the health of prisoners] is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial."); *Reynolds v. Wagner*, 128 F.3d 166, 175 (3d Cir. 1997) (Alito, J.) ("[T]he deliberate indifference standard of *Estelle* does not guarantee prisoners the right to be entirely free from the cost considerations that figure in the medical-care decisions made by most non-prisoners in our society."). Of course, this Court recognizes that issues of funding might excuse some delay. For instance, if DAAs were released yesterday, this Court would not expect FDC to wave a magic wand and suddenly treat thousands of inmates overnight. But that is not the case. FDC has had since late 2013 to respond to this problem, and it has only just recently started doing what it should have done years ago.

preliminary injunction. *See O'Shea v. Littleton*, 414 U.S. 488, 495 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . ."). Instead, there must be some evidence of ongoing or future violations. *See id.* at 495–96. Accordingly, this Court must focus on what FDC has promised to do going forward.[16]

In that light, two pieces of evidence are particularly relevant to this Court's analysis. The first is FDC's HCV-treatment policy. The second is a letter sent by Mr. Reimers (FDC's current Director of Health Services) to Centurion.

a. FDC's Treatment Policy

FDC's treatment policy for HCV is enshrined in an ever-evolving document titled "HSB 15.03.09 Supplement #3." There are four different versions of the policy in the record, the earliest dating back to September 2014. *See* Def.'s Ex. 7; Def.'s Ex. 8; Def.'s Ex. 9; Def.'s Ex. 10.

The most recent version of FDC's policy was created in October 2017.[17] Def.'s Ex. 10. Broadly speaking, it specifies how

[16] Of course, this Court can still consider FDC's past violations to place things into context. *Cf. O'Shea*, 414 U.S. at 496 ("[P]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.").

[17] Undoubtedly in response to this litigation.

and when doctors should screen, evaluate, and treat inmates with HCV. *See id.* For example, as to screening the policy notes that "[t]he preferred screening test for HCV infection is an immunoassay" and that "[s]creening will be offered to all patients, regardless of risk factors." *Id.* at 2. As to treatment, the policy sets out eligibility criteria and groups patients into four priority levels based on the severity of their conditions and other considerations. *Id.* at 6–8. Generally speaking, patients with the most severe conditions are grouped in "Priority Level 1 – Highest Priority for Treatment," and patients with the least severe conditions are grouped into "Priority Level 4 – Routine for Treatment." *Id.*

When Plaintiffs filed this lawsuit, FDC was operating under an older version of the policy. Plaintiffs identified several shortcomings with the policy at the time, but a number of those shortcomings have been resolved. *Compare* ECF No. 11, at 21–23, *with* Def.'s Ex. 10. Nevertheless, the policy still has shortcomings.

Indeed, Defendant's own expert, Dr. Dewsnup, admitted that the policy needs to be fixed. *See* Test. of Dr. Dewsnup. That admission is significant because Dr. Dewsnup is in charge of drafting FDC's policy. *Id.* That is, after this litigation ensued, FDC hired Dr. Dewsnup not only to serve as an expert witness for

purposes of the hearing before this Court, but also for purposes of guiding and advising FDC's policies and practices for treating HCV. *Id.* Accordingly, this Court finds that Defendant needs to update FDC's policy in light of the shortcomings identified by Dr. Dewsnup at the hearing.

b. Mr. Reimers's Letter

On October 13, 2017, Mr. Reimers sent a letter on behalf of FDC to the CEO of Centurion (FDC's current medical contractor). Def.'s Ex. 20. The stated purpose of the letter "is to follow-up on a discussion" between Dr. Whalen (FDC's Chief Clinical Advisor) and Dr. Cherry (Centurion's medical director for FDC). *Id.* During that discussion, Dr. Whalen allegedly asked Dr. Cherry "to identify Priority 1 Level patients, and *some* Priority 2 patients, for HCV treatment in accordance with HSB 15.0.3.09 Supplement 3." *Id.* (emphasis added). Mr. Reimers's letter memorializes FDC's intent that those inmates, "once identified as appropriate for treatment, receive DAA medications during Fiscal Year 2017/2018." *Id.* The letter then continues:

> Going forward, we are requesting that you ensure that all patients diagnosed with HCV have been identified and properly prioritized in accordance with HSB 15.03.09 Supplement 3. It is our intent to provide treatment for thee inmates, once properly educated,

> screened, and evaluated as appropriate for treatment, in accordance with HSB 15.03.09. Supplement 3.

Id.

Ostensibly, the letter seem to be an attempt to moot this case.[18] It was drafted less than a week before this Court's hearing, and soon after it was written Defendant moved for a case management conference to discuss the fact that Plaintiffs had received the relief they wanted. *See* ECF No. 128. Whatever FDC's intended effect may have been, the letter does not moot this case.

Indeed, FDC's own expert, Dr. Dewsnup, testified that FDC should be treating many more inmates than what was promised in Mr. Reimers's letter.[19] *See* Test. of Dr. Dewsnup. Dr. Dewsnup also testified that FDC should be treating inmates at a faster rate than what was promised in Mr. Reimers's letter. *Id.* In fact, even if

---

[18] Mr. Reimers, of course, disagrees. According to him, the letter served "to make it clear what the expectations are for Centurion in the short term and in the long term what their requirements are as [FDC's] contractor to provide services for individuals with Hepatitis C." ECF No. 151, at 25.

[19] For instance, Mr. Reimers's letter says that only "some Priority 2 patients" will be treated. Dr. Dewsnup testified that all Priority 2 patients should be treated. *See* Test. of Dr. Dewsnup. In fact, Dr. Dewsnup testified that *more* than just Priority 2 patients should be treated. *Id.* The way FDC has currently worded its Priority 2 class means that even patients with F3 or F4 fibrosis scores might not get treatment under FDC's promise. *Compare* Def.'s Ex. 10, at 7 (requiring APRI score over 2 to qualify), *with* Def.'s Ex, 22, at 5 (explaining that APRI testing generally "lack[s] the power to exclude patients with advanced fibrosis to a statistically significant level").

FDC's promises *were* good enough, Dr. Dewsnup testified that FDC currently lacks the system capacity to be able to accomplish what it has promised. *Id.* Specifically, Dr. Dewsnup testified that FDC needs more practitioners to screen, evaluate, and treat inmates in a timely fashion. *Id.*

This Court agrees with Dr. Dewsnup's conclusions. Since the Kennedy 12 were first assembled in 2014, up to and including of this very litigation, FDC has been extremely slow to respond to the serious issue of treating HCV-infected inmates.[20] Even if FDC were excused for Corizon and Wexford's failures,[21] when Centurion came on board in mid-2016 Dr. Dewsnup specifically told Dr.

---

[20] Plaintiffs filed their complaint on May 11, 2017, and filed their motion for a preliminary injunction on May 23, 2017. Ordinarily, this Court would rule on a motion for a preliminary injunction based on sworn declarations or affidavits so as to resolve the matter as soon as possible. But Defendant wanted a four- or five-day hearing. ECF No. 37, at 2. So this Court set one for the end of August. ECF No. 53. But then Defendant informed this Court that she had not yet retained an expert and wanted to continue the scheduled hearing. ECF No. 59. This Court reluctantly granted a continuance, ECF No. 64, and then did so again due to Hurricane Irma, ECF No. 90. When this Court finally held the hearing on Plaintiffs' motion, it was revealed that Defendant did not hire her expert witness, Dr. Dewsnup, until sometime in August 2017. *See* Test. of Dr. Dewsnup. This delay is significant considering that Dr. Dewsnup is now redrafting FDC's policy and directing FDC how to move forward with treatment. One can only wonder how long Defendant would have kicked the can down the road had Plaintiffs not filed this case.

[21] Which it isn't. *See* Ancata, 769 F.2d at 705 ("The federal courts have consistently ruled that governments, state and local, have an obligation to provide medical care to incarcerated individuals. This duty is not absolved by contracting with an entity . . . ." (citation omitted)).

Cherry to develop a list of patients with HCV-inmates and to stage them appropriately. *See* Test. of Dr. Dewsnup. Over a year has passed, and the completion of the list and staging process has barely begun.[22] *Id.*

This Court has no doubt that without a court-ordered injunction, FDC is unlikely to treat inmates in a constitutionally appropriate manner. In fact, Defendant's own expert, Dr. Dewsnup, testified that an injunction is necessary for FDC to respond to this problem with the requisite alacrity. *See* Test. of Dr. Dewsnup. This Court finds Dr. Dewsnup's testimony to be credible, and accordingly finds that FDC must comply with the treatment directions and timelines Dr. Dewsnup identified at the hearing with some clarifications.

3. *Causation*

"The final requirement for a deliberate indifference claim is that a defendant have a causal connection to the constitutional harm." *Goebert*, 510 F.3d at 1327. As Secretary of FDC, Defendant is ultimately responsible for FDC's policies and practices. *See*

[22] FDC cannot hide behind the excuse that this is a difficult or lengthy process. Dr. Dewsnup testified that inmates with the most advanced liver disease could be quickly and simply identified based on what FDC already knows about their albumin levels and through further testing with proprietary indices. *See* Test. of Dr. Dewsnup.

§ 20.315(3), Fla. Stat. Accordingly, because Plaintiffs' claim is based on inadequacies in FDC's policies and implementation of those policies, the causation element has been satisfied. *Cf. Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) ("[T]he causal connection may be established when a supervisor's custom or policy . . . result[s] in deliberate indifference to constitutional rights . . . ." (alteration in original) (internal quotation marks omitted)).

4. *Conclusion*

Plaintiffs have shown that the class suffers from chronic HCV and that chronic HCV is a serious medical need. Plaintiffs have also shown that Defendant has been deliberately indifferent to the class's serious medical needs. Moreover, Plaintiffs have shown a causal connection between Defendant's deliberate indifference and the class's injuries. Consequently, Plaintiffs have a substantial likelihood of success on the merits of their Eighth Amendment claim.

B. Whether an Injunction is Necessary to Prevent Irreparable Injury

"[I]njunctive relief is appropriate 'to prevent a substantial risk of serious injury from ripening into actual harm.'" *Thomas v.*

Bryant, 614 F.3d 1288, 1318 (11th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 845 (1994)). "In such circumstances, the irreparable-injury requirement may be satisfied by demonstrating a history of past misconduct, which gives rise to an inference that future injury is imminent." *Id.* Here, FDC's history of past misconduct leads this Court to believe that future injury is imminent. Specifically, this Court finds that FDC will not treat HCV-infected inmates in an appropriate and timely manner.

If these inmates are not treated, they will undoubtedly suffer irreparable injury. Although DAAs can cure a person of HCV, they do not necessarily reduce the level of fibrosis a person has already suffered. ECF No. 138, at 64. Consequently, it is important to treat patients with HCV as soon as possible so that they can be cured of the virus before their liver becomes significantly diseased. Pls.' Ex. 28, at 11.

C. Whether the Threatened Injury Outweighs the Harm that an Injunction Would Cause to Defendant

The only harm facing FDC is that it will have to spend more money than it wants to.[23] Indeed, Defendant identifies no other

[23] Defendant argues that any funds required to be spent by FDC are funds taken from providing care to other inmates. ECF No. 31, at 21. But that is no excuse. FDC cannot use its constitutional duty to treat a certain group of inmates as a reason not to treat a different group. *See, e.g.*, *Williams v. Bennett*,

possible harm that could result in this case. *See* ECF No. 31, at 19–21. "The threat of harm to the plaintiffs cannot be outweighed by the risk of financial burden or administrative inconvenience to the defendants." *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002). Contrarily, Plaintiffs and Plaintiffs' class face great injuries. The record is rife with evidence of the harmful consequences that result from untreated HCV. *See* supra, at 14–15. Accordingly, this Court finds that the threatened injury facing Plaintiffs and Plaintiffs' class outweighs any harm that the injunction would cause to Defendant.

D. Whether an Injunction is Adverse to the Public Interest

Again, FDC only identifies the financial consequences it will suffer in discussing whether an injunction in this case would be adverse to the public interest. ECF No. 31, at 21–23. On the other hand, the public is undoubtedly interested in seeing that inmates' constitutional rights are not violated. *See, e.g.*, *Laube*, 234 F. Supp. 2d at 1252 ("[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated . . . .").

689 F.2d 1370, 1388 (11th Cir. 1982) ("If . . . a state chooses to operate a prison system, then each facility must be operated in a manner consistent with the constitution.").

Moreover, both parties' experts testified that treating HCV inside prisons may have great impacts on reducing the prevalence of HCV outside prisons. ECF No. 138, at 81; Test. of Dr. Dewsnup. So, if anything, it seems that an injunction in this case would actually *serve* the public interest. *Cf. Costello v. Wainwright*, 397 F. Supp. 20, 37 (M.D. Fla. 1976) ("[I]t seems clear to this Court that, in the long run, providing decent medical care and housing to inmates would serve to promote the rehabilitative goals of the criminal justice system so as to permit their re-entry into free society as upright and law abiding citizens and to prevent their re-entry into the criminal justice system."), *vacated in part on other grounds*, 539 F.2d 547 (5th Cir.), *rev'd*, 430 U.S. 325 (1977).

III. Conclusion

"Preventable deaths from HCV are occurring within the prison system." Def.'s Ex. 22, at 1. Most of the witnesses who testified before this Court, and even Defendant's own expert, all but admitted that Defendant has been deliberately indifferent to Plaintiffs' (and the class's) serious medical needs.[24] Moreover,

[24] When asked whether the standard of care is currently being met by FDC given so few inmates have been evaluated to date, Dr, Dewsnup responded, "I don't believe it's being met at all. I think those numbers that you've just outlined, you know, on their face is a prima facie case that it's not being met." *See* Test. of Dr. Dewsnup.

FDC's promises and plan for the future are simply not good enough. Relying heavily on the testimony of Defendant's expert, Dr. Dewsnup, this Court finds that an injunction is necessary to ensure that Plaintiffs and the class receive timely and appropriate medical care in a manner that complies with the Constitution.

Accordingly, with limited exceptions, this Court is ordering Defendant to ensure that FDC complies with its own expert's recommendations. Specifically, FDC must update its HCV-treatment policy (HSB 15.03.09 Supplement #3) in line with the shortcomings noted by Dr. Dewsnup during the hearing before this Court so that there is a clear plan for doctors and practitioners to follow.[25] Moreover, FDC must formulate a plan to implement its policy by screening, evaluating, and treating inmates in line with the directions and timelines identified by Dr. Dewsnup during the hearing before this Court.[26] To the extent FDC does not have the

---

[25] Indeed, even Mr. Reimers testified that the reason he sent his letter was to make FDC's expectations clear. ECF No. 151, at 25. Similarly, Mr. Reimers had to make FDC's expectations clear when Corizon and Wexford weren't treating anyone. *Id.* at 40–43. Enough is enough. FDC needs to clear up the loosey-goosey language in its treatment policy so that it can no longer hide behind the consequences of its own obfuscations.

[26] As noted by Dr. Dewsnup during his testimony, this includes referring inmates for liver-transplant evaluation where necessary.

system capacity to meet these requirements, it must increase its capacity and outline a timetable for doing so.[27]

As to system capacity, Dr. Dewsnup testified that FDC will likely only be able to evaluate inmates at a rate of 100 per month. *See* Test. of Dr. Dewsnup. To the extent Dr. Dewsnup finds this rate acceptable, this Court disagrees. Dr. Dewsnup testified that, as long as otherwise eligible, inmates with decompensated cirrhosis should be treated immediately, inmates with cirrhosis should be treated within three to six months, and inmates with F2 and F3 fibrosis scores should be treated within a year. *Id.* Moreover, Dr. Dewsnup testified that the balance of the infected inmates, with F1 and F0 fibrosis scores, should continue to be monitored, including restaging labs every six months. This Court agrees with those timelines, and FDC needs to increase its system capacity to be able to satisfy them.[28]

---

[27] Dr. Dewsnup unequivocally stated that to gather the requisite information, screen the inmates, evaluate the inmates, and to begin treatments of the inmates to meet the appropriate standard of care will "require a massive expansion of system capacity." *See* Test. of Dr. Dewsnup. He made plain that a single infectious disease nurse, "Christine," could not update the spreadsheet being used to help prioritize the infected inmates and it would take more than one doctor, himself, to review the data with Dr. Cherry and make recommendations.

[28] Dr. Dewsnup agreed there are ways to speed this process. For example, Defendant could—and should—immediately send the blood of the 500 inmates with the lowest albumin levels for lab work and proprietary testing. *See* Test.

This Court recognizes that these directions are broad. To be clear, this was done at Defendant's request. During closing arguments before this Court, Defendant stated that she wishes to prepare a plan in light of this Court's directions. Accordingly, at this stage this Court is only providing overarching guidance of how it believes FDC should address HCV treatment going forward. This guidance is consistent with the opinions expressed by Dr. Dewsnup during his testimony before this Court. Defendant shall be permitted to provide a more specific plan, and this Court will consider Defendant's plan before entering a preliminary injunction. In so ruling, this Court notes that Defendant must move with "alacrity." This Court will not tolerate further foot dragging. If Defendant needs further direction from this Court with respect to what the proposed plan must contain then Defendant shall contact this Court no later than Monday, November 20, 2017, to schedule a telephonic hearing to be held no later than November 22, 2017. It was been represented to this Court at hearing that Defendant is already in the process of

---

of Dr. Dewsnup. Defendant needs to have a plan and a timetable to do the same for the other 6,500 inmates. This Court recognizes that the labs and proprietary testing costs approximately $400 per inmate but time is of the essence and the urgency is born of delays of the Defendant.

formulating and implementing such a plan. Stated otherwise, Defendant has already had time to refine its plan and marshal resources to address this problem.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' motion for a preliminary injunction, ECF No. 11, is **GRANTED**.
2. No later than December 1, 2017, Defendant shall file a plan consistent with the directions this Court listed above. Defendant must include specific timetables. Once this Court issues its injunction, it will require Defendant to file updates to make sure such benchmarks are met.

SO ORDERED on November 17, 2017.

s/Mark E. Walker
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL HOFFER, et al.,

***Plaintiffs*,**

v. **Case No. 4:17cv214-MW/CAS**

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

***Defendant*.**
_____/

ORDER ENTERING A PRELIMINARY INJUNCTION

This Court previously granted Plaintiffs' motion for a preliminary injunction as to the treatment being provided by the Florida Department of Corrections ("FDC") to inmates infected with the Hepatitis C virus ("HCV"). ECF No. 153. In doing so, however, this Court noted that it was "only providing overarching guidance of how it believes FDC should address HCV treatment going forward." *Id.* at 31. This Court did that because Defendant specifically requested to "prepare a plan in light of this Court's directions" before this Court entered a preliminary injunction. *Id.*

Since then, Defendant filed her proposed plan. ECF No. 175. This Court noted a number of deficiencies with Defendant's plan and asked the parties to provide comments in light of this Court's findings. ECF No. 178. The parties have now filed their comments. ECF No. 180;[1] ECF No. 181.[2] Having considered the parties' comments, and in light of this Court's findings in its order granting Plaintiffs' motion for a preliminary injunction, this Court orders Defendant to comply with her plan with some modifications.

---

[1] Plaintiffs identified several shortcomings with Defendant's plan. Some of those shortcomings need to be fixed, and are accordingly addressed in this injunction. Other alleged shortcomings (such as Plaintiffs' concern for the "vague" standards that make an inmate ineligible for treatment) need not be addressed at this stage. This Court may revisit those issues at the conclusion of the case or upon a motion for modification. Indeed, "[n]othing prevents the plaintiffs from seeking further relief from the district court if [defendant] fail[s] to comply in good faith with the requirements of the injunction and the applicable federal standards." *Ga. Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1581 (11th Cir. 1983), *vacated on other grounds by Bd. of Pub. Educ. for City of Savannah & Cty. of Chatham v. Ga. Ass'n of Retarded Citizens*, 468 U.S. 1213 (1984). Moreover, it should be obvious that FDC may not circumvent this Court's injunction by attempting to do indirectly what it may not do directly. *Cf. Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1419 (4th Cir. 1994) (Murnaghan, J., concurring) ("[W]e would not allow the plaintiffs to gain indirectly . . . what we have expressly prevented them from gaining directly through an injunction . . . ."). In other words, this Court does not expect FDC to avoid its obligation to treat inmates by unjustifiably finding inmates ineligible for treatment. This Court and Plaintiffs can be sure of this expectation because Defendant will be filing monthly status reports of FDC's progress. Like President Ronald Reagan, this Court will "trust, but verify."

[2] Defendant addressed some of this Court's concerns, but not all of them. In fact, Defendant created further concerns by stating that some of the deadlines she had promised to comply with in her plan were "potentially ambitious." ECF No. 181-1, at 5. To be clear, none of the dates in this injunction are "goals"—the dates are adopted as deadlines that must be complied with.

Accordingly,

IT IS ORDERED:

1. Defendant must ensure that FDC, FDC's employees, and FDC's contractors comply with Defendant's Plan of Treatment for Chronic Hepatitis C, ECF No. 175-1, (attached as Exhibit A to this order)[3] as modified below:

[3] The Federal Rules of Civil Procedure provide that "[e]very order granting an injunction . . . must . . . describe in reasonable detail—*and not by referring to the complaint or other document*—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C) (emphasis added). As some have recognized,

> [e]ven though the express language of Rule 65(d) appears to prohibit incorporation by reference, it is undesirable to . . . set out long and verbose findings that may be found in another document since the injunction or restraining order should furnish defendant with a direct and succinct statement of the acts that have been enjoined or the conduct that must be undertaken by the defendant.

11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2955 (3d ed. & Apr. 2017 update). "Thus, some courts have looked to the purpose of the rule, which is to assure adequate notice to defendants of the act or acts prohibited, and have interpreted it less restrictively than the literal text of the rule might suggest is appropriate." *Id. See also, e.g.*, *California v. Campbell*, 138 F.3d 772, 783 (9th Cir. 1998); *United States v. Sarcona*, 457 F. App'x 811, 811–12 (11th Cir. 2012) (unpublished). Given that Defendant drafted her own plan, Defendant should have no qualms with this Court's incorporation of that plan. *Cf. Balla v. Idaho Bd. of Corr.*, No. CV81-1165-S-BLW, 2009 WL 1574454, at *5 (D. Idaho May 28, 2009) ("Here, Defendants drafted the plans that would govern their own actions, satisfying the notice requirement."). If Defendant disagrees, then she is welcome to move this Court for modification and/or clarification of this injunction.

a. FDC must initiate treatment for all known chronic HCV inmates, who are eligible for treatment, and who have fibrosis stage 3, by December 31, 2018.

b. FDC must initiate treatment for all known chronic HCV inmates, who are eligible for treatment, and who have fibrosis stage 2, by December 31, 2018.

c. FDC must evaluate and stage all of the ~7,500 inmates it knows have chronic HCV no later than April 30, 2018. For all other inmates, FDC must evaluate and stage inmates within 60 days of confirming that the inmates have chronic HCV.

d. Of the ~7,500 inmates FDC knows have chronic HCV, FDC must stage and evaluate the 2,500 inmates who have the lowest albumin levels no later than February 28, 2018.[4]

[4] This order is consistent with Dr. Dewsnup's recommendation in light of this Court's questioning at the preliminary-injunction hearing. ECF No. 158, at 176–79. Specifically, it will ensure that inmates with the most advanced liver disease are staged and evaluated first. *See id.* FDC might already be employing a similar methodology, but there is no indication (or guarantee) in FDC's plan that FDC is doing so. If Defendant has a different method in mind for identifying the inmates that should be evaluated and staged first, then Defendant is welcome to move this Court for a modification. Either way, evaluating and staging the worst 2,500 inmates (i.e., 1/3 of the ~7,500) by February 28 should not be an onerous task given that FDC already planned to evaluate all 7,500 by April 30.

2. Defendant must ensure that FDC, FDC's employees, and FDC's contractors comply with FDC's HCV-treatment policy, HSB 15.03.09 Supplement #3,[5] as it is revised.

3. Defendant must ensure that FDC's HCV-treatment policy, HSB 15.03.09 Supplement #3, is modified as follows:

    a. The policy must make clear that treatment deadlines (e.g., the 0–6 month deadline for priority level 1) begin to run from the date that an inmate is staged at a particular fibrosis level.

    b. The policy must make clear that FDC must evaluate and stage inmates within 60 days of confirming that the inmates have chronic HCV.[6]

4. Beginning on January 1, 2018, and on the first day of each month thereafter, Defendant shall file with this Court a status report reflecting FDC's progress in complying with this Court's injunction. That status report must detail:

---

[5] The most recent version of this document is attached as Exhibit B to this order.

[6] The other timeframes in this plan trump the policy. *See supra*, at ¶¶ 1(c)-(d).

a. The total number of inmates in FDC custody who have been screened/tested for HCV.

b. The total number of inmates in FDC custody who have been identified as having chronic HCV.

c. The total number of inmates in FDC custody who have been identified as having chronic HCV but have not yet completed evaluation and staging.

d. The total number of inmates in FDC custody who have been identified as having chronic HCV and have been staged and evaluated. This number must be further broken down by stage (i.e., F0, F1, F2, F3, F4, and decompensated cirrhosis).

e. The total number of inmates in FDC custody who have begun and/or completed treatment with direct-acting antiviral drugs ("DAAs").

f. The total number of inmates in FDC custody who have been deemed (temporarily or permanently) ineligible for treatment with DAAs. For each such inmate, FDC must list, in summary form, the reason for ineligibility.

5. The bond provisions of Rule 65(c) of the Federal Rules of Civil Procedure are waived, and this preliminary injunction shall issue immediately.

SO ORDERED on December 13, 2017.

s/Mark E. Walker
United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL HOFFER, RONALD MCPHERSON, and ROLAND MOLINA, individually and on behalf of a Class of persons similarly situated,

Plaintiffs,

vs. **Case No.: 4:17-cv-214-MW/CAS**

JULIE L. JONES,

Defendant.
_____/

DEFENDANT'S PLAN OF TREATMENT FOR CHRONIC HEPATITIS C

Defendant Julie L. Jones, sued in her official capacity as Secretary of the Florida Department of Corrections ("FDC"), submits this plan of treatment for inmates with chronic hepatitis C, and in response to this court's Order Granting Motion for a Preliminary Injunction ("Order") [D.E. 153]:

A. INTRODUCTION

On November 17, 2017, this court entered an order that granted the Plaintiffs' motion for a preliminary injunction and required FDC to file a plan that was consistent with the court's directions, and that included specific timetables [D.E. 153, page 32]. During final argument on November 1, 2017, FDC offered to

submit such a plan, but noted that in participating in the process of plan submission, FDC was not waiving the right to either further contest liability, or to challenge the scope of any court ordered remedy.

B. POLICY REVISIONS

FDC's medical providers are mandated to follow its health services bulletins for the care of inmates who have hepatitis C, specifically HSB 15.03.09, Supplement No. 3 ("Supplement 3"). Prior to the evidentiary hearing on Plaintiffs' motions, Supplement 3 was revised in October 2017. In its order, the Court required the FDC to update Supplement 3 so that there is a clear plan for doctors to follow [D.E. 132, page 21 and 29].

Attached as Exhibit A is FDC's revised Supplement 3.[1] Generally, Supplement 3 now includes specific direction to providers regarding the steps to be taken in screening inmates for both the presence of hepatitis C ("HCV") and the presence of fibrosis (pages 5-6). Additionally, once inmates are found to have chronic hepatitis C ("cHCV"), Supplement 3 contains detailed directions for their evaluation and testing, along with time periods for that (pages 6-8). With respect to treatment with direct-acting antiviral medication ("DAA" or "DAAs"), Supplement 3 now contains two priority levels for treatment with DAAs, as well as

[1] This needs to be reviewed by the Correctional Medical Authority (CMA), pursuant to Sec. 945.603, Florida Statutes.

directions regarding the time periods for DAA treatment (pages 8-9). There is also direction for regular monitoring of the third priority level, those individuals who are at fibrosis stages F1 and FO (page 9). The new, comprehensive descriptions of tests, treatment, and time standards are consistent with the expert testimony of Dr. Dan Dewsnup at the evidentiary hearing, and this court's direction.

Timetable: Complete.

C. MONITORING AND EVALUATION OF INMATES WHO ARE KNOWN TO HAVE CHRONIC HEPATITIS C

FDC has begun the process of evaluating and staging all inmates known to have cHCV, and will complete this process for all current cHCV inmates by April 30, 2018. This process will be ongoing for all newly discovered cHCV inmates. Inmates with cHCV will be enrolled in the Gastrointestinal Clinic ("GC") where their monitoring and evaluation will include an examination every six months, and they will receive proprietary indices and/or elastography every six months, and an abdominal ultrasound every six months if they are at fibrosis stages 2-4 (Supplement 3, pages 6-8). For those who are at fibrosis stages 0-1, they will receive an examination every 6-12 months in the GC, as well as laboratory testing every six months, and the proprietary indices and/or elastography every 12 months (Supplement 3, pages 6-8).

It is important to recognize that, based on existing information, the GC will have a patient load of approximately 7,500 inmates. Hence, FDC is prepared to

significantly surpass the previously suggested evaluation rate of 100 inmates per month that the court found to be deficient [D.E. 132, page 30].

Moreover, all those with cHCV will receive counseling regarding the disease, including the staging of treatment with DAAs, and the availability of peer-to-peer counseling (Supplement 3, page 8).

Timetable: This began in November 2017, and will be complete for currently known cHCV inmates by April 30, 2018. The process will be ongoing for newly discovered cHCV inmates.

D. TREATMENT OF THOSE WHO HAVE DECOMPENSATED CIRRHOSIS WITH DIRECT-ACTING ANTIVIRAL MEDICATION

All cHCV inmates who are known to have decompensated cirrhosis will be offered treatment with DAAs (Supplement 3, page 8).

Timetable: FDC began treating inmates with decompensated cirrhosis in August 2017, and will have initiated treatment for all known cHCV inmates with decompensated cirrhosis by December 31, 2017. This will be ongoing for newly discovered cHCV inmates with decompensated cirrhosis.

E. TREATMENT OF THOSE WHO HAVE COMPENSATED CIRRHOSIS WITH DIRECT-ACTING ANTIVIRAL MEDICATION

All cHCV inmates who are known to have compensated cirrhosis will be offered treatment with DAAs within three to six months (Supplement 3, page 8).

Timetable: FDC will begin initiating treatment for cHCV inmates with compensated cirrhosis in December 2017, and will have initiated treatment for all current cHCV inmates with compensated cirrhosis by May 2018. This will be ongoing for newly discovered cHCV inmates.

F. TREATMENT OF THOSE WHO HAVE FIBROSIS STAGE 3 WITH DIRECT-ACTING ANTIVIRAL MEDICATION

All cHCV inmates who are known to have fibrosis stage 3 will be offered treatment with DAAs within 12 months (Supplement 3, page 8).

Timetable: FDC will begin initiating treatment for cHCV inmates who have fibrosis stage 3 by no later than April 1, 2018, and will have initiated treatment for all current cHCV inmates who have fibrosis stage 3 by March 31, 2019. This will be ongoing for newly discovered cHCV inmates.

G. TREATMENT OF THOSE WHO HAVE FIBROSIS STAGE 2 WITH DIRECT-ACTING ANTIVIRAL MEDICATION

All cHCV inmates who are known to have fibrosis stage 2 will be offered treatment with DAAs within 24 months (Supplement 3, page 9). The timetable for treatment is directly impacted by the fact that the current number of inmates who are in fibrosis stage 2 is presently unknown. The FDC is actively evaluating the 6,500 inmates referenced in the Order to determine the fibrosis scores of 0, 1, and 2. [D.E. 153, p. 30-31]. Additionally, every year the FDC receives approximately 30,000 newly incarcerated inmates; thus, the number of inmates in fibrosis stage 2

is likely to increase by an unknown magnitude over the court's proposed timetable for treatment.

Timetable: All 6,500 inmates referenced in the Order will be evaluated and staged on or before April 1, 2018. FDC will begin initiating treatment for cHCV inmates who have fibrosis stage 2 by no later than May 1, 2018, and will have initiated treatment for all current cHCV inmates who have fibrosis stage 2 by April 30, 2020. This will be ongoing for newly discovered cHCV inmates.

H. STANDING ORDERS FOR THE ADMINISTRATION OF EPCLUSA, MAVYRET, AND RIBAVIRIN

Dr. Dan Dewsnup has issued standing orders for the administration of Epclusa and Mavyret, which are two commonly used DAAs, along with Ribavirin, which needs to be utilized in conjunction with DAAs in certain circumstances. The current versions of those standing orders are attached hereto as composite Exhibit B. It should be noted that the content of standing orders may need to be adjusted from time-to-time to reflect provider feedback, adjustments in administration, or new information.

Timetable: Ongoing.

I. MONITORING THOSE WHO HAVE FIBROSIS STAGES 0-1

All cHCV inmates who are known to be in fibrosis stages 0-1 will be monitored regularly with both labs and proprietary indices for re-staging at least annually into a higher priority level (Supplement 3, page 9).

Timetable: Ongoing.

J. EXPANSION OF SYSTEM CAPACITY

The FDC's medical contractor, Centurion, will be adding a specialty physician to assist with identification, evaluation, and staging for treatment with DAAs. Also, Centurion will be adding eleven infection control nurses whose duties are anticipated to include ordering tests and coordinating medication administration. In addition, the FDC will hire a specialty physician as a project consultant to assist with oversight and administration of this program. Moreover, existing health services staff from Centurion who are located at prisons will undergo additional HCV training, and shift responsibilities as necessary to participate in the screening, monitoring, testing, and medication administration.

Timetable: By January 31, 2018.

K. TRACKING OF INMATES WHO HAVE CHRONIC HEPATITIS C

FDC has significantly enhanced its ability to identify and track those inmates who have HCV. For example, new computer codes have been created for HCV inmates that will indicate whether they have acute hepatitis or, instead, cHCV, and also indicate whether they have been treated with DAAs, and have achieved cure, i.e., a Sustained Viral Response ("SVR").

Timetable: Complete.

L. TRACKING OF MEDICATION ADMINISTRATION

FDC has begun to produce weekly pharmacy reports that would indicate the inmates who are receiving DAA medication. Medical administration of DAAs will also be tracked at the patient level by virtue of Medication Administration Records (MARs).

Timetable: Ongoing.

M. REFERRAL FOR LIVER TRANSPLANTS

In accordance with Supplement 3, the FDC will determine the MELD score for all patients with decompensated cirrhosis. If the score meets the listing/eligibility criteria maintained by the liver transplant centers in Florida, the patient will be referred to the transplant center. Thereafter, co-management as directed by the transplant center will be instituted if the patient is listed for transplant. (Supplement 3, page 12).

Timetable: January 31, 2018, while referrals are ongoing.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

EXHIBIT B

MANAGEMENT OF HEPATITIS C

This guideline describes departmental recommendations for the screening, evaluation, treatment, and monitoring of patients infected with hepatitis C virus (HCV).

A. GENERAL INFORMATION REGARDING HEPATITIS C

1. Hepatitis C is a liver disease caused by the hepatitis C virus (HCV) which is found in the blood of persons who have this disease. HCV is spread by contact with the blood of an infected person.

2. Risk factors for infection may include, but are not limited to, injection drug use, transfusion with HCV-infected blood or blood products, tattooing, vertical transmission from mother to child, and massive exposure to HCV-infected blood during fighting or other trauma.

3. The average incubation period is six to nine weeks, with a range from two weeks to six months. Therefore, acute HCV infection usually is established within 3-6 months of the contact with the infected blood.

4. Those individuals who spontaneously clear hepatitis C usually do so within the first six months of being infected. Many patients have no symptoms of acute hepatitis.

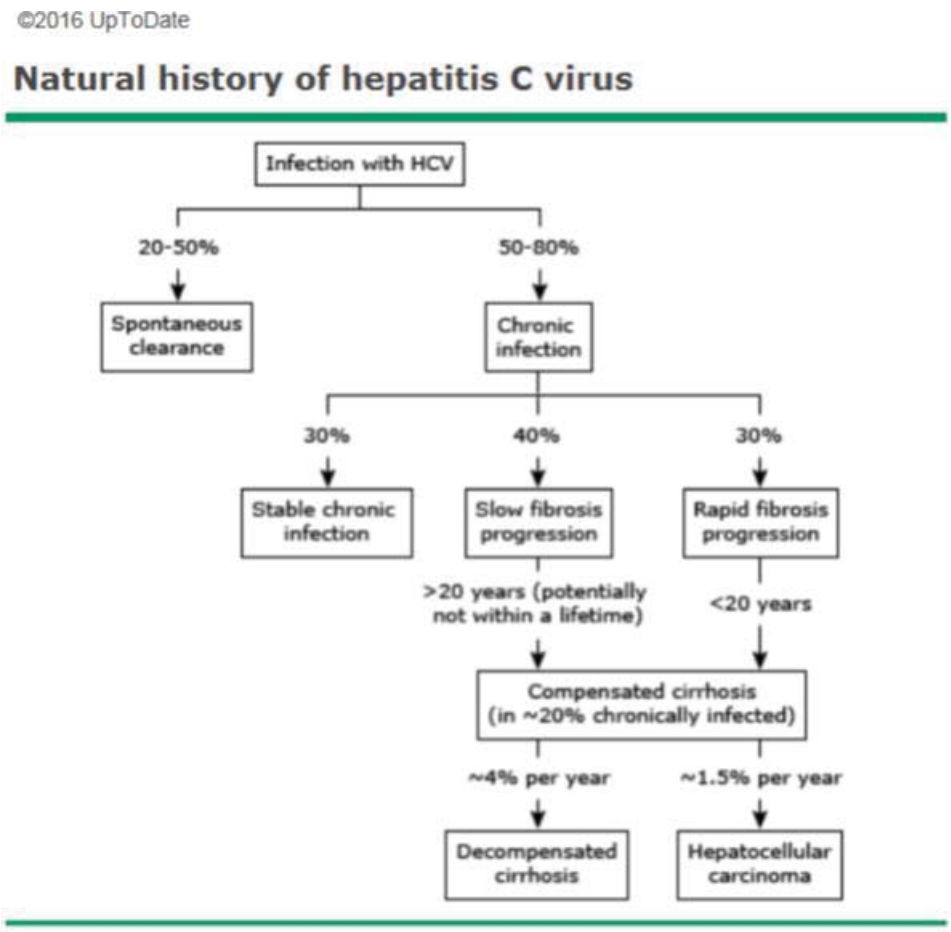
5. Approximately 50-80% of individuals infected with hepatitis C will not spontaneously clear the virus. For them, the infection becomes chronic.

6. Chronic hepatitis C (sometimes abbreviated as "cHCV") is characterized by the persistent presence of HCV-RNA detectable in blood/serum, i.e., the HCV viral load (HCV-VL). Those patients who are HCV-VL+ in the context of the correctional setting usually have chronic HCV disease.

7. The principal consequence of cHCV is infection of the liver, which causes inflammation that may, in turn, result in scarring of the liver, which is known as "fibrosis." The amount of liver scarring a patient has is usually measured on the METAVIR scale. On this scale, a person can be classified as F0 (inflammation, but no fibrosis), F1 (mild fibrosis), F2 (moderate fibrosis), F3 (severe fibrosis), or F4 (cirrhosis).

8. Liver scarring can significantly impair liver function, and can place a patient at risk for several serious symptoms/complications, as well as liver failure or liver cancer.

9. For a depiction of the natural history of HCV, see Diagram 1, below.



Reproduced with permission from UpToDate, Inc. www.uptodate.com. Copyright © 2017.

B. THE PROGRESSION OF CHRONIC HEPATITIS

1. Progression of cHCV to fibrosis and cirrhosis may take years in some patients and decades in others, or, in some cases, may not occur at all. The rate at which patients progress along the METAVIR scale, and can progress toward serious symptoms/complications differs among the population, and can be influenced by a variety of factors.

2. Patients with cirrhosis may develop decompensated cirrhosis and/or hepatocellular carcinoma over time. Factors associated with rapid progression or death (less than 20 years from infection to cirrhosis) can include, but are not limited to, ALT elevation (especially if ALT>200, or "ALT flare"), active alcohol and drug abuse, grade 3 inflammation (Batts and Ludwig classification) on liver biopsy, presence of bridging fibrosis (Batts and Ludwig S3+/Metavir F3+) on liver biopsy, genotype 3 infection, HIV co-infection, HBV co-infection (those with HIV+HBV +HCV co-infection and detectable viremia of both HIV+HBV are at highest risk), hepatic steatosis and NASH, diabetes and insulin resistance, obesity, daily use of marijuana, and uncontrolled underlying liver disease. HCV risk behaviors that occur 10 or more years prior to the

cHCV diagnsosis, the male gender, and whether an individual is age 40 or more at the time of infection, are also associated with a rapid progression, but are less significant in multivariate analysis.

3. The rapid accumulation of data since 2013 regarding hepatic fibrosis and progression to end stage liver disease (decompensated cirrhosis and hepatocellular carcinoma or primary liver cancer) has indicated that the risk for rapid progression within one year begins to be measurable when the patient reaches F2. There is an ~0.5% and ~1.0% one-year risk of progressing to hepatocellular carcinoma and decompensated cirrhosis, respectively, once the patient can be staged as F2 (Whether this is due to underestimation of the actual stage with present staging methods or represents very rapid progression of hepatic fibrosis is unknown). The best data continues to indicate that risks of progression in one year to hepatocellular carcinoma or decompensated cirrhosis in the patient with F3 and F4 fibrosis is 1%, 2% or 1.5-2%, 4%, respectively.

4. On the other hand, the factors associated with non-progression of hepatic fibrosis are not fully understood at this time, and may be less well-studied due to treatment bias. Non progression is more likely in patients with the following characteristics: female sex, age <40yrs, BMI<30, Batts and Ludwig inflammation Grade 0-1, Batts and Ludwig S0-1/Metavir F0-1, IL28B genotype (with C/C and C/T genotypes less likely to be associated with advanced hepatic fibrosis), and normal ALT (≥75% do not have advanced hepatic fibrosis). African-American race (slower progression/histology less severe in black patients), patients whose HCV risk behaviors have happened in the recent past (usually <5-10yrs), and those without an alcohol abuse history also have less risk.

5. The contribution of sobriety/cessation of injection drug use to slowing the progression of hepatic fibrosis is also highly significant in terms of positive lifestyle behaviors associated with improved quality and length of life, especially if the patient achieves a sustained viral response (SVR), which is considered to be a cure. Additionally, statin use has been associated with a lower progression rate, and coffee (caffeinated only) consumption has been demonstrated in both retrospective and prospective trials to be associated with reduced hepatic fibrosis.

6. For a depiction of the progression of cHCV, and priority for treatment, see Diagram 2, below.

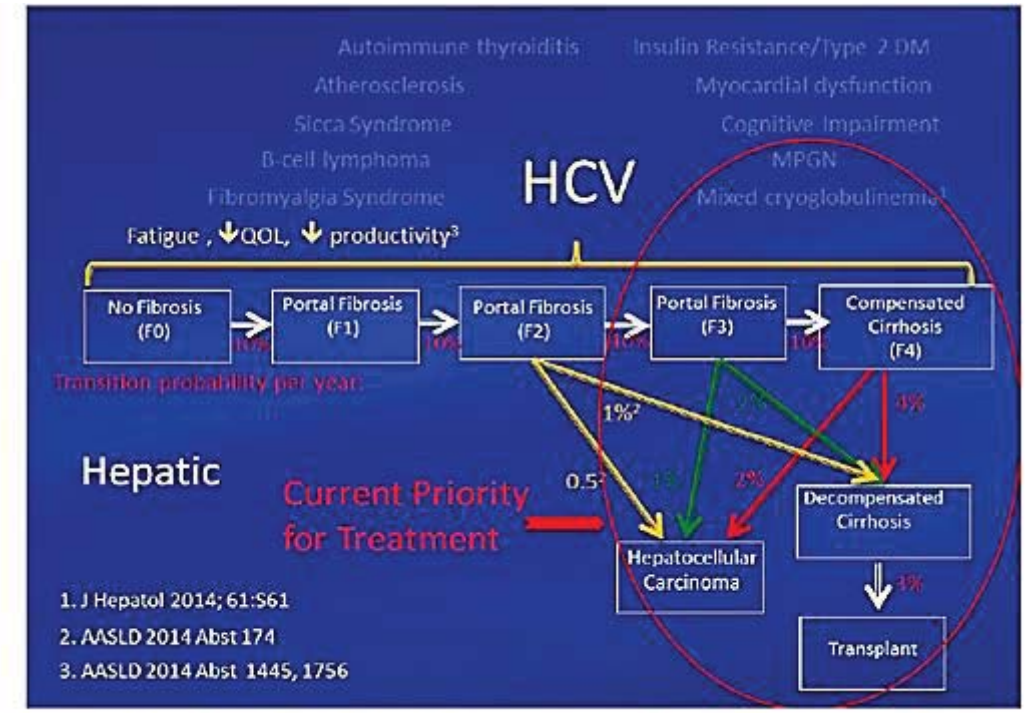


Diagram 2 attribution: Ken Benner, MD/Hepatology, Oregon Clinic, Portland, Oregon.

C. THE NEED FOR COMPREHENSIVE HCV TREATMENT, NOT JUST VIRAL ERADICATION

1. Identifying patients who need treatment sooner than others, and would benefit most, is a complex task requiring evaluation of multiple and diverse factors. The positive outcomes of increased survival and improved quality of life associated with successful viral eradication and a sustained viral response (SVR) are dependent upon sobriety and positive lifestyle change.[1]

2. Patients have a responsibility to learn from past behaviors and interact with society positively. Evaluation and treatment of chronic health problems such as chronic HCV and substance abuse play a crucial role in patients establishing trust and developing healthy behaviors, thereby reducing their rates of substance abuse relapse and correctional recidivism.

[1] For example, a long-term Danish study demonstrated an 18.2-fold increased mortality risk among younger patients with chronic HCV that was not due to their liver disease but, instead, was due to unnatural death: i.e., mortality associated with untreated mental illness and substance abuse associated suicide, homicide, and trauma. Liver related mortality only becomes more prevalent as the population ages. Therefore, sobriety is key to an overall harm reduction. (Clin Gastro and Hepatology 2011; 9:71-78).

3. The benefits of evaluation and treatment of cHCV go beyond the immediate goal of viral eradication in the individual. cHCV treatment is one part of a multi-part strategy to promote healthy lifestyles, which in turn benefits the patient, his/her family, and society.

4. Any patients interested in cHCV evaluation should understand that further laboratory testing, liver biopsy, imaging, or another method for staging hepatic fibrosis may be required prior to and during therapy. The risk and side effects of evaluation, the proposed treatment regimen and the need for monitoring must be fully discussed with the patients.

5. If there is reasonable documented concern about a patient's ability to adhere to and benefit from a standardized treatment regimen, and these concerns are not able to be resolved through a cooperative treatment plan, treatment should not be initiated. Patients will be re-evaluated for treatment compliance in accordance with their Gastrointestinal Clinic (GC) scheduling.

6. Behavioral risk reduction and substance abuse counseling is an integral part of cHCV treatment. The use of peer educators has been shown to potentially have the greatest impact in this area. Patients should have pro-sobriety attitudes assessed and documented in the medical record. Patients with high propensity for relapse may need more extended time periods of sobriety prior to treatment as deemed appropriate by the clinical care committee or equivalent. Unfortunately, there is no evidence at this time that institutionally-mandated substance abuse programs improve outcomes over incarceration alone. However, patient-driven substance abuse treatment such as Narcotics Anonymous or Alcoholics Anonymous groups with peer educators and sponsors have demonstrated improved outcomes and decreased substance abuse relapse rates post-release. Patients should be encouraged to participate in these programs.

D. EDUCATION FOR NEWLY INCARCERATED INMATES REGARDING HCV

All newly incarcerated patients should be provided with educational information regarding prevention, transmission, risk factors, and screening of HCV. The form for this should include peer-to-peer education.

E. MONITORING OR TREATMENT FOR ACUTE HEPATITIS

1. HCV-VL shall be monitored at 6 months after the date of first diagnosis. If viremia persists after that time, continue to monitor and manage the case as a chronic infection.

2. In some cases when acute HCV infection superimposes on patients with established cirrhosis or advanced fibrosis, there may be a compelling reason to treat the acute infection as a chronic infection in order to prevent severe complications.

F. SCREENING OF PATIENTS FOR THE PRESENCE OF cHCV, AND THE AMOUNT OF FIBROSIS

Screening for cHCV will be offered to all patients, regardless of risk factors, at multiple opportunities throughout incarceration. Patients may request screening as well. Screening should include the following components:

1. The preferred screening test for HCV infection is an immunoassay that detects the presence of antibodies to HCV antigens (referred to as HCV-Ab, or Anti-HCV).

2. If there is the presence of HCV-Ab, the specimen should be automatically analyzed for HCV-RNA (the HCV viral load, or HCV-VL) to immediately establish the presence or absence of chronic HCV.

3. In patients with a detectable viral load (HCV-VL), the specimen will also then be analyzed by a proprietary predictive index (e.g. FibroSURE), to initially assess the amount of fibrosis (liver scarring). Note: Proprietary indices that predict hepatic fibrosis stage such as FibroSURE, Fibrometer™ or FibroSPECT™ utilize a combination of age, sex, and a battery of laboratory parameters to predict the fibrosis score (F0-F4). Proprietary indices are widely utilized in the U.S. correctional system and in some communities in combination with ultrasound liver imaging to estimate the stage of hepatic fibrosis, especially in areas which are resource or access challenged, which would make routine elastography or other imaging very difficult.

4. HCV-VL+ patients who have been diagnosed to have F2, F3, or F4 will be reviewed and an abdominal ultrasound ordered to rule out the presence of portal hypertension (indicative of advanced hepatic fibrosis).

G. EDUCATION OF PATIENTS WHO ARE FOUND TO BE INFECTED WITH cHCV

Once patients are found to be infected with chronic HCV, they should be counseled by a clinician during the initial visit regarding the natural history of the infection, measures to assess the progress of cHCV, potential treatment options, and specific measures to prevent transmitting the HCV infection to others.

H. EVALUATION AND MONITORING IN THE GASTROINTESTINAL CLINIC

1. The following patients will be enrolled in the Gastrointestinal Clinic ("GC") for evaluation and monitoring: (a) those with active cHCV who are not being treated with direct-acting antiviral medication, (b) those who have had HCV treatment failure, and (c) those who have had a relapse of HCV infection or reinfection.

2. In the GC clinic, the patient will receive the following: (a) a baseline history and physical examination; (b) labs and other tests (see below), including a proprietary predictive index, if not previously provided, and an abdominal ultrasound, if not

previously provided; (c) an assessment and discussion with the patient of the results of the proprietary predictive index and abdominal ultrasound; (d) an evaluation and assessment of the need for preventive health interventions such as vaccines and screenings for other conditions; and (e) counseling on cHCV infection.

3. Patients who are fibrosis stage 4 (F4), or stage 3 (F3) shall be seen every six (6) months or sooner, if indicated, shall receive laboratory testing every 3-6 months, and shall receive an abdominal ultrasound for hepatocellular carcinoma (HCCa) surveillance every six (6) months.

4. Patients who are fibrosis stage 2 (F2), stage 1 (F1) or stage 0 (F0) shall be seen every six (6) months, and shall receive laboratory testing every six (6) months, and the proprietary predictive indices and/or elastography every twelve (12) months.

5. Each patient's fibrosis stage will be recorded as F0-F4. If available, the patient's Child-Turcotte-Pugh score will be recorded as well. In particular, consider the following:

   (a) The history and physical examination: Focus on signs and symptoms of liver disease, prior alcohol consumption, and risk behaviors for acquiring HCV infection. Based on this information and the period in which the patient engaged in injection drug use or other risk behaviors, attempt to estimate earliest possible date of infection. Evaluate for other possible causes of liver disease, including alcoholism, non- alcoholic steatohepatitis (NASH), iron overload (hemochromatosis), and auto-immune hepatitis. Inquire about prior treatment for HCV infection, specific medications used, dosages and duration of treatment, and outcomes, if known.

   (b) Laboratory and Other tests:

   (1) This will include a complete blood count (CBC); Prothrombin time (PT) with International Normalization Ratio (INR); and a comprehensive metabolic panel (CMP).

   (2) Laboratory testing consistent with cirrhosis may include elevated bilirubin, decreased albumin, and prolonged INR, but these tests are only used to quantify cirrhosis. Use of predictive indices uses laboratory markers to predict the state of hepatic fibrosis.

   (3) Elastography methods (using either ultrasound or MRI) may be critical in determining the fibrosis stage. Imaging studies may also identify cirrhosis, and not require further staging. [2]

[2] A recent review of the use of liver imaging and biopsy in clinical practice (Use of Liver Imaging and Biopsy in Clinical Practice; Tapper EB and S.-F. Lok, NEJM 377:8:756-768) indicates that present non-invasive elastography modalities have been shown to be reliable in detecting advanced hepatic fibrosis, are cheaper, easily repeated for serial monitoring, and thus long-term outcomes may be accurately predicted.

(4) A liver biopsy is no longer required unless otherwise clinically indicated.

(5) Abdominal imaging studies such as ultrasound or CT scan may identify findings consistent with or suggestive of cirrhosis, portal hypertension or hepatocellular carcinoma (HCC).

CTP calculators are available at: http://www.hepatitisc.uw.edu/page/clinical-calculators/ctp

(c) Screening for other conditions: There should be screening for the Hepatitis A antibody (HAV-Ab), and the Hepatitis B surface antigen (HBsAg), unless these were already known from a prior Hepatitis Panel, and also testing for the HIV antibody (HIV- Ab). If risky behavior occurred after previously negative testing, repeat the testing. An anti-nuclear antibody (ANA) and ferritin should be ordered as screening for auto-immune hepatitis and hepatic iron overload.

(d) Counseling: Patients should be counseled regarding the progression of cHCV, the staging of treatment with direct acting antiviral medication (DAAs), other potential treatment options, the availability of peer-to-peer counseling, and specific measures to prevent transmitting HCV infection to others.

I. PRIORITIZATION FOR TREATMENT WITH DAAs

1. Although many patients with chronic HCV infection may benefit from treatment with direct-acting antiviral medication (DAAs), certain cases are at higher risk for complications or disease progression and require more urgent consideration.

2. Eligibility for DAA treatment should be established via concordance between laboratory, imaging (abdominal ultrasound, and elastography if available), and predictive scoring (proprietary indices). Resource challenged systems may use the combination of proprietary indices and abdominal ultrasound to assess for the presence of F2-F4 hepatic fibrosis.

3. Within the eligible group of patients, the following priority criteria have been established to ensure that those with the greatest need are treated first.

