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COURT TERM CONCENTRATED ON HARASSMENT, INDIVIDUAL

The Arizona Republic

June 28, 1998

By Aaron Epstein, Knight Ridder Newspapers

Without sex, the Supreme Court term that ended Friday would have been dull and of little importance to most Americans.

But the moderately conservative court delved into the issue of harassment between— and within— the sexes as never before, producing a record number of significant rulings on one of the most inflammatory and divisive topics of the decade.

"It is now well recognized that hostile-environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace," Justice David Souter observed in one of the high court's four sexual harassment decisions of the term.

It is not customary for this court, composed as it is of a majority of justices appointed by Presidents Reagan and Bush, to expand the rights of individuals. But in three decisions on sexual harassment on the job and one on the rights of the disabled, they did just that.

In most cases, though, the court preserved the status quo, as it did in striking down the line-item veto, finding the lie detector still too unreliable for courtrooms, blocking suits arising from high-speed police pursuits and refusing independent counsel Kenneth Starr's request for a new exception— after the client's death— to the attorney-client privilege.

Criminal defendants lost two of every three cases, and Indians lost four of five.

But in the area of sexual harassment, the justices enlarged the individual rights of workers, male and female.

First, in a unanimous opinion, the justices authorized same-sex lawsuits, saying that harassment can be illegal even when men abuse men or women mistreat women.

Congress probably didn't have male-on-male sexual harassment in mind when it wrote the law that bars employment discrimination, Title VII of the Civil Rights Act of 1964.

But Justice Antonin Scalia, who rarely is willing to extend the reach of a statute, explained for the court that laws "often go beyond the principal evil to cover reasonably comparable evils."

On Friday, in two 7-2 decisions, the court enlarged the rights of victimized employees to win damages from their employers for sexual mistreatment by supervisors. It was a new application of the ancient rule that masters are legally responsible for the acts of servants, unless the servants veer off "on a frolic of their own."

As a result, employees can file harassment suits even if they haven't been fired, demoted, transferred to some undesirable outpost or suffered some other tangible job detriment.

But on this court, majorities can't be created by taking extreme positions, and so the court devised a defense for employers in suits filed by employees who haven't suffered adverse job consequences. Employers can win such suits if they have an effective anti-harassment policy and complaint procedure that the employee unreasonably failed to take advantage of.

The defense is likely to motivate employers to crack down on harassment if they haven't done so already.

For parents of students who are victims of sexual harassment by teachers or other school personnel, the news was not good.

In a 5-4 decision last week, the court's conservatives ruled that students can't win damages from school districts unless they can jump a high legal hurdle: produce proof that some district official knew of the misconduct but did nothing about it.

To some critics, there is a double standard here. The law, as handed down by the Supreme Court, gives harassed workers a right to sue that it denies to more vulnerable student-victims.

The conservatives' explanation: The law barring sex discrimination in schools that received federal funds, Title IX of the Education Amendments of 1972, provides narrower protections than the civil rights law governing bias in employment, Title VII.

Justice Sandra Day O'Connor described Title IX as an administrative law designed primarily to inform school officials of violations, give them a chance to correct the problems and withdraw federal funds if they don't.

The split in the school case, in which a teacher sexually exploited a 15-year-old girl, was ideologically pure.

Five conservatives— Chief Justice William Rehnquist, Scalia, Clarence Thomas, O'Connor and Anthony Kennedy— voted to limit the liability of the school districts.

The four liberals— John Paul Stevens, Stephen Breyer, Ruth Bader Ginsburg and Souter— sided with the girl and her parents.

"Kennedy is still the most critical vote on the court in close cases," said Tom Goldstein, a Washington lawyer who tracks the alignments of the Supreme Court justices. "He voted in dissent only six times during the term."

That means, Goldstein said, that Kennedy was in the majority in 85 of the court's 91 decided cases in 1997-98, more than any other justice.

The next-most important justices in close closes, Goldstein said, were O'Connor and, somewhat surprisingly, Rehnquist. They dissented 11 times each. "The chief was more in the middle of the court than he has been in the past," Goldstein said.

But the biggest change in alignments during the term, he said, was that Scalia and Thomas, the court's rarely divided arch-conservatives, parted ways in close cases.

Goldstein said they had always voted together in 5-4 cases in the past, but this term they voted differently in four of them. The cases concerned guns, excessive fines, deportation and double jeopardy.

In one of those cases, Thomas joined the liberals for the first time, in a 5-4 case in which he wrote a majority opinion that struck down a government-proposed forfeiture as excessive for the first time in the court's history.

Still, Scalia and Thomas agreed completely or partly 88 percent of the time, second only to the 90 percent pairing of Kennedy and Rehnquist.

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THE SUPREME COURT: THE WORKPLACE; COURT SPELLS OUT RULES FOR FINDING SEX HARASSMENT

The New York Times

June 27, 1998, Page A1

By Linda Greenhouse

The Supreme Court clarified the law on sexual harassment in the workplace today, making some lawsuits against employers easier to win while limiting the legal exposure of companies that have effective anti-harassment policies in place.

The pair of 7-to-2 decisions, issued on the final day of the Court's term, cut through a thicket of confusing and contradictory lower-court rulings that had grown up in the 12 years since the Justices first ruled that sexual harassment was a form of employment discrimination.

Among the Court's holdings was that an employee who resists a supervisor's advances need not have suffered a tangible job detriment, like dismissal or loss of a promotion, to be able to pursue a lawsuit against the company. But such a suit cannot succeed, the Court said, if the company has an anti-harassment policy with an effective complaint procedure in place and the employee has unreasonably failed to use it.

The rulings won praise across a broad spectrum of both management and civil rights groups for bringing coherence to the law and providing incentives for preventing harassment and dealing promptly with problems.

"It's a win-win for employers and for all the women of America," Kathy Rodgers, executive director of the National Organization for Women Legal Defense and Education Fund, said in a comment virtually echoed by a lawyer for the United States Chamber of Commerce.

"The Court responded to our cries in the wilderness for clear, bright-line standards so employers will know what to do," Robin Conrad, senior vice president of the chamber's legal arm, said in an interview.

Ms. Conrad called the rulings "fair and reasonable."

Taken together, the two decisions had an almost legislative sweep, establishing clearly defined rights and responsibilities for companies and their employees. Both were interpretations of Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in the workplace.

One of the decisions awarded judgment to a former lifeguard who sued the City of Boca Raton, Fla., for failing to protect her from years of harassment by her supervisors. The other made a large corporate employer presumptively liable for a supervisor's harassment of a lower-level employee— although the woman in fact received a promotion— but gave the company a new chance to show in its defense that it had a good complaint policy in place that the plaintiff did not use.

This second case, Burlington Industries Inc. v. Ellerth, No. 97-569, was being closely scrutinized today as offering a potential clue to the future of the Paula Corbin Jones sexual harassment lawsuit against President Clinton. A Federal district judge in Little Rock, Ark., dismissed that suit in April, based in part on precedent in the United States Court of Appeals for the Eighth Circuit, which covers Little Rock, that made proof of a "tangible job detriment" a necessary element of a harassment claim of the type Ms. Jones brought against Mr. Clinton. She has appealed to the Eighth Circuit seeking reinstatement of her lawsuit.

While the decision today invalidated the circuit's precedent, the ruling will not necessarily affect the outcome of Ms. Jones's appeal. In dismissing the suit, Judge Susan Webber Wright found that Ms. Jones could not prevail under any legal standard because she had offered no evidence that Mr. Clinton had threatened her with job-related consequences.

The decisions today in both the Burlington Industries case and the lifeguard's lawsuit, Faragher v. City of Boca Raton, No. 97-282, were supported by the same group of Justices. Justice Anthony M. Kennedy wrote the Burlington decision, and Justice David H. Souter wrote the Boca Raton decision. Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, Ruth Bader Ginsburg and Stephen G. Breyer also voted in both majorities. Justices Clarence Thomas and Antonin Scalia dissented in both cases.

Earlier Supreme Court decisions had concerned themselves principally with defining sexual harassment and had spoken only vaguely on the crucial question of how an employee, experiencing harassment by a supervisor, can make the company legally responsible. Without employer liability, there is no action under Title VII, which refers to the "terms, conditions or privileges of employment."

Previous decisions had established that an employee who suffered a job-related injury from resisting a supervisor's "quid pro quo" demand for sexual favors had a legal cause of action against the employer, and that rule was reinforced today.

"A tangible employment decision requires an official act of the enterprise, a company act," Justice Kennedy said in the Burlington case.

But the law was much less clear in two other situations: when an employee was forced to endure a sexually hostile environment, as in the Boca Raton case, where no specific demand was made but where unwanted touching and crude remarks were pervasive over a long period; and when demands were resisted but no job detriment ensued, as in the Burlington case.

The lower Federal courts had become entangled in a maze of inquiries about whether supervisors in these situations could be described as acting within the scope of their official authority or, if not, whether the employer could be held responsible for a supervisor's unauthorized search for personal gratification. In the Boca Raton case, for example, the United States Court of Appeals for the 11th Circuit, in Atlanta, had ruled that the two supervisory lifeguards who harassed Beth Ann Faragher were not acting within the scope of their employment and that the city thus was not responsible for their actions.

Further adding to the confusion, the lower courts disagreed on whether to hold an employer responsible only if high-level officials "knew or should have known" of the harassment— a negligence standard that is difficult for plaintiffs to meet— and also on the extent to which a published anti-harassment policy should immunize a company from liability.

In their opinions today, Justices Souter and Kennedy said the effort to draw neat boundaries around categories of harassment or aspects of supervisors' behavior had proven unsuccessful. The distinction between a "quid pro quo" case and a "hostile work environment" case was of "limited utility," Justice Kennedy said. He said it was necessary to step back and examine the "basic policies" underlying Title VII, which he said included "encouraging forethought by employers" as well as actions by employees to mitigate harm to themselves.

As a result, both decisions incorporated an identical, page-long set of rules under which harassment cases are to proceed. The rules establish the following:

- Employers are responsible for harassment engaged in by their supervisory employees.

- When the harassment results in "a tangible employment action, such as discharge, demotion or undesirable reassignment," the employer's liability is absolute.

- When there has been no tangible action, an employer can defend itself if it can prove two things: first, that it has taken "reasonable care to prevent and correct promptly any sexually harassing behavior," such as by adopting an effective policy with a complaint procedure, and second, that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities" provided.

Applying this framework in the Burlington case, the Court said that the plaintiff, Kimberly Ellerth, should have a chance at trial to prove her case and that, at the same time, the company should have the chance to assert a defense. The decision affirmed a ruling by the United States Court of Appeals for the Seventh Circuit, in Chicago, which had found Ms. Ellerth entitled to a trial.

In a dissenting opinion in the Burlington case, Justice Thomas said employers should face liability only for their own negligence. His opinion, which Justice Scalia also signed, accused the majority of "willful policymaking, pure and simple," under which "employer liability very well may be the rule."

Several lawyers said today that future cases would be needed to elaborate on what employers need to do to make their anti-harassment policies effective. Eric Schnapper, a civil rights expert at the University of Washington Law School, said the greatest impact of the rulings would be to change the employer's incentive system from one of "don't ask, don't tell to having proven and effective policies in place."

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HIGH COURT DRAWS LINE ON SEXUAL HARASSMENT; EMPLOYERS HELD LIABLE; SUIT THRESHOLD EASED

The Washington Post

June 27, 1998

By Joan Biskupic, Washington Post Staff Writer

Employers are responsible for the sexual misconduct of supervisors, even if they knew nothing about the behavior, the Supreme Court ruled yesterday. The decision sets a strict new standard for harassment on the job and raises the stakes for companies accused of permitting it in their workplaces.

By 7-to-2 votes in a pair of cases on the last day of the term, the justices made clear that workers need no longer prove that an employer knew or should have known about the sexual harassment and failed to stop it. And victims do not necessarily have to show that they lost out on a promotion or were fired because they spurned a boss's sexual advances; if the boss's threats and other abuse were severe or pervasive, that's enough basis for a lawsuit.

Yesterday's twin rulings were among the most awaited in a term full of controversial decisions, from one making clear the balance of spending power between Congress and the president to another ensuring that people with the AIDS virus are protected by disabilities law.

Yet no other term in history has produced so many rulings on the topic of sexual harassment. And the combined effect of those decisions yielded an unequivocal message to American business: Sexual misconduct is to be taken seriously and any company that doesn't can
expect to pay a price.

"It is by now well recognized that . sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace," Justice David H. Souter wrote in one of the rulings, adding that an employer's burden of preventing harassment is "one of the costs of doing business." Justices Clarence Thomas and Antonin Scalia joined in a strong dissent.

The high court's focus on sexual harassment comes at a time when the subject is at the forefront of public awareness, ignited most recently by the charges of President Clinton accuser Paula Jones and reinforced by record court settlements, such as the $34 million Mitsubishi Motors payment to female workers at its Illinois factory.

The number of sexual harassment claims has been soaring for nearly a decade, since 1991, when Anita Hill charged that she had been harassed by Justice Thomas while he was chairman of the agency that investigates harassment claims. That same year, Congress first allowed money damages for harassment victims.

In the intervening years, the financial stakes have risen significantly for companies, and yesterday's rulings could prove to be another benchmark.

Women's rights advocates praised the decisions for giving employers the responsibility for eliminating harassment. "The court said the 'hear no evil, see no evil' defense won't work," said Kathy Rodgers, executive director for the NOW Legal Defense and Education Fund, which represented a former lifeguard who sued the city of Boca Raton, Fla., for the harassment she endured.

Business groups, while protesting portions of the decisions, said they were gratified— after years of conflicting lower court standards— to get clear guidelines.

Ann Elizabeth Reesman of the Equal Employment Advisory Council, which sided with Boca Raton, said the court decisions "support the employer who takes proactive steps to fight sexual harassment, such as with an accessible complaint procedure."

The court ruled that employers can be held outright responsible for any harassment by a supervisor that leads to a tangible job consequence. But the justices established a two-part test for determining liability when the harasser warned a victim of job consequences for refusing to submit, but then never carried out the threat.

In those cases, the majority said an employer would have to show that it used "reasonable care" to prevent and promptly correct any sexually harassing behavior. And second, it must show that the worker unreasonably failed to prevent or correct the harm, for example, by complaining to officials.

In the Boca Raton case, Beth Ann Faragher was a lifeguard who said two of her supervisors harassed her by slapping her on the rear, tackling her to the ground and making vulgar comments. She never complained to management, but sued for harassment.

A federal district court ruled that the harassment was sufficiently serious and met the test for discrimination under Title VII of the 1964 Civil Rights Act. But a federal appeals court reversed the ruling, saying an employer was liable only if it had given the supervisor authority to harass. Other appeals courts had ruled that employers would be liable if they were negligent in permitting the supervisor's conduct to occur.

Yesterday, in setting a new national standard, the Supreme Court lowered the bar for workers and said an employer is responsible for supervisors' misconduct in situations such as Faragher's that constitute what is known as a "hostile work environment," or for misconduct carried out by co-workers and supervisors that is severe or pervasive.

