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Medellín v. Texas

(06-984)


Medellín, a Mexican national who spent most of his life in Texas, was convicted of the rape and murder of two teenage girls. He later appealed on grounds that he was not notified of his right to access the Mexican consulate for advice and legal counsel. In Mexico v. U.S. (the Avena judgment), the International Court of Justice (ICJ) held that 51 Mexican nationals, including petitioner, were entitled to receive review and reconsideration in the U.S. President Bush then ordered a review and hearings in each of the 51 cases, which the Texas Court of Criminal Appeals disregarded, holding that the decision of the ICJ was not binding federal law and so did not abide by its decision.

Questions Presented: (1) Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined on Feb. 28, 2005, that the states must comply with the United States' treaty obligation to give effect to the Avena judgment of the International Court of Justice in the cases of the 51 Mexican nationals named in that March 2004 judgment? (2) Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the Avena judgment in the cases that the judgment addressed?

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Ex parte MEDELLIN

Court of Criminal Appeals of Texas

Decided November 15, 2006

[Excerpt: Some footnotes and citations omitted.]

KEASLER, Judge, delivered the opinion of the Court with respect to Parts I, II, III.A., III.C., and IV:

José Ernesto Medellín filed this subsequent application, alleging that the International Court of Justice Avena decision and the President’s memorandum directing state courts to give effect to Avena, require this Court to reconsider his Article 36 Vienna Convention claim because they (1) constitute binding federal law that preempt Section 5. Article 11.071 and (2) were previously unavailable factual and legal bases under Section 5(a)(1). We hold that Avena and the President’s memorandum do not preempt Section 5 and do not qualify as previously unavailable factual or legal bases.

I. PROCEDURAL HISTORY OF MEDELLÍN’S CASE

Medellín, a Mexican national, was convicted of capital murder and sentenced to death for

Medellin filed an initial application for a writ of habeas corpus, claiming for the first time, among other things, that his rights under Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested. *Ex parte Medellin*, No. 675430-A (339th Dist. Ct. Jan. 22, 2001). The district court found that Medellin failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review. The court also found, in the alternative, that Medellin, as a private individual, did not have standing to bring a claim under the Vienna Convention because it is a treaty among nations and therefore does not confer enforceable rights on individuals; only signatory nations have standing to raise a claim under the treaty. Offering an additional alternative, the court determined that Medellin failed to show harm because he received effective legal representation and his constitutional rights had been safeguarded. Finally, the court concluded that Medellin did not prove that his rights under the Fifth, Sixth, and Fourteenth Amendments had been violated and that he failed to show that any non-notification affected the validity of his conviction and sentence. We adopted the trial court’s findings of fact and conclusions of law with written order and denied relief.

Medellin then presented his Vienna Convention claim in a federal petition for a writ of habeas corpus. The district court denied relief, and Medellin filed for a certificate of appealability. While his application was pending, the International Court of Justice (ICJ) issued its decision in *Avena, Mexico v. U.S.*, 2004 I.C.J. No. 128. In that case, Mexico claimed that the United States had violated the Vienna Convention by failing to timely advise more than fifty Mexican nationals awaiting execution in United States prisons, including Medellin, of their right to talk to a consular official after they had been detained. *Id.* at 13-16, 49. The ICJ ruled in favor of Mexico, holding that the Vienna Convention does confer individual rights and that the United States violated the Convention. *Id.* at 90, 106, 140. To remedy the violation, the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences at issue to determine whether the violation “caused actual prejudice to the defendant in the process of administration of criminal justice.” *Id.* at 121. The ICJ specifically stated that review is required regardless of procedural default rules that would otherwise bar review. *Id.* at 112-13, 153(9), (11).

The federal district court denied Medellin’s application for a certificate of appealability, and Medellin appealed to the United States Court of Appeals for the Fifth Circuit, which also denied his application. *Medellin v. Dretke*, 371 F.3d 270, 273, 281 (5th Cir.2004). The Fifth Circuit noted the ICJ decision in *Avena*, but determined that it was bound by the Supreme Court’s decision in *Breard v. Greene*, which held that claims based on a violation of the Vienna Convention are subject to procedural default rules. *Id.* at 280 (citing *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998)). Continuing, the court found that even if Medellin’s Vienna Convention claim was not procedurally defaulted, its previous holding in *United States v. Jimenez-Nava*—that the Vienna Convention does not create individually enforceable rights—would require it to deny Medellin’s application for a certificate of appealability. *Id.* (citing *United
States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir.2001)).

Medellín petitioned for certiorari to the Supreme Court of the United States, which granted review. Medellín v. Dretke, 543 U.S. 1032, 125 S.Ct. 686, 160 L.Ed.2d 518 (2004). Before oral argument, the President issued a memorandum directing state courts to give effect to the Avena decision under the principles of comity. Then, while his case was pending before the Supreme Court, Medellín filed an application for a writ of habeas corpus in this Court, requesting that we give full effect to the Avena decision and to the President’s memorandum. Ex parte Medellín, 206 S.W.3d 584 (Tex.Crim.App. 2005), Application No. AP-75,207. The Supreme Court subsequently dismissed Medellín’s case as improvidently granted, stating that there is a possibility that “Texas courts will provide Medellín with the review he seeks pursuant to the Avena judgment and the President’s memorandum. . . .” Medellín v. Dretke, 544 U.S. 660, 125 S.Ct. 2088, 2092, 161 L.Ed.2d 982 (2005) (per curiam).

Based on the Supreme Court’s dismissal, we determined that Medellín’s subsequent application is ripe for consideration. We therefore filed and set this case for submission.

Under Article 11.071, Section 5(a) of the Code of Criminal Procedure, we may not consider the merits of any claims raised on a subsequent application for a writ of habeas corpus or grant relief unless the applicant provides sufficient specific facts demonstrating that:

“the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.”

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We ordered Medellín and the State to brief the following issue: whether Medellín “meets the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Criminal Procedure.” Ex parte Medellín. We also invited the Attorney General of the United States to “present the views of the United States.” Id.; see 28 C.F.R. § 0.5 (2005). On September 14, 2005, we heard oral argument from the parties and the Solicitor General, who argued on behalf of the Attorney General of the United States. . . .

Medellín argues that the Avena decision and the President’s memorandum are binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution. Alternatively, contending that he meets the requirements of Section 5(a)(1), Medellín claims that the Avena decision and the President’s memorandum are previously unavailable factual and legal bases because neither was available when he filed his first application. Countering Medellín’s arguments, the State contends that the Avena decision and the President’s memorandum do not meet the requirements of Section 5 and do not override it. Finally, the United States as amicus curiae asserts that, although Avena is not enforceable in United States courts, Medellín is entitled to review and reconsideration of the merits of his Vienna Convention claim “to the extent that his claim relies on the President’s determination that ‘review and reconsideration’ . . . by Texas courts is necessary for compliance with the
United States’ international obligations.” The United States also avers that “Section 5 would contravene the President’s implementation of treaty obligations, and federal law would preempt its operation in the circumstances of this case.”

II. CONTEXTUAL BACKGROUND

A. Treaties

Treaties, entered into by the President of the United States with the consent of a super-majority of the United States Senate, are incorporated into the domestic law of our country pursuant to the Supremacy Clause of the United States Constitution, which commands: “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Treaties are “placed on the same footing” as legislation enacted by the United States Congress, and while neither is superior to the other, both are subject to the United States Constitution. Reid v. Covert, 354 U.S. 1, 17, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). . . .

* * *

When a self-executing treaty and an act of Congress concern the same subject matter, courts should give effect to both unless the language of one would be violated. Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888). But when “the two are inconsistent, the one last in date will control the other.” Id.

Addressing the relationship between state law and treaties, the Supreme Court has stated: “[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.” United States v. Pink, 315 U.S. 203, 230, 62 S.Ct. 552 (1942). Accordingly, “state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.” Id. at 230-31, 62 S.Ct. 552.

The Supreme Court has recognized that a treaty may contain certain provisions that grant judicially enforceable rights to a foreign national residing in another country. Head Money Cases, 112 U.S. at 598, 5 S.Ct. 247. In such cases, under the Supremacy Clause, the provisions of the treaty are placed in the “same category as other laws of Congress” and therefore, are “subject to such acts as Congress may pass for its enforcement, modification, or repeal.” Id. at 599, 5 S.Ct. 247. When a treaty confers rights that are judicially enforceable, a court will look “to the treaty for a rule of decision for the case before it as it would to a statute.” Id. However, as we recently noted, there is a presumption that “‘international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’” Sorto v. State, 173 S.W.3d 469, 478 (Tex.Crim.App.2005). . . .

B. The United Nations Charter and the Statute of the International Court of Justice

. . . Article 92 establishes the ICJ as “the principal judicial organ of the United Nations.” The ICJ operates “in accordance with the annexed Statute [of the ICJ]. . . .” Under Article 93, “All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.” . . . Article 34 of the Statute provides that “[o]nly states
may be parties in cases before the [ICJ]" and, under Article 36(1), the court has jurisdiction over "cases which the parties refer to it and all matters specifically provided for . . . in treaties and conventions in force." Under Article 59, an ICJ decision binds only the parties to that particular case.

C. The Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes

. . . The Vienna Convention is a seventy-nine article multilateral treaty that "promotes the effective delivery of consular services in foreign countries, including access to consular assistance when a citizen of one country is arrested, committed to prison or custody pending trial, or detained in any other manner in another country." . . .

Article 36 "ensure[s] that no signatory nation denies consular access and assistance to another country's citizens traveling or residing in a foreign country. . . ." Sorto, 173 S.W.3d at 477. Article 36 reads as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with . . . and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . .

* * *

In addition to becoming signatories to the Vienna Convention, Mexico and the United States became parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Although the United States recently withdrew from the Optional Protocol, the United States has agreed to "discharge its inter-national obligations under the decision . . . by having State courts give effect to the [Avena] decision. . . ."

D. International Court of Justice Rulings on Article 36 of the Vienna Convention Involving the United States

The ICJ has encountered a series of cases filed against the United States by other nations alleging violations of Article 36 of the Vienna Convention.

. . . Two suits were filed. Federal Republic of Germany v. United States of America (LaGrand) and Mexico v. United States of America (Avena). . . . Although both the LaGrands were executed before the ICJ issued its judgment, the ICJ still found.
among other things, that: (1) Article 36 of the Vienna Convention confers individual rights on detained foreign nationals; (2) the United States failed to comply with Article 36; and (3) as applied to the LaGrands, the procedural default rules of the United States prevented the rights intended under Article 36 from being given full effect. LaGrand, 2001 I.C.J. 104, ¶¶ 1, 10, 14. The court further stated that the United States, “by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.”