(a) PRIORITY LEVEL 1 - Highest Priority for Evaluation and Treatment
The following individuals should receive DAA treatment within 0-6 months (subject to paragraph K, below):

(1) Fibrosis Stage 4, decompensated cirrhosis, including both symptomatic patients (e.g., with ascites, hepatic encephalopathy, esophageal varices, etc.) and asymptomatic patients with CTP scores greater than or equal to 7.

(2) Fibrosis Stage 4, compensated cirrhosis, with CTP scores greater than 5 and less than 7.

(3) Liver transplant candidates or recipients in consultation with and co-managed by a transplant hepatologist.

(4) Hepatocellular carcinoma in consultation with a hepatologist for correct timing.

(5) Comorbid medical conditions associated with HCV, including cryoglobulinemia with renal disease or vasculitis, certain types of lymphomas, hematologic malignancies or metabolic abnormalities.

(6) Continuity of care for those entering custody already on treatment.

(7) Patients taking immunosuppressant medications for a comorbid medical condition which may cause rapid progression of hepatic fibrosis.

(8) HIV co-infection.

(9) HBV co-infection.

(b) PRIORITY LEVEL 2 - Intermediate Priority for Evaluation and Treatment
The following individuals should receive DAA treatment within 12 months (subject to paragraph J, below):

(1) Fibrosis stage 3 (F3)

(2) Fibrosis stage 2 (F2).

(3) Comorbid liver disease (e.g., autoimmune hepatitis, hemochromatosis, steatohepatitis).

(4) Chronic Kidney Disease with proteinuria.

(5) Diabetes Mellitus.

(6) Patients previously staged as F0, but who advanced in staging to F1 within 1-4 years are considered to have progressive hepatic fibrosis, and should be treated in this priority group.

(c) PRIORITY LEVEL 3 – Active Monitoring for DAA Treatment
The following individuals should be monitored regularly with labs and proprietary predictive indices for re-staging at least annually into a higher priority level:

(1) Fibrosis stage 1 (F1).

(2) Fibrosis stage 0 (F0).

J. OTHER CRITERIA TO BE CONSIDERED BEFORE TREATMENT WITH DIRECT-ACTING ANTIVIRAL MEDICATION

1. In addition to meeting the above criteria for Priority Level 1 and Priority Level 2, patients being considered for treatment of cHCV infection should 1) have no contraindications to, or significant drug interactions with, any component of the treatment regimen, 2) have sufficient time remaining on their sentence in the Department of Corrections to complete pre-treatment evaluation, a course of treatment, and post treatment SVR assessment at 8-24 weeks, in order for patient education and system efficiencies to be evaluated (generally, this requires approximately 12-18 months), 3) have a life expectancy sufficient to achieve benefit from HCV viral eradication, and 4) demonstrate willingness and an ability to adhere to a rigorous treatment regimen and to abstain from high risk behaviors while incarcerated.

2. A cHCV patient's attitude, functional ability to thrive within the system, and optimal treatment of mental health issues are critical for good outcomes. Patients who have chronic disciplinary issues within the system have very high substance abuse relapse rates upon release, with newer evidence indicating higher re-infection rates. Patients should be counseled and observed on a case-by-case basis, and involvement of mental health professionals is critical. It is also critical to remember that patients who have chronic behavioral management issues, common in jails/prisons, are rarely able to establish and maintain a therapeutic provider-patient relationship which results in completion of treatment and an SVR.

3. Patients who are Priority Level 1 or Priority Level 2, but who (1) are unable to demonstrate a willingness and an ability to adhere to a rigorous treatment regimen, (2) do not abstain from high risk behaviors while incarcerated, (3) have chronic disciplinary issues, or (4) have chronic behavioral management issues may not be eligible for treatment until those issues are considered to be resolved. A patient should be willing to participate in any available counseling or treatment in order to achieve the sobriety/behavior change before treatment with DAAs is initiated.

K. RECOMMENDED TREATMENT REGIMENS

1. Recommendations for HCV treatment regimens continue to evolve, and are changing rapidly as new agents become available and as evidence of the most effective ways to utilize the DAAs accumulates. Usually 8-12 week regimens are preferred due to improved adherence, lower toxicity, and cost-effectiveness.

2. The AASLD/IDSA/IAS[3] website, which is found at hcvguidelines.org, presents reliable summaries of drug treatment data and should be used to direct most treatment.

3. Expert consultation is required in patients eligible for liver transplantation.

4. Treatment of chronic HCV during pregnancy is presently not recommended due to the lack of safety data.

L. TREATMENT FAILURE FOLLOWING DAA TREATMENT

1. Treatment failure is defined as a detectable HCV-VL 12 weeks following completion of therapy.

2. If the HCV-VL is <50 copies/ml or in the "non-quantifiable" range then the test should be repeated in 4 weeks as this situation usually represents lab error or very slow clearance of virus; the repeat testing will usually be "not detected."

3. In the case of true failure, the medical record should be reviewed for non-adherence, system failure in drug dispensing (e.g., omissions in directly observed therapy, not providing refills on time, etc.), possible drug-drug interactions, and the patient should be interviewed for illicit drug use and the ingestion of other acid-lowering medications or supplements.

4. If no interfering risk factors are identified, the possibility of viral mutation causing drug resistance (Resistance-Associated Substitutions) should be considered.

5. Further resistance testing and a secondary treatment regimen should be selected according to the principle and treatment recommendations contained in hcvguidelines.org.

M. TREATMENT MONITORING

1. The patient will have an outpatient clinic visit at 2-4 weeks after starting therapy in order to establish adherence to the prescribed regimen, and assess for side effects and the need for treatment modification. DAA regimens usually do not require routine lab monitoring, unless clinical symptoms of increased fatigue or other side effects occur.

2. A CBC and comprehensive metabolic panel (CMP) equivalent may be drawn at 4 weeks to rule out transaminase elevation due to autoimmune hepatitis or HBV reactivation. The CMP may also be used to reassure the patient that there is evidence of efficacy and encourage further adherence and program compliance.

---

[3] AASLD (American Association for the Study of Liver Diseases); IDSA (Infectious Diseases Society of America); IAS (International Aids Society)

3. Progressive increases in the ALT may require more frequent monitoring or early discontinuation.

4. For regimens containing RIBAVIRIN: a CBC and CMP should also be drawn 2 weeks after starting therapy, then at 4 weeks, then monthly or more frequently as clinically indicated. A Ribavirin dosage adjustment may be required. Mild (1-3x upper limit of normal) elevation of the total bilirubin may be expected as a consequence of Ribavirin-induced oxidative stress and RBC Lysis. Pregnancy testing is required prior to treatment with ribavirin-containing regimen, and thereafter as risk behavior for pregnancy occurs.

N. POST-TREATMENT MONITORING

1. A post-treatment quantitative HCV-VL assessment will be drawn at 12 weeks after completion of treatment; and if HCV is undetectable, that defines a sustained viral response (SVR).

2. A patient who sustains SVR may be removed from the Gastrointestinal Clinic (GC), so long as the patient has no cirrhosis, complications, or related comorbidities.

O. OTHER HEALTH CARE INTERVENTION RECOMMENDED FOR CIRRHOSIS

1. All patients with cirrhosis shall have additional consultative co-management as follows:

   (a) At first identification of a F4 diagnosis the Platelet/Spleen diameter ratio shall be computed (example: 112,000/131 (mm) = 855). All patients with values <905 shall be referred for EGD for diagnosis of esophageal varices. If varices are present, non-selective beta-blockers to prevent variceal bleeding shall be initiated. Alternatively, some selected patients may require banding of varices; however, beta-blocker prophylaxis is preferred and recommended in accordance with AASLD recommendations.

   (b) Patients with decompensated cirrhosis shall be co-managed by a gastroenterologist or hepatologist. Decisions for co-management including ongoing variceal surveillance, antibiotic prophylaxis if risk factors are present for spontaneous bacterial peritonitis, optimized diuretic therapy for ascites, and optimized therapy for hepatic encephalopathy shall be addressed during the consultation.

2. In general, NSAIDs should be avoided in advanced liver disease/cirrhosis and METFORMIN should be avoided in decompensated cirrhosis. Other resources should be consulted for more specific recommendations related to management of cirrhosis.

P. REFERRAL FOR LIVER TRANSPLANTS FOR PATIENTS WITH DECOMPENSATED CIRRHOSIS

A determination of the UNOS MELD score will be made for all patients with decompensated cirrhosis. If the score meets the listing/eligibility criteria maintained by the liver transplant centers in Florida, the patient will be referred to the transplant center. Thereafter, co-management as directed by the transplant center will be instituted if the patient is listed for transplant.

Q. HCV TREATMENT APPROVAL PROCESS

Treatment of all genotypes will be coordinated through the Regional Medical Director and if applicable, the Hepatitis C Program Director in order to determine site and mode of therapy. Patients previously unsuccessfully treated may be considered for treatment on a case by case basis.

R. REQUIRED DOCUMENTATION AND DATA ENTRY

In accordance with HSB 15.03.05 Appendix #8, patients with chronic liver disease should be enrolled in Gastrointestinal Clinic (GC) with baseline information completed prior to start of treatment using DC4-770GG-Gastrointestinal Baseline History and Procedures.

Documentation of evaluation of treatment should be entered on form DC4-701F (*Chronic Illness Clinic*). The encounter should be entered in the OFFENDER-BASED INFORMATION SYSTEM (OBIS) as a GC appointment using the appropriate diagnosis code as shown below.

1. GH08 – Front Page. Add the following codes as determined:

   (a) **For Acute hepatitis C** - use ICD-10-CM Diagnosis Code **B17.1**
   (Note: Per Section E.1. above, if viremia persists at 6 months after the date of first diagnosis, continue to monitor and manage the case as a chronic infection. This requires a change in OBIS code in accordance with R.1.b. If viremia does not persist at 6 months, remove code B17.1, but continue to monitor for other health issues.)

   (b) **For Chronic viral hepatitis C** – use ICD-10-CM Diagnosis Code **B18.2**

2. GH08 – back page. Add the following action codes on the GH08 Back page (contact screen):

   (a) **DAA** = HepC Tx Started
      1. Enter start date – Required Field
   (b) **DAAx** = HepC Tx Discontinued

1. Enter end date – Required Field **AND**
2. Requires remarks (i.e., 12 weeks completed; inmate non-compliant, inmate refused, etc.)

(c) **SVR** = Sustained Virologic Response Achieved

1. Enter date – Required Field

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.

MARIA VIDAL,
as the Personal Representative
of the ESTATE OF ANTHONY VIDAL,
on behalf of the Estate, and his Survivors,

Plaintiff,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
an Agency of the State of Florida,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff, Maria Vidal, as Personal Representative of the Estate of Anthony Vidal and on behalf his Estate and his survivors, sues Defendant, Florida Department of Corrections (FDC), an Agency of the State of Florida, and alleges:

Preliminary Statement

1. This is an action for wrongful death. On March 11, 2016, Anthony Vidal was brutally killed by Tarrin Blue, a prisoner at Dade Correctional Institution (Dade CI).

2. Defendant's employees and agents negligently failed to properly classify, house, and supervise Anthony and come to his aid, and failed to protect Anthony from harm. The audio

monitors in his unit had been turned off, so guards couldn't hear his screams for help and other prisoners yelling for them to intervene.

3. In fact, Defendant's employees and agents negligently placed Blue in the same cell as Anthony despite knowing that Blue was mentally ill, had a propensity for violence, was a dangerous and violent prisoner, and had beaten other prisoners without provocation.

4. This was not the first instance of a prisoner death at Dade CI. Including Anthony, thirteen (13) prisoners died at Dade CI in 2016.

5. The Defendant has kept Dade CI dangerously understaffed leading to preventable deaths. At the time Anthony was murdered, Dade CI was operating under a federal court settlement agreement based on its failure to properly house and treat mentally ill inmates such as Tarrin Blue. *See Disability Rights of Florida, Inc. v. Julie Jones, Secretary of the Florida Department of Corrections, et al.*, 14-cv-23323 (S.D. Fla. 2018).

6. Plaintiff Maria Vidal, Anthony's mother and the Personal Representative of his Estate, seeks damages arising from Defendant's negligence and failure to protect Anthony from harm in total disregard for his life.

Jurisdiction and Venue

7. This is an action for damages in excess of fifteen thousand dollars ($15,000.00), exclusive of interest, costs, attorneys' fees, and declaratory relief.

8. This Court has jurisdiction over the state law claims raised, pursuant to Article V, section 5(b) of the Florida Constitution.

9. Plaintiff has complied with all applicable pre-suit notice provisions of Section 768.28, Florida Statutes.

10. Venue is proper in Miami-Dade County pursuant to Section 47.011, Florida Statutes. At all times material to this action, Anthony Vidal was a prisoner confined in Dade Correctional Institution, Homestead, Florida, a correctional facility owned and operated by Defendant FDC, and was a resident of Miami-Dade County, Florida. Plaintiff is also a resident of Miami-Dade County.

Parties

11. Plaintiff, Maria Vidal, is the duly appointed Personal Representative of the Estate of Anthony Vidal, having been appointed Personal Representative by the Probate Division of the Circuit Court in and for Miami-Dade County, Florida, File No. 64819123. This action is brought by Maria Vidal, the mother of Anthony Vidal, in her capacity as Personal Representative of the Estate of Anthony Vidal and on behalf of his survivors.

12. Defendant FDC is an Agency of the State of Florida, subject to a suit for wrongful death pursuant to the Wrongful Death Act, Fla. Stat, §§ 768.16–786.27. The FDC has a responsibility to ensure that all inmates are properly and safely classified and housed. The FDC is charged by law with the responsibility to maintain all its facilities, including Dade CI, in a safe and secure manner which complies with the applicable rules and regulations of the FDC and proper correctional practices.

13. At all times material to this action, Anthony Vidal was a prisoner subject to the custody and control of Defendant FDC.

14. At all times material to this action, the guards and medical staff charged with Anthony's care were duly appointed, qualified, and acting officers, employees, and/or agents of the FDC or its contractors, employed by the FDC or its contractors, and acting within the course or scope of their employment and/or agency.

Factual Allegations

15. On the morning of March 11, 2016, Anthony was brutally attacked and murdered by Tarrin Blue, a prisoner at Dade CI.

16. Blue struck Anthony on his head, neck and chest, fractured his rib, lacerated his spleen, and choked him.

17. During this brutal assault, which lasted for several minutes, Anthony repeatedly cried out for help to no avail.

18. Other prisoners who heard the attack and Anthony's cries for assistance also screamed for guards to intervene.

19. But for nearly ten minutes, no guards came.

20. This was because, inexplicably, the audio monitors in Anthony's unit were turned off so that the guards could not hear Anthony's cries for help.

21. Eventually, a guard came to Anthony's cell front during a routine security check and finally noticed something was wrong.

22. However, by the time Dade CI guards and medical staff entered Anthony's cell, a full twenty (20) minutes after the attack had begun, he was unresponsive and not breathing.

23. Anthony was pronounced dead at 7:55 a.m.

24. His cause of death was later determined to be due to asphyxiation.

25. Just days before the attack, one or more Dade CI guards negligently placed Blue in Anthony's cell despite there being other single cells available for Blue and full well knowing that Blue was violent and mentally ill.

26. In fact, on information and belief, Tarrin Blue was mentally ill, and had negligently been housed in Administrative Confinement at Dade CI when he should have instead been single celled and housed in an appropriate setting for the confinement of mentally ill inmates.

27. This negligent failure to properly house Blue is evidenced by the fact that immediately after killing Anthony, Defendant FDC housed him in a single cell in the Mental Health Unit at Dade CI. Had Defendant FDC properly housed Blue, Anthony Vidal would be alive today.

28. Moreover, these guards and the FDC knew that Blue had a propensity for violence and was a dangerous and violent prisoner.

29. Just one month prior, Blue had viciously assaulted another prisoner after being placed in a cell with the victim and the attack occurred in the presence of a guard. Nonetheless, FDC guards negligently placed Blue in a locked cell with Anthony for hours and then negligently failed to come to Anthony's aid or otherwise intervene during Blue's attack.

30. But for the negligent actions of the employees and officers at Dade CI, Anthony would be alive today.

31. And Anthony's death was not an isolated incident at Dade CI.

32. Dade CI is one of the most violent prisons in the State of Florida.

33. Defendant FDC's inability to properly house and treat mentally ill inmates at Dade CI was the subject of a settlement agreement in a federal lawsuit. *See Disability Rights of Florida, Inc. v. Julie Jones, Secretary of the Florida Department of Corrections, et al.*, 14-cv-23323 (S.D. Fla. 2018).

34. Thirteen (13) prisoners died at Dade CI in 2016, which was nearly twice as many deaths as any other Florida prison, except for prison hospitals that serve the sick and elderly.

35. Then in 2017, twelve (12) prisoners died at Dade CI.

36. And now in 2018, at least three (3) prisoners have already died at Dade.

37. Defendant FDC has admitted to Florida's legislature in budget requests that understaffing and hiring inexperienced guards has contributed to an increase of violence in Florida's prisons.

38. The Secretary of the Department of Corrections said, "we are working [corrections officers] to death because of the vacancy rate. I don't have time to train them."

39. But FDC salaries are too low to retain experienced guards, particularly in the expensive South Florida region, where Dade CI is located.

40. Compounding this problem, Dade CI is also dangerously understaffed.

41. Defendant FDC's facilities are so chronically understaffed that one independent audit found that an emergency should be declared to keep guards and prisoners safe.

42. Another study ordered by the State legislature found that Florida's prisons are so understaffed that the FDC can only, at best, maintain minimal coverage of critical security and operational functions.

43. This study also ordered by the State found that there was a "a significant lack of experienced staff in the facilities and supervisory staff who . . . were spread too thin."

44. Yet, FDC's prisons, including Dade CI, are still understaffed, no state of emergency has been declared, and deaths in prison have continued to rise for several years.

45. Defendant FDC's negligent understaffing and hiring of inexperienced guards has led to preventable deaths like Anthony's.

Claim for Negligence and Wrongful Death

46. This wrongful death lawsuit is against Defendant FDC for the negligent classification, housing and treatment of Anthony Vidal, and failing to protect Anthony from harm, while incarcerated at Dade CI resulting in his death in violation of Florida's Wrongful Death Act, Fla. Stat. §§ 768.16-768.27.

47. The negligent acts of Defendant FDC's agents and employees were done while acting within the course and scope of their employ and/or agency with Defendant FDC. Thus, Defendant FDC is vicariously liable for the actions of its agents and employees when they committed the negligent acts alleged herein.

48. Defendant FDC owed Anthony a non-delegable duty to use reasonable care to ensure that Anthony was properly classified and housed for his safety and well-being.

49. Defendant FDC failed to perform its duty to use reasonable care to ensure that Anthony was properly classified and housed for his safety and well-being, thereby abandoning Anthony.

50. The carelessness and negligence of the FDC and its employees and agents, as set forth above, were the direct and proximate cause of the serious personal injuries sustained by Anthony and directly and proximately resulted in his death.

WHEREFORE, as a result of the tragic and untimely death of Anthony Vidal in violation of Florida's Wrongful Death Act, the Survivors of and the Estate of Anthony Vidal seek all possible damages under state law, including the following:

A. Maria Vidal, as the mother of Anthony Vidal, has sustained the following damages:

1. Loss of support and services of her son;

2. Mental pain and suffering from date of injury; and

B. The Estate of Anthony Vidal has sustained the following damages:

1. Loss of earnings of Anthony Vidal from the date of his death, less loss support of her survivors excluding contributions in kind with interest.

2. Loss of perspective net estate accumulations;

3. Funeral and burial expenses incurred as a result of the death of Anthony Vidal that have become a charge against her estate or that were paid on her behalf; and

C. Each and every other Survivor has sustained the following damages:

1. Loss of support and services of their family member; and

2. Mental pain and suffering from the date of injury and continuing for the remainder of their life.

Jury Trial Demand

Plaintiff demands trial by jury.

Respectfully submitted,

Randall C. Berg, Jr., Esq.
Florida Bar No. 318371
rberg@floridajusticeinstitute.org
Dante P. Trevisani, Esq.
Florida Bar No. 72912
dtrevisani@floridajusticeinstitute.org
Erica A. Selig, Esq.
Florida Bar No. 0120581
Eselig@floridajusticeinstitute.org
Ray Taseff, Esq.
Fla. Bar No. 352500
rtaseff@floridajusticeinstitute.org

FLORIDA JUSTICE INSTITUTE, INC.
3750 Miami Tower

100 S.E. Second Street
Miami, Florida 33131-2309
Phone 305.358.2081
Fax 305.358.0910

Attorneys for Plaintiff

By: _/s/ Randall C. Berg, Jr._
Randall C. Berg, Jr., Esq.

FDC withdraws proposed rule to cut prison visitation hours

By Capitol News Service | Posted: Tue 4:05 PM, Jul 24, 2018 | Updated: Wed 10:52 AM, Jul 25, 2018

By: Capitol News Service
July 24, 2018

TALLAHASSEE, Fla. (CNS) -- Prison reform groups are celebrating a victory after a proposed rule to cut visitation hours in Florida prisons was withdrawn after extensive public outcry.

The Florida Department of Corrections had been trying to cut prison visitation hours since February. The department was met with outrage from families of those behind bars.

“I have done nothing wrong, but be a mother,” said Jodi Chambers during a public hearing in May. "Let me be a mother to my son and let these people... Look at them! Every one of them wants what I want!”

The Legislature’s Joint Administrative Procedures Committee ordered FDC to start over because the rule process took longer than the 90 days allowed by law.

Lakey Love with the Campaign for Prison Reform says it’s major victory for families of inmates.

“Humans are family-oriented people, which means that they will find a family if they're not given access to their own family and what a family behind bars is, is a gang,” said Love.

The Department of Corrections denies the assertion that public testimony was responsible for the rule being withdrawn, saying in a statement, “Public testimony did not delay the rule’s implementation. We welcome further comments as we move forward with implementing the new draft.”

Barney Bishop with the Florida Smart Justice Alliance says he believes the push to reduce visitation is a result of

staffing shortages at FDC.

“Without having enough staff, you can't do these visitations and some of the other things they need to do on a basis that makes it safe,” said Bishop.

The FDC says it plans to re-submit the rule, but with election day less than four months away, prison reform advocates say it’s likely dead on arrival.

“Once November comes, all of this will be out of play anyway because we'll have a new governor and we can hold it over their head,” said Love.

The Campaign for Prison Reform says it’s currently working on Legislative initiatives to increase prison visitation hours. The group hopes to announce their ideas next month.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLASSEE DIVISION

LORINE GAINES, as Personal Representative of the Estate and Mother of VINCENT GAINES, Plaintiff, v. JULIE JONES, in her official and individual capacities; KEVIN D. JORDAN, individually; CORIZON HEALTH, INC.; and DOES 1-20, in their individual capacities. Defendants.	Civil Division Case No. **JURY TRIAL DEMANDED**

COMPLAINT FOR DAMAGES

Plaintiff LORINE GAINES, as Personal Representative of the Estate and Mother of VINCENT GAINES (Decedent), brings this civil rights, statutory, and simple negligence action to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to the Decedent by the Civil Rights Act, provisions of the Eighth and Fourteenth Amendments to the United States Constitution, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. Mr. Gaines was denied and deprived entirely of adequate nutrition and treatment for his basic and serious mental health and medical needs during a critical period, which resulted in his malnutrition, starvation, and death.

JURISDICTION AND VENUE

1. This Court has jurisdiction over Plaintiff's civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343, which prescribe the authority of the Federal District Courts to exercise jurisdiction over claims arising under the United States Constitution, laws, or treaties of the United States, and to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution of the United States.

2. Accordingly, this Court has subject matter jurisdiction over Plaintiff's claims under the Eighth and Fourteenth Amendments to the Constitution of the United States and under the Americans with Disabilities Act, 42 U.S.C. § 12102 *et seq.* and the Rehabilitation Act, 29 U.S.C. § 701 *et seq*.

3. Venue is proper in the United States District Court for the Northern District of Florida under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred within this district, as set forth below.

4. All conditions precedent to the filing of this action have occurred, been performed, or have been waived.

PARTIES

5. Plaintiff, Lorine Gaines, is the mother of Decedent, Vincent Gaines, and is an adult resident of Florida. She is the Personal Representative acting on behalf of the Estate of Vincent Gaines, as well as the survivor of the Decedent as Mr. Gaines' mother.

6. Defendant Julie Jones is the Secretary of the Florida Department of

Corrections ("FDOC"), the state agency that manages correctional facilities in the State of Florida. The Florida Department of Corrections ("FDOC") is the third largest state prison system in the country with a budget of $2.4 billion, approximately 96,000 inmates incarcerated, and nearly 167,000 offenders on active community supervision. FDOC has nearly 22,000 employees and is an agency under the purview of the Executive Office of the Governor.[1] In addition, FDOC receives federal financial assistance and is covered by the Rehabilitation Act. FDOC is a public entity within the meaning of Title II of the ADA. Defendant Jones is has ultimate responsibility for the promulgation and implementation of FDOC policies, procedures, and practices and for the management of FDOC. As an incarcerated individual, Mr. Gaines was under the custody and control of FDOC. At all material times hereto, Defendant Jones was an employee or agent of FDOC and at the relevant times described in this Complaint, was acting within the scope and course of her employment and was acting under color of state law. Defendant Jones is sued in her official and individual capacities.

7. Defendant Kevin D. Jordan is an adult resident of the State of Florida, who at all times material hereto worked for FDOC and was charged with implementing, enforcing and following laws, rules, regulations, and policies and providing access to

[1] *See* "About the Florida Department of Corrections", http://www.dc.state.fl.us/about.html (last accessed: Jul. 11, 2018).

mental health and medical care for prisoners in the custody of FDOC. At all relevant times, Defendant Jordan was the Warden of Union Correctional Institution (UCI), where Mr. Gaines was housed immediately prior to his death, and was responsible for all policies, procedures, and training regarding the mental health and medical treatment of prisoners in that facility. At all times relevant hereto, Defendant Jordan acted under color of law and within the scope of employment. He is sued individually.

8. Defendant Corizon Health, Inc. ("Corizon") is a Tennessee Corporation registered in the state of Florida that contracted with correctional institutions, including FDOC, to provide medical care to prisoners. At all times material hereto, it was acting under color of law and was responsible for the promulgation and enforcement of rules, regulations, policies, and practices regarding the access to and administration of mental health and medical treatment to prisoners in the custody of FDOC. Corizon was responsible for ensuring that prisoners were not denied mental health and medical treatment and received such treatment in a timely and adequate manner. Defendant Corizon was also responsible for the employment, qualifications, training, supervision, and conduct of its employees and agents. Additionally, Corizon's employees and agents directly oversaw Mr. Gaines' initial mental health and medical intake following his sentencing and remand into the custody of FDOC, as well as his subsequent treatment and his treatment classifications between various FDOC facilities and within the housing units of each FDOC facility. Corizon is therefore both directly and vicariously liable under a

theory of *respondeat superior* for the actions of its employees, implied agents, agents, and Defendants in this action.

9. The true names and identities of Defendants DOES 1 through 20 are presently unknown to Plaintiff. Each of Defendants DOES 1 through 20 are or were employed by and are or were agents of FDOC and/or Corizon when some or all of the events in this Complaint took place. Each of Defendants DOES 1 through 20 were personally involved in the provision of nutrition, mental health, and/or medical services to prisoners in FDOC custody. Plaintiff will seek to amend this Complaint as soon as the true names and identities of Defendants DOES 1 through 20 have been ascertained.

FACTUAL ALLEGATIONS[2]

10. On or about June 4, 2013, Mr. Gaines pled guilty in the Fifteenth Judicial Circuit, Palm Beach County, to violation of Fla. Stat. § 810(1)(3) (Burglary of a Dwelling). He was sentenced to 60 months imprisonment with credit for three hundred and thirty-one (331) days served. At the sentencing hearing, the Court recommended that Mr. Gaines be housed close to his family in Palm Beach County, and that he be placed in a mental health program. Mr. Gaines was remanded into the custody of FDOC to begin serving his sentence.

---

[2] The following facts were obtained from the custodial and medical records maintained by FDOC and Corizon.

11. On or about June 24, 2013, Mr. Gaines was received into the custody of FDOC at the South Florida Reception Center ("SFRC"). At the inception of his prison term, he weighed approximately 190 pounds with a height of 5 feet 9 inches, for a Body Mass Index (BMI) of 28.1. This BMI is considered overweight by the National Institutes of Health.[3] Under the Custody Assessment and Reclassification System, Mr. Gaines was classified for Close Custody[4] and was assigned to South Bay Correctional Facility ("SBCF").

12. On or about October 9, 2013, mental health staff at SBCF conducted a biopsychosocial assessment of Mr. Gaines. Staff noted his history of auditory hallucinations, which had twice led to his being involuntarily held for several months under Florida's Mental Health Act (commonly referred to as the "Baker Act"). In addition, mental health staff at SBCF diagnosed him under the Diagnostic and Statistical Manual of Mental Health Disorders (DSM) as follows:

> AXIS I: 296.44 Bipolar Disorder, mania, with psychotic features
> AXIS II: 317.00 Mild Mental Retardation
> AXIS Ill: None
> AXIS IV: Incarceration
> AXIS V: GAF= 65 (current).

---

[3] Indeed, the FDOC Admission Summary for Mr. Gaines described his build as "Stocky."
[4] "Close custody refers to that class of inmates who must be maintained within an armed perimeter or under direct, armed supervision when outside of a secure perimeter." Fla. Dep't of Corr., *Inmate Orientation Handbook: Reception Center Processing*, available at www.dc.state.fl.us/pub/files/Inmate%20Orientation%20Handbook.pdf.

13. On or about March 21, 2014, Mr. Gaines was transferred from SBCF to Dade Correctional Institution ("DCI") with a provisional diagnosis under the DSM for Axis I Bipolar Disorder and Mania and Axis II Borderline Intellectual Functioning.[5] Prison staff processed the transfer as an emergency referral because Mr. Gaines was exhibiting mood swings, auditory hallucinations, paranoia, disorganized thinking, and was talking to himself. In addition, he was non-complaint with his medications, only taking them sporadically. Prison staff also noted that at this time, Mr. Gaines was at risk for exploitation, and staff further noted Mr. Gaines' two prior hospitalizations under the Baker Act for a period of 6 months due to psychosis. On March 27, 2014, Mr. Gaines was admitted to the Transitional Care Unit at DCI with a diagnosis of bipolar disorder and psychosis.

14. On or about November 10, 2014, Mr. Gaines continued to experience auditory hallucinations and delusions, and was urinating and defecating on the floor of his cell. He refused medication and treatment. According to mental health staff at the facility, he did not exhibit any suicidal ideations.

15. On or about November 12, 2014, due to his worsening mental condition, Mr. Gaines was transferred to the Crisis Stabilization Unit of the SFRC under doctor's orders

---

[5] Historically referred to as mental retardation.

that he:

a. Be placed on suicide watch with checks every 15 minutes;

b. Be provided with a suicide mattress, wrap, and blanket;

c. Not be permitted any reading materials; and

d. Be fed a boneless diet in a Styrofoam tray, without utensils.

16. Mr. Gaines continued to refuse medication and treatment. At this time, he reported sleeping only 2 to 3 hours a night. On November 12, 2014, his weight was recorded by mental health staff as 151 pounds.[6] He denied having any suicidal ideations to medical staff at the SFRC.

17. On or about April 16, 2015, a disciplinary report was prepared against Mr. Gaines for Failure to Follow a Verbal or Written Order after he allegedly became belligerent when being reprimanded by a correctional officer for attempting to enter the food service area without permission.

18. Sometime after this disciplinary incident, Mr. Gaines was transferred from the SFRC to Florida State Prison ("FSP"), almost 400 miles away from the SFRC and over 300 miles away from all of his family, who live in West Palm Beach, Florida.

19. Shortly after, Mr. Gaines was yet again transferred a short distance to Union

---

[6] At that point, since his admission into FDOC custody approximately 16 months earlier, Mr. Gaines had lost 39 pounds.

Correctional Institution ("UCI") in Raiford, Florida, which was still hundreds of miles away from his family.

20. On or about May15, 2015, as a result of his mental illness and deteriorating mental condition, Mr. Gaines was placed in Close Management (CM) status at UCI.[7]

21. On or about August 24, 2015, mental health staff at UCI requested that Mr. Gaines be transferred for inpatient treatment from UCI's Transitional Care Unit to the Crisis Stabilization Unit. Staff reported that Mr. Gaines had "been in [the Transitional Care Unit] for a few months and has consistently had difficulty…" and that while he was cooperative with staff and security, he "has been observed smearing feces on his floor."

22. Nevertheless, on or about September 29, 2015, only a month later, mental health staff at UCI requested that Mr. Gaines be transferred for inpatient treatment from UCI's Crisis Stabilization Unit to the Transitional Care Unit. At that time, staff indicated that Mr. Gaines no longer demonstrated psychosis or bizarre behavior, and that he "has achieved a level of stability than can be addressed in Transitional Care Unit."

23. On or about December 1, 2015, Annette Eccles, a Registered Clinical Social

---

[7] According to FDOC, "CM refers to the confinement of an inmate apart from the general population, for reasons of security or the order and effective management of the institution, where the inmate through his/her own behavior has demonstrated an inability to live in the general population without abusing the rights and privileges of others." Fla. Dep't of Corr., "Impact of the 'Rethinking Personal Choice Program: September 2002'" available at http://www.dc.state.fl.us/pub/RPChoice/intro.html.

Worker Intern employed by Corizon who was involved in Mr. Gaines' mental health treatment at UCI, reported the following of Mr. Gaines:

> Inmate was alert, standing at cell door looking through the window Inmate's cell was clean and organized; Inmate was alert, calm and cooperative and his speech was appropriate
>
> Appearance: clean, appropriate and neat; Condition of cell was clean

24. On or about December 2, 2015, Bih Tambi, M.D., a psychiatrist employed by Corizon who was involved in Mr. Gaines' psychiatric and/or medical treatment at UCI, noted that per laboratory results from two months earlier, Mr. Gaines' prescription for Tegretol was discontinued due to hyponatremia, and that he was not on an alternate psychotropic medication to replace the Tegretol.[8] FDOC was aware that Mr. Gaines had been prescribed Tegretol prior to his incarceration at a mental health center in West Palm Beach. In addition, Mr. Gaines was prescribed Tegretol while he was in FDOC custody since at least 2013.

25. At or around 12:30 PM on the afternoon of December 3, 2015, correctional officers served Mr. Gaines lunch. When the officers returned to his cell a short time later, they noticed that Mr. Gaines had not moved and had not eaten any of his food. The officers

---

[8] Hyponatremia is a condition that occurs when the level of sodium in the blood is too low. It is a common side effect of taking Tegretol, which is often prescribed to control acute mania associated with manic depressive disorder, also known as bipolar disorder.

contacted the prison nurse who advised the officers to enter Mr. Gaines' cell.

26. At around 1:26 PM, correctional officers entered Mr. Gaines' cell and found him unresponsive. Cardiopulmonary resuscitation (CPR) was started and Mr. Gaines was transported to UCI's Urgent Care Center. Mr. Gaines was not able to be revived and was pronounced dead at 2:48 PM on December 3, 2015.

27. On December 4, 2015, an autopsy was performed on Mr. Gaines where the Medical Examiner made the below findings:

> 1. MALNUTRITION (HEIGHT 69 INCHES, WEIGHT 115 POUNDS)[9]
>
> 2. GENERALIZED UNWASHED APPEARANCE AND PROBABLE FECES ON SOLES OF FEET
>
> 3. CORONARY ARTERY ATHEROSCLEROSIS, MILD TO MODERATE
>
> 4. HEAVY LUNGS (1865g) WITH MARKED CONGESTION AND EDEMA
>
> 5. MINOR SKIN INJURIES OF VARIABLE AGE INVOLVING ANTERIOR AND POSTERIOR TRUNK AND EXTREMITIES
>
> 6. KING TL TUBE PLACEMENT IN TRACHEAL LUMEN
>
> 7. NEGATIVE TOXICOLOGY (SEE UF PATHLABS FORENSIC

[9] In the year between his transfer from the SFRC in November 2014 and his placement at UCI at the time of his death in December 2015, Mr. Gaines lost 36 pounds; he lost a total of 75 pounds during the approximately two and a half years he was in the custody of FDOC. At the time of his death, Mr. Gaines' BMI was 17.0 – well under the 18.5 minimum considered "underweight" by the National Institutes of Health.

TOXICOLOGY REPORT Rl 5-02466)

PROBABLE CAUSE OF DEATH: UNDETERMINED

(Emphasis in original autopsy report). Additionally, the Medical Examiner noted that while the paramedic on scene had attributed the difficulty in using the King L-T tube on Mr. Gaines during resuscitation efforts to trismus,[10] the Examiner indicated that "[i]n my opinion the 'trismus' was actually rigor mortis of jaw muscles in a dead patient."

28. Following Mr. Gaines' death, Defendants did not timely inform Plaintiff. As a result, Mr. Gaines was not released to his family; the Decedent was buried by FDOC on FDOC property against the wishes and without the consent of Plaintiff.

[10] Trismus is the medical name for "lock-jaw", a condition that causes muscles in the jaw to spasm due to various reasons, including neurological conditions, inflammation, or disease.

COUNT I

VIOLATION OF 42 U.S.C. § 1983 AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

(Against all Defendants)

29. Plaintiff hereby incorporates by reference the allegations in paragraphs 5 through 8 and 11 through 28 as though set forth herein.

30. Defendants, with knowledge of Mr. Gaines' mental illness and susceptibility to erratic eating habits, and with deliberate indifference to such mental health and resultant medical conditions, acted or failed to act in such a way as to deprive him of necessary and adequate mental health and medical care and treatment, including prescribed treatment, thus endangering his health and life. Such acts and omissions of Defendants violated rights secured to Mr. Gaines under the Eighth and Fourteenth Amendments to the United States Constitution.

31. Defendants were aware of Mr. Gaines' psychotic hallucinations, bipolar disorder, and other mental health issues and that his mental health compromised his ability to independently maintain an adequate diet, and his need for medical treatment, care, and/or supervision as a result. Defendants nevertheless acted with deliberate indifference to the risks to Mr. Gaines' health by failing and refusing to provide or interfering with needed mental health and medical services, to include medical staff, medication, nutrition, and related treatment during the length of Mr. Gaines' confinement, thus endangering his health

and well-being and increasing the risk of serious harm and death.

32. Defendant Jones was aware of a history of widespread and longstanding abuse and deliberately indifferent treatment by her employees and agents, including that of Corizon, during the latter's tenure as FDOC's mental health and medical services provider. Jones was aware that such abuse and deliberately indifferent treatment resulted in many unnecessary and avoidable prisoner deaths and medical injuries.

33. Jones was deliberately indifferent when she:

a) Failed to properly evaluate Mr. Gaines' mental health history, including his two prior Baker Act commitments, of which FDOC was aware;

b) Failed to consider Mr. Gaines' mental illness when determining in which prison and in which level of confinement he should be housed, given the sentencing court's recommendation that he be confined close to his family support in Palm Beach County, Florida;

c) Failed to adequately manage and treat his mental illness, in that she housed Mr. Gaines in an environment whose squalor and isolation exacerbated his psychotic hallucinations and bipolar disorder;

d) Failed to ensure that Mr. Gaines was kept clean, clothed and fed during his incarceration, rather than the unsanitary, disheveled, naked, and starved conditions under which he died;

e) Failed to take steps to ensure that Mr. Gaines received adequate nutrition when his mental health disorders prevented him from eating enough food, to the point of losing 75 pounds in the approximately two and a half years that he was in the custody of FDOC; and

f) Failed to properly and adequately supervise Corizon to ensure

that the mental health and medical provider adequately treated mentally ill and malnourished prisoners in FDOC custody at UCI.

34. Defendant Jordan was or should have been aware of a history and culture of widespread and longstanding abuse and deliberately indifferent treatment by FDOC's agents and employees, including that of FDOC staff under his authority at UCI and that of Corizon during the latter's tenure as FDOC's mental health and medical services provider, which has resulted in many unnecessary and avoidable prisoner deaths and medical injuries.

35. Defendant Jordan was deliberately indifferent when he:

a) Failed to properly evaluate Mr. Gaines' mental health history, including his two prior Baker Act commitments, of which FDOC was aware;

b) Failed to consider Mr. Gaines' mental illness when determining in which prison and in which level of confinement he should be housed, given the sentencing court's recommendation that he be confined close to his family support in Palm Beach County, Florida;

c) Failed to adequately manage and treat his mental illness, in that he housed Mr. Gaines in an environment whose squalor and isolation exacerbated the Decedent's psychotic hallucinations and bipolar disorder;

d) Failed to ensure that Mr. Gaines was kept clean, clothed and fed during his incarceration, rather than the unsanitary, disheveled, naked, and starved conditions under which he died;

e) Failed to take steps to ensure that Mr. Gaines received adequate nutrition when his mental health disorders prevented him from eating enough food, to the point continuing to lose weight from

the time he was transferred to UCI until the time of his death; and

f) Failed to properly and adequately supervise prison and Corizon staff at UCI to ensure adequate and appropriate mental health and medical treatment of a mentally ill and malnourished prisoners in the custody of FDOC at that facility.

36. Defendant Corizon, at all times pertinent to this action, contracted with FDOC to provide mental health and medical care and services to prisoners, and as such, the above-mentioned actions and/or omissions of Corizon and/or its agents and employees were committed under color of law and/or pursuant to policies, customs, practices, rules, regulations, ordinances, statutes, and/or usages of Defendant Corizon.

37. Defendant Corizon was aware of a history of widespread and longstanding abuse and deliberately indifferent treatment by its employees, agents, and implied agents which has resulted in many unnecessary and avoidable prisoner deaths and medical injuries during its brief contract with FDOC to provide mental health and medical care.

38. Defendant Corizon was deliberately indifferent by having a pattern and practice of:

a) Failing to appropriately adjust and/or maintain the medications for treatment of mentally ill prisoners like Mr. Gaines;

b) Failing to make the appropriate recommendations to FDOC authorities regarding where and in which housing level mentally ill prisoners like Mr. Gaines should be confined;

c) Failing to properly document when prisoners under its care like Mr. Gaines cease eating adequately as result of their mental illness;

d) Failing to take steps to ensure that mentally ill prisoners under its care like Mr. Gaines receive adequate nutrition when their mental health disorders prevent them from eating enough food, to the point that Mr. Gaines lost 75 pounds in the approximately two and a half years that he was in the custody of FDOC;

e) Otherwise failing to adequately manage and treat mentally ill prisoners like Mr. Gaines in a manner that exacerbates their psychotic and bipolar disorders; and

f) Failing to properly and adequately supervise its agents, implied agents, and employees to ensure that they adequately treat mentally ill and malnourished prisoners like Mr. Gaines in the custody of correctional entities like FDOC.

39. Defendants Doe 1-20 were deliberately indifferent, as noted in the above, including but not limited to, failing to provide necessary and adequate nutrition, mental health, and/or medical treatment and failing to supervise the provision of nutrition, mental health, and/or medical treatment that would have kept Mr. Gaines adequately fed, clothed, clean, and safe while in the custody of FDOC.

40. The conduct of all of Defendants in failing to keep Mr. Gaines adequately fed, clothed and clean is a violation of clearly established constitutional rights under the Eighth and Fourteenth Amendments of the Constitution, which prohibit the infliction of cruel and unusual punishment and guarantee equal protection under the laws respectively. In addition, their actions violated clearly established statutory rights under the Civil Rights Act, 42 U.S.C § 1983.

41. Defendants' conduct was so deliberately indifferent as to Mr. Gaines'

nutritional, medical and/or mental health needs as to violate his right against cruel and unusual punishment.

42. Defendants' conduct violated Mr. Gaines' right to equal protection because in depriving him of nutrition, medical and/or mental health, Defendants' treated Mr. Gaines differently from other prisoners with whom he is similarly situated. Defendants' failure to keep Mr. Gaines clean, clothed, and fed, resulting in his gradual malnutrition, starvation, and death in squalid conditions, demonstrates Defendants' intentional or purposeful discrimination against Mr. Gaines rising to level of a discriminatory animus against him.

43. Furthermore, the conduct of all of the Defendants was of a gross and flagrant character, suggestive of a reckless disregard of human life or safety, and/or a complete lack of care suggesting indifference to consequences, thereby entitling Plaintiff to punitive damages.

44. Plaintiff was obliged to retain counsel in bringing this lawsuit and is entitled to the reasonable value of the attorneys' services, as well as the costs of litigation.

WHEREFORE, Plaintiff demands the following relief against all Defendants:

a. Equitable relief against Defendant Jones in her official capacity in the form of the relinquishment of Mr. Gaines' remains to Plaintiff;

b. Judgment in her favor against the individual Defendants and Corizon for their violation of the Eighth and

Fourteenth Amendment and 42 U.S.C. § 1983 in an amount to be proven at trial for damages, including, without limitation, pecuniary injury, compensatory damages, and punitive damages;

c. Plaintiff's attorneys' fees, interest and costs under 42 U.S.C. § 1988; and

d. All such other relief as the Court deems just and proper.

COUNT II

VIOLATIONS OF TITLE II OF THE AMERICAN WITH DISABILITIES ACT AND THE REHABILITATION ACT

(Against Defendant Jones)

45. Plaintiff hereby incorporates by reference the allegations in paragraphs 5 through 7 and 10 through 28 as though set forth herein.

46. At all material times hereto, Defendant Jones' employees and agents were operating within the scope of their employment.

47. Count II is a claim for disability discrimination against Defendant Jones for violating Title II of the Americans with Disabilities Act (ADA) (public entities). Title II of the ADA prohibits disability-based discrimination by any public entity. *See* 42 U.S.C. §§ 12131-12132; 28 C.F.R. § 39.130; and 28 C.F.R. §35.130.

48. Section 504 of the Rehabilitation Act prohibits discrimination against an

individual based on disability by any program or entity receiving federal funds. *See* 29 U.S.C. §§ 794(a), (b)(1)(A), (b)(1)(B), and (b)(2)(B).

49. These disability anti-discrimination laws impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.

50. Mr. Gaines was disabled as defined in 42 U.S.C. § 12102 and 42 U.S.C. §§ 12131, 28 C.F.R. §§ 35.108, as he suffered mental impairments that substantially limited one or more of his major life activities.[11]

51. FDOC is a program or entity that receives federal financial assistance.

52. FDOC is a public entity as defined by Title II of the ADA.

53. FDOC's prison, Union Correctional Institution, is a facility and its operation comprises a program of service for purposes of Title II of the ADA.

54. As a prisoner in FDOC's custody, Mr. Gaines was an individual qualified to participate in or receive the benefit of FDOC's services, programs, or activities, which included the provision of adequate nutrition and a clean and safe prison environment.

55. Mr. Gaines was denied the benefits, programs, and services of FDOC's facilities by Jones and her employees, agents, and implied agents because of his mental disability.

---

[11] *See supra*, ¶¶ 12, 13, and 15.

56. Mr. Gaines was abused by Jones and her employees, agents, and implied agents when he was not provided with adequate nutrition, cleanliness, and safety during his incarceration due to his mental disability, which was known to Jones and her employees, agents, and implied agents. Such abuse constitutes discrimination against individuals based on their disability in violation of the Rehabilitation Act and Title II of the ADA.

57. Defendant Jones failed to provide adequate nutrition, cleanliness, and safety to Mr. Gaines while he was in her custody. Left unaddressed, Mr. Gaines' mental illness led to his malnutrition – a condition that Defendants ignored until it resulted in Mr. Gaines' starvation and death. The inadequate nutrition, cleanliness, and safety provided to Mr. Gaines by FDOC was so grossly incompetent and inadequate that it shocks the conscience and shows a deliberate indifference and reckless disregard for Mr. Gaines' disability.

58. Defendant Jones showed deliberate indifference toward Mr. Gaines and his disability when she:

a) Housed Mr. Gaines in an environment whose squalor and isolation exacerbated his psychotic hallucinations and bipolar disorder;

b) Failed to ensure that Mr. Gaines was kept clean, clothed, and fed during his incarceration, rather than the unsanitary, disheveled, naked, and starved conditions under which he died;

c) Failed to take steps to ensure that Mr. Gaines received adequate nutrition when his mental health disorders prevented him from eating enough food, to the point of losing 75 pounds in the approximately two and a half years that he was in the custody of FDOC; and

d) Failed to properly and adequately supervise Corizon to ensure that the mental health and medical provider adequately kept Mr. Gaines clean, clothed, and fed as a disabled prisoner in the custody of FDOC.

59. Had Defendant Jones and her agents, implied agents, and employees not discriminated against Mr. Gaines due to his mental disability, he would not have been kept in such insalubrious conditions and in isolation, nor would he have become malnourished to the point of starving to death in the custody of FDOC.

WHEREFORE, Plaintiff demands the following relief against Defendant Jones:

a. Declaratory relief that Jones violated Mr. Gaines' rights under the Americans with Disabilities Act and Rehabilitation Act;

b. Equitable relief against Jones in the form of the relinquishment of Mr. Gaines' remains to Plaintiff; and

c. Judgment in her favor against Jones for violating the ADA and Rehabilitation Act in an amount to be proven at trial for damages including, without limitation, pecuniary injury, compensatory damages, and punitive damages;

d. Plaintiff's attorneys' fees, interest and costs; and

e. All such other relief as the Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Lorine Gaines, as Personal Representative of the Estate and Mother of Vincent Gaines, respectfully requests that the Court grant judgment in her

favor as to each Count of this Complaint as alleged therein.

JURY DEMAND

Plaintiff, by and through its attorneys, hereby demands a trial by jury on all issues so triable.

Dated: August 1, 2018

Respectfully submitted,

/s/ Sabarish Neelakanta
Sabarish Neelakanta, Fla. Bar No.: 26623
sneelakanta@hrdc-law.org
Masimba Mutamba, Fla. Bar No.: 102772*
mmutamba@hrdc-law.org
Daniel Marshall, Fla. Bar No.: 617210*
dmarshall@hrdc-law.org
HUMAN RIGHTS DEFENSE CENTER
P.O. Box 1151
Lake Worth, FL 33460
Tel.: (561) 360-2523
Fax: (866) 735-7136

/s/ Edwin Ferguson
Edwin Ferguson, Fla. Bar. No.: 15216*
eferguson@thefergusonfirm.net
THE FERGUSON FIRM, PLLC
41 West 27th Street
Riviera Beach, Florida 33404
Tel.: (561) 840-1846
Fax: (561) 840-1642

Attorneys for Plaintiff

**Pro hac vice applications to be filed*

Miami New Times

Vincent Gaines allegedly starved to death inside Union Correctional Institution. **Florida Department of Corrections**

Mentally Ill South Florida Man Starved to Death in Prison, Lawsuit Alleges

JERRY IANNELLI | **AUGUST 3, 2018** | **8:00AM**

When Vincent Gaines was sentenced to five years in prison on robbery charges in June 2013, state officials recommended he be placed in a mental-health unit because he had regular visual and auditory hallucinations. So Gaines was transferred to the Dade Correctional Institution in South Miami-Dade County, where he was placed on a "boneless diet" that left the five-foot-nine man 40 pounds lighter – dropping from 190 to 151 – in just 18 months.

After accumulating a series of disciplinary reports, Gaines was shuffled through multiple prisons before winding up at the Union Correctional Institution in Raiford, Florida, where he soon died. In his autopsy, he weighed only 115 pounds and showed obvious signs of malnourishment, advocates say.

Now Gaines' family says the evidence is clear: He was starved to death inside the state prison system and then buried on Florida Department of Corrections (FDOC) property without their knowledge or consent. His mother, Lorine, sued FDOC head Julie Jones, former for-profit prison health provider Corizon Health, and Union CI warden Kevin Jordan in North Florida federal court. The *Palm Beach Post,* which published a stinging investigation into Corizon Health's deadly failures across Florida in 2014, first reported on the lawsuit yesterday afternoon. To file the suit, Lorine Gaines partnered with the Human Rights Defense Center (HRDC), a nonprofit that fights for the rights of ex-prisoners nationwide.

"It is an outrage that in the 21st-century American prisoners are being starved to death in barbaric conditions by a prison system whose employees enjoy total impunity for their criminal actions," HRDC executive director Paul Wright, himself a former prisoner, said in a news release. (In addition to founding the HRDC, Wright also founded *Prison Legal News,* a monthly news magazine for and by prisoners, from his jail cell in 1990.) "We hope the civil justice system will help provide the deterrence that is otherwise sadly lacking within Florida's prison system."

In response, the FDOC told *New Times* that it had not yet been served the lawsuit and could not comment on the case's specifics but that the department "is committed to ensuring all inmates have access to appropriate health services."

A Corizon spokesperson, Martha Harbin, told *New Times* via email that the company is confident it handled the case correctly but that Corizon could not speak further without violating the Health Insurance Portability and Accountability Act, or HIPAA, privacy laws.

"Patient privacy laws and the filed complaint prevent us from disclosing specific information from the patient's medical records that would provide a more complete picture of Mr. Gaines's health challenges and treatment, but we are confident that appropriate, evidence-based medical care was provided," she said.

But the suit echoes an eerily similar case that also involved the Dade Correctional Institute. In 2012, multiple witnesses said guards at the facility scalded mentally ill inmate Darren Rainey to death in a makeshift prison shower as punishment for defecating in his cell. State officials did not reopen the case until the *Miami Herald's* Julie Brown wrote a blistering series of articles about it. Even after Brown obtained gruesome images of Rainey's scalded body, the county medical examiner's office and
Miami-Dade State Attorney Katherine Fernandez Rundle still insisted Rainey did not suffer deadly burns. No one was fired or charged in the case.

Perhaps more importantly, the *Herald* also spoke to other witnesses who claimed inmates at Dade CI were being starved.

The *Palm Beach Post* series about Corizon also noted that after prison medical care was privatized and handed over to the company in 2012, inmate deaths spiked. Corizon walked away from its $1.2 billion, five-year state contract after the award-winning *Post* series but claimed the move was a fiscal decision.

According to the latest suit, judges and other justice-system officials knew in 2013 that Gaines was severely mentally ill. After he pleaded guilty in 2013 to burglary charges, a judge instructed officials to house Gaines near his family in Palm Beach County. At a subsequent mental-health evaluation at the
FDOC's
South Florida Reception Center (SFRC), officials noted Gaines had repeatedly been "Baker Acted" – committed involuntarily to a mental institution – because of his constant auditory hallucinations. Among other diagnoses, officials stated Gaines had bipolar disorder, mania, had "psychotic features," as well as "borderline intellectual functioning," which the suit says is "historically referred to as 'mental retardation.'" He also struggled to comply with his medication regimen and often refused his medicine.