Lower courts already had been in virtual agreement that employers are automatically liable for supervisor harassment known as "quid pro quo," in which a boss typically links requests for sexual favors

with some job consequence. Yesterday, the justices said employer liability should be the same for the two kinds of cases, partly because employers should anticipate such misconduct and try to prevent it.

"When a person with supervisory authority discriminates , his actions necessarily draw upon his superior position over the people who report to him," Souter wrote for the majority in Faragher v. City of Boca Raton, adding that "an employee generally cannot check
a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor. . . "

In their dissent, Thomas and Scalia said employers should be liable only if the employer was negligent in letting the harassment occur. They complained that the new rule was "a whole-cloth creation."

The companion case was first filed by Kimberly Ellerth, a marketing representative for Burlington Industries in Chicago. A boss told her suggestively, "I could make your job very hard or very easy," asked her to wear shorter skirts and touched her inappropriately. Ellerth did not submit and did not lose her job or a promotion. But after she quit she sued.

In an opinion by Anthony M. Kennedy, the court ruled that harassment victims need not show an obvious job consequence. But it said in Burlington Industries v. Ellerth that if there is no clear job loss, the employer can overcome liability by showing that it took reasonable care to prevent and correct harassment and that the employee herself failed to take reasonable steps to either prevent or stop the harassment.

Although the abuse both women endured was similar in some respects— both said bosses touched them inappropriately, for example, and neither complained— each came to the court by different avenues and presented separate legal questions. In the end, the justices set aside the differences to broadly address an employer liability.

To many women's rights advocates, the decisions combined with a ruling on Monday set up an unfair double-standard, allowing adult workers to sue for harassment more readily than students— who presumably would need more protection.

The court said a school district could not be liable for harassment unless it knew of the abuse and was deliberately indifferent to it. That narrow majority justified the standard by
noting that, unlike Title VII's outright prohibition on harassment, the law forbidding sex discrimination at schools that receive federal funds (known as Title IX) is based on the idea that school officials will be notified of problems and allowed to try to correct them.

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SEX HARASSMENT AND DOUBLE STANDARDS

The New York Times

June 30, 1998

Section A; Page 23; Column 1; Editorial Desk

By Marcia D. Greenberger and Verna L. Williams

When is a victim of sexual harassment not a victim of sexual harassment? When the victim is a student, according to several decisions by the Supreme Court this term. Indeed, the Court's rulings inadvertently created two classes of citizens: employees, who are protected from sexual harassment, and students, who are not.

In a victory for employees, the Court, in a pair of 7-to-2 decisions, ruled that employers could be held financially responsible when supervisors sexually harassed workers, whether or not the employer actually knew about the harassment.

Indeed, the Court ruled that under Title VII, the Federal law prohibiting workplace discrimination, an employee who resisted a supervisor's advances need not have suffered any kind of tangible loss, like dismissal or loss of a promotion, to be able to file a lawsuit against her company. Instead, when the harassment does not result in any loss, but causes emotional distress or other injury, then the employer must show that it had strong policies and procedures in place, that employees were informed about these policies and that the employee had unreasonably failed to use it.

Under this sound decision, if a teacher harasses an assistant, and the school system fails to respond, then it can be held liable.

But what happens to a student harassed by a teacher? In Gebser v. Lago Vista Independent School District, the Court ruled 5 to 4 that schools or colleges do not have to pay damages for harassment of a student by a teacher unless officials specifically knew about the misconduct and responded with "deliberate indifference." It does not matter whether the school system had any policies or procedures in place or whether it did anything at all to combat harassment.

This decision creates an incentive for school officials to turn their backs on the most egregious instances of harassment like sexual assault. Officials need only insulate themselves from being informed and claim ignorance.

Why would the Court make this distinction between students and employees? Students fall under Title IX, the Federal law that prohibits sex discrimination in education. Title IX, unlike Title VII, has

no specific language allowing students to sue and win damages from lawsuits— even though the Court had previously ruled that Congress intended such remedies.

The majority instead said that students were covered by another remedy under Title IX: schools can be sanctioned by the Education Department, which is authorized to investigate sexual harassment complaints and, if justified, to halt Federal financing if a school persists in allowing such harassment.

Thanks to the Education Department's efforts, many schools have complied with Title IX. But this cannot be the only remedy. The Government has limited resources and many civil rights obligations extending far beyond harassment. It cannot possibly pursue every harassment complaint. And even if the Government investigates a complaint— and a school adopts procedures to insure that complaints are addressed promptly— that does little to compensate a student for the injury he or she suffered.

Now, the Government's job might be even harder, since the Court's decision has created a financial incentive for schools to hide harassment. Many schools will wait to be caught before coming into compliance with the law.

The Supreme Court has ruled, and now Congress must step in. Working with the Clinton Administration, it should define Title IX as explicitly allowing students who have been harassed to sue their schools and to win damages. Justice requires no less.

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DISABILITY LAW COVERS H.I.V., JUSTICES HOLD; 5-4 Ruling Gives Protection Before AIDS Develops

The Washington Post

June 26, 1998, Pg. A01

By Joan Biskupic; Amy Goldstein, Washington Post Staff Writers

Americans with the AIDS virus won an important victory yesterday in their struggle for recognition, as the Supreme Court made clear for the first time that they are protected from discrimination under the nation's disabilities law from the moment they become infected.

In a closely divided, 5 to 4 decision, the court ruled that all people who are HIV-positive, even those with no overt symptoms of the deadly disease, fall within the shelter of the Americans with Disabilities Act, the landmark federal law that prohibits discrimination in jobs, housing, medical care and other places that serve the public.

The decision represents the high court's first ruling on an issue related to AIDS and its first major interpretation of the 1990 disabilities law. Influential as it may prove in the lives of people with HIV, the opinion could have an even more far-reaching effect by broadening the grounds on which Americans may claim to be disabled, according to legal experts familiar with the case.

Seventeen years into the AIDS epidemic in the United States, the decision on HIV, coming from a generally conservative court, is a striking mixture of compassion and precise clinical understanding about a disease that often has been highly stigmatizing.

"It reflects that this country has come a long way from moving from simple fear of this disease to a more realistic understanding," said Chai Feldblum, a Georgetown University law professor who filed a brief on behalf of AIDS activists, gay rights advocates and other civil rights organizations.

AIDS activists predicted yesterday that the decision, involving a Maine woman whose dentist refused to fill her cavity unless she paid to have it done in a hospital, could have a beneficial effect on public health. Some predicted, for example, that it could encourage more people to get tested for the disease, secure in the knowledge that, even if they turn out to be HIV-positive, they no longer risk losing their jobs, homes or medical care.

Some activists said the decision also may provide them greater leverage in trying to persuade the federal government to enable HIV-infected people to qualify for Medicaid, the government health insurance program for the poor. Right now, only people with full-blown AIDS are covered. But if the definition of disability under that law were changed to include those who are simply HIV-positive, it

could enable more people to afford new classes of medications that can help many remain healthier for a longer period.

Between 400,000 and 650,000 Americans are infected with the human immunodeficiency virus (HIV), but are not sick enough to qualify as having AIDS, according to the most recent estimates of the federal Centers for Disease Control and Prevention. It is unclear how many of those people are symptom-free -- the group directly affected by the court's ruling.

Until now, lower courts have consistently held that the disabilities act covered people with full-blown AIDS. As a result, coverage for that group was not in dispute. What the high court did yesterday, in Bragdon v. Abbott, was establish that Sidney Abbott was covered, too, even though she had no outward evidence of her infection. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Justice Anthony M. Kennedy, who wrote the majority opinion, was pivotal to the case's outcome, siding with the court's four more liberal members. He said it was a "misnomer" to refer to HIV as asymptomatic even in its early stages.

"In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease," Kennedy wrote, "we hold it is an impairment from the moment of the infection."

Kennedy went on to say that Abbott's attorney, Bennett H. Klein, was correct in saying his client was impaired on the grounds that she could not, in good conscience, reproduce because she might transmit the virus to a fetus. "Reproduction and the sexual dynamics surrounding it are central to the life process itself," Kennedy said. "Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health."

In deciding that reproduction is grounds for a disability— and thus may not be discriminated against— the court may have made it easier for women to win insurance coverage for birth control or treatment for infertility, said Simon Heller, litigation director for the New York-based Center for Reproductive Law and Policy.

"It's anybody's guess how far [employers] can be pushed," said Ann Reesman, a spokeswoman for the Equal Employment Advisory Council, a group of 300 large businesses that sided with dentist Randon Bragdon in the case. She cited the recent example of a television station news anchor who had contended that she ought to be let out of broadcasts that conflicted with her fertility treatments. "You can't exactly move the news," Reesman said.

Bragdon, who refused to fill Abbott's cavity in his office in 1994, had argued that the ADA was intended to apply to impairments of more routine activities, such as one's ability to see, breathe or walk.

John McCarthy, Bragdon's attorney, had also argued that his client could legally refuse to treat Abbott under a provision of the ADA that allows health care providers to turn patients away if treating them posed a risk to the doctor's health. The court said Bragdon must return to lower courts if he wants to prove he faced such a risk.

The court's decision ratified the long-standing position of the Justice Department, which has regarded the AIDS virus, even among people without symptoms, as grounds for discrimination complaints under disability law. But relatively few people have pursued such cases. The department's civil rights office currently has 67 active cases involving discrimination complaints by HIV-infected people, 15 of them resembling Abbott's case in that they involved denial of health care services.

But despite the Justice Department's position, discrimination has persisted. In one recent instance, a Beloit, Wis., day-care center refused to accept a 4-year-old boy who was HIV-infected but had no symptoms. In another case, a professor at Northeastern University in Boston went to court, contending that he had been denied tenure because he, too, was HIV-positive.

By cementing that the ADA applies in such cases, yesterday's decision is "the most important legal victory for people with HIV in the history of the epidemic," said Daniel Zingale, executive director of AIDS Action, a leading advocacy group.

Dissenting justices said that a person's claim of a disability should be evaluated on an individual basis and that Abbott had not shown she was impaired in a major life activity. Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, said reproduction does not rise to the level of major daily activities that Congress had intended to be included under the ADA.

Justice Sandra Day O'Connor wrote separately that "the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons."

But Georgetown's Feldblum praised the majority, saying "there is now a confluence of law and medicine that can be very powerful."

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DISABILITY OF LOGIC

The Recorder

July 15, 1998, Pg. 5

By Chai Feldblum

On June 25, the U.S. Supreme Court properly found that a woman infected with the human immunodeficiency virus, the virus that causes AIDS, is a person with a "disability" under the Americans with Disabilities Act. But the decision— *Bragdon v. Abbott*— was more complicated than it needed to be. In the court's contorted statutory maneuvers, *Bragdon* all too accurately reflected the current state of litigation under the ADA.

When Sidney Abbott sought dental treatment, Dr. Randon Bragdon informed her that his policy was to fill the cavities of HIV-infected individuals only in hospital settings and not in his dental office. Abbott would be required to travel to the hospital and pay the hospital fee, in addition to the dentist's fee. She chose instead to bring suit, charging discriminatory treatment under the ADA. Abbott's argument was that the American Dental Association and public health authorities had previously advised that HIV-infected patients could be treated safely in dental offices and, thus, she deserved treatment comparable to that afforded other patients.

Abbott was granted summary judgment at the district court level. The court ruled that she was a person with a disability under the ADA because her HIV infection substantially limited her in the major life activity of reproduction, and that Dr. Bragdon had no objective basis for believing that treating her in his office would pose a "direct threat" to himself— a defense under the ADA for refusal to provide services to a person with a disability. The First Circuit U.S. Court of Appeals affirmed on the same bases.

OBJECTIVE BASIS REQUIRED

One of the questions presented to the Supreme Court was whether Bragdon's belief that Abbott could be treated safely only in a hospital setting should be given deference in deciding whether he had subjected Abbott to discriminatory action. Five members of the court, in an opinion written by Justice Anthony Kennedy, concluded that health care professionals must assess the risk of infection based on "objective, scientific information," and that Bragdon's "belief that a significant risk existed" would not relieve him from liability. But because at least three justices in the majority were unsure whether the First Circuit had correctly assessed the evidence on this question, the case was remanded for a second evaluation.

What Justice Kennedy spent the bulk of his analysis on was the threshold question: Was Sidney Abbott a person with a "disability" under the ADA who had standing to challenge the alleged

discriminatory treatment? Kennedy's opinion thus reflected a consistent trend in ADA litigation, in which energy, effort and pages of printed words are expended on the basic question of whether the plaintiff is a person with a "disability" under the law.

To AIDS, disability and civil rights advocates who worked for passage of the ADA, the fact that the Supreme Court was asked whether people with HIV infection were covered under the 1990 law bordered on the bizarre. If there was one medical condition these advocates had to know was covered, it was AIDS and HIV infection. The Presidential Commission on the HIV Epidemic had called for a law to protect people with AIDS and asymptomatic HIV infection, and those recommendations were consistently repeated by members of Congress supporting the ADA.

Other members railed against the fact that people with AIDS and HIV infection were covered. And the final four months of consideration of the ADA were dominated by tense negotiations and lobbying on one provision which would have allowed restaurant owners to transfer people with HIV infection out of food-handling jobs. Following dramatic meetings and intense Senate hallway negotiations, that provision was ultimately modified to apply only to people whose communicable diseases could be transmitted through the food supply— a list that did not include HIV

Why, these advocates wondered, was the Supreme Court now being asked whether people with HIV infection were covered under the ADA? If they had not been covered (for example, if only people with AIDS had been covered), most of the drama surrounding the food-handler amendment would have been beside the point.

OTHERS SIMILARLY BEMUSED

Other observers were similarly bemused by the *Bragdon* case, but for different reasons. These onlookers found it difficult to decipher why reproduction appeared to be a central focus of the case. Laypeople and lawyers alike found it hard to grasp how Sidney Abbott's decision not to bear children had any relevance to Dr. Bragdon's decision not to treat her cavity in his office. Bragdon never inquired into Abbott's life in any detail. He came into possession of one simple fact— that she was HIV-infected— and then conveyed his policy that he would not treat her in his office.

The fact that the Supreme Court ultimately ruled by only a narrow margin, 5-4, that Abbott was covered under the ADA, and the fact that reproduction became a central focus of the case, reflects two simple truths. The first is that statutory text matters, and the text of the ADA requires that a person with a "disability" be an individual who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. 12102(2). The second is that statutory text can sometimes be made to matter too much and can force courts into contortions of language and logic that belie the purpose of the underlying law.

The crux of Justice Kennedy's majority opinion is a stolid, basic interpretation of statutory text. In a remarkably accessible primer, Kennedy describes the course of HIV infection so as to demonstrate that AIDS meets the requirement of being a "physical impairment" during every stage of the disease. Kennedy

then systematically addresses the additional statutory requirement that the physical impairment substantially limit a major life activity.