Almost three years after LaGrand, the ICJ handed down its decision in Avena. With regard to Medellín and fifty other Mexican nationals, the ICJ concluded that the United States breached its obligations under Article 36, paragraph 1(b) by failing to inform them, after their arrests and without delay, of their right to contact the Mexican consular post. Avena, ¶¶ 106(1), 153(4). And in forty-nine cases, including Medellín’s case, the court found that the United States violated Article 36, paragraphs 1(a) through (c) by failing to: (1) notify the consular post of their detention; (2) enable consular officials to communicate with and have access to them; and (3) enable consular officials to visit with them. The court also found that in Medellín’s case, in addition to thirty-three others, the United States violated Article 36, paragraph (c) by preventing consular officials from being able to timely arrange for their citizens’ legal representation.

After addressing the United States’ and Mexico’s arguments concerning the appropriate remedy for the Article 36 violations, the court concluded “that the ‘review and reconsideration’ prescribed by it in the LaGrand case should be effective.” Directing the United States to provide review and reconsideration of the convictions and sentences of the Mexican nationals whose individual rights under the Vienna Convention had been violated, the ICJ stated:

... [W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

E. The Presidential Memorandum

After the United States Supreme Court granted certiorari in this case, the President weighed in on the controversy surrounding Avena by issuing a memorandum to the United States Attorney General, which states, in pertinent part, as follows:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in ... [Avena], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

III. ANALYSIS

A. Avena and The Supremacy Clause

Medellín claims that the ICJ decision in Avena is binding federal law that preempts Section 5 of the Texas Code of Criminal Procedure. The State and the United States as amicus curiae disagree.
As an initial matter, while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether Avena is enforceable in this Court. Our decision is controlled by the Supreme Court’s recent opinion in Sanchez-Llamas v. Oregon, and accordingly, we hold that Avena is not binding federal law and therefore does not preempt Section 5.

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In this case, we are bound by the Supreme Court’s determination that ICJ decisions are not binding on United States courts. As a result, Medellin, even as one of the named individuals in the decision, cannot show that Avena requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.

B. The Presidential Memorandum and the Supremacy Clause

Aligned on the effect of the President’s memorandum, both Medellin and the United States as amicus curiae contend that the President’s February 28, 2005, memorandum preempts Section 5 and, as a result, requires us to review and reconsider Medellin’s conviction and sentence as prescribed by Avena. In opposition, the State challenges, among other things, the effect of the memorandum’s substantive language.

...We conclude that Medellin has not shown that the President’s memorandum entitles him to review and reconsideration, we will assume, without deciding, that the memorandum constitutes an executive order.

...With regard to external affairs, the federal government possesses exclusive power; it is “vested with all the powers of government necessary to maintain an effective control of international relations.” Curtiss-Wright, 299 U.S. at 318, 57 S.Ct. 216. When acting in external affairs, the President has “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations.” And while the President’s power “must be exercised in subordination to the applicable provisions of the Constitution,” such power is not necessarily dependent on specific congressional authorization. Id. The President, for example, can enter into executive agreements with foreign nations without the advice and consent of the Senate. Am. Ins. Ass' n v. Garamendi, 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). Valid agreements are accorded the same status as treaties and, consequently, may preempt state law if they “impair the effective exercise of the Nation’s foreign policy.” Executive orders issued by the President must be authorized by an act of Congress or by the Constitution.

Justice Jackson, in his concurring opinion in Youngstown Sheet & Tube Company v. Sawyer, sought to define the scope of the President’s power. Recognizing that he was offering “a somewhat over-simplified grouping” because “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,” Justice Jackson related the following:

- The President’s “authority is at its maximum” “[w]hen the President acts pursuant to an express or implied authorization of Congress.” In such circumstances, the President’s power “includes all that he possesses in his own right plus all that Congress can delegate.”

- The President’s power is in “a zone of twilight” “[w]hen the President acts in
absence of either a congressional grant or denial of authority."

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The President’s memorandum cites his authority under the Constitution and laws of the United States. With this in mind, we must decide whether the President has exceeded his power by directing us to give effect to the Avena decision under the principles of comity. The President’s directive, which is dependent on his power to act in both foreign and domestic affairs, is unprecedented. What Justice Jackson proclaimed in his concurrence in Youngstown Sheet & Tube Company fifty-four years ago—that the judiciary “may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves” resonates with us today.

We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary. By stating “that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in . . . [Avena], by having State courts give effect to the decision . . . [J],” the President’s determination is effectively analogous to that decision. In Sanchez-Llamas, the Supreme Court made clear that its judicial “power includes the duty ‘to say what the law is.’” Sanchez-Llamas, 126 S.Ct. at 2684. And that power, according to the Court, includes the authority to determine the meaning of a treaty as a “matter of federal law.” The clear import of this is that the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law.

Medellín and the United States argue that the President’s authority is at its maximum. In doing so, both rely on the President’s inherent foreign affairs power to enter into executive agreements to settle claims with foreign nations. . . .

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Turning to the case before us, we conclude that the reliance on the President’s power to enter into executive agreements to settle disputes with other nations, and even corporations under the limited circumstances described in Garamendi, by Medellín and the United States is misplaced. The President has not entered into any such agreement with Mexico relating to the Mexican nationals named in the Avena decision. There has been no settlement. Rather, the presidential memorandum is a unilateral act executed in an effort to achieve a settlement with Mexico.

The President’s independent foreign affairs power to enter into an executive agreement to settle a dispute with a foreign nation under Article II of the Constitution “has received congressional acquiescence throughout its history . . . .” Garamendi, 539 U.S. at 415, 123 S.Ct. 2374. But there is no similar history of congressional acquiescence relating to the President’s authority to unilaterally settle a dispute with another nation by executive order, memorandum, or directive. See Youngstown Sheet & Tube Co., 343 U.S. at 610-11, 72 S.Ct. 863. . . . In this context, it is evident that the President’s independent power to settle a dispute with a foreign nation, recognized throughout the nation’s history, depends on the existence of an executive agreement. Given the extraordinary conduct of the President, unsupported by a history of congressional acquiescence, we find that the President’s chosen method for resolving this country’s dispute with Mexico is “incompatible with the . . . implied will of Congress[.]” Accordingly, in this instance, we find that the exercise of the President’s foreign affairs power “is at its lowest ebb[.]” Having acted contrary to the implied will of
Congress, we conclude that the President has exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with Avena.

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Contrary to the United States’ contentions, requiring a formal bilateral agreement does not limit or constrain the President’s ability to settle international controversies or comply with treaty obligations. The President’s ability to negotiate and enter into an executive agreement to settle a dispute with a foreign nation remains. In this case, however, the President failed to avail himself of that mechanism to settle this nation’s dispute with Mexico. And although it may be time-consuming to obtain an executive agreement, the need for “swift action” does not override what the Constitution requires—an international compact or agreement.

... A Presidential resolution that is based on an evaluation of the means necessary to resolve a dispute and then implemented in anticipation of future acquiescence by a foreign government is not a settlement. The mere possibility of later acquiescence by a foreign government is speculation. Representatives of foreign governments change. and with them, international relations are subject to modification. When it comes to foreign relations, history has proven that a nation deemed an ally on one day, may on the next, be declared an enemy. Finally, the view that an executive agreement allows “a foreign government veto power over the President’s exercise of his foreign affairs powers” undermines the purpose of the negotiation process—the accomplishment of an actual settlement.

The absence of an executive agreement between the United States and Mexico is central to our determination that the President has exceeded his inherent foreign affairs power by ordering us to comply with Avena. We must make clear, however, that our decision is limited to the issue before us—the effect of the President’s February 28, 2005, memorandum. Therefore, we express no opinion about whether an executive agreement between the United States and Mexico providing for state court compliance with Avena would preempt state law.

Medellin also relies on the President’s duty to faithfully execute the laws as provided in Article II, Section 3 of the Constitution. According to Medellin, the President “has both the authority and the duty to enforce the United States’s treaty obligations within the domestic legal system” because, under the Supremacy Clause, treaties are supreme. Related to this argument is Medellin’s contention that the President has done nothing more than confirm that the United States will do what it has already promised to do—abide by the decision of the ICJ in a dispute concerning the interpretation and application of the Vienna Convention. That promise was made by [a] constitutionally prescribed process when the President, with the advice and consent of the Senate, entered into the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute.

The Supreme Court’s determination about the domestic effect of ICJ decisions—that they are entitled only to “‘respectful consideration’” Sanchez-Llamas, 126 S.Ct. at 2685 (quoting Breard, 523 U.S. at 375, 118 S.Ct. 1352), based on its interpretation of the Statute of the ICJ and the United Nations Charter in Sanchez-Llamas forecloses any argument that the President is acting within his authority to faithfully execute the laws of the United States. By directing state courts to give effect to Avena, the President has acted as a lawmaker. But, as Justice Black explained in Youngstown Sheet & Tube, “[i]n
the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” The President’s February 28, 2005, determination cannot be sustained under the power of the Executive to ensure that the laws are faithfully executed.

Relying again on the enumerated powers of the President, Medellin also contends that “[t]he Constitution explicitly vests the President with authority over diplomatic and consular relations.” He argues: “No power is more clearly Presidential than the authority to protect U.S. citizens and their interests abroad.” He contends that the ability of the United States to protect its citizens may be compromised if the United States does not comply with Avena. Looking to statutory authority, Medellin maintains that by virtue of Title 22 United States Code, Sections 1732 and 402(a)(1)(D), “Congress has specifically referenced the President’s duty in the context of protecting U.S. citizens who have been detained or arrested in foreign lands, . . . and in requiring the President to protect foreign nationals in the United States[].”

* * *

We have no doubt that the President and other executive branch officials play a vital role in protecting the interests of American citizens abroad when necessary. However, we do not construe the constitutional provisions as expressly or implicitly granting the President the authority to mandate state court compliance with the ICJ Avena decision, and Medellin cites no precedent that would lead us to conclude otherwise.

Nor can the statutes be read to authorize the President’s independent action in this case. First, there is no indication that the Hostage Act specifically grants the President unlimited power to act when the President’s objective is to protect the interests of American citizens traveling or residing abroad. . . .

* * *

. . . We cannot accept Medellin’s argument that the Hostage Act grants the President unfettered authority to act to protect the interest of United States citizens abroad. It strains logic to conclude that the power delegated to the President under the Hostage Act permits the President to engage in any conduct that will ensure the maintenance of that power. Nevertheless, we need not decide the scope of any implied power conferred to the President under the Hostage Act, because, as we have already concluded in this case, “there is [not] a history of congressional acquiescence in conduct of the sort engaged in by the President.” When concluding that the President had the authority to suspend pending court claims in Dames & Moore, the Court relied on not only the President’s power under the Hostage Act, but on the President’s power under the International Emergency Economic Powers Act and the President’s power to settle claims with foreign nations by executive agreement. In doing so, the Court specifically noted: “Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.” We decline to find that the Hostage Act authorizes the President to order this Court to comply with Avena.