He was then transferred from the SFRC to Dade CI in Homestead — while there, the suit says, he continued to experience hallucinations and refuse treatment. After a particularly rough period, he was sent back to a crisis unit at the SFRC, where he slept only two to three hours per night and weighed 151 pounds. He was also written up for alleged failure to follow orders and in 2015 was sent more than 300 miles away from his family to the Florida State Prison and then to the Union Correctional Institution. On May 15, the suit says, because of Gaines' "rapidly deteriorating" mental condition, he was placed in a "close management" unit at the facility, where health officials noted in reports that he had "been observed smearing feces on his floor."

From here, the suit claims, things grew strange. On December 1, Corizon Health officials began to write that Gaines' condition seemed to be improving. Reports from that day say a company social worker observed his "clean and organized" cell and "neat" appearance.

But just two days later, Gaines was dead. Just after noon December 3, officials noted he seemed quiet and had not eaten. They checked on him around 1:26 p.m. and found him unresponsive. After emergency medical technicians administered CPR, he was pronounced dead.

Medical examiners conducted an autopsy the next day. Though writing that his cause of death was "undetermined," examiners wrote that Gaines suffered from "malnutrition" and weighed only 115 pounds. In contrast with the glowing Corizon report three days earlier, doctors said Gaines also died with a "generalized unwashed appearance and
probable
feces on [the] soles of [his] feet."

"Following Mr. Gaines' death, Defendants did not timely inform Plaintiff," the suit adds. "As a result, Mr. Gaines was not released to his family; the Decedent was buried by FDOC on FDOC property against the wishes and without the consent of Plaintiff."

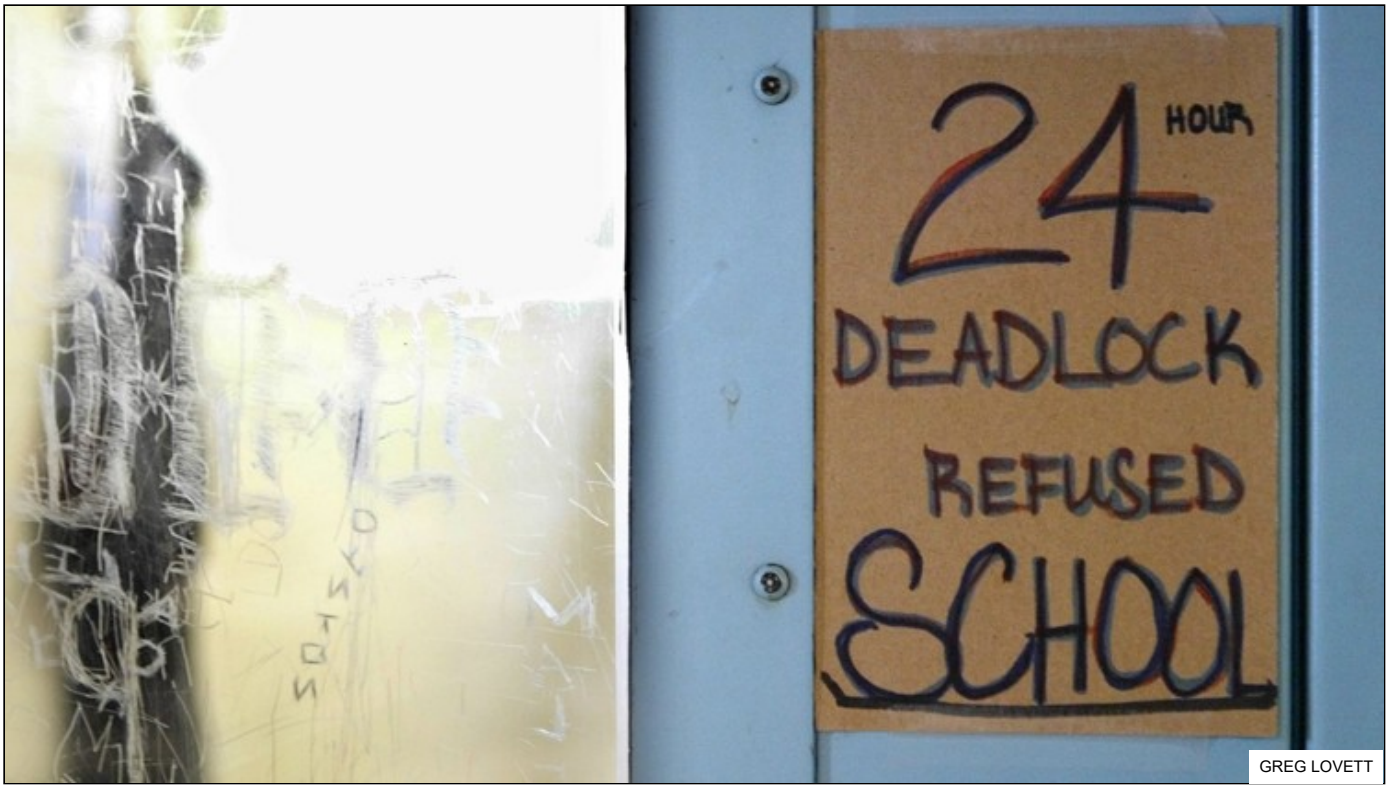
Gaines' mother is now suing for alleged violations of the Eight and Fourteenth Amendments to the U.S. Constitution, which prohibit cruel and unusual punishment and guarantee equal protection for people of all races under the law. The Gaines family also alleges their loved one's treatment violated the Americans With Disabilities Act.

The prison's "conduct was so deliberately indifferent as to Mr. Gaines' nutritional, medical, and/or mental health needs as to violate his right against cruel and unusual punishment," the suit reads.

RELATED TOPICS: NEWS POLICE

Suit: Jail keeps teens in solitary for months without care, education

LOCAL By John Pacenti - Palm Beach Post Staff Writer



In 2006, the Palm Beach Post took this photo of a lockdown cell at the Palm Beach County jail. A new lawsuit alleges teens charged as adults in solitary confinement are not receiving a proper education, mental health care and are subject to cruelty by the guards. (Photo: Greg Lovett/Palm Beach Post)

Updated: 12:30 p.m. Thursday, June 21, 2018 | Posted: 9:53 a.m. Thursday, June 21, 2018

One young inmate in solitary confinement at the Palm Beach County jail hallucinated, staring at the blank wall of his cell, thinking he was watching a television show, a federal lawsuit filed Thursday alleges.

A 16-year-old got his teeth knocked out by deputies after flooding his cell with toilet water when his telephone privileges were cut short — a brief moment he could have contact with anyone.

Other juveniles begged deputies for water but were forced to drink the putrid discolored water from the sink attached to their toilet. “I’m not your water boy,” the deputies barked back.

If these teens — in isolation for sometimes up to 16 consecutive months — complained, deputies threatened to send them to the mental health ward where they would be stripped naked then left in a freezing cell wearing only a paper gown that failed to cover their backside.

These are just some of the claims made in the class-action lawsuit against Sheriff Ric Bradshaw, the Palm Beach County School Board, schools Superintendent Donald Fennoy and others in the sheriff’s department that calls for an end to solitary confinement for inmates under age 18.

Sophie’s choice

Teenage males charged by the state attorney’s office as adults are put in solitary for months at a time, spending 23 or 24 hours a day alone in the 6-by 12-foot cell dubbed “the box,” receiving no mental health care and little or no education, according to the lawsuit spearheaded by the Legal Aid Society of Palm Beach County and the Human Rights Defense Center in Lake Worth.

Solitary confinement means no music, no television, no human contact. Child inmates get their food on a tray passed through a metal slot of their cell, which is adorned with only a metal cot, a sink, a stainless steel desk and a commode bolted to the wall. A single overhead fluorescent light hangs over each solitary cell.

They are permitted, at most, one hour three times a week of solitary recreation inside a caged basketball court. They are handcuffed every time they leave their cell.

Some of the young jail inmates in the lawsuit, often identified only by initials or first names, were in solitary after fighting. But others were subject to a cruel Sophie’s choice by Bradshaw’s administration, ending up in solitary only because they had co-defendants — “keep-aways” — in the general jail population of juveniles on the 12th floor of the 2,166-bed Main Detention Center on Gun Club Road, the lawsuit states.

The sheriff’s department and the school district violated the constitutional rights of these teenagers — often minorities and developmentally or mentally disabled — by subjecting them to cruel and unusual punishment and a lack of due process, the litigation alleges. The teenage boys received no mental health care and little or no regular education and were denied help guaranteed by the Americans With Disabilities Act, according to the 75-page complaint.

Sheriff's spokeswoman Teri Barbera said the office had yet to be properly served with the lawsuit and that the sheriff doesn't comment on potential or pending litigation as a matter of policy. Efforts to reach a spokesperson for the school district for comment were unsuccessful.

The school district released a statement:

"The district has just received a copy of the lawsuit and is in the process of reviewing it at this time. However, it is important to note that the school district has no control over the Palm Beach County Sheriff's Office policies and practices regarding juveniles, including those held at the county jail or juvenile assessment center."

'Throwaways of society'

"The sheriff sees these kids as not worthy of constitutional protections," said Sabarish P. Neelakanta, general counsel and litigation director for the Human Rights Defense Center. "They see these kids as bad kids; they see them as throwaways of society. So they lock them up in these little rooms and forget about them."

> *"They see these kids as bad kids; they see them as throwaways of society."*
>
> *— Sabarish P. Neelakanta, general counsel and litigation director for the Human Rights Defense Center*

The nexus of the lawsuit started with Melissa Duncan of Legal Aid Society when the Palm Beach County Public Defender's Office contacted her about concerns that the teenagers in solitary weren't getting an education.

"When I started talking to the kids, they weren't just getting any education; they weren't getting anything," she said.

Duncan, the supervising attorney for the Legal Aid Society's Educational Advocacy Project, then researched other lawsuits around the country.

"So far I found the Palm Beach County practice is the most egregious in terms of the length of the time the kids are left in solitary confinement," she said. "They feel like they are going crazy."

None of the incarcerated teens in the lawsuit had been convicted of crimes when they were subject to the box, but had been charged as adults for crimes such as armed robbery, burglary or grand theft auto.

Similar lawsuits have led to calls for reform in several states. Wisconsin reached a settlement this month to end the practice at the state's youth prison after a lawsuit by the American Civil Liberties Union. A judge prohibited the practice temporarily in one Tennessee county to allow another

ACLU suit to move forward. In New York, federal court orders recently stopped solitary confinement policies in two jails.

In the Palm Beach County litigation, the powerhouse class-action law firm of Cohen Milstein Sellers and Toll has been brought on board. The lawsuit focuses on males in solitary, as females under age 18 charged as adults are kept in the jail's medical unit.

An aerial view of the Palm Beach County jail, the subject of a lawsuit that alleges that teenage boys charged as ... Read More

Going crazy

Nehomie Perceval of West Palm Beach said her son, Jeremy, had been diagnosed with ADHD and anxiety before he ended up in solitary. He received none of his medication while in solitary, which was lifted only when attorneys pleaded with the judge to recommend he be taken out of the box, the suit contends.

"I don't want any other kid to go through that

"I don't want any other kid to go through that again, being in solitary confinement," Perceval said. "A child is a child regardless of what the child did or did not do. Mentally, it will drive the kid crazy. I don't think anybody should be locked up in a room with just four walls to look at for that long."

again ... Mentally, it will drive the kid crazy."

— Nehomie Perceval, whose son Jeremy was placed in solitary confinement

Before his arrest, her son -- identified as J.E. in the lawsuit -- was a 10th-grader of Haitian descent at Lake Worth High School, struggling with his reading. He is quoted in the lawsuit as saying the isolation “does something to you. It’s crazy.”

He lost 20 pounds and started experiencing visual and auditory hallucinations, hearing screaming at night and staring at a blank wall in his cell watching what he believed was a full television show. He served more than five months in solitary.

As with other juveniles charged as adults, juveniles, he filed grievances to get out of solitary but were told they were frivolous. He told lawyers that deputies tormented the young inmates by turning on the emergency lights so they couldn’t sleep or, in his case, leaving him undressed for hours when deputies decided he did not have the correct pants to wear.

When he complained, a deputy told him, “You don’t like it? Don’t get yourself arrested.”

Another inmate, identified as Jeff in the lawsuit, also reported hallucinations, seeing a third arm coming from his body and hearing voices at night. He spent nearly five months in solitary.

“Jeff reports that his father would drive to the parking lot of the jail each night and flash his headlights so Jeff could see them, which would be the only reprieve he had from the constant sense of loneliness,” the lawsuit states. Jeff is now 18.

The psych cell

The threat of being sent to the mental health unit — the “psych cell” — looms large, the lawsuit states. One plaintiff, identified as W.B., said deputies threaten to send teens to the ward if they are too noisy under the ruse that they threatened to commit suicide.

Another plaintiff, identified as Jeziah, said deputies would take what little items he had: socks, sheets, drawings as punishment for talking to other teens in solitary. Jeziah spent a total of 21 months in solitary, including a 16-month stretch.

“One of the problems is that these kids can’t fight back or navigate these policies and how to deal with them,” Neelakanta said. “They are scared. They are frightened.”

The lawsuit alleges retaliation by deputies against Jeziah, now 18, who flooded his cell after a deputy unplugged his telephone call before it was required to end. During the cell extraction, the teenager resisted and had two of his front teeth shattered.

When he returned to solitary, deputies destroyed his dentures and laughed at him, the lawsuit states.

“Another Palm Beach Sheriff’s Office staff member told Jeziah that she would have other inmates assault him if he got out of confinement,” the lawsuit states. “Jeziah called the PREA (Prison Rape Elimination Act) hotline, but received no follow up in response.”

A fellow teen in solitary said a deputy would warn him he could end up like Jeziah if he misbehaved.

Duncan said the lack of education for these kids is an important part of the lawsuit. Packets of work are shoved under the cell door and they may receive brief moments to speak with a teacher standing outside.

“These children cannot view educational instruction because the windows on their cell doors are scratched up to the point that it is nearly impossible to discern what is being written on the chalkboard, nor are they able to hear the teachers’ lessons through the solid metal doors,” the lawsuit states.

“Additionally, for children with disabilities, highly specialized instruction, accommodations and related services are not offered or meaningfully available in solitary confinement.”

‘Making It Worse’

Palm Beach County Public Defender Carey Haughwout said solitary confinement of juveniles has been a concern for her office.

“Solitary confinement is a difficult setting, to say the least, for anyone, but when you put children in solitary confinement it has an even greater effect on their mental health, their physical well-being,” she said. “It should really never be used.”

The number of cases of juveniles charged as adults dropped from 2016 to 2017 — falling from 47 to 33. However, since the massacre at Marjory Stoneman Douglas High School, 20 juveniles have been charged as adults in Palm Beach County so far this year.

“A lot of these kids have a myriad of problems to begin with, which is why they are there,” Haughwout said. “And we are worried solitary confinement only makes it worse.”

The American Civil Liberties Union and Human Rights Watch, in a now 6-year-old report, sent up the flare that solitary was being used against juveniles throughout the country and having a profound effect. Many suffered post-traumatic stress and were more prone to suicide.

In New York, in a celebrated case, 16-year-old Kalief Browder spent two of his three years at the infamous Rikers Island jail complex in solitary after being charged with stealing a backpack. When released, Browder committed suicide in 2015 at age 22.

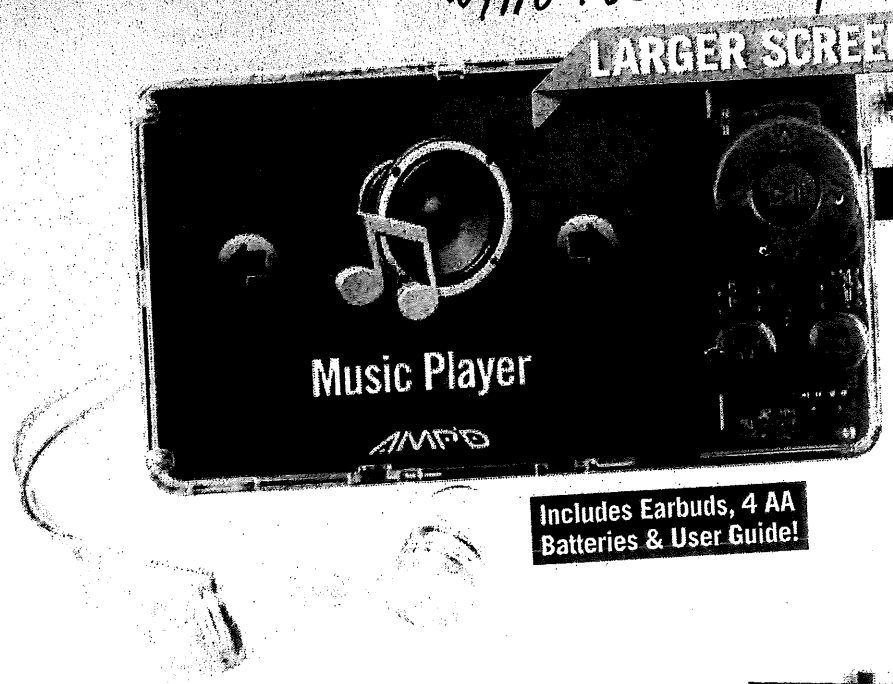
“Because the adolescent brain is still in early stage development, it is quite susceptible to the harm,” Neelakanta said. “When they are out of custody and receiving treatment, they don’t trust anybody. They don’t trust the adults and they don’t trust anyone around them.”

About the Author

JOHN PACENTI

ORDER YOUR MAXXpro4 TODAY!

w/110-1803-0074



Includes Earbuds, 4 AA Batteries & User Guide!

THE NEW MAXXpro4

GET A WHOLE LOT MORE FOR LESS!

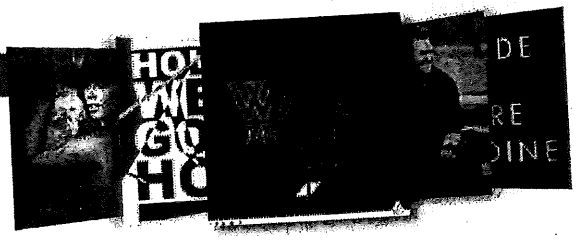
ONLY $99.95

Enjoy 8GB of memory, longer operating power and browsing music catalog on the **3.5" LCD screen**!

Worry Free Upgrade!

When you upgrade to the MAXXpro4, all of your previously purchased music will transfer to your new player in 100 song segments.

E.g. 400 songs = 4 separate connections.



Florida Department of Corrections
NOW ACCEPTING ORDERS

Order form on back

5179*	AMP'D MAXXpro4 with earbuds, 4 AA Batteries & User Guide	**$99.95**
4641	MP4 Armband with Protective Rubber Cover	**$15.00**
5180	MP4 Screen Protectors 3 pk	**$6.00**
1838	AMP'D Ear Buds *(for use with MP3/MP4)*	**$16.00**
1346	MP3 Armband with Protective Rubber Cover *(while supplies last upon coming back in stock)*	**$15.00**
1237	MP3 Screen Protectors 3 pk *(while supplies last)*	**$6.00**

MAXXpro4 Player Program Information

- Browse, search and preselect songs from updated music catalogs holding millions of song titles representing a wide array of music genres. You have the ability to purchase and listen to unlimited music utilizing the re-download feature free of charge. Once music is purchased, you'll always own it!
- MAXXpro4 comes with earbuds, 4 AA batteries and user's guide. Requires 4 AA batteries that allow for an estimated 100 hours of usage when listening to downloaded music. No refunds after order has been placed. Manufacturer's Warranty—90 days from purchase against manufacturer's defects only. Prices includes all shipping and handling charges.

Restrictions

* Only one MP4 player in possession per inmate as per possession limits in chapter 33 of the FAC.

ACCESS CORRECTIONS®

EX. A

NOTICE TO INMATES

Statewide Digital Music Player (MP3/4) Program

Access Corrections' service of the Digital Music Player (MP3/4) Program will come to a close on January 23, 2018. Below are important dates to take notice as this program comes to a close.

- December 15, 2017 – This will be the last day inmates will be able to purchase new music or accessories. The commissary will not accept order forms after this date. Inmates will continue to be able to download previously purchased music until January 23, 2018, but no new music will be available for purchase after December 15, 2017.

- December 22, 2017 – Starting this date, through January 23, 2018, which officially ends the contract, inmates will be able to connect to the kiosk and extend the security timer through January 23, 2019. Please note that inmates will not be able to simultaneously possess an MP3/4 player and tablet. If you purchase a tablet, you will be required to send the MP3/4 player out. The extension of the security timer to January 23, 2019 will allow sufficient time for inmates planning to acquire a tablet as well as extending the service for those that do not intend to purchase a tablet.

- January 23, 2019 – After this date the security timer on the MP3/4 players will expire, therefore the MP3 players will need to be sent out in accordance Rule 33-602.201 F.A.C., Inmate Property.

    - Inmates will have two options to remove the security feature:
        - Inmates can send their MP3/4 players to Access Corrections to have the security hardware removed from their players and mailed home by Access Corrections for a fee of $24.95 or have their purchased music placed on a CD for the same fee.
        - Inmates can send their MP3/4 players home and a family member can send the MP3/4 players to Access Corrections to have the security hardware removed from the player and mailed back home by Access Corrections for a fee of $24.95 or have their purchased music placed on a CD for the same fee.

CONTRACT BETWEEN

THE DEPARTMENT OF CORRECTIONS

AND

JPAY, INC.

This Contract is between the Florida Department of Corrections ("Department") and JPay, Inc. ("Contractor"), which are the parties hereto.

WITNESSETH

Whereas, the Department is responsible for the inmates and for the operation of, and supervisory and protective care, custody and control of, all buildings, grounds, property, and matters connected with the correctional system, in accordance with Section 945.04, Florida Statutes (F.S.);

Whereas, this Contract is a no-cost Contract and is not a purchase as contemplated by Chapter 287, F.S.; and

Whereas, although not required to be procured through a competitive solicitation, this Contract is entered into as an approved alternate contract source (ACS), pursuant to Rule 60A-1.045, Florida Administrative Code (F.A.C), and Section 287.042(16), F.S., having been competitively procured by the State of Nevada;

Whereas, the State of Nevada, on behalf of the Multi-State Corrections Procurement Alliance (MCPA) and the Contractor are parties to a contract effective August 1, 2011, and amended April 4, 2012 and July 24, 2014 (collectively, the "Master Agreement Price List"), containing cooperative language under which Agencies within the State of Florida may purchase services from the Contractor; and

Whereas, the Contractor is a qualified and willing participant with the Department to provide multimedia kiosks and tablets for use by inmates statewide.

Therefore, in consideration of the mutual benefits to be derived hereby, the Department and the Contractor do hereby agree as follows:

I. CONTRACT TERM AND RENEWAL

A. Contract Term

This Contract shall begin on April 17, 2017, or the date on which it is signed by both parties, whichever is later, and shall end at midnight on April 16, 2022. In the event this Contract is signed by the parties on different dates, the latter date shall control.

B. Contract Renewal

The Department has the option to renew this Contract for up to an additional five (5) year period beyond the initial contract term, in whole or in part, upon written agreement of both parties. Exercise of the renewal option is at the Department's sole discretion, shall be at no cost to the Department, and shall be conditioned, at a minimum, on the Contractor's satisfactory performance of the Contract and subject to the availability of funds. The Department, if it desires to exercise its renewal option, will provide written notice to the Contractor no later than 30 calendar days prior to the Contract expiration date.

C. ACS Agreement

This Agreement between the Department and the Contractor, consists of the documents listed below in the following order of precedence:

1. This Contract
2. Participating Addendum
3. Nevada Master Price Agreement #1901

II. SCOPE OF SERVICE

A. General Service Description/Purpose

The Contractor shall provide multimedia kiosks and tablets for use by inmates housed at Department facilities statewide at no cost to the Department. Additionally, the Contractor shall provide all infrastructure necessary to support the kiosks and tablets including, but not limited to, secure wired and wireless networks, charging carts, and support. Upon installation of the kiosks, inmates can use them to purchase tablets preloaded with a variety of educational and entertainment content. Inmates can also browse and purchase additional content for these tablets, including music, games, news, and eBooks. Tablets, loaded with agreed upon complementary content, will be made available for inmates to purchase with funds from their Inmate Trust Account or their Media Account, if approved by the Department. The Contractor will also provide a variety of goods and services to the Department at no cost, detailed in Section II(F)(18) of this Contract.

B. Rules and Regulations

1. The Contractor shall provide all services in accordance with all applicable federal and state laws, rules, regulations, and Department of Corrections' rules and procedures. All such laws, rules, regulations, current and/or as revised, are incorporated herein by reference and made a part of this Contract. The Contractor and the Department shall work cooperatively to ensure service delivery is in complete compliance with all such rules and regulations.

2. The Contractor shall ensure that all Contractor's staff providing services under this Contract comply with prevailing ethical and professional standards, and the statutes, rules, procedures, and regulations mentioned above.

3. Should any of the above laws, standards, rules, regulations, Department procedures, or directives change during the course of this Contract term, the updated version will take precedence.

4. The Contractor shall pay for all costs associated with local, state, and federal licenses, permits, and inspection fees required to provide services. All required permits and licenses shall be current, maintained on-site, and a copy submitted to the Department's Contract Manager, or designee, upon request.

5. The Contractor shall comply with the provisions of the Americans with Disabilities Act. This includes provisions referencing both employment and public service agencies (Titles I and II), as well as any other applicable provisions.

6. The system shall adhere to Florida Agency for State Technology (AST) Rule 74-2, F.A.C., "Florida Cybersecurity Standards."

7. The system shall adhere to Florida Department of Corrections Procedure 206.007, "User Security for Information Systems."

8. The system shall adhere to the requirements of Section 501.171, F.S. "Security of Confidential Personal Information" regarding the protection of Personally Identifiable Information (PII) data in the system.

C. Communications

Contract communications will be in three (3) forms: routine, informal, and formal. For the purposes of this Contract, the following definitions shall apply:

Routine: All normal written communications generated by either party relating to service delivery. Routine communications must be acknowledged or answered within 30 calendar days of receipt.

Informal: Special written communications deemed necessary based upon either contract compliance or quality of service issues. Must be acknowledged or responded to within 15 calendar days of receipt.

Formal: Same as informal but more limited in nature and usually reserved for significant issues such as Breach of Contract, failure to provide satisfactory performance, assessment of Financial Consequences, or contract termination. Formal communications shall also include requests for changes in the scope of the Contract and billing adjustments. Must be acknowledged upon receipt and responded to within seven (7) days of receipt.

The only personnel authorized to use formal contract communications are the Department's Director of Administration, the Department's Bureau Chief of Contract Management & Monitoring, the Department's Contract Manager, the Department's Bureau Chief of Procurement, the Department's Contract Administrator, and the Contractor's Representative or CEO. Designees, or other persons authorized to utilize formal contract communications, must be agreed upon by both parties and identified in writing within 10 days of execution of the Contract. Notification of any subsequent changes must be provided in writing prior to issuance of any formal communication from the changed designee or authorized representative.

In addition to the personnel named under formal contract communications, personnel authorized to use informal contract communications include any other persons so designated in writing by the parties.

If there is an urgent administrative problem the Department shall make contact with the Contractor and the Contractor shall verbally respond to the Department's Contract Manager within two (2) business hours. If a non-urgent administrative problem occurs, the Department will make contact with the Contractor and the Contractor shall verbally respond to the Department's Contract Manager within 48 hours (not including weekends and state holidays). The Contractor or Contractor's designee at each facility shall respond to inquiries from the Department by providing all information or records that the Department deems necessary to respond to inquiries, complaints, or grievances from or about inmates within three (3) business days of receipt of the request.

The Contractor shall respond to informal and formal communications by email or fax (only if necessary), with follow-up by hard copy mail.

A date/numbering system shall be utilized for tracking of formal communications.

D. Confidentiality

The Contractor shall maintain confidentiality with reference to individual participants receiving services in accordance with applicable local, state, and federal laws, rules, and regulations. The

Department and Contractor agree that all information and records obtained in the course of providing services to program participants shall be subject to confidentiality and disclosure provisions of applicable Federal and State statutes and regulations adopted pursuant thereto.

E. Department's Responsibilities

The Department will provide the Contractor with access to all applicable Department rules and regulations. The Department will inform the Contractor of any regulatory or operational changes impacting the delivery of services to be provided pursuant to this Contract.

F. Contractor's Responsibilities

1. General Service Requirements

The Contractor shall provide multimedia kiosks and tablets for use by inmates housed at Department facilities statewide. Additionally, the Contractor shall provide all infrastructure necessary to support the kiosks and tablets, including the below, at no cost to the Department:

a. Corrections-grade secure wired and wireless networks necessary to support the kiosks and wireless connectivity of inmate tablets;
b. Multimedia kiosks located in inmate housing units with a kiosk-to-inmate ratio of 1:50, unless it is determined that more are needed to support effective delivery of services;
c. Custom developed, fourth generation inmate tablets (JP5mini and JP5*S*);
    1) For every inmate with an active Keefe digital music player, the Contractor will provide a free JP5mini tablet (or the ability to apply the value of the JP5mini tablet to the full cost of a JP5*S* tablet (making it $50)) and a $10 credit to the Media Store; and
    2) A promotional 50% tablet discount for all inmates for the first 60 days after implementation of tablets at their FDC facility; and
    3) Pre-filled DC6-224, Inmate Personal Property List, with all fields completed except initial and signature fields, sent along with each tablet purchased or provided for inmate use.
d. Sufficient charging carts to be placed within inmate housing units, with numbered charging slots, to support nightly charging of inmate tablets; and
e. Inmate help desk support via the kiosk with no FDC facility involvement needed.

2. Inmate Kiosks

The Contractor will provide inmate kiosks that are secure, tested, corrections-grade, vandalism-proof, and ADA compliant. The current kiosk design has a standard-size keyboard, trackball mouse and resting space for the user's wrists. The kiosk is wall- or tabletop-mounted depending on the location. In addition, it may be mounted high for standing users or low for seated usage and ADA compliance. ADA features to be included in the kiosks within units that house ADA inmates include text-to-speech and speech-to-text capability via Windows Narrator for email and grievances Braille stickers on the keyboard, and home row position indicators on QWERTY keyboards for sight-impaired users.

Kiosks will be available during set hours of operation with a time limitation for each inmate's use, agreed to by the Department in writing. In the event of a security issue, the Contractor shall have the ability to render the kiosk inoperable for inmate use at the Department's request.

Sufficient kiosks will be provided to support efficient use of the services available on the kiosk within operating hours. For inmates in general population a kiosk-to-inmate ratio of 1:50 will be followed, while special housing units and Community Release Centers will each receive one kiosk, unless it is determined by the Department or the Contractor that more are needed to

support effective delivery of services.

The below services will be available to inmates through the secure kiosks:

a. Video Visitation
b. Secure Mail, including the viewing of attachments such as photos, eCards, and VideoGrams
c. Purchase of content available on inmate tablets
d. Access to inmate communications sent out by the Department, including documents such as the Inmate Handbook
e. Access to complete inmate surveys, as requested by the Department (once available per Section II.F.18(k) of this Contract)
f. Ability to access and apply for available jobs through Employ Florida Marketplace job search engine. The Contractor may provide this service by means of an IFrame (inline frame). Employ Florida Marketplace shall be responsible for providing Contractor a link that is secure to the Department's standards and does not permit inmates to access external links.
g. Ability to submit grievances, sick call, and Prison Rape Elimination Act (PREA) reports electronically
h. Ability to conduct inmate trust account balance checks

The Contractor shall provide the necessary labor, parts, materials and transportation to maintain all kiosks in good working order, in compliance with the equipment manufacturer's specifications, and using current technology throughout the life of the Contract. If the Contractor wishes to install new or updated equipment, it must first be approved by the Department's Contract Manager, or designee. No charge shall be made to the Department for maintenance of the kiosks or featured applications. The Contractor shall have the capability to perform remote diagnostics to determine if a problem is associated with the kiosk unit, network, or featured application and to resolved certain routine issues remotely. The Contractor shall be responsible for repairing any damage to the kiosk, including damage caused by inmates, at no cost to the Department.

Kiosks shall be owned by the Contractor and will remain their property at the conclusion of the Contract. At an agreed-upon date, but no later than 30 days following the end of the Contract, the Contractor will ensure that all kiosks are removed from Department property.

3. Tablets

The Contractor will provide tablets that feature high quality, corrections-grade construction with a shatter-resistant, tamper-proof housing. The tablets will be available in two (2) sizes: the 4.3" JP5mini (with 16GB of internal storage) and the 7" JP5*S* (with 32GB of internal storage). The JP5mini and JP5*S* will be used with rechargeable lithium power packs. Tablets will be charged by placing on multi-unit secure charging carts overnight, which the Contractor will provide to the Department free of charge. Tablets also come with a clear 11-inch USB cable, clear plastic earbuds, and a clear rubberized protective cover. For maximum security, the tablets have no camera or internet access capability (not including the secure wireless connection designed especially for use with these tablets). The player shall have the ability to be unlocked by the Contractor upon release of the inmate for continued use. Additionally, the Contractor agrees to unlock any player submitted by a releasing inmate within 30 calendar days of receipt of the tablet.

a. Tablet functions include:

1) Core Functions available include a clock, calendar, calculator, FM radio, and PDF Viewer;
2) Secure Mail, including viewing of attachments such as photos, eCards, and VideoGrams;

3) Music, including the ability to search, preview, and download songs and albums;
4) Games, including the ability to search, preview, and download games;
5) News, subscription to a daily Reuters news feed, with no advertisements or other promotional material;
6) eBooks, including the ability to search and download eBooks, including 100 books at the Department's choice to be pre-loaded onto all tablets at no cost to the inmate;
7) Audiobooks, including the ability to search and download audiobooks;
8) Movies, ability to rent and watch full-length movies, TV shows, and self-help videos suitable for a corrections environment;
9) Educational content through the Contractor's Learning Management System (LMS) Lantern and free Khan Academy Lite videos, which include GED prep; and
10) Access to complete inmate surveys, as requested by the Department, through Lantern.

b. Additional features include:

1) Wireless Security: The Contractor's tablets can communicate with their servers through secure wireless access points. This effectively turns every tablet into a handheld kiosk (excluding services only available through the kiosk) through which inmates may send email and download media. The tablets' operating system is a highly modified version of the Android OS and has been revised at the kernel level to address the extreme security measures needed for operating in a corrections environment. The device can only access the Contractor's validated access points, and cannot communicate with other Wi-Fi networks or devices. Access to a device is only permitted in the institution assigned to the inmate. The Department will provide a nightly file to the Contractor indicating current inmates and their housing location.

2) Player Security: Each player is credentialed to its owner and contains an embedded RFID chip that enables identification even if the player becomes corrupted. The inmate's ID number and name appear on the screen every time it is turned on, so that the inmate and facility staff may easily verify its owner.

Tablets have security timers that track the number of days since it was last connected to the kiosk. If the player is not connected to the kiosk within 30 days, it will lock and become unusable until it syncs with a kiosk again. This timeframe can be changed at the request of the Department's Contract Manager, or designee. Once requested the change will be made within five (5) business days of request.

Inmate kiosks and secure wireless access points are connected to the Contractor's proprietary network, which is shared with the Department. All Contractor products allow inmate communication with the Contractor's account holders only, while prohibiting inmate to inmate communication, including connection to other players. In addition, in order for any content to be loaded to the player, it must be digitally "signed" by the Contractor, eliminating the ability to load prohibited content. The tablet network is hardened by a powerful firewall that allows access only to the Contractor's servers.

3) Fraud Lock: If an unauthorized attempt is made to connect a player to a kiosk, an error message displays and the device locks. Any player not connected before its security timer expires will lock as well. This is configurable and can be turned on and off based on Department preferences.

Additionally, if the Department determines a player has been stolen or is being used inappropriately, individual players which are connected via Wi-Fi can be deactivated from the Wi-Fi network by the Contractor at the Department's request.

4) Inmate Cloud: The Contractor offers unlimited cloud storage for each inmate. With cloud storage, player storage space is no longer an issue, since inmates can easily transfer songs and other media to and from their player. In addition, if an inmate is transferred to another facility, released, or loses his or her tablet, all purchased content may be easily retrieved from the cloud.

5) Warranty: The Contractor shall provide a 90 day warranty against defects. Repair or replacement to any defective player shall be completed within 21 business days after receipt of the defective player by the Contractor. In the event of loss/destruction/theft of the tablet, the Inmate Cloud shall enable the inmate to "restore" his/her media purchases on a replacement player. The content shall be restored to the replacement player at no cost to the inmate. Firmware and software of tablet devices will be routinely updated through syncs with the kiosk, in accordance with the Contractor's established release cycle.

4. Secure Mail (Email)

Friends and family (customers) access this service online at www.JPay.com and from the Contractor's iPhone and Android mobile apps to send email messages, photo attachments, VideoGrams, and eCards. Friends and family members must initiate a conversation in order for an inmate to respond. This opt-in system prevents unwanted inmate contact. Inmates may access their email via the kiosk in their housing unit and from their tablet. Once a message is received, the inmate can respond or compose a message to that contact. The inmate's response is then available on the JPay app or at JPay.com. Customers can delete inmate contacts at any time to prevent future correspondence. Inmates are allowed a maximum of 200 read, 200 unread, and 200 sent messages (and associated attachments) within their account at any one time. When a new message is received that exceeds the limit, the oldest message is then deleted.

a. Truly Secure Email: The Contractor will provide the Department with an optimal email screening and intelligence system so that all incoming and outgoing messages are screened and approved before release. This includes keyword searching and other parameters defined by the Department.

b. Stamps: Friends, family members, and inmates can buy and use virtual stamps from our website, mobile devices, or the kiosk to send emails, photo attachments, VideoGrams, and eCards. When sending an email, a customer can include an extra stamp to pay for the inmate's reply. Inmates purchase stamps via the inmate kiosk using their trust account. A one-page email (5,000 character limit) costs one stamp. Longer messages require additional stamps and customers are asked to confirm extra stamp expenditures before sending the email. Each added recipient also adds one stamp to the cost.

c. Photo Album: Customers can attach photos to their emails that inmates can view on the kiosk and download to their tablets. All photo attachments will then be stored in their photo album app, unless deleted. From the kiosk, inmates can also submit a request to the facility for a printout of a photo attachment, enabling them to have a physical copy if the Department approves.

d. Snap n' Send: Inmates and their friends and family can utilize the Snap n' Send feature on the JPay mobile app. It lets customers take and send a photo to an inmate in a single, intuitive step, similar to other popular photo-sharing apps. It integrates with the Contractor's secure email system, retaining all of the security benefits of email photo attachments while streamlining the process of sharing images.

e. Mailroom Equipment: As part of the Contractor's secure email service, they will provide each facility mailroom with a PC, monitor, printer, supply of toner, and paper. This equipment will be installed on the Department's existing network and will be maintained and replaced, if needed, by the Contractor. Upon conclusion of this agreement, equipment will belong to the Department. This will enable facility mailroom staff to print inmate emails and photo attachments as desired.

f. Mail Management: The Contractor will work with the Department to determine the feasibility of implementing a mail management solution in year two (2) or three (3) of the Contract in which the Contractor will receive all physical mail sent to Department inmates, digitize it and transmit it to the inmate's email account.

5. VideoGrams

VideoGrams are 30-second video clips transferred between friends and family and inmates. Friends and family create the 30-second clip from the Contractor's smartphone app. Inmates may view and respond using the kiosk's handset and camera. The conversation continues between the parties and the clips stack up similar to a regular messaging app.

The Contractor will assign a team of trained representatives to review all VideoGrams for the Department at no cost. The Contractor's system is programmed to stop a VideoGram for review before delivery and, if necessary, flag it in the Facility System (Contractor's secure online management portal) for additional Department scrutiny or reject it entirely. Even after a VideoGram is delivered, the Department can still delete it via the Facility System. FDC staff can also use the Facility System to suspend inmates and/or customers from using the VideoGram product for a specified period of time or indefinitely. Alternatively, the Department can contact the Contractor and request a suspension of VideoGram capabilities for an inmate or customer.

6. eCards

Friends and family may use the JPay.com web site or the mobile app to send and receive eCards, while inmates can compose, send, receive, and save eCards via the inmate kiosk or a separate eCard app on their tablets. Inmates can download and save eCards to their tablets as well as browse the catalog and attach an eCard to an email to send to their loved ones.

7. Communications Center

The Contractor's Communications Center is a tool that offers inmates the ability to log a grievance, submit a sick call form, submit a PREA report, and manage the process, either from the inmate kiosk or the inmate's tablet. The information is routed electronically to the appropriate Department staff for review and response. The inmate receives the response electronically as well. This is available at no cost to the inmate or the Department.

The online Facility System will allow staff to view, sort, and reply to grievances since all activity is logged.

Facility Announcements: The Communications Center will also be configured to issue staff-to-inmate announcements. The facility staff member logs into the Facility System and creates the announcement, chooses the target audience (the entire facility, one or more living units, or even a particular inmate), and sends. The announcement is sent to the inmate's email account for easy viewing, either on the kiosk or the inmate's tablet.

The Communications Center must be compliant with the Health Insurance Portability and Accountability Act (HIPAA) and the HITECH Act. Any service, software, or process that

handles and/or transmits electronic protected health information must do so in full HIPAA compliance and with encryption provided as a part of the service, software, or process.

The Contractor agrees to safeguard Protected Health Information in accordance with the terms and conditions outlined in the Business Associate Agreement (**ATTACHMENT D**).

8. Media Store

The tablets will allow inmates to access the Contractor's Media Store to browse, purchase, and download music, games, news, eBooks, and other digital content. Inmates must sync their player to a kiosk to purchase and download their selections. The Department may request any content be removed from the media store by the Department's Contract Manager, or designee, submitting a request to the Contractor. Content shall be removed within three (3) business days of request. Songs may not be offered that are labeled as "explicit content." However, these songs can be made available in clean version formats. The Department may also restrict the catalog even further, if desired, by notifying the Contractor's Client Services team. If content is removed at the request of the Department, it will be removed from an inmate's tablet at the next sync with the kiosk. The inmate will receive a credit for the purchase and it will be applied to their account within five (5) business days.

a. Music: Inmates use the Contractor's inmate kiosk to preview, select, purchase, and download music since it is the simplest, most interactive method available to perform music purchases. The music storefront shows the latest releases, top hits and most popular albums and also suggests other music a user may like based on their previous downloads. The kiosk will allow an inmate the following:

   1) Search by artist, album, and genre from more than 11 million tracks;
   2) Review descriptions of artists and albums;
   3) Listen to a 30-second snippet of a song to make sure it is the desired version;
   4) Browse the entire catalog, with real time updates; and
   5) Download selected songs in seconds.

   The Contractor's music platform will allow inmates to listen to music previews, view album art, and view album details, before purchasing a song or album.

   Once an inmate is ready to purchase a song, they add it to their virtual shopping cart, agree to the transaction, and submit. The song will usually be available to download in the same kiosk session.

b. Games: There are currently over 500 games available.

   1) Game Catalog: In addition to several basic free games that are pre-installed on each tablet (with the Department's approval), inmates may browse the Contractor's Game Store on their tablet for an ever-growing selection of educational and recreational premium game content. An inmate can select any game to learn about it before deciding whether to purchase it.

   2) Purchasing and Downloading Games: To purchase a game, the inmate clicks the "Buy Now" button to send the game to the virtual shopping cart for purchase. After the purchase is approved, the game will be available for download the next time the tablet syncs with the kiosk.

c. News: The Contractor partners with Reuters, a leading news provider, to offer a daily news service for inmates. The newsfeed is updated daily with the latest articles and is available

on the inmate kiosk for download to inmate tablets. News is available through a monthly subscription.

d. eBooks: In addition to the 100 free books pre-installed on each tablet, the eBook Reader app on the tablet enables inmates to preview, buy, and store thousands of eBooks. Contractor's eBook library includes more than 30,000 titles from a variety of publishers and in several languages, including Spanish, French, Russian and German. Genres include classics, educational material, history and religious study. Inmates search the catalog on the kiosk and select eBooks to purchase and download to their device.

e. Audiobooks: Inmates can browse, preview, and purchase an ever-growing selection of books in the Contractor's music catalog. Ideal for vision-disabled inmates, audiobooks eliminate many of the shortcomings of hardcopy books, such as portability, ease of use, checking books in and out of a library, and book damage/vandalism.

f. Movies, TV Shows and Self-Help Videos: The Contractor's video rental app will be available later this year, by the time the implementation of the Department's system has been completed, and will let inmates browse the inmate kiosk catalog to rent and download a movie, television show, or self-help video of their choice. Selections will be available on the inmate's tablet for a specific period of time, and will then automatically delete. The model uses Digital Rights Management (DRM) technology, the standard in today's movie industry, to prevent copying, modifying, or redistributing. All selections will be appropriate for viewing within a corrections environment, meaning no titles will be offered that include unacceptable levels of violence, sexual situations, or other objectionable content.

g. JPay Media Account: The JPay Media Account is a prepaid account inmates can use for all kiosk-related purchases, such as stamps, players, music, games and news. It is prepaid and managed by the Contractor which allows for real-time accuracy. All inmate kiosk accounts correlate with their JPay Media Account, their player device ID, all transaction history, their Inmate Trust Fund account and any past communications between the inmate and the Contractor's Help Desk. Media purchases made using the inmate's JPay Media Account will be available for download instantly.

   At this time, the JPay Media Account will only be used to process inmate purchase refunds and promotional credit provided by the Contractor. The Department is open to considering alternative ways to utilize the JPay Media Account while ensuring that inmates are not able to place funds in their JPay Media Account as a way to circumvent paying debts owed to the Department. These discussions will begin within the first 90 days after Contract execution, the Contractor will present a solution within 60 days of finalization of the Department's requirements, and the Department will determine feasibility of implementation within 60 days of receipt of the solution. The Department is committed to seriously considering expansion of the use of the JPay Media Account, to the extent its meets the Department's requirements, is mutually beneficial, and is technical feasible.

9. Education Platform

The Contractor's Lantern is a Canvas-based LMS. The Contractor has modified this system to produce a secure corrections-based LMS. Lantern is compatible with content created in the leading industry LMS platforms; Canvas, Moodle, or Blackboard; however, there may be small differences such as file size specifications.

All student coursework is completed on and saved directly to his or her tablet. When a student syncs his or her tablet with a kiosk, all submitted coursework is uploaded to the Contractor's Lantern website for teachers/staff to access, grade, and provide feedback. Once assignments are

graded on the Contractor's Lantern website and the student again syncs with the kiosk, the students will receive all new grades and communications from their teachers. This allows module completion and coursework to be tracked both on the tablet and the Contractor's Lantern website.

Khan Academy is a not-for-profit organization that promotes learning through a wide variety of concise, easily understood "How To" videos, including a free GED prep course. The Contractor will offer the entire Khan Academy video catalog to inmates through an app called KA Lite. Once a video is selected, inmates may watch the videos on their tablets.

10. Video Visitation

Inmates may participate in web-enabled live video chats with friends and family members who are at home on their personal computer using the multimedia kiosk (function will not be available on the inmate tablets).

a. Scheduling a Visit: Scheduling a video visitation session is straightforward and is done online at jpay.com. If the Department prefers to restrict scheduling to friends and family who have been previously approved for onsite visitation, or a specific list for video visitation, the Contractor can verify customers' names against a Department-provided visitor list before allowing them to proceed with scheduling. Designated timeslots are available for video visitation sessions.

b. Customer Pays in Advance: Once the inmate name and scheduled time is set, the friend or family member pays for a block of time in advance with a credit/debit card.

c. Participants are Notified via Email: After payment, the system emails the customer and the inmate notifying them of the date and time of the session. The inmate is also notified of the assigned kiosk and the visitor's name. Shortly before the scheduled start time, the system emails a visit reminder to the customer and inmate.

d. Accessing the Session: Contractor's video visitation system is designed to make visitation available to as many people as possible. Friends and family members may access the system from any computer with a standard webcam, microphone, and Adobe Flash (a free plug-in most PCs will already have). Customers log into their JPay.com account to access their scheduled visitation session, while inmates can use the assigned inmate kiosk to log into their account and access video visitation.

   The session is initiated when both parties show up to conduct a visit. The Department can choose to set a "pre-start" window that allows the visit to initiate a few minutes earlier if both parties are available.

   The video session will continue if either party disconnects, allowing the visit to resume quickly when that party reconnects. Since network connectivity can sometimes drop unexpectedly, it is essential that the Contractor's system accommodates such scenarios.

   At the beginning of every visit, the video visitation application checks the user's camera, microphone and internet bandwidth to adjust the video quality for the best user experience. If the system detects a problem, it instructs the user how to fix it. If the visit is unable to occur due to network connectivity, the Contractor will credit the customer's account.

11. Facility System

The Contractor's Facility System provides the Contractor and the Department with access to reports and detailed transactions for all payments and batches. It also enables feature-rich

ATTACHMENT A
Fee Structure

Item Description	Cost
JP5mini 4.3" Tablet (include earbuds and protective case)	$79.99*
JP5*S* 7" Tablet (include earbuds and protective case)	$129.99*
Replacement Earbuds	$10.00
Armband	$10.00
High Definition Wired Headphones	$40.00
Songs	$1.00 - $2.50
Games	Free - $7.99
Movies	$0.99 - $7.99
Audiobooks	$0.99 - $19.99
News Subscriptions	Up to $7.99 per month
eBooks	$0.99
Video Visitation	$2.95/ per 15 minute session
Electronic Stamps: Single Stamp (inmate purchase only) 10 Stamp Bundle 30 Stamp Bundle 60 Stamp Bundle	 $0.39** $4.40 $12.00 $21.00
Secure Mail Message (up to 5,000 characters)	1 electronic stamp
VideoGram	4 electronic stamps
eCard	1 electronic stamp
Photo Attachment	1 electronic stamp
Black & White Printout of Mail Message or Mail Attachment***	$0.25
Color Printout of Mail Attachment***	$1.00

* For the first 60 days of the promotional period, players will be available at half price for inmates who are new customers.

** At the Department's request, the Contractor will offer inmates the ability to purchase a single stamp. This single-stamp purchase will not be available for friends and family.

*** No charge for mail message printouts for inmates in Special Housing Units. Friends and family will be charged one (1) additional electronic stamp for each mail attachment to cover cost of printouts. For example, an email with one (1) attachment would cost three (3) electronic stamps instead of two (2).

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

CONTRACT AMENDMENT BETWEEN

THE FLORIDA DEPARTMENT OF CORRECTIONS

AND

JPAY, INC.

This is an Amendment to the Contract between the Florida Department of Corrections ("Department") and JPay, Inc. ("Contractor") to provide inmate deposit, release cash, and court ordered payment services to the Department's inmates.

This Amendment:

- Revises Section III., A., Payment, Inmate Trust Fund Transaction;
- Revises Section VII., A., 1., Public Records Law;
- Adds Section VII**.**, W., Indemnification; and
- Adds Section VII., X., Scrutinized Companies Lists.

Original contract period:	July 1, 2013 through June 30, 2016
Amendment #1:	November 8, 2013 through June 30, 2016
Amendment #2:	July 1, 2016 through June 30, 2019

In accordance with Section V., CONTRACT MODIFICATION; the following changes are hereby made:

1. Section III., A., Payment, Inmate Trust Fund Transactions is hereby revised to read:

III. A. Payment

INMATE TRUST FUND TRANSACTIONS				
Type of Transaction	**Number of Transactions**	**Commissions**	**Payment Amount**	**Fee**
		$2.75	$0.00 - $9.99	$2.95
Phone Transaction		$2.75	$10.00 - $19.99	$3.95
		$2.75	$20.00 – $29.99	$5.95
		$2.75	$30.00 – $39.99	$7.95
	Unlimited	$2.75	$40.00 – $49.99	$8.95
		$2.75	$50.00 – $74.99	$9.95
		$2.75	$75.00 – $99.99	$11.95
		$2.75	$100.00 – $199.99	$12.95
		$2.75	$200.00 – $300.00	$13.95
Internet Transaction		$2.75	$0.00 - $9.99	$1.95
		$2.75	$10.00 - $19.99	$2.95
		$2.75	$20.00 – $29.99	$4.95
		$2.75	$30.00 – $39.99	$6.95
	Unlimited	$2.75	$40.00 – $49.99	$7.95
		$2.75	$50.00 – $74.99	$8.95
		$2.75	$75.00 – $99.99	$10.95
		$2.75	$100.00 – $199.99	$11.95
		$2.75	$200.00 – $300.00	$12.95

2. Section VII., A., 1. Public Records Law is hereby added to read:

VII. A. 1. Public Records Law

The Contractor agrees to: (a) keep and maintain public records required by the Department in order to perform the service; (b) upon request from the Department's custodian of public records, provide the Department with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law; (c) ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the Contract if the Contractor does not transfer the records to the Department; and (d) upon completion of the Contract, transfer, at no cost, to the Department all public records in possession of the Contractor or keep and maintain public records required by the Department to perform the service. If the Contractor transfers all public records to the Department upon completion of the Contract, the Contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Contractor keeps and maintains public records upon completion of the Contract, the Contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the Department, upon request from the Department's custodian of public records, in a format that is compatible with the information technology systems of the Department. Pursuant to §287.058(1)(c), F.S, the Department is allowed to unilaterally cancel the Contract for refusal by the Contractor to allow public access to all documents, papers, letters, or other material made or received by the Contractor in conjunction with the Contract, unless the records are exempt from §24(a) of Art. I of the State Constitution and §119.07(1), F.S.

If the Contractor has questions regarding the application of Chapter 119, Florida Statutes, to the Contractor's duty to provide public records relating to this Contract, contact the custodian of public records at:

Florida Department of Corrections
ATTN: Public Records Unit
501 South Calhoun Street
Tallahassee, Florida 32399-2500
Telephone: (850) 717-3605
Fax: (850) 922-4355
Email: CO.PublicRecords@mail.dc.state.fl.us

3. Adds Section VII., W., Indemnification, is hereby added to read:

VII. W. Indemnification

The Contractor shall be liable, and agrees to be liable for, and shall indemnify, defend, and hold the Department, its employees, agents, officers, heirs, and assignees harmless from any and all claims, suits, judgments, or damages including court costs and attorney's fees arising out of intentional acts, negligence, or omissions by the Contractor, or its employees or agents, in the course of the operations of this Contract, including any claims or actions brought under Title 42 USC §1983, the Civil Rights Act.