In an interesting and important aside, he first expressly acknowledges that Abbott and several of the *amici* argued that HIV infection has a profound impact on almost every phase of an infected person's life. Although conceding that it might seem "legalistic" to focus solely on reproduction, Kennedy then justifies his narrow focus on the grounds that the courts below treated reproduction as the major life activity limited by Abbott's impairment.

SEXUALITY IS CENTRAL TO LIFE

Justice Kennedy's discussion of the statutory standard of a "major" life activity is itself brief and uncomplicated. He concludes that the term "major" encompasses any activity that is significant, and that " reproduction and the sexual dynamics surrounding it are central to the life process itself."

Kennedy goes to greater lengths to explain how HIV infection substantially limits this life activity. HIV infection limits the individual's ability to reproduce, he explains, because a person infected with HIV who attempts to conceive imposes on his or her mate a significant risk of becoming infected, and because an infected woman risks infecting the baby during gestation and childbirth. Because the statutory text requires only that a major life activity be substantially limited, and not that it be utterly impossible, Kennedy concludes that conception and childbirth are substantially limited for a person with HIV infection.

Following this textual analysis, Justice Kennedy explains that his holding is "confirmed" by a consistent course of agency and judicial opinion that established coverage of HIV infection under the definition of "handicap" for purposes of 504 of the Rehabilitation Act of 1973— the federal law on which the ADA was expressly modeled. Kennedy notes that his conclusion is "further reinforced" by the administrative guidance issued by various federal agencies subsequent to the ADA, including that of the Department of Justice and the Equal Employment Opportunity Commission, in which individuals with HIV infection are presumed to be covered.

The dissenting opinion, written by Chief Justice William Rehnquist and joined by Justices Antonin Scalia and Clarence Thomas, does not address at all the legal landscape that existed when Congress passed the ADA or the subsequent agency interpretations of the ADA Instead, the dissent argues that every plaintiff must prove that a particular life activity was major for her, and that the impairment resulted in a substantial limitation of that life activity for her. As far as Rehnquist is concerned, Abbott presented no evidence that reproduction was a major activity for her prior to becoming infected with HIV

REPRODUCTION NOT A MAJOR ACTIVITY

Moreover, according to Rehnquist, reproduction is not a major life activity, as conceived of under the statutory text. Drawing on the illustrative list of major life activities noted in agency ADA regulations (which include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking,

breathing, learning and working), Rehnquist concludes that " fundamental importance . is not the common thread linking the statute's sic listed activities," but rather the fact that the activities are "repetitively performed and essential in the day-to-day existence of a normally functioning individual." These activities are quite different, according to Rehnquist, from reproduction.

Rehnquist also faults Abbott for not explaining how her HIV infection makes her "less able" to engage in the activity of reproduction. The fact that the fatal nature of HIV infection would result in Abbott's being unable to care for her child in the long term is irrelevant, explains Rehnquist, because the statutory text is focused on the present: an impairment that substantially limits (present tense) a major life activity. Abbott's argument, charges Rehnquist, "taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects."

The majority and the dissent in *Bragdon* thus fight on the same battleground: the meaning of "disability" under the ADA. The majority commands five votes in this fight, the dissent commands four. (Justice Sandra Day O'Connor filed a separate dissenting opinion, curtly and dismissively concluding that while the act of giving birth is very important to many women, it is not generally the same as the representative major life activities listed in the ADA regulations.) But the irony is that the very existence of this battlefield was not apparent to the Congress that passed the ADA.

EXTENDING THE REHAB ACT

During passage of the ADA, little, if no, attention was paid by the lawmakers or the advocates to what life activities were "major," or how particular impairments "substantially limited" those activities. The reason for this lack of attention was simple. Congress understood the ADA as merely extending to the private sector 504 of the Rehabilitation Act, the law that for 15 years had prohibited federal fund recipients from discriminating on the basis of handicap. Indeed, Congress used the definition of "handicap" applicable to 504 as its definition of "disability" for purposes of the ADA. And under 504 case law, the battlefield on which the *Bragdon* opinion was waged hardly existed.

Under the 504 definition, individuals with a range of significant medical conditions had been held by federal courts to be handicapped. The conditions covered included vision in one eye, depressive neurosis, epilepsy, congenital limb deficiency, multiple sclerosis, AIDS and HIV infection, cerebral palsy, limited mobility of arm and shoulder, learning disabilities, diabetes, heart disease, asthma, hepatitis B carrier, sterility, asbestosis, Crohn's disease, alcoholism, and drug addiction. The range of conditions covered under 504 was so broad that one of the main arguments presented by the National Federation of Independent Businesses against the ADA was that it would cover more than 900 different medical conditions.

One of the most fascinating aspects of judicial decisions under 504, however, was that courts rarely analyzed how a particular medical condition met the statutory requirement of being a physical or mental impairment that " substantially limited" a "major life activity." Agency regulations for 504 implied that the statutory requirements were designed primarily to exclude trivial impairments, such as infected fingers

or a common cold. Thus, as long as a stated impairment seemed relatively serious, courts rarely scrutinized (and lawyers rarely challenged) whether the impairment "substantially limited" a life activity that was sufficiently "major."

AN INTERESTING TWIST

Given this backdrop of 504 case law, Congress assumed that the same broad range of medical conditions would be covered under the ADA's definition of " disability," and that non-meritorious cases would be dealt with in a similar manner. Instead, an interesting twist developed. In almost all ADA cases, defense lawyers began claiming not only that their clients had not discriminated on the basis of the plaintiff's disability (or had engaged in justified discrimination based on disability), but also that the plaintiff did not even have a disability for purposes of the ADA. And in non-meritorious cases, courts consistently began to adopt a stringent reading of the statutory definition to conclude that individuals with conditions ranging from breast cancer to epilepsy to diabetes to HIV infection were not persons with disabilities under the law because they were not "substantially limited" in some "major life activity."

This trend soon dominated ADA jurisprudence. In 1997, the editors of the *National Disability Law Reporter* surveyed all ADA cases brought in 1995 and 1996 and found that in 110 cases the question had been raised as to whether the plaintiff met the definition of disability under the ADA. In only six of these cases had the judges definitively found that the plaintiff met the definition.

The court's opinion in *Bragdon v. Abbott* will, in all likelihood, result in lower courts systematically finding that plaintiffs with HIV infection are covered under the ADA. Some of these courts will hold that a person with HIV infection is limited in the life activity of reproduction; others will adopt Justice Kennedy's acknowledgment that HIV infection also substantially limits other major life activities because, in the words of Justice Ruth Bader Ginsburg's concurrence, it "inevitably pervades life's choices."

The unanswered question is whether the Supreme Court's opinion will also influence lower courts to hold that the broad range of medical conditions that were covered under 504 are similarly covered under the ADA. Both the lower courts and the Supreme Court would do well to pay closer attention to what Congress intended to cover in the words it adopted, and to do justice in interpreting those terms.

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TO INCUR LIABILITY, ACTIONS MUST 'SHOCK THE CONSCIENCE'

The National Law Journal

June 8, 1998

Police officers who cause accidents that kill or hurt others, even innocent bystanders, during a high-speed pursuit of a criminal suspect are not liable unless their actions "shock the conscience," the U.S. Supreme Court ruled May 26. Sacramento County v. Lewis, 96-1377.

The decision unanimously rejected a less protective standard that would have made police liable if they showed a "reckless disregard for life."

Justice David H. Souter wrote for the court that police are entitled to considerable protection for the "split-second judgments" their work demands. "A police officer deciding whether to give chase must balance on the one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers or bystanders," he said. The majority added: "Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due-process violation."

Chief Justice William H. Rehnquist and justices Anthony M. Kennedy and Stephen G. Breyer filed concurring opinions. Justices John Paul Stevens and Antonin Scalia wrote opinions concurring in the judgment, and Justice Clarence Thomas joined Justice Scalia's opinion.

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SCALIA MOCKS INCONSISTENT HIGH COURT

The Montgomery Advertiser

June 20, 1998

Editorial; Pg. 10A

By James Kilpatrick

Over the mocking concurrence of Justice Antonin Scalia, the Supreme Court last month extended constitutional protection to police officers who engage in high-speed chases. The court's decision made sense as a practical matter, but it plainly caused discomfiture on the bench.

The facts were never in dispute. On an evening in May 1990 in Sacramento County, Calif., Deputy Sheriff James Everett Smith attempted to stop a motorcycle driven by Brian Willard, 18. His passenger was Philip Lewis,16.

When Willard failed to stop, Smith and a fellow deputy pursued. The 75-second chase ended when Willard failed to make a sharp left turn. Lewis was thrown free. The pursuing patrol car skidded into the youth. He died at the scene.

Lewis' parents brought suit. They won in the lower courts, but on May 26 the Supremes reached a unanimous conclusion: The deputies had not violated young Lewis' constitutional rights.

Justice David Souter spoke for the high court, but the court's voice suffered from laryngitis. There were five concurring opinions. Souter held that the correct test of due process is whether the state's conduct "shocks the conscience." In the case at hand, his own conscience was not shocked. Souter explained:

"Smith was faced with a course of lawless behavior for which the police were not to blame."

Chief Justice William Rehnquist laconically concurred. He agreed that "shocks the conscience," rather than "deliberate indifference" or "reckless disregard," is indeed the right test.

Justice Anthony Kennedy, joined by Justice Sandra Day O'Connor, said the shock-the-conscience test "must be viewed with considerable skepticism." The phrase "has the unfortunate connotation of a standard laden with subjective assessments." Even so, in circumstances such as these, the judicial conscience will not be shocked if "police conduct a dangerous chase of a suspect who disobeys a lawful command to stop when they determine it is appropriate to do so."

Justices Stephen Breyer and John Paul Stevens filed fussy concurring opinions of no particular moment. It remained for the irrepressible Scalia, concurring only in the judgment, to poke a sardonic stick in his colleagues' inconsistent eye.

It was just a year ago, he reminded them, that they had rejected the very reasoning that they now adopted. Then the court had spoken grandly of relying upon "our nation's history, legal traditions and practices" to direct and restrain their exposition of the due process clause. Now they had resorted to the highly subjective test of "shocks the conscience."

"Today's opinion resuscitates the ne plus ultra, the Napoleon Brandy, the Mahatma Ghandi, the Cellophane of subjectivity, th' ol' 'shocks the conscience' test."

The test that triggered Scalia's derision dates from a case in 1952 involving behavior by a government officer that was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Scalia scorned the notion. Rather than ask "whether the police conduct here at issue shocks my unelected conscience, I would ask whether our nation has traditionally protected the right that (Lewis' parents) assert."

THE STATES are free, said Scalia, to enact laws governing tort liability in cases of police pursuit, but for judges to overrule such democratically adopted acts on the ground that they shock THEIR consciences "is not judicial review but judicial governance."

My own view, often expressed, is that we live by a curious Constitution. Its chains are forged of rubber bands. We leave it to judges to decide what speech is "free," what searches are "reasonable," what laws are "appropriate." In the Sacramento case the high court has told us what conduct is "due." Like Scalia, I would concur in the justices' decision, but not in the evanescent path that led them there.

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MORE OF O'CONNOR'S MUDDLED MODERATION; MAJORITY OPINION ON ENDOWMENT FOR ARTS PLACATES BOTH SIDES

Fulton County Daily Report

July 8, 1998

Stuart Taylor Jr.

In terms of artistic merit, Justice Antonin Scalia's sizzling concurrence was the winner among the opinions accompanying the Supreme Court's June 25 decision upholding, sort of, a 1990 law that tells the National Endowment for the Arts to consider "general standards of decency" when it awards money based on artistic merit.

"Avant-garde artistes," Scalia wrote--with disdain for the lot of them, or at least for those who cry "censorship" while seeking handouts "remain entirely free to ipater les bourgeois; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it."

But at the court, the winning formula is neither artistic merit nor decency. It's getting five votes. Justice Scalia did not do that; his opinion-- stressing that Congress should be free to deny public money to artists who smear their naked bodies with chocolate or submerge crucifixes in urine--was joined only by Justice Clarence Thomas. Justice David Souter, who wanted to strike down the 1990 law, was alone in dissent.

Justice Sandra Day O'Connor, joined by her remaining five colleagues, wrote the opinion for the court in National Endowment for the Arts v. Finley, which sustained the statute--but only "by gutting it," in Scalia's view. O'Connor suggested that the 1990 law's constitutionality might be in doubt if (as both Scalia and Souter asserted) it did require "a penalty on disfavored viewpoints." She upheld it by straining to read it as "advisory," and thus largely toothless.

This was, in short, a classically O'Connoresque exercise in muddled moderation, lacking elegant analysis or memorable lines, and easily attacked as illogical from the pure, polar positions of Scalia and Souter.

The O'Connor opinion was also a pretty good outcome, however. It resolved an essentially symbolic skirmish in the culture wars by giving both sides something to crow about, while letting the NEA get back to its usually benign if boring business of financing the works of orchestras and the like.

From the right, House Speaker Newt Gingrich applauded the court for vindicating "the right of the American people to not pay for art that offends their sensibilities." From the left, the American Civil Liberties Union expressed relief that the court had rendered the law "essentially meaningless."

A judicial fudge that placates partisans on both sides is not a good thing, of course, if it sacrifices important constitutional principles to expediency. But it is a good thing when the court avoids a collision between two vital principles that can co-exist only if neither is carried to the limits of its logic.

The two principles at stake here are both woven deeply into our traditions and precedents. The first, honored by Scalia, is that in a democracy the people cannot, and in the long run will not, be taxed to subsidize "art"--or any other form of speech--that they abhor. The second, honored by Souter, is that the First Amendment bars all "viewpoint discrimination in the exercise of public authority over expressive activity."

This battle began in 1989, when Congress got into an uproar over two NEA grants that totaled $45,000. One went to Andres Serrano, whose "Piss Christ"--a photograph of a crucifix immersed in urine--enraged religious conservatives. The other helped finance an exhibit of the late Robert Mapplethorpe's stunningly rendered photographs of such homoerotic scenes as a man urinating into another's mouth.

Conservatives led by Sen. Jesse Helms, R-N.C., pressed for a ban on NEA funding of such "indecent" art. But others warned that this smacked of censorship, and avant-garde artists painted dark visions of oppression descending on the land.

The 1990 statute that resulted was a vague, watered-down compromise. It required the arts agency to consider "general standards of decency and respect for the diverse beliefs and values of the American public." But it stopped short of explicitly barring federal subsidies for any particular viewpoint, "indecent" or otherwise.

The NEA diluted the statute further, implausibly construing it as requiring no more than geographic, ethnic and aesthetic diversity on the agency's advisory panels. But the NEA also shied away from further support of art as inflammatory as that of Mapplethorpe and Serrano.

Four artists whose grant applications were rejected in 1990--after they had been blessed by an NEA advisory panel--sued the agency, asserting that they had been rejected for political reasons and that the 1990 law was unconstitutional. The name plaintiff was Karen Finley, a performance artist known for covering her body with chocolate (signifying excrement) to make a symbolic statement (she said) about abused women.

The crux of Justice O'Connor's holding was that the 1990 statute posed no "realistic danger to First Amendment values" because its "advisory" language did not "disallow any particular viewpoints," but rather merely specified that the "decency and respect" criteria were among the inherently subjective factors to be considered in the NEA's "assessment of artistic merit."