Although Section 4802(a)(1)(D), Title 22, United States Code, provides that the Secretary of State has the duty to protect “foreign missions, international organizations, and foreign officials and other foreign persons in the United States,” that duty extends only to things “‘authorized by law.’” The statute, therefore, cannot be regarded as an
independent source of authority for the President’s memorandum ordering state courts to comply with Avena.

In further support of its position that the President has the authority to direct state courts to give effect to the ICJ Avena decision, the United States directs us to the United Nations Charter and the United Nations Participation Act. The United States maintains that the ratification of the Charter “implicitly grants the President ‘the lead role’ in determining how to respond to an ICJ decision.” And under the United Nations Participation Act, according to the United States, the President, through appointed officials, “represents the United States in the United Nations, including before the ICJ and in the Security Council.” Moreover, the United States argues that Congress “expressly anticipated that these officials would . . . perform ‘other functions in connection with the participation of the United States in the United Nations’ at the direction of the President or his representative to the United Nations.”

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Starting with the United Nations Charter, we hold it does not authorize the type of action that the President has taken here. The President is still bound by the Constitution when deciding how the United States will respond to an ICJ decision, and, as stated above, the President exceeded his implied foreign affairs power by directing state courts to give effect to Avena.

Additionally, the subsections of the United Nations Participation Act set forth above do not support the President’s determination. Because the participation of the United States in proceedings before the ICJ does not bind the courts of this country to comply with a decision of the ICJ, it necessarily follows that the participation of the United States in the United Nations does not authorize the President to order state courts to give effect to any decision rendered by the ICJ.

Based on the foregoing, we hold that the President’s memorandum ordering us to give effect to the ICJ Avena decision cannot be sustained under the express or implied constitutional powers of the President relied on by Medellin and the United States or under any power granted to the President by an act of Congress cited by Medellin and the United States. Youngstown Sheet & Tube Co., 343 U.S. at 585, 72 S.Ct. 863. As such, the President has violated the separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellin cannot show that the President’s memorandum preempts Section 5.

C. Section 5(a)(1), Article 11.071 of the Texas Code of Criminal Procedure

We now consider whether Medellin has satisfied the requirements of Article 11.071. Section 5(a)(1) of the Texas Code of Criminal Procedure so as to permit this Court to review and reconsider his Vienna Convention claim.

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Medellin contends that the Avena decision and the Presidential memorandum serve as previously unavailable factual and legal bases because both issued after his first application was denied. The State maintains that the legal basis for Medellin’s claim, the Vienna Convention, was available before his trial and when he filed his first application. Medellin claims, however, that he is not reasserting the same claim presented on his first application; he contends that the Avena decision and the President’s memorandum provide him with the right to prospective review and reconsideration. We will address whether the
The Avena decision or the Presidential memorandum qualify as a new factual or legal basis under Section 5(a)(1) separately.

1. Factual Basis

Section 5(e) of Article 11.071 states:

For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

What constitutes a “factual basis” under Section 5(a)(1) is not defined. Therefore, to determine whether Avena or the President’s memorandum qualify as a previously unavailable factual basis under Section 5(a)(1), we must perform a statutory-construction analysis to determine the meaning of “factual.”

Our review of multiple dictionaries reveals that there are numerous definitions for the word “fact.” For instance, Webster’s Third New International Dictionary alone contains six definitions. Although there are a variety of definitions for the word “fact,” it must be considered in the context in which it appears. We find it instructive that the Legislature expressly distinguished factual basis (fact) from legal basis (law) in Section 5(a)(1). This distinction accounts for the two necessary, but separate, parts of any subsequent claim: the factual basis and the legal basis. With this in mind, we find that the following definition of “fact” from Black’s Law Dictionary accurately reflects the Legislature’s intent: “[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation.” Giving effect to the plain meaning of “fact” does not lead to an absurd result that the Legislature could not have intended. It is the application of the law to a fact or set of facts that yields the legal effect, consequence, or interpretation. And in some cases, the legal effect, consequence, or interpretation creates a new rule of law.

The actual event or circumstance involved in Medellin’s case is that law enforcement authorities did not inform Medellin of his right to contact the Mexican consulate after his arrest as required by Article 36(1)(b). This fact provided the factual basis for Medellin’s challenge to his conviction and sentence under the Vienna Convention on his first application for a writ of habeas corpus. We disposed of this claim on an independent state ground. Ex parte Medellin, No. WR-50,191-01 (Tex.Crim.App. Oct. 3, 2001). Agreeing with the trial court, we found that the legal effect or consequence of Medellin’s Vienna Convention claim resulted in the application of our state procedural default rule due to Medellin’s failure to object at trial.

Medellin now argues that Avena is a previously unavailable factual basis for purposes of Section 5(a)(1). We disagree. For purposes of Section 5(a)(1), the Avena decision is properly categorized as law, even though it is not binding on us. Sanchez-Llamas, 126 S.Ct. at 2682. The ICJ’s decision in Avena is not a fact and, therefore, does not qualify as a previously unavailable factual basis under Section 5(a)(1).

As to the President’s memorandum, Medellin asserts that “[a] judgment giving rise to new claims issued after an applicant’s habeas application renders the factual basis of the claim ‘unavailable’ under Section 5(a).” Thus, he urges, the President’s memorandum is a new “factual basis” entitling him to review. We also disagree with this argument.
Medellín broadly claims that “whether considered as a factual or legal basis . . . the President’s Determination was [not] available at the time of his initial application for purposes of Section 5(a)” without further explanation as to how the memorandum constitutes a “factual” basis. Medellín’s arguments, however, address the memorandum exclusively as a legal, not factual, basis; he argues that the President’s memorandum “constitutes a binding federal rule of decision.” But even if Medellín had devised a complete argument that the President’s memorandum constitutes a “factual basis,” we would still reach the same conclusion . . .

2. Legal Basis

Because neither the Avena decision nor the President’s memorandum constitute a “factual basis,” we now consider whether either qualifies as a previously unavailable “legal basis” under Section 5(a)(1). Section 5(d) of Article 11.071 states:

"a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state. . . ."

Indeed, as we noted earlier, the United States Supreme Court recently reaffirmed its holding in Breard—that procedural default rules may bar Vienna Convention claims. In Sanchez-Llamas, the Supreme Court concluded that Avena is entitled to only “‘respectful consideration,’” and as such, that decision is not binding on us. Likewise, because we have concluded that the President has exceeded his authority by ordering state courts to give effect to Avena, the President’s determination is not binding federal law. Because Avena and the President’s memorandum are not binding law, neither of them can serve as a previously unavailable legal basis for purposes of Section 5(a)(1).

IV. CONCLUSION

Having found that the ICJ Avena decision and the Presidential memorandum do not constitute binding federal law that preempt Section 5 under the Supremacy Clause of the United States Constitution and that neither qualify as a previously unavailable factual or legal basis under Section 5(a)(1), we DISMISS Medellín’s subsequent application for a writ of habeas corpus under Article 11.071, Section 5.

KELLER, Judge, concurring:

On behalf of the United States as amicus curiae, the U.S. Attorney General’s office has taken the position that President Bush’s memorandum constitutes an order requiring this Court to ignore rules of procedural default (including rules governing contemporaneous objections at trial and statutes governing subsequent habeas corpus applications) and evaluate anew whether applicant was prejudiced by a failure to comply with the Vienna Convention on
Consular Relations. I conclude that the President of the United States does not have the power to order a state court to conduct such a review.

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The Supreme Court has suggested that the proper analysis for determining whether a president’s exercise of his foreign relations power preempts state law is to determine first whether the state has acted within an area of “traditional state responsibility.” and if it has, to assess the degree of conflict with federal policy and the strength of the state interest involved. Garamendi, 539 U.S. at 420, 420 n. 11, 123 S.Ct. 2374. Unlike other federal preemption cases in which a state has prevailed, we address here an express, stark conflict between the President’s assertion of power (at least under the Justice Department’s interpretation) and the state law at issue. Nevertheless, given the principle that a weighty state interest lessens the likelihood of federal preemption, it follows that a president cannot use his foreign affairs authority to intrude into the state arena with impunity: at some point, the national interest is served in too attenuated a manner by the specific presidential action, and the state interest intruded upon is too fundamental, to permit a president’s intervention.

Such a case is now before us. Criminal justice is an area primarily of state concern. The Supreme Court has repeatedly recognized that the “States possess primary authority for defining and enforcing the criminal law.” And states have, to say the least, an overwhelming interest in the procedures followed in their own courts. . . . Moreover, the memorandum ignores “the importance of the procedural default rules in an adversary system.” These rules, which are neutral—applying to everyone, not just foreign nationals—“are designed to encourage parties to raise their claims promptly and to vindicate the law’s important interest in finality of judgments.”

When a habeas petitioner asked the United States Supreme Court in Sanchez-Llamas to exempt Vienna Convention claims from the rules of procedural default, the Court responded that the relief requested was “by any measure, extraordinary.” The Court observed that the exception to procedural default rules requested in that case (as in this one) “is accorded to almost no other right, including many of our most fundamental constitutional protections.” The President’s action here is unprecedented.

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The President has made an admirable attempt to resolve a complicated issue involving the United States’ international obligations. But this unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution. As a consequence, the presidential memorandum does not constitute a new legal or factual basis for relief under Art. 11.071. § 5, nor does it override § 5’s requirements.

With these comments, I concur in the judgment with regard to the analysis of the president’s memorandum and otherwise join the Court’s opinion.

PRICE. Judge, concurring:

I agree with the majority’s analysis and rationale, and, therefore, join the majority. Nevertheless, I write separately to advise law enforcement of this State to honor the provisions of Article 36 of the Vienna Convention and apprise foreign nationals of their rights under the treaty.
A key issue, however, is the question of whether Article 36 of the Vienna Convention even confers individual rights upon detained foreign nationals. I believe it does. Pertinent language of the treaty states “if [the detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post...” Since a foreign national may request that the consular official be notified, it is quite logical to conclude that it is the foreign national’s personal decision to make whether the consulate is or is not notified. This decision is not left to public or diplomatic officials; rather, the detainee is to decide. Furthermore, the treaty explicitly directs a consular officer to desist in aiding a detained national if that is the national’s desire. This language provides additional support for the position that Article 36 creates individual rights for the signatory-nation’s citizenry. It is apparent that the power of choice is left to the foreign national. Though the United States Supreme Court has not directly ruled on this issue, a strong voice on that Court favors the position that individual rights are conferred by the Vienna Convention.