4. Adds Section VII., X., Scrutinized Companies Lists, is hereby added to read:

VII. X. Scrutinized Companies Lists

If the Contract exceeds $1,000,000.00 in total, not including renewal years, the Contractor certifies that they are not listed on either the Scrutinized Companies with Activities in Sudan List, the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or the Scrutinized Companies that Boycott Israel List created pursuant to Sections 215.473, F.S., and 215.4725, F.S. Pursuant to Section 287.135(5), F.S., and 287.135(3), F.S., the Contractor agrees the Department may immediately terminate the Contract for cause if the Contractor is found to have submitted a false certification, or if the Contractor is placed on the Scrutinized Companies with Activities in Sudan List, the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or the Scrutinized Companies that Boycott Israel List, or is engaged in a boycott of Israel during the term of the Contract.

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

All other terms and conditions of the original Contract and any previous amendments remain in full force and effect.

This Amendment shall begin on the date on which it is signed by both parties.

IN WITNESS THEREOF, the parties hereto have caused this Amendment to be executed by their undersigned officials as duly authorized.

CONTRACTOR:
JPAY, INC.

SIGNED BY: _____

NAME: Errol Feldman

TITLE: Chief Executive Officer

DATE: March 30, 2017

FEID #: 01-0756761

FLORIDA DEPARTMENT OF CORRECTIONS

SIGNED BY: _____

NAME: Julie L. Jones

TITLE: Secretary

DATE: 4/17/17

Approved as to form and legality, subject to execution.

SIGNED BY: _____

NAME: Kenneth S. Steely

TITLE: General Counsel

DATE: 4/12/17

CARDHOLDER AGREEMENT

(Effective June, 2016)

This Cardholder Agreement (this "**Agreement**") sets forth the terms of your non-reloadable prepaid Card. Please read it carefully and retain it for your records. If you do not agree to these terms, do not use the Card and cancel it by calling Customer Service at 1-877-287-2448. Otherwise, your acceptance and/or use of the Card will be evidence of your agreement to these terms.

NOTE: THIS AGREEMENT REQUIRES CERTAIN DISPUTES TO BE RESOLVED BY WAY OF **BINDING ARBITRATION**, RATHER THAN BY JURY TRIAL. THE TERMS OF THE ARBITRATION CLAUSE APPEAR AT THE END OF THIS AGREEMENT.

Definitions. In this Agreement, the words "you" and "your" mean the Cardholder. "Bank," "we," "us" and "our" mean Cache Valley Bank, the issuer of the Card, or anyone to whom we assign our rights. "Card" means the network branded card that is issued to you.

Identification. To help the government fight the funding of terrorism and money laundering activities, federal law requires us to obtain, verify, and record information that identifies each person who obtains a Card. When you request or agree to receive a Card, you authorize the party giving you the Card to provide us with your name, address, date of birth and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents and may use resources such as credit bureaus or other means to verify your identity information.

Using Your Card. Your Card is active right now and can immediately be used to access available funds that have been "loaded" to the Card. You do not need to call us to activate the Card. If you find that your card is not active, please visit www.accessfreedomcard.com to activate it.

You may use your Card to purchase goods and services anywhere MasterCard® debit cards are accepted and to access cash at ATMs of financial institutions displaying the MasterCard®, Pulse®, or Maestro® name and/or logo. Each time the Card is used to purchase goods or services or to withdraw cash at ATMs, you authorize us to charge that amount (and any applicable fees) against your Card's available balance. You may not give or transfer your Card to another person for their use.

You will be required to input your personal identification number ("PIN") in order to access cash at ATMs and to purchase goods or services at some point-of-sale ("POS") terminals. Please refer to the activation label on your card for your temporary PIN number. You should promptly change your temporary PIN by calling Customer Service at 1-877-287-2448. You agree not to disclose your PIN to others.

ATM Receipts. You can get a receipt at the time you make any withdrawal with your Card using one of our ATMs.

Balance and Transaction Information. You can obtain information about the current available balance on your Card and a description of recent transactions by calling Customer Service at 1-877-287-2448 or visiting www.accessfreedomcard.com.

Limitations. Subject to your available balance, you may use your Card to make withdrawals at ATMs and purchase goods or services up to the aggregate amount of $3,500 per day. You may not conduct more than five ATM or twenty purchase transactions on any single day. For security reasons, there may be times when we further limit these amounts. You may not use your Card for any unlawful purpose or to conduct Internet gambling transactions.

The maximum amount that can be loaded to the Card is $9,700. Interest will not be paid to you for any amount loaded on the Card. The Card is non-reloadable. This means that you cannot add amounts to the Card balance after it is issued. There is no credit card, credit line, overdraft protection, or deposit account associated with your Card. Your Card is not transferable and may only be used by you.

FDIC Insurance. The money credited to your Card will be held in a custodial account at the Bank. Funds in the custodial account are insured by the FDIC to its maximum limits.

Unclaimed Property. We may transfer (escheat) your Card balance to the appropriate state if no activity occurs in the Card and you fail to communicate with us regarding your Card within the time period specified by state law. If funds are transferred to the state, you may file a claim with the state to recover the funds.

Cancellation and Suspension. We may cancel or suspend Card privileges without cause or prior notice, except as otherwise required by law. We may refuse to process any transaction that we believe may violate the terms of this Agreement or may be unauthorized. You may cancel your Card by calling Customer Service at 1-877-287-2448.

We will attempt to notify you if we decide to cancel or suspend your use of the Card. You agree not to use or allow others to use an expired, cancelled, suspended or otherwise invalid Card. Our cancellation or suspension of Card privileges will not otherwise affect your rights and obligations under this Agreement. If we cancel or suspend your Card privileges through no fault of yours, you will be entitled to a refund of the remaining balance without charge.

Card Expiration. Subject to applicable law, you may use the Card only through its expiration date. The expiration date is shown on your Card. If you attempt to use the Card after the expiration date, the transactions may not be processed.

Although the Card expires, the underlying funds do not expire. If there is a balance remaining on the Card at the time of its expiration, you may request a replacement Card by calling Customer Service at 1-877-287-2448. Otherwise, we will either send you a replacement Card or refund the balance remaining on the Card to you, less any amounts owed to us. The replacement Card or a check for the Card balance may be mailed to you at the latest postal address reflected in our records. We do not impose a fee for any replacement Card or check sent to you as a result of your Card's expiration.

Privacy. We may release information about you, your Card and the transactions you perform to third parties: where it is necessary or helpful in verifying or completing a transaction; to disclose the existence, history, and condition of your Card to consumer reporting agencies; when you give us your consent; to comply with the law or a court or governmental order; to local, state and federal authorities if we believe a crime may have been committed involving your Card; and as permitted by law. Please see our Privacy Policy at www.cachevalleybank.com/privacy.pdf for further information.

Although no credit history is required to obtain a Card, you authorize us to obtain information about you from time to time from credit reporting agencies and other third parties to assist us in verifying your identity, to prevent fraud, and to investigate potential misuse of the Card.

Notice of Lost or Stolen Cards/Unauthorized Activity. You agree to notify us AT ONCE of the loss, theft or unauthorized disclosure of any PIN or code that might be used to access Card funds. If you believe your Card or PIN has been lost or stolen or that someone has transferred or may transfer money from the Card without authorization, call Customer Service at 1-877-287-2448. You agree to cooperate reasonably with us in our attempts to recover funds from, and to assist in the prosecution of, any unauthorized users of your Card. If you allow another person to use the Card, you agree to be responsible for all transactions conducted by that person, even if the transactions exceed the amounts or use authorized by you.

Our Liability for Failing to Make Transfers. If we do not complete a transaction to or from the Card on time or in the correct amount according to this Agreement, we may be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance:

(a)if your Card funds are insufficient for the transaction or are unavailable for withdrawal (e.g., because they are subject to a hold or legal process);

(b)if a computer system, ATM, or POS terminal was not working properly and you knew about the problem when you started the transaction;

(c)if a merchant refuses to honor the Card;

(d)if circumstances beyond our control (such as fire, flood, terrorist attack or national emergency) prevent the transaction, despite reasonable precautions that we have taken;

(e)if we refuse a transaction because the Card has been reported as lost or stolen, has been suspended by us, or we have reason to believe the transaction is not authorized by you; or

(f)as otherwise provided in this Agreement.

In Case of Errors or Questions About Card Transactions. Call us at 1-877-287-2448, or write to Customer Service at P.O. Box 6425, North Logan, Utah 84341 as soon as you can if you think your balance or transaction information is wrong or if you need more information about a transaction.

We must hear from you no later than 60 days after the problem or error is first made available for you to view at www.accessfreedomcard.com or disclosed to you by telephone. When notifying us:

(1) Tell us your name and Card number.

(2) Describe the error or the transaction you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

In addition, it would be helpful if you provided us with any supporting documentation related to the error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit the Card within 10 business days for the amount you think is in error so that you will have the use of the money during the time it takes us to complete the investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit the Card.

For errors involving new Cards (i.e., Cards issued within the previous 30 days), point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new Cards, we may take up to 20 business days to credit your Card for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

Your Liability for Unauthorized Transfers. Tell us AT ONCE if you believe your Card or PIN has been lost or stolen. Telephoning is the best way of keeping your possible losses down. You could lose all the money loaded on your Card.

If you are a Registered Cardholder and tell us within two business days after you learn of the loss or theft of your Card or PIN, you can lose no more than $50 if someone used your Card or PIN without your permission. If you do NOT tell us within two business days after you learn of the loss or theft of your Card or PIN, and we can prove we could have stopped someone from using your Card or PIN without your permission if you had told us, you could lose as much as $500.

Also, if become aware of or otherwise suspect transactions that you did not make, including those made by Card, PIN or other means, tell us at once. If you do not tell us within 60 days after the transaction is first made available for you to view at www.accessfreedomcard.com, you may not get back any money you lost after the 60 days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or a hospital stay) kept you from telling us, we will extend the time periods.

If you are not a Registered Cardholder, you will be responsible for all transactions conducted with the Card, regardless of whether or not they were authorized by you (i.e., the limitations on liability described above do not apply to you). As such, protect your Card as you would your cash. We will not reimburse you for any unauthorized transactions which occur prior to the time you notify us of the unauthorized activity or that your Card or PIN has been lost or stolen.

Limited Liability. UNLESS OTHERWISE REQUIRED BY LAW, WE WILL NOT BE LIABLE TO YOU FOR: DELAYS OR MISTAKES RESULTING FROM ANY CIRCUMSTANCES BEYOND OUR REASONABLE CONTROL, INCLUDING, WITHOUT LIMITATION: ACTS OF GOVERNMENTAL AUTHORITIES, NATIONAL EMERGENCIES, INSURRECTION, WAR, OR RIOTS; THE FAILURE OF MERCHANTS TO HONOR YOUR CARD; THE FAILURE OF MERCHANTS TO PERFORM OR PROVIDE SERVICES; COMMUNICATION SYSTEM FAILURES; OR FAILURES OR MALFUNCTIONS ATTRIBUTABLE TO YOUR EQUIPMENT, ANY INTERNET SERVICE, OR ANY PAYMENT SYSTEM. IN THE EVENT THAT WE ARE HELD LIABLE TO YOU, YOU WILL ONLY BE ENTITLED TO RECOVER YOUR ACTUAL DAMAGES. IN NO EVENT SHALL YOU BE ENTITLED TO RECOVER ANY INDIRECT, CONSEQUENTIAL, EXEMPLARY OR SPECIAL DAMAGES (WHETHER IN CONTRACT, TORT OR OTHERWISE), EVEN IF YOU HAVE ADVISED US OF THE POSSIBILITY OF SUCH DAMAGES. THIS PROVISION SHALL NOT BE EFFECTIVE TO THE EXTENT OTHERWISE REQUIRED BY LAW. TO THE EXTENT PERMITTED BY LAW, YOU AGREE THAT YOUR RECOVERY FOR ANY ALLEGED NEGLIGENCE OR MISCONDUCT BY THE BANK OR OUR SERVICE PROVIDERS SHALL BE LIMITED TO THE TOTAL AMOUNT LOADED ON THE CARD.

Our Business Days. Our business days are Monday through Friday, excluding federal and legal banking holidays in the State of Utah.

Notices. We may send notices to you at the last postal or e-mail address reflected for you in our Card records or by otherwise making the information available to you. If your e-mail or postal address changes, you agree to notify Customer Service immediately. Failure to do so may result in Card information being mailed to the wrong person or your transactions being declined. You agree to provide notices to us by calling us at 1-877-287-2448 or writing us at: Customer Service, P.O. Box 6425, North Logan, Utah 84341.

Third-Party Service Providers. We may engage a third party such as Rapid Financial Solutions to assist us in administering, supporting, and/or marketing the Card program and otherwise performing our obligations under this Agreement.

Delay of Rights. We can waive or delay enforcement of any of our rights under this Agreement without losing them.

No Assignment by You. You may not assign or transfer this Agreement or any of your rights or obligations under this Agreement. Any attempt to the contrary (such as the grant of a security interest) shall be null and void. This Agreement shall be binding on you, your executors, administrators, and any permitted assigns.

Invalidity. If any term of this Agreement is determined to be invalid under applicable law, the remaining terms shall continue in effect as if the invalid term had not been included.

Change in Terms. Subject to the limitations of applicable law, we may at any time add to, delete or change the terms of this Agreement by sending you a notice. We will not change the fees or terms and conditions of expiration. Advance notice may not be given, however, if we need to make the change immediately in order to maintain or restore the security of the Card or any related payment system.

Governing Law/Jurisdiction. All matters, whether sounding in contract, tort or otherwise, relating to the validity, construction, interpretation or enforcement of this Agreement shall be determined by the laws of the United States and, to the extent not inconsistent therewith, the laws of the State of Utah. You consent and submit to the exclusive jurisdiction of the state and federal courts located in Cache County, Utah in all controversies arising out of or in connection with your use of the Card and this Agreement.

Entire Agreement. This Agreement sets forth the entire understanding and agreement between you and us, whether written or oral, with respect to its subject matter and supersedes any prior or contemporaneous understandings or agreements with respect to its subject matter.

Your Representations and Warranties. You represent and warrant to us that: (i) you are a U.S. citizen or legal alien residing in one of the 50 states or the District of Columbia; (ii) the personal information that you provide to us in connection with the Card is true, correct and complete; (iii) you reviewed this Agreement and agree to its terms; (iv) you accept the Card; and (iv) you will not use the Card to purchase illegal goods or services or to violate any law.

Arbitration of Disputes. Except as expressly provided below, any controversy that arises out of or is related to (a) the Card, (b) any service relating to the Card, or (c) this Agreement, whether based on statute, contract, tort or any other legal theory, in which the aggregate amount in controversy for all claimants exceeds $15,000, including interest and attorneys' fees, (any "Claim") will be settled on an individual basis by binding arbitration under the Federal Arbitration Act ("FAA"). Judgment on the arbitration award may be entered in any court having jurisdiction. Any dispute regarding whether a particular controversy is subject to arbitration will be decided by the arbitrator(s). If any part of the damages or other relief requested is not expressly stated as a dollar amount, the controversy will be a Claim that is subject to arbitration. You and Bank acknowledge and agree that the transactions contemplated by use of the Card, and any controversy that may arise under or relate to the Card, Card services, or this Agreement involve "commerce" as that term is defined and used in the FAA.

The arbitration will be administered by the American Arbitration Association (the "AAA") under its Commercial Arbitration Rules (the "**Arbitration Rules**"). We will tell you how to contact the AAA and how to get a copy of the Arbitration Rules without cost if you ask us in writing to do so. The Arbitration Rules permit you to request deferral or reduction of the administrative fees of arbitration if paying them would cause you a hardship. Any in-person arbitration hearing will be held in Cache County, Utah, where our employees and records of the Card are located. It is within the arbitrator's discretion to order the arbitration to take place by telephone.

Each arbitrator shall be a licensed attorney who has been engaged in the private practice of law continuously during the 10 years immediately preceding the arbitration or a retired judge of a court of general or appellate jurisdiction. The arbitration award shall award only such relief as a court of competent jurisdiction could properly award under applicable law, including attorneys' fees if allowed by applicable law or agreement, and may award to the prevailing party all pre- and post-award expenses of arbitration. All statutes of limitation, defenses, and attorney-client and other privileges that would apply in a court proceeding will apply in the arbitration. The filing of a demand for arbitration in accordance with the Arbitration Rules will be deemed the commencement of an action for purposes of any applicable statute of limitations. There will be no class Claims—Claims by or on behalf of other persons will not be considered in or consolidated with the arbitration proceedings between you and Bank.

The Agreement does not limit the right of you or us, whether before, during or after the arbitration proceeding, to obtain provisional or ancillary remedies or injunctive or other traditionally equitable relief (other than a stay of arbitration) necessary to protect the rights or property of the party seeking relief pending the arbitrator's determination of the merits of the Claim or the Bank's to exercise self-help remedies, such as the right of set-off. The taking of any of the actions described in the preceding sentence by either party or the filing of a court action by a party shall not be deemed to be a waiver of the right to demand arbitration of any Claim asserted as a counterclaim or the like in response to any such action. This arbitration provision will survive the termination of your relationship with Bank, whether evidenced by this Agreement or otherwise.

You understand, acknowledge and agree that: you have read carefully this provision in which you and Bank have agreed to arbitrate disputes; this provision limits or waives certain of your rights, including the right to bring a court action and to have a jury trial; there will be no class claims in arbitration; discovery may be more limited in arbitration than in a court proceeding; the right and grounds to appeal from an arbitrator's award are more limited than in an appeal from a court judgment; and certain other rights you have in a court proceeding also may not be available in arbitration.

Questions. If you have questions regarding your Card, you may call us at 1-877-287-2448 or write to Customer Service, P.O. Box 6425, North Logan, Utah 84341.

When you use your Card to initiate a transaction at certain merchants (e.g., gas stations, hotels, restaurants, and car rentals), the merchant may request confirmation of the Card's validity and authorization for the transaction. Note: The amount may be estimated by the merchant and may include a gratuity. You agree that we may place a temporary hold on your Card balance for the estimated amount, even if it exceeds the amount of your ultimate transaction. Any excess will be released later after the transaction is finally settled through the system.

Your Obligation for Overdrafts. You agree not to conduct transactions which would cause your Card balance to become overdrawn. If a merchant attempts to process a transaction for more than your Card's available balance, the transaction may be declined. If you conduct transactions in an amount that exceeds the balance on your Card, you agree to pay us the overdrawn amount immediately, without further demand.

Merchant Refunds and Disputes. Depending on the merchant, any refund for goods or services purchased with the Card may be made in the form of a credit to the Card. You are not entitled to receive a cash refund.

We are not responsible for the delivery, quality, safety, legality or any other aspect of goods and services that you purchase from others with a Card. All such disputes should be addressed to the merchants from whom the goods and services were purchased.

Foreign Transactions. If you conduct a transaction in a currency other than U.S. dollars, the merchant, network or card association that processes the transaction may convert any related debit into U.S. dollars in accordance with its then current policies. MasterCard currently uses a conversion rate that is either: (a) selected from a range of rates available in the wholesale currency markets on or one day prior to its central or transaction processing date (note: this rate may be different from the rate the association itself receives), or (b) the government-mandated rate. The conversion rate may be different from the rate in effect on the date of your transaction and the date it is posted to your Card. We may impose a charge on the transaction amount (including reversals) for each transaction that you conduct outside the United States or in a foreign currency. This charge is in addition to any applicable ATM fee. See Fees and Charges section.

Fees and Charges. We will charge you, and you agree to pay, the fees and charges set forth below. We normally deduct fees and charges automatically from the Card balance at the time a fee or charge is incurred.

ATTENTION!

Online Registration will ensure the security of your funds. Please visit **accessfreedomcard.com** for additional protection and benefits such as: Mobile Alerts, 24/7 Transaction Monitoring, Fraud Protection, and to Upgrade to a Reloadable Bank Card

Use your card where you see these symbols:

MasterCard pulse Maestro

Card Fees

Card Activation:	$0.00
Calls to Customer Service:	$0.00
PIN Change:	$0.00
Point of Sale Transactions (PIN or Signature):	$0.00
Cash Back Option with POS Transaction:	$0.00
Cash Back at MasterCard Principal Location:	$0.00
Transfer from Card to Bank Account:	$0.00
POS Declines:	$0.00
Card Maintenance*:	$2.50 per week
ATM Inquiry:	$1.50 per inquiry
ATM Withdrawal (Within USA):	$2.95 per transaction
ATM Withdrawal (Outside USA):	$3.95 per transaction
ATM Decline (Within USA):	$2.95 per transaction
ATM Decline (Outside USA):	$3.95 per transaction
Foreign Transactions: (See paragraph titled "Foreign Transactions" above)	3% of total transaction amount
Card Replacement ¥:	$10.00
Close Account with Check Disbursement ‡:	$10.00

** Weekly maintenance fee begins 3 calendar days after the Card is issued and will be deemed fully earned when assessed.*

¥ Applies to replacements for lost or stolen Cards.

‡ Does not apply when a check is sent as a result of Card expiration or we cancel or suspend your Card privileges through no fault of yours.

Note: When you use an ATM not owned by us, you may be charged a fee by the ATM operator or any network used (and you may be charged a fee for a balance inquiry even if you do not complete a withdrawal).

You can obtain more information about Card fees by calling Customer Service at 1-877-287-2448 or visiting www.accessfreedomcard.com.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,	)	
Plaintiff/Counter-Defendant,	)	
v.	)	No. 3:15-CV-452-TAV-CCS
JAMES "J.J." JONES, Sheriff of Knox County, Tennessee, in his official and individual capacities; RODNEY BIVENS, Assistant Chief Deputy of the Knox County Sheriff's Office, in his official and individual capacities; and KNOX COUNTY, TENNESSEE,	)	
Defendants/Counter-Plaintiffs.	)	

AMENDED AND RESTATED ANSWER

Come now the Defendants, Knox County, Tennessee ("Knox County")[1] and James J.J. Jones and Rodney Bivens, in their individual capacity, by and through the undersigned counsel and with the Plaintiff's consent pursuant to F.R.Civ.P. Rule 15(a)(2), and withdraw their counterclaim, and amend and restate their Answer [Doc. 25] as follows:

[1] It is well established that "an official capacity claim filed against a public employee is equivalent to a lawsuit directed against the public entity which that agent represents." *Claybrook v. Birchwell*, 199 F.3d 350, 355 n.4 (6th Cir. 2000) (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Consequently, an action against a municipal or county officer in an official capacity under 42 U.S.C. § 1983 is treated as an action against the governmental entity. *Campbell v. Anderson County*, 695 F. Supp.2d 764, 770 (E.D.Tn. 2010) (citing *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)).

AMENDED AND RESTATED ANSWER

I. KNOX COUNTY'S ADMISSION OF LIABILITY

Knox County, individually and collectively with its official policy-makers Sheriff J. J. Jones and Chief Rodney Bivens in their official capacity, believe that electronic communication systems are the way of the future for correctional facilities. Having successfully implemented a revolutionary system that allows inmates to communicate with the outside world by e-mail and by video conferencing, Knox County set out to increase the capabilities of the system by adding books, periodicals and other written materials to a server, as well as legal research, and allowing inmates to access these materials on kiosks in the common areas and privately on tablets in their cells. At all times the goals of Sheriff Jones and Chief Bivens in implementing this system were to eliminate the risk of smuggling of contraband and to preserve and enhance the safety and security of the inmates and staff, while facilitating communication by members of the public with inmates. Prison Legal News (PLN) never contacted Knox County before bringing suit, and Knox County was unaware of the nationwide litigation brought by the Plaintiff in other jurisdictions.

Knox County admits that it implemented a post-card only inmate mail policy before successfully completing the improvements necessary to make Plaintiff's materials available to all of its inmates electronically. Knox County attempted in good faith to complete the transition to electronic communications after suit was brought, but ran into supply difficulties ordering enough tablets for each inmate, and technical difficulties connecting sufficient tablets to Wi-Fi throughout the facility.

Knox County has reviewed the nationwide litigation brought by PLN in other jurisdictions. Pursuant to these authorities, Knox County elects not to dispute that it is liable to

the Plaintiff under 42 U.S.C. §§ 1983 and 1988 for the implementation of its post-card only policy before successfully completing the improvements necessary to make Plaintiff's materials available to all of its inmates electronically. When it became apparent that the technical difficulties in fully implementing the electronic communications system could not be overcome promptly, Knox County returned to the practice of allowing paper publications, and thereafter amended and revised its written policies to allow Plaintiff's publications in paper form to be mailed to and delivered directly to inmates. A copy of the current policy is attached and incorporated herein.

With respect to Plaintiff's due process claim, Knox County advised the inmates that Plaintiff's materials were received and had been placed in the inmates' property boxes, but Knox County admits that it did not inform PLN that its mail had not been delivered directly to the inmates. Knox County elects not to dispute that it is liable to the Plaintiff under 42 U.S.C. §§ 1983 and 1988 for failing to inform Plaintiff that its mail had not been delivered directly to the inmates. Knox County also amended and revised its written policies to provide notice to the sender of any decision censoring publications, an opportunity to be heard, and for administrative and judicial review under the Tennessee Administrative Procedures Act. A copy of the current policy is attached and incorporated herein.

Sheriff J. J. Jones and Chief Rodney Bivens aver that they are not liable in their individual capacity for adopting the aforementioned written policies in an effort to establish a modern electronic inmate communications system for Knox County, *See e.g. Harvey v. Campbell County*, 453 Fed. Appx. 557, 562-563 (6th Cir. 2011); and that, in any event, they are entitled to qualified immunity.

II

In answer to the specific factual allegations of the Complaint, as set forth in numbered paragraphs, Defendants respond as follows:

1. In response to Paragraph 1 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief. All other allegations of Paragraph 1 are denied.

2. Paragraph 2 of the Complaint is admitted.

3. Paragraph 3 of the Complaint is admitted.

4. Paragraph 4 of the Complaint is admitted.

5. Paragraph 5 of the Complaint is admitted.

6. Paragraph 6 of the Complaint is admitted.

7. Paragraph 7 of the Complaint is denied.

8. In response to Paragraph 8 of the Complaint, it is denied that Plaintiff is entitled to any relief against the individual defendants.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint, and consequently, such allegations are denied.

10. In response to Paragraph 10 of the Complaint, it is admitted that Sheriff Jones is a final policy-maker for Knox County but Defendants assert that Sheriff Jones is improperly sued in his individual capacity. Any remaining allegations of Paragraph 10 are denied except to the extent stated in Section I, Admission of Liability, which is adopted and incorporated herein.

11. In response to Paragraph 11 of the Complaint, it is admitted that Chief Bivens is a policy-maker for Knox County and is subject to the supervision and direction of Sheriff Jones, but Defendants assert that Chief Bivens is improperly sued in his individual capacity. It is admitted that Chief Bivens in his official capacity signed the jail mail policy, Policy 12.2. Any remaining allegations of Paragraph 11 are denied except to the extent stated in Section I, Admission of Liability, which is adopted and incorporated herein.

12. In response to Paragraph 12 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 12 are denied.

13. In response to Paragraph 13 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. It is admitted that Knox County established, maintained, and enforced the policies at issue in this action through the actions of Sheriff Jones and Chief Bivens in their official capacities. It is admitted that all of Defendants' actions were taken under color of state law and that all of the individual Defendants' actions were taken within the scope of their official duties as employees and officers of Knox County. It is averred that all of these actions were taken in the Defendants' official capacity, and denied that actions or omissions taken in their individual capacity violated the Plaintiff's rights. All other allegations of Paragraph 13 are denied.

14. The allegations of Paragraph 14 are admitted.

15. The allegations of Paragraph 15 are admitted.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint, and consequently, such allegations are denied.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint, and consequently, such allegations are denied.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint, and consequently, such allegations are denied.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint, and consequently, such allegations are denied.

20. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint, and consequently, such allegations are denied.

21. In response to Paragraph 21 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 21 are denied.

22. In response to Paragraph 22 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 22 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

23. In response to Paragraph 23 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 23 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

24. In response to Paragraph 24 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 24 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

25. In response to Paragraph 25 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 25 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

26. In response to Paragraph 26 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 26 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

27. The allegations of Paragraph 27 of the Complaint are denied.

28. In response to Paragraph 28 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 28 are denied, except that Defendants do not dispute that before adopting the current policies, there were one-hundred and eleven (111) mailings not delivered directly to inmates. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

29. The allegations of Paragraph 29 of the Complaint are admitted.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint, and consequently, such allegations are denied.

31. In response to Paragraph 31 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 31 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

32. In response to the allegations of Paragraph 32 of the Complaint, it is admitted only that Plaintiff publishes certain materials. Defendants are without knowledge or information sufficient to form a belief as to the truth of the universe of materials published by Plaintiff, and consequently, the remaining allegations of Paragraph 32 of the Complaint are denied.

33. In response to Paragraph 33 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 33 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

34. In response to Paragraph 34 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 34 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

35. In response to Paragraph 35 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 35 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 of the Complaint, and consequently, such allegations are denied.

37. In response to Paragraph 37 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 37 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

38. In response to the allegations of Paragraph 38 of the Complaint, it is admitted only that Plaintiff publishes certain materials. Defendants are without knowledge or information sufficient to form a belief as to the truth of the universe of materials published by Plaintiff, and consequently, the remaining allegations of Paragraph 38 of the Complaint are denied.

39. Defendants do not dispute the allegations of Paragraph 39 of the Complaint.

40. In response to Paragraph 40 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 40 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

41. In response to Paragraph 41 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 41 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

42. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 of the Complaint, and consequently, such allegations are denied.

43. In response to the allegations of Paragraph 43 of the Complaint, it is admitted only that Plaintiff publishes certain materials. Defendants are without knowledge or information

sufficient to form a belief as to the truth of the universe of materials published by Plaintiff, and consequently, the remaining allegations of Paragraph 43 of the Complaint are denied.

44. Defendants do not dispute the allegations of Paragraph 44 of the Complaint.

45. In response to Paragraph 45 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 45 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

46. In response to Paragraph 46 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 46 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

47. In response to Paragraph 47 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 47 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

48. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 48 of the Complaint, and consequently, such allegations are denied.

49. In response to Paragraph 49 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 49 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

50. In response to Paragraph 50 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 50 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

51. In response to Paragraph 51 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 51 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

52. In response to Paragraph 52 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 52 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

53. Referring to each of the policies and amended policies adopted during the relevant time, the allegations of Paragraph 53 of the Complaint are admitted.

54. In response to Paragraph 54 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 54 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

55. In response to Paragraph 55 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 55 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

56. In response to Paragraph 56 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 56 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

57. In response to Paragraph 57 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 57 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

58. In response to Paragraph 58 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 58 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

59. In response to Paragraph 59 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraph 59 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

60. In response to Paragraphs 60 through 65 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraphs 60 through 65 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

61. In response to Paragraphs 66 through 71 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraphs 66 through 71

are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

62. In response to Paragraphs 73 through 79 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraphs 73 through 79 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

63. In response to Paragraphs 80 through 86 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraphs 80 through 86 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

64. In response to Paragraphs 87 through 90 of the Complaint, Defendants adopt and incorporate Section I, Admission of Liability. All other allegations of Paragraphs 87 through 90 are denied. Knox County's revised policies fully satisfy Plaintiff's First Amendment Rights, and are not depriving Plaintiff of due process. Accordingly, it is denied that Plaintiff is entitled to any injunctive relief.

65. Any factual allegations not heretofore specifically and explicitly admitted are hereby denied.

66. It is denied that Plaintiff is entitled to any award of compensatory or punitive damages against James J.J. Jones or Rodney Bivens in their individual capacity.

III. Defenses of the Individual Defendants

1. James J.J. Jones and Rodney Bivens in their individual capacity violated none of Plaintiff's constitutional rights or any other rights and Plaintiff's Complaint against them should be dismissed for failure to state a claim upon which relief can be granted.

2. James J.J. Jones and Rodney Bivens in their individual capacity are immune by virtue of the doctrines of qualified immunity, qualified good faith immunity, and under the GTLA as the same may apply to the facts and circumstances herein.

3. Pursuant to Tenn. Code Ann. § 29-20-310(b), James J.J. Jones and Rodney Bivens in their individual capacity are immune from suit for any state law claims.

4. Pursuant to Tenn. Code Ann. § 29-20-310(c), no claim can be brought against James J.J. Jones and Rodney Bivens in their individual capacity for any state law claims in excess of the amounts established for governmental entities in Tenn. Code Ann. § 29-20-403.

5. Plaintiff is not entitled to recover any damages against James J.J. Jones and Rodney Bivens in their individual capacity in any amount, or for attorney's fees, expert fees, or other costs in this action.

WHEREFORE, Knox County adopts and incorporates Section I, Admission of Liability, and moves the Court to set this matter for hearing solely on the issue of Plaintiff's compensatory damages and attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988. James J.J. Jones and Rodney Bivens in their individual capacity deny liability and move to dismiss Plaintiffs claims for the reasons stated herein.

s/David S. Wigler
David S. Wigler (TN BPR # 014525)
Deputy Knox County Law Director
Suite 612, City-County Building
400 Main Street
Knoxville, TN 37902
(865) 215-2327
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/David S. Wigler
David S. Wigler (TN BPR # 014525)

SPLC Southern Poverty Law Center

Fighting Hate
Teaching Tolerance
Seeking Justice

Detained Immigrants in the Southeast Lack Meaningful Access to Lawyers

The U.S. Department of Homeland Security (DHS) imprisons roughly 350,000 people each year while their civil immigration cases are adjudicated.[1] Even though most of these immigrants are not accused of violating any criminal laws, they are often held in prisons, sometimes for months or even years at a time – often far from family, friends and resources. People facing immigration removal proceedings have the right to be represented by a lawyer, but only if they can find and retain one in the isolated communities where many immigration prisons are located.

A lawyer can make the difference between life and death for a person in immigration prison.

- 10 ½ x: People in immigration prisons who are represented by counsel are 10-and-a-half times as likely to succeed in their cases.
- 7x: People in immigration prisons are almost seven times as likely to obtain bond as those who try to represent themselves.
- 20x: People who are released from immigration prisons and are able to secure counsel are almost 20 times as likely to succeed in their cases than those without counsel.
- 14%: Nationally, only 14 percent of imprisoned immigrants are represented in removal proceedings – compared to 37 percent of all immigrants.
- 6%: Only 6 percent of detainees at Stewart Detention Center and LaSalle Detention Center are able to secure legal counsel.[2]
- Deportation can be a death sentence.[3]

DHS intentionally imprisons immigrants in remote rural towns that had no immigration law offices until SPLC created the Southeast Immigrant Freedom Initiative (SIFI).

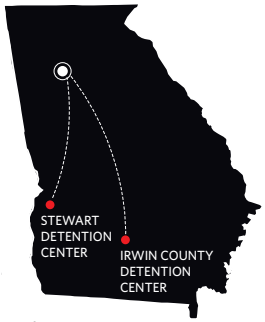
- Stewart Detention Center is in Lumpkin, Georgia, a town of about 1,091 people that is a two-and-a-half-hour drive – or about 140 miles – from Atlanta.
- Irwin County Detention Center is in Ocilla, Georgia, a town of about 3,604 people that is a three-hour drive – or about 190 miles – from Atlanta.
- LaSalle Detention Facility is in Jena, Louisiana, a town of about 3,435 people that is a four-hour drive – or about 230 miles – from New Orleans.
- As Chief Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit has observed, DHS' policy of transferring detainees to these "far-off" detention centers creates "significant obstacles" to securing much-needed legal counsel.[4]

The conditions at these prisons impede access to and communication with legal counsel.

- At Stewart, there are only three attorney-visitation rooms for nearly 1,900 detainees.
- Irwin and LaSalle each have only one visitation room for up to 1,200 detainees at each facility.
- Attorneys are frequently subjected to waits of longer than an hour – and sometimes two or three hours – to see their clients.
- The visitation rooms do not have telephones, and attorneys are prohibited from bringing their own, meaning there is no way to call interpreters. There are no contact visits, even though immigration prisons are supposedly civil.

Miles from nearest major metropolitan area

New Orleans, La.
LaSalle Detention Facility
Jena, Louisiana
230 mi



Atlanta, Ga.
Irwin County Detention Center
Ocilla, Georgia
190 mi

Stewart Detention Center
Lumpkin, Georgia
140 mi

The United States leads the world in civil immigration incarceration.

➨ The astronomical number of people held in immigration prison is a deliberate policy choice. DHS has construed congressional appropriations for detention as constituting a "bed mandate" since at least 2009, meaning that ICE tries to fill every empty immigration prison bed every night. This is akin to a police department being told to fill local jail beds nightly regardless of criminal activity.

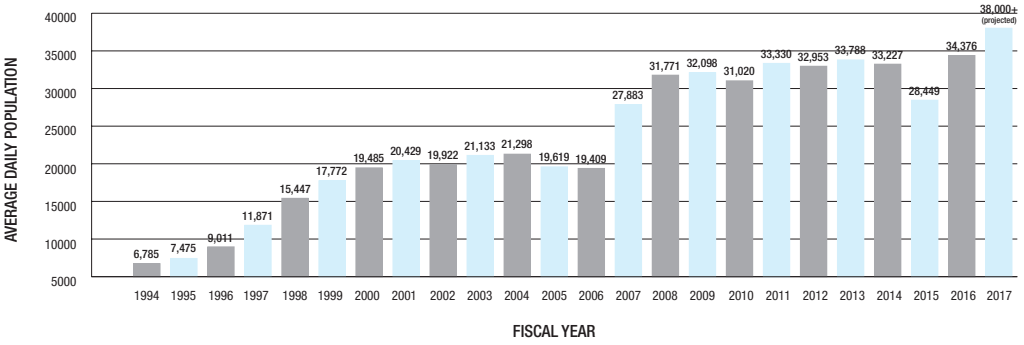
➨ The private prison companies that operate many immigration prisons reap the benefits of this bed mandate. Because DHS guarantees payment for each bed plus a per diem for every person detained, the bed mandate effectively guarantees that companies will turn a significant profit for imprisoning noncitizens.

➨ The average daily population of noncitizens held in immigration prisons has steadily increased, thereby expanding the profits of private prison companies.

➨ These private companies' primary concern is the financial interests of their stockholders, not the well-being of the people they imprison. Improving prison conditions and hiring additional staff to make operations run more smoothly would cut into these companies' profits, and therefore they have little incentive to take measures that would protect the constitutional rights of detainees.

FY 1994–2017

Average Daily Population of Immigrant Detainees



This graph tracks the average daily population of noncitizens held in immigration detention from FY 1994-2017.[5]

1 Bryan Baker, Immigration Enforcement Actions: 2016, available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

2 *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. Penn. L. Rev. 1, 49, 70 (2015); Eunice Cho, Paromita Shah, *Shadow Prisons: Immigration Detention in the South* pp. 29, 38 (2016), available at https://www.splcenter.org/sites/default/files/leg_ijp_shadow_prisons_immigrant_detention_report.pdf.

3 See Sarah Stillman, When Deportation Is A Death Sentence, (January 15, 2018), available at https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence.

4 Hon. Robert A. Katzmann, *Bench, Bar, and Immigrant Representation: Meeting an Urgent Need,* 15 N.Y.U. J. Legis. & Pub. Pol'y 585, 593 (2012).

5 Data for FY 1994-2010 available at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1712&context=key_workplace; Data for FY 2010-2012 available at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1887&context=key_workplace; Data for FYI 2013-2016 available at https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf; Data for FY 2017 available at https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers.

Additional Resources

Read more about Shadow Prisons

Learn more about the Southeast Immigrant Freedom Initiative

SPLC Southern Poverty Law Center

ACTIVE CASE

BRAGGS, ET AL. V. JEFFERSON DUNN, ET AL.

The Alabama Department of Corrections (ADOC) systemically put the health and lives of prisoners at risk by ignoring their medical and mental health needs and discriminating against prisoners with disabilities – violations of federal law by a prison system that has one of the highest mortality rates in the country. The SPLC and the Alabama Disabilities Advocacy Program filed suit to end the deplorable conditions in Alabama prisons.

The lawsuit, filed in the U.S. District Court for the Middle District of Alabama, describes how prisoners, including those with disabilities and serious physical and mental illnesses, were confined to prisons where discrimination and dangerous – sometimes life-threatening – conditions were the norm. Strokes, amputations and prisoner deaths that may have been prevented with proper care are detailed in the lawsuit.

An agreement was reached with the Alabama Department of Corrections in March 2016 to ensure that prisoners with disabilities receive treatment and services required under the Americans with Disabilities Act.

Federal judge declares mental health system in Alabama to be "horrendously inadequate"

After a two-month trial over the lawsuit's mental health claims, a federal judge declared the mental health care system in Alabama prisons to be "horrendously inadequate" – an unconstitutional failure that has resulted in a "skyrocketing suicide rate" among prisoners. In the June 2017 opinion, U.S. District Judge Myron H. Thompson ordered the state to reform the system and directed them to work with the Southern Poverty Law Center and others who filed the lawsuit.

Within his 302-page ruling, Thompson identified multiple areas where the ADOC has failed to maintain a constitutionally adequate mental health care system – ranging from a failure to identify prisoners with serious mental health needs to inadequate treatment for suicidal prisoners.

"[T]he evidence from both sides ... materially supported the plaintiffs' claim," Thompson wrote. He later added: "Simply put, ADOC's mental-health care is horrendously inadequate."

Thompson highlighted a key issue facing the system: "persistent and severe shortages of mental-health staff and correctional staff, combined with chronic and significant overcrowding." The judge noted that during the trial, Corrections Commissioner Jeff Dunn "described the prison system as wrestling with a 'two-headed monster': overcrowding and understaffing."

The judge also noted the ADOC fails to provide individualized treatment plans to prisoners with serious mental health needs as well as psychotherapy by qualified and properly supervised staff and with adequate frequency

and sound confidentiality. He also described a system that disciplines mentally ill prisoners for the symptoms of their illness and segregates them for prolonged periods.

A separate trial regarding the lawsuit's medical care claims is expected to be scheduled for 2017.

Lack of testing, medication and other examples of poor conditions

The lawsuit, which was filed in 2014, cites numerous examples of conditions that threatened the health and lives of prisoners:

- The department had a policy and practice of not treating hepatitis C. In April 2014, 2,280 prisoners in ADOC custody had been diagnosed with it, but only seven prisoners were receiving treatment. A prisoner at Holman Correctional Facility died of complications from hepatitis C.
- A prisoner who had survived prostate cancer had a blood test indicating his cancer had probably returned, but no follow-up test was given until a year and a half later. By that time, the cancer had spread to his bones and was terminal. He died.
- A prisoner stabbed 15 times with an icepick did not have his wounds cleaned or treated. Instead, he was placed in segregation for three months. He also suffered a cracked lens in his right eye at the county jail where he was held before being transferred to prison. He was told the lens won't be treated because he still has one good eye.
- A prisoner at St. Clair Correctional Facility with a history of heart problems had a new stent placed in his heart in 2012. Afterward, he was not given the necessary blood thinners at the prison, though the doctor had prescribed them. The prisoner's blood clogged the stent, requiring emergency open-heart surgery to correct.

In addition, prisoners were placed under "do not resuscitate" or "allow natural death" orders without their consent or knowledge, according to the lawsuit. Moreover, although "do not resuscitate" forms refer only to not resuscitating prisoners experiencing cardiac arrest, the department relied on them to deny other treatment to prisoners with such orders.

The lawsuit also describes how the ADOC leaves prisoners with disabilities isolated and deprived of the care and accommodations they need. Several prisoners reported incidents where they were verbally or physically mistreated due to their disabilities, including guards taunting blind or wheelchair-bound prisoners about their disabilities.

State contracts with Corizon Inc., despite the company failing every major health care audit

Alabama had the most overcrowded prisons in the nation and spent one of the lowest amounts, per inmate, on health care. The prison system contracted with Corizon Inc. to provide medical care and MHM Correctional Services to provide mental health care. In 2012, when the ADOC released a "Request for Proposal" for a new health care contract, applicants were scored on a 3,000 point scale. Out of a possible 3,000 points, contract price accounted for a possible 1,350 points. Qualifications and experience counted for only 100 points.

The ADOC renewed its contract with Corizon in 2012, even though Corizon (the company providing health care in Alabama prisons since 2007) failed every major audit of its health care operations in Alabama prisons under its first contract with the state.

Shortly before filing the lawsuit, the SPLC and ADAP released a report on the conditions within Alabama prisons, *Cruel Confinement: Abuse, Discrimination and Death Within Alabama's Prisons.* The report's findings were based

on inspections of Alabama prisons, interviews with prisoners and a review of medical records, depositions and media accounts as well as the policies, contracts and reports of the ADOC and two major contractors.

ISSUE AREA

CRIMINAL JUSTICE REFORM

CASE DETAILS

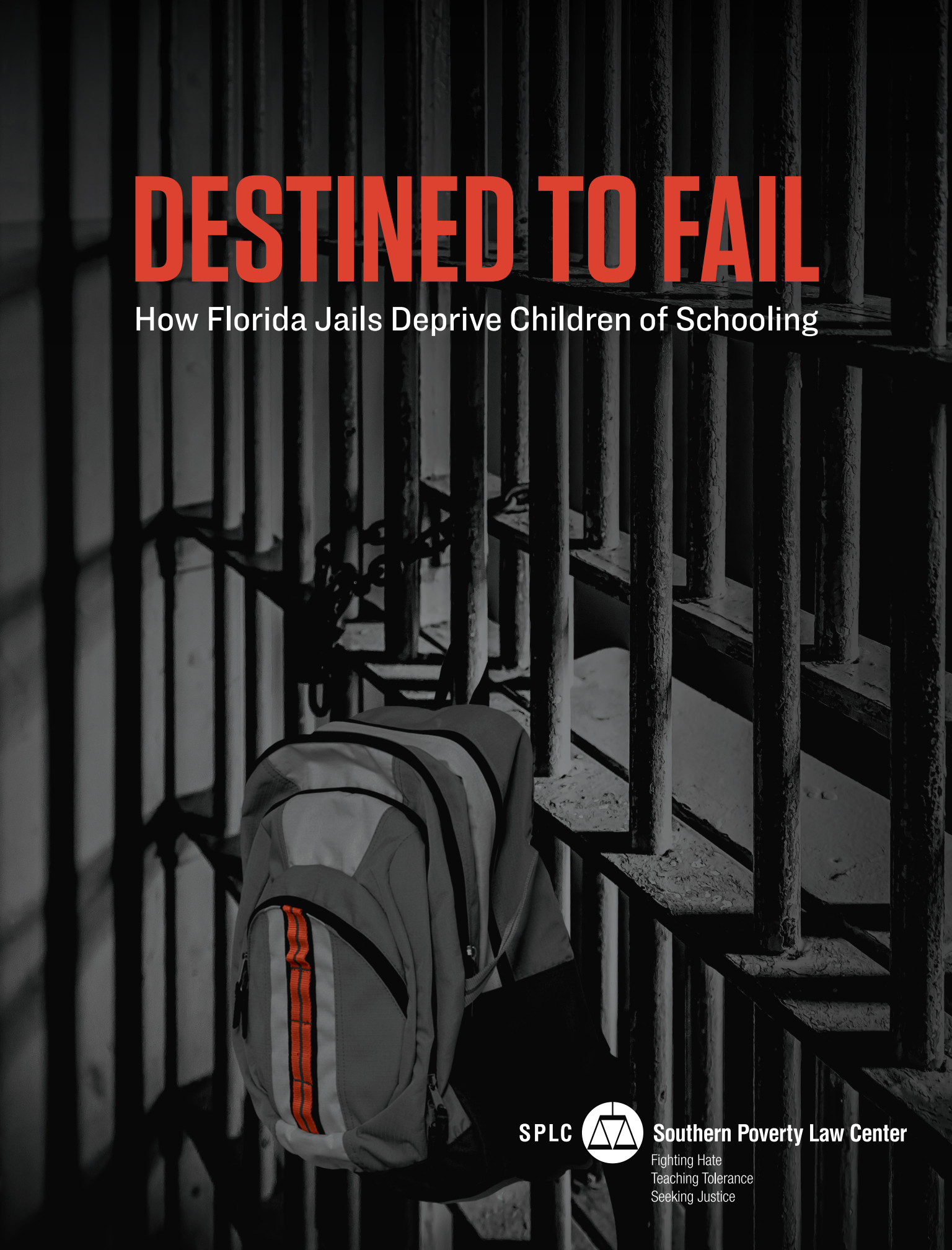
Date Filed: June 16, 2014

Status: In Trial

RELATED DOCUMENTS

- Complaint
- Amended Complaint
- Motion for Preliminary Injuction
- Declaration from our client, Joshua Dunn, a prisoner at St. Clair Correctional Facility
- Declaration from Jonathan Sanford, a prisoner at Bullock Correctional Facility
- Declaration from Eldon Vail, former corrections administrator
- Joint Request for Continuance with Exhibit
- Motion to Settle the Disabilities Portion
- Settlement Agreement for the Disabilities Portion
- Expert Report of Dr. Jay Shulman (medical)
- Expert Report of Eldon Vail (overall conditions)
- Expert Report of Dr.Michael Puisis (medical)
- Expert Report of Dr.Kathryn A. Burns (mental health)
- Expert Report of Dr.Craig Haney (mental health)
- Motion for Class Certification
- Memorandum of Law In Support of Plaintiffs' Motion for Class Certification
- Phase 2A: Plaintiff's Proposed Findings of Fact and Conclusions of Law
- Phase 2A: ADAP Summary Judgment Opinion
- Phase 2A: Individual Plantiffs Summary Judgment Opinion
- Phase 2A: Class Certification Opinion
- Plaintiffs' Emergency Motion For A Temporary Restraining Order Or Preliminary Injunction
- Interim Relief Order Regarding Suicide Prevention Measures
- Interim Agreement Regarding Suicide Prevention Measures
- Liability Opinion and Order As To Phase 2A Eighth Amendment Claim
- Brief In Support of Libiaility

* * *



DESTINED TO FAIL

How Florida Jails Deprive Children of Schooling

SPLC Southern Poverty Law Center
Fighting Hate
Teaching Tolerance
Seeking Justice

ABOUT THE SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center, based in Montgomery, Ala., is a nonprofit civil rights organization founded in 1971 and dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.

For more information about

THE SOUTHERN POVERTY LAW CENTER

visit **www.splcenter.org**

DESTINED TO FAIL

How Florida Jails Deprive Children of Schooling

The solution to these problems is simple: Children don't belong in adult jails.

Executive Summary

Florida prosecutes more children in the adult criminal justice system than any other state,[1] and as a consequence, hundreds of children are held in adult county jails[2] every year.

In the majority of cases, the decision to prosecute a child as an adult is made by the prosecutor, without judicial review or an individual assessment of the child's potential for rehabilitation. As a result, children as young as 12 have been incarcerated with adults. Many have not been found guilty, but are merely waiting for their cases to be adjudicated.[3]

While imprisoned, children still have rights under state and federal law to access education – a critical factor in their future.[4] And with good reason: The further they fall behind, the less likely they are to become productive members of society.

Unfortunately, children in adult jails are being denied these rights as Florida's jails and school districts are not living up to their legal obligations. The educational services they provide to children held in adult jails are, in most cases, seriously deficient. For some children, the services are virtually nonexistent. Adult jails are simply not intended or equipped to house children.

For this review, which began in 2016, the Southern Poverty Law Center submitted public records requests to school districts across the state,[5] spoke with public defenders and advocates, examined data from the U.S. Department of Education Civil Rights Data Collection, and interviewed children who are or have been held in county jails in Florida. The findings are troubling:

Many small jails (facilities holding fewer than 20 children in 2015-16) offer only GED courses to children, eliminating the opportunity for a child to pursue a high school diploma while awaiting trial. Some children receive only two to three hours per week of instruction in these small county jails.[6] When they return to their neighborhood schools, they often do not receive credit for their studies, including the GED work.

In large jails (facilities holding 20 to 130 children in 2015-16), children often receive educational services geared toward a high school diploma – though they don't all receive the legally required 300 minutes of instruction per day that is necessary for a total of 180 instruction days per year.[7]

At many small jails, students with disabilities receive limited – if any – educational services that are required by law because of their disabilities. At large jails, students' existing Individualized Education Programs (IEPs), which outline the services that a student with disabilities should receive, are sometimes altered[8] – and even effectively closed out – leaving them without the services they deserve under the law.

At many large and small jails, students with IEPs between the ages of 18 and 22 must be proactive and ask for the education services to which they are entitled. Consequently, they often do not receive them.

Because county jails are not designed to accommodate children, there are multiple barriers that limit access to education. Small jails, in particular, do not have housing units for children, much less a space for classes. In such instances, children may be held in solitary confinement, which has been likened to torture.

Lacking access to materials and teachers, children in solitary may simply receive worksheets that don't count toward school credit and without any writing instruments to complete them.[9]

Large jails, on the other hand, may have cell blocks for youth and space for classes, but these arrangements pose problems as well. Youth units, for example, are often for boys. As a result, girls under 18 are routinely held in solitary confinement or in medical or mental health segregation wings, which are not equipped for providing education.

And as in small jails, children held in solitary confinement at large jails – whether for housing or discipline – are often left out of educational programming or provided with worksheets. In some counties, students are marked absent from the jail's classes for each day they are held in confinement.[10]

The solution to these problems is simple: Children don't belong in adult jails.

Florida should change the law allowing prosecutors to directly file charges against children in adult court without judicial review or an individualized assessment. Children should be adjudicated in the juvenile justice system, which should be more equipped to meet their educational needs.

As long as Florida continues to prosecute children as adults, it must fulfill its legal mandate to provide an adequate education to children in adult jails. Currently, children are being deprived of the tool that can provide them with the best opportunity for a better future – an education.

Virtually all of these youth will eventually re-enter our communities. Failing to educate them not only deprives them of their rights, it increases the likelihood they will re-offend, a failure that Florida residents will pay for in tax dollars and loss of public safety.[11]

Reform is urgently needed. Our children – and communities – deserve no less.

Recommendations are offered at the end of this report.

Florida's Failure to Educate Children in Jail

Miguel Rodriguez

It's hard for Miguel Rodriguez to forget the time he was held in the Pasco County Jail in Land O' Lakes, Florida.

Miguel was sent into the adult system in 2009 at age 15. At the jail, there were no books, no library and no educational services offered to minors. Miguel believes the lack of school and other productive activities fostered violence, creating a fight club atmosphere.

"It was like a little dungeon," he said.

But Miguel also believes it didn't have to be that way. Classes – or any form of education – could have gone a long way toward changing the environment.

"[I]t would have made everything a lot less violent and a lot less scary," he said.

Unfortunately, many children held in adult jails across Florida receive little – if any – education during their confinement, this Southern Poverty Law Center (SPLC) review, launched in 2016, found. In most of the counties surveyed, the educational services for children, as reported, fail to meet even the basic requirements of federal and state law.

As part of this review, the SPLC submitted public records requests to school districts to determine how they are educating children in adult jails,[12] spoke with public defenders and advocates, examined data from the U.S. Department of Education Civil Rights Data Collection, and interviewed children who are or have been held in county jails.