This was a deliberately cramped reading. But it draws plausibility from the legislative history. It also draws legitimacy from the court's long-standing practice of straining to read statutes narrowly if doing so is necessary to avoid potential constitutional problems.

The potential problem here, O'Connor noted, was posed by precedents holding that "even in the provision of subsidies, the government may not seek 'the suppression of dangerous ideas.' " She intimated that the court might bar any application of the 1990 statute that amounted to clear viewpoint discrimination. But she also hedged, by noting that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."

An ambiguous, inconclusive muddle? Yes--but one preferable to the sharp analytical extremes represented by Scalia and Souter. Both were cogent in stressing that the 1990 law was designed to require the NEA to discriminate against (although not to ban all funding of) disfavored viewpoints. But neither was entirely persuasive on the constitutional issue.

Justice Scalia was too facile in claiming that viewpoint discrimination "is perfectly constitutional" when it comes to endowment grants.

As a general proposition, government money must often be subjected to First Amendment strictures, given its massive role in the economy and in facilitating private speech-- whether by subsidizing university tuition, or by giving preferential postage rates to publications, or by providing parks and streets as public forums for protest marches.

And in Rosenberger v. Rector and Visitors of University of Virginia (1995), the court ruled that a state university that financed student publications violated the First Amendment right of free speech when it denied funding to otherwise qualified publications with religious viewpoints.

Scalia dismissed Rosenberger as irrelevant because the funding there was available on a nonselective basis to all student publications except religious ones, whereas the NEA is necessarily selective and must reject most applications for its scarce funds. But would Scalia uphold a state university subsidy scheme that, say, selectively supported publications deemed to exhibit editorial excellence, while excluding any that failed to display empathy for the radical feminist perspective? I don't think so.

Justice Souter, on the other hand, was kidding himself if he thought that barring any congressional deviation from viewpoint neutrality--and leaving it to the NEA to choose among competitors on the basis of "artistic merit"--would purge the process of viewpoint discrimination.

As Justice O'Connor noted, the 1990 statute seems unlikely to "introduce any greater element of subjectivity than the determination of 'artistic excellence' itself." At a time when much "art" exudes political messages and little else, assessments of "artistic merit" are often steeped in viewpoint discrimination. Karen Finley's chocolate-smeared performance may be a thing of beauty to those attuned to her message. But would the NEA advisory panelists who supported Finley also have gone to bat for a painter who used her technical virtuosity to preach that a mother's place is at home with her children? I don't think so.

The point is not that the one artist is better than the other. It is that the government cannot avoid a measure of viewpoint discrimination when it rewards "artistic merit." And that suggests that if government is to be a patron of the arts at all, the people's elected representatives are entitled to some say in what they will pay for.

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NEA LAW ON DECENCY IS UPHELD

The Boston Globe

June 26, 1998

Patti Hartigan, Globe Staff

By an 8-to-1 vote yesterday, the Supreme Court upheld a 1990 law requiring the National Endowment for the Arts to consider "general standards of decency" in its grant-making process.

The court reversed a 1996 federal appeals court decision that declared the law unconstitutional for violating the right to free speech and due process.

Yesterday's ruling sent shock waves through the artistic community in Boston and nationwide, with artists and administrators warning of a chilling effect on cultural expression. But the decision was applauded by groups that have opposed the NEA and a handful of its controversial grants, most notably those that went to exhibitions that displayed the photography of Andres Serrano and the late Robert Mapplethorpe.

"We are living in an ice age, and this decision will prove to be a cold, snowy white monument," said Holly Hughes, one of four performance artists who sued the government in 1990 after they were denied federal funding.

Hughes, Karen Finley, Tim Miller, and John Fleck, known as "the NEA four," settled their original claims against the government in 1993 for damages totaling $252,000. But they continued their legal challenge against the "decency clause."

"I have seen what the threat of the 'decency' language has done to the world I work in," Hughes said. "It has destroyed the alternative arts scene in this country."

But William Donohue, president of the Catholic League for Religious and Civil Rights, called the decision "a victory for common sense, as well as decency." The Washington-based Family Research Council also lauded the decision, as did House Speaker Newt Gingrich.

"Today the Supreme Court validated the right of the American people to not pay for art that offends their sensibilities," Gingrich said.

Writing for the majority, Justice Sandra Day O'Connor concluded that the law is "valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles."

The court qualified its decision by writing, "Even in the provision of subsidies, the government may not 'aim at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."

The law was enacted in 1990 at the height of a controversy in Congress over NEA grants that indirectly funded art by Mapplethorpe, whose work includes graphic homoerotic images, and by Serrano, particularly for his infamous photograph of a crucifix immersed in urine, titled "Piss Christ." The law required the NEA to consider, in making grant awards, "general standards of decency and respect for the diverse beliefs and values of the American public."

"The court reaffirms the principle that the government cannot discriminate against unpopular political ideas," said Marjorie Heins, outgoing director of the Arts Censorship Project at the American Civil Liberties Union and one of the attorneys for the plaintiffs. "But at the same time, it is an unrealistic way of viewing the message this law sends to the NEA and to artists to be careful and conscious and to censor themselves."

In their original suit, the four performance artists charged that they were "blacklisted" by the NEA for their political views; Hughes, Miller and Fleck are gay and address their sexuality in solo performances, and Finley is known for her stridently feminist material.

Since the suit was filed, the NEA has restructured its grant-making system, cutting out grants to individual artists, channeling most of its funds to state arts councils, and limiting arts institutions to one grant application per year. Congress has cut the budget over the years to current allotment of $98 million.

NEA chairman William J. Ivey, who was on Capitol Hill yesterday seeking congressional support for the agency, said in a statement that he was pleased with the Supreme Court decision. "The endowment's citizen-review panels represent the broad diversity of the American people," he said.

The court's lone dissenter, David Souter, argued that the law should be struck down because it carries "a significant power to chill artistic production and display."

Arts administrators echoed that sentiment.

"It is a dark day," said David Ross, executive director of San Francisco's Museum of Modern Art and former director of the Institute of Contemporary Art in Boston. "It is a complete refutation of the founding principles of the NEA, which were to support excellence and to insulate the process from the winds of politics."

Ross and others, however, said that the NEA is becoming increasingly irrelevant to the nation's nonprofit arts organizations. It has limited grant applications to four broad categories, and it no longer provides general operating support for nonprofits.

"The issue about government funding is practically moot because it doesn't exist anymore," said Robert Brustein, artistic director of the American Repertory Theatre in Cambridge. The theater, he said, received about $800,000 a year from the NEA before the controversy began; it received $62,500 this year.

But, he added, "It's going to send a chill through the artistic community, and you can already see it in the conservative and safe choices most theaters are making."

Finley, who became widely known as "the chocolate woman" for a performance in which she smeared chocolate and alfalfa sprouts on her body as a symbol, she said, of oppression against women, worked her response into her performance last night at an alternative theater in the TriBeCa district of Manhattan. Her show, "The Return of the Chocolate Smeared Woman," opened Wednesday.

Wearing only the chocolate, panties, a pink boa and silver high-heeled shoes, Finley said she was disappointed. "Who's going to be deciding what's decent or indecent?" she asked. "Is it a banana going into someone's mouth, is it covering your body with chocolate?"

The case is National Endowment for the Arts v. Finley, 97-371.

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RENO v. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE

By Troy R. Rackham

Can Congress close the courthouse doors to individuals with Constitutionally protected freedom of association claims when these individuals have not pursued all other administrative avenues available? This is the question at issue in *Reno v. American-Arab Anti-Discrimination Committee*.

This case began eleven years ago in Los Angeles, when seven Palestinians and one Kenyan were arrested and held for deportation by the Immigration and Naturalization Service (INS) because they were raising money for the Popular Front for the Liberation of Palestine (PFLP). The State Department classifies PFLP as a terrorist organization and the eight individuals arrested were charged with supporting terrorism. When the INS brought deportation proceedings against the eight individuals, these individuals petitioned the federal district court in Los Angeles for help. In multiple rulings, the district court enjoined the deportation proceedings because it determined that the INS was selectively enforcing its anti-terrorism laws against the eight individuals because of their association with PFLP, in violation of the First Amendment's protection of the freedom of association.

In 1996, Congress enacted the Illegal Immigration Reform and Responsibility Act (IIRRA). The IIRRA was enacted to alleviate Congress' concern about long delays in the deportation process by removing jurisdiction from federal courts to review deportation proceedings. After Congress' enactment of the IIRRA, federal courts only had jurisdiction to review final deportation orders.

Pursuant to this new law, the Justice Department argued to the Ninth Circuit Court of Appeals that the district court in *American-Arab Anti-Discrimination Committee* was without jurisdiction to enjoin the deportation proceedings because the IIRRA applies retroactively. While the Ninth Circuit agreed that the IIRRA applies retroactively, it held that the district court nonetheless had jurisdiction to enjoin the deportation of the eight individuals because the constitutional freedom of association was at issue. The Ninth Circuit held, according to well settled principles of constitutional law, that the IIRRA must be interpreted to preserve the authority of federal courts to hear constitutional questions.

The Court granted certiorari in this case to give a definitive answer to the important procedural question presented by this case. Indeed, while this case may seem at first glance to present only the technical legal issue of jurisdiction before the Court, the ramifications of the Court's holding could be significant. If the Court reverses the Ninth Circuit and finds that federal courts do not have the power to review deportation proceedings until a final deportation order has been entered, immigrants may be denied any substantial federal court review of their constitutional rights claims. Indeed, federal courts will only have jurisdiction to review final deportation orders based on the limited set of facts taken by the immigration judge. This would practically leave the immigration judge to decide the content and breadth of the constitutional rights of immigrants who are on the verge of being deported without any substantial review in federal court.

On the other hand, a Supreme court affirmance of the Ninth Circuit opinion could leave Congress' intent in passing the IIRRA hollow. Congress intended to ease the pressures of illegal immigration on this country by removing federal court jurisdiction to review deportation proceedings. The assumption was that deportation of illegal immigrants would be expedited if no federal court review was available until a final deportation order was issued.

HIGH COURT TO REVIEW IMMIGRATION LAW OF '96

The Washington Post

June 2, 1998

Joan Biskupic, Washington Post Staff Writer

The Supreme Court said yesterday it will review for the first time whether a 1996 law unfairly bars immigrants who face deportation from protesting the action in the nation's federal courts. The case arises from the government's effort to deport eight foreigners it says are tied to Palestinian terrorists.

The high-profile case has become a cause of First Amendment advocates and other civil libertarians because the immigrants say they were targeted for deportation as a result of their association with the Popular Front for the Liberation of Palestine.

Now, it has become a crucial test of whether the 1996 immigration law went too far in curtailing certain access to federal trial courts. A Supreme Court ruling in the case could affect immigrants challenging deportation in a range of situations.

The case before the court specifically tests whether immigrants who claim they have been selectively prosecuted or otherwise suffered a violation of their constitutional rights can go to court or must proceed instead through a limited and sometimes lengthy administrative process.

Before the 1996 law, the Justice Department says, federal courts were generally barred from hearing deportation challenges until all administrative routes were exhausted. The department says the law strengthened and made explicit those limits.

"Congress can't bar people, whether they be immigrants or citizens, from going to federal court when substantial constitutional violations are at issue," said Georgetown University law professor David D. Cole, representing seven Palestinians and one Kenyan protesting deportation.

But Solicitor General Seth P. Waxman told the justices that Congress intended to foreclose all judicial review of deportation proceedings until other administrative avenues had been exhausted.

In his appeal of a lower-court decision favoring the immigrants, Waxman said going through the administrative process before getting to a federal appeals court would not irreparably hurt someone fighting deportation, even in a First Amendment case. He noted the courts have long deferred to executive branch enforcement of immigration laws.

The case of Reno v. American-Arab Anti-Discrimination Committee traces to 1987, when the Immigration and Naturalization Service tried to deport eight immigrants in Los Angeles because of their

activities on behalf of the Popular Front for the Liberation of Palestine. The Justice Department notes in its filing that the PLPF violently opposes U.S. peace efforts in the Middle East and has been responsible for numerous acts of terrorism and the deaths of many Americans over the past three decades.

The immigrants argued to lower courts that the PLPF engages in a range of lawful activities and that they had made a sufficient initial case that the government was selectively enforcing deportation law.

After the group prevailed, the Justice Department appealed on various grounds. Most recently, it contended that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 clarifies the law that courts may not hear a challenge to a deportation case until other administrative procedures have been followed. The government said the lower court never should have taken up the selective prosecution case.

Oral arguments will be heard in the term that begins next October and a ruling is not likely until 1999.

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COURT TO REVIEW DEPORTATION CASE OF ACTIVISTS

Los Angeles Times

June 2, 1998

David G. Savage, Times Staff Writer

WASHINGTON -- Taking up the case of a group of Palestinian activists from Los Angeles, the Supreme Court agreed Monday to hear the government's charge that judges are barred from blocking a move to deport immigrants, even when they are targeted for their political views.

The case, to be heard in the fall, gives the high court its first look at provisions of the 1996 immigration law in which Congress closed the courthouse door to immigrants who are facing possible deportation.

Frustrated at long delays in deportations, Congress took away the power of judges to hear such cases. "No court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from" the government's move to seek deportation, the law says. The only exception is for a final deportation order. Then, a U.S. court of appeals is empowered to review the evidence.

For more than a decade, however, the so-called "L.A. 8" have succeeded in staving off deportation and winning a series of victories in the federal courts in California.

In 1987, seven Palestinians and one Kenyan were arrested and held for possible deportation because they were raising money for the Popular Front for the Liberation of Palestine. The group is classified as a terrorist organization by the State Department and the eight were charged with supporting terrorism.

But their lawyers noted that the PFLP engages in a wide array of lawful activities such as education, day care, health care and sponsorship of publications. The eight said that they had done nothing illegal in the United States and were being targeted for punishment because of their political views.

U.S. District Judge Stephen Wilson in Los Angeles, as well as the U.S. 9th Circuit Court of Appeals, agreed in multiple rulings. They blocked the deportation proceedings and said that the 1st Amendment does not permit "guilt by association."

In its latest ruling, the appeals court agreed with the government that the 1996 law closes the courthouse door to most challenges to deportation. However, it also ruled that constitutional claims are the exception. Because the Palestinians say that they were targeted because of their political beliefs in violation of the 1st Amendment, their challenge can go forward, the 9th Circuit said.

The Clinton administration appealed, arguing that neither Wilson nor the 9th Circuit had the authority to intervene in the deportations. These judges "have flouted clear statutory limitations on their own jurisdiction and have imposed wholly unwarranted constraints on the executive branch," U.S. Solicitor General Seth Waxman stated to the high court.

In a brief order Monday, the justices agreed to hear the government's appeal in the case (Reno vs. American-Arab Anti-Discrimination Committee, 97-1252).

Georgetown University law professor David D. Cole, who has represented the Palestinians, said he will argue that the protection of the 1st Amendment trumps the jurisdictional limit imposed by Congress.