. . . Since I agree with the majority’s application of procedural default to Article 36, I find it all the more imperative for a foreign national in the custody of law enforcement in this State to be informed of his treaty rights. Unless he is informed of what his rights are under the Vienna Convention, those rights will be of no use to him. One must be aware of these rights before one can properly exercise them. Not only is it imperative as a practical matter, Article 36 compels it.

* * *

HERVEY, Judge, concurring:

This international cause célèbre centers around this applicant who makes no claim that he did not brutally rape and murder two teenage girls (ages 14 and 16) with fellow gang members over 13 years ago in the summer of 1993. . . .

This case has dragged on for an amount of time equal to almost the entirety of the lives of these two girls. For many years, in both state and federal courts, applicant has received the almost unparalleled due process protections afforded by our country’s laws. Now, from half-way around the world, the International Court of Justice in its Avena decision has ordered our state courts to review applicant’s Article 36 Vienna Convention claim which applicant did not even raise until his first state habeas application. The President of the United States has made a similar request.

. . . The Court’s 60 plus page opinion disposing of applicant’s current successive habeas corpus application provides applicant with much more than he deserves and is also consistent with the President’s unprecedented memorandum expressing the United States’ intent to discharge its international obligations under Avena “by having State courts give effect to the [ Avena ] decision in accordance with general principles of comity.” The Court’s opinion in this proceeding affords the Avena decision all the “respectful consideration” that it deserves “in accordance with general principles of comity.”

Finally, applicant is by no means a stranger in a strange land. He has lived in this country and enjoyed its benefits since he was three-years old. . . .

. . . Nevertheless, applicant maintains that the lack of intentional, reckless, or negligent wrongdoing by the State (other than, perhaps, the lack of clairvoyance), and despite his non-assertion of any privilege or immunity, he is
entitled to an immunity heretofore not afforded to any citizen or nonresident under Texas or Federal law—immunity from procedural default. He argues that he has this immunity simply because he happened to be born on foreign soil approximately 28 years ago and, for whatever reason, has elected not to apply for United States citizenship.

With these comments, I join the Court’s opinion.

COCHRAN, Judge, joined by JOHNSON, and HOLCOMB, JJ, concurring:

I join all of the Court’s opinion except for Section IIIB dealing with the Presidential Memorandum. I am unable to conclude that a memorandum from the President to his Attorney General constitutes the enactment of federal law that is binding on all state courts. This memorandum, discussing compliance with the decision of the International Court of Justice in *Avena*, looks much more like a memo than a law....

... It is written in a private memo style. I am unable to find a copy of this memo published in the Federal Register. In fact, the only public publication of this memo that I can find is on the White House Press Release Internet website. I cannot accept the proposition that binding federal law, either through Congressional enactment or Executive Order, can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General. Thus, I cannot accept the premise that the President’s memo to his Attorney General is federal law that could supersede and obviate a clear and explicit Texas statute. Thus, I find it unnecessary to undertake a separation of powers analysis as does the majority.
WASHINGTON—The Supreme Court on Monday agreed to hear an appeal from a Mexican citizen on death row in Texas whose case has embroiled the World Court, the Bush administration and the State of Texas in a conflict that has only deepened in the two years since the justices last considered how to resolve it.

The inmate, Jose E. Medellin, is one of 50 Mexicans on death rows in various states who, the World Court found in 2004, had been charged and tried without the assistance from Mexican diplomats to which an international treaty entitled them.

The United States is a signatory to the treaty, the Vienna Convention on Consular Relations, which requires local authorities to inform foreign nationals being held on criminal charges of the right to consult with their country’s diplomats. The requirement was, until recently, widely ignored.

In the World Court, formally known as the International Court of Justice, Mexico sued the United States on behalf of its citizens who had been sentenced to death without receiving the required “consular notification.” The court ruled that the United States was obliged to have the defendants’ cases reopened and reconsidered.

Initially, the Bush administration described Mexico’s suit as “an unjustified, unwise and ultimately unacceptable intrusion in the United States criminal justice system.” But in early 2005, with Mr. Medellin’s death-penalty appeal pending before the Supreme Court, the White House announced that it would abide by the World Court’s decision by instructing the states to reconsider the convictions and sentences of the Mexican nationals on death row. The Supreme Court then dismissed Mr. Medellin’s case to enable the Texas courts to comply with that directive.

The Texas Court of Criminal Appeals refused to relax its procedural rules that barred any reconsideration. One of the court’s judges, in a concurring opinion, accused the White House of an “unprecedented, unnecessary and intrusive exercise of power over the Texas court system”—language that echoed the criticism that the administration had once directed at Mexico.

Now, however, the administration has entered the case on Mr. Medellin’s behalf and urged the Supreme Court to overturn the Texas court’s decision. The case, Medellin v. Texas, No. 06-984, will be argued next fall. The government’s brief, filed by Solicitor General Paul D. Clement, told the justices that the Texas court’s decision, if not reversed, “will place the United States in breach of its international law obligation” to comply with the World Court’s decision and would “frustrate the president’s judgment that foreign policy interests are best served by giving effect to that decision.”

Mr. Medellin was a gang member in Houston when he was convicted in 1993 of participating in the gang rape and murder of two teenage girls. In urging the Supreme
Court not to hear the case, the Texas solicitor general, R. Ted Cruz, recounted the crime in vivid detail and said that the Texas court had applied its usual rules in concluding that Mr. Medellin was procedurally barred from reopening his case. The president had no constitutional authority to pre-empt the state's procedural rules, Mr. Cruz said.

Mexico filed a brief on Mr. Medellín's behalf, noting its desire to provide "critical resources to aid in the defense of its nationals facing the death penalty." Mexico noted that last month, the Texas court had denied relief to five other Mexican death-row inmates who are also governed by the World Court decision. "Bilateral relations between the United States and Mexico" will "unquestionably" be affected by these cases. Mexico's brief said.
The Bush Administration, continuing its sturdy defense of presidential powers, has urged the Supreme Court to rule that President Bush had the authority to direct state courts to obey a decision of the World Court bearing on state criminal prosecutions. The state of Texas disputed that plea in urging the Court not to hear again a case that was before the Justices in 2005, but did not produce a ruling at that time.

In an amicus filing in the case of Medellin v. Texas (06-984), the government called for reversal of a Texas state court ruling that Bush did not have the power to ensure that state courts complied with the international tribunal’s decision on the rights of foreign nationals arrested and prosecuted within the U.S. for crimes here. The state argued in response that the case is moot because Medellin has had access to the courts in Texas to challenge his conviction, and that is all that the World Court ruling required. While Texas challenges the Bush Administration’s assertion of executive power, it suggests that that question, too, is moot.

The Vienna Convention on Consular Relations gives such foreign nationals a right to meet with a diplomatic officer from his or her home country when arrested in another country. The World Court (the International Court of Justice at The Hague) ruled that the U.S. government must take steps to assure that 51 Mexican nationals (including Medellin) who were prosecuted in the U.S. had that right, despite state court rules that barred them from relying upon the Convention in challenging their convictions.

The government’s brief was filed last Thursday but has just now become publicly available. Similarly, the state’s brief in opposition, filed last week, is now publicly available.

The government supports the appeal of Jose Ernesto Medellin, a Mexican national who was convicted of a double rape and murder in Houston in 1993. Medellin claims that his consular access rights were violated, but he has been denied a chance to press that claim, both by the Fifth Circuit Court and by Texas’ highest criminal court. In the most recent decision, last Nov. 15, the Texas state court found he had failed to raise that issue properly as his case unfolded in state court. Medellin’s appeal to the Justices was filed on January 16.

Medellin’s appeal is also supported by the Mexican government and by a group of law professors who are experts on World Court matters.

The case has not yet been scheduled for a Conference of the Justices. It is expected to go to the Justices sometime in April, after Medellin’s counsel has filed a reply.

While the government brief stressed that President Bush did not agree with the World Court’s ruling (and noted that he has since withdrawn the U.S. from the protocol that gave the World Court authority to apply the Vienna Convention), the brief argued that the Texas ruling will undermine the President’s authority to determine “how the United States will comply with its treaty obligations.”
The *Medellin* case had been before the Supreme Court in 2005, when the Justices agreed to review and heard argument on the enforceability of the World Court decision. But, after argument, the Court dismissed the case as "improvidently granted," partly because Medellin’s lawyers had then recently filed a state court challenge to his conviction based on a violation of the Convention. That case went forward in Texas courts, resulting in the ruling at issue in his new appeal.

In defending presidential powers, the new brief by Solicitor General Paul D. Clement argued that the state court decision "decided fundamental questions of federal law relating to the authority of the President to bring the United States into compliance with its treaty obligations." Moreover, it added, the ruling "set a course that, if not reversed, will place the United States in breach of its international law obligation to comply with the [World Court] decision, leave unresolved the dispute between Mexico and the United States over the treatment of [Medellin], and frustrate the President’s judgment that foreign policy interests are best served by giving effect to that decision."

Citing the famous concurrence opinion of Justice Robert H. Jackson in the 1952 ruling in *Youngstown Sheet & Tube v. Sawyer*, Clement argued that the President’s powers were at the maximum when he was acted under authority recognized by Congress. In this instance, the Solicitor General said, the President’s authority relies upon two treaties—the protocol that gave the World Court the authority to implement the Vienna Convention, plus the United Nations Charter. The UN Charter requires signatory nations like the U.S. to comply with World Court decisions when the nation is a party in a case decided by that tribunal, Clement noted.

“Because the President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch,” the brief contended, “the Optional Protocol and the U.N. Charter are most sensibly read to entrust the President with the responsibility of deciding how to respond to an ICJ decision.”

In addition, the brief noted that Congress had “expressly authorized the President to direct all functions connected with the United States’ participation in the United Nations.”

While some of the Texas judges had argued that the President’s attempt to get the states to carry out the World Court decision would be deeply intrusive in state criminal proceedings, Clement countered that the intrusion is no greater than necessary to see that the World Court ruling is obeyed to the extent it requires consideration of the Vienna Convention claims, without dictating how the state court decides the underlying case. “Where, as here, the President acts pursuant to his authority under treaties of the United States, principles of federalism do not stand as an obstacle. To the contrary, federal law is supreme, and state law must give way.”

While supporting Medellin on implementation of the World Court ruling, the government brief did not support his separate claim that the Vienna Convention is open to private enforcement. But Clement indicated that the government did not oppose review of that issue, too.

Texas, in opposing Supreme Court review, contended that President Bush’s
“memorandum” demanding that the states comply with the World Court ruling is beyond presidential authority as spelled out in the Constitution. “The President’s Article II powers are limited to executing, not creating, the law.”

Making its own argument out of the Court’s 1952 Youngstown Sheet decision, the state suggested that the President had attempted to use unilateral authority.