Small Jails

In many of Florida's smaller counties, where jails housed fewer than 20 children in 2015-16, there is no dedicated unit for children, much less a dedicated space for classes. For children held in some of these smaller counties, legal prohibitions on "sight and sound" contact with adult detainees[13] have spurred the jails to frequently house children in solitary confinement, significantly impeding their ability to receive an education – and potentially violating federal law.

In Indian River County, for example, where in 2016 there were no more than two or three children in the county jail at any given time, they were almost always held in solitary confinement and denied educational services. The county school district had not budgeted for, among other things, a classroom, full-time teachers, or special education teachers at the jail.

Similarly, a public defender in Gadsden County reported that children transferred into the adult criminal justice system there were left in isolation for the entirety of their pre-trial detention – over six months in one case – while receiving no educational services. School districts in Gadsden and Levy counties also reported that they lacked a written agreement with the sheriff's office to educate children at the jail.

In some instances across the state in 2016, children received worksheets but did not have access to a teacher, and the worksheets did not count toward class credit. Some counties provided worksheets to children in solitary confinement but did not even allow them to have

pens or pencils to complete them.[14]

Many smaller county jails offered only GED preparation to children.[15] Such practices shortchange students, who often do not receive credit for their work, including GED work, when they return to their neighborhood schools. And the practices also may violate federal requirements.

In addition, with few exceptions,[16] the smaller county jails surveyed did not provide 300 minutes of daily instruction and 180 days of instruction per year to children, which are required under Florida law. Many provided just a few hours of instruction per week.

Isolated and deprived of an education

K.T. * spent almost five months in the St. Lucie County Jail after he was sent into the adult system at age 14.

During that time, he received an education with other youths in a classroom at the jail. He was housed in a cell block with other children tried as adults, including his co-defendants.

When he was transferred to the Broward County Jail in November 2017, things changed. He was initially placed in a cell block, but after his co-defendants arrived, he was moved into solitary confinement, per the jail's policy of segregating co-defendants.

K.T. was left in that cell for 23 hours a day. He was allowed out for an hour when the rest of the jail was on lockdown. He also could not attend school as long as he was in solitary. Before his arrest, K.T. was a ninth-grader at a public school in Fort Lauderdale. As a student with a disability, he had an Individualized Education Program (IEP) entitling him to one-on-one sessions with a counselor, which he had not received since being placed in solitary confinement.

When the SPLC met K.T., he had spent 10 days in solitary and faced the prospect of staying there for as long as his co-defendants remained at the jail, further depriving him of an education and the services he needed.

* K.T.'s initials have been changed to protect his privacy.

Small Jails Reviewed (0-19 children)*

Alachua
Baker
Bay
Bradford
Calhoun
Charlotte
Citrus
Clay
Collier
Columbia
DeSoto
Dixie
Flagler
Franklin
Gadsden
Gilchrist
Glades
Gulf
Hamilton
Hardee
Hendry
Hernando
Highlands
Holmes
Indian River
Jackson
Jefferson
Lafayette
Lake
Lee
Levy
Liberty
Madison
Marion
Martin
Monroe
Nassau
Okeechobee
Osceola
Putnam
Santa Rosa
St. Johns
Sumter
Suwannee
Taylor
Union
Volusia
Wakulla
Walton
Washington

Large Jails Reviewed (20+ children)*

Brevard
Broward
Dade
Duval
Escambia
Hillsborough
Leon
Manatee
Okaloosa
Orange
Palm Beach
Pasco
Pinellas
Polk
Sarasota
Seminole
St. Lucie

*According to the **2015-16** transfer data supplied by the Department of Juvenile Justice.

Large Jails

Larger counties may have jails with separate units for children, but they don't fare much better in terms of educating the children in their care. Children in Palm Beach County, for example, are regularly placed in solitary confinement to keep multiple co-defendants separate. The solitary confinement cells look into the common room where class is held, but the students in these cells cannot see anything the teacher writes on the board and have a difficult time hearing lessons through their cell doors. Interviews at the Broward County Jail uncovered similar problems.

Although most of the larger county jails provided instruction for the required length of time to children housed in the general population, several of them failed to do so for children held in solitary confinement.[17]

Female students

The SPLC found that female students in jails – including jails with separate units for children – encounter barriers that hinder their education. Units for children are frequently limited to boys, meaning that girls under 18 are held separately in solitary confinement or in medical and mental health segregation wings.

The segregation units holding girls are not equipped for education. Failure to provide an education specifically to girls may violate Title IX of the Education Amendments of 1972, which provides girls with the right to the kinds of opportunities that are comparable to what boys receive.

When 15-year-old D.A. was held in the Sarasota County Jail in 2015 after being charged as an adult for burglary, she experienced how girls were treated differently than boys.[18] A community advocate told the SPLC that D.A. was held on the jail's medical floor. She slept on a rubber mattress in a room that lacked a desk. She didn't receive educational services, books or any materials for learning. The community advocate said this is how all girls are treated at the jail.

Children with Disabilities

Children with disabilities represent a disproportionate number of the youth in jail and have an extensive and well-defined set of legal protections. Even so, the SPLC's review found that many do not receive the educational services to which they're entitled.[19]

Of the 55 out of 67 counties that responded to a records request, the SPLC found that small jails that hold fewer than 20 children per year fail to properly identify students with disabilities when they enter custody. As a result, these children receive few, if any, services. Such failures likely violate multiple federal laws.

The records produced by many of the smaller counties do not show that these children are being evaluated by the local school districts' Exceptional Student Education (ESE) coordinator, the official responsible for ensuring that the needs of students with disabilities are being met.[20] In addition, some existing IEPs for students in facilities were not implemented as written. In several smaller counties, IEPs already in place were altered during the course of the children's stay at the county jail.[21]

Larger facilities, this review found, typically have a standard practice for identifying children with IEPs when they enter custody. For the most part, the school district assigns personnel to conduct the necessary assessments and develop IEPs. The plans, much like the IEPs in smaller counties, are sometimes rewritten, however. The SPLC encountered a few instances in which the plans were effectively terminated without an IEP meeting or re-evaluation, leaving students without services.[22]

The high cost of Florida's failure

Children in Florida's adult jails face a number of dangers that can have disastrous consequences for their future.

They're in greater danger of abuse and assault, and are less likely to receive any rehabilitative services than children in juvenile facilities.[23] They also risk falling further behind in their education.[24] Unsurprisingly, they are more likely to re-offend upon release.

Despite these dangers, Florida's outdated law grants prosecutors unfettered discretion to charge children as adults.[25] Florida is not only out of step with the rest of the United States as a result, but it also charges more children as adults than any other state in the country.[26]

Under current Florida law, these children must be housed in adult jail while awaiting disposition of their cases.[27] It's a process that can take months and, in some cases, years.

And the price is high for everyone involved. Incarceration of young people increases their chances of dropping out of high school.[28] Research shows that shortchanging the education of children has negative consequences. Failure to obtain a diploma reduces their prospects of future employment and economic independence.[29]

↓13% When individuals participate in any kind of educational program while incarcerated, their chances of future incarceration drop by 13 percent.

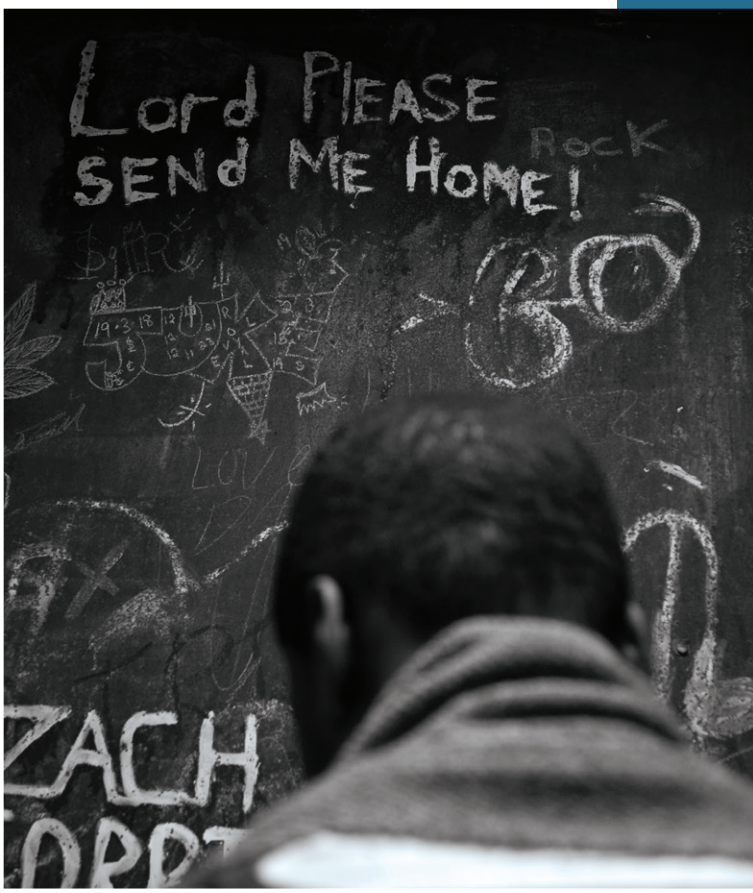
Failing to educate these children also increases the risk to public safety because it increases the likelihood they will re-offend.[30] When individuals participate in any kind of educational program while incarcerated, however, their chances of future incarceration drop by 13 percent.[31] And the rate of recidivism decreases as young people's educational achievements increase.[32] What's more, every dollar spent on education for incarcerated people saves $4 to $5 in re-incarceration costs.[33]

These costs are both immediate and long-term. On the front end, Florida spends a minimum of approximately $20,000 per youth per year to incarcerate children, not including the costs of educating them. On the back end, it costs each child around $400,000 in lost earnings over an average lifetime, and costs the state of Florida more than $100,000 in tax revenues every time a youth fails to receive a high school diploma.[34]

It's also worth noting that the public already funds a juvenile system whose ostensible purpose is to rehabilitate children who get into trouble with the law. From a fiscal perspective, it makes no sense to operate two separate systems of youth education in a correctional context – one in each of Florida's 67 county jails and another in Department of Juvenile Justice (DJJ) facilities. Because there are comparatively fewer children in the adult jails, youth education in the adult system will never be as economical.

Florida can clearly do better.

Photograph by ***Sharon Steinmann***



Legal and Policy Analysis

Children and the Florida Criminal Justice System

When examining the issue of children in the corrections system, it's important to acknowledge that the legal system recognizes that children are different from adults in a number of fundamental ways.

The U.S. and Florida Supreme Courts have each recognized that children lack the same maturity as adults; have less education and less life experiences to draw upon when assessing the consequences, risks, and propriety of their behavior; are more susceptible to negative societal and peer influence; and have not reached full psychological and physical brain development.[35] Such limitations diminish a child's level of culpability[36] and also increase the likelihood of rehabilitation with the right interventions and supports.[37]

Florida, like all other states, maintains a separate justice system for children who break the law.[38] The state constitution provides that "a child ... may be charged with a violation of law as an act of delinquency instead of crime."[39]

Florida statutes make clear that the purpose of this specialized juvenile justice system is "to increase public safety by reducing juvenile delinquency through effective prevention, intervention, and treatment services that strengthen and reform the lives of children; ... to provide an environment that fosters healthy social, emotional, intellectual, educational, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state's care."[40]

This statement of purpose is nothing new. When Florida lawmakers wrote those words, they were keeping with an old tradition – the rehabilitative tradition that goes back to the founding of the juvenile justice system more than a century ago.[41]

Yet Florida law currently allows some children to be removed from the delinquency system and tried as adults. Specifically, prosecutors may choose to transfer children ages 14 and 15 charged with certain felonies and children ages 16 and 17 charged with any felony to adult court.[42]

This means that an eighth-grader can be charged as an adult with robbery for taking another child's bike, phone or lunch, or with burglary for entering a garden shed or abandoned house and taking anything of value; if the child has a pocket knife, he or she can be charged with armed burglary.[43]A 10th-grader can be charged as an adult for those same acts, as well as for any other felony, such as stealing a cell phone or video game system or taking a car without permission.[44]

As noted earlier, Florida prosecutors try more children in adult court than any other state – more than 1,100 in fiscal year 2016-17.[45] The vast majority are "direct files," meaning that the state attorney exercised his or her sole discretion to prosecute the child as an adult, without any input from a judge or the Department of Juvenile Justice (DJJ).[46] In a significant number of child transfer cases, about one-third in fiscal year 2015-16, transfer to adult court is mandated by law.[47]

Adult Jail vs. the Juvenile Justice System

When a child is transferred to adult court and prosecuted as an adult, he or she goes into the adult carceral system. As outlined in this report, adult prisons and jails are ill-equipped to handle children and provide for their education and rehabilitation. In short, jail is no place for a child.

By contrast, the Florida juvenile justice system is at least designed by law to focus on children's capacity for rehabilitation, with the guiding principles that "prevention and education are paramount."[48] Further, the Legislature has mandated that children in the juvenile justice system be guaranteed "equal opportunity and access to quality and effective education, which will meet the individual needs of each child."[49]

Federal law provides similar guarantees. Any facilities receiving Title I, Part D funds must, to the extent feasible, ensure that youth in juvenile justice residential facilities have the same opportunities to meet academic content standards and achievement standards as they would have if they were enrolled in a regular public school.[50]

Because of its mandated focus on education and rehabilitation, the DJJ operates an Office of Education, which is meant to coordinate with the Florida Department of Education and with district school boards to ensure that children in DJJ custody receive an education.

The Legislature instructed the DJJ to "implement procedures to ensure that educational support activities are provided throughout the juvenile justice continuum," including "mentoring, tutoring, group discussions, homework assistance, library support, designated reading times, independent living, personal finance, and other appropriate educational activities."[51] Further, a child's school records and IEP or 504 Plan[52] are included in planning treatment objectives while in DJJ custody.[53]

Children in Adult Jails Have Education Rights

Children charged with a crime who are being held in jail are legally entitled to access education under federal and state law.[54] Florida law requires school districts to offer educational services to minors in custody who have not graduated from high school and to students with disabilities under 22 who are in custody and lack a high school diploma.[55]

The law requires the county sheriff to notify the local school district when a child under 21 is admitted to the jail; the sheriff and school district must develop a cooperative agreement reflecting the notification requirement and the provision of educational services reflecting each entity's legal obligations.[56] All children, no matter where they are educated, are entitled to 300 minutes of instruction per day and 180 days of instruction per year.[57]

In addition, federal law makes clear that incarcerated children have a right to access education.[58] Recipients of Title I, Part D funds, as described above, must ensure that all children in facilities have access to comparable opportunities as those educated outside of facilities.[59] States and localities also have comparability of services obligations when it comes to providing services equitably for boys and girls in custody; under Title IX, girls in facilities have comparability rights and cannot be assigned to opportunities that are based on gender stereotypes.[60]

States and localities also have obligations to English Learner (EL) students. Under Title VI of the Civil Rights Act of 1964 and under the Equal Education Opportunities Act of 1974, education agencies cannot, among other things, discriminate on the basis of a student's national origin and language status, and must take "appropriate action" to overcome EL students' language barriers so that they can meaningfully participate in their schools' educational programs. To that end, facilities must provide these students with an educationally sound and effective educational program, and afford meaningful access to all of the facility's educational programs.[61]

Separately, children with disabilities have a number of education rights that they retain no matter where they are held. As the U.S. Department of Education's Office

Florida prosecutors try more children in adult court than any other state.

of Special Education and Rehabilitative Services clarified in 2014, "the fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the Individuals with Disabilities Education Act (IDEA) to students with disabilities and their parents."[62]

Under IDEA, and similarly under other federal disability rights laws (i.e., Section of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, also known as the ADA), each child with a disability is entitled to various forms of evaluation and assistance. This includes assessment to determine which services are necessary to allow the child to fully access education and the receipt of those support services in a timely and consistent manner.[63]

Facilities also must reasonably modify their policies, practices and procedures to account for children's disabilities,[64] and must educate children in the most integrated, least restrictive setting appropriate to their needs.[65]

Under disability rights laws, the state has ultimate responsibility for ensuring that an education is made available to all eligible students with disabilities.[66] The state educational agency must monitor and enforce implementation of the act to ensure compliance with the law.[67] Similarly, Section 504 binds all recipients of federal financial assistance,[68] which includes many justice facilities. The ADA also requires public entities, including states and local governments, to administer their programs without the purpose or effect of discriminating on the basis of disability.[69]

Recommendations

Children are fundamentally different from adults.

Florida, however, continues to prosecute more children as adults than any other state, removing them from a system designed to give them a chance at turning their lives around. Instead, the state sends them into an adult system that virtually guarantees their failure by frequently depriving them of their right to an education.

It doesn't have to be this way. There is a path for reform that can end this practice.

The simplest solution is to stop prosecuting children as adults.

- The adult system is designed to punish and deter criminal behavior rather than rehabilitate individuals: It is fundamentally incapable of accommodating children. While keeping children in the juvenile justice system is no guarantee that they will be rehabilitated, it is a system designed for children. Its shortcomings also are more easily addressed.

Short of ending the practice, the following reforms should be considered:

- Amend state law to limit the number of children prosecuted as adults.
- Amend state law so that children are not held in adult facilities pending disposition of their cases. Provide judges with the discretion to house them in juvenile facilities or at home while their cases are pending.
- Improve the oversight and accountability of school districts to ensure children are afforded their legally required education while in jail.
- Develop systems to better coordinate between criminal justice and education service agencies to ensure the smooth and consistent delivery of educational services to children in jail.
- If Florida insists on incarcerating children in adult jails, then it must, at the very least, provide education that meets state and federal legal requirements.

Endnotes

1 Deborrah Brodsky, Cyrus O'Brien & Sal Nuzzo, *No Place for a Child: Direct File of Juveniles Comes at a High Cost; Time to Fix Statutes*, JMI Policy Brief (Feb. 2016), at 1, *available at*: https://www.jamesmadison.org/Library/docLib/2016-Juvenile-Justice-Policy-Brief-21.pdf.

2 Florida Department of Juvenile Justice Delinquency Profile ("DJJ Dashboard"), *available at*: http://www.djj.state.fl.us/research/reports/reports-and-data/interactive-data-reports/delinquency-profile/delinquency-profile-dashboard. More than 1,100 youth were prosecuted as adults in FY 2016-17, although not all were housed pretrial in the adult jail if they were able to post bail.

3 Section 985.265, F.S.

4 Title I, Part D of the Every Student Succeeds Act, 20 U.S.C. 6421 et seq.; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (Title VI); Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 et seq. (EEOA); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX); Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et seq. (ADA); Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq.; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (Section 504). The Florida Constitution establishes education as a "fundamental value of the people of the State of Florida" and "creates a paramount duty of the state to make adequate provision for the education of all children residing within its borders." Fla. Const. Art. IX, 1(a). There are no exclusions of youth held in adult jails. *See also generally* United States Departments of Education and Justice, "Dear Colleague Letter: Civil Rights in Juvenile Justice Residential Facilities," Dec. 8, 2014, *available at*: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf (DOJ/ED DCL).

5 The SPLC sent requests to every school district, seeking contracts between school districts and sheriffs' departments as well as records documenting the allocation of resources for education programs, the capacity and scheduling of these programs, and teachers allocated to the jail. As of Feb. 1, 2018, of the state's 67 school districts, eight simply did not respond (Clay, Duval, Flagler, Glades, Holmes, Leon, Okaloosa, and Washington counties), four would provide records only at a prohibitive cost (Bay, Brevard, Escambia, and Nassau counties), and 13 said they did not have responsive documents (Calhoun, Charlotte, Columbia, Dixie, Franklin, Gulf, Hamilton, Jefferson, Lafayette, Liberty, Pasco, Union, and Wakulla counties). As to these nonresponsive counties, local officials' failure to provide documents leave open multiple possibilities, including that the school district does not comply with its obligations, that there have been no children in the jail to educate as students either posted bail or were never held in the jail, or that the school district lost track of students.

6 These range from one to two hours a week (Hernando and Walton) to three to six hours a week (Baker, DeSoto, Gadsden, Gilchrist, Hendry, Santa Rosa, and Taylor (but only for students with disabilities)) to something more, but less than the required minimum (Lake (but only for students under 18), Lee, Putnam, St. Johns, and Volusia). Several counties confirmed that they provide zero hours of instruction (Hardee, Liberty, Okeechobee, and Sumter). This does not account for the many small counties who did not provide responses to the SPLC's records requests and who may or may not be in compliance with this requirement.

7 Dade and Polk counties meet the requirement. The other counties with large jails that provide the required amount of instruction to most students—including Manatee, Orange, Broward, and Palm Beach—restrict educational services for those in solitary confinement. And Sarasota, which has a large jail, certainly does not meet the requirement, as it provides 300 minutes of instruction *per week*, not 300 *per day*, as required by law. This does not account for large counties that did not respond to our requests.

8 Large counties that altered IEPs include Broward, Hillsborough, Manatee, Polk, and St. Lucie. Again, this does not include large counties that did not respond to our requests.

9 Hendry, Lake, Lee, Marion, Santa Rosa, and Walton counties do not allow pens and pencils in solitary confinement. This information comes from a variety of sources, including public records and interviews with public defenders, legal aid staff, and advocates on the ground in various jurisdictions.

10 Broward, Duval, Hillsborough, Manatee, Orange, and Palm Beach counties. This information comes from a variety of sources, including public records and interviews with public defenders, legal aid staff, and advocates on the ground in various jurisdictions.

11 Incarceration of juveniles increases the probability that they will recidivate—i.e., commit another criminal offense—as an adult by 22-26 percent. Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly Assigned Judges*, National Bureau of Economic Research Working Paper 19102, at 3 (June 2013), *available at*: http://www.nber.org/papers/w19102.pdf.

12 *See supra* note 5.

13 Section 985.265, F.S. The sight and sound separation requirement is important for the safety of children held in the adult jail and is required by federal law in the Juvenile Justice and Delinquency Prevention Act.

14 *See supra* note 9.

15 Alachua, DeSoto, Gilchrist, Hendry, Hernando, St. Johns, and Sumter counties. In Seminole County, a little over half the children in 2014-16 received only GED services. This information comes from a variety of sources, including public records and interviews with public defenders, legal aid staff, and advocates on the ground in various jurisdictions.

16 *See supra* note 6.

17 Broward, Dade, Manatee, Orange, and Polk counties all generally provide at least 300 minutes of instruction per day to children in their jails, while Pinellas, Sarasota, and St. Lucie counties do not. Even among the counties that provide the required amount of instruction in the general population, Broward, Hillsborough, Manatee, and Orange restrict instruction for students who are in some type of solitary confinement.

18 D.A.'s initials have been changed to protect her privacy. The SPLC learned about D.A.'s experience from a community advocate in Sarasota and news reports about her sentence.

19 Children with disabilities represent a disproportionate number of children in jail. On average, 41 percent of the youth receiving educational services in Florida's county jails have been identified as qualifying for services under the IDEA. The IDEA is designed to ensure students with disabilities receive "a free appropriate public education that emphasizes special education and related services." 20 U.S.C. § 1400(d). The U.S. Department of Education, Office for Civil Rights receives data about individual schools throughout the country. See http://ocrdata.ed.gov/DistrictSchoolSearch#schoolSearch.

20 Of the small counties that replied to our public records request, the following did not provide affirmative responses when asked about num-

ber of IEP evaluations conducted at the jail: Alachua, Baker, Bradford, Citrus, Collier, DeSoto, Gadsden, Hardee, Hernando, Highlands, Lake, Levy, Martin, Monroe, Okeechobee, Osceola, Putnam, St. Johns, Santa Rosa, Sumter, Suwannee, Taylor, and Walton.

21 Small counties that made changes to children's IEPs included Baker, Gadsden, Gilchrist, Jackson, Lake, Marion, Putnam, Seminole, St. Johns, Taylor, and Walton. As before, this does not account for the counties who did not respond to the SPLC's records requests.

22 Large counties that altered IEPs include Broward, Hillsborough, Manatee, Polk, and St. Lucie. Large counties that reported that an IEP evaluation was never conducted include Orange and Pinellas. Again, this does not include large counties that did not respond to our requests.

23 *National Prison Rape Elimination Commission* Report 69 (June 2009), *available at*: http://nprec.us/files/pdfs/NPREC_FinalReport.PDF. See also Carmen Daugherty, *Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard*, Campaign for Youth Justice (2015), at 14, http://www.campaignforyouthjustice.org/images/pdf/Zero_Tolerance_Report.pdf; Irene Y. H. Ng, Rosemary C. Sarri, Jeffrey J. Shook & Elizabeth Stoffregen, *Comparison of Correctional Services for Youth Incarcerated in Adult and Juvenile Facilities in Michigan*, The Prison Journal (Dec. 2012), 92(4), 460-83, at 477, *available at*: https://www.researchgate.net/publication/258194434_Comparison_of_Correctional_Services_for_Youth_Incarcerated_in_Adult_and_Juvenile_Facilities_in_Michigan.

24 Neelum Arya, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, Campaign for Youth Justice (Nov. 2007), at 7, *available at*: http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

25 Section 985.557, F.S.

26 Brodsky, O'Brien & Nuzzo, *supra* note 1.

27 Section 985.265, F.S. (Detention transfer and release; education; adult jails).

28 Aizer & Doyle, supra note 11. Another study found that incarceration increases the likelihood of a youth dropping out of high school by between 11.1 and 18.8 percent. *See* Robert Apel and Gary Sweeten, *The Impact of Incarceration on Employment During the Transition to Adulthood*, Social Problems (2010), 57(3), 448-479, *available at*: www.jstor.org/stable/10.1525/sp.2010.57.3.448. *See generally* Amanda Petteruti, Marc Schindler & Jason Ziedenberg, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*, Justice Policy Institute (Dec. 2014), *available at*: http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

29 For example, the difference between the median annual income in 2013 for those who completed high school and those who did not is approximately $20,000, which translates to a loss of about $680,000 over the lifetime of an individual. *See* Joel McFarland, Patrick Stark & Jiashan Cui, *Trends in High School Dropout and Completion Rates in the United States: 2013*, U.S. Department of Education, National Center for Education Statistics (2016), *available at*: https://nces.ed.gov/pubs2016/2016117rev.pdf. In addition, employment data in 2014 for 16- to 24-year-olds indicates that fewer than one-third (28.7 percent) of high school dropouts were employed, compared with more than half (51.7 percent) of high school graduates who were employed. *See Employment and Unemployment of Recent High School Graduates and Dropouts*, Career Outlook, U.S. Bureau of Labor Statistics (July 2015), *available at*: https://www.bls.gov/careeroutlook/2015/data-on-display/dod_q4.htm. Further, youth who are incarcerated are more than twice as likely to rely on public assistance in adulthood. *See* Amanda B. Gilman, Karl G. Hill & J. David Hawkins, *When Is a Youth's Debt to Society Paid? Examining the Long Term Consequences of Juvenile Incarceration for Adult Functioning*, J. Dev. Life Course Criminology (2015), 1:33-47, at 43-44, *available at*: https://link.springer.com/content/pdf/10.1007%2Fs40865-015-0002-5.pdf.

30 Lois Davis, *et al, Evaluating the effectiveness of correctional education —A meta-analysis of programs that provide education to incarcerated adults*, RAND Corporation (2013), *available at*: https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/ RAND_RR266.sum.pdf.

31 *Id.*

32 Becky Pettit & Bruce Western, *Mass imprisonment and the life course: Race and class inequality in U.S. incarceration*, American Sociological Review (2004), 69(2), 151-169, *available at*: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.612.7385&rep=rep1&type=pdf.

33 Davis, *et al*, *supra* note 30.

34 Calculations based on http://all4ed.org/wp-content/uploads/2013/06/HighCost.pdf.

35 *See Roper v. Simmons*, 543 U.S. 551, 569-74 (2005); *Graham v. Florida*, 560 U.S. 48, 68-69 (2010); *Atwell v. State*, 197 So. 3d 1040, 1044-1045 (2016) (noting that juvenile offenders have diminished culpability and a greater likelihood of rehabilitation); *Henry v. State*, 175 So. 3d 675, 677-78 & 680 (2015) ("juveniles are different [than adults when it comes to criminal conduct and punishment]").

36 *See Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570 ("The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.") (quotations and citations omitted).

37 *See Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68.

38 *See* Fla. Const. Art. I, § 15; Chapter 985, F.S.

39 Fla. Const. Art. I, § 15.

40 Section 985.01, F.S. (Juvenile justice purposes and intent); section 985.02, F.S. (Legislative intent for the juvenile justice system).

41 *See*, *e.g.*, *Application of Gault*, 387 U.S. 1, 15-16 (1967) ("The early [juvenile justice] reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude'. . . The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

42 Section 985.557, F.S.

43 If this child committed burglary and did $1,000 or more worth of damage, such as by destroying a piece of lawn equipment, he could be charged with a first degree felony punishable with a life sentence. *See* § 810.02(2)(c)(2), F.S.

44 The child can be prosecuted as an adult not only for committing these felonies but also for merely attempting or even conspiring to commit the offenses. *See* § 985.557(1)(a), F.S.

45 *See* Brodsky, O'Brien & Nuzzo, *supra* note 1; DJJ Dashboard, *supra* note 2.

46 Office of Program Policy Analysis & Government Accountability, Report No. 17-06 (March 2017), *available at*: http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1706rpt.pdf.

47 *Id.*

48 *See* § 985.01, F.S.; § 985.02, F.S. Whether the Department of Juvenile Justice has in fact been achieving that mission has been recently cast in doubt by the reporting of the *Miami Herald*. *See* Carol Marbin Miller and Audra D.S. Birch, *Fight Club*, *Miami Herald*, Oct. 10, 2017, *available at*: http://www.miamiherald.com/news/special-reports/florida-prisons/article176773291.html.

49 Section 958.02, F.S.

50 20 U.S.C. §§ 6434(a)(1)(A), 6435(c)(4), 6435(a)(2)(B), 6453(3), 6455(6).

51 Section 985.601(10), F.S.

52 29 U.S.C. § 794.

53 http://www.djj.state.fl.us/faqs/education-development.

54 *See supra* note 4. Indeed, school districts in Florida have been on notice of their legal duty to provide educational services to children in county jails for some time. In 2013, for example, the SPLC settled a claim against the Polk County School Board requiring the district to provide appropriate education. *The SPLC Reaches Agreement with Florida School District to Ensure Children at County Jail Receive an Education* (Sept. 23, 2013), *available at*: https://www.splcenter.org/news/2013/09/24/splc-reaches-agreement-florida-school-district-ensure-children-county-jail-receive. Long before that, the Alachua County School Board entered a consent decree requiring that children and eligible young adults in the jail received appropriate educational services after a lawsuit was filed by the Florida Justice Institute. *Green v. Sch. Bd. of Alachua Cnty.*, No. 2000-ca-3816K (Fla. 8th Cir. Ct. Feb 18, 2002).

55 *See* § 951.176, F.S.; § 1006.07(5), F.S. This requirement is consistent with federal obligations under IDEA.

56 *Id.*

57 Section 1003.02(g)1., F.S.; F.A.C. Rule 6A-1.045111.

58 *See supra* note 4.

59 Title I, Part D, as well as IDEA, also require that carceral authorities and education agencies work together on transition planning—i.e., on connecting children who are leaving facilities to opportunities in their communities to further education or employment. *Cf.* 20 U.S.C. §§ 6434(c)(9) & (15), 6453(12), 6455(2).

60 34 C.F.R. part 106, subpart D; *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1994); *Lothes v. Butler Cnty Juvenile Rehab. Ctr.*, 243 Fed. Appx. 950, 954-55 (6th Cir. 2007). As an example, if a facility runs an auto mechanic program, the facility must allow girls equal access to it, and cannot make them enroll instead in, for instance, a cosmetology program.

61 *Castañeda v. Pickard*, 648 F.2d 989, 1009-1011 (5th Cir. 1981); Departments of Education and Justice, "Dear Colleague Letter, English Learner Students and Limited English Proficient Parents," Jan. 7, 2015, *available at*: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf.

62 Office of Special Education and Rehabilitative Services, "Dear Colleague Letter: Students with Disabilities Who Are in Correctional Facilities and the Requirements of Part B of the Individuals with Disabilities Education Act," Dec. 5, 2014, *available at*: https://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf (OSERS DCL). See also 34 C.F.R. § 300.102(a)(2)(i). The IDEA and its implementing regulations provide a limited exception to this rule for students age 18 to 22 in adult correctional facilities who were not identified as having a disability under the IDEA at their last educational placement before incarceration and did not have an IEP under the IDEA. *Id.*

63 *See generally* DOJ/ED DCL; OSERS DCL.

64 28 C.F.R. § 35.130(b)(7).

65 42 U.S.C. § 12101; 28 C.F.R. § 35.130(d); *see also* United States Department of Justice, Civil Rights Division, "United States' Investigation of the Georgia Network for Educational and Therapeutic Support, D.J. No. 169-19-71," July 15, 2015, *available at*: https://www.justice.gov/sites/default/files/crt/legacy/2015/07/15/gnetslof.pdf.

66 *See supra* note 19; *see also* ADA, Section 504.

67 *See* 20 U.S.C. §§1412(a)(11), 1413(d), (g); 34 C.F.R. §300.600(e).

68 29 U.S.C. § 794.

69 28 C.F.R. § 35.130(b)(3)(i)-(ii).

Acknowledgments

The writing and analysis for this report was conducted by Shalini Agarwal, Lisa Carmona, Maya Goldman, Lisa Graybill, Carla Laroche, Michelle Llosa, Asim Lynch, Scott McCoy, Zoe Savitsky and Jessica Zagier Wallace. It was edited by Jamie Kizzire and Booth Gunter. Cierra Brinson designed the report.

SOUTHERN POVERTY LAW CENTER
CO-FOUNDERS Morris Dees, Joseph J. Levin Jr.
PRESIDENT & CEO J. Richard Cohen
INTELLIGENCE PROJECT DIRECTOR Heidi Beirich
OUTREACH DIRECTOR Lecia Brooks
LEGAL DIRECTOR Rhonda Brownstein
CHIEF COMMUNICATIONS & DEVELOPMENT OFFICER Wendy Via

DESIGN
DESIGN DIRECTOR Russell Estes
DEPUTY DESIGN DIRECTOR Valerie Downes
SENIOR DESIGNERS Michelle Leland, Scott Phillips
DESIGNERS Shannon Anderson, Cierra Brinson, Sunny Paulk, Kristina Turner
DESIGN ASSOCIATE Angela Greer

SPLC Southern Poverty Law Center

400 Washington Avenue
Montgomery, AL 36104
(334) 956-8200
splcenter.org

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

R.W.,

Plaintiff,

v.

Case No. 5:16-CV-45-Oc-10 PRL

BRUCE A. KISER JR.,
in his individual capacity,

Defendant.
_____/

COMPLAINT AND JURY DEMAND

Introduction

R.W. was just 17 years old when, while in the custody of the Florida Department of Corrections, he was beaten and raped by a group of approximately six prisoners at Sumter Correctional Institution. The attack happened on the watch and in plain view of Officer Bruce A. Kiser Jr., who failed to prevent the beating, intervene after it began, or even report it. Over the course of almost 30 minutes, R.W. was stabbed dozens of times with broken pieces of fence and raped by at least one prisoner using a broom handle while Officer Kiser did nothing.

This attack was part of the ritual of initiation beatings for youthful offenders widely known to both guards and incarcerated youth as "Tests of Heart" or "T.O.H." R.W. was attacked just weeks after entering prison for the first and only time. He is scheduled to be released from prison in 2017.

R.W. seeks redress for the suffering he endured as a result of Officer Kiser's deliberate indifference to the substantial risk of serious harm he faced.

Jurisdiction

1. This action arises under the Eighth Amendment to the United States Constitution and 42 U.S.C. § 1983.

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this claim occurred within this Court's district and the Ocala division.

Parties

4. R.W. entered the custody of the Florida Department of Corrections ("F.D.C.") in May 2013 at the age of 17. He is classified as a "youthful offender" and currently incarcerated at Lancaster Correctional Institution.

5. Defendant Officer Bruce A. Kiser Jr., is a correctional officer employed by the F.D.C. He is sued in his individual capacity for damages. Defendant Officer Kiser, at all times material to this action, was assigned to work in "F Dormitory" at Sumter Correctional Institution ("Sumter"), supervising youthful offenders. Defendant Officer Kiser was responsible for the operation and supervision of F Dormitory; the enforcement of the relevant rules, regulations, policies and practices; and the safety of those under his watch.

Factual Allegations

6. When R.W. entered the F.D.C., he was classified as a "youthful offender." The term "youthful offender" refers to youth who have been sentenced in accordance with the youthful offender sentencing scheme as outlined in Florida Statute § 958.04, or to youth who have been classified as such by the F.D.C. in accordance with Florida Statute § 958.11.

7. In general, prisoners classified as youthful offenders include those under age 25 whose sentences do not exceed 10 years. Many, like R.W., entered the F.D.C. as minors.

8. Many of these youth enter prison after being "direct filed," that is, when prosecutors transfer a child's juvenile charges from the juvenile

court system to adult criminal court. If convicted in adult court, a direct-filed youth may be sentenced to adult prison time, regardless of his age, and transferred to a prison within the F.D.C.

9. Violence and neglect pervade the F.D.C., making its prisons a particularly inappropriate place for youth. In 2013, 305 people died while incarcerated by the F.D.C. In 2014, that number increased to 346, including one young person who was reportedly attacked in a youthful offender prison, like R.W., and subsequently died, just six days after his twentieth birthday.

10. The majority of youthful offenders in the custody of the F.D.C. are incarcerated at one of three prisons: Sumter, Lancaster and Lake City Correctional Institutions.

11. At Sumter, R.W. was incarcerated in F Dormitory, an open-bay housing unit that held approximately 80 other prisoners, all classified as youthful offenders.

12. During a typical shift, only one officer was present on the housing unit with dozens of youth, even if two officers were technically assigned to be there. Sometimes, a second officer entered the unit briefly.

13. The officer on duty for the housing unit spent the majority of his time in the "bubble" or officer station, which is separated from the unit

by glass windows and a door. The station is situated so that an officer can easily observe happenings in the housing unit, including the bathroom area, from inside the station.

14. Shortly after arriving at Sumter, R.W. was told by other incarcerated youth that he would need to pay for his safety by purchasing items from the canteen and giving them to other prisoners, or he would have to fight another youth in a Test of Heart. He understood that refusal to do either would result in regular beatings, and that he would live under the constant threat of physical and sexual assault, from which the F.D.C. would not protect him.

15. In order to pay in the initiation system, a youth like R.W. must have money placed in his prison account so that he is able to purchase items like candy or chips from the prison canteen as payment. Because no amount of "payment" satisfies the continuing demands, the choice of paying or fighting is a false one.

16. The Test of Heart initiation system is part of the pervasive culture of brutality within the F.D.C. Guards are not only aware of the violence, but are often complicit in it. The youthful offender prisons are among the most violent in the Florida prison system.

17. When R.W. was warned of his impending Test of Heart, he believed that reporting the threat served no purpose and could even put him in added danger of retaliation for "snitching." R.W. had heard of other youth who reported similar threats; guards responded by saying, "Welcome to prison," and did nothing to prevent the violence. Until R.W. fought or paid for his safety, he would live under the constant threat of sexual or physical violence.

18. Like the majority of minors in the F.D.C., R.W. was indigent and did not have "protection" money to pay. Before his incarceration by the F.D.C., R.W. lived with his grandmother, who had since died.

July 24: 2013: The Attack

19. On July 24, 2013, R.W. was housed in F Dormitory at Sumter.

20. Defendant Officer Kiser was assigned to supervise F Dormitory on that day.

21. Shortly before 9:15 a.m. on July 24, 2013, R.W. entered the bathroom in F Dormitory to wash up.

22. In the bathroom area, a youth approached R.W. to confirm that R.W. would fight the youth to satisfy his Test of Heart. R.W. had no choice.

23. The youth slapped R.W., initiating the Test of Heart.

24. Unbeknownst to R.W., about six other youth were hiding in the bathroom area at the time. They joined in and began beating R.W.

25. Unbeknownst to R.W., this type of attack – multiple youth ganged up against one, often unsuspecting, youth – is typical of a Test of Heart.

26. R.W. was immediately overwhelmed and could not defend himself.

27. When the attack began, Defendant Officer Kiser was in the officer's station, which is adjacent to the bathroom area where the attack occurred. In order to enter the bathroom area, a person must walk directly past the officer's station, within the officer's view. The officer's station is made of glass walls so that an officer can observe the happenings in the unit from inside the station.

28. From the officer's station, Defendant Officer Kiser and others similarly situated can see clearly inside the bathroom area.

29. Defendant Officer Kiser could see clearly inside the bathroom area from the officer's station during the attack. Defendant Officer Kiser could see the multiple youth who entered the bathroom area, as well as those

who gathered outside the bathroom, near the officer's station, during the attack.

30. After the attack began, Defendant Officer Kiser looked at R.W. from the officer's station.

31. While the attack continued, Defendant Officer Kiser stepped outside the officer's station towards the youth gathered near the bathroom to watch the attack. Defendant Officer Kiser looked towards the bathroom area and then returned to the officer's station. He took no action.

32. Over the course of almost 30 minutes, R.W. was hit, choked, slammed on the floor, punctured dozens of times with two pieces of barbed wire broken from a fence, and raped with a broom handle that was inserted into his rectum.

33. The pieces of barbed wire had been sharpened into "pokers" for stabbing. Each piece was approximately eight inches long and had been fashioned into a stabbing tool with a handle for gripping.

34. Youth use a variety of weapons in the Tests of Heart, including pokers, broom handles, mop handles and homemade knives.

35. Guards know these weapons, specifically broom and mop handles, are used in Tests of Heart to beat youth and may be forcibly

inserted into a youth's rectum during the initiation attack. This constitutes rape under the Prison Rape Elimination Act. 42 U.S.C.A. § 15609(9)(A) ("The term 'rape' means ... sexual assault with an object ... forcibly or against that person's will.").

36. While the attack continued, one youth exited the bathroom area and picked up a broom that was resting near the bathroom entrance, by the officer's station. He took the broom into the bathroom. Defendant Officer Kiser remained in the officer's station and took no action.

37. One or more youth took the broom that had been brought into the bathroom area and used it to rape R.W., forcibly inserting the handle into his rectum.

38. R.W. was stabbed in his chest and back with the pokers well over 100 times.

39. At multiple times during this attack, R.W. was choked until he was rendered unconscious.

40. R.W.'s prison uniform was soaked with his blood and water from the bathroom.

41. During the attack, numerous other incarcerated youth walked in and out of the bathroom area. Some joined in beating R.W.; others watched

and laughed as his beating continued. Still others came in to use the bathroom and walked out when they were done.

42. Defendant Officer Kiser was in the officer's station throughout most of the attack.

43. About 30 minutes after the attack began, some youth left the bathroom area soaking wet from sweat and water in the bathroom. They walked directly by the officer's station, where Defendant Officer Kiser was located and could see them. Defendant Officer Kiser took no action.

44. Other youth left the bathroom, grabbed cleaning supplies, and went back into the bathroom.

45. Defendant Officer Kiser again exited the officer's station and looked towards the bathroom area. R.W. was still in the bathroom. Defendant Officer Kiser turned, walked the other way into the unit, then returned to the officer's station.

46. At no time did Defendant Officer Kiser investigate, intervene in, stop or report the attack.

47. When the attack ended, R.W. was weak and appeared to others to be in shock. He was in pain, injured, degraded, humiliated and scared. R.W. suffered numerous cuts and puncture wounds on his arms, back and

chest from the barbed wire that prisoners attacked him with. He received multiple contusions, and his neck was left red long after the attack, from injuries sustained when he was rendered unconscious. He was bleeding from his injuries and from his rectum.

48. R.W. borrowed clean clothes from another youth before leaving the bathroom area.

49. R.W. exited the bathroom more than 30 minutes after the attack began on Defendant Officer Kiser's watch.

50. R.W. did not report what had happened because he believed that reporting the Test of Heart would be futile, and he feared that it would lead to another beating in retaliation.

51. R.W. tried to appear as if nothing had happened, despite being in pain and having dozens of open puncture wounds on his body.

52. R.W. had cuts and redness around his neck. Youth encouraged him to use toothpaste to clog the wounds and stop the bleeding on his neck.

53. Defendant Officer Kiser never spoke to R.W. about the incident and never asked him about his well-being or whether he needed medical attention.

54. Several hours later, on his return to F Dormitory from the cafeteria for dinner, R.W. was stopped by Officer Vincent Cruz. Officer Cruz saw injuries on R.W.'s body and face. He sent R.W. to see medical staff.

55. R.W. was examined by a nurse, who noted dozens of wounds on his torso. He was kept in the medical unit for one night.

56. While in medical, R.W. was questioned by Captain David Boyd, an "Officer in Charge" at Sumter. When Captain Boyd learned that R.W.'s attack had been a Test of Heart, he asked R.W. specifically if he had been sexually assaulted because he knew that youth are often sexually assaulted with broom handles during Tests of Heart.

57. The Office of the Inspector General subsequently initiated an investigation.

58. On July 25 – one day after his attack – R.W. was removed from the medical unit and placed in confinement, which is a form of isolation.

59. While in confinement, R.W. was locked in a small cell that contained just a metal bed with a thin mattress, a toilet and a sink. There was one small window to the outside, but it was so dirty that R.W. could not see through it.

60. For the first few days in confinement, R.W. did not receive a sheet to cover his mattress, a blanket or any other bedding. While in confinement, R.W. was allowed outside of the cell only to shower, three times a week, and for three interviews with the investigator from the Inspector General's office. He was prohibited from interacting with other prisoners, going to recreation, attending GED classes or participating in any programming. R.W. never received his personal items, which included letters and legal mail.

61. According to F.D.C. regulations, prisoners placed in administrative confinement are allowed to keep their personal property. F.A.C. Rule 33-602.220(5)(c). Despite that, R.W. was denied his property and treated as if he were in punitive isolation.

62. R.W. remained in confinement at Sumter for several weeks. During that time, he never went outside.

63. R.W. was forced to endure these conditions even though he was the victim of a brutal attack and sexual assault. According to the Prison Rape Elimination Act, efforts must be made to avoid placing a person who has been the victim of a sexual abuse in prison in confinement. 28 C.F.R. §§ 115.68, 115.43. This added protection is based on the recognition that

victims of sexual abuse are at risk for greater trauma when placed in isolation.

64. At Sumter and throughout the F.D.C., victims of attacks are typically held in confinement following their assaults, despite the Prison Rape Elimination Act.

65. After a few days in confinement, R.W. sent his only clothes to the laundry unit. The clothes were not returned to him.

66. R.W. remained in isolation with nothing but his underwear for multiple days.

67. R.W. did not receive clothes until Robert Weeks, the investigator from the Inspector General's office, was scheduled to meet with him.

68. Mr. Weeks had investigated a Test of Heart attack in the Florida Department of Corrections before under similar circumstances.

69. Mr. Weeks reviewed facility video related to R.W.'s attack. He noted in his report "[p]ossible [a]dministrative issues" specifically related "to the lack of action taken by Officer Kiser while on duty" during the attack.

70. Defendant Officer Kiser was not disciplined for his role in this attack and continues to be employed as a prison guard by the F.D.C.

CAUSE OF ACTION

Eighth Amendment; 42 U.S.C. § 1983

Defendant Bruce A. Kiser Jr.

71. Plaintiff repeats and realleges each preceding paragraph as if fully set forth herein.

72. Plaintiff's claim for relief is predicated upon 42 U.S.C. § 1983, which authorizes actions to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the Eighth Amendment to the U.S. Constitution and the laws of the United States, and upon 42 U.S.C. § 1988, which authorizes the award of attorneys' fees and costs to prevailing plaintiffs in actions brought pursuant to 42 U.S.C. § 1983.

73. At all times material to this action, Defendant Officer Kiser was employed by the F.D.C. All actions performed by Defendant Officer Kiser were done under color of state law and constitute state action.

74. Defendant Officer Kiser knowingly failed to intervene, report or respond in any way to the beating, repeated puncture and stabbing, and rape of R.W. Defendant Officer Kiser allowed prisoners unsupervised access

to brooms and mops, despite knowing that these weapons are used in prison assaults.

75. Defendant Officer Kiser was aware that R.W. faced a substantial risk of serious harm, yet failed to do anything to stop it. Defendant Officer Kiser acted with deliberate indifference to the substantial risk of serious harm to R.W.

76. As a result of Defendant Officer Kiser's failure to intervene, report or respond in any way to the attack and sexual assault endured by R.W., R.W. suffered physical injury, severe emotional and mental distress, humiliation and degradation.

WHEREFORE, Plaintiff R.W., as a result of Defendant Officer Kiser's violation of the Eighth Amendment to the U.S. Constitution, respectfully requests that this Court award him all available damages, including punitive and compensatory, for the physical injury, severe emotional and mental distress, humiliation, and degradation he has suffered; any and all other damages suffered; attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and such other and further relief as the Court deems just and equitable.

JURY TRIAL DEMAND

Plaintiff respectfully demands trial by jury.

Respectfully submitted,

By: /s/ Miriam Haskell

Miriam Haskell
Fla. Bar. No. 69033
SOUTHERN POVERTY LAW CENTER
P.O. Box 370037
Miami, FL 33137
Tel: (786) 347-2056
Fax: (786) 237-2949
miriam.haskell@splcenter.org

Tania Galloni
Fla. Bar. No. 619221
SOUTHERN POVERTY LAW CENTER
P.O. Box 370037
Miami, FL 33137
Tel: (786) 347-2056
Fax: (786) 237-2949
tania.galloni@splcenter.org

Cassandra Capobianco
Fla. Bar. No. 614734
FLORIDA LEGAL SERVICES
14260 W Newberry Rd # 412
Newberry, FL 32669-2765
Tel: (352) 375-2494
Fax: (352) 331-5202
cassandra@floridalegal.org

Vox

America's prisoners are going on strike in at least 17 states

Incarcerated Americans are often forced to work for cents an hour. So they're launching what could be their biggest protest ever.

By German Lopez | @germanrlopez | german.lopez@vox.com | Updated Aug 22, 2018, 9:00am EDT

An inmate firefighter is deployed from a minimum-security prison on September 2017. | David McNew/AFP via Getty Images

America's prisoners are going on strike.

The demonstrations are **planned** to take place from August 21 to September 9, which marks the anniversary of the **bloody uprising at the Attica Correctional Facility in New York**. During this time, inmates across the US plan to refuse to work and, in some cases, refuse to eat to draw attention to poor prison conditions and what many view as exploitative labor practices in American correctional facilities.

"Prisoners want to be valued as contributors to our society," Amani Sawari, a spokesperson for the protests, told me. "Every single field and industry is affected on some level by prisons, from our license plates to the fast food that we eat to the stores that we shop at. So we really need to recognize how we are supporting the prison industrial complex through the dollars that we spend."

Prison labor issues recently received attention in California, where inmates have been voluntarily recruited to **fight the state's record wildfires** — for the paltry pay of just $1 an hour plus $2 per day. But the practice of using prison inmates for cheap or free labor is fairly widespread in the US, due to an exemption in the 13th Amendment, which abolished chattel slavery but allows involuntary servitude as part of a punishment for a crime.

For Sawari and the inmates participating in the protests, the sometimes forced labor and poor pay is effectively "modern slavery." That, along with poor prison conditions that inmates blame for a deadly South Carolina prison riot earlier this year, have led to protests.

For prisons, though, fixing the problems raised by the demonstrations will require money — something that cash-strapped state governments may not be willing to put up. That raises real questions about whether the inmates' demands can or will be heard.

The demonstrations come two years after **what was then the largest prison strike in US history**, with protests breaking out in at least 12 states in 2016. The new demonstrations could end up even larger than those previous protests.

Protests are planned in at least 17 states

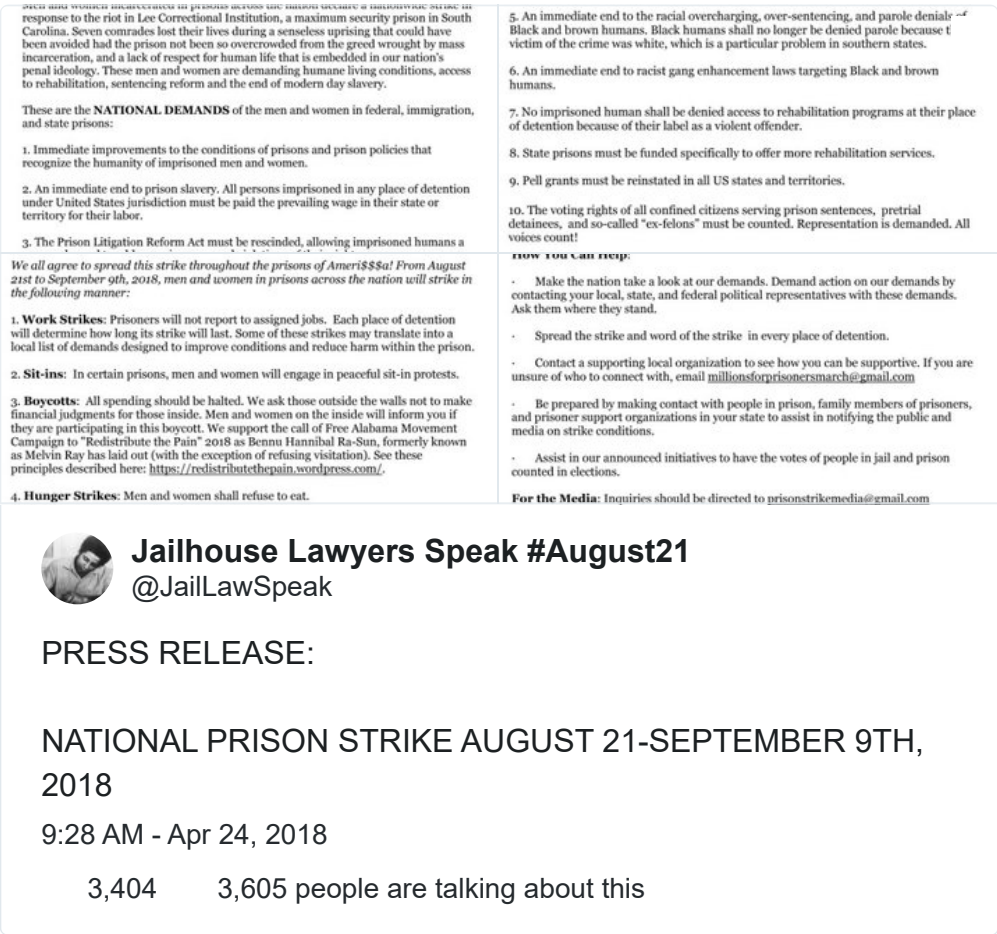
There's no hard estimate for how many inmates and prisons are taking part in the protests, as organizers continue to recruit more and more inmates and word of mouth spreads. But demonstrations are expected across at least 17 states.