"Millions of American citizens and immigrants 'associate' with the NRA, the ACLU, the Boy Scouts or labor unions by paying dues, donating funds or raising money," he said. "Soliciting and donating funds is a form of constitutionally protected political association."

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COURT TO TEST IMMIGRATION LAW

AP Online

Monday, June 1, 1998

By Laurie Asseo

WASHINGTON (AP) - The Supreme Court today agreed to use the government's effort to deport a group of Palestinians to clarify a 1996 immigration law's limits on court review of such cases.

The justices said they will hear the government's contention that lower courts lacked authority to hear the Palestinians' argument that they were singled out for selective enforcement of immigration laws. The Palestinians are accused of supporting a foreign terrorist organization.

The government has been trying since 1987 to deport eight Los Angeles-area aliens, including seven Palestinians and the Kenyan-born wife of one of them.

Immigration officials say the eight are members or supporters of the Popular Front for the Liberation of Palestine, which has been labeled a terrorist organization by the U.S. government.

The eight asked a federal judge to stop the deportation proceeding, saying they were victims of selective enforcement. In 1994, the judge temporarily barred the Immigration and Naturalization Service from conducting deportation proceedings against them.

In 1996, while the Palestinians' case was pending, Congress voted to allow deportation cases to be taken to court only after the INS has issued a final order. In such cases, a federal appeals court would review the deportation order.

Also in 1996, Congress passed an anti-terrorism law that makes it a crime for anyone— citizen or noncitizen— to provide financial support to a foreign organization labeled terrorist by the secretary of state.

The 9th U.S. Circuit Court of Appeals last year upheld the district court's order, saying the new immigration law did not bar the judge from hearing the Palestinians' case because they raised a free-speech issue that might not get adequate judicial review after issuance of a final deportation order.

The 9th Circuit court also said raising money for an organization that engages in both terrorist and legal activities does not justify deportation unless the fund-raisers intended to support terrorism.

In the appeal acted on today, Justice Department lawyers said the lower courts "flouted clear statutory limitations" on their authority to hear such cases, and that the rulings would harm the government's ability to enforce the law barring financial support to foreign terrorists.

Lawyers for the Palestinians said donating funds is a form of free speech, and that courts long have ruled that association with a political group cannot be penalized without proof of intent to further the group's illegal goals.

The case is Reno vs. American-Arab Anti-Discrimination Committee, 97-1252.

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97-1252 RENO v. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE

Ruling below (CA 9, 119 F.3d 1367):

Although Section 242(g) of Immigration and Nationality Act, as amended by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, applies to pending cases, thereby depriving federal courts of jurisdiction to hear certain cases on behalf of aliens until final order of deportation is issued, such provision incorporates an exception that permits prompt federal review of constitutional claims when no other avenue of meaningful federal review is available. Accordingly, although a final deportation order has not been issued, federal district courts may retain jurisdiction over an aliens' federal action to contest their deportation proceedings on grounds that government singled them out for selective enforcement of immigration laws in retaliation for their constitutionally protected associational activity.

The district court's order denying government's motion to dissolve preliminary injunction on behalf of certain aliens, and its grant of injunction on behalf of certain other aliens, is affirmed. Injunctive relief was originally granted because aliens established prima facie case of selective enforcement by showing that others similarly situated— aliens affiliated with groups that have advocated violence and destruction of property— were not prosecuted and that prosecution was based on impermissible motive, namely their association with a disfavored group— Popular Front for Liberation of Palestine. The only change since the original time when relief was granted is the government's evidence that the eight aliens participated in fundraising activities for PFLP and the government's contention that such activity is 'terrorist activity' that qualifies aliens as deportable, but such change of circumstances simply represents government's decision to change its litigation strategy with respect to certain aliens. With respect to certain other aliens encompassed by additional preliminary injunction, government's claims are meritless. Thus dissolution of injunction is not justified.

Question presented: In light of Illegal Immigration Reform and Immigrant Responsibility Act, did courts below have jurisdiction to entertain respondents' challenge to deportation proceedings prior to entry of final order of deportation?

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al., Plaintiffs-Appellees,
v.
Janet RENO, Attorney General, et al, Defendants-Appellants.

United States Court of Appeals,
Ninth Circuit.

Decided July 10, 1997.

D.W. NELSON, Circuit Judge:

The central issues in this case are (1) whether 8 U.S.C. § 1252(g), as amended by the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") applies retroactively; and (2) whether the provision eliminates federal jurisdiction over a case such as this one, in which aliens have filed a federal suit challenging deportation proceedings on First Amendment grounds before a final order of deportation has been issued. We conclude that subsection (g) applies to pending cases but that the provision does not bar jurisdiction in this case. Because subsection (g) states that it applies "except as provided in this section," we conclude that the amended version of 8 U.S.C. § 1252(f), which permits certain collateral challenges to INS action, also applies by incorporation. We find that subsection (f) allows the instant suit because the factual record for the Plaintiffs' First Amendment claims cannot be developed in administrative proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the decision of the Immigration and Naturalization Service ("INS") to commence deportation proceedings against seven native Palestinians and one native Kenyan affiliated with the Popular Front for the Liberation of Palestine ("PFLP"). The complete factual history of this case is set forth in this court's prior opinion affirming the grant of a preliminary injunction to six of the aliens on First Amendment grounds. To summarize, briefly:

The eight named aliens in this case, ("Plaintiffs"), have participated in PFLP events to varying degrees. The PFLP is an international organization with ties to Palestine, and which the district court concluded is engaged in a wide range of lawful activities, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political organizing." The government avers that the PFLP is an international terrorist and communist organization, but does not dispute the district court's finding that the organization conducts lawful activities.

In January, 1987, the INS arrested the Plaintiffs and initiated deportation proceedings against them. Six of the Plaintiffs in this case, Barakat, Sharif, Mungai, Ayman Obeid, Amjad Obeid, and Amer, ("the Six") were living in this country under temporary student or visitor visas at the time that this case was filed. The remaining two, Hamide and Shehadeh, were permanent resident aliens The INS charged all of the Plaintiffs under the McCarran-Walter Act of 1952 ("1952 Act"), which provided for

the deportation of aliens "who advocate the economic, international, and governmental doctrines of world communism." In addition, the INS charged the Six with non-ideological, technical visa violations. Former FBI director William Webster testified to Congress that " '[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation.... [I]f these individuals had been United States citizens, there would not have been a basis for their arrest.' " Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987).

The INS subsequently dropped the ideological charges against the Six and reformulated the 1952 Act charges against Hamide and Shehadeh. Shortly thereafter, INS regional counsel William Odencrantz indicated "that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP " American-Arab I, 70 F.3d at 1053.

Following the repeal of the 1952 Act, the INS commenced proceedings against Hamide and Shehadeh under the "terrorist activity" provision of the Immigration Act of 1990.

The Plaintiffs filed this federal action to contest the deportation proceedings on First Amendment grounds. They claimed that the INS had singled them out for selective enforcement of the immigration laws in retaliation for their constitutionally protected associational activity. The district court held that it lacked jurisdiction over the claims of Hamide and Shehadeh but granted a preliminary injunction staying the immigration proceedings against the Six. On appeal, this court upheld the injunction and concluded that the court had jurisdiction over the claims of Hamide and Shehadeh. The district court then entered an injunction staying the proceedings against Hamide and Shehadeh.

The government now appeals the district court's decision refusing to dissolve the existing preliminary injunction and granting the injunction in favor of Hamide and Shehadeh. Relying on new evidence submitted to the district court following this court's decision in American-Arab I, the government argues that the deportation proceedings were initiated for permissible reasons. Specifically, the government cites to materials detailing the Plaintiffs' support of PFLP fundraising activities and argues that under the applicable First Amendment standard, the Plaintiffs may be sanctioned for this behavior.

In addition, while this appeal was pending, the government filed motions to dismiss the case both with the district court and with this panel. The government contends that 8 U.S.C. § 1252(g), as amended by IIRIRA, deprives the federal courts of jurisdiction over all claims such as those at issue here, except on review of final deportation orders. The district court has determined that the new statute does not eliminate jurisdiction in this case, and the appeal of the district court's decision has been consolidated with this case.

STANDARD OF REVIEW

The interpretation of a statute is a question of law, which we review de novo.

We review a decision regarding a preliminary injunction for an abuse of discretion. A district court abuses its discretion "if the court bases its decision on an erroneous legal conclusion or on clearly erroneous findings of fact." American-Arab I, 70 F.3d at 1062.

DISCUSSION

I. Jurisdiction

IRIRA amends section 242(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(g), to provide:

> (g) Exclusive jurisdiction
> Except as provided in this section and notwithstanding any other provision of law, 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.

The government argues that subsection (g) applies retroactively and eliminates federal jurisdiction over this case at this stage in the proceedings. While we agree that subsection (g) applies, we hold that it does not deprive the court of jurisdiction in this case.

IIRIRA explicitly provides for the retroactive application of subsection (g). Section 306(c) states that

> the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Thus, the provision carves out an exception to the general rule, specified in section 309(c), that IIRIRA does not apply to pending cases.

Two circuits already have drawn this conclusion. The D.C. Circuit recently held that in a federal suit challenging the execution of a deportation order, the provision governed even though Congress enacted IIRIRA "[s]ubsequent to the District Court hearing." Ramallo v. Reno, 114 F.3d 1210, 1213 (D.C.Cir.1997). And in a decision holding that the effective date of amended 8 U.S.C. § 1252(g) was the same as the rest of the IIRIRA amendments, the Seventh Circuit has concluded that "the reference to subsection (g) in section 306(c) is meant only to provide an exception to section 309(c)'s nonretroactivity, so that when IIRA comes into effect on April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections." Lalani v. Perryman, 105 F.3d 334, 336 (7th Cir.1997). We follow the D.C. and Seventh Circuits and conclude that subsection (g) applies retroactively.

We also conclude, however, that subsection (g) incorporates certain exceptions when it applies to pending cases Subsection (g) states that "except as provided in this [new] section, [8 U.S.C. § 1252]," no court can consider any claim arising from a decision of the Attorney General "to commence proceedings, adjudicate cases, or execute removal orders against any alien." The provision thus expressly contemplates the applicability of other jurisdictional amendments to 8 U.S.C. § 1252. It is true that retroactive application of the entire amended version of 8 U.S.C. § 1252

would threaten to render meaningless section 306(c) of IIRIRA, which provides that in general, the narrow set of jurisdictional reforms codified at 8 U.S.C. § 1252 do not govern in pending cases. Yet a reading of subsection (g) that did not incorporate any exceptions would contradict the plain meaning of the text of (g).

Moreover, such a reading would be illogical. Divorced from all other jurisdictional provisions of IIRIRA, subsection (g) would have a more sweeping impact on cases filed before the statute's enactment than after that date. Without incorporating any exceptions, the provision appears to cut off federal jurisdiction over all deportation decisions. We do not think that Congress intended such an absurd result. We believe that when it applies to pending cases, (g) must apply along with at least some of the other provisions of section 1252, as amended by IIRIRA.

We must consider, then, which provisions of the amended version of 8 U.S.C. § 1252 are incorporated by reference into subsection (g) and whether any of these provisions preserve federal jurisdiction in this case. One candidate is 8 U.S.C. § 1252(f), which provides:

> (f) Limit on injunctive relief
> ....
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Because this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the Plaintiffs' claims.

In determining whether subsection (f) applies, and in interpreting its meaning, we are guided by the well-established principle that where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims. The Supreme Court has stated unequivocally that "serious constitutional question[s] ... would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603, (1988). Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims such as those at issue here

The government contends that subsection (g) alone applies and that the provision does not cut off federal review of constitutional claims because it allows courts to consider such claims on review of final orders of deportation. The difficulty with this position is that the text of (g) alone does not appear to authorize judicial review of final orders of deportation. The provision can be read as authorizing such review only if it is read in conjunction with other subsections, such as the amended version of 8 U.S.C. 1252(b)(9), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding

> brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

The government makes the alternative argument that if subsection (b)(9) governs, the provision clearly limits judicial review, including review of all constitutional claims, to final orders of deportation.

We disagree. Even if subsection (b)(9) applies along with subsection (g), we believe that subsection (f) must be incorporated as well, and that (f) must be read to preserve judicial review of constitutional claims such as the ones at issue here. Any other reading would present serious constitutional problems. As we determined in American-Arab I, and as the government has conceded, neither the immigration judge ("IJ") nor the Board of Immigration Appeals ("BIA") has the authority to consider a selective enforcement claim during a deportation proceeding. Moreover, a selective enforcement claim is not purely legal but rather requires factual proof. Thus, the factual record necessary to the adjudication of such a claim would not be available to a federal court reviewing a final deportation order.

In McNary v. Haitian Refugee Center, Inc., the Supreme Court drew a similar conclusion. 498 U.S. 479, 483-84 (1991). At issue in McNary was a provision of the INA that the government argued limited judicial review to final orders of deportation. Because the factual record necessary to the consideration of the plaintiffs' constitutional and procedural statutory claims could not be developed in administrative proceedings, the Court construed the provision as preserving general federal jurisdiction over the claims at issue in the case.

The government's argument that 28 U.S.C. § 2347(b)(3) enables federal appellate courts to remedy the fact-finding deficiencies of administrative deportation proceedings in cases such as this one is unpersuasive. Section 2347(b)(3) allows an appellate court reviewing an agency determination to transfer proceedings to a district court for additional factual development in certain circumstances. However, we have held that this provision is not available on review of deportation proceedings. Because the INA limits appellate review to the administrative record, the statute "precludes application of the procedures ... that permit transfer of a case to a district court for a hearing, under circumstances set forth at 28 U.S.C. § 2347(b)(3)." While IIRIRA repeals 8 U.S.C. § 1105a(a), which contained the provision cited in American-Arab I and Ghorbani confining appellate review to the administrative record, IIRIRA adopts the same requirement. 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.") Thus, the statutory basis for American-Arab I and Ghorbani remains the same, and these decisions still control.

In addition, IIRIRA expressly forecloses the appellate courts from remanding such cases to the IJ for further factual development under a related provision. The government's argument that IIRIRA's express preclusion of section 2347(c) proceedings by negative inference allows proceedings under section 2347(b)(3) does not make sense because the express statutory elimination of section 2347(b)(3) proceedings then would have been unnecessary. Prior to the enactment of

IIRIRA, while some circuits had allowed remand under section 2347(c), even those circuits which permitted remand to the agency under section 2347(c) did not allow proceedings under section 2347(b)(3). Thus, Congress needed to act only to cut off the availability of section 2347(c).

In sum, we conclude that while subsection (g) applies to pending cases, it incorporates subsection (f). Moreover, even if (b)(9) is incorporated along with (f), we read (f) as permitting federal review of constitutional claims such as those at issue here, because no other avenues of meaningful federal review remain available. Accordingly, the district court may retain jurisdiction over this case.