The claim of Executive power made by Medellin’s lawyers (and seconded by the government’s brief), the state added, is an argument for “a hypothetically limitless executive power to create law based on unilateral decisions concerning the foreign affairs interests of the United States. But no enumerated power in Article II allows the President to order a state to disregard its own habeas corpus statute and review a claim based on the decision of a foreign tribunal that this Court has determined has no binding effect on domestic courts.”

The latter point, Texas argued, was settled in the Court’s decision last Term in Sanchez-Llamas v. Oregon. In that ruling, the state said, “the Court determined that decisions of the ICJ are not binding on American courts. Medellin’s request that the Court revisit an issue decided last Term is without merit.”

In the state’s argument on the mootness question, it contends that Medellin’s first post-conviction challenge, rejected by state courts, was a sufficient opportunity under the World Court decision that the U.S. must “give effect” to its ruling.
In a first-of-its-kind ruling, the Court of Criminal Appeals has held that an International Court of Justice (ICJ) decision and President George W. Bush's directive that state courts comply with that decision do not require the CCA to revisit a death-row inmate's case.

"We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary," CCA Judge Mike Keasler wrote for a plurality of the court in Nov. 15's *Ex Parte Medellín*.

Three members of the CCA—Judges Lawrence Meyers, Tom Price and Barbara Hervey—joined Keasler in the portion of the opinion that addresses the presidential memorandum, raising the question of whether the holding is precedent. But in a concurring opinion, Presiding Judge Sharon Keller provided a similar analysis, holding that the memorandum does not override the state's procedural rules.

"Technically, it is not precedent if it is only a plurality opinion," says University of Texas School of Law professor George Dix, who teaches criminal law. "If it appears that a majority of the judges agree with the plurality, it comes very close to precedent."

The CCA's holding in *Medellín* is the first judicial decision on a U.S. president's authority to issue a directive for state courts to implement a decision of the ICJ, the judicial arm of the United Nations.

Mexico had sued the United States before the ICJ in January 2003, alleging that this country had violated its obligations under the Vienna Convention and the treaty's Optional Protocol. In March 2004, the ICJ held in *Case Concerning Avena and Other Mexican Nationals* that the United States had denied the rights to consular notification and consultation required under Article 36 of the Vienna Convention to 49 Mexican nationals, including Jose Ernest Medellin, who are sentenced to die in Texas and other states.

The ICJ held in *Avena* that the rights created under the treaty between nations were also individual rights that, if violated, the United States must remedy by providing the 49 Mexican nationals with a forum for the "review and reconsideration" of their convictions. Under the ICJ's holding, courts cannot apply procedural default to deny judicial review of the Article 36 claims and must determine if the violations prejudiced the Mexican nationals.

According to the CCA's plurality opinion in *Medellín*, Bush weighed in on the controversy surrounding *Avena* in February 2005 by issuing a memorandum directing state courts to hold the hearings that the international tribunal required.

But the CCA held in *Medellín* that the ICJ's *Avena* decision and Bush's memorandum are not binding federal law that pre-empts Article 11.071, §5(a) of the Texas Code of Criminal Procedure. Under Article 11.071, §5(a), a court may not consider the merits or grant relief if a death-row inmate files a successive state habeas writ application, unless the
inmate could not have presented the claim previously, because the legal basis for the claim was unavailable. The CCA held that the ICJ’s decision in *Avena* and the president’s memorandum do not qualify as previously unavailable factual or legal bases for filing a successive writ.

The CCA's opinion sets out the following facts: In 1994, a Harris County jury convicted Medellin of capital murder and sentenced him to death for his participation in the 1993 gang rape and murder of two teenage girls in Houston. Medellin, who was born in Mexico, was 18 at the time of the slayings. The CCA affirmed Medellin’s conviction on direct appeal in 1997.

It wasn’t until he filed his initial state habeas writ application in 1998 that Medellin claimed that law enforcement authorities had violated his rights under Article 36 of the Vienna Convention because they did not advise him of his right to contact the Mexican consular official after he was arrested. The 339th District Court in Houston, which considered Medellin’s second state writ application, concluded that his claim was procedurally barred, because Medellin had not objected at trial to the violation of his right to contact the consulate.

Medellin presented his Vienna Convention claim in an application for a federal habeas writ to the U.S. District Court for the Southern District of Texas. In June 2003, the federal district court denied relief, and Medellin filed for a certificate of appealability. The ICJ issued its decision in *Avena* while Medellin’s application was pending.

After the federal district court denied his application for a certificate of appealability, Medellin appealed to the 5th U.S. Circuit Court of Appeals, which denied his application in May 2004.

Medellin filed a petition for writ of certiorari with the U.S. Supreme Court, which granted review in *Medellin v. Dretke* in December 2004 to review the enforceability of the *Avena* decision. [The current case before the Court is *Medellin v Texas.*] Bush issued his memorandum in February 2005 before the Supreme Court heard arguments in Medellin’s case.

Medellin filed his second application for a state habeas writ while his case was pending before the Supreme Court, which subsequently dismissed his case to allow the CCA to act.

The CCA held that the Supreme Court’s June decision in *Sanchez-Llamas v. Oregon* controls its decision in *Medellin.* The Supreme Court consolidated *Sanchez-Llamas* with *Bustillo v. Johnson* to consider, among other issues, whether a defendant forfeits an Article 36 claim under state procedural rules if the defendant fails to raise the claim at trial. The Supreme Court concluded that ICJ decisions are entitled only to “respectful consideration.”

According to the CCA opinion in *Medellin,* the Supreme Court made it clear in *Sanchez-Llamas* that judicial power includes the duty “to say what the law is.”

“The clear import of this is that the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law,” Keasler wrote for the plurality.

Keller wrote in a concurring opinion that Bush’s memorandum “ignores the importance of the procedural default rules in an adversary system.” According to Keller’s concurrence, the rules are designed to encourage parties to raise claims promptly and to “vindicate the
law’s important interest in finality of judgments.”

Bush’s action in issuing the memorandum was unprecedented, and such extraordinary action is unnecessary, Keller wrote. As noted in Keller’s opinion, a foreign national whose lawyer fails to raise the Vienna Convention issue at trial can raise ineffective assistance of counsel in a state habeas writ application. If all other measures fail, the foreign national still can apply to the Texas Board of Pardons and Paroles and the governor for clemency, Keller noted.

Price, Hervey and CCA Judge Cathy Cochran also each wrote concurring opinions. Judge Paul Womack concurred in the judgment of the court but did not write an opinion.

U.S. Deputy Solicitor General Michael R. Dreeben, who argued for the United States before the CCA as an amicus curiae, declines comment on the CCA’s decision. Dreeben had contended during the arguments that Bush was at the zenith of the lawful exercise of executive power when he issued the memorandum because of his inherent constitutional authority to conduct foreign affairs, the United States’ international obligation to comply with Avena under the U.N. Charter and the nation’s obligations under the Vienna Convention. [See “Medellin Returns,” Texas Lawyer, Sept. 19, 2005, page 1.]

Sandra Babcock, a Northwestern University School of Law professor who represents Medellin, says it was in the interest of Americans abroad to comply with the ICJ’s decision in Avena, because they depend on the protections afforded by the Vienna Convention.

“It continues to be our position that it’s well within the president’s power to comply with international law,” Babcock says, adding that Medellin will petition the U.S. Supreme Court again for a writ of certiorari. “I believe Mr. Medellin’s rights ultimately will be vindicated by the Supreme Court,” she says.

But Roe Wilson, chief of the post-conviction writs section in the Harris County District Attorney’s Office, says she thinks the CCA is correct in its interpretation of Bush’s memorandum.

Wilson, who argued on the state’s behalf before the CCA in Medellin, says state courts have to go by state law; they don’t have to go by the ICJ decision. “It’s not binding on our courts,” she says of the Avena decision.

Lori Fisler Damrosch, a professor of international law at Columbia Law School, says the CCA erred in Medellin by applying the Supreme Court’s ruling in Sanchez-Llamas to more than the high court actually held. Damrosch says Sanchez-Llamas involved individuals who were not covered by the ICJ’s Avena decision.

What the president did in his memorandum responding to Avena was to tell Texas courts to comply with the United States’ treaty obligations, Damrosch says.

“Even if the president had never put his oar in these waters, the courts would have an obligation to comply with these treaty obligations,” she says. Damrosch predicts that the Supreme Court will take another look at Medellin’s case. The Supreme Court’s two newest members—Chief Justice John Roberts Jr. and Justice Samuel Alito Jr.—are strong proponents of executive powers, she says.

Notes Damrosch: “I think we could well expect Chief Justice Roberts and Justice Alito to be quite interested in thinking through questions of presidential powers.”
HOUSTON—A state appeals court chastised President Bush for intervening in the case of a condemned killer born in Mexico, one of several dozen cases in which Bush ordered new hearings amid international complaints.

The Texas Court of Criminal Appeals on Wednesday rejected the argument from Jose Ernesto Medellin that he was denied legal help he should have received under international treaties. [The Supreme Court will consider Medellin’s case in Medellin v. Texas this term.]

Medellin, who spent most of his life in Texas, was sentenced in 1994 to die for the rapes and killings of two teenage girls.

“We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary,” the court said in a 64-page ruling.

Justice Department spokesman Brian Roehrkasse said the department was reviewing the ruling and considering its options.

Medellin was supported in his appeal by dozens of countries, legal groups and human rights organizations, as well as former American diplomats and the European Union. Much of the international community is opposed to capital punishment and the execution of Mexican nationals in Texas, the nation’s most active death penalty state, is a particularly touchy point.

At issue overall was how much weight U.S. courts should give to decisions of the International Court of Justice in The Hague, which ruled the convictions of Medellin and 50 other Mexican-born prisoners violated the 1963 Vienna Convention. The pact requires consular access for Americans detained abroad and foreigners arrested in the United States.

In February 2005, Bush unexpectedly ordered new state court hearings for all 51 prisoners. The Texas court said Wednesday neither the Constitution nor any act of Congress gives the president the power to issue such an order.

The decision means Medellin, 31, is not entitled to additional review of his international rights claim.

Last year, the Supreme Court rejected Medellin’s case and those of the 50 other Mexican nationals on death row in the United States, citing the presidential order, and sent them to their respective state courts for review. That ruling avoided the dispute over whether international law is binding on American courts.

In their arguments to the Supreme Court, Medellin’s attorneys said his court-appointed trial lawyer was suspended from practicing law for ethics violations during the case, and he failed to call any witnesses during the guilt phase of the trial. Lawyers for Mexico said the country would have made sure Medellin had a competent lawyer had it known about the trial.

Medellin, 18 at the time, was one of six
members of a fledgling Houston street gang convicted in the slayings of Jennifer Ertman, 14, and Elizabeth Pena, 16. The pair had been tortured, raped and strangled.