The inmates will take part in work strikes, hunger strikes, and sit-ins. They are also calling for boycotts against agencies and companies that benefit from prisons and prison labor.

"The main leverage that an inmate has is their own body," Sawari said. "If they choose not to go to work and just sit in in the main area or the eating area, and all the prisoners choose to sit there and not go to the kitchen for lunchtime or dinnertime, if they choose not to clean or do the yardwork, this is the leverage that they have. Prisons cannot run without prisoners' work."

While 2016's protests were largely planned for just September 9 (then the 45th anniversary of the Attica uprising), they ended up taking part over weeks or months as prison officials tried to tamp down the demonstrations and mitigate the effects of the protests. This year, the protests are spread out over three weeks to make it more difficult for prison officials to crack down.

The inmates have **outlined 10 national demands**. They include "immediate improvements to the conditions of prisons" and "an immediate end to prison slavery." They also target federal laws that boosted **mass incarceration** and have made it harder for inmates to sue officials for potential rights violations. And they call for an end to **racial disparities** in the criminal justice system and an increase to rehabilitation programs in prisons.



response to the riot in Lee Correctional Institution, a maximum security prison in South Carolina. Seven comrades lost their lives during a senseless uprising that could have been avoided had the prison not been so overcrowded from the greed wrought by mass incarceration, and a lack of respect for human life that is embedded in our nation's penal ideology. These men and women are demanding humane living conditions, access to rehabilitation, sentencing reform and the end of modern day slavery.

These are the **NATIONAL DEMANDS** of the men and women in federal, immigration, and state prisons:

1. Immediate improvements to the conditions of prisons and prison policies that recognize the humanity of imprisoned men and women.

2. An immediate end to prison slavery. All persons imprisoned in any place of detention under United States jurisdiction must be paid the prevailing wage in their state or territory for their labor.

3. The Prison Litigation Reform Act must be rescinded, allowing imprisoned humans a

5. An immediate end to the racial overcharging, over-sentencing, and parole denials of Black and brown humans. Black humans shall no longer be denied parole because t victim of the crime was white, which is a particular problem in southern states.

6. An immediate end to racist gang enhancement laws targeting Black and brown humans.

7. No imprisoned human shall be denied access to rehabilitation programs at their place of detention because of their label as a violent offender.

8. State prisons must be funded specifically to offer more rehabilitation services.

9. Pell grants must be reinstated in all US states and territories.

10. The voting rights of all confined citizens serving prison sentences, pretrial detainees, and so-called "ex-felons" must be counted. Representation is demanded. All voices count!

We all agree to spread this strike throughout the prisons of Ameri$$$a! From August 21st to September 9th, 2018, men and women in prisons across the nation will strike in the following manner:

1. **Work Strikes**: Prisoners will not report to assigned jobs. Each place of detention will determine how long its strike will last. Some of these strikes may translate into a local list of demands designed to improve conditions and reduce harm within the prison.

2. **Sit-ins**: In certain prisons, men and women will engage in peaceful sit-in protests.

3. **Boycotts**: All spending should be halted. We ask those outside the walls not to make financial judgments for those inside. Men and women on the inside will inform you if they are participating in this boycott. We support the call of Free Alabama Movement Campaign to "Redistribute the Pain" 2018 as Bennu Hannibal Ra-Sun, formerly known as Melvin Ray has laid out (with the exception of refusing visitation). See these principles described here: https://redistributethepain.wordpress.com/.

4. **Hunger Strikes**: Men and women shall refuse to eat.

How You Can Help:

- Make the nation take a look at our demands. Demand action on our demands by contacting your local, state, and federal political representatives with these demands. Ask them where they stand.
- Spread the strike and word of the strike in every place of detention.
- Contact a supporting local organization to see how you can be supportive. If you are unsure of who to connect with, email millionsforprisonersmarch@gmail.com
- Be prepared by making contact with people in prison, family members of prisoners, and prisoner support organizations in your state to assist in notifying the public and media on strike conditions.
- Assist in our announced initiatives to have the votes of people in jail and prison counted in elections.

For the Media: Inquiries should be directed to prisonstrikemedia@gmail.com

Jailhouse Lawyers Speak #August21
@JailLawSpeak

PRESS RELEASE:

NATIONAL PRISON STRIKE AUGUST 21-SEPTEMBER 9TH, 2018

9:28 AM - Apr 24, 2018

3,404 3,605 people are talking about this

The demands are on top of specific local and regional asks that prisoners are making. For example, Sawari said, in South Carolina they're also focused on getting prisoners the **right to vote** — and, of course, improving conditions in the state that helped inspire this year's protests.

The strikes are in part a response to South Carolina's recent prison riots

One reason for this year's demonstrations is the **prison riot at Lee Correctional Institution** in April, which was described as a "mass casualty" event by state officials.

"After that violent incident happened, South Carolina prisoners and the jailhouse lawyers group out of Lee County came out with the strike demands and really wanted to do

something to draw attention to the dehumanizing environment of prisons in general," Sawari said.

In total, seven inmates were killed and at least 17 were seriously injured, according to the **Associated Press**. An inmate told the AP that bodies were "literally stacked on top of each other," claiming that prison guards did little to stop the violence between inmates. Most of the fatal injuries appeared to be a result of stabbing or slashing, although some inmates may have been beaten to death. No prison guards were hurt.

The riot was the worst in a US prison in a quarter-century, according to the **AP**.

Based on reports following the riot, it seems some of the major causes, besides personal and potentially gang-related disputes, were poor prison conditions and understaffing — which meant there weren't enough guards to stop the fighting.

This appears to be part of a growing problem. An **investigation** by John Monk for the State, a South Carolina newspaper, found that the number of inmates killed in the state's prisons "more than doubled in 2017 from the year before and quadrupled from two years ago."

John Bacon and Tim Smith at USA Today in April **reported** on other incidents at Lee Correctional:

> The prison, which opened 25 years ago and holds about 1,700 of some of South Carolina's most violent offenders, is no stranger to violence. Three weeks ago, inmates overpowered a guard, holding him hostage and taking control of part of a dorm for about 90 minutes. The guard was released uninjured.
>
> In February, one inmate fatally stabbed another. ...
>
> The prison is about 50 miles east of Columbia. The state capital is home to the Kirkland Correctional Institution, where four inmates were fatally strangled a year ago. One of the two inmates accused of the crime said he killed them so he would be moved to death row.

Violence is generally a big problem in US prisons. According to a 2009 **study** published in the *Journal of Correctional Health Care*, about 21 percent of male prison inmates during a six-month period are physically assaulted, and between 2 and 5 percent are sexually assaulted.

But the problem appears to be particularly acute in South Carolina facilities in recent years. One potential reason: understaffing. Lee County Coroner Larry Logan **told the AP** that most South Carolina prisons have struggled to find enough workers, indicating that understaffing is making it difficult to keep these places under control. South Carolina Department of Corrections Director Bryan Stirling **previously acknowledged** the understaffing problem — and the dangers it causes — as well.

Sawari cited poor conditions in the prison as another cause of the riots. "Prisoners were placed in some really aggravated conditions," she said. "They were placed on lockdown all day. They weren't allowed to eat or use the bathroom. They were placed in units with rival gang members. And then their lockers were taken away, so they didn't have any safe place to put their personal belongings, which really aggravated and caused tensions among prisoners — to the point where fights broke out, inevitably."

For the state, a big problem is costs. Hiring more guards — and paying guards more to make the job more attractive to more people — costs money. So does improving prison conditions in general. All of that is cash that could be spent elsewhere.

For inmates, the situation poses a question: If South Carolina can't properly staff its prisons and keep prisoners in safe, humane conditions, should so many people be locked up in the first place?

A big issue: prison labor exploitation

If there's one issue inmate protesters are united on, it's prison labor. In many states, prisoners are forced to work for cents an hour or even for free. This is allowed after the abolishment of slavery through the 13th Amendment of the US Constitution, which banned slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."

Hundreds of thousands of inmates across the US have jobs — not just firefighting, but also more typical jobs like kitchen work, cleaning, and GED tutoring. Sometimes the jobs will take inmates outside of prison, although more frequently they merely mimic real-world jobs or involve menial chores that need to be done around the prison. The average pay in state prisons is 20 cents an hour, according to **the Marshall Project**.

During the 2016 prison strikes, protesters characterized the practice as modern slavery. And with black people **disproportionately likely** to be incarcerated, there are racial disparities in this often forced, low-paid labor.

The 2018 protesters are taking a similar approach.

"Prison slavery exists," Sawari argued. "The 13th Amendment didn't abolish slavery. It wrote slavery into the Constitution. There's a general knowledge that the 13th Amendment abolished slavery, but if you read it, there's an exception clause in the abolishing of it. That's really contradictory — that something would be abolished and there would be an exception to that."

She pointed to companies that have taken advantage of prison labor in the past, including **Victoria's Secret** and **Starbucks** — arguing they need to be called out for what amounts to, in some inmates' view, exploitation.

Prison officials and other advocates argue, however, that prison labor can help inmates gain much-needed real-world working experience. Some research has backed this up: A **study** of federal prisoners found inmates who took part in UNICOR, the federal prison work program, were 24 percent less likely to reoffend and 14 percent more likely to be employed a year after their release. And a **study** of a Florida program found significant increases in employment after release, but no changes in inmates' likelihood to reoffend.

These studies aren't definitive proof, because they have serious selection bias issues. It's difficult to know whether the inmates participating in prison labor programs are those who are already less likely to reoffend and more likely to get and keep a job after prison — since they're able and, in some cases, volunteering to work while they're incarcerated. Some studies try to control for this, but it can never be fully ruled out.

There's also a moral argument against prison labor as it's done today: Even if prison work helps some inmates, that doesn't justify paying prisoners pennies or nothing at all. Under this view, if the prison work programs are beneficial, spending on them should be increased so everyone can participate and get more pay for their work.

Of course, these are also people in prison — a place they are in as punishment for their crimes. So why do they deserve to be paid a higher wage? Sawari countered that these inmates are still often the primary breadwinners for their families and expected to meet some financial obligations even before their release.

"Prisoners do like having the opportunity to earn, because they do have to support themselves financially in a lot of ways," Sawari said. "Prisoners have to provide for their health care, their dental care. They have to buy food if they want to eat outside the three

times a day most prisons serve. … They have to buy clothes like jackets and boots, hygiene products, cosmetics, books, study materials, paper, tape, scissors. Any little thing they need, they have to buy that. So they want to be able to."

Prison officials say they couldn't afford to pay inmates more. They point out that there are many extra costs tied to prison labor — such as the chance of lockdowns, security needs, and the costs of inmates' housing, food, and health care. As California Department of Corrections and Rehabilitation spokesperson Jeffrey Callison told me, "The per capita cost of one inmate in our prison system now exceeds $80,000." Those are expenses employers in the free world don't typically have to carry.

But for many inmates, the poor pay still feels unfair. So they're protesting for three weeks.

The New York Times

Prison Strike Organizers Aim to Improve Conditions and Pay

By Mitch Smith

Aug. 26, 2018

The inmates at North Carolina's Hyde Correctional Institution hung three banners from the prison fence last week as supporters gathered outside. One sign asked for better food; another requested parole; the third said, "In solidarity."

The protest came in support of a nationwide prisoner strike to call attention to the low inmate wages, decrepit facilities and harsh sentences that organizers say plague prison populations across the country. Though it is unclear how widespread such demonstrations have been, activists said they had shown a new ability to reach inmates across state lines at a time when prison unrest and in-custody deaths are frequently in the news.

"Prisoners aren't oblivious to their reality," said Paul Wright, the executive director of the Human Rights Defense Center and a longtime critic of prison conditions. "They see people dying around them. They see the financial exploitation. They see the injustice."

Inmate protests have been happening for generations, but it is only in the last few years that organizers have had success coordinating from penitentiary to penitentiary and state to state. In 2010, Georgia inmates used contraband cellphones to coordinate protests across at least six prisons. And in 2016, prisoners in several states stopped reporting for work to protest their wages.

Much of the recent activism has focused on inmate pay, which can range from nothing at all in states like South Carolina and Texas to, at best, a few dollars for a day of hard labor in other places. Prisoners frequently refer to it as "slave labor," and organizers of this year's strike have called for inmates to be paid the prevailing wage for the cleaning, cooking and other work they perform behind bars.

"People are starting to realize how disgusting it is how human beings can be paid pennies," said Amani Sawari, a spokeswoman for Jailhouse Lawyers Speak, a group organizing the strike.

The current pay leaves many prisoners struggling to afford phone calls to family members or toothpaste and deodorant from the commissary, experts said. Even after years of hard work inside, they frequently have little or nothing saved to help with rent or other necessities when they are released.

“If they were being paid — even something less than minimum wage, but some reasonable amount of money — they could get out and have at least a little bit of money to get started again,” said Michele Deitch, a senior lecturer at the University of Texas at Austin who once served as a court-appointed monitor of that state’s prison system.

Ms. Sawari said inmates in several states planned to participate in the strike, which started last week and is scheduled to run through Sept. 9. In addition to increased pay and better living conditions, strikers were calling for changes to sentencing laws and expanded access to rehabilitation and educational opportunities for inmates, among other requests.

Ms. Sawari’s group has suggested that inmates could stop reporting for work, stop eating or perform subtler protests, such as no longer buying supplies from the prison commissary. She said word of the protests has spread through the news media, word of mouth and outreach to different prisons.

“Prisoners have heard on the radio, they’ve seen on TV,” said Ms. Sawari, whose group has also supported demonstrations in recent days outside of prisons. “We know that this is widespread. We just don’t know what specific actions and what specific prisoners.”

Prison officials in several states downplayed the impact of the protests and, in many cases, denied that they were occurring.

Knowing what is happening in prisons in real time is notoriously difficult. When strikes played out across the country in 2016, activists said it often took weeks or months to fully understand the scope of the protests. Members of the public cannot witness what is going on inside a prison, inmates are limited in their ability to relay their accounts and corrections departments have little incentive to publicize discord.

In California last week, activists circulated video that appeared to show an inmate turning down a burrito and saying he was on a hunger strike. State officials said they could not confirm that the footage was real.

“I’m aware of the video but I have no way of identifying the inmate in the video or verifying where it was recorded,” Vicky Waters, a spokeswoman for the California Department of Corrections and Rehabilitation, said in an email. “I can tell you we have had no reported incidents or activities from inmates related to the national prison strike.”

Activists said detainees at a federal Immigration and Customs Enforcement facility in Washington State were on a hunger strike. A department spokeswoman, Lori K. Haley, said Sunday that those were “false rumors.”

Officials in Colorado, Florida, Georgia, Indiana, New York and South Carolina, where protest activity had either been reported or rumored, all denied on Sunday that anything was amiss at their facilities. Officials in Ohio, New Mexico and at the Federal Bureau of Prisons did not respond to requests for comment.

“There are no strikes occurring in Georgia,” wrote Joan Heath, a corrections spokeswoman there, in a message that was typical of the other states. “We have been, and will continue to monitor the situation.”

Advocates working on behalf of inmates say there is an urgency in this year’s strike, which they are convinced is gaining momentum despite the lack of corroboration. In April, seven inmates died in a riot in a South Carolina prison, and already in August, at least 10 Mississippi inmates have died, most in cases that officials believe were from natural causes.

By inmates stopping work and calling attention to the problems, their supporters said, there is a hope that conditions might eventually improve.

“Do we expect that, hey, there’s a prison strike and all of a sudden tomorrow prisoners are going to be paid the minimum wage and get adequate health care?” asked Mr. Wright, of the Human Rights Defense Center. “Probably not,” he said, “but it’s a process.”

Follow Mitch Smith on Twitter: @MitchKSmith.

A version of this article appears in print on Aug. 27, 2018, on Page A12 of the New York edition with the headline: Inmates Strike Over Conditions and Pay, and Protests May Be Spreading

Published on *American Civil Liberties Union* (https://www.aclu.org)

The Nationwide Prison Strike: Why It's Happening and What It Means for Ending Mass Incarceration [1]

Earlier this spring, violence broke out [2] in the Lee Correctional Institution in South Carolina, resulting in seven deaths and many injuries. Incarcerated leaders in the South Carolina prison system decided they had had enough. Brutal treatment from corrections officers, deteriorating prison conditions, and incredibly long, punitive sentences had led to a condition of hopelessness in South Carolina's prisons.

Leaders within the South Carolina prison system began reaching out to incarcerated allies across the country, including the Free Alabama Movement [3], who had led a prison strike in 2016 [4]. A decision was made: It was time to launch a national prison strike to raise awareness around the brutality of mass incarceration.

On Tuesday, these incarcerated leaders and their partners are launching a "Nationwide Prison Strike [5]" to raise awareness of not only the horrific conditions throughout the American prison system but the broader injustices that have led to our current system of mass incarceration [6] — from racist police practices to unjust sentencing laws to the lack of support people experience when they come home from prison.

The Nationwide Prison Strike, scheduled to last from Aug. 21 to Sept. 9, is centered around 10 specific policy demands [5]. These demands include significantly reducing the number of people in jail and prison, improving prison conditions, properly funding rehabilitation, and addressing racism throughout the criminal justice system.

None of the demands, taken individually, is new to the criminal justice movement. Many organizations, including the ACLU, have fought against the rise of mass incarceration [7] and the horrendous conditions of American prisons [8]. Yet this may be the first occasion in which incarcerated leaders have coordinated nationally to list their specific policy agenda to end the system that has imprisoned them.

The strike's organizers are emphasizing Demand #10, also known as the #Right2Vote [9] campaign, a demand that all American citizens of voting age — including all people in jail, prison, or on parole — have the right to vote. In an early planning call, one organizer noted that the right to vote was the right from which all other rights flowed and stressed the need for people outside of prison to support this change. Presently, only Maine and Vermont permit all incarcerated and formerly incarcerated citizens the right to vote.

The term "strike" itself refers to incarcerated people across the country engaging in various types of nonviolent disobedience within the prison system, including not reporting to their workstations, from Aug. 21 to Sept. 9. This tactic is closely tied with a demand that prison labor be properly compensated, in contrast to what one of the organizers calls "slave labor [10]," referencing the 13th Amendment to the U.S. Constitution, which abolished slavery but carved out an exception for people who have been convicted of criminal offenses.

Even the dates of the strike are rooted in a broader historical narrative that the organizers are seeking to bring into the public discourse. The strike will begin on Aug. 21, the anniversary of a 1971 prison rebellion [11] in San Quentin, California, and will end on Sept. 9, the anniversary of the famous Attica uprising [12], a 1971 prison protest in upstate New York that turned deadly.

The activism during this strike will largely take place within prison walls, but people on the outside can still show their support. In an interview [10] conducted shortly before the strike, an organizer expressed hope that supporters of the strike and its demands would participate in acts of solidarity in their local communities or outside of the facilities themselves, as incarcerated people are encouraged and energized by such showing of support.

The ACLU supports the demands of the Nationwide Prison Strike, including #Right2Vote. We believe in lifting up the voices of those who are most directly impacted by the systems that oppress them. Those closest to the problem are closest to the solution, and nobody is closer than people living inside of America's jails and prisons. And while the ACLU has no formal role in the strike, ACLU staff and members have fought for decades for many of these issues in the streets, state legislatures, and the courtroom.

Acts of civil disobedience inside of prisons come with serious risks for participants, including severe punishment. Corrections officials should not respond with unjust retaliation. Peaceful demonstrations challenging unjust conditions and practices do not merit placing participants into solitary confinement or adding time to their sentences. Incarcerated people and corrections staff deserve safety, dignity, and the ability to express themselves.

The American criminal justice system is broken, and now we have an opportunity to hear from those most impacted by its corruption and abuse. Our country is stronger when people more marginalized and directly impacted by unjust policies organize and raise their voices to demand a better future.

The courageous people who are bringing focused attention to America's system of mass incarceration through the Nationwide Prison Strike deserve our admiration. The time to listen is now.

Links
[1] https://www.aclu.org/blog/smart-justice/mass-incarceration/nationwide-prison-strike-why-its-happening-and-what-it-means
[2] https://www.nytimes.com/2018/04/28/opinion/how-a-south-carolina-prison-riot-really-went-down.html
[3] http://www.freealabamamovement.com/
[4] https://theintercept.com/2016/09/16/the-largest-prison-strike-in-u-s-history-enters-its-second-week/
[5] https://incarceratedworkers.org/campaigns/prison-strike-2018
[6] https://www.aclu.org/issues/smart-justice
[7] https://www.aclu.org/issues/smart-justice/prosecutorial-reform
[8] https://www.aclu.org/issues/prisoners-rights
[9] http://sawarimi.org/right-2-vote-campaign
[10] https://shadowproof.com/2018/08/16/im-for-disruption-interview-with-prison-strike-organizer-from-jailhouse-lawyers-speak/
[11] https://blackthen.com/%E2%80%8Baugust-21-1971-george-jackson-is-shot-to-death-by-prison-guards/
[12] https://www.nytimes.com/2016/09/04/books/review/blood-in-the-water-attica-heather-ann-thompson.html

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

THE ETHICS OF CIVIL PROCEDURE AND COLLECTING ATTORNEYS' FEES: COMMON PITFALLS

Moderator: *Marc Gold*, Retired Judge, Broward County, FL

Panelists: *James K. Green*, P.A., West Palm Beach, FL

Prof. Michael Masinter, Nova Southeastern University Shepard Broad Law Center

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC.,
d/b/a Avista Plex, Inc.,

Plaintiff,

-vs- **Case No. 6:05-cv-1430-Orl-31JGG**
(Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

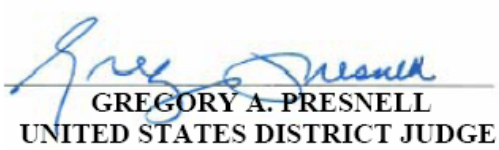
ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the

period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.



GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

FREEDOM'S PATH AT DAYTON, Plaintiff, vs. DAYTON METROPOLITAN HOUSING AUTHORITY, Defendant.	:	Case No. 3:16-cv-466 District Judge Walter H. Rice Magistrate Judge Sharon L. Ovington

DECISION AND ENTRY

I. Introduction

Plaintiff Freedom's Path at Dayton brings this action alleging Defendant Dayton Metropolitan Housing Authority (DMHA) d/b/a Greater Dayton Premier Management (GDPM) "blocked funding for and financing of 60 units of project-based funded affordable housing for veterans …" in violation of the American with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, *et seq*., and the Fair Housing Act of 1968, as amended, 42 U.S.C. § 3601, *et seq.*

This case is presently before the Court upon Defendant's Motions for Protective Orders (Doc. #s 27, 28), Plaintiff's Responses in Opposition (Doc. #33, 34), Defendant's Reply (Doc. #35), Plaintiff's Motion to Compel (Doc. #29), Defendant's Response in Opposition (Doc. #32), and Plaintiff's Reply (Doc. #36).

II. Background

To understand the parties' discovery disputes requires a brief look into the history

of the case. Plaintiff's goal is to use Veterans Affairs Supportive Housing (VASH) project-based rental assistance to house veterans, most of whom are disabled, in a development known as Freedom Path-Dayton VA on the VA Medical Center's campus in Dayton, Ohio. *Id*. at ¶s 25, 28. To reach this goal, Plaintiff needs Defendant's support "because only [Public Housing Authorities] such as GDPM may apply for a VASH allocation." *Id*. at ¶27.

On April 9, 2013, GDPM's Interim Chief Executive Officer, Alphonzio Prude, sent Defendant a letter extending GDPM's "support for Plaintiff's new development on the campus of the VA Medical Center and committed thirty-three … project-based vouchers." *Id*. at ¶28. Plaintiff understands this as GDPM's initial affirmative commitment to support Plaintiff's efforts to obtain VASH financing. (Doc. #6, *PageID* #53, ¶29). But since this initial commitment, GDPM "has balked at providing continued support to Plaintiff." *Id*. at ¶30.

In December 2015, Plaintiff asked GDPM to apply for project-specific, project-based VASH vouchers on Plaintiff's behalf. Defendant declined to do so and, instead, "proposed applying for VASH Project-Based Rental Assistance on behalf of itself…." *Id*. at ¶s 31-32. "By applying for VASH [assistance] … on its own behalf … and by not applying in a timely manner for Plaintiff's specific, project-based VASH vouchers, GDPM jeopardized HUD's award of 25 points that would give Plaintiff enough points for its project to be selected …." *Id*. at ¶s 31-32. According to Plaintiff, Defendant GDPM provided "various inconsistent, mistaken, or shifting rationales for its indecision…." *Id*. at ¶33. Plaintiff alleges, for example, GDPM explained, in part, that Prude's letter was

inconsistent with federal law, and GDPM "has already exceeded its overall allocation of vouchers (this in incorrect—a HUD VASH voucher waiver to the cap is available)[.]" *Id.*

On September 2, 2016, Plaintiff's counsel sent a detailed letter to GDPM asking it to apply to HUD on Plaintiff's behalf for 60 VASH vouchers before the impending September 9, 2016 deadline. *Id*. at ¶34 and Exhibit B, *PageID* #64. Plaintiff asked Defendant to "[p]lease treat this as a request for reasonable accommodation under the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act, and take whatever steps necessary to accommodate our request...." *Id.* Plaintiff asserts that GDPM denied the requested accommodation. (Doc. #6, *PageID* #54, ¶34).

Plaintiff seeks (1) declaratory relief concluding that GDPM violated the FHA and ADA; (2) an Order mandating GDPM to apply to HUD on Plaintiff's behalf for VASH project-based rental assistance or, alternatively, to grant Plaintiff a reasonable accommodation; (3) preliminary and permanent injunctions prohibiting GDPM from violating the ADA and FHA; and damages "for the harm it experienced as a result of GDPM's discriminatory and dilatory practices." *Id*. at ¶60.

III. Standard of Review

Under the Federal Rules of Civil Procedure, the scope of discovery is "traditionally quite broad." *Lewis v. ACB Bus. Servs, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (citing *Mellon v. Cooper–Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970)).

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant

> information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). But, "this desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant." *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991).

A party may file a motion to compel discovery when a deponent fails to answer a question under Rules 30 or 31. Fed. R. Civ. P. 37(a)(3)(B). "[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant." *Mayer v. Allstate Vehicle & Prop. Ins. Co.*, No. 2:15-cv-2896, 2016 WL 1632415, at *2 (S.D. Ohio Apr. 22, 2016) (Deavers, M.J.), *objections overruled*, 2016 WL 2726658 (S.D. Ohio May 10, 2016) (Marbley, D.J.) (quoting *Guinn v. Mount Carmel Health Sys.*, No. 2:09-cv-226, 2010 WL 2927254, at *5 (S.D. Ohio July 23, 2010) (Kemp, M.J.); *Clumm v. Manes*, No. 2:08-cv-567 (S.D. Ohio May 27, 2010) (King, M.J.)); *see also United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016) ("In cases where a relevancy objection has been raised, the party seeking discovery must demonstrate that the information sought to be compelled is within the scope of discoverable information under Rule 26."). If the proponent meets its initial burden, then "the party resisting production has the burden of establishing that the information is either not relevant or is so marginally relevant that the presumption of broad disclosure is outweighed by the potential for undue burden or harm." *Pillar Title Agency v. Pei*, No.

2:14-cv-525, 2015 WL 2238180, at *3 (S.D. Ohio May 12, 2015) (Kemp, M.J.) (citing *Vickers v. Gen. Motors Corp.*, No. 07-2172 M1/P, 2008 WL 4600997, at *2 (W.D. Tenn. Sept. 29, 2008)).

When a party seeks to limit discovery, it may file a motion for protective order. Federal Rule of Civil Procedure 26(c) provides that a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense …." "To justify restricting discovery, the harassment or oppression should be unreasonable, but discovery has limits and ... these limits grow more formidable as the showing of need decreases." *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (quoting 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed. 2012)) (internal quotation marks omitted). To prevail on a motion for protective order, the party must "show that the requested discovery does not fall within Rule 26(b)(1)'s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable." *Bros. Trading Co. v. Goodman Factors*, No. 1:14-CV-975, 2016 WL 9781140, at *2 (S.D. Ohio Mar. 2, 2016) (Litkovitz, M.J.) (quoting *Mckinney/Pearl Rest. Partners, L.P.*, 322 F.R.D. 235, 242) (N.D. Tex. 2016)).

IV. Discussion

A. Protective Orders

Defendant DMHA filed two motions for protective orders barring the depositions of five individuals. In its first motion, Defendant DMHA sought a protective order barring the deposition of its former interim CEO, Jeff Rieck. (Doc. #27). District Judge

Walter H. Rice overruled Defendant's Motion for Protective Order Barring the Deposition of Jeff Rieck (Doc. #27) as moot.

In its second motion for protective order, Defendant DMHA seeks to bar the depositions of third-party witnesses Alphonzio Prude, De Carol Smith, Phyllis Smelkinson, and Raymond Keyser. Defendant asserts that (1) the depositions are irrelevant to any claim or defense; (2) the depositions would subject DMHA to severe undue burden and expense; and (3) none of the depositions meet the proportionality requirement of Rule 26(b)(1). (Doc. #28).

i. Relevance under Rule 26(b)(2)

Defendant asserts that the deposition of Mr. Prude—a former interim CEO of DMHA—is "largely irrelevant" because his "only involvement in the events giving rise to Plaintiff's lawsuit pertains to the letter that Prude authored in his capacity as interim CEO of DMHA in April 2013 expressing the agency's purported support for Plaintiff's request for vouchers for its housing project." (Doc. #28, *PageID* #227). Defendant claims to be "categorically barred [from] satisfying Plaintiff's reasonable accommodation request through use of the Prude letter as a matter of law." *Id.* at 228. The law Defendant refers to is 24 C.F.R. § 983.51. And, this requires some additional information: Under 24 C.F.R. § 983.51(b), there are two methods by which a public housing authority (PHA) can select project-based voucher (PBV) proposals: (1) request PVB proposals; or (2) rely on previous competition. A public housing authority—such as Defendant in the present case—must have an administrative plan that describes "the

procedures for owner submission of PBV proposals and for PHA selection of PBV proposals." *Id.* § 983.51(a).

Defendant asserts that its administrative plan indicates it may only select project-based voucher proposals using the *first* method. (Doc. #28, *PageID* #s 228, 253-56). Thus, according to Defendant, because "Plaintiff's attempt to utilize Prude's letter to obtain vouchers for its housing project involved the issuance of vouchers through the second method …," and "because awarding Plaintiff housing vouchers through the use of the Prude letter would have violated federal HUD regulations, it is beyond dispute that the letter is completely irrelevant to Plaintiff's sole claim in this case that DMHA improperly refused to satisfy Plaintiff's accommodation request." *Id.* at 229.

Plaintiff asserts that this is merely one of Defendant's "various inconsistent, mistaken, or shifting rationales for its inactions." (Doc. #33, *PageID* #710). Plaintiff argues that, because Defendant's administrative plan requires Defendant to comply with all HUD regulations and HUD regulations allow two methods of selection of PBV proposals, Defendant could rely on the second method for selecting PBV proposals. And, because Plaintiff's previous competitive processes satisfy this second method, awarding Plaintiff housing vouchers through Mr. Prude's letter would not violate HUD regulations.

Further, if Defendant could not—under its administrative plan at that time—select Plaintiff's PVB proposal, Defendant could amend its administrative plan. And, indeed, Defendant did. In October 2016, Defendant's Board approved changes to its administrative plan to include the second method for selecting PBV proposals. (Doc. #29, *PageID* #304). HUD approved the changes in April 2017. *Id.*

Plaintiff alleges that through Mr. Prude's letter, Defendant "extended its support for Plaintiff's new development on the campus of the VA Medical Center and committed thirty-three (33) project-based vouchers." (Doc. #6, *PageID* #53). This commitment is at the heart of Plaintiff's claims. And, Mr. Prude, as Defendant's interim CEO at the time of this commitment, likely has relevant and thus discoverable information about Plaintiff's claims.

Defendant contends that the deposition of Ms. Smith—an Enhanced Use Lease Project Manager at the United States Department of Veterans Affairs—is "largely irrelevant." *Id.* at 227. Ms. Smith's "involvement in the events giving rise to this lawsuit is limited to her correspondence with DMHA and Plaintiff's representatives regarding the status of DMHA's response to Plaintiff's accommodation request." *Id*. But, Defendant argues, "any testimony provided by Smith regarding her conversations and interactions with DMHA would constitute inadmissible hearsay, and as such cannot … be used to support either of the causes of action asserted by Plaintiff against DMHA in this action." *Id*.

Given Defendant's assertion that "Plaintiff's sole claim in this case" is "that DMHA improperly refused to satisfy Plaintiff's accommodation request," the deposition of Ms. Smith—who, as Defendant claims, was involved with Plaintiff's accommodation request—seeks information relevant to Plaintiff's claim. Defendant's argument that Ms. Smith's testimony is not relevant because it would constitute inadmissible hearsay lacks merit for discovery purposes: "Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P 26(b)(1).

Defendant asserts that depositions of Ms. Smelkinson—a Housing Program Specialist at HUD—and Mr. Keyser—General Counsel for HUD—"must be barred due to these two individuals' lack of personal knowledge regarding *any* facts underlying the [present] lawsuit." (Doc. #28, *PageID* #s 223, 226). Defendant insists that neither was "involved in any of the events giving rise to Plaintiff's action relating to Plaintiff's accommodation request for an award of vouchers for Plaintiff's housing complex, or DMHA's handling of and response to Plaintiff's accommodation request." *Id.* at 226.

Plaintiff alleges that Ms. Smith consulted Ms. Smelkinson on whether Plaintiff was disqualified from the HUD VASH NOFA (notice of finding availability) process. *Id.* And, Ms. Smelkinson "reportedly told the VA VASH person, De Carol Smith, that, contrary to Defendant's assertion, Plaintiff was eligible to partner with Defendant in the NOFA. (Doc. #33, *PageID* #715).

Likewise, Ms. Heapy—the current CEO of Defendant DMHA—stated that Mr. Keyser, HUD general counsel, agreed with the opinion of Gordon Black, a low-level HUD official, who said that she could not "'honor' the original commitment of 33 vouchers to Plaintiff 'without going through the necessary RFP [competitive] process." *Id* at 713-15 (citation omitted); *see* Doc. #29, *PageID* #317. But, according to Plaintiff, its attorney, Orlando Cabrera, spoke to Mr. Keyser, and he "said that there were a number of ways that DMHA could partner with Plaintiff, including amending its Administrative Plan." *Id.* at 714. As explained above, "DMHA's Administrative Plan was amended by its Board in October or early November of 2016, and approved by HUD in April 2017 to

specifically include selection based on previous competition …." *Id.* at 714, n. 4 (citing Heapy Depo. Tr. At 107-08).

In other words, Ms. Smelkinson and Mr. Keyser were allegedly involved—to some degree—in the facts giving rise to the present lawsuit. And, Plaintiff asserts, Ms. Smith, Ms. Smelkinson, and Mr. Black all possess information regarding whether Defendant could lawfully honor its initial commitment of thirty-three project-based vouchers and/or whether Defendant could lawfully grant Plaintiff's request for reasonable accommodation. Therefore, their depositions search for relevant and discoverable information about Plaintiff's claims.

Further, Plaintiff alleges that "[t]he historical background of [Defendant's] actions, the sequence of events, [Defendant's] departures from the normal procedural sequence or substantive criteria all reflect intent to discriminate." (Doc. #6, *PageID* #54). Accordingly, the background—including Mr. Prude's initial commitment letter, Defendant's and Plaintiff's consultation with HUD employees, and HUD employee's discussions with VA employees—might or might not shed light on the merits of Plaintiff's claims. Consequently, the information Plaintiff seeks by deposing Mr. Prude, Ms. Smith, Ms. Smelkinson, and Mr. Keyser is discoverable

ii. Proportionality

Under Federal Rule of Civil Procedure 26(b)(1), discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Importance of the Issues at Stake

Plaintiff correctly asserts that the issues at stake in the present case are important: "They involve housing for homeless veterans, many of whom are disabled due to their service to this country. This case implicates important national policies about eradicating homelessness, especially for veterans, and providing permanent housing for them as proposed by Plaintiff." (Doc. #33, *PageID* #716). Defendant does not argue to the contrary.

Amount in Controversy

Plaintiff validly contends that the amount-in-controversy factor weighs in its favor. "Plaintiff's damages expert opines that DMHA's actions caused Plaintiff, and more importantly the veterans, to lose more than $15,000,000 in lost housing and overlay services." *Id*. Defendant does not suggest otherwise.

Parties' Relative Access to Relevant Information

It is likely that Defendant has, or has access to, most or all of the information Plaintiff seeks. Thus, this factor falls in Plaintiff's favor.

Parties' Resources

Defendant contends that the parties'-resources factor weighs in favor of barring the depositions. "DMHA is a public housing agency funded solely by taxpayer dollars. Thus, DMHA has limited resources as it relates to defending against Plaintiff's claims in this case, as each dollar spent on defending this meritless action is a dollar that cannot be

put toward providing affordable housing to the residents of Dayton." (Doc. #28, *PageID* #233).

Plaintiff contends that the parties' resources are the same. "Defendant is being defended by an insurance defense firm and has millions of dollars in potential coverage. Its annual budget is $45,000,000." (Doc. #33, *PageID* #716) (citing Heapy Depo. Tr. at 10).

Without additional information about the parties' resources—which the record presently lacks—this factor favors neither party.

Importance of the Discovery in Resolving the Issues

Defendants argue that none of the depositions "are in any way necessary or otherwise important to resolving the sole dispute at issue in this lawsuit - whether DMHA improperly declined to satisfy Plaintiff's accommodation request regarding the issuance of vouchers for its housing complex." (Doc. #28, *PageID* #233).

Plaintiff disagrees, asserting, "The discovery is necessary for Plaintiff's anticipated summary judgment motion. The witnesses all have important information that is directly relevant to whether Defendant improperly employed shifting rationales for denying Plaintiff's request for housing vouchers." (Doc. #33, *PageID* #s 716-17).

As explained in greater detail above, these four individuals were involved with the events underlying Plaintiff's claims and likely have information regarding whether Defendant improperly employed shifting rationales for denying Plaintiff's request for the housing vouchers.

Whether the Burden or Expense of the Proposed Discovery Outweighs Its Likely Benefit

Defendant argues that "all four depositions would subject DMHA to severe undue burden and expense." (Doc. #28, *PageID* #230). According to Defendant, the distant depositions of Ms. Smith and Ms. Smelkinson (in Washington, D.C.), Mr. Prude (in Michigan), and Mr. Keyser (in Cleveland) "would force [Defendant] to incur both air [or other] travel and overnight lodging expenses …." *Id.* at 231. In addition, Defendant "would incur substantial additional litigation expenses in having to prepare for and attend these depositions, none of which will produce any tangible benefit for either of the parties involved in this action." *Id*. Defendant asserts that Plaintiff will receive "little—if any—benefit" because the witnesses "possess scant knowledge of facts or evidence that would assist Plaintiff …." *Id.* at 232.

Plaintiff insists, however, that Defendant's "counsel is located in Cincinnati, which has regular non-stop service to the Washington, D.C. area where Smelkinson and Smith are located." (Doc. #33, *PageID* #715). It also has frequent non-stop flights to Cleveland, where Mr. Keyser is located, and to Chicago, near where Plaintiff intends to depose Mr. Prude. *Id.* at 715-16.

Plaintiff notes that it scheduled the depositions of Mr. Keyser and Gordon Black, a low-level HUD official, on the same day in Cleveland. *Id.* at 717, n.6. Defendant did not seek a protective order barring the deposition of Mr. Black. *Id.* And, if Defendant had agreed to the deposition of Mr. Keyser on the same day as Mr. Black, Defendant would not have incurred significant additional expenses.

Defendant bears the burden of establishing good cause for a protective order. *Nix v. Sword*, 11 F. App'x 498, 500 (6th Cir. 2001). "To show good cause, a movant for a protective order must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements." *Id.* (quoting *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987)) (internal quotation marks omitted); *see* Fed. R. Civ. P 26(b)(1) advisory committee's note (2015) ("A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination."). Defendant's broad allegations of "significant travel expenses" and "substantial additional litigation expenses" suffice to show it will suffer undue burden or expense and do not establish good cause for a protective order.

In sum, the balancing of these factors weighs in favor of allowing the depositions of Mr. Prude, Ms. Smith, Ms. Smelkinson, and Mr. Keyser. Additionally, Plaintiff has shown that it seeks information from their depositions that is relevant to its claims and proportional to the needs of the case. Accordingly, Defendant's Motion for Protective Order is denied.

B. Motion to Compel

Plaintiff's Motion to Compel Discovery and Request for Attorneys' Fees and Expenses asks the Court for an order compelling Ms. Heapy's deposition testimony and admonishing defense counsel to refrain from speaking and coaching objections, instructing witnesses not to answer questions, and making baseless objections. (Doc. #29).

Under Federal Rule of Civil Procedure 30, "An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."

i. Mr. Freudiger's Objections

Plaintiff asserts, "Mr. Freudiger made at least 17 other speaking objections that suggested to his client how to answer questions." (Doc. #29, *PageID* #259) (citations omitted). Further, "In 20+ instances, Mr. Freudiger instructed Ms. Heapy not to answer even though no claim of privilege had been raised or was implicated." *Id.* at 262 (citations omitted).

Plaintiff asserts that opposing counsel's statements such as "if you can" or "if you know" are suggestive and, therefore, in violation of Rule 30. For example, after noting his objection, Mr. Freudiger instructed Ms. Heapy to respond:

> Q. Does the Americans with Disabilities Act apply to your policies and actions?
> MR. FREUDIGER: Objection. You can answer *if you know*.
> THE WITNESS: That's a legal determination. I don't know.

Id. at 314 (emphasis added).

Defendant disagrees: "this statement merely patterns the extremely common principal followed almost uniformly by all litigants in both state and federal court that deponents should not guess or speculate as to their deposition answers." (Doc. #32, *PageID* #681).

This is why astute counsel prepares witnesses—before depositions begin—to testify about their personal knowledge rather than to guess or speculate. Defendant is correct that deponents should not guess or speculate as to their deposition answers. Nevertheless, assuming this practice is widespread in state and federal courts, there is no valid reason why Defendant's counsel would need to repeatedly interrupt the deposition questioning of any individual—here, Ms. Heapy—who has been an attorney for nearly fifteen years. Indeed, at a minimum, Defendant's "counsel would do well to avoid using this phrasing in the future, as it can plausibly be[] seen as coaching [the] witness. It is the attorney's job to make an objection and then stop talking. If the deponent does not know how to answer a question, he or she may state as much, but it is not appropriate for his or her attorney to push him or her in that direction." *Pogue v. NorthWestern Mut. Life Ins. Co.*, No. 3:14-CV-598-CRS, 2017 WL 3044763, at *11 (W.D. Ky. July 18, 2017).

Plaintiff also points to multiple instances where Mr. Freudiger objected and then suggested a response.

> Q. So would it be fair to say … that there would be minutes … of the meeting where Mr. Prude was terminated, but that those may or may not be available under the public record law depending upon whether the meeting was open or closed?
> MR. FREUDIGER: Yeah, I have to object. *I don't think she's going to know that.*

> MR. GREEN: Well, I'm asking her a question. It's not for you to testify.
> MR. FREUDIGER: Well, it's beyond the purview of the topics. You're asking a question that probably needs to be asked of her general counsel. She is hired by the board. You can answer if you know. If you do not know, then say you do not know.
> THE WITNESS: Can you repeat the question?
> (Record read.)
> THE WITNESS: I do not know the answer to that.

(Doc. #29, *PageID* #327) (emphasis added). Rather than allowing Ms. Heapy to respond to—or ask for clarification of—Mr. Green's questions, Mr. Freudiger expressed his own opinions:

> Q. What part of the regulations did Orlando Cabrera say that you could ignore?
> A. He didn't specifically state which ones could be -- what he said was as long as the administrative plan says just a blanket statement that you will comply with all HUD rules and regulations, that we didn't have to follow what was in our administrative plan.
> Q. Is that because the HUD regulations trumped your administrative plan?
> MR. FREUDIGER: Objection.
> BY MR. GREEN:
> Q. Is that because the HUD regulations controlled your administrative plan?
> MR. FREUDIGER: Objection, vague. *It's not clear whether you're talking about whether Cabrera said that or you're asking for her legal opinion.*

Id. at 324 (emphasis added). Mr. Freudiger's comments are improper under Rule 30(c)(2). *See Little Hocking Water Ass'n, Inc. v. E.I. Du Pont de Nemours & Co.*, No. 2:09-CV-1081, 2013 WL 6632678, at *15 (S.D. Ohio Dec. 17, 2013) ("The Court strongly disapproves of defense counsel's efforts to interject [defendant] positions into the course of plaintiff's deposition inquiry. Certainly, [defendant] has a right to attempt

to clarify the witness' testimony, if it perceives a need to do so, but that attempt must await the completion of plaintiff's inquiry.); *Cullen v. Nissan N. Am., Inc.*, No. 3-09-0180, 2010 WL 11579750, at *6 (M.D. Tenn. Feb. 2, 2010) ("[I]t is not proper for counsel for the deponent to ask the deposing attorney to clarify the question; that is the responsibility of the deponent.").

Notably, during Ms. Heapy's deposition, Mr. Freudiger declared, "I can instruct my witness. Speaking objections -- *we all know what the federal rules say*. I have been less vocal than you were. So I'm permitted to instruct the witness whether she can answer or not." (Doc. #29, *PageID* #286) (emphasis added). And shortly thereafter, "I have a right to tell my witness that she can answer a question." *Id*.

Mr. Freudiger's interpretation of "what the federal rules say" is incorrect. He does not have the right to tell his witness that she can answer a question. Indeed, all he can do is state a concise, nonargumentative, and nonsuggestive objection on the record and instruct his witness not to answer in the limited circumstances laid out in Rule 30(c)(2). *See Montiel v. Taylor*, No. 3:09-CV-489, 2011 WL 1532529, at *3 (E.D. Tenn. Apr. 21, 2011) ("Rule 30(c)(2) allows non-examining counsel at a deposition to do one of two things: (1) listen and (2) make objections.").

ii. The CEOs Prior to Ms. Heapy

Plaintiff asserts that Defendant's counsel improperly instructed Ms. Heapy not to respond to questions about Mr. Prude's application for unemployment. (Doc. #29, *PageID*# 264). On March 23, 2018 (after Ms. Heapy's deposition), at Plaintiff's request, the Court held an informal telephone conference regarding, in part, the termination of

Alphonzio Prude's employment with Defendant. Plaintiff reported that, although Defendant provided Mr. Prude's employee file, his file did not include Defendant's response to Mr. Prude's application for unemployment. This Court found that this evidence was relevant, therefore discoverable, and directed Defendant to investigate whether there was a response to Mr. Prude's application and, if there was, produce it. If Defendant could not produce the response, then Defendant must certify that it could not be located. It appears that Defendant failed to follow the Court's instruction.

Accordingly, Defendant must, within one week of this Order, produce its response to Mr. Prude's application for unemployment.

Plaintiff also notes that Mr. Freudiger—objecting on the basis of "pending litigation"—instructed Ms. Heapy not to answer questions about why Danielle Wright and Jeff Rieck, former CEOs, left DMHA.

Defendant does not suggest that "pending litigation" is a valid ground for instructing a deponent not to answer. Instead, Defendant insists that Plaintiff's questions were "wholly improper" because Ms. Wright and Mr. Rieck's prior employment are "wholly irrelevant" to the present case. (Doc. #32, *PageID* #s 689-90). Defendant's argument misses the mark: Rule 30(c)(2) requires a deponent to continue her testimony over objection unless she has asserted a privilege, is enforcing a limitation ordered by the court, or to present a motion under Rule 30(d)(3). "Objecting on the basis of relevance does not constitute one of these exceptions." *Grider v. City of Russell Springs*, No. 1:05-CV-137, 2010 WL 4683748, at *2 (W.D. Ky. Nov. 12, 2010).

Accordingly, Plaintiff is permitted to send written deposition questions to Ms.

Heapy to which she must respond within two weeks after she receives them.

iii. Defendant's Administrative Plan and HUD Regulations

Next, Plaintiff asserts that Defendant's counsel improperly objected to questions concerning Defendant's Administrative Plan and HUD regulations. On several occasions, Mr. Freudiger objected and instructed Ms. Heapy not to respond on the grounds that the question called for a legal conclusion or for her to interpret law.

> BY MR. GREEN:
> Q. Is there any HUD authority or rule that requires an expiration date for the … April 9th, 2013, commitment vouchers?
> MR. FREUDIGER: Again, objection, legal conclusion, beyond the scope of the topic for the 30(b)(6). *She can't answer that.*
> BY MR. GREEN:
> Q. Are you aware of any HUD authority or HUD rule that requires an expiration date for Mr. Prude's 2013 letter committing to 33 units of PBRA?
> MR. FREUDIGER: Same objection, same instruction.

(Doc. #29, *PageID*# 317) (emphasis added).

Mr. Freudiger stopped her from answering questions as the Rule 30(b)(6) designee or as an individual.

> Q. Would you agree as CEO that your organization is required to interpret your administrative plan consistently with HUD regulations?
> MR. FREUDIGER: Objection, legal conclusion, beyond the scope of the notice of taking 30(b)(6).
> MR. GREEN: I'm asking her as an individual.
> MR. FREUDIGER: Well, she cannot give a legal opinion as an individual.
> BY MR. GREEN:
> Q. As a member of management, do you agree that you need to interpret your administrative plan consistently with HUD regulations?

MR. FREUDIGER: Objection.
MR. GREEN: Go ahead and answer.
THE WITNESS: Can you repeat the question again?
(Record read.)
THE WITNESS: We have to write our administrative plan taking into consideration the regulations.
BY MR. GREEN:
Q. Okay. I asked you the question are you required to interpret your administrative plan consistently with federal regulations?
MR. FREUDIGER: Well, she answered to the best of her ability, and you're asking her if she is required to interpret --
MR. GREEN: No.
MR. FREUDIGER: -- or if GDPM is required to interpret, so I don't think she can answer that question.
MR. GREEN: She said she was required to write the administrative plan.
MR. FREUDIGER: I know what she said, but she's not going to answer your next question.
MR. GREEN: Okay. So you're directing her not to answer the last question about interpretation?
MR. FREUDIGER: Yeah.
MR. GREEN: Okay.

Id. at 324-25. And he stopped some questions without providing a reason:

Q. Okay. As CEO of GDPM, is it your understanding that federal law trumps state and local law?
MR. FREUDIGER: Objection. That is still a legal conclusion and beyond the scope of the 30(b)(6).
MR. GREEN: It's entirely within the scope.
MR. FREUDIGER: No, it's not.
MR. GREEN: I asked her for the reasons, and she stated that the administrative plan did not provide for something that HUD regulations provided for, so I'm trying to explore that.
MR. FREUDIGER: Your topic said the factual basis for the refusal. So obviously she can testify to the reasons that she gave your client as to her understanding. But you asked her a general question about whether federal law trumps state law. That's entirely outside the scope of your topic or the reasons that she has ever given.

> MR. GREEN: Okay.
> MR. FREUDIGER: So she can't answer that.
> MR. GREEN: She can answer that as an individual.
> BY MR. GREEN:
> Q. You're a lawyer, correct?
> MR. FREUDIGER: *No, we're not going there. We're not going there.*
> MR. GREEN: So you're instructing her not to answer as an individual who is also a lawyer; is that correct?
> MR. FREUDIGER: Well, I'm instructing her to … not answer, period. I don't have to give you my reasons. She is not answering it.
> MR. GREEN: Okay.

Id. at 309-10 (emphasis added).

On at least one occasion, Mr. Freudiger answered the question himself:

> [MR. GREEN:]
> Q. And if HUD regulations specifically allow … that Freedom's Path could qualify for the PBV under (b)(2), that would allow your agency to … treat them as being qualified, correct?
> *MR. FREUDIGER: No.*
> THE WITNESS: No.
> MR. FREUDIGER: Objection. *She cannot answer that question.* You're asking her to interpret the regulations.

Id. at 302-03 (emphasis added).

The Rule is clear: "An objection … must be noted on the record, but the examination still proceeds; *the testimony is taken subject to any objection*…. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30. There is no indication from Defendant that any of the exceptions apply. Accordingly, it was improper for Mr. Freudiger to instruct Ms. Heapy not to answer questions on the ground that it called for a legal conclusion.

iv. Ms. Heapy's Failure to Prepare as a Rule 30(b)(6) Designee

Under Federal Rule of Civil Procedure 30(b)(6), "a party may name as the deponent a ... corporation ... and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more ... persons who consent to testify on its behalf …. The persons designated must testify about information known or reasonably available to the organization." *See Rivet v. State Farm Mut. Auto. Ins. Co.*, 316 F. App'x 440, 447 (6th Cir. 2009). "A Rule 30(b)(6) deponent testifies as to the knowledge of the corporation and the corporations' subjective beliefs and opinions and interpretation of documents and events." *Buck v. Ford Motor Co.*, No. 3:08CV998, 2012 WL 601922, at *3 (N.D. Ohio Feb. 23, 2012) (quoting *Hilton Hotels Corp. v. Dunnet*, 2002 WL 1482543, *2 (W.D. Tenn. 2002)) (quotation marks omitted). The corporation has a duty to prepare the witness to answer all questions about the designated topics fully and without evasion. *U.S., ex rel. Fry v. Health All. of Greater Cincinnati*, No. 1:03-CV-167, 2009 WL 5227661, at *2 (S.D. Ohio Nov. 20, 2009) (citing *Great American Ins. Co. v. Vegas Constr. Co., Inc.*, No. 2:06-cv-911, 251 F.R.D. 534, 539 (D.Nev. March 24, 2008) ("Counsel has the responsibility to prepare its designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.").

Plaintiff contends that Ms. Heapy failed to adequately prepare as the Rule 30(b)(6) designee. Specifically, she "failed to look for records concerning the reasons for terminating the employment of former Interim CEO, Alphonzio Prude. She conducted no

written review of documentation as to the reasons for the termination. She spoke with only one member of her board." (Doc. #29, *PageID* #268) (internal citations omitted).

Ms. Heapy testified that, in preparation for her deposition, she spoke to one board member about Mr. Prude's termination and reviewed Mr. Prude's personnel file. *Id.* at 283-84. His file did not contain a record of the reasons for his termination. *Id.* Ms. Heapy did not, however, review Mr. Prude's "benefits file" because she does not consider it to be part of a personnel matter. *Id.* at 285.