II. Preliminary Injunction

This court already has upheld the preliminary injunction in favor of the Six. In American-Arab I, we held that "[t]he aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights." 70 F.3d at 1066. We reached this conclusion because we affirmed the district court's finding that the Plaintiffs had made out a prima facie case of selective enforcement by showing (1) others similarly situated were not prosecuted (disparate impact) and (2) the prosecution was based on an impermissible motive (discriminatory motive). We determined that the Plaintiffs had made a sufficient showing of discriminatory motive by demonstrating that the government targeted them "because of their associational activities with particular disfavored groups," and because the government did not establish that the Plaintiffs had the "specific intent to further [any alleged] ... illegal aims" of those groups. Id. at 1063. Following our decision, the district court granted an additional preliminary injunction that included Hamide and Shehadeh.

The government has now presented new evidence in the district court showing that the Plaintiffs participated in fundraising activities for the PFLP. The government argues that the submission of this evidence has two consequences: First, the government contends that there is no longer sufficient evidence to sustain the district court's finding of disparate impact. Second, the government maintains that the standard under which the district court analyzed the evidence of discriminatory motive is no longer applicable. In evaluating the preliminary injunction in favor of the Six, we need not consider either of the government's arguments. As applied to the preliminary injunction in favor of Hamide and Shehadeh, both arguments are without merit.

A. Preliminary injunction in favor of the Six

With respect to the preliminary injunction granted in favor of the Six, we need not address either of the government's arguments. The government has not demonstrated changed circumstances. Moreover, it is improper to use a motion to dissolve an existing preliminary injunction to "try ... to relitigate on a fuller record preliminary injunction issues already decided." American Optical Co. v Rayex Corp., 394 F.2d 155, 155 (2d Cir.1968)

The district court concluded, and the government does not appear to dispute, that "the government's new 10,000-page submission was available to the government at the time the preliminary injunction was

entered; the government simply chose not to litigate the facts at that time." Up until that point, the government had argued that the Plaintiffs did not possess the same First Amendment rights as citizens. Because the only change in circumstances is of the government's own making, resulting from its decision to change its litigation strategy, we conclude that it is equitable to continue the original injunction staying proceedings against the Six without consideration of the new evidence.

B. Preliminary injunction in favor of Hamide and Shehadeh

1. Disparate impact

The government contends that the district court's finding of disparate impact is clearly erroneous because the Plaintiffs have failed to produce sufficient evidence showing that the INS refrained from deporting fundraisers in other terrorist organizations. Yet the government does not dispute the district court's conclusion that the INS sought to deport the Plaintiffs because of mere membership in the PFLP. As Plaintiffs did show that members of numerous other organizations advocating violence and the destruction of property were not deported, the comparison with aliens who engaged in fundraising for other terrorist organizations is unnecessary.

Even if such a comparison were required, the Plaintiffs have produced sufficient evidence to this effect. The Plaintiffs identified Toryalai Ali, a permanent resident alien living in San Diego who represented a Mujahedin guerrilla organization and who contributes approximately half of his income to the group. In addition, the Plaintiffs introduced evidence to show that the government did not seek to deport aliens who distributed a newsletter designed to build support for the Nicaraguan contras and which included an appeal to send money to support the Nicaraguan Democratic Forces. The Plaintiffs also submitted asylum files obtained in discovery demonstrating that the INS did not move to deport 59 out of 65 members and material supporters of the Contras and Mujahedin.

The government's assertion that "the district court had no evidence regarding a proper control group for Hamide and Shehadeh, who are permanent resident aliens" is also incorrect. As discussed above, the record contained evidence that Toryalai Ali, a permanent resident alien, was not deported despite his leadership role and financial contributions to a sub-group of the Mujahedin. The record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property.

The district court did not clearly err in finding that the Plaintiffs established disparate impact.

2. Improper motive

The district court found that, even after the government made its supplemental evidentiary submission, there was "no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." The government does not contest this finding. Accordingly, for the purposes of the First Amendment analysis, we assume that the Plaintiffs did not possess specific intent.

The government now tries to evade the specific intent standard we articulated in American-Arab I. Relying on the new evidence of fundraising activity, the government contends that a more relaxed First Amendment inquiry is appropriate. Because activity, rather than mere association, is at issue, the government maintains that the case should be analyzed under the standard set forth in United States v. O'Brien, 391 U.S. 367.

Yet in American-Arab I we already considered this question. We emphasized that the government was required to show that the Plaintiffs had the "specific intent" to engage in illegal group aims because the Plaintiffs had demonstrated that they were targeted for their "associational activities with particular disfavored groups." 70 F.3d at 1063. In making this statement, we had before us evidence that these associational activities included fundraising. Thus, we already have made it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals.

O'Brien is inapplicable in a case such as this one, in which the restrictions are in effect content-based. Here, the central issue is whether the government impermissibly targeted the Plaintiffs due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property. Thus, the stringent First Amendment standard articulated in American-Arab I continues to apply.

Moreover, the government has not challenged the factual finding made by the district court that the INS targeted the Plaintiffs for their mere association with the PFLP Indeed, in the prior appeal the government conceded that citizens would not have been treated in the same fashion. Therefore, regardless of whether the government has demonstrated that the Plaintiffs were also targeted for fundraising activity, the district court's conclusion that the Plaintiffs have made a prima facie showing of the government's improper motive is not clearly erroneous.

CONCLUSION

For the foregoing reasons, we conclude that IIRIRA does not eliminate federal jurisdiction at this stage in the proceedings. We also affirm the district court's decision denying the government's motion to dissolve the preliminary injunction on behalf of the Six and granting the preliminary injunction on behalf of Hamide and Shehadeh.

BUCKLEY v. AMERICAN CONSTITUTIONAL LAW FOUNDATION

By Troy R. Rackham

Thirty-three states have a process under which the citizens of the state can directly place legislation on the ballot. The process involves circulating copies of the proposed legislation to registered voters, soliciting signatures from those registered voters who want to vote on the proposed legislation at the general election, and then submitting the petitions with the appropriate amount of signatures to the state. If a majority of the electorate approve of the legislation, then the initiative then becomes law. Of course, each state which allows an initiative process like the one described has the authority to regulate this "direct democracy" in order to prevent abuses of the system and fraud. At issue in *Buckley v. American Constitutional Law Foundation* is the extent to which a state can regulate this process.

The specific issue presented to the Court is whether the state of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

The case arises out of Colorado's attempt to control the abuses committed by circulators in the initiative process. In 1910, the citizens of Colorado amended the state constitution to allow the citizens to pass laws and make changes to the Colorado Constitution through an initiative process. Since then, the Colorado General Assembly has passed numerous measures aimed at controlling fraud and abuse in the initiative process. The Colorado Constitution was even amended in 1980 in order reform the initiative and referendum process. The most recent measure adopted by the Colorado General Assembly, passed in 1993, added two requirements to the initiative process: (1) circulators must wear badges; and (2) proponents of initiatives using paid circulators had to report the names and addresses of the circulators, the proposed ballot measure the circulators are circulating, and how much the circulators are being paid.

Various plaintiffs filed suit against these initiative regulations claiming, inter alia, that the regulations interfered with their freedom of speech. The district court held that the badges provision was a restriction on core speech protected by the First Amendment, and found that the badges provision was unconstitutional because it was not the least restrictive means of furthering Colorado's compelling interest of preventing fraud in the initiative process. The district court further held that the registration requirement did not violate the Constitution. The court reasoned that because the U.S. Constitution gives no mention of initiatives or referenda, states allowing such devices were free to restrict them as they please. Finally, the district court struck down the reporting requirements because they were not narrowly tailored to serve Colorado's compelling interests in the law.

The Tenth Circuit Court of Appeals affirmed the district court as to the badges provision, holding that requiring the circulators to wear badges was too broad an intrusion into the circulators' freedom of

speech which discourages candor and controversial political speech. The Tenth Circuit also affirmed the district court as to the reporting requirements. The Tenth Circuit reasoned that forcing the disclosure of the circulators' identities and financial interests creates a chilling effect on paid circulation, a constitutionally protected exercise. Finally, the Tenth Circuit reversed the district court as to the registration requirement. The Tenth Circuit applied strict scrutiny to the registration requirements and found that the registration requirements were not narrowly tailored to meet Colorado's compelling interests in the law. Indeed, the Tenth Circuit held that the state could further the same interests by a residency requirement, which is much less burdensome on the freedom of speech than the registration requirement.

This case may have important implications for those thirty-three states which allow some sort of initiative, referenda, or recall process, and perhaps even those states without such a process. For the first time, the Court will have the opportunity to significantly define the role a state may take in regulating its initiative, referenda, and recall process. If the Court affirms the Tenth Circuit, states may look for different routes to take in order to prevent fraud. States may even decide that the costs of maintaining an initiative process outweigh the benefits of it and forego initiatives altogether. If the Court reverses the Tenth Circuit, states will be left with broad authority to regulate their own initiative process. Finally, this case may likely appeal to the federalism sympathies of some of the justices. After all, the Constitution mentions nothing about initiatives or referenda, and the traditional presumption is that if the states are not expressly limited by the Constitution, then the states retain the power.

The states of Washington, Alaska, Arizona, California, Idaho, Iowa, Kansas, Maine, Mississippi, Oklahoma, Ohio, Oregon, and South Dakota have all joined in an amicus brief supporting the petitioner by arguing that the initiative process serves an essential function, but states must be left to regulate these processes broadly. The thirteen-state coalition further argues that Colorado's regulations survive strict scrutiny because they are the least intrusive means of regulation that will work to curb the abuses of the initiative process.

COURT AGREES TO REVIEW COLORADO BALLOT PETITION RULES

The Associated Press Political Service

February 23, 1998

Richard Carelli, Associated Press

WASHINGTON (AP) - The Supreme Court, setting the stage for a significant ruling for ballot initiatives, today agreed to review requirements Colorado once imposed on petitioning for such measures.

The court voted to review lower courts' rulings that said the Colorado regulations, which supporters claim are aimed at reducing the likelihood of fraud, violated free-speech and could not be enforced.

The justices left intact requirements that had been upheld by the courts - limiting petition drives to six months and banning persons under 18 from collecting petition signatures.

More than half the states authorize voter-initiated ballot measures. The court's eventual ruling, expected sometime in 1999, could contain important guidelines for those states.

In Nebraska, the 8th U.S. Circuit Court of Appeals in October ruled that a state law requiring that petition circulators be registered voters was unconstitutional. The court ruled that the law violated the First Amendment because it restricted political speech.

Colorado since 1913 has allowed voters to place certain initiatives on the state ballot. To get a measure on the ballot, supporters must collect the signatures of at least 5 percent of the total votes cast in the most recent secretary of state election. The state Legislature in 1994 sought to limit the possibility of fraud and to enhance public confidence in the initiative process by requiring several additional requirements:

- Circulators of ballot-initiative petitions had to be registered with the state and were required to display identification badges disclosing whether they were paid or volunteer workers.

- Supporters of any initiative had to file monthly reports with the secretary of state and disclose the names and addresses of all petition circulators.

A group of state residents and a public interest group, the American Constitutional Law Foundation, sued to challenge the requirements. U.S. District Judge Richard Matsch struck down three of the four requirements, and when state officials appealed the 10th U.S. Circuit Court of Appeals struck down the fourth as well.

"A state has a strong, often compelling, interest in preserving the integrity of its electoral system," the appeals court said. But it added that Colorado had failed to justify the invalidated requirements.

The cases are Buckley vs. American Constitutional Law Foundation, 97-930, and American Constitutional Law Foundation vs. Buckley, 97-992.

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HIGH COURT TO REVIEW COLORADO'S PETITION LIMITS

The Rocky Mountain News (Denver, Co.)

February 24, 1998; Pg. 9A

Michael Romano; Rocky Mountain News Washington Bureau

The U.S. Supreme Court set the stage Monday for a ruling that could have a dramatic impact on voter's rights, with a decision to review tough Colorado restrictions on petitioning for ballot issues. The nation's highest court agreed to look at two lower-court rulings that invalidated a 1994 state law supporters claimed would reduce the likelihood of fraud in ballot initiatives.

"I'm very happy they decided to review it, to look at it," said Colorado Secretary of State Victoria Buckley. "Maybe some of the issues we're concerned with are finally going to be heard by the highest court. It's a step in the right direction." Buckley said the law on petition circulators was passed, at least in part, to ensure accountability. She said she wanted to be able to find them in case of any problems with required signatures— at least 5 percent of the total votes cast in the most recent election for secretary of state. "I believe they need to be registered," she said. "What we found is a lot of these paid circulators coming in, causing problems in terms of our not being able to find them. My subpoena power only goes to the borders of the state of Colorado." The law required petition circulators to be registered with the state and forced them to display identification badges disclosing whether or not they were paid to collect signatures. That provision and others— including a requirement that supporters of an initiative file monthly reports with the secretary of state— was struck down by U.S. District Judge Richard Matsch.

But the Supreme Court decided to review the decision by Matsch and a similar ruling by the 10th U.S. Circuit Court of Appeals. Colorado Attorney General Gale Norton said the high court's decision "could well be one of he more important First Amendment cases decided this decade."

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97-930 BUCKLEY v. AMERICAN CONSTITUTIONAL LAW FOUNDATION INC.

Ruling below (American Constitutional Law Foundation Inc. v. Meyer, CA 10, 120 F.3d 1092):

Colo.Rev.Stat.Ann. Section 1-40-112(1), which requires that circulators of initiative and referendum petitions be registered voters, discriminates against unregistered voters without being narrowly tailored to ensure that circulators are residents. Moeover, Section 1-40-112(1) does not advance any other compelling state interest, and thus violates First Amendment. Section 1-40-112(2), which requires each circulator to wear personal identification badge, deprives circulators of anonymity without being narrowly tailored to serve state's asserted interest in identifying and punishing fraud, and thus violates First Amendment. Section 1-40-121(1), which requires proponents of initiative or referendum to file monthly reports disclosing names of all paid circulators, and their address, county of voter registration, and amounts paid, chills protected activity of paid circulation without being narrowly tailored to advance state's asserted interests in informing electorate of whether measure has grassroots support and in discouraging fraud, and thus violates First Amendment.

Question presented: May Colorado constitutionally regulate process of circulating initiative petitions by requiring that: (1) petition circulators who verify signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of initiative must file reports disclosing amounts paid to circulators and identity of petition circulators?

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., et al, Plaintiffs- Appellants,
v.
Natalie MEYER, individually and as Secretary of State for the State of Colorado, et al, Defendants-Appellants.

United States Court of Appeals,
Tenth Circuit.
July 28, 1997

BRISCOE, Circuit Judge.

Plaintiffs brought this 42 U.S.C. § 1983 action challenging portions of Senate Bill 93-135, which regulates Colorado's initiative and referendum petition process. Plaintiffs argued S.B. 93-135 imposed restrictions that violated their rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiffs appeal the district court's decision to uphold portions of S.B. 93-135, and defendants appeal the court's decision to strike down portions of S.B. 93-135. We agree with the district court's decision in all regards, except for its ruling upholding the requirement set forth in C.R.S.A. 1-40-112(1) that the circulator be a registered elector. We affirm in part and reverse in part.