One of Medellin’s companions, Derrick Sean O’Brien, also 18 at the time of the slayings, was executed earlier this year. In a confession, O’Brien said Medellin was at one end of a belt being pulled around Ertman’s neck as he yanked on the other.

Two other gang members had their death sentences commuted to life in prison when the Supreme Court last year barred executions for those who were 17 at the time of their crimes. The man authorities call the gang’s ringleader remains on death row without an execution date.

The sixth person convicted was Medellin’s brother, Vernancio, who was 14 at the time and received a 40-year prison term.
WASHINGTON—The Supreme Court turned away an appeal Monday [prior to the current court’s case, *Medellin v. Texas*] that contended 51 Mexicans on U.S. Death Row were improperly denied legal help, avoiding a dispute over whether international law is binding on American courts.

The 5-4 decision dismissed the case of Jose Medellin, who argued he was entitled to a federal court hearing on whether his rights were violated when a Texas court tried and sentenced him to death in 1994 on rape and murder charges.

It means the case, which has stirred tensions with foreign countries over convictions of their citizens in violation of international law, will be hashed out in state courts. President Bush in February ordered new state court hearings for the 51 Mexicans, and the court cited that order on Monday.

Texas prosecutors vow to challenge Bush’s authority in the matter. “Jose Medellin voluntarily confessed to the brutal gang-rape and murder of two teenage girls.” Texas Solicitor General Ted Cruz said.

Sandra Babcock, an attorney representing the Mexican government, said she remained hopeful that Medellin’s international rights would ultimately be recognized in state court.

“All the issues are still open, and Mexico is confident that if and when Mexican nationals receive new consideration, they will prevail,” she said.

In an unsigned opinion, the Supreme Court dismissed Medellin’s case as premature because of Bush’s unexpected order, which came one month before justices heard arguments in the case. The court reserved the right to hear the appeal again once the case had run its full course in state court.

“This state-court proceeding may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding,” stated the opinion, which was backed by Chief Justice William H. Rehnquist, as well as Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg and Antonin Scalia.

At issue is how much weight U.S. courts should give to decisions of the International Court of Justice in The Hague, which ruled last year that the 51 convictions violated the 1963 Vienna Convention.

In 1969, the Senate ratified the Vienna Convention, which requires consular access for Americans detained abroad and foreigners arrested in the United States. The Constitution states that U.S. treaties “shall be the supreme law of the land,” but does not make clear who interprets them.

In a dissent, Justice Sandra Day O’Connor said she would have ordered the federal courts to review whether international law should be binding on the U.S. courts.
"Justices Consider Rights of Foreigners"

The Washington Post
March 29, 2005
Charles Lane

WASHINGTON—The Supreme Court seemed divided over how best to handle a dispute over the role of international law in U.S. death penalty cases yesterday, as the justices heard oral arguments in the case of a Mexican who says Texas violated his rights under a U.S.-ratified treaty when it sentenced him to death more than a decade ago.

The court took up Medellin v. Dretke, No. 04-5928, which centers on a ruling last year by the International Court of Justice (ICJ) in The Hague. [The court for the coming term addresses a different issue in Medellin v. Texas.] The international court ruled that the United States had violated the Vienna Convention on Consular Relations by failing to tell 51 Mexicans charged with capital murder that they had a right under the convention to meet with diplomats from their home country.

One of the Mexicans, Jose Ernesto Medellin, and his supporters had urged the court to rule that the ICJ ruling is binding in U.S. courts—an argument that, if endorsed by the Supreme Court, would have laid an important precedent in favor of the authority of international law generally.

But Texas, citing Supreme Court rulings, countered that the ICJ could not override state procedural rules under which Medellin had forfeited his right to invoke the Vienna Convention by not asserting it until 1998, rather than at his trial in 1994.

A month ago, however, President Bush intervened in this looming clash between global law and Texas law, issuing a determination that he alone, as the country’s chief diplomat, has the power to decide how the country should react to the international court’s rulings. Noting that the United States had agreed to accept ICJ rulings on cases involving the Vienna Convention, he instructed the state courts to give Medellin and the other Mexicans new hearings, as the ICJ had proposed, and told the Supreme Court it should bow out.

Then he withdrew the United States from international court jurisdiction under the convention, to avoid future cases.

Medellin’s lawyer, Donald F. Donovan, asked the court to suspend its proceedings until he has a chance to seek a new hearing in state court, as provided for in the president’s determination.

But Justice Sandra Day O’Connor said “it would be more likely we would dismiss” the case. “This is a very unusual request,” she added.

And Chief Justice William H. Rehnquist said that “granting a stay could be seen as validating the position of the government without an opinion” from the court. . . .

Texas Solicitor General R. Ted Cruz asked the court to avoid “the many interesting international law questions that swirl around the case” and rule in favor of Texas now.

Even if Medellin’s rights under the treaty had been violated, Cruz argued, that could not entitle him to a new hearing. That is
because a federal law enacted in 1996—the treaty went into effect in 1969—says that death row inmates can seek a fresh hearing only on new claims that their constitutional rights were violated.

But Justice David H. Souter said the court “wouldn’t even have to venture into [that], if we accept the president’s determination.”

Cruz replied that Texas sees “significant constitutional problems with any unilateral [presidential] decision” that tells state courts what to do.

But that constitutional issue, he acknowledged, would inevitably reach the Supreme Court, after Texas courts have dealt with Medellín’s effort to enforce the president’s determination there.

“Why doesn’t the ICJ judgment get the same recognition as any judgment by any other court?” Justice Ruth Bader Ginsburg asked Cruz.

Cruz replied that international law contemplates the Vienna Convention will be enforced through U.N. Security Council action.

U.S. Deputy Solicitor General Michael Dreeben, urging the court to let Bush’s proposal for new state court hearings run its course, told the court that “if this court treats the ICJ as a free-standing source of law . . . it would rob the president of freedom of action in international affairs.”
President Bush, in a bow to international law, has decided that the 49 Mexican nationals who are on death row in California, Texas and other states are entitled to new hearings to see if they were harmed by the failure of authorities to tell them of their right to seek the aid of Mexican officials.

The presidential order—if it stands—could eventually lead to the release from death row of as many as 28 Mexican inmates in California and 15 in Texas, as well as others in Arizona, Arkansas, Florida, Nevada, Ohio and Oregon.

It may also affect dozens of other foreign nationals who have been condemned to death across the country.

The president’s order was issued last week without fanfare. It puts the former Texas governor in the unusual spot of challenging Texas officials on the validity of death sentences in the Lone Star State.

Texas Atty. Gen. Greg Abbott questioned Tuesday whether the president had the authority to tell the state courts to reopen these old cases.

"We respectfully believe the executive determination [issued by Bush] exceeds the constitutional bounds for federal authority," Abbott’s office said in a statement. California officials had no comment.

Bush’s action was triggered by a recent ruling by the International Court of Justice, known as the World Court, that the U.S. had violated the Vienna Convention by failing to notify Mexican officials when Mexican nationals were arrested and charged with serious crimes.

In the Vienna Convention of 1963, the U.S. and most other nations agreed to protect their citizens by requiring that they be informed whenever one of their nationals was “arrested or committed to prison.” Local authorities must also tell the arrested person of his rights.

This treaty protects Americans when they live or travel abroad.

However, its requirements have been widely ignored by U.S. police and prosecutors when foreign nationals are taken into custody.

The Supreme Court is scheduled to hear a case this month that tests whether Jose Medellin, a Mexican national who is on death row in Texas, has a right to a new hearing in federal court after the World Court ruling.

Two years ago, Mexico took the issue to the World Court on behalf of 51 Mexicans who were held on death rows across the U.S.

The lead plaintiff, Carlos Avena Guillen, was charged with murder in Los Angeles in 1980 and sentenced to death in 1981. Mexican officials say they did not learn of the Avena case until the mid-1990s.

Last year, the international tribunal ruled for
Mexico and said the U.S. must provide “review and reconsideration of the convictions and sentences of the Mexican nationals.” Despite the ruling, it was unclear how the World Court’s order could be enforced.

Lawyers for Mexico raised the issue in the federal courts in Texas on behalf of Medellin, but got nowhere. The U.S. Court of Appeals said the World Court’s decision did not give him a right to a new hearing under U.S. law.

However, the Supreme Court agreed to hear Medellin’s appeal. The justices are scheduled to hear arguments in the case March 28.

Last week, in a friend-of-the-court brief, the Bush administration agreed with Texas lawyers in saying the Mexicans had “no judicially enforceable right” to seek help in the federal courts. The brief urged the Supreme Court to dismiss Medellin’s legal appeal.

But having rejected Medellin’s legal claim, the administration then declared that the president had the authority to order new hearings in state courts for Medellin and the other Mexicans. Lawyers attached an order signed by Bush on Feb. 28.

“I have determined, pursuant to the authority vested in me as president . . . that the United States discharge its international obligations under the decision of the International Court of Justice . . . in the case concerning Avena and other Mexican nationals by having state courts give effect to the decision,” the order said.

Bush’s lawyers said the “foreign policy interests” of the U.S. outweighed the laws of the states. Texas, for example, has a law that forbids its courts from reopening cases that have been thoroughly litigated.

Paul Clement, acting U.S. solicitor general, said state courts must “review and reconsider the conviction and sentence” of each Mexican to see whether the failure to warn him of his rights “caused actual prejudice to the defense at trial or at sentencing.” If so, “a new trial or a new sentencing would be ordered,” Clement said.

To their surprise, defense lawyers and international law experts found themselves cheering a move by Bush. The president has been a critic of international courts and a strong supporter of the death penalty.

“This is an amazing concession,” said Mike Charlton, a defense lawyer for several Texas inmates. “The president is saying the Texas courts have to reopen and relitigate these cases.”

“This is a complete victory for the Mexican nationals,” said Sandra Babcock, a Minneapolis lawyer who worked for the Mexican government in the case. “It is not the way we anticipated winning, but we won.”

Many police and prosecutors are not aware of the Vienna Convention and its duties, Babcock said. “I have talked to police officers in San Diego and in the Central Valley of California, and they say they never heard of this. But the old maxim—ignorance of the law is no excuse—applies here as well,” she said.

It is not clear what the Supreme Court will do now.

Bush’s order “raises more questions than it answers,” Charlton said. He and other defense lawyers would like the high court to
say the inmates have a legal right to a new hearing. Texas state lawyers, by contrast, are likely to argue that neither Bush nor the Supreme Court can reopen an old case such as Medellin's.

"The state of Texas believes no international court supersedes the laws of Texas and the laws of the United States," Abbott said.