When asked about "how Mr. Prude came to be terminated," she explained, "He was placed on administrative leave in November and was ultimately fired that following month." *Id.* Ms. Heapy did not know if he was given reasons why he was placed on administrative leave and she did not ask anyone. *Id.* She testified that she believed there was a board meeting when Mr. Prude was terminated but she was not at the meeting and she did not remember whether it was an open or closed meeting. *Id.* at 288. Ms. Heapy knew, based on her previous discussions with the board of directors and general counsel, that Mr. Prude "was fired by our Board of Commissioners for his lack of ability to maintain compliance of the agency and to work within the rules and regulations laid out by HUD. He also settled a lawsuit without consulting the board." *Id.* at 282, 284. The areas of non-compliance included their public records policy and their violence against women policy. *Id.* at 282. The lawsuit involved an employment issue brought by Karen Boneski. *Id.* at 283. Ms. Heapy did not know "the specific allegations"; the settlement amount; or if Mr. Prude was named individually. *Id.* She knew that there were no allegations of sexual harassment or issues with violence against women. *Id.*

When asked if she knew that Mr. Prude applied for unemployment compensation, she replied, "I believe he did." *Id.* at 284. However, Ms. Heapy did not know what position DMHA took regarding his application and stated that she did not ask anyone. *Id.* At that point, Mr. Freudiger objected, contending

> That's beyond the scope of the topics. She was asked for the personnel and disciplinary reasons and the reasons for his separation discharge or termination. There's nothing in here about DMHA's position in his request for unemployment, and it's totally outside the bounds of any kind of relevancy whatsoever, so she won't be answering any questions on that.

Id. at 284.

Mr. Freudiger, however, is not correct on either assertion. Plaintiff's list of Rule 30(b)(6) topics includes "The personnel and disciplinary records of Alphonzio Prude." *Id.* at 276. It is reasonable to think that his application for unemployment and any response by Defendant would be included in Mr. Prude's personnel file. Further, as explained above, DMHA's response is relevant and Defendant must produce a copy of its response to Mr. Prude's application for unemployment compensation or a sworn affidavit stating that it cannot be located.

Although Ms. Heapy could not answer every question concerning Mr. Prude's termination, "the inability of a designee to answer every question on a particular topic does not necessarily mean that the corporation has failed to comply with its obligations under the Rule." *Pogue v. NorthWestern Mut. Life Ins. Co.*, No. 3:14-CV-598-CRS, 2017 WL 3044763, at *8 (W.D. Ky. July 18, 2017) (citing *Janko Enters. v. Long John Silver's, Inc.*, 2014 U.S. Dist. LEXIS 185334, *14, 2014 WL 11152378 (W.D. Ky. Apr.

3, 2014)). Ms. Heapy did adequately prepare for her deposition and was able to provide the reasons for Mr. Prude's termination.

Further, Defendant, in response to Plaintiff's Motion to Compel, provided a sworn affidavit from a Board member, Reverend Wilburt Shanklin. (Doc. #32, *PageID* #s 704-06). Rev. Shanklin indicated that the Board discussed Mr. Prude's employment issues during an executive session and no meeting minutes were generated. *Id.* at 705. Ideally, Ms. Heapy would have known those details during her deposition. But, a "30(b)(6) witness is not expected to perform with absolute perfection." *Pogue*, No. 3:14-CV-598-CRS, 2017 WL 3044763, at *8 (citing *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 691 (S.D. Fla. 2012)).

v. Reasonable Attorney Fees and Costs

Under Rule 30(d)(2), a court "may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent."

Plaintiff asks the Court to award attorneys' fees—at an hourly rate of $500 per hour—for the time spent preparing the motion to compel. Plaintiff also asks the Court to order Ms. Heapy and Defendant's employees "to directly and fully respond to questions posed by Plaintiff's counsel unless subject to a valid exception under Rule 30(c)(2); and … order Mr. Freudiger, as counsel for Defendant, to refrain from making speaking objections and comments intended to influence the testimony, such as 'if you know.'" (Doc. #29, *PageID* #270).

Although Defendant's counsel's conduct during the deposition of Ms. Heapy was improper at times, the imposition of sanctions is presently unwarranted because Plaintiff was not ultimately prevented from conducting a "fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

In this contentious case, counsel for both parties "should strive to be cooperative, practical and sensible, and should turn to the courts (or take positions that force others to turn to the courts) only in extraordinary situations that implicate truly significant interests." *Cable & Computer Tech.*, 175 F.R.D. 646, 652 (citations and internal quotations marks omitted); *see also Saria v. Mass. Mut. Life Ins. Co.*, 228 F.R.D. 536, 539 (S.D.W. Va. 2005) ("The integrity of the discovery process rests on the faithfulness of parties and counsel to the rules—both the spirit and the letter. [T]he discovery provisions of the Federal Rules are meant to function without the need for constant judicial intervention and … those Rules rely on the honesty and good faith of counsel in dealing with adversaries.") (quoting *Poole v. Textron, Inc.*, 192 F.R.D. 494, 507 (D. Md. 2000)) (citation and internal quotation marks omitted).

IT IS THEREFORE ORDERED THAT:

1. Defendant's Motion for Protective Order (Doc. #28) is denied; and

2. Plaintiff's Motion to Compel Discovery and Request for Attorneys' Fees and Expenses (Doc. #29) is granted, in part, and denied, in part.

June 13, 2018

s/Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge

JAMES K. GREEN, P.A.

LAWYERS

JAMES K. GREEN
NINA M. ZOLLO
ANNE F. O'BERRY
NANCY UDELL, OF COUNSEL
JOHN F. PAULY, OF COUNSEL

SUITE 1650, ESPERANTE'
222 LAKEVIEW AVENUE
WEST PALM BEACH, FLORIDA 33401
561.659.2029
FACSIMILE 561.655.1357

May 28, 2018

Via email only to Edward.Soto@weil.com
lauren.alexander@weil.com

Edward Soto
Lauren Alexander
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue, Suite 1200
Miami, FL 33131

Re: Mr. Lindner's Responses to Montes Interrogatories

Dear Mr. Soto and Ms. Alexander:

Jack Scarola is in trial. He asked me to reach out to see if you will withdraw various objections and provide better answers to the above interrogatories so that we can avoid judicial intervention. Please review this letter and I'll call tomorrow to discuss these issues by telephone.

I. Defendant's General Objections to the First Set of Interrogatories are Improper and Should Be Withdrawn or Stricken.

"Federal courts have long disfavored boilerplate objections." Matthew L. Jarvey, *Note, Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913, 916 (2013) (citing *St. Paul Reinsurance Co. v. Commercial Fin. Corp*., 198 F.R.D. 508, 512 (N.D. Iowa 2000)). *See, e.g.*, *Puccio v. Sclafani*, No. 12–61840, 2013 WL 4068782, at *3 (S.D. Fla. Aug.12, 2013); *see also*, *Chavez v. Merchtil Commercebank, N.A.*, No. 10–23244–CIV, 2011 WL 1135005, at *1 (S.D. Fla. Mar. 28, 2011) (overruling general objections because plaintiff's general objections failed to satisfy "the requirements of specificity required by Local Rule 26.1(g)(3)(A*)"); Underwriters v. Federal Express Corp*., 1988 WL 56747 at *1 (S.D. N.Y. 1988) (explaining that general objections "have been universally held to be impermissible"). Further, "boilerplate, shotgun-style objections are not consistent with the Federal Rules of Civil Procedures' goal of securing 'the just, speedy, and inexpensive determination of every action.'" *Covington v. Sailormen Inc*., 274 F.R.D. 692, 693 (N.D. Fla. 2011). Accordingly, courts have admonished parties for such practices and stated, "such objections will not be tolerated . . . and may result in severe economic and other sanctions." *Id*.; *see also Malautea v. Suzuki Motor Co., Ltd*., 987 F.2d 1536, 1547 (11th Cir.1993) (affirming the sanction of default judgment for repeated refusal of defendants to properly respond to discovery).

Defendant Lindner precedes his responses to the Plaintiffs' Interrogatories with a list of eight general objections. All of these general objections are qualified in that they are raised "to the extent that" Plaintiffs'interrogatories might run afoul of them. Further, Defendant purports to

incorporate each of the general objections into all of his responses to Plaintiffs' Interrogatories and states that his "failure to restate or repeat all or part of these General Objections is not a waiver or relinquishment of any General Objection." (Lindner's Response, "General Objections," ¶¶ 1-12).

Defendant's "General Objections" are improper, meaningless, and should be withdrawn. Notably, in overruling similar general objections, the Southern District of Florida has stated:

> The Court finds these General Objections worthless for anything beyond delay of discovery. [The responding parties] might just as well have said they object upon every possible ground which the law may provide, so long as it may conceivably apply to [a discovery request]. These ostensible objections say nothing of consequence. They do not constitute objections. [The responding parties] have made no meaningful effort to show the application of any such theoretical objection to any [discovery request]. They have simply stated them as hypothetical or contingent possibilities. Neither the court nor anyone else could reasonably determine beyond speculation what objection, ifany, [the responding parties] intend to assert against any specific [discovery request]. They hedge each objection with noncommittal language "to the extent" it may apply. This says nothing more than [the responding parties] possibly may or may not want to object to [a discovery request] on any one or more of twelve different, broadly stated grounds.

Thermoset Corp. v. Bldg. Materials Corp. of Am., No. 14-60268-CIV, 2014 WL 6473232, at *2 (S.D. Fla. Nov. 18, 2014) (citing *Cotracom Commodity Trading Co. v. Seaboard Corp*., No. CIV. A 97–2391, 1998 WL 231135, at *1 (D. Kan. May 6, 1998)). The foregoing statements are equally applicable here as Defendant Lindner has made no effort whatsoever to show the application of its general objections to any specific interrogatory and hedged each objection with noncommittal language "to the extent" it may apply. Further, the inclusion of general objections such as those that Defendant has asserted relieves Defendant of being accountable to their responses and maintains uncertainty as to whether Defendant has fully responded to the Plaintiffs' Interrogatories.

II. Defendant's Objections to Definitions and Objections to Instructions Should be Withdrawn or Stricken.

In addition to the improper General Objections, Defendant Lindner states several objections to the definitions of terms as included in Plaintiffs' First Set of Interrogatories and to the instructions provided therein. First, he objects to the definition of "Chiquita" "to the extent it improperly lumps Mr. Lindner with Chiquita Brands International, Inc. by including current and former directors, members, employees, shareholders, officers, agents (whether as employees, independent contractors, or otherwise), officials, representatives, associates, and all persons and entities acting or purporting to act on its behalf." (Lindner's Response, p. 4). Plaintiffs' Interrogatories define the term "Chiquita" as follows:

> "Chiquita" means Defendant Chiquita Brands International, Inc. and its agents whether as employees, independent contractors, or otherwise), employees, representatives, current and former subsidiaries, affiliates, parents, predecessors,

> successors, divisions, departments, operating units, partners, managers, directors, members, representatives, contractors, subcontractors, principals, shareholders, officers, officials, associates, consultants, brokers, attorneys, advisors, accountants, and all persons and entities acting or purporting to act on its behalf. This shall specifically include the Special Litigation Committee as well as Banadex.

(Plaintiffs' First Set of Interrogatories, p. 1-2, "Definitions", ¶ 2). There is nothing improper about this definition, and Lindner has not explained or demonstrated any impropriety. The definition does not improperly "lump" Linder with Chiquita Brands, International. He served as a director, a senior executive vice president, president and Chief Operating Officer of Chiquita and Plaintiffs' Interrogatories appropriately seek information from him that was within his knowledge in those capacities.

Next, Defendant Lindner objects to the definition of the term "document" to the extent it "purports to include materials that are greater in scope than, or inconsistent with, the term 'Documents or electronically stored information' in Federal Rule 34(a)(1)(A)," and to the extent it "enlarges, expands, or alters in any way the plain meaning and scope of any specific Interrogatory where such enlargement, expansion, or alteration renders the Interrogatory vague, ambiguous, overbroad, unduly burdensome, harassing, or incomprehensible," or "seeks information that is not relevant to the claim or defense of any party or information that is not within Mr. Lindner's possession, custody or control." (Lindner's Response, p. 4-5). This objection is improper and nonsensical. Plaintiffs' definition of the term "document" specifically references Federal Rule 34 and states that it is intended to follow that rule. Defendant has not explained how Plaintiffs' definition has or could have any of the effects contended in the objection, and thus, it should be withdrawn.

Lindner also objects to the definition of the term "identify" to the extent that it "purports to impose obligations upon Mr. Lindner greater than those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law, rules, or statutes. Plaintiffs' Interrogatories state that: "Identify" means: a) with respect to a person, to list the person's full name, title, employer, address and telephone number; b) with respect to a document, to provide the document's title and a description of where the document may be found, identify its author and recipient, and specify the date of the document and (if previously produced) the bates-number range." Again, Defendant does not explain how this definition imposes any obligation upon him that is greater than the rules or applicable case law and statutes. Accordingly, it should be withdrawn.

Lindner further objects to the definition of the term "Individual Defendant" to the extent it "improperly lumps Mr. Lindner with Charles Keiser, William Tsacalis, Cyrus, Freidhiem, Roderick M. Hills, Robert Olson, Robert Kistinger, Fernando Aguirre, Steven Warshaw, and John Ordman." (Lindner's Response, p. 5). Plaintiffs' definition of "Individual Defendant" simply states the names of the individual persons who are defendants in this matter, as opposed to the corporate defendants. Mr. Lindner is one such person. There is nothing improper about the definition. The objection should be withdrawn.

Lindner objects to the definitions of the terms "Special Litigation Committee," "SLC Report," "Convivir," and "Individual Defendant" because those terms are not used in the

interrogatories. (Lindner's Response, p. 4-5). Defendant points to no authority that supports such an objection. It is meaningless and serves no purpose. Accordingly, it should be withdrawn.

Finally, Lindner objects to Plaintiffs' Instructions in the interrogatories "to the extent they purport to impose obligations upon Mr. Linder greater than those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law." Again, because Lindner fails to explain how Plaintiffs' instructions have any such effect, this objection is meaningless and should be withdrawn.

III. Defendant's Formulaic Objections Followed by an Answer are Improper

"The Parties shall not recite a formulaic objection followed by an answer to the request." *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc*., No. 08-21085-CIV, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008); *C.T. v. Liberal Sch. Dist*., Nos. 06-2093-JWL, 06-2360-JWL, 06-2359-JWL, 2008 WL 394217, at *5 (D. Kan. Feb. 11, 2008) (describing conditional boilerplate as "neither an objection, nor an adequate identification of the responsive documents."); *Meese v. Eaton Mfg. Co*., 35 F.R.D. 162, 166 (N.D. Ohio 1964) ("Whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands.") "Objecting but answering subject to the objection is not one of the allowed choices under the Federal Rules" of Civil Procedure. *Chemoil Corp. v. MSA V*, 2013 WL 944949, at *2 (M.D. Fla. 2013); *Chambers v. Sygma Network, Inc*., 2013 WL 1775046 at *3 (M.D. Fla. 2013) (holding that answers "subject to" and "without waiving" objections are improper andejected by the District Courts); see also *Mann v. Island Resorts Dev., Inc*., No. 3:08CV297/RS/EMT, 2009 WL 6409113, at *3 (N.D. Fla. Feb. 27, 2009) (holding that "[t]his court cannot logically conclude that the objection survives the answer.").

Here, in response to Plaintiffs' Interrogatory Nos. 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 18, Defendant Lindner asserts various objections and then purports to answer, "subject to and without waiving" such objections. As cited above, the district courts have recognized that such objections cannot stand and should be withdrawn as the objection cannot logically survive the answer. *See Mann v. Island Resorts Dev., Inc*., No. 3:08CV297/RS/EMT, 2009 WL 6409113, at *3 (N.D. Fla. Feb. 27, 2009). Therefore, Defendant Lindner's objections to Interrogatory Nos. 1, 2, 4, 5, 8, 9, 10,11,12, 13, 14, 15, 16, and 18 should be withdrawn.

VI. Defendant's Objections Should Be Withdrawn and He Should Provide Responses or Better Responses to All of Plaintiffs' Interrogatories.

As established above, Defendant Lindner's objections to Interrogatories No. 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 18, are waived because they cannot logically survive the answers to them. In addition, all of Linder's objections to Plaintiffs' Interrogatories are meritless and should be denied,[1] and he should answer or better answer each one.

[1]Defendant Linder makes identical boilerplate and generalized objections to multiple interrogatories, and Plaintiffs' respectfully request that all such objections be withdrawn. First, he objects to Interrogatory Nos. 1, 2, 3, 8, and 18 "to the extent [they] seek disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity protection provided by law." Lindner

Interrogatory No. 1

Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with a description of that information—that you may use to support your claims or defenses, unless the use would be solely for impeachment.

RESPONSE: Mr. Lindner objects that this Interrogatory is facially overly broad and unduly burdensome as a matter of law because it improperly purports to impose upon Mr. Lindner an obligation to marshal all evidence of particular facts well in advance of trial. Mr. Lindner objects that this Interrogatory purports to impose upon him obligations far beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law. Mr. Lindner also objects to this Interrogatory to the extent it seeks disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity or protection provided by law.

Subject to and without waiving the foregoing objections, Mr. Lindner states that, apart from any relevant and applicable business records of Chiquita and any individuals able to testify regarding those records, he is not currently aware of any individuals likely to have discoverable information that he may use to support his claims and defenses.

Lindner's objections lack the required specificity and explanation, and on that basis should be withdrawn. He fails to explain how Interrogatory No. 1 is overbroad and unduly burdensome "as a matter of law" and cites no support for such objection. His contention that it improperly requires him to "marshal all evidence of particular facts well in advance of trial" is nonsensical. *See B-H Transp. Co. v. Great Atlantic & Pacific Tea Co.*, 44 F.RD. 436 (N.D. N.Y. 1968)

---

fails to explain how the information requested in these interrogatories is privileged and has failed to provide a privilege log, which is required. *See* Fed. R. Civ. P. 26(b)(5)(A); *In re Santa Fe Int'l Corp*., 272 F.3d 705, 710 (5th Cir. 2001) (citing rule). Accordingly, all such objections should be withdrawn. Next he objects to Interrogatory Nos. 1, 2, 4, and 5 "to the extent" they "impose upon him obligations beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law." Linder fails to explain how these interrogatories have or could have such an effect. Accordingly, all such objections should be withdrawn. Finally, he objects to Interrogatory Nos. 8, 9, 10, 11, 12, 13, 15, 16 on the grounds that they "assume" he has knowledge of various facts. These interrogatories do not improperly assume Defendant has knowledge pertaining to the matters addressed therein. In answering interrogatories, a party must give not only information within his personal knowledge, but also information that is available to him, including information known through his attorney, investigators, or other agents or representatives. *See Aiges v. Ironshore Speciality Ins. Co.,* 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015); *Lincoln Rock, LLC v. City of Tampa,* 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016). Thus, it is irrelevant whether he has knowledge, if such knowledge is available to him, and all such objections should be withdrawn.

(rejecting similar objections in light of requirements of Rule 26). In fact, Federal Rules of Civil Procedure 26(a)(1)(A)(i) requires disclosure of exactly the information requested in Interrogatory No. 1, and requires such disclosure to be made "without awaiting a discovery request." Mr. Lindner has failed to make the required disclosures under Rule 26, and Plaintiffs' are entitled to this information.

Mr. Lindner should provide a better response to Interrogatory No. 1. Lindner's response is that "apart from any relevant and applicable business records of Chiquita and any individuals able to testify regarding those records, *he is not currently aware of any individuals likely to have discoverable information that he may use to support his claims and defenses*." (Emphasis added). This answer is quite obviously disingenuous, at best, and is improperly limited to his personal knowledge. *See Aiges v. Ironshore Speciality Ins. Co.*, 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same). Further, he should be required to specifically identify the "relevant and applicable business records of Chiquita and any individuals able to testify regarding those records," to which he refers. *See Mann v. Island Resorts Dev., Inc*., No. 3:08CV297/RS/EMT, 2009 WL 6409113, at *1 (N.D. Fla. Feb. 27, 2009) (stating that interrogatory answers must be complete in and of themselves and incorporating materials by reference is not a responsive answer); *see also, Dipietro v. Jefferson Bank,* 144 F.R.D. 279, 282 (E.D. Pa. 1992) (noting general rule that answers to interrogatories should be complete in and of themselves, and should not refer to pleadings, depositions, or other documents) (citing 4 James Wm. Moore et al., Moore's Federal Practice (2d ed.1989)).

Interrogatory No. 2

Provide a description, by category and location, of all documents, electronically stored information, and tangible things that you have in your possession, custody, or control and may use to support your defenses, unless the use would be solely for impeachment.

RESPONSE: Mr. Lindner objects that this Interrogatory is facially overly broad and unduly burdensome as a matter of law because it improperly purports to impose upon Mr. Lindner an obligation to marshal all evidence of particular facts well in advance of trial. Mr. Lindner objects to the extent this Interrogatory purports to impose upon him obligations beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law. Mr. Lindner also objects to this Interrogatory to the extent it seeks disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity or protection provided by law.

Subject to and without waiving the foregoing objections, Mr. Lindner states that he does not have any documents, electronically stored information, or tangible things in his possession, custody, or control that he may use to support his defenses.

Lindner's objections lack the required specificity and explanation and should be withdrawn on the same grounds as his objections to Interrogatory No. 1. The Court should also require Mr. Lindner to provide a better response to Interrogatory No. 2. Like his response to Interrogatory. No. 1, his response is quite obviously disingenuous, at best, and is improperly limited to his personal knowledge. *See Aiges v. Ironshore Speciality Ins. Co.*, 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same).

Interrogatory No. 3

Set forth all facts and legal justification supporting each and every affirmative defense in your answer, and identify each individual and document supporting that defense.

RESPONSE: Mr. Lindner objects that this Interrogatory is facially overly broad and unduly burdensome as a matter of law because it improperly purports to impose upon Mr. Lindner an obligation to marshal all facts and legal justifications supporting Mr. Lindner's affirmative defenses well in advance of trial. Mr. Lindner objects that these Interrogatories are an abuse of the discovery process in that they improperly seek to require Mr. Lindner to set forth the entire basis of his affirmative defenses to Plaintiffs' claims in what Plaintiffs purport is a single Interrogatory. Mr. Lindner also objects that this Interrogatory would impose an undue burden or expense upon Mr. Lindner. Mr. Lindner further objects to this Interrogatory to the extent it seeks disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity or protection provided by law, by seeking the opinions and/or mental impressions of counsel for Mr. Lindner concerning the effects of certain pieces of evidence.

Mr. Lindner also objects that this purported single Interrogatory is, in reality, 43 discrete, distinct, independent, and individual Interrogatories seeking information related to 43 distinct and individualized affirmative defenses. Thus, Plaintiff has exceeded the maximum number of allowable interrogatories, pursuant to Rule 33 ofthe Federal Rules of Civil Procedure. Mr. Lindner is not obligated to respond to any Interrogatories propounded beyond the maximum number allowed under Rule 33 of the Federal Rules of Civil Procedure. Accordingly, until Plaintiffs clarify which of these Interrogatories Mr. Lindner should answer in accordance with applicable rules, Mr. Lindner is not in a position to provide a response to each of the separate, discrete, and individual Interrogatories contemplated by this purported single Interrogatory.

As to Interrogatory No. 3, Lindner raises the same nonsensical, unsupported, and unexplained objection that it is somehow overbroad and unduly burdensome because it "improperly" obligates him to marshal all facts and legal justifications well in advance of trial, an

improper objection based on privilege without filing a privilege log, and an insufficient objection stating merely that it "would impose an undue burden or expense upon" him. As demonstrated by the authorities cited above, these objections should be withdrawn.

Lindner also objects to Interrogatory No. 3 on the basis that because he has asserted 43 affirmative defenses, this one interrogatory is really 43 separate interrogatories, thus exceeding the allowed number of interrogatories under Federal Rule of Civil Procedure 33(a)(1). However, he has cited no authority for such objection, and Interrogatory No. 3 is almost identical to one approved by the court in *Belfleur v. Salman Maint. Serv.*, 2007 U.S. Dist. LEXIS 65403, *9-11 (S.D. Fla., Sept. 5, 2007) (stating that defendant "must list each affirmative defense, and state what documents and what facts support each affirmative defense"). Accordingly, this objection should be rejected and Lindner should provide a response.

Interrogatory No. 4

Describe your history of employment or other affiliation with Chiquita, including dates of positions held, duties, salaries, and total annual value of all compensation derived from your employment or other affiliation with Chiquita.

RESPONSE: Mr. Lindner objects to this Interrogatory as vague and ambiguous as to a time period and as to "affiliation." Mr. Lindner also objects to the request for "salaries and total annual value of all compensation" as irrelevant to Plaintiffs' claims. Mr. Lindner objects to the extent this Interrogatory purports to impose upon him obligations beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law. Mr. Lindner objects that this Interrogatory seeks information that is obtainable from another source that is more convenient, less burdensome, or expensive. Mr. Lindner further objects to this Interrogatory to the extent that it calls for, purport to calls for, or otherwise seeks information that is not in Mr. Lindner's knowledge, possession, custody, or control.

Subject to and without waiving the foregoing objections, Mr. Lindner states that he recalls the following history of employment or other affiliation with Chiquita:

Date	Position	Duties
1984 — March 2002	Director, Chiquita	As a Director of Chiquita, Mr. Lindner had general duties and responsibilities of a corporate Board member. In March 1997, Mr. Lindner was named Vice Chairman. This ceremonial label did not add any additional duties, power or authority as compared to that of any other Board member.

March 1986 — June 1989	Senior Executive Vice President, Chiquita	As Senior Executive Vice President of Chiquita, Mr. Lindner focused his efforts on strategic direction, capital markets and other market-related efforts, including raising funds for capital investments worldwide.
July 1989 — March **1997**	President and Chief Operating Officer, Chiquita	As President and Chief Operating Officer of Chiquita, Mr. Lindner focused his efforts on strategic direction, capital markets and other market-related efforts, including raising funds for capital investments worldwide.
December 1986 — at least March 1996	President and Chief Executive Officer, Chiquita Brands, Inc.'	No additional duties other than those listed above.

Although there is no specific time period set forth, this interrogatory clearly seeks information as to all of Lindner's employment history with Chiquita and all of his duties and responsibilities in all positions that he held. Thus, they are not vague as to time. Further, the term "affiliation" as used in this context is not vague. A party responding to a discovery request should use common sense and reason to determine the meaning of the words and phrases used, and should apply ordinary meanings, where possible. *Symons Int'l Grp. V. Cont'l Cas. Co*., 2017 U.S. Dist. LEXIS 157344, *14 (S.D. Ind., Sep. 26, 2017) (overruling objection to term "affiliate" where common sense and ordinary meaning of term in context was not ambiguous or vague); *see also Consumer Fin. Prot. Bureau v. Seila Law, LLC*, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal., Aug. 25, 2017) (overruling objection and concluding that term "affiliated" was not vague given its common sense meaning, considered in the context it was used). Here, the term "affiliation" is used in conjunction with employment— "history of employment or other affiliation." Thus, in context and given its ordinary meaning, the term is not vague, and this objection should be withdrawn.

Further, Plaintiffs seriously question how information pertaining to Linder's own employment history and duties and responsibilities could possibly constitute information that is not in his knowledge, possession, custody, or control. Thus, this objection also should be withdrawn.

Lindner also objects on the basis that this interrogatory "seeks information that is obtainable from another source that is more convenient, less burdensome, or expensive." Although this ground is stated in Federal Rule of Civil Procedure 26(b)(2)(C) as one upon which discovery may be limited by the court, Defendant Lindner has failed to explain or establish any basis for the court to make such a determination. Further, because this interrogatory seeks information pertaining to Lindner's own employment history and duties and responsibilities, it seems unlikely that such information could be obtained from a more convenient, less burdensome, or expensive source.

Defendant Lindner should also provide a better and more complete response to Interrogatory No. 4. In response, Lindner provided a chart listing his various positions and the dates he held them, and a description of his "Duties" as to each position. However, these descriptions say very little about what Lindner's duties and responsibilities were as the holder of several very high-ranking corporate positions. The response is inadequate and unresponsive to Plaintiffs' request for a detailed description of his duties and responsibilities. Further, to the extent that the response is limited to what Lindner "recalls," it is improperly limited to personal knowledge. *See Aiges v. Ironshore Speciality Ins. Co.*, 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same). He must make a reasonable inquiry, and his response must be supplemented with all information that is available to him.

Lindner also fails to respond to Interrogatory No. 4's request for information pertaining to his salaries and total annual value of all compensation derived from your employment or other affiliation with Chiquita. Linder objects to this request on the basis that it is irrelevant to Plaintiffs' claims. Under the Federal Rules of Civil Procedure, a party is permitted to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Defendant Linder's present and past compensation is relevant to his bias in favor of Chiquita. Further, there is record evidence that Chiquita salaries were "grossed up" so that additional portion of salaries could be placed in slush funds to fund cash payments to the paramilitaries.

> **Interrogatory No. 5**
> Describe in detail your duties and responsibilities for Chiquita's business and operations related to Colombia when you worked for Chiquita.
>
> **RESPONSE:** Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period. Mr. Lindner objects to the extent this Interrogatory purports to impose upon him obligations beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law. Mr. Lindner further objects to this Interrogatory to the extent that it calls for, purport to calls for, or otherwise seeks information that is not in Mr. Lindner's knowledge, possession, custody, or control.
>
> Subject to and without waiving the foregoing objections, Mr. Lindner states that, for the vast majority of the time period that forms the basis of Plaintiffs' claims, Mr. Lindner's duties and responsibilities only included those general duties and responsibilities of a corporate Board member. As described in the Response to Interrogatory No. 4, Mr. Lindner was the President and COO of Chiquita for only three months within the time period that forms the basis of Plaintiffs' claims, during which he focused his efforts on strategic direction, capital markets and other market-related efforts, including raising funds for capital investments worldwide. For the rest of the time period at issue, from March 1997 until his retirement from

Chiquita in March 2002, Mr. Lindner was solely a Director. Mr. Lindner is not aware of any of these duties and responsibilities having affected Chiquita's business and operations related to Colombia during this time period.

Linder's objections to Interrogatory No. 5 are meritless and should be withdrawn. Lindner contends that this interrogatory is vague as to time period. Although there is no specific time period set forth, this interrogatory clearly seeks information as to all of Lindner's duties and responsibilities for Chiquita's business and operations related to Colombia. Thus, the applicable time period is self-limiting and not vague. Further, Plaintiffs' seriously question how information pertaining to Linder's own employment duties and responsibilities could possibly constitute information that is not in his knowledge, possession, custody, or control. Thus, these objections also should be withdrawn.

Defendant Lindner should also provide a better and more complete answer to Interrogatory No. 5. In response, Lindner merely refers to the inadequate chart provided in response to Interrogatory No. 4, and to the extent that the response is limited to what Mr. Lindner is "aware of," it is improperly limited to personal knowledge. *See Aiges v. Ironshore Speciality Ins. Co.*, 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same). He must make a reasonable inquiry and his response must be supplemented with all information that is available to him.

Interrogatory No. 6

Describe in detail any agreements between you and Chiquita relating to your relationship with Chiquita or surviving your separation from Chiquita, including severance arrangements and any ongoing indemnification or other benefits.

RESPONSE: Mr. Lindner objects to this Interrogatory, as it seeks information that is irrelevant to Plaintiffs' claims. Given the irrelevance of this Interrogatory, Mr. Lindner is not obligated by the Federal Rules of Civil Procedure, the Local Rules, and applicable case law to provide a response to this Interrogatory as propounded.

The information requested in this interrogatory is relevant to the issue of Mr. Lindner's bias in favor of Chiquita and thus, the credibility of any testimony he may provide in this matter. Thus, the objection to these interrogatories should be withdrawn, and Lindner should provide an answer.

Interrogatory No. 7

Identify who is paying your legal fees in relation to the Chiquita **MDL.**

RESPONSE: Mr. Lindner objects to this Interrogatory, as it seeks information that is irrelevant to Plaintiffs' claims. Given the irrelevance of this Interrogatory, Mr. Lindner is not obligated by the Federal Rules of Civil Procedure, the Local

Rules, and applicable case law to provide a response to this Interrogatory as propounded.

The information requested in this interrogatory is relevant to the issue of Mr. Lindner's bias in favor of Chiquita and thus, the credibility of any testimony he may provide in this matter. Thus, the objection to these interrogatories should be withdrawn, and Lindner should provide an answer.

Interrogatory No. 8

Describe in detail your knowledge of the transfer of money or anything else of value including any goods or services between Chiquita and the AUC, including when you first learned of each such transfer, the source of your knowledge, and the evolution of your knowledge over time, if any.

RESPONSE: Mr. Lindner objects to this Interrogatory because it assumes Mr. Lindner has knowledge of any such transfers between Chiquita and the AUC. Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period or specific transfers between Chiquita and the AUC. Mr. Lindner also objects to this Interrogatory to the extent it seeks disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity or protection provided by law.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such alleged transfer of money or anything else of value including any goods or services between Chiquita and the AUC, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report.

This interrogatory is not vague. The time period during which Plaintiffs' allege that such transfers took place is clearly delineated in the Amended Complaint, and it is unnecessary for Plaintiffs' to identify specific transfers, as they clearly seek the requested information as to <u>all</u> such transfers. These objections should be withdrawn and Lindner should provide a better, more complete answer.

Linder's response to this interrogatory essentially states that *if* he had any knowledge, he *"would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should determine whether or not information responsive to this interrogatory is available to him, even if it is outside his personal knowledge, and provide a definitive answer. He also should provide definite answers about his own personal knowledge.[2]

[2] In 2003, Chiquita consulted with attorneys from the District of Columbia office of a national law firm ("outside counsel") about Chiquita's ongoing payments to the AUC. Outside counsel advised Chiquita that the payments were illegal under United States law and that Chiquita should immediately stop paying the AUC directly or indirectly. Among other things, outside counsel advised Chiquita:

"Must stop payments."

Interrogatory No. 9

Describe in detail your role in approving or directing the transfer of money or anything else of value between Chiquita and the AUC, including any changes to that role over time.

RESPONSE: Mr. Lindner objects to this Interrogatory because it assumes Mr. Lindner had knowledge of and a role in any such transfers between Chiquita and the AUC. Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period or specific transfers between Chiquita and the AUC.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such alleged transfer of money or anything else of value between Chiquita and the AUC, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report. Given Mr. Lindner's lack of such knowledge, Mr. Lindner could not have had and did not have any role in approving or directing any such alleged transfer of money or anything else of value between Chiquita and the AUC.

This interrogatory is not vague. The time period during which Plaintiffs' allege that such transfers took place is clearly delineated in the Amended Complaint, and it is unnecessary for Plaintiffs' to identify specific transfers, as they clearly seek the requested information as to all such transfers. These objections should be withdrawn and Lindner should provide better, more complete answers.

Linder's response to this interrogatory essentially states that *if* he had any knowledge, he *"would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should determine whether or not information responsive to this interrogatory is available to him, even if

---

(notes, dated February 21, 2003)
"Bottom Line: CANNOT MAKE THE PAYMENT"
"Advised NOT TO MAKE ALTERNATIVE PAYMENT through CONVIVIR"
"General Rule: Cannot do indirectly what you cannot do directly"
"Concluded with: CANNOT MAKE THE PAYMENT"
(memo, dated February 26, 2003)
"You voluntarily put yourself in this position. Duress defense can wear out through repetition. Buz [business] decision to stay in harm's way. CHIQUITA should leave Colombia."
(notes, dated March 10, 2003)
"[T]he company should not continue to make the Santa Marta payments, given the AUC's designation as a foreign terrorist organization[.]"
(memo, dated March 11, 2003)
[T]he company should not make the payment."
(memo, dated March 27, 2003)

it is outside his personal knowledge, and provide a definitive answer. He also should provide definite answers about his own personal knowledge.

Interrogatory No. 10

If you contend that you attempted to stop any transfers of money, goods, or services between Chiquita and the AUC, describe in detail all efforts that you took to do so, when each effort occurred, and the identity of each person with knowledge of the effort.

RESPONSE: Mr. Lindner objects to this Interrogatory because it assumes Mr. Lindner had knowledge of any such transfers between Chiquita and the AUC. Mr. Lindner also objects to this Interrogatory as vague and ambiguous because it fails to identify a time period or specific transfers between Chiquita and the AUC.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such alleged transfers of money, goods, or services between Chiquita and the AUC, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report. Given Mr. Lindner's lack of such knowledge, he could not have taken any steps to attempt to stop any such alleged transfers of money, goods, or services between Chiquita and the AUC.

This interrogatory is not vague. The time period during which Plaintiffs' allege that such transfers took place is clearly delineated in the Amended Complaint, and it is unnecessary for Plaintiffs' to identify specific transfers, as they clearly seek the requested information as to all such transfers. These objections should be withdrawn and Lindner should provide better, more complete answers.

Linder's response to this interrogatory essentially states that *if* he had any knowledge, he *"would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should determine whether or not information responsive to this interrogatory is available to him, even if it is outside his personal knowledge, and provide a definitive answer. He also should provide definite answers about his own personal knowledge and actions, if any.

Interrogatory No. 11

Describe in detail your knowledge of the AUC smuggling weapons into Colombia, including when you first learned of such smuggling, the extent of your knowledge (including whether you learned of allegations that any of Chiquita's facilities were involved in the smuggling), and the evolution of your knowledge over time, if any.

RESPONSE: Mr. Lindner objects to this Interrogatory because it assumes Mr. Lindner has such knowledge of the AUC's actions. Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period or specific instances of smuggling by the AUC.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such alleged smuggling of weapons

by the AUC into Colombia, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report.

The objections to Interrogatory no. 11 should be withdrawn. The applicable time period is clearly set out in the Amended Complaint and there is no need for Plaintiffs to identify specific instances of smuggling—the interrogatories clearly seek the requested information pertaining to any and all such instances.

Linder's response to this interrogatory essentially states that *if* he had any knowledge of the smuggling, he "*would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should determine whether or not information responsive to this interrogatory is available to him, even if it is outside his personal knowledge, and provide a definitive answer. He also should provide definite answers about his own personal knowledge.

Interrogatory No. 12

If you contend that you attempted to stop the smuggling of weapons by the AUC into Colombia through Chiquita's facilities, describe in detail all efforts that you took to do so, and identify each person with knowledge of your efforts.

RESPONSE: Mr. Lindner objects to this Interrogatory because it assumes Mr. Lindner had knowledge of any such alleged smuggling of weapons by the AUC through Chiquita's facilities. Mr. Lindner also objects to this Interrogatory as vague and ambiguous because it fails to identify a time period or specific instances of smuggling by the AUC.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such alleged smuggling of weapons by the AUC into Colombia through Chiquita's facilities, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report. Given Mr. Lindner's lack of such knowledge, he could not have taken any steps to attempt to stop any such alleged smuggling of weapons by the AUC into Colombia through Chiquita's facilities.

The objections to Interrogatory No. 12 should be withdrawn. The applicable time period is clearly set out in the Amended Complaint and there is no need for Plaintiffs to identify specific instances of smuggling—the interrogatories clearly seek the requested information pertaining to any and all such instances.

Linder's response to this interrogatory essentially states that *if* he had any knowledge of the smuggling, he "*would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should determine whether or not information responsive to this interrogatory is available to him, even if it is outside his personal knowledge, and provide a definitive answer. He also should provide definite answers about his own personal knowledge.

Interrogatory No. 13

Identify all persons named in the SLC Report (including those named by pseudonym) who reported to you.

RESPONSE: Mr. Lindner objects to this Request because it assumes Mr. Lindner has knowledge of which individuals the pseudonyms in the SLC Report represent. Mr. Lindner also objects to this Interrogatory as vague and ambiguous because it fails to identify a time period. Mr. Lindner objects that this Interrogatory seeks information that is obtainable from another source that is more convenient, less burdensome, or expensive. Mr. Lindner further objects to this Interrogatory to the extent that it calls for, purport to calls for, or otherwise seeks information that is not in Mr. Lindner's knowledge, possession, custody, or control.

Subject to and without waiving the foregoing objections, Mr. Lindner states that, of the persons named in the SLC Report, the only individuals who reported to him, while he was an officer of Chiquita, were Steven Warshaw, Dennis Doyle, and Robert Kistinger.

Linder provides no explanation as to why Plaintiff must identify a time period with regard to these requests—they are simply requests for information pertaining to Chiquita employees who are either named in the SLC report and who reported to him. He also provides no explanation and nothing to establish his contention that this information is somehow obtainable from another source that is more convenient, less burdensome or expensive. The contention that the information sought—information about Chiquita employees who reported to him—is somehow not within his knowledge, possession, custody or control is also completely unsupported.

Defendant Lindner should provide better, more complete answers. In response to the request that he identify all persons named in the SLC report who reported to him, Lindner identified Steven Warshaw, Dennis Doyle, and Robert Kistinger. As to individuals named by pseudonym in the SLC Report, Lindner appears to assert that he does not have knowledge of their identities. However, given Lindner's position within Chiquita and the nature of the request—i.e., information pertaining to employees who reported *to him*—he should be able to and should be required to identify such individuals.

Interrogatory No. 14

Except as already identified in response to the previous interrogatory, identify all Chiquita employees who worked on matters related to Colombia who reported to you, and describe the responsibilities of each including the dates when those responsibilities were held.

RESPONSE: Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period. Mr. Lindner also objects that this Interrogatory seeks information that is obtainable from another source that is more convenient, less burdensome, or expensive. Mr. Lindner further objects to this Interrogatory to the extent that it calls for, purport to calls for, or otherwise seeks information that is not in Mr. Lindner's knowledge, possession, custody, or control.

Subject to and without waiving the foregoing objections, Mr. Lindner has no knowledge of any individuals who reported to him, other than those listed in the answer to Interrogatory No. 14, who worked on matters related to Colombia.

These objections should be withdrawn for the same reasons raised as to Interrogatory No. 13 and Defendant Lindner should provide a better, more complete answer. The response that "Mr. Lindner has no knowledge of any individuals who reported to him, other than those listed in the answer to Interrogatory No. 14, who worked on matters related to Columbia, is improperly limited to personal knowledge. *See Aiges v. Ironshore Speciality Ins. Co.,* 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same). Given Lindner's position within Chiquita and the nature of the request—i.e., information pertaining to employees who reported *to him*—he should be able to and should be required to identify such individuals. Moreover, he must determine whether information responsive to this interrogatory is available to him even if it is outside his personal knowledge. There is no indication that he has done this. Accordingly, his answer is insufficient and he should provide a better one.

Interrogatory No. 15

Describe in detail every act and threat of physical violence by the AUC against Chiquita or Chiquita employees, when it occurred, when and how you learned of it, and all action taken by you in response.

Response: Mr. Lindner objects to this Request because it assumes Mr. Lindner had (and currently has) knowledge of any such acts and threats of violence by the AUC against Chiquita. Mr. Lindner also objects to this Interrogatory as vague and ambiguous because it fails to identify a time period.

Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge of any such acts and threats of physical violence by the AUC against Chiquita or Chiquita employees, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report.

This interrogatory is not vague and ambiguous because it fails to identify a time period. The time periods involved are set forth in the Amended Complaint and are well known to Defendant Lindner. Linder's response to this interrogatory essentially states that *if* he had any knowledge, he *"would not have had" it* prior to the SLC investigation. This is evasive and incomplete. He should provide information available to him. He also should provide definite answers about his own personal knowledge and actions, if any.

Interrogatory No. 16

Describe in detail when and how you learned that the AUC had been designated a Foreign Terrorist Organization (FTO), and all action, if any, taken by you in response.

RESPONSE: Mr. Lindner objects to this Request because it assumes Mr. Lindner has knowledge of the AUC's FTO designation. Subject to and without waiving the foregoing objections, Mr. Lindner states that to the extent he had any knowledge that the AUC had been designated a FTO, he would not have had any such knowledge prior to the SLC-related efforts dealing with Mr. Lindner that resulted in the SLC Report.

This interrogatory does not improperly assume Mr. Lindner has knowledge of the AUC's FTO designation. Given his position within Chiquita, it would be unreasonable to assume otherwise, as other evidence in this matter clearly indicates that Chiquita was made aware of the FTO designation. Further, Lindner's answer to this interrogatory is evasive and unresponsive, essentially stating that *if* he knew that the AUC had been designated as an FTO, he *would not have known* it prior to the SLC investigation. This is evasive and unresponsive. The interrogatory seeks information about Linder's own knowledge and actions, and he should be required to give a definitive answer.

Interrogatory No. 17

With respect to any Potential Witness, state whether you and/or anyone acting on your behalf; have offered or made any payments to or offered or provided any other benefit or inducements to that individual (including without limitation agreements to defend or indemnify), and if so, describe with specificity the amount and substance of any such offer, payments, benefits, or inducements, and identify all documents concerning such offer, payments, benefits or inducements.

RESPONSE: Mr. Lindner states that neither he nor, to the best of his knowledge, anyone acting on his behalf have offered or made any payments to or offered or provided any other benefit or inducements to any Potential Witness.

This qualified answer—"to the best of his knowledge"—is insufficient. *See Aiges v. Ironshore Speciality Ins. Co.,* 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same).

Interrogatory No. 18

With respect to any Potential Witness, state whether you and/or your counsel have had any communications with that individual or any agent or associate of that individual, excluding attorney-client privileged communications, state the date of each communication, describe the substance of those communications, and identify all documents concerning such communications.

> **RESPONSE**: Mr. Lindner objects to this Interrogatory as vague and ambiguous because it fails to identify a time period and subject matter. Mr. Lindner also objects to this Interrogatory to the extent it seeks disclosure of information that is protected by attorney-client privilege, work product immunity, joint defense privilege, or any other applicable privilege, confidentiality, immunity or protection provided by law.
>
> Subject to and without waiving the foregoing objections, Mr. Lindner states that neither he nor, to the best of his knowledge, his counsel have had any communications relevant to the Plaintiffs' claims not protected by the joint defense privilege or any other applicable privilege or immunity with any Potential Witness.

Given the very specific definition of "Potential witness" provided in the Definitions portion of the Interrogatories, this interrogatory is not vague because it does not specify a time period and subject matter. "Potential witness" is defined as 1) any Individual Defendant; 2) any individual likely to have discoverable information that you may use to support your defenses, unless the use would be solely for impeachment; 3) all individuals mentioned, by name or pseudonym, in the SLC report or the Factual Proffer; 4) any "Witness" as that term is defined in Chiquita's Special Interrogatories to ATS Plaintiffs. Given the specific scope of these individuals, it is unnecessary to identify a time period or subject matter. Plaintiffs seek information pertaining to all such non-privileged communications and are entitled to such information because it is relevant to the issues presented—namely, any potential bias of such witnesses. Further, Defendant Linder's qualified answer—"to the best of his knowledge"—is insufficient. *See Aiges v. Ironshore Speciality Ins. Co.*, 2015 U.S. Dist. LEXIS 181723, *2 (S.D. Fla. Dec. 9, 2015) (answers to interrogatories may not be limited to matters within personal knowledge; party answering must give information personally known, or available to him, including information known through his attorney, investigators, or other agents or representatives; *see also Lincoln Rock, LLC v. City of Tampa*, 2016 U.S. Dist. LEXIS 146091, *45-46 (M.D. Fla. Oct. 21, 2016) (same). He is obligated to inquire of his counsel as to the information sought and provide any information obtained.

I hope we can resolve these disputes amicably.

Sincerely,

/s/ James K. Green

cc. Jack Scarola, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Western Division

Case No. 16-cv-00466-WHR

DAYTON VETERANS RESIDENCES LIMITED PARTNERSHIP, d/b/a FREEDOM'S PATH AT DAYTON, a Florida limited partnership authorized to do business in the State of Ohio,

Plaintiff,

v.

DAYTON METROPOLITAN HOUSING AUTHORITY, an Ohio public housing authority d/b/a GREATER DAYTON PREMIER MANAGEMENT,

Defendant.
_____/

PLAINTIFF'S PRELIMINARY REPLY TO DAYTON METROPOLITAN HOUSING AUTHORITY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE RESPONSE TO DMHA'S SUR-RESPONSE TO PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Enough is enough. *See* Docs. 55, 57, 58. Plaintiff will file a full reply if requested by the Court.

Respectfully submitted,

s/Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 235-6956 (facsimile)
Ohio Bar No.: 81941
mbrown@law.capital.edu

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Esperantè

222 Lakeview Ave.
West Palm Beach, FL 33401
(561) 659-2029
(561) 655-1357 (facsimile)
Florida Bar No: 229466
jkg@jameskgreenlaw.com
(admitted *pro hac vice*)

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served by CM/ECF [electronic mail] to Christopher C. Green, Attorney for Defendant, cgreen@dmha.org; Ray C. Freudiger, Co-Counsel for Defendant, rcfreudiger@mdwcg.com; and David J. Oberly, Co-Counsel for Defendant, djoberly@mdwcg.com, this 28th day of July, 2018.

s/James K. Green

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01916-MD-MARRA/JOHNSON

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC. ALIEN TORT STATUTE AND SHAREHOLDER DERIVATIVE LITIGATION

This Document Relates To:

ATA ACTIONS
_____/

Case No. 08-20641-CIV-KAM

TANIA JULIN, et al.,

Plaintiffs,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.

Defendant.
_____/

Case No. 09-80683-CIV-KAM

OLIVIA PESCATORE, et. al.

Plaintiffs,

vs.

CHIQUITA BRANDS INTERNATIONAL, INC., et al.,

Defendants.
_____/

Case No. 11-80402-CIV-KAM

GREGORY SPARROW, ON BEHALF OF THE ESTATE OF JANE PESCATORE SPARROW

Plaintiff,

vs.

CHIQUITA BRANDS INTERNATIONAL, INC., et al.,

Defendants.
_____/

PROTECTIVE ORDER

This cause is before the Court on the parties' Joint Motion for Entry of Protective Order. (DE 710). It is **ORDERED AND ADJUDGED** that the motion (DE 710) is **GRANTED**. Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the Court enters the following Protective Order ("Order") limiting the disclosure and use of certain discovered information as hereinafter provided.

IT IS HEREBY ORDERED THAT:

1. Designation of Confidentiality:

(a) All documents and information produced in this litigation either prior to or after the entry of this Order that:

i. contain, reveal, or are derived from trade secrets, proprietary information, or confidential commercial or financial information;

ii. contain, reveal, or are derived from private facts of a personal or family nature, including, but not limited to, financial, medical, psychological, interpersonal relationships, employment or educational

information, current and past home or business addresses, telephone numbers, and email addresses; or

iii. contain, reveal, or are derived from domestic or foreign government sources that are not in the public domain nor publicly accessible, including, but not limited to, documents and information produced by the Department of Justice, Federal Bureau of Investigation, Securities and Exchange Commission, and United States Department of State, and their foreign equivalents or counterparts.

may be designated "CONFIDENTIAL" by the person producing documents or information in this litigation or a party to this litigation (the "Producing Party"). Information described in sub-paragraphs i-iii above shall be referred to herein as "Confidential Information."

(b) All Confidential Information that a Producing Party believes to be of such a highly sensitive nature that disclosure of such information may result in substantial commercial or financial harm to a party or its employees, customers, vendors, consultants, or contractors, or that a Producing Party believes to be of such a highly personal nature that disclosure of such information may expose a party or non-party to risk of harm, may be designated "HIGHLY CONFIDENTIAL" by that party. Information described in this paragraph shall be referred to herein as "Highly Confidential Information."

(c) With respect to documents or materials which have been designated as containing Highly Confidential Information and which contain or refer to the identity of persons who are not parties to this litigation but who pursuant to paragraph III.A.2 of the Discovery Scheduling Order have been, either by agreement of the Parties or order of the Court, deemed to require special procedures necessary to safeguard such person and such person's family and

associates because of the risk of physical harm to him, her, his family, or associates should their identity or location become known, access to such documents or materials shall be further restricted in accordance with the special procedures agreed upon by the Parties or ordered by the Court.

(d) Except for what is required to be disclosed pursuant to Section III of the Discovery Scheduling Order, a Producing Party may redact the home addresses, phone numbers, email addresses, social security numbers, drivers license numbers, and passport identification numbers for any individuals, from all documents that it produces.

(e) The Producing Party shall have a good faith basis for designating information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

(f) A person receiving Confidential Information or Highly Confidential Information shall not use or disclose the information except for the purposes set forth in paragraph 3 of this Order.

(g) The provisions of this Order extend to all designated Confidential Information and Highly Confidential Information regardless of the manner in which it is or was disclosed, including, but not limited to, documents, electronically stored information, interrogatory answers, responses to requests for admissions, deposition testimony and transcripts, deposition exhibits, any other discovery materials produced by a party in response to or in connection with any discovery or other proceedings conducted in this litigation, or pursuant to any agreement among the parties, and any copies, notes, abstracts or summaries of the foregoing.

(h) A Producing Party may withdraw a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation, by providing written notice to all other parties. A party may also change a confidentiality designation from "CONFIDENTIAL" to "HIGHLY

CONFIDENTIAL" or from "HIGHLY CONFIDENTIAL" to "CONFIDENTIAL," by providing written notice to all other parties.

2. Means of Designating Documents Confidential: Documents or information may be designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" within the meaning of this Order in the following ways:

(a) Documents: The Producing Party will place the following legend in the page header or footer on each page of any such document: "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."

(b) Interrogatory Answers and Responses to Requests for Admissions: The Producing Party will place a statement in each confidential or highly confidential answer or response specifying that the answer or response or specific parts thereof are designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." In addition, the Producing Party will place the following legends on the front of any set of interrogatory answers or responses to requests for admission containing or revealing Confidential Information or Highly Confidential Information: "CONTAINS CONFIDENTIAL INFORMATION" or "CONTAINS HIGHLY CONFIDENTIAL INFORMATION"; and "DESIGNATED PARTS NOT TO BE USED, COPIED, OR DISCLOSED EXCEPT AS AUTHORIZED BY COURT ORDER."

(c) Depositions: A witness who provides deposition testimony, or a party participating in the deposition, will identify on the record the portions of the deposition transcript (including exhibits) that contain or reveal Confidential Information or Highly Confidential Information or will submit a letter making that identification within thirty (30) days of receipt of the deposition transcript or a copy thereof, or written notification that the transcript is available. Every deposition transcript (including exhibits) shall be treated as Highly Confidential

Information under this Order until the expiration of the 30-day period for designation by letter, except that the deponent may review the transcript during this 30-day period. If all or part of a deposition transcript is designated as Confidential Information or Highly Confidential Information, the following legend shall be placed on the front of the original deposition transcript and each copy of the transcript containing Confidential Information or Highly Confidential Information: "CONTAINS CONFIDENTIAL INFORMATION" or "CONTAINS HIGHLY CONFIDENTIAL INFORMATION"; and "DESIGNATED PARTS NOT TO BE USED, COPIED, OR DISCLOSED EXCEPT AS AUTHORIZED BY COURT ORDER." If all or part of a videotaped deposition is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the videocassette, other videotape container, or DVD shall be labeled with these legends.