I.

Colorado allows its citizens to place issues on the ballot by petition. The petition process consists of the initiative and the referendum. A referendum is unavailable with respect to laws "necessary for the immediate preservation of the public peace, health, or safety." Under the Colorado system, the general assembly has exclusive authority to determine whether a law is "necessary for the immediate preservation of the public peace, health, or safety." Thus, when the general assembly attaches a "safety clause" to a law, a referendum on the law is precluded, although the right of initiative remains.

The Colorado Constitution grants the general assembly the authority to adopt legislation "designed to prevent fraud, mistake, or other abuses" in the petition process. The manner in which petitions may be circulated and by whom, and how they may be signed and by whom are regulated by C.R.S.A. §§ 1-40-101 et seq. Senate Bill 93-135 rearranged and amended the article to "properly safeguard, protect, and preserve inviolate" the people's initiative and referendum power. C.R.S.A. § 1-40-101.

Prior to circulation, proponents of a ballot issue must submit a draft petition to the directors of the legislative council and the office of legal services for review and comment. A public hearing is held within two weeks of submission. Following the hearing, the draft is presented to the title board, which prepares a title, submission clause, and summary. The proponents then have six months to file the petition with the Secretary of State. Unless the petition contains the number of signatures required by the Colorado Constitution, it is of no effect when filed.

Petition circulators collect the signatures and sign affidavits in which they aver, among other things, that each signer was a registered elector and was not paid to sign the petition. Circulators assume personal responsibility to prevent irregularities in the process. If any circulator is found to have violated any

provision of the article, the section of the petition circulated by that person "shall be deemed void." C.R.S.A. § 1-40-132(1).

Plaintiff American Constitutional Law Foundation, Inc., is a non-profit, public-interest organization that supports direct democracy. The remaining plaintiffs are various individuals who, with the exception of William David Orr (a minor who desires to circulate petitions regarding educational vouchers) and Bill Orr (a qualified but unregistered elector), regularly participate in the petition process as proponents and circulators. At the time of trial, Jon Baraga was circulating the Colorado Hemp Initiative and was also the statewide petition coordinator for the Hemp Initiative.

Along with several other plaintiffs, including American Constitutional Law Foundation, Baraga sought to repeal S.B. 93-135 by referendum. Plaintiffs had agreed to devote their resources in a joint effort, but the Secretary of State informed them by letter that a referendum on S.B. 93-135 was precluded because it contained a safety clause.

Plaintiffs brought suit claiming various portions of Article 40 violated the First and Fourteenth Amendments by restricting circulation to six months, requiring all circulators to sign an affidavit, restricting the right to circulate by age and voter registration, requiring all circulators to wear identification badges, requiring proponents to disclose the names of all paid circulators and the amounts they were paid, and attaching a safety clause to S.B. 93-135. The court struck down the badge requirement and portions of the disclosure requirement after concluding they unduly burdened the First and Fourteenth Amendments. The court rejected plaintiffs' remaining claims.

II.

We turn to plaintiffs' First Amendment issues. Plaintiffs argue the manner in which Colorado regulates the petition process is subject to exacting scrutiny because it significantly burdens political speech. They rely heavily on Meyer v. Grant (1988) in which proponents challenged a Colorado law making it unlawful to pay any consideration for the circulation of initiative or referendum petitions. Meyer acknowledged "circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " The Court applied exacting scrutiny to strike down the challenged law, concluding it restricted political expression by limiting the number of voices conveying the proponents' message and making it less likely the proponents would gather the required number of signatures to place their issue on the ballot.

Plaintiffs reason that because S.B. 93-135 restricts the manner in which citizens may circulate petitions, the instant case is indistinguishable from Meyer. They also cite Citizens Against Rent Control v. City of Berkeley (1981), First Nat. Bank of Boston v. Bellotti (1978), and Buckley v. Valeo (1976), as controlling authority Each case, including Meyer, involved restrictions on expenditures to disseminate information on political issues. No such restrictions are involved here.

A successful petition results in a question being submitted to the voters. Thus, the petition process is a ballot access vehicle, as well as an avenue for political expression. Unlike plaintiffs, we do not read Meyer to require that Colorado maintain a petition process that, in essence, allows unregulated access to the ballot. Indeed, such a reading would conflict with the general rule that states

have the power to regulate their elections and access to their ballots.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992). The Supreme Court has upheld "generally-applicable and evenhanded restrictions that protect the integrity of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788 n. 9 (1983). At least one other circuit has extended similar deference to regulations governing initiative petitions. See Taxpayers United for Assessment Cuts v. Austin (6th Cir.1993). Colorado has a strong interest in ensuring both candidate elections and ballot issues are run fairly, efficiently, and honestly.

To subject every petition regulation to exacting scrutiny would tie Colorado's hands in seeking to assure equitable and efficient elections on ballot issues. Timmons discussed a flexible standard for evaluating the constitutionality of laws regulating the electoral process:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Thus, the rigorousness of our inquiry depends upon the extent to which the challenged law burdens plaintiffs' First and Fourteenth Amendment rights.

Plaintiffs challenge five restrictions--(1) the C.R.S.A. § 1-40-108(1) requirement that proponents file a petition with the secretary of state within six months of the date that the titles, submission clause, and summary have been fixed; (2) the C.R.S.A. § 1-40-111(2) requirement that circulators sign affidavits averring, essentially, that they have complied with Colorado law; (3) the C.R.S.A. § 1-40-112(1) restriction allowing petitions to be circulated only by registered electors at least eighteen years old; (4) the C.R.S.A. § 1-40-112(2) requirement that all circulators wear badges identifying themselves by name and as either paid or volunteer; and (5) the C.R.S.A. § 1-40-112(1) and (2) disclosure requirement regarding paid circulators.

C.R.S.A. § 1-40-108(1) provides, in part, that "[n]o petition for any ballot issue shall be of any effect unless filed with the secretary of state within six months from the date that the title, submission clause, and summary have been fixed and determined." The gist of plaintiffs' argument is that the six-month limit is arbitrary and excludes some measures from being placed on the ballot. Defendants argue the deadline is necessary to preserve an orderly ballot and, in any case, is not as onerous as other limits approved by the Supreme Court.

The six-month deadline is a neutral ballot access regulation. By definition, ballot access restrictions prevent some measures from being placed on the ballot. However, this feature is insufficient by itself to require strict scrutiny. The court found, and the record indicates, that by planning and proper preparation of the

ballot, title proponents enjoy ample time to circulate petitions.

Although some measures might fare better under a longer or indeterminate period, the current deadline is not a significant burden on the ability of organized proponents to place a measure on the ballot. "[T]he State's asserted regulatory interests [need only be] 'sufficiently weighty to justify the limitation' imposed on the [Plaintiffs'] rights." Timmons, 117 S.Ct. at 1366. Our inquiry does not require "[e]laborate, empirical verification of weightiness" of the State's asserted justifications. Id. Defendants assert several interests: preserving the integrity of the state's elections, maintaining an orderly ballot, and limiting voter confusion. The regulation here advances these interests by establishing a reasonable window in which proponents must demonstrate support for their causes. The six-month deadline is a reasonable, nondiscriminatory ballot access regulation; it does not offend the First and Fourteenth Amendments.

C.R.S.A. § 1-40-111(2) requires circulators to sign specifically described affidavits and is "generally-applicable." [quotation omitted, eds.]

A state has a strong, often compelling, interest in preserving the integrity of its electoral system. Circulators play an important role in ballot issue elections--they are solely responsible for gathering the number and type of signatures required to place an issue on the ballot. Indeed, as we have previously noted, circulators are, in effect, entrusted with personal responsibility to prevent irregularities in the petition process. The affidavits "ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state." Loonan, 882 P.2d at 1388-89. Given the responsibility circulators bear in ensuring the integrity of elections involving ballot issues, and given the fact that the affidavit requirement is a reasonable, nondiscriminatory restriction, we conclude plaintiffs' challenge fails.

Section 1-40-112(1) prescribes who may circulate: "No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated." The district court held 1-40-112(1) was unreviewable because the petition process is not a right granted by the United States Constitution. In Meyer, we rejected that argument, explaining even though the initiative and referendum process is not guaranteed by the United States Constitution, Colorado's choice to reserve it does not leave the state free to condition its use by impermissible restraints on First Amendment activity. Furthermore, it is irrelevant that the statutory restriction is based upon a constitutional provision enacted by petition. The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation.

Plaintiffs argue, essentially, that 1-40-112(1) is discriminatory. Under an equal protection analysis, classifications that impinge upon the exercise of a fundamental right are subject to the most exacting scrutiny. Plaintiffs do not bring an equal protection claim; nevertheless, when a statute allows some people to speak but not others, the principles of equal protection and free speech are intertwined.

The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, thereby excluding that group of persons from participating in core political speech. Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. The mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponent's message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot. Consequently, we apply exacting scrutiny.

Colorado fails to identify a compelling state interest to which its registration requirement is narrowly tailored. The state attempts to justify the registration requirement by arguing it has a compelling interest in ensuring circulators are residents so the regulatory system may be more easily policed (the secretary's authority to issue subpoenas to circulators does not extend beyond Colorado's borders) and circulators who violate the law may be more easily prosecuted. Even if we assume the state's potentially compelling interest in preserving the integrity of its elections requires all circulators to be residents, a question we need not decide, the registration requirement is not narrowly tailored to ensure that circulators are residents. Clearly, a large number of Colorado residents are not registered voters. The state's asserted interest could be more precisely achieved by simply imposing a residency requirement for circulators. Because Colorado's requirement that circulators be registered voters is not narrowly tailored to a compelling state interest, we find it unconstitutionally impinges on free expression and reverse the district court.

Section 1-40-112(1) also places an age restriction on circulation. We are mindful that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967). We also recognize, however, that age commonly is used as a proxy for maturity. Subject to the Twenty-sixth Amendment, it seems states generally may place an age requirement on the right to vote without having to satisfy exacting scrutiny. Plaintiffs have not demonstrated that persons under eighteen have a stronger interest in circulating than they do in voting. The age requirement is a neutral restriction that imposes only a temporary disability— it does not establish an absolute prohibition but merely postpones the opportunity to circulate. Exacting scrutiny is not required. Because maturity is reasonably related to Colorado's interest in preserving the integrity of ballot issue elections, plaintiffs' First Amendment challenge fails.

Section 1-40-112(2) requires each circulator to wear a personal identification badge:

> "(a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.
> (b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator."

A violation of 1-40-112(2) could result in the signatures collected by a circulator being declared void, C.R.S.A. 1-40-132, and

possibly even criminal prosecution, C.R.S.A. 1-40-130(2). The district court held that 1-40-112(2) infringes the right to anonymous political expression and struck it down in its entirety. The court found the badge requirement discourages people from circulating because people are reluctant to wear badges, especially when they advocate unpopular causes.

Defendants attempt to avoid exacting scrutiny. First, they argue the badge requirement has been upheld by the Supreme Court, citing footnotes from Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 799 n. 11 (1988), and Martin v. City of Struthers, 319 U.S. 141, 148 n. 14 (1943). Riley invalidated a North Carolina law restricting the manner in which professional fundraisers could solicit charitable contributions, and Martin invalidated a city ordinance prohibiting knocking on the door or ringing the doorbell of any residence for the purpose of distributing literature. Neither case addressed a law similar to 1-40-112(2) and neither held that a state may condition political expression on the wearing of an identification badge. Further, the footnotes on which defendants rely are dicta.

Second, defendants argue exacting scrutiny is unwarranted because there is no constitutionally protected right to circulate anonymously. However, "[t]he First Amendment affords the broadest protection to ... political expression in order '[t]o assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " Buckley, 424 U.S. at 14. It is also clear that circulation is core political expression. The Supreme Court has protected anonymous political expression and association. The Court protects anonymity because "fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Talley, 362 U.S. at 65. As the Court has explained, our nation's tradition of anonymous political expression "is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation " McIntyre, 514 U.S. at 342.

On the other hand, the Court also has upheld disclosure requirements that deprive some speakers of anonymity. Although exhaustive, the disclosures examined in Buckley are not akin to the identification badges at issue here. The disclosures in Buckley were limited to candidate elections, were triggered only where the speaker spent money, and were further removed from the moment of speech. Even in Buckley, however, the Court acknowledged that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." Buckley, 424 U.S. at 64. Thus, the Court subjected the disclosure requirements to exacting scrutiny. To the extent defendants attempt to avoid exacting scrutiny, their second argument is unpersuasive.

Third, defendants argue circulators have only a diminished interest in anonymity because they sign affidavits that are attached to the petition, which is available to the public. Information contained on an identification badge is much more accessible than information attached to a filed petition and, unlike the affidavit requirement, the badge requirement forces circulators to reveal their identities at the same time they deliver their political message. The badge requirement operates when the reaction to their message may be the most intense, emotional, and unreasoned. Thus, as opposed to the affidavit

requirement, the badge requirement deprives circulators of their anonymity at the precise moment their interest in anonymity is greatest. The record amply supports the court's finding that the badge requirement chills circulation. It places a "severe" restriction on First and Fourteenth Amendment rights requiring exacting scrutiny.

Defendants argue the badge requirement serves a compelling interest, aiding the state's efforts to prevent fraud by enabling the public to identify individuals who make false or fraudulent statements while circulating. Thus, defendants essentially argue the badges enable the state to pursue more efficiently individuals who engage in misconduct. Although the state has a compelling interest in preserving the integrity of its elections, "the First Amendment does not permit the State to sacrifice speech for efficiency," Riley, 487 U.S. at 795. Additionally, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." Meyer, 486 U.S. at 427, Therefore, "[a]lthough the State has every right to take strong measures to prevent ... dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems within clearly recognized areas permitted by the Supreme Court." Grant, 828 F.2d at 1454.

Circulating a petition is akin to distributing a handbill. In both instances, an individual identifies himself or herself with a specific viewpoint by personally disseminating it. Just as those who distribute handbills have a strong interest in remaining anonymous, so do circulators. [Quotation omitted, eds.]

Defendants argue the badge requirement is the type of "limited identification requirement" McIntyre suggested might be constitutional. Defendants rely on Buckley, which upheld compelled disclosure of certain expenditures and their uses in candidate elections. Requiring circulators to identify themselves against their will is more intrusive than simply disclosing an expenditure. Whereas contributing to a campaign is only a generalized demonstration of support, circulating a petition, and the advocacy it entails, more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support. Spending money to advance an unpopular viewpoint is a more detached form of support and is less likely to precipitate retaliation than circulating a petition.

As previously noted, defendants argue the badge requirement is necessary to enable the state to identify and punish fraud. Section 1-40-112(2) is not narrowly tailored to serve the state's asserted interest. Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud. Article 40 provides other tools that are much more narrowly tailored to serve the state's interest. Although requiring circulators to wear identification badges may enhance the state's ability to impose other penalties, it does not follow, and it is unestablished, that the badges are a necessary component of the state's arsenal.