[The Supreme Court will address Medellin's case again in the coming term in *Medellin v. Texas.*]
WASHINGTON—The Supreme Court agreed yesterday to decide whether the federal courts must give a hearing to a Mexican inmate on Texas’s death row who says the state violated international law by trying him on murder charges without first notifying Mexican diplomats who might have helped him.

The case, which has attracted worldwide attention, is seen as a test of the willingness of the judicial branch of the U.S. government to accept an international institution’s authority at a time when the executive branch under President Bush is taking criticism from many quarters abroad for operating unilaterally in world affairs.

The context of the death penalty, for which the United States in general and Texas in particular are under fire in Europe and Latin America, adds to its potential international impact.

The case marks the Supreme Court’s first opportunity to respond to a March 31 decision by the International Court of Justice (ICJ) in The Hague, which ruled that the United States violated the Vienna Convention on consular relations in the case of the Texas inmate, Jose Ernesto Medellin, and 48 other Mexican nationals on death row.

The application of the Vienna Convention to criminal cases is no small issue in the United States, where the population includes millions of noncitizens. Including the Mexicans directly involved in the ICJ ruling, there are 118 foreign nationals on death row in the United States, from 32 countries.

The court received friend-of-the-court briefs from the European Union, Argentina, Bolivia, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, Uruguay, Venezuela and Mexico, all urging it to hear the case. Also supporting Medellin’s appeal was a group of former U.S. diplomats, including former Iran hostage L. Bruce Laingen, who argued that U.S. citizens abroad will “suffer in kind” if their own courts do not enforce consular access.

In its March ruling, the ICJ did not attempt to overturn the men’s death sentences. It said only that the treaty—which both the United States and Mexico have ratified—gives Medellin and the other Mexicans an individual right to claim in a federal court that their cases might have turned out differently if they had had consular access. U.S. rules that require them to raise such claims in state court first do not apply, the ICJ ruled.

The Bush administration had argued against this interpretation, but the vote in the ICJ was 14 to 1. with a U.S. judge joining the majority.

The ICJ ruling brought to a head a long-simmering conflict between that court and the conservative majority on the Supreme Court, which generally favors limiting the avenues by which death-row inmates may challenge their sentences on constitutional
and other legal grounds.

Six years ago, the Supreme Court said that a treaty-based right of consular access could not trump the requirement in U.S. law that inmates seeking to overturn their sentences must raise their constitutional and legal claims in state court first—or forfeit the right to bring them up later in federal court.

In that case, *Breard v. Greene*, the court declined to stay the execution of a Paraguayan convicted of murder and rape in Virginia. Its unsigned opinion said that, even if the Paraguayan, Angel Francisco Breard, were permitted to raise his claim in federal court, he could not show that the violation of his right to see a consul would have made a difference.

He had insisted on going to trial against the advice of his American attorneys, who urged him to plead guilty in return for a life sentence.

The vote was 6 to 3, with Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen G. Breyer dissenting.

The court acted in *Breard* even though Paraguay had taken the case to the ICJ, and the ICJ had called on Virginia not to execute Breard until it had finished considering the matter.

But now it faces a direct and clear judgment by the ICJ.

The case accepted for review yesterday is *Medellin v. Dretke*, No. 04-5928. Oral argument is scheduled for March, and a decision is expected by July.
AUSTIN—The last of five young gang members sent to death row for the rapes and murders of two teenage girls in Houston 3 1/2 years ago had his death sentence upheld Wednesday by the Texas Court of Criminal Appeals.

Jose Medellin has been on death row since September 1994 for the slayings of Jennifer Ertman, 14, and Elizabeth Pena, 16.

The girls were raped, strangled and beaten to death after they came upon a railroad trestle in Houston where the members of a gang known as the “Black and Whites” were celebrating a new member’s initiation. The girls’ bodies were found four days later.

It was a crime so brutal—committed by people all younger than 20—that it caught the nation’s attention and shocked the city of Houston.

“It’s a relief to have gotten through this stage,” said Bill Delmore, Harris County assistant district attorney who prosecuted the case.

The girls’ parents have since become leaders in the victims’ rights movement and fought for the state’s new law that allows murder victims’ families to witness the execution of their loved one’s killer.

“The facts in this case were so heinous, that if there ever was a small error the court would find it harmless given the evidence,” said Kim Stelter, who prosecuted three of the five cases for the Harris County district attorney’s office.

The five gang members charged with capital murder in the case—Mr. Medellin, Peter Cantu, Derrick Sean O’Brien, Raul Villereal, and Efrian Perez—all received the death penalty. All were 18 at the time of the slayings.

A sixth participant, tried as a juvenile, was sentenced to 40 years in prison.

Mr. Medellin did not challenge his being found guilty, but rather the sufficiency of evidence to support the jury’s decision to sentence him to death.

When Mr. Medellin’s Houston attorney Randy McDonald was asked if he was surprised with the decision, he replied: “A little, his four co-defendants were denied, but our issues were a little different.”

Mr. McDonald had argued in his appeal that several errors were made by the court in jury selection and that Mr. Medellin deserved a new trial.
United States v. Williams

(06-694)

Ruling Below: (U.S. v. Williams, 444 F.3d 1286 (11th Cir. 2006), cert granted, 127 S.Ct. 1874, 167 L.E.2d 363, 75 USLW 3508, 75 USLW 3286, 75 USLW 3511).

U.S. Secret Service Special Agent Timothy Devine entered a chatroom under an alias screen name and replied to a post by the defendant which stated that he had pictures of his toddler for exchange. Defendant then stated he had nude photos and hardcore photos of defendant and his daughter as well as others engaging in oral sex with the four-year old toddler. Defendant later posted a hyperlink which led to several pictures of children five to fifteen naked and engaged in various sexual activities, including sado-masochistic behaviors. Secret Service agents raided defendant’s home and found two hard drives full of photos. Williams was charged with one count of promoting material in such a manner that was intended to cause another to believe it was illegal child pornography. The charge carries a 60-month mandatory minimum sentence. Williams filed a motion that 18 U.S.C. § 2252A(a)(3)(B) was unconstitutionally vague and overbroad. While the motion was pending, Williams reached a plea agreement and plead guilty but reserved the right to challenge the constitutionality of the statute.

Questions Presented: Whether §2252A(a)(3)(B), which prohibits knowingly advertising, promoting, presenting, distributing, or soliciting any material in such a manner that reflects the belief or that is intended to cause another to believe the material is illegal child pornography, is overly broad and impermissibly vague, and thus facially unconstitutional.

UNITED STATES of America,
Plaintiff-Appellee

v.

Michael WILLIAMS,
Defendant-Appellant

United States Court of Appeals
for the Eleventh Circuit

Decided April 6, 2006

[Excerpt: Some footnotes and citations omitted.]

REAVLEY, Circuit Judge:

Michael Williams appeals his conviction for promotion of child pornography under 18 U.S.C. § 2252A(a)(3)(B) on the grounds of facial unconstitutionality. For this reason, we reverse that conviction. Williams was also convicted of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), and he appeals his sentence for that offense on the grounds that the court unconstitutionally enhanced his sentence under a mandatory guidelines scheme in violation of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738.
160 L.Ed.2d 621 (2005). Because there was no reversible Booker error, we affirm Williams’s sentence of 60-months’ imprisonment.

I. THE CHARGES

[The Court recounts the background and factual history of the case.]


* * *

B. The Child Pornography Problem

In this case, we consider the constitutionality of a law aimed at curbing the promotion, or “pandering,” of child pornography. While society has benefited greatly from the technological advances of the last decade, an unfortunate byproduct of sophisticated imaging technology and the rise of the Internet has been the proliferation of pornography involving children.

[The Court explains the development of widening child pornography distribution rings over the internet and the challenges with regulating child pornography with that expansion and with the sexual stimulation pedophiles derive from innocuous images.]

Over the years, Congress has, by large bipartisan majorities, enacted legislation designed to punish those who produce, peddle, or possess child pornography. Congress has struggled to draft legislation that captures the truly objectionable child-exploitative materials while staying within the boundaries of the Supreme Court’s First Amendment jurisprudence. In other words, Congress may not “burn the house to roast the pig.” Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). Whether that difficult balance has been struck in the instant legislation is the issue before us.

C. The Law and Child Pornography

[The Court explains the root of child pornography regulation as growing from the obscenity doctrine, specifically that in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In the first case dealing directly with child pornography, the Supreme Court found it was a new category of speech and was unprotected by the First Amendment, finding that it documents an underlying act of abuse and the circulation of images causes the child injury. New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Congress shaped a law against child pornography by following the statute upheld in Ferber. After this law, Congress passed the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2251, to outlaw computer-generated images. Since its passing, the circuits have split and the Supreme Court granted certiorari to Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).]

* * *

D. The Supreme Court’s Decision in Free Speech Coalition

[The Court explains the Supreme Court’s decision in Free Speech Coalition and the Supreme Court’s rationale in striking down two provisions of the CPPA, including prohibitions of computer-generated images and pandering. The Court found both provisions to be overbroad under Miller and Ferber, further stating that the government may not prohibit speech on grounds that it may merely encourage, rather than incite, pedophiles to engage in illegal activity.]
E. The PROTECT Act

Almost immediately after the *Free Speech Coalition* decision was handed down, Congress began an effort to craft responsive legislation. [T]he houses compromised and passed the PROTECT Act, now codified in scattered sections of 18 U.S.C.

The revised pandering provision of the PROTECT Act at issue in this case, 18 U.S.C. § 2252A(a)(3)(B), provides that any person who knowingly—

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

commits a criminal offense...

Any person who violates, or attempts or conspires to violate, the pandering prohibition is subject to a fine and imprisonment for a minimum of five years and up to twenty years. 18 U.S.C. § 2252A(b)(1). It is an affirmative defense for certain reproducers, distributors, recipients, and possessors of child pornography charged under other subsections of § 2252A that the alleged child pornography depicts actual adults rather than minors or that no “actual” minors were involved in the production. 18 U.S.C. § 2252A(c). However, the affirmative defense expressly does not apply to the pandering provision.

F. What Congress Has Done Differently

At the outset of our discussion, we note that the new pandering provision allays certain concerns voiced by the Court in *Free Speech Coalition*. First, the Court’s primary objection to the CPPA’s pandering provision was that pandered materials were criminalized for all purposes in the hands of any possessor based on how they were originally pandered. *Free Speech Coalition*, 535 U.S. at 257-58, 122 S.Ct. at 1405-06. By moving the pandering provision from the definitions section to a stand-alone status, and using language that targets only the act of pandering, the new provision has shifted from regulation of the underlying material to regulation of the speech related to the material. This remedies the problem of penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography.