(d) Electronically Stored Information, which shall mean information stored or recorded in any form of electronic or magnetic media (including information, data, files, images, audio recordings, video recordings, databases or programs stored on any digital or analog machine-readable device, computer, optical or magnetic disc, chip, network, or tape): The Producing Party will designate Electronically Stored Information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in a cover letter identifying the information generally. When feasible, the Producing Party will also mark the electronic or magnetic media or device with the appropriate designation. Whenever any party to whom Electronically Stored Information designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" is produced reduces such material to hardcopy form, such party shall mark such hardcopy form with the legends provided for in paragraph 2(a) above. Whenever any Electronically Stored Information designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" is copied into another file, device or

storage media, all such copies shall also be marked "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," as appropriate, in a manner reasonably calculated to protect such information from disclosure to unauthorized persons.

(e) To the extent that any party or counsel for any party creates, develops, or otherwise establishes on any digital or analog machine-readable device, recording media, computers, discs, networks, or tapes, any information, files, databases, or programs that contain or reveal information designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," that party and its counsel must take all necessary steps to ensure that access to that electronic or magnetic media is properly restricted to those persons who, by the terms of this Order, may have access to Confidential Information and Highly Confidential Information.

(f) Documents and materials filed with the Court:

i. Any documents or materials containing or revealing Confidential Information or Highly Confidential Information filed with the Court shall be filed in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption of this litigation, a generic designation of the contents, the words "SEALED DOCUMENT, CONTAINS CONFIDENTIAL INFORMATION" (or "SEALED DOCUMENT, CONTAINS HIGHLY CONFIDENTIAL INFORMATION") and "SUBJECT TO COURT ORDER" and words in substantially the following form:

> This envelope contains documents that are filed under seal in this case by [name of party] and, by Order of this Court dated _____, 2015, shall not be opened nor its contents displayed or revealed except as provided in that Order or by further Order of the Court.

ii. Notwithstanding Local Rule 5.4, a party filing documents under seal pursuant to paragraph 2(f)(i) is not required to file a motion to seal.

iii. Any pleading or other paper required to be filed under seal pursuant to this paragraph shall also bear the legend "FILED UNDER SEAL" in the upper-right hand corner of the cover page of the document.

iv. Only those documents and materials containing or revealing Confidential Information or Highly Confidential Information shall be considered "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and may be disclosed only in accordance with this Order. To the greatest extent possible, only those portions of court filings that contain or reveal Confidential Information or Highly Confidential Information shall be filed under seal.

v. Any sealed document may be opened by the presiding Judge or designated Magistrate, the presiding Judge's or designated Magistrate's law clerks, and other necessary Court personnel without further order of the Court.

vi. Each document filed under seal may be returned to the party that filed it under the following circumstances: (1) if no appeal is taken, within ninety (90) days after a final judgment is rendered, or (2) if an appeal is taken, within thirty (30) days after the ruling of the last reviewing court that disposes of this litigation in its entirety is filed. If the party that filed a sealed document fails to remove the document within the appropriate time frame, the Clerk may destroy the document, return the document to

counsel for the party that filed the sealed document upon request within two years after termination of the litigation, or take any other action to dispose of the document that the clerk deems appropriate.

3. Use of Discovery Materials: Documents and information produced during discovery, or otherwise exchanged by or between the parties, in this litigation that are not in the public domain or publicly accessible, including, but not limited to, documents which have been designated as containing or revealing Confidential Information and Highly Confidential Information, shall only be used in prosecuting and defending the cases captioned Julin, et al v. Chiquita Brands International, Inc., No. 08-20641-CIV-KAM, Pescatore v. Chiquita Brands International, Inc., No. 09-80683-CIV-KAM or Sparrow v. Chiquita Brands International, Inc., No. 11-80402-CIV-KAM, or in connection with any proceedings convened for the purpose of attempting to settle such cases, and for no other purpose and in no other litigation, except as required pursuant to a subpoena or other discovery or process under the terms specified in paragraph 13 of this Protective Order.

4. Disclosure of Confidential Information: Access to information designated "CONFIDENTIAL" pursuant to this Order shall be limited to:

(a) Attorneys for the parties (including members, associates, counsel, and any attorneys in private law firms representing the parties), as well as their law firms' paralegal, investigative, technical, secretarial, and clerical personnel who are engaged in assisting them in this litigation;

(b) Outside photocopying, document storage, data processing, translation service, or graphic production services employed or retained by the parties or their counsel to

assist in this litigation, provided that paragraph 7 of this Protective Order has been complied with;

(c) Any expert, consultant, or investigator retained by counsel, or whom counsel contemplates retaining for the purposes of consulting or testifying in this litigation, and any assistants retained by said individual for purposes of their consulting or testifying work in this litigation, provided that paragraph 7 of this Protective Order has been complied with;

(d) Any director, officer, or employee of Chiquita Brands International, Inc. ("Chiquita") involved in the defense or resolution of this action;

(e) Any consultant or independent contractor of Chiquita involved in this action, provided that paragraph 7 of this Protective Order has been complied with;

(f) The Producing Party, any current employee or agent of a Producing Party, or any other person, who, as appears from the face of the document, authored, received, or otherwise has been provided access to (in the ordinary course, outside this litigation) the Confidential Information sought to be disclosed to that person;

(g) This Court, the Court's personnel, and qualified persons (including necessary clerical personnel) recording, taking, transcribing, or translating testimony or argument at any deposition, hearing, trial or appeal in this litigation;

(h) Third-party witnesses, and counsel representing third-party witnesses in this action, in good faith preparation for, during the course of, or in review of deposition or (subject to the provisions of paragraph 9) trial testimony, provided that paragraph 7 of this Protective Order has been complied with;

(i) Any other person to whom the Producing Party agrees in writing or on the record in advance of the disclosure, upon the request of another party, provided that paragraph 7 of this Protective Order has been complied with; and

(j) Any other person to whom the Producing Party elects to disclose the information.

5. Disclosure of Highly Confidential Information: Access to information designated "HIGHLY CONFIDENTIAL" pursuant to this Order shall be limited to:

(a) Outside attorneys for the parties (including members, associates, counsel, and any attorneys in private law firms representing the parties), as well as their law firms' paralegal, investigative, technical, secretarial, and clerical personnel who are engaged in assisting them in this litigation;

(b) Outside photocopying, document storage, data processing, translation service, or graphic production services employed or retained by the parties or their counsel to assist in this litigation, provided that paragraph 7 of this Protective Order has been complied with;

(c) Any expert, consultant, or investigator retained by counsel for the purposes of consulting or testifying in this litigation, and any assistants retained by said individual for purposes of their consulting or testifying work in this litigation, provided that paragraph 7 of this Protective Order has been complied with;

(d) The Producing Party and any current employee or agent of a Producing Party, or any other person who, as appears from the face of the document, authored, received, or otherwise has been provided access to (in the ordinary course, outside this litigation) the Highly Confidential Information sought to be disclosed to that person;

(e) This Court, the Court's personnel, and qualified persons (including necessary clerical personnel) recording, taking, transcribing, or translating testimony or argument at any deposition, hearing, trial or appeal in this litigation;

(f) Third-party witnesses, and counsel representing third-party witnesses in this action, in good faith preparation for, during the course of, or in review of, deposition or (subject to the provisions of paragraph 9) trial testimony, provided that paragraph 7 of this Protective Order has been complied with;

(g) Any other person to whom the Producing Party agrees in writing or on the record in advance of the disclosure, upon the request of another party, provided that paragraph 7 of this Protective Order has been complied with; and

(h) Any other person to whom the Producing Party elects to disclose the information.

6. Attendance at Depositions: Only those individuals to whom Highly Confidential Information may be disclosed, as identified in paragraph 5, are permitted to attend depositions in this matter, unless otherwise agreed by the parties and deponent in advance.

7. Notification of Confidentiality Order:

(a) Unless otherwise agreed in writing by the parties, all persons who are authorized to receive and are to be shown Confidential Information or Highly Confidential Information under this Protective Order (other than the persons listed in paragraphs 4(a), (d), (f), (g), and (j), and 5(a), (d), (e), and (h)) shall be provided a copy of this Protective Order prior to the receipt of Confidential Information or Highly Confidential Information, and shall, prior to disclosure of any Confidential Information or Highly Confidential Information, execute a

Confidentiality Agreement such as that annexed as Exhibit A, stating that he or she has read this Protective Order and agrees to be bound by its terms.

(b) The originals of such Confidentiality Agreements shall be maintained by the counsel who obtained them until the final resolution of this litigation, including appeals. Confidentiality Agreements and the names of persons who signed them shall not be subject to discovery except upon agreement of the parties or further order of the Court after application upon notice and good cause shown.

8. Objections to Designations: A failure to challenge the propriety of a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation at the time the material is produced shall not preclude a subsequent challenge to the designation. In the event a party objects to the designation of any material under this Order by another party, the objecting party first shall consult with the Producing Party to attempt to resolve the differences. If the parties are unable to reach an accord as to the proper designation of the material, the objecting party may, on notice to the other party, apply to the Court for a ruling that the material shall not be so treated. If such motion is made, the Producing Party will have the burden to establish that the designation is proper. If no such motion is made, the material will remain as designated. Any documents or other materials that have been designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall be treated as such until the Court rules that they should not be so treated, and a 10-day period to move to reconsider or appeal that ruling has expired without a motion to reconsider or an appeal having been filed.

9. Use of Confidential Information or Highly Confidential Information at Trial: Procedures governing the use of Confidential Information or Highly Confidential Information at trial will be determined at a later date by the parties, who shall meet and confer and submit to the

Court a proposed order setting forth procedures governing the use of such Confidential Information or Highly Confidential Information in court.

10. Preservation of Rights and Privileges: Nothing contained in this Order shall affect the right of any party or witness to make any other available objection or other response to discovery requests, including, without limitation, interrogatories, requests for admissions, requests for production of documents, questions at a deposition, or any other discovery request. Nothing contained in this Protective Order shall operate to require the production of any information or document that is privileged or otherwise protected from discovery. The parties expressly preserve any and all privileges and exemptions, including, without limitation, the attorney-client privilege and work product immunity, as well as any objections to the production of documents located exclusively outside the United States where local law prohibits such production. Inadvertent disclosure or production of materials so protected shall not be deemed a waiver of any privilege, protection, or immunity. Nothing in the foregoing shall be construed as a waiver of the right of any party to challenge any such objection or claim of privilege or exemption.

11. Return of Materials: Within sixty (60) days after the final resolution of all litigation identified in paragraph 3 above, all Confidential Information and Highly Confidential Information, including all copies, abstracts, and summaries, shall be returned to counsel for the Producing Party or, if the Producing Party's counsel is so informed, destroyed, with the party that had received the Confidential Information or Highly Confidential Information certifying to the return or destruction, as appropriate. As to those materials that contain or reveal Confidential Information or Highly Confidential Information, but that constitute or reveal counsel's work product, counsel of record for the parties shall be entitled to retain such work product in their

files in accordance with the provisions of this Order, so long as such files are clearly marked to reflect that they contain or reveal information subject to Protective Order. Counsel shall be entitled to retain pleadings, affidavits, motions, briefs, other papers filed with the Court, deposition transcripts, and the trial record (including exhibits) even if such materials contain or reveal Confidential Information or Highly Confidential Information, so long as files containing such pleadings, affidavits, motions, briefs, other papers filed with the Court, deposition transcripts, and the trial record (including exhibits), in accordance with the provisions of this Order, are clearly marked to reflect that they contain or reveal information subject to Protective Order, and are maintained as such.

12. Compliance Not An Admission: A party's compliance with the terms of this Order shall not operate as an admission that any particular document is or is not (a) confidential, (b) privileged or (c) admissible in evidence at trial.

13. Subpoenas or other Discovery or Process: Any Receiving Party in possession of Confidential Information or Highly Confidential Information who receives a subpoena, document request, interrogatory, or other process (from any person or entity who is not a party to this Order), which subpoena or other demand seeks production or other disclosure of such Confidential Information or Highly Confidential Information ("Covered Material"), shall promptly, and in any case within three (3) business days, give telephonic notice and written notice by e-mail or facsimile to counsel for the Producing Party, identifying the materials sought and enclosing a copy of the subpoena, discovery, or other process. The Receiving Party shall also inform the person seeking the Covered Material that such information is subject to this Protective Order and shall take all reasonable steps to preserve the confidentiality of such information. The Receiving Party shall refrain from any production or other disclosure of the

Covered Material pursuant to the subpoena, discovery, or other process until the last date on which such production or other disclosure is due under the terms of the subpoena, discovery, or other process, unless before such deadline the Receiving Party has been served with written notice from the Producing Party that (i) such party does not object to production of the Covered Material, or (ii) an agreement has been reached between the Producing Party and the issuer of the subpoena, discovery or other process concerning production, or (iii) an order has been issued by a court with competent jurisdiction, relieving the Receiving Party either temporarily or permanently from its obligation to withhold the Covered Material, in which event the Receiving Party's obligations with respect to the subpoena, discovery, or other process shall be in accordance with any such agreement or order. Nothing contained within this paragraph shall obligate any party or person who receives a subpoena, discovery, or other process seeking the production or disclosure of Confidential Information or Highly Confidential Information to resist such production or disclosure, or be construed as encouraging any party or person to resist production or disclosure, if such party or person is required or compelled to produce or disclose by any court order or order by a regulator of competent jurisdiction.

14. Application to Non-Parties: This Order shall apply to any non-party who is obligated to provide discovery, by deposition, production of documents, or otherwise, in this litigation, if that non-party requests the protection of this Order as to its Confidential Information or Highly Confidential Information and agrees to be bound by the provisions of this Order by executing a Confidentiality Agreement in substantially the form attached hereto as Exhibit A.

15. Modification: The Parties shall have the right to seek modification of, and relief from, any of the terms of this Protective Order for good cause.

16. Objections: Nothing contained in this Protective Order shall preclude non-parties from submitting objections for ruling by the Court.

17. Inadvertent Disclosure to Third Parties: If a person bound by this Order inadvertently discloses Confidential Information or Highly Confidential Information to a person not authorized to receive that information, or if a person authorized to receive Confidential Information or Highly Confidential Information breaches any obligations under this Protective Order, that person shall immediately give notice of the unauthorized disclosure to the Producing Party. In addition, if a person bound by this Order becomes aware of the unauthorized disclosure of Confidential Information or Highly Confidential Information by a non-party, that person shall immediately give notice of the unauthorized disclosure to the Producing Party. Notice in either circumstance described in this paragraph shall include a full description of all facts that are pertinent to the wrongful disclosure. The person disclosing the Confidential Information or Highly Confidential Information shall make every reasonable effort to retrieve the information that was disclosed without authorization and to limit the further dissemination or disclosure of such information. Persons who violate the provisions of this Protective Order may be subject to sanctions as provided by statute, rule, or the inherent power of this Court.

18. Inadvertent Disclosure to A Party:

(a) If, in connection with the pending litigation, a Producing Party inadvertently discloses information subject to a claim of privilege, including, but not limited to, attorney-client privilege or attorney work product protection ("Inadvertently Disclosed Information"), the disclosure of the Inadvertently Disclosed Information shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection that the

Producing Party would otherwise be entitled to assert with respect to the Inadvertently Disclosed Information and its subject matter.

(b) If a claim of inadvertent disclosure is made in writing by a Producing Party with respect to Inadvertently Disclosed Information, the Receiving Party must—unless it contests the claim of privilege or work product protection in accordance with paragraph 18(c)—within five (5) business days of receipt of that writing, (i) return or destroy all copies of the documents or materials that contain the Inadvertently Disclosed Information, as identified by the Producing Party, and (ii) provide a certification of counsel that all of the Inadvertently Disclosed Information has been returned or destroyed. Within five (5) business days of receipt of the notification that the Inadvertently Disclosed Information has been returned or destroyed, the Producing Party must produce a privilege log with respect to the Inadvertently Disclosed Information.

(c) If the Receiving Party contests the claim of privilege or work product protection, the Receiving Party must—within five (5) business days of receipt of the claim of inadvertent disclosure—move the Court for an Order compelling disclosure of the Inadvertently Disclosed Information (a "Disclosure Motion"). The Disclosure Motion must be filed under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the inadvertent disclosure. Pending resolution of the Disclosure Motion, the Receiving Party must not use the Inadvertently Disclosed Information or disclose it to any person other than those required by law to be served with a copy of the sealed Disclosure Motion.

(d) The parties may stipulate to extend the time periods set forth in paragraphs 18(b) and 18(c).

(e) The Producing Party retains the burden of establishing the privileged or protected nature of the Inadvertently Disclosed Information. Nothing in this paragraph shall limit the right of any party to petition the Court for an *in camera* review of the Inadvertently Disclosed Information.

19. Binding: Upon the final resolution of this litigation, the provisions of this Order shall continue to be binding. This Court expressly retains jurisdiction over this action for enforcement of the provisions of this Order following the final resolution of this litigation. This Order is binding on all parties to this litigation, on all third parties who have agreed to be bound by this Order, and on all others who have signed the Confidentiality Agreement in substantially the form attached hereto as Exhibit A, and shall remain in force and effect until modified, superseded, or terminated by consent of the parties or by Order of the Court.

20. Time: All time periods set forth in this Order shall be calculated according to Rule 6 of the Federal Rules of Civil Procedure, as then in effect.

21. A designation of or agreement that an item is CONFIDENTIAL or HIGHLY CONFIDENTIAL, or a designation or agreement that an item shall be sealed, is not binding on the Court

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 20th day of February, 2015.

KENNETH A. MARRA
United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01916-MD-MARRA/JOHNSON

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC. ALIEN TORT STATUTE AND SHAREHOLDER DERIVATIVE LITIGATION

This Document Relates To:

ATA ACTIONS

Case No. 08-20641-CIV-KAM

TANIA JULIN, et al.,

Plaintiffs,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.

Defendant.

Case No. 09-80683-CIV-KAM

OLIVIA PESCATORE, et. al.

Plaintiffs,

vs.

CHIQUITA BRANDS INTERNATIONAL, INC., et al.,

Defendants.

Case No. 11-80402-CIV-KAM

GREGORY SPARROW, ON BEHALF OF THE
ESTATE OF JANE PESCATORE SPARROW

Plaintiff,

vs.

CHIQUITA BRANDS INTERNATIONAL, INC., et al.,

Defendants.
_____/

CONFIDENTIALITY AGREEMENT

1. My name is _____, and I live at _____ _____. I am employed as _____ (state position) by _____ (state name and address of employer).

2. I have read the Protective Order that has been entered in this case, and a copy of it has been given to me. I understand the provisions of this Order, and agree to comply with and to be bound by its provisions.

3. I understand that sanctions may be entered for violation of the Protective Order. I consent to personal jurisdiction over me by the United States District Court for the Southern District of Florida with respect to the Protective Order.

Executed this ___ day of _____, 201__.

Signature: _____

CHECKLIST FOR
APPLICATION FOR ATTORNEYS FEES

I. AS A GENERAL RULE, follow the checklist set out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 716 (5th Cir. 1974).

A. Johnson adopted these factors from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106:

(1) Time and labor required. (Hours.)

(2) Novelty and difficulty of the questions. (Hours.)

(3) Skill requisite to perform the service. (Rate.)

(4) Preclusion of other employment due to acceptance of the case. (Rate.)

(5) Customary fee for similar work. (Rate.)

(6) Whether the fee is fixed or contingent. (Rate and enhancement.)

(7) Time limitations imposed by the client or the circumstances. (Rate.)

(8) Amount involved and results obtained. (Enhancement.)

(9) Experience, reputation, and ability of the attorneys. (Rate.)

(10) Undesirability of the case. (Rate.)

(11) Nature and length of the professional relationship. (Rate.)

(12) Awards in similar cases. (Total.)

B. Review your local bar rules for criteria that govern fees. Consider discussing any criterion not found in Johnson.

C. If the Court has written an opinion or made findings in the case, cite them in support of your petition.

II. AFFIDAVITS ARE THE MOST IMPORTANT PART OF YOUR PETITION.

A. Trial Counsel's Affidavits.

1. Describe time and tasks.

① Yellow pages
② 61 So Cal 353 (1938)

2. Justify the time and tasks.

3. Explain any duplication.

4. Deduct for inefficiency.

5. Other deductions of hours or reductions of hourly rates.

6. Qualifications and experience.

7. Defense tactics and strategy.

8. Complexity and difficulty, generally.

9. Particular difficulties that added to the time spent.

10. Need for out of town counsel.

11. Novelty of issues; issues of first impression.

12. Any retainer agreement with client.

13. Other Johnson factors.

14. Avoid conclusory statements unless warranted by the detailed facts.

B. Independent Counsel's Affidavits.

1. Reasonableness of the hourly rates; prevailing rates for plaintiff's complex federal litigation.

2. Need for out of town counsel.

3. Reasonableness of time.

4. Reputation of trial counsel.

5. Awards in other cases.

6. Excellent success.

C. Contingency Enhancement Affidavits.

1. Undesirability of civil rights cases in general because of lack of fees.

2. Undesirability of this case in particular because of risk or lack of compensatory fees. (This is not a substitute for #1.)

3. General absence of attorneys willing to accept civil rights cases.

4. Counsel's rule of thumb for accepting contingent fee cases. How many times must s/he expect her/his hourly rate will be enhanced before s/he accepts a case on a contingency basis.

5. Counsel's rule of thumb for accepting civil rights cases on a contingency. How many times must her hourly rate be multiplied before she accepts a civil rights case? Before she would have accepted this civil rights case.

6. Professional surveys (if you have the funds.)

7. Your clients' affidavit describing his difficulty in finding counsel generally and finding counsel to accept his case on contingency in particular.

III. GENERAL FORM OF MOTION OR PETITION -- GROUNDS.

A. Plaintiffs are prevailing parties.

B. Plaintiffs obtained excellent results or substantial success.

C. List of hours, rates, and lodestar by attorney.

D. Explanations of any oddities in the list (i.e. why is any attorney billed at a lower rate.)

E. Summary of deductions or reductions made in the hours.

F. Summary of expenses.

G. Request for enhancement.

H. Total request (enhanced fees + expenses.)

IV. GENERAL FORM OF BRIEF in Support of Motion for An Award of Attorney's Fees.

A. PLAINTIFFS ARE PREVAILING PARTIES

1. Introduction.

a. Discuss the general rules of Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486, 1493 (1989); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Newman v. Piggie Park

Enterprises, Inc., 390 U.S. 400, 402 (1968); Hensley at 429; cf., Northcross v. Board of Education of Memphis, 412 U.S. 427, 428 (1973) (limited discretion of the court); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 68 (1980) (special circumstances).

b. What are not special circumstances?

2. Plaintiffs succeeded on significant issues.

3. Degree of success.

a. Do not add up each little issue and argue that you were successful on it.

b. Identify the primary issue in the case or the primary relief sought. Argue its success.

c. Look at your last amended complaint and the issues in your pretrial order. Then summarize the counts, issues, and/or elements of the prayer in broad, general categories. Argue your success on these general categories.

d. If you were genuinely unsuccessful on an issue, cut your hours.

(1) Cut by identifiable task, if possible.

(2) Cut by a percentage if you cannot cut by task.

(3) Remember the rule of interrelatedness.

(4) This is the conservative approach. Arguably the Fee Act does not require a reduction, or losing private counsel would always refund their fees to their clients.

e. Catalyst claims apply to both prevailing party issue and degree of success on the merits.

(1) Refer to trial or deposition testimony if available.

B. PURPOSE OF FEE AWARDS UNDER § 1988 -- LEGISLATIVE HISTORY

1. Civil rights actions are meaningless without reasonable attorneys fees.

2. Congress recognized that either damage awards would be small or there would not be a fund available.

3. Rule that counsel be paid as is traditional with fee-paying clients.

C. FEE AWARD FACTORS (Nearly all of the factors in Johnson are subsumed into the hourly rate or the time expended.)

1. Reasonable hourly rate.

a. Requisite skill. If appropriate, discuss the need for out of town rates. You should have already submitted affidavits from local counsel telling why they did or would have declined the case (because of lack of expertise) and from your cooperating attorney attesting to their lack of expertise and how thankful they were to have out-of-town counsel on the case. If staff counsel worked the case locally, be sure that you have filed an affidavit from a member of the bar in support of your hourly rate.

b. Experience reputation and ability of counsel.

c. Customary fee for similar work. Do not use bar surveys and surveys from national publications as your primary source of support. As a rule, these do not address rates for plaintiff's counsel in complex federal litigation, and therefore understate rates. Use them, but point out the fact that they understate the applicable rate. Rely primarily on affidavits of attorneys in the locale.

d. Preclusion of other employment due to acceptance of the case.

e. Time limitations imposed by the client or the circumstances.

f. Undesirability of the case. This does not always apply to private counsel (e.g. Skokie.)

2. Reasonable number of hours. Your affidavits primarily should provide detailed facts for (and the brief should address) these issues:

a. Complexity.

(1) Cite from the Court's opinion if language is available.

b. Novelty of issues; issues of first impression.

c. Time and labor required.

d. Duplication or lack thereof.

(1) If there is or may be duplication, be sure that your affidavits, motion, and brief discuss it and tell the court where and how you have reduced your hours.

e. Inefficiency or lack thereof. Again, plan to reduce your hours if appropriate.

f. Defense tactics and strategy.

(1) This is an important and under-used factor. Your affidavits and briefs should go into detail about how they ran you around in circles, about how you did their discovery for them. This is helpful in explaining why you have so many more hours than they do.

(2) City of Riverside v. Rivera, 477 U.S. 561, 580 n.11 (1986); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 730 (1987) (quality of opposition should be reflected in lodestar element of time).

3. Whether the fee is fixed or contingent.

a. Enhancement.

4. Amount involved and results obtained (Degree of success.)

a. Enhancement.

b. If this does not appear to be a case for enhancement, be sure to address this issue anyway, if only as a part of the prevailing party discussion.

5. Compensable tasks.

a. For example, travel time (as well as expense) is compensable, but you had better be working

on the plane.

6. Fee awards in similar cases.

a. This is especially important if you have alot of time in. Load your brief with these cases. Use as many local cases as possible.

D. Entitlement to fees incurred in preparing the fee petition.

E. Conclusion: Rule of reason (R x R = R). If your rates are reasonable, the hours are reasonable, and the enhancement is reasonable, then the product must be reasonable.

V. THE REPLY -- AVOID SIMULTANEOUS BRIEFING.

A. Reply with affidavits as well as a brief.

B. How much do you tell the other side?

1. Don't clobber the defendants' failure to submit evidence or sufficient evidence if they can supplement the record before oral argument or at an evidentiary hearing. Sandbag.

2. Consider presenting the general rules as to defendants' burden and argue generally that they failed to carry it.

C. Motion to strike affidavits.

1. File before or at hearing.

D. Motion for Rule 11 sanctions.

E. File no reply brief.

VI. THE HEARING

A. The general rule is that an evidentiary hearing should be held to settle material issues of fact.

1. If the defendants' affidavits are insufficient, there will be no material issues.

2. If the defendants' affidavits are poor or absurd, argue that no evidentiary hearing is necessary (unless you want one.)

3. If the defendants do not want an evidentiary

hearing, and the court has not scheduled one, obtain a waiver on the record at the oral argument. (Not before, since you may want an evidentiary hearing following eleventh hour affidavits from the defendant.)

B. Clobber them in a Hearing or Trial Brief and in oral argument.

1. Prepare a summary of those cases that hold it is an abuse of discretion to refuse to find for the fee movant on an issue if the defendants have failed to submit substantial, material evidence or detailed, specific objections as to that issue.

C. Then settle the case, if you haven't already.

D. If the Court schedules an evidentiary hearing, or if the defendants' evidentiary submittal is substantial, do some discovery.

1. Defendants' counsel's time (in this case) and their rates and their witnesses' rates (in other similar cases in which they represented a plaintiff.)

2. Defendants' counsel's and witnesses' practice for accepting contingent fees.

VII. REMEMBER, THESE ARE YOUR CLIENT'S FEES. YOU HAVE AN ETHICAL DUTY TO ENSURE THAT THEY ARE AS HIGH AS POSSIBLE. REMEMBER, TOO, IF CIVIL RIGHTS CASES ARE ATTRACTIVE TO THE PRIVATE BAR, WE WILL HAVE MORE COOPERATING ATTORNEYS TO DO MORE CASES.

RESUME

JAMES K. GREEN
James K. Green, P.A.
Esperantè Building - Suite 1650
222 Lakeview Avenue
West Palm Beach, Florida 33401
Telephone: (561) 659-2029
Facsimile: (561) 655-1357

EDUCATION

B.A.	University of Pennsylvania Dean's List	1973
J.D.	Antioch School of Law Honors Thesis; Reginald Heber Smith Fellowship (declined)	1976

PROFESSIONAL EXPERIENCE

Office of the Public Defender
West Palm Beach, Florida 1976-1979

From July 1, 1976 through July 1, 1979, I practiced criminal law exclusively on all levels in state and federal courts.

Green, Eisenberg & Cohen
West Palm Beach, Florida 1979-1990

From 1979 through 1990, I engaged in the private practice spending a significant amount of time litigating criminal, death penalty and civil rights cases in state and federal courts.

James K. Green, P.A.
West Palm Beach, Florida 1990- present

BAR ADMISSIONS

Supreme Court of Florida	1977
United States Supreme Court	1980
United States District Court for the Southern District of Florida	1977

United States District Court for the Middle District of Florida	1983
United States District Court for the Northern District of Florida	2009
United States Circuit Court of Appeals for the Fourth Circuit	1999
United States Circuit Court of Appeals for the Fifth Circuit	1977
United States Circuit Court of Appeals for the District of Columbia	1979
United States Circuit Court of Appeals for the Eleventh Circuit	1982
District of Columbia Court of Appeals	1978

GENERAL LITIGATION EXPERIENCE (partial list of published and significant cases)

Antitrust

Marquis v. U.S. Sugar Corporation, et al., 652 F.Supp. 598 (S.D. Fla. 1987) (represented claims of U.S. workers in antitrust action against sugar companies).

Harvey v. NASCAR, 84 - 95 Reed (M.D. Fla.) (represented race car driver in antitrust action against racing association).

Attorneys' Fees

Jonas v. Stack, 758 F.2d 567 (11th Cir. 1985) (held that prevailing attorney entitled to reimbursement for attorneys' fees expended in litigating fee application).

Dunbar v. City of Belle Glade, Case No. 79 8341 CIV HASTINGS (S.D. Fla.) (testified as plaintiffs' expert regarding reasonableness of fee request).

Calaway v. South Florida Water Management District, Case No. 85 1173, 15th Judicial Circuit, State of Florida (represented successful attorney in fee application).

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (represented successful attorneys in fee litigation).

LaMarca v. Turner, 995 F.2d 1526 (11th Cir.1993)(fees expert after remand in prisoners' rights case where inmates were threatened with physical violence and assaulted by other inmates

at Glades Correctional Institution because they refused to participate in brutal same-sex rapes, or pay protection to be left alone).

Mendelson et al. v. City of St. Cloud, et al., Case No. 87 205 ORL 18 (M.D. Fla.) (represented successful attorneys in fee application).

Commercial Litigation

Rayfield Inv. Co. v. Kreps, 35 So.3d 63 (Fla. 4th DCA 2010) (notwithstanding creditor's knowledge that Palm Beach gallery had some consignments in its inventory, creditor who perfected security interest had superior interest in rare painting over that of consignor).

Constitutional Rights

American Civil Liberties Union, Inc. v. The Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990) (declared unconstitutional application of Canon 7(B) of the Code of Judicial Conduct to campaign speech).

American Civil Liberties Union, Inc. v. The Florida Bar, 999 F.2d 1486 (11th Cir. 1993) (State bar was proper defendant in challenging constitutionality of judicial code where candidate was lawyer who fell within bar's disciplinary jurisdiction when suit was filed; controversy remained live even after bar and JQC stated in court papers that code could not constitutionally be applied to candidate's proposed campaign speech).

American Federation of State, County and Mun. Employees (AFSCME) Council 79 v. Scott, 277 F.R.D. 474 (S.D. Fla. 2011) (Governor's subpoenas on nonparty nonprofit advocacy organization serving as counsel for union quashed).

Baptiste, et al. v. City of West Palm Beach, et al., Case No. 86 8335 CIV DAVIS (S.D. Fla.) (class action challenging pattern of Fourth Amendment violations against Haitians by police department; consent decree).

Blackmun v. Wille, 980 F.2d 691 (11th Cir.1993)(represented inmate class in jail conditions case in Palm Beach County; obtained sweeping injunctive relief).

Bland v. Norvell, Case No. 80 8251 CIV PAINE (S.D. Fla.) (represented inmate class in jail conditions case in St. Lucie County; obtained sweeping relief by partial consent decree and injunction).

Brayshaw v. City of Tallahassee, Fla., 709 F.Supp.2d 1244 (N. D. Fla. 2010) (Florida statute proscribing the unauthorized publication of the home address or telephone number of any law enforcement officer, with malice and intent to intimidate on the part of the speaker, was not narrowly tailored to serve the state interest of protecting police officers from harm or death, and thus was facially invalid under the First Amendment).

Bruce v. Beary, 498 F.3d 1232 (11th Cir.2007) (fact issues existed as to whether warrantless administrative inspection of shop was reasonable; fact issues existed as to reasonableness of officers' seizure of, and refusal to return, owner's property; fact issues existed as to whether sheriff had policy of inadequately training officers regarding execution of administrative inspections; single instance of withholding property seized from auto body repair shop, after state court ordered that such property be returned to shop owner, could subject county sheriff, as policymaker, to liability for constitutional violation).

Bryant v. Wainwright, 686 F.2d 1373 (11th Cir. 1982) (represented African American woman in federal habeas corpus challenge alleging racial and sexual discrimination in Florida grand jury selection process).

City of Delray Beach v. Barfield, 579 So. 2d 315 (Fla. 4th DCA 1991) (public records case).

Chandler v. Baird, 926 F.2d 1057 (11th Cir.1991) (evidence created genuine issue of material fact whether conditions of administrative confinement, principally with regard to cell temperature and provision of hygiene items, violated the Eighth Amendment, precluding summary judgment).

Cooper v. Dillon, 403 F.3d 1208 (11th Cir. 2005) (Police chief had final policymaking authority for City of Key West in law enforcement matters, and his decision to enforce Florida statute prohibiting disclosure of nonpublic information by participant in internal investigation of law enforcement officer against newspaper publisher was adoption of "policy" that caused deprivation of publisher's First Amendment rights sufficient to render municipality liable under § 1983).

Cronin v. Holt, Case No. 81 8309 CIV SPELLMAN (S.D. Fla.) (represented inmate class in jail conditions case in Martin County; obtained sweeping relief by consent decree).

DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987) (declared Palm Beach shirtless jogging statute unconstitutional).

Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994) (Because Florida courts are tribunals of plenary jurisdiction, federal standing requirements do not apply to Florida courts; neither the sovereign immunity nor common law defenses apply to claims brought under either the state or federal constitutions).

Doe v. Florida Supreme Court and the Florida Bar, 734 F. Supp. 981 (S.D. Fla. 1990) (declared unconstitutional a regulation requiring confidentiality of complaints against lawyers to the Florida Bar).

Doe v. Gonzalez, 723 F. Supp. 690 (S.D. Fla. 1988) (declared unconstitutional a Florida statute requiring confidentiality of complaints to Florida Ethics Commission).

Doe v. State of Fla. Judicial Qualifications Comm'n., 748 F. Supp. 1520 (S.D. Fla. 1990) (declared unconstitutional a Florida constitutional prohibition on disclosure of fact that complaint had been filed with Judicial Qualifications Commission).

Esquivel v. Village of McCullom Lake, 633 F. Supp. 1199 (N.D. Ill. 1986) (trial counsel for family whose house was wrongfully demolished for health code violations without due process of law).

Florida Consumers Federation v. City of Plantation and City of Tamarac, Case No. 83 6141 CIV EATON (S.D. Fla.) (declared municipal canvassing ordinances unconstitutional).

Frazier v. Alexandre, et al., 434 F.Supp.2d 1350 (S. D. Fla. 2006) aff'd in part, reversed in part sub nom Frazier v. Winn, 535 F.3d 1279 (11th Cir.2008) (Florida statute mandating parental permission for students to refuse to recite pledge declared unconstitutional).

Fulani v. Krivanek, 973 F.2d 1579 (11th Cir. 1992) (declared unconstitutional a Florida statute allowing independent but not minor party candidates from obtaining waiver of signature verification fees upon showing of indigency).

Hickox v. Tyre, Case No. 87-8327-CIV-ZLOCH (S.D. Fla.) (declared unconstitutional §112.533, Fla. Stat., that criminalized dissemination of truthful information concerning complaints against law enforcement officers).

Jakin v. City of Sebring, Case No. 82 8224 CIV MARCUS (represented former inmate challenging constitutionality of jail strip search policy).

Johnson v. Bush, 214 F.Supp.2d 1333 (S.D. Fla. 2002), aff'd in part, rev'd in part and remanded, 353 F.3d 1287 (11th Cir. 2003); rehearing en banc granted, opinion vacated, 377 F.3d 1163 (11th Cir. 2004) (co-counsel in class action challenging Florida's felon disenfranchisement law; challenge ultimately rejected)

Kerr, et al. v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989) (reinstated jury verdict finding city encouraged atmosphere of lawlessness and was grossly negligent in supervision of police canine unit).

Naturist Society, Inc. v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992) (adoption of amended regulations did not render controversy moot; state beach was a public forum).

Reinish v. Clark, 765 So.2d 197 (Fla. 1st DCA 2000), rev. denied, 790 So.2d 1107 (Fla. 2001), cert. denied, 534 U.S. 993 (2001)(Florida's constitutional and statutory homestead tax exemption provisions did not constitute a *per se* violation of the Dormant Commerce Clause).

Spillias v. City of West Palm Beach, Case No. 82 8319 CIV GONZALEZ (S.D. Fla.) (represented county commissioner candidate in successful First Amendment challenge to constitutionality of municipal sign ordinance).

Strickland v. Sheppard, Case No. 83 8428 CIV NESBITT (S.D. Fla.) (represented inmate class in jail conditions case in Highlands County; obtained sweeping relief by partial consent decree and injunction).

Sydney v. Pingree, 564 F.Supp. 412 (S.D. Fla. 1982) (declared part of Chapter 393, Florida Statutes, unconstitutional as violating parents' constitutional right to name children).

United Farm Workers of America, AFL CIO v. Quincy Corp., 681 So.2d 773 (Fla. 1st DCA 1996) (Ex parte temporary injunction, prohibiting farm workers' union from taking certain actions in support of union organizing efforts, violated rule governing temporary injunctions; nothing in record indicated that notice was given to union, and injunction did not define injury, state findings as to why injury might be irreparable, or give reasons why injunction was granted without notice).

Vogt v. School Board, Case No. 81 8217 CIV GONZALEZ (S.D. Fla.) (First Amendment case establishing right of access for draft counselors to public schools).

Wallace v. Town of Palm Beach, 624 F. Supp. 864 (S.D. Fla. 1985) (declared Palm Beach worker identification law unconstitutional).

Warner v. City of Boca Raton, 267 F.3d 1223 (11th Cir.2001) (Class action free exercise of religion claim challenging City's prohibition on vertical grave decorations; issues of first impression relating to application of Florida Religious Freedom Restoration Act (RFRA) to owners' claims certified to Florida Supreme Court; questions answered adverse to class, 887 So.2d 1023(Fla.2004)).

Whiting v. Traylor, 85 F.3d 581 (11th Cir.1996) (§ 1983 claim for malicious prosecution in violation of Fourth Amendment rights exists, at least insofar as it is based on some actual, unlawful, forcible restraint of plaintiff's person, and boat owner stated such claim).

Wodka v. Jamason, Case No. 80 8375 CIV HASTINGS (S.D. Fla.) (represented inmate class in jail conditions case in City of West Palm Beach; jail closed by consent decree).

Wright v. Sheppard, 919 F.2d 665, 669 (11th Cir.1990) (Remand necessary in civil rights action arising out of alleged battery during deputy sheriff's attempt to collect private debt where trial court did not address various types of compensable damages that debtor claimed to have suffered, such as physical injuries other than loss of teeth, nonphysical injuries such as humiliation, emotional distress and suffering, continued pain in debtor's mouth, and loss of use and physical pain caused by arm injury; also "This case cries out for punitive damages as punishment. The wrongs were especially offensive in their nature.").

Disability Rights

Concerned Parents v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994) (budget cuts which resulted in disproportionate reduction in recreational services for people with disabilities violated ADA).

Doe v. Judicial Nominating Commission, 906 F. Supp. 1534 (S.D. Fla. 1995) (questions concerning physical and mental health on applications for judicial appointments violated ADA).

Doe v. Stincer, 175 F.3d 879, 884 (11th Cir. 1998) (nothing in the PAMII Act requires a protection and advocacy organization to name a specific individual in bringing suit to redress violations of the rights of individuals with mental illnesses; rather, "[t]he text of PAMII grants standing to protection and advocacy systems to pursue legal remedies to 'ensure protection of individuals with mental illness.'")

Ellen S. v. Florida Board of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994) (questions on bar application and follow-up inquiries regarding treatment for mental illness violated ADA).

Jeffrey O. v. City of Boca Raton, 511 F.Supp.2d 1339 (S.D. Fla. 2007) (provision of city code, which capped the number of unrelated individuals who could live together in residential zones at three, violated Fair Housing Act because it did not establish a reasonable accommodation procedure; another provision of city code, which prohibited sober homes in residential neighborhoods by defining them as substance abuse treatment facilities also violated Fair Housing Act).

Johnson v. Florida, 348 F.3d 1334 (11th Cir. 2003)(class action challenging quality of treatment and placement at state mental hospital; obtained sweeping relief by partial consent decree requiring placements of 375 patients in community and closure of over 450 hospital beds; forced closure of hospital; state not entitled to termination of consent decree; consent decree dissolved in 2010 upon compliance after nearly 25 years of litigation).

International Human Rights

Arce, et al. v. Garcia and Vides-Casanova, 434 F.3d 1254 (11th Cir.2006) (co-lead counsel in Torture Victim Protection Act (TVPA) and Alien Tort Statute (ATS) case for plaintiffs who obtained $54.6 million jury verdict against former Salvadoran Ministers of Defense; featured in National Law Journal Top 100 Verdicts, 2002; district court did not abuse its discretion by equitable tolling of statute of limitations on Salvadoran refugees' claims under TVPA and ATCA, which alleged that two Salvadoran military officials were responsible for torture of refugees by soldiers in El Salvador during the course of a campaign of human rights violations, until the end of the civil war in El Salvador, even though officials left El Salvador to reside in the United States three years earlier; prior to end of civil war, refugees legitimately feared reprisals from Salvadoran military, as military regime remained in power until end of civil war).

In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig., 792 F.Supp.2d 1301, 1312 (S.D.Fla.2011) (co- counsel in Alien Tort Statute (ATS) case for torture and extrajudicial killing of plaintiffs and family members by Colombian paramilitary; case brought after Chiquita pled guilty to U.S. government charges of "prolonged, steady, and substantial support" to Colombian paramilitary organization).

Labor

Okeelanta Corporation, et al. v. Bygrave, 660 So.2d 743 (Fla. 4th DCA 1995) (co-counsel in class action on behalf of more than 25,000 foreign sugarcane cutters for breach of contract; obtained $51,000,000 judgment for class; reversed and remanded for trial).

Land Use

Boca Development Associates, Ltd. v. Palm Beach County, et al., Case No. 85 6792 CIV PAINE (S.D. Fla.) (represented developer in land use case alleging denial of due process).

Southern Entertainment v. City of Boynton Beach, Case No. 89 8210 CIV SCOTT (S.D. Fla.) (defended constitutionality of zoning law for municipality).

Educational Development Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So.2d 106 (Fla. 1989) (established extent of district court's certiorari review of circuit court's order overturning decisions of administrative agencies).

Privacy Rights

Rios v. Direct Mail Express, Inc., 435 F.Supp.2d 1199 (S.D. Fla. 2006) (motorists stated a claim that marketer knowingly obtained records in violation of Drivers' Privacy Protection Act (DPPA); marketer was not entitled to defense of good faith reliance on state motor vehicles department to comply with law; statute did not require allegation that marketer knowingly violated DPPA; DPPA preempted state constitutional provision and state statute governing disclosure of motor vehicle records; and DPPA did not violate Tenth Amendment).

Amicus Curi

In Re: The Petition of Kerry Mark Hooper to Change Name, 436 So.2d 401 (Fla. 2nd DCA 1983) (wrote amicus brief for Florida Association of Woman Lawyers).

City of Pompano Beach v. Capalbo, 455 So.2d 468 (Fla. 4th DCA 1984), cert. denied, 461 So.2d 113 (Fla. 1985); cert. denied, 474 U.S. 1000 (1985) (wrote amicus brief for American Civil Liberties Union of Florida, Inc.).

Long v. State of Florida, 570 So.2d 257 (Fla. 1990) (wrote amicus brief for American Civil Liberties Union of Florida, Inc.).

Butterworth v. Smith, 494 U.S. 624 (1990) (on amicus brief for American Civil Liberties Union of Florida, Inc.).

State v. Davis, 516 So.2d 953 (Fla. 4th DCA 1986) (wrote amicus brief for Florida Public Defender's Association).

Florida v. Riley, 488 U.S. 445 (1989) (on amicus brief for American Civil Liberties Union Foundation of Florida, Inc.).

Palm Beach County v. Hudspeth, 540 So.2d 147 (Fla. 4th DCA 1989) (wrote amicus brief for American Civil Liberties Union Foundation of Florida, Inc.)

Special Master

Givens v. Hamlet Estates, Ltd., Case No. 90-1908-CIV-NESBITT (S.D. Fla. 1990) (Appointed special master to determine damages of individual class members in $3.4 million settlement of class action housing discrimination lawsuit).

Miscellaneous

Former outside counsel to cities of Boynton Beach, Riviera Beach, and Palm Beach Gardens, Florida

Legal Director for the American Civil Liberties Union of Florida (1987-1992)

PUBLICATIONS

Jury Challenges in Florida: Improving the Composition of Juries, Florida Bar Journal (May 1980)

Truth Maybe, But At What Consequence?, Palm Beach Post (April 1985)

James K. Green & Barbara Kritchevsky, Litigating Attorney's Fees: Running the Gauntlet, 37 URB. LAW. 691 (2005)

LECTURES

AMERICAN ASSOCIATION OF LAW SCHOOLS, San Francisco (Speaker on attorney's fees litigation in civil rights cases)

AMERICAN CIVIL LIBERTIES UNION, University of Wisconsin (Speaker on monitoring compliance in jail and prison conditions cases)

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, West Palm Beach, Florida (Moderator of panel discussion of police misconduct/prisoner litigation)

FEDERAL BAR ASSOCIATION, Fort Lauderdale, Florida (Speaker on Section 1983 litigation)

FEDERAL PROBATION OFFICER'S ASSOCIATION, Ft. Lauderdale, Florida (Speaker on corrections in the community)

NATIONAL IMMIGRATION LAW CENTER, Miami, Florida (Speaker on Section 1983 remedies for state/local official misconduct involving aliens)

TULANE LAW SCHOOL CLE, New Orleans, Louisiana (Speaker on ethics and Section 1988 attorney's fees)

UNIVERSITY OF CALIFORNIA (Boalt Hall Law School), Berkeley, California (Speaker on "Understanding and Proving Privacy Harm")

UNIVERSIDAD SANTO TOMAS, LA FACULTAD DE DERECHO, Bogotá, Colombia (Lecturer, "Casos Colombianos de Violacion de Derechos Humanos Litigados en Estados Unidos y Estrategias de Litigio ante cortes Norteamericanas," November 2009)

CIVIC ACTIVITIES

President, American Civil Liberties Union of Florida, Inc. (1993-1996)

Legal Director, American Civil Liberties Union of Florida, Inc. (1987-1992)

Director, Haitian-American Community Center, Inc. (1984-1987)

President, Palm Beach Rowing Association, Inc. (1980-1982)

Member, Bicentennial Constitutional Commemorative Committee (1986)

Honors Recipient, President's Pro Bono Service Award, The Florida Bar (1990)

William Reece Smith, Jr. Public Service Award, presented by Stetson University College of Law (1991)

ACLU Legal Award, presented by the American Civil Liberties Union of Florida, Central Florida Chapter (1992)

Nelson Poynter Civil Liberties Award, presented by the American Civil Liberties Union Foundation of Florida (1997)

Chairperson, Charter Review Commission of the City of West Palm Beach (1992)

ATHLETIC ACTIVITIES

1969 Middleweight Boxing Champion, Culver Military Academy
1970-1973 Heavyweight Crew, University of Pennsylvania

1973	3rd Place, Intercollegiate Rowing Association National Championships
1974	1st Place, Elite Lightweight Four with Coxswain (Stroke), U.S. National Rowing Championships, Orchard Beach Lagoon, New York
1985	1st Place, World Masters Rowing Championships, Toronto, Canada
1991	1st Place, World Masters Rowing Championships, Miami
1991	Quarter-Finalist, Henley Royal Regatta, Henley-on-Thames, England
1996	New York Marathon, finished 3:06:49
1998	1st Place, Head of the Charles Regatta, Mens Masters Four
1999	1st Place, Head of the Charles Regatta, Mens Masters Eight
1999	1st Place, World Masters Rowing Championships, Seville, Spain
2001	1st Place, World Masters Rowing Championships, Montreal, Canada
2002	1st Place, Head of the Charles Regatta, Mens Masters Eight
2003	1st Place, World Masters Rowing Championships, Vichy, France
2006	1st Place, World Masters Rowing Championships, Princeton
2009	2nd Place, Head of the Charles Regatta, Mens Senior Masters Eight
2010	2nd Place, Head of the Charles Regatta, Mens Senior Masters Eight
2010	1st Place, World Masters Rowing Championships, St. Catharines, Canada
2011	2nd Place, Head of the Charles Regatta, Mens Senior Masters Eight
2015	2nd Place, World Masters Rowing Championships, Mechelen, Belgium
2016	1st Place, World Masters Rowing Championships, Copenhagen, Denmark

ACLU OF FLORIDA
2018 LAWYERS CONFERENCE
Delray Beach Marriott

DISCOVERY AND E-FILING – AMENDMENTS AND OTHER CHANGES TO RULES

Michael Barfield, Law Office of Andrea Flynn Mogensen, P.A.

On April 26, 2018, the Supreme Court approved amendments to the Federal Rules of Civil Procedure, which will take effect on December 1, 2018.
The following rules were updated: Rules 5, 23, 62, and 65.1. The changes are listed below. New text is underlined while deleted text has ~~strike through~~. The Committee Notes are below each rule change.

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) ***Service in General.*** A paper is served under this rule by:
(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~that the person consented to in writing—in either of which events service is complete upon ~~transmission~~filing or sending, but is not effective if the ~~serving party~~filer or sender learns that it did not reach the person to be served; or

* * * * *

(3) ***Using Court Facilities.*** ~~If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~ [Abrogated (Apr. ___, 2018, eff. Dec. 1, 2018.)]

* * * * *

(d) Filing.
(1) ***Required Filings; Certificate of Service.***
(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served—~~together with a certificate of service~~—must be filed ~~within~~no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service*. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:
(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.
(2) ***Nonelectronic Filing~~How Filing Is Made—In General~~.*** A paper not filed electronically is filed by delivering it:
(A) to the clerk; or
(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.
(3) ***Electronic Filing~~,~~ and Signing~~, or Verification~~.*** ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~
(A) *By a Represented Person—Generally Required; Exceptions*. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
(B) *By an Unrepresented Person—When Allowed or Required*. A person not represented by an attorney:
(i) may file electronically only if allowed by court order or by local rule; and
(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.
(C) *Signing*. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.
(D) *Same as a Written Paper*. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.
* * * * *

Committee Note
Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.
The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (d). Rule 5(d)(1) has provided that any paper after the complaint that is required to be served "must be filed within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.
Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court's electronic-filing system. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be

taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), —or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.
(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~
(A) the class representatives and class counsel have adequately represented the class;
(B) the proposal was negotiated at arm's length;
(C) the relief provided for the class is adequate, taking into account:
(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3); and
(D) the proposal treats class members equitably relative to each other.
(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
(4) ***New Opportunity to Be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
(5) ***Class–Member Objections.***
(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval.~~ The o bjection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
(i) forgoing or withdrawing an objection, or
(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained be fore an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.
(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1).~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the 118 district court unless the district judge or the court of appeals so orders.
* * * * *
Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard

contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.
Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.
The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The

sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.
Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.
Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.
The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good–faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This

amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.
The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay~~; Exceptions for Injunctions, Receiverships, and Patent Accountings~~. Except as provided in Rule 62(c) and (d),~~stated in this rule, no execution may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise.~~ But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~
~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b) Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions:~~

~~**(1)** under Rule 50, for judgment as a matter of law;~~
~~**(2)** under Rule 52(b), to amend the findings or for additional findings;~~
~~**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or~~
~~**(4)** under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction, Receivership, or Patent Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~c~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing

party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.
~~**(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~
* * * * *

Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30–day automatic stay also suffices in cases governed by a 60–day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has

expired, or after the automatic stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

Rule 65.1. Proceedings A gainst a ~~Surety~~Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given ~~through a bond or other undertaking~~ with one or more ~~sureties~~security providers, each ~~surety~~provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the ~~bond or undertaking~~security. The ~~surety's~~security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly ~~mail~~send a copy of each to every ~~surety~~security provider whose address is known.

Committee Note

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to "bond" is retained in Rule 62 because it has a long history.

The word "mail" is changed to "send" to avoid restricting the method of serving security providers.

April 26, 2018

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2018

Honorable Michael R. Pence
President, United States Senate
Washington, DC 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2018

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 23, 62, and 65.1.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

* * * * *

(3) ***Using Court Facilities.*** [Abrogated (Apr. __, 2018, eff. Dec. 1, 2018.)]

* * * * *

(d) Filing.

(1) ***Required Filings; Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to

permit entry onto land, and requests for admission.

(B) *Certificate of Service.* No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

* * * * *

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more

of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable

it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the

objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of

Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction, Receivership, or Patent Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

Rule 65.1. Proceedings Against a Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly send a copy of each to every security provider whose address is known.