Because we find the badge requirement unconstitutionally infringes on circulators' First Amendment rights by its identification requirements, and because plaintiffs' arguments and evidence focus entirely on this element of

the badge requirement, we express no opinion regarding whether the additional requirements that the badge disclose whether the circulator is paid or a volunteer, and if paid, by whom, would pass constitutional muster standing alone.

Section 1-40-121 places disclosure requirements on paid circulators and is "generally-applicable." [Quotation ommitted, eds.]

The court invalidated 1-40-121(1) to the extent it requires the proponents of a petition to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" in reporting the amounts paid to circulators. The court invalidated 1-40-121(2) in its entirety. We apply exacting scrutiny.

Section 1-40-121 is a broad disclosure provision. It compels disclosure of the name of a paid circulator regardless of the amount he or she received to circulate. The State analogizes 1-40-121 to the Federal Election Campaign Act of 1971 disclosure provision upheld in Buckley. Buckley acknowledged that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64. However, Buckley identified three interests "sufficiently important to outweigh" the infringement on the "privacy of association and belief guaranteed by the First Amendment." Id. at 64. First, campaign finance disclosure informs voters of the candidate's place in the political spectrum and alerts them "to the interests to which a candidate is most likely to be responsive." Id. at 67. Second, "disclosure requirements deter actual corruption and avoid the appearance of corruption." Id. Third, "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." Id. at 68.

Unlike the statute in Buckley, 1-40-121 imposes no monetary threshold-- a circulator must be identified by name and address regardless of whether he or she received 10 cents or $10,000. The statutes at issue in Buckley and Brown are dissimilar from 1-40-121 for another reason— they regulate candidate elections but 1-40- 121 does not. Section 1-40-121 applies only to the circulation of initiative and referendum petitions. None of the three interests the Court found sufficient in Buckley are relevant here. The first and third are inapplicable because 1-40-121 addresses expenditures, not contributions. The second is inapplicable because "quid pro quo" concerns are not present here. Defendants' attempts to analogize 1-40-121 to Buckley are unpersuasive.

The court struck down 1-40-121(1) to the extent it compels disclosure of information specific to each paid circulator. Much like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise. Although the fact that disclosure is made at the time the proponents file the petition lessens the burden of the disclosure, the law fails exacting scrutiny because the interests asserted by the state either already are or can be protected by less intrusive measures.

Defendants' first asserted interest, informing the electorate whether a measure has grassroots support, is directly and specifically protected by the constitutional requirement that to reach the ballot an initiative or referendum petition must be signed "by

registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, § 1(2) & (3). As limited by the court, 1-40-121(1) requires proponents to disclose the amount spent per signature and, thus, the total amount paid to circulators. To the extent the amount of money spent has some correlation to the level of grassroots support, this information allows voters to compare the level of support enjoyed by different issues. Requiring proponents to provide a detailed roster of all who were paid to circulate compromises the expressive rights of paid circulators, but sheds little light on the relative merit of the ballot issue.

Defendants' second asserted interest, discouraging fraud, also is protected by a battery of more narrowly tailored measures. The State has made no showing that these mechanisms are inadequate. Defendants have not shown the disclosure is necessary to discourage fraud.

Section 1-40-121(2) compels detailed monthly disclosures. The court invalidated it in its entirety. Defendants assert the same two interests: grassroots support and fraud. Compelling detailed monthly disclosures while the petition is being circulated chills speech by forcing paid circulators to surrender the anonymity enjoyed by their volunteer counterparts. In that the disclosures are contemporaneous with circulation, 1-40-121(2) is more akin to the badge requirement than 1-40-121(1). Section 1-40-121(2) is a broad intrusion only loosely related to the interests it is purported to serve. Like 121(1), 121(2) fails exacting scrutiny because it is not narrowly tailored to serve either of defendants' asserted interests.

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CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. GARRET F.

By Troy R. Rackham

Does the Individuals with Disabilities Education Act (IDEA) require schools to pay for services provided to disabled individuals who need the one-on-one continuous service of a nurse in order to attend school? This is the question presented to the Supreme Court by *Cedar Rapids Community School District v. Garret F.*

Garret F. was severely injured in a motorcycle accident when he was 4. He is now a quadriplegic and depends on a ventilator to breathe. Despite his physical setbacks, Garret's mental abilities were unaffected and he is now in high school. However, Garret requires the continuous medical attention of a nurse at school. Specifically, Garret requires urinary bladder catheterization once a day, suctioning of his tracheotomy as needed, food and drink on a regular schedule, ambu bag administration, observation for respiratory distress, blood pressure monitoring, and bowel disimpactation in cases of autonomic hyperreflexia.

Obviously the cost of providing a nurse on a daily basis to perform these services is extensive. Garret's parents initially footed the bill for the nurse attendant. However, when Garret reached fifth grade, the parents could no longer afford to provide the nurse and asked the school to do so under the IDEA. The school refused, claiming that it was not obligated under the IDEA to provide for continuous nursing service.

Garret's mother, Charlene, challenged the school's position by appealing to an administrative law judge. The ALJ found that the IDEA expressly excluded 'medical services' from the obligations imposed upon schools. Notwithstanding the 'medical services' exception, the ALJ determined that the school was required to pay for the nursing services given to Garret F because continuous nursing service is not a medical service. The school appealed the ALJ's decision to the federal district court. The district court affirmed the ALJ's decision by granting Garret's motion for summary judgment. The Eighth Circuit Court of Appeals, citing the Supreme Court's decision in *Irving Indep. School Dist. v. Tatro* (1984), found that the IDEA's medical services exception was meant to apply only to services provided by a physician and not a nurse. Accordingly, the Eighth Circuit affirmed the district court's decision and held that the school is required to provide the nursing services to Garret F

The Supreme granted certiorari to this case to resolve a circuit split. The Second, Sixth, and Ninth Circuits have previously held that the IDEA's 'medical services' exception applies to other medical services, like providing a nurse in school. The Eighth circuit split from these circuits in *Garret F.* by holding that nursing services are not excluded by the IDEA.

An affirmance of the Eighth Circuit's opinion could have enormous ramifications for the many schools who are already short on resources. Schools may have to provide nursing and other related services to all disabled individuals in need. The financial and logistical impact of this type of holding upon schools will obviously be great.

COURT TO DECIDE SCHOOL-NURSES CASE

AP Online

May 18, 1998

Richard Carelli

WASHINGTON (AP) - The Supreme Court today agreed to decide whether public school districts must pay for professional nurses to accompany some disabled students throughout the school day.

The justices said they will review rulings that require a Cedar Rapids, Iowa, school district to pay for nursing services needed by a teen-age boy identified in court papers as Garret F.

At issue is the scope of the federal Individuals with Disabilities Education Act. The law provides that all children with disabilities receive a "free appropriate public education."

Under the law, public schools are required to provide various "special education and related services." But an exception is made for medical services.

Asked by the court for its views, the Clinton administration had urged the justices to reject the school officials' appeal and leave the lower court rulings intact.

Garret, injured in a motorcycle accident at age 4, is a quadriplegic and ventilator dependent. His mental abilities were unaffected, and he is now in the ninth grade.

During the school day, he requires a personal attendant to see to his health-care needs. Through most of his schooling, a licensed practical nurse has served as that attendant

In 1993, Garret's mother asked the school district to pick up the costs of providing an attendant for Garret.

She said such costs are to be free "related services" provided under the federal law. But school officials said one-on-one nursing services are medical, not educational, and do not have to be provided at taxpayer expense.

A federal trial judge and the 8th U.S. Circuit Court of Appeals ruled for Garret and against the school district.

"Garret's services are not provided by a physician but rather a nurse," the appeals court said last December. "Thus ... the services are not medical services but rather school health services or supportive services, both of which meet the definition of related services which the district must provide."

The appeals court relied heavily on a 1984 Supreme Court ruling that said public school officials had to pay for and provide a special procedure for a child disabled by spina bifida and unable to urinate by herself.

Such services, the high school said then, "are no less related to the effort to educate than are services that enable the child to reach, enter or exit the school."

But that 1984 opinion added: "It bears mentioning that not even the services of a nurse are required."

In the appeal acted on today, lawyers for the Cedar Rapids school officials noted that three other federal appeals courts have ruled that schools don't have to pay for continuous services provided by licensed nurses.

"Medical services are not provided only by physicians," the appeal said. "The court of appeals effectively converted the (federal law) from an educational law to a law requiring school districts to pay catastrophic medical expenses of their students."

Lawyers for the boy and his mother urged the justices to reject the school district's appeal, contending that the disputed costs were minimal when the revenue generated by Garret's attendance is taken into consideration.

The case is Cedar Rapids Community School District vs. Garret F., 96-1793.

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SUPREME COURT REVIEW SOUGHT IN HEALTH CARE RULING

The Special Educator

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The Board of Education in the Cedar Rapids Community School District has decided to ask the U.S. Supreme Court to review the recent 8th Circuit ruling in which the court ignored several factors generally used to determine health care services requirements in granting those services to a medically fragile student.

In Cedar Rapids Community Sch. District v. Garret F., 25 IDELR 439, the court said it was bound by the "bright-line" physician/nonphysician rule in the Supreme Court's Tatro case: The services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not.

Since the services in question for a 12-year-old quadriplegic (urinary bladder catheterization, suctioning of tracheostomy, ventilator setting checks, ambu bag administrations as a backup to the ventilator, blood pressure monitoring, observation to determine if he was in respiratory distress or autonomic hyperreflexia, and disempactation in the event of autonomic hyperreflexia) did not need to be administered by a doctor, the court said they were school health services or supportive services which the district must provide.

Jeananne Hagen, Iowa's special education director, said the state was just beginning to analyze the potential impact of the ruling, and specifically how many districts are already providing such services.

Other courts have weighed several factors in determining whether health care services are required related services or excludable medical services. Those factors have included the level of expertise necessary to administer the services, whether the student's condition is life-threatening, and the financial burdens of providing the services.

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96-1793 CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT v. GARRET F.

(Ruling Below 106 F.3d 822 (8th Cir. 1996))

Individuals with Disabilities Education Act's exclusion of 'medical services' beyond those for diagnostic and evaluation purposes from statute's funding of special education and related services, 20 USC 1401(a)(17), is limited, under *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984), to services of physician other than for diagnostic and evaluation purposes, and thus quadriplegic fifth grader was entitled to funding for nurse's services necessary to enable him to enjoy benefit of special education.

Questions presented: (1) Is school district required to pay for continuous one-on- one nursing services for disabled student, when IDEA expressly excludes 'medical services' from its mandate? (2) Should there be bright-line rule that IDEA's exclusion of 'medical services' means only those services provided by physician, as determined below by Eighth Circuit, or are other medical services excluded from statute, as previously determined by Second, Sixth, and Ninth Circuits?

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT, Appellant,
v.
GARRET F., A minor by his Mother and Next friend, CHARLENE F., Appellee.

No. 96-1987 NICR.

United States Court of Appeals,
Eighth Circuit.

Decided Feb. 7, 1997.

STROM, Senior District Judge.

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400--1491o. At issue is whether the IDEA requires the Cedar Rapids Community School District to provide Garret F. with continuous nursing services while he is in school. The district court granted summary judgment in favor of Garret finding that the necessary services were not within the "medical services" exclusion of the IDEA, and therefore, were "related services" which the school district must provide.

FACTS

In 1987, when he was four years old, Garret was severely injured in a tragic motorcycle accident. While Garret's mental abilities were unaffected, his spinal cord injury left him a quadriplegic and ventilator dependant.

In the fall of 1988, Garret started kindergarten in the Cedar Rapids Community School District. He has been in school there ever since. During the school day, Garret requires a personal attendant within hearing distance of him at all times to see to his health care needs. Garret requires urinary bladder catheterization about once a day, suctioning of his tracheotomy as needed, food and drink on a regular schedule, repositioning, ambu bag administration if the ventilator malfunctions, ventilator setting checks, observation for respiratory distress or autonomic hyperreflexia, blood pressure monitoring, and bowel disimpactation in cases of autonomic hyperreflexia. From kindergarten through the fourth grade, pursuant to an agreement between Garret's parents and the school district, Garret's family provided the personal attendant.

However, in 1993, when Garret started fifth grade, the agreement between his parents and the school district was discontinued. Garret's mother, Charlene F., requested that the school district provide Garret's nursing services while he was at school. The school district refused stating that it was not obligated to provide continuous, one-on-one nursing services.

Relying on the IDEA and the Iowa special education laws, Charlene administratively challenged the school district's position. After a hearing, the administrative law judge concluded that the school district had to reimburse Charlene for the nursing costs she incurred during the 1993-94 school year and had to provide such services in the future. The school district appealed to United States District Court.

In district court, both parties filed motions for summary judgment based on the record from the administrative hearing. The court granted summary judgment in favor of Garret finding that the services were not within the scope of the "medical services" exclusion of the IDEA, and therefore, the school district was required to provide them as "related services." The school district appealed.

STANDARD OF REVIEW

The court will review the district court's interpretation of the applicable federal statutes de novo on appeal.

DISCUSSION

In order to receive funds under the IDEA, a state must demonstrate to the Secretary of Education that it has "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1) (Supp.1996). The phrase "free appropriate public education" is defined as special education and related services. 20 U.S.C. § 1401(18) (1990). Thus, if Garret's nursing services qualify as "related services," the school district must provide them.

Related services are statutorily defined as:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and valuation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17) (Supp.1996). Garret contends that his nursing services qualify as related services, but the school district argues that the services are "medical services" which are expressly excluded from the definition of supportive services and consequently the definition of related services.

This court's decision is controlled by the two step test pronounced by the Supreme Court in Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984). To determine if a service is a related service under the IDEA, the court must first determine whether the service is a "supportive service[ ] .. required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(17) (1990). If it is, then the court must determine if the service is excluded from the definition of supportive service as a medical service beyond diagnosis or evaluation.

There is little argument about whether the services Garret requires qualify as supportive services necessary to enable him to enjoy the benefit of special education. If the services are not available during the school day, Garret cannot attend school and thereby benefit from special education. "Services ... that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the building" which are expressly provided for in the IDEA. Thus, the court finds that the services Garret requires at school are supportive services.

At the second step, the court must determine whether the services are excluded from the definition of supportive services as medical services beyond diagnosis and evaluation. In

Tatro, the Supreme Court established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not. Regardless of whether we agree with this reading of the statute and the regulations, we are bound by the Supreme Court's holding.

Here, Garret's services are not provided by a physician, but rather, a nurse. Thus, based on Tatro, the services are not medical services, but rather, school health services or supportive services, both of which meet the definition of related services which the district must provide.

The court is aware of several decisions that have not interpreted Tatro as establishing a bright-line, physician/non-physician test for medical services. Going beyond the physician/non-physician distinction the Supreme Court found in the statute and the regulations, these courts rely on dicta in Tatro in order to factor into the medical services exclusion considerations of the nature and extent of the services performed. The court declines to seize dicta in Tatro to go beyond the physician/non-physician test which the Supreme Court sets forth therein.

Accordingly, we affirm the judgment of the district court.

The Court and the Public: How the Media Covers the Court