With respect to its legislative findings for the PROTECT Act, Congress largely abandons the secondary effects and market deterrence justifications found wanting by the Court in *Free Speech Coalition*. . . . Congress instead focuses primarily on beefing up its findings that technological advancements since *Free Speech Coalition* have increased the prosecutorial difficulties raised by the ready availability of technology able to disguise depictions of real children (proscribable under *Ferber*) to make them unidentifiable or to make them appear computer-generated (defensible under *Free Speech Coalition*).

[The Court explains the PROTECT Act’s new
definition for child pornography, which includes computer-generated images and the pandering of such images. The Court further explains that Williams’s pictures were of real children and so the computer-generated definition is not at issue in this case.]

***

G. Williams's Overbreadth Challenge

Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face. Free Speech Coalition, 535 U.S. at 255, 122 S.Ct. at 1404. Williams asserts that the PROTECT Act prohibition of speech that "reflects the belief, or that is intended to cause another to believe" that materials contain illegal child pornography is no different than the CPPA's prohibition of images that "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct that was struck down as overbroad in Free Speech Coalition.

We begin our analysis with the recognition that subsections (i) and (ii) of the PROTECT Act pandering provision capture perfectly what remains clearly restrictable child pornography under pre- and post-Free Speech Coalition Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same. As reviewed above, the government may constitutionally regulate, on interstate commerce grounds, the transportation and distribution of obscene material, even if it is legal to hold privately (i.e. non-real child pornography), U.S. v. Orito, 413 U.S. at 141, 93 S.Ct. at 2676, and may outlaw "real" child pornography for all purposes, including private possession. Osborne v. Ohio, 495 U.S. at 110, 110 S.Ct. at 1696; Ferber, 458 U.S. at 760, 102 S.Ct. at 3359. However, the PROTECT Act pandering provision criminalizes not the speech expressed in the underlying materials described in (i) and (ii), but the speech promoting and soliciting such materials. The question before us is whether the restriction on that speech is too broad.

1. The Government May Wholly Prohibit Commercial Speech That Is False or Proposes an Illegal Transaction

We recognize that, if we consider the pandering provision as purely a restriction of commercial speech, we do not apply strict overbreadth analysis. See Bd. of Tr. of the State Univ. of New York v. Fox, 492 U.S. 664, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Instead, we determine whether the government has narrowly tailored any content-based regulation on protected speech, that is neither misleading nor related to unlawful activities, to achieve its desired legitimate objectives. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Under this analysis, the government may prohibit completely the advertisement or solicitation of an illegal product or activity as well as false or misleading advertisement because neither is protected speech. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770, 96 S.Ct. 1817, 1829-30, 48 L.Ed.2d 346 (1976). If a person possessing or seeking either obscene synthetic child pornography or "real" child pornography, offers to sell or buy it, this is unlawful commercial activity that the government may constitutionally proscribe. If a person does not have obscene or "real" child pornography but offers such things for sale, then the offeror is engaged in false or misleading advertising, which the government may likewise punish.

If all that the pandering provision stood for
was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were, the Government need not show that it has narrowly tailored its restriction because neither of these scenarios involve protected speech. We observe, however, that false or misleading commercial advertising is already addressed under other state and federal laws, which are aimed at protecting consumers from fraud. Here, under legislation aimed at protecting children, the only person who is harmed by misleading speech, even if it preys on the basest of motives, is the would-be buyer of illegal child pornography, and that individual is scarcely in a position to complain.

Because the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product and because, in the commercial context, we have before us no challenge to the severity of punishment meted out for such behavior, the pandering provision would likely pass our muster as a prohibition of unprotected forms of commercial speech, if that were all it proscribed. However, the law is not limited to commercial exploitation and continues to sweep in non-commercial speech. Accordingly, we must move to the question of whether the restriction on such non-commercial speech is constitutionally overbroad.

2. The PROTECT Act Pandering Provision Continues to Sweep in Protected Non-Commercial Speech

Because it is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny, determining whether it represents the least restrictive means to advance the government’s compelling interest or instead sweeps in a substantial amount of protected speech. United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Under this analysis, we find the language of the provision problematic for three reasons.

First, that pandered child pornography need only be “purported” to fall under the prohibition of § 2252A(a)(3)(B) means that promotional or speech is criminalized even when the touted materials are clean or non-existent. . . . In a non-commercial context, any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of “Our Gang,” a dirty handkerchief, or an empty pocket.

Further, while the commercial advertisement of an unlawful product or service is not constitutionally protected, this feature of the Supreme Court’s commercial speech doctrine does not apply to non-commercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement. The First Amendment plainly protects speech advocating or encouraging or approving of otherwise illegal activity, so long as it does not rise to “fighting word” status. See Free Speech Coalition, 535 U.S. at 253, 122 S.Ct. at 1403 (citing Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (holding advocacy of racist violence protected speech)). . . . Thus, the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment.

Finally, we find particularly objectionable the
criminalization of speech that "reflects the belief" that materials constitute obscene synthetic or "real" child pornography. Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted in legal child erotica, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious. 18 U.S.C. §§ 2252A(a)(3)(B)(ii), 2256(2)(A)(v).

What exactly constitutes a forbidden "lascivious exhibition of the genitals or pubic area" and how that differs from an innocuous photograph of a naked child (e.g. a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete. 18 U.S.C. § 2256(2)(A)(v). Generally, courts must determine this with respect to the actual depictions themselves. While the pictures needn't always be "dirty" or even nude depictions to qualify, screening materials through the eyes of a neutral fact finder limits the potential universe of objectionable images.

In this case, however, the law does not seek to attach liability to the materials, but to the ideas and images communicated to the viewer by those materials. This shifts the focus from a community standard to the perverted but privately held belief that materials are lascivious. Through this lens, virtually all depictions of children, whom to pedophiles are highly eroticized sexual objects, are likely to draw a deviant response. Many pedophiles collect and are sexually stimulated by non-pornographic depictions of children such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines—otherwise innocent pictures that are not traditionally seen as child pornography and which non-pedophiles consider innocuous. Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L.Rev. 209, 259-260 (2001). As illustrated in this case, relatively innocent candid snapshots of children, such as those initially exchanged by the defendant Williams and the undercover agent, are also collected and used as a medium of exchange. We cannot, however, outlaw those legal and mainstream materials and we may not outlaw the thoughts conjured up by those legal materials.

Freedom of the mind occupies a highly protected position in our constitutional heritage. Even when an individual’s ideas concern immoral thoughts about images of children, the Supreme Court has steadfastly maintained the right to think freely. . . . Free Speech Coalition, 535 U.S. at 253, 122 S.Ct. at 1403 (finding that the fact that possession of non-obscene virtual child pornography may cause sexually immoral thoughts about children was not enough to justify banning it). The Court reiterated that the concern with child pornography is "physiological, emotional, and mental health" of children, and thus regulation is permissible only when targeted at the evils of the production process itself, and not the effect of the material on its eventual viewers. Free Speech Coalition, 535 U.S. at 253, 122 S.Ct. at 1403. The PROTECT Act pandering provision misses that target and, instead, wrongly punishes individuals for the non-inciteful expression of their thoughts and beliefs. Stanley v. Georgia, 394 U.S. at 566, 89 S.Ct. at 1249 (stating that legislators "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"). However repugnant we may find them, we may not constitutionally suppress a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious.
3. The Supreme Court’s Decision in *Ginzburg* Does Not Support Pandering as an Independent Offense

The Government’s central justification for the pandering provision, found convincing by the district court, relies on the Supreme Court’s decision in *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), for the proposition that an individual may be found criminally liable for promoting material as appealing to prurient interests even though the material actually being promoted might not fall outside the First Amendment’s protection. We believe that reliance is ill-grounded.

In *Ginzburg*, erotic publications that were not “hard core” pornography, and may not have been obscene per se, became the subjects of conviction because their prurient qualities were exploited, or pandered, by the defendant for commercially sexual purposes. The Court found that evidence of the manner in which the publications were advertised and mailed “was relevant in determining the ultimate question of obscenity,” and that evidence of such pandering on the basis of salacious appeal “may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.” *Ginzburg*, 383 U.S. at 470, 476, 86 S.Ct. at 947, 950. In *Free Speech Coalition*, the Court recognized the limited scope of the pandering rationale expressed in *Ginzburg*: that “in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test.” *Free Speech Coalition*, 535 U.S. at 258, 122 S.Ct. at 1406 (quoting *Ginzburg*, 383 U.S. at 474, 86 S.Ct. at 942). The Court also suggested that *Ginzburg* has no application where, as in the case of the CPPA, “[t]he statute does not require that the context be part of an effort at commercial exploitation.” *Free Speech Coalition*, 535 U.S. at 258, 122 S.Ct. at 1406.

We disagree with the district court that *Ginzburg* supports a prohibition of pandering as a stand-alone crime without regard to the legality, or even to the existence, of the pandered material. First, we note that, notwithstanding its brief mention by the Court in *Free Speech Coalition*, there is some question as to the continued vitality of the *Ginzburg* pandering rationale. Shortly after *Ginzburg* was decided, the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), that truthful, non-misleading commercial speech is protected by the First Amendment, although to a lesser degree than protected non-commercial speech. The sort of pandering that caused the publications in *Ginzburg* to be found obscene, in other words, has since gained some First Amendment protection. In one of two post-*Ginzburg* cases in the 1970s, a dissent joined by four justices states that “*Ginzburg* cannot survive *Virginia Pharmacy*.” *Splawn v. California*, 431 U.S. 595, 603 n. 2, 97 S.Ct. 1987, 52 L.Ed.2d 606 (1977) (Stevens, J., dissenting) . . .

Consequently, although *Ginzburg* has not been overturned, its precedential value is questionable.

Even if the *Ginzburg* pandering rationale remains viable, the PROTECT Act pandering provision, as discussed above, is not limited to the commercial context. In considering the CPPA pandering provision at issue in *Free Speech Coalition*, the Court clearly suggested that, even if the *Ginzburg* pandering rationale remains viable, it would only apply in a the commercial context. *Free Speech Coalition*, 535 U.S. at 258, 122 S.Ct. at 1406 (2002). The PROTECT Act pandering provision, like the CPPA pandering provision found unconstitutional in *Free Speech Coalition*, does “not require that the context be part of an

Finally, to the extent that the Ginzburg pandering rationale remains valid, it lends little constitutional support to the pandering provision at issue here. With respect to the "obscene" virtual or simulated material described under subsection (i), if the pandering rationale remains valid, then it might be the basis for a court to uphold a conviction under the PROTECT Act for distributing material of questionable social value that would not be deemed obscene but for the defendant's promotion of it suggesting that it was. But if the rationale holds, then this would be the case under existing obscenity law and the pandering provision adds nothing in that respect. The rationale does not justify a prosecution under the PROTECT Act that goes farther than existing obscenity law by attempting to convict a defendant for distributing material that is clearly not obscene, merely because the defendant pandered it as obscenity.

With respect to "real" child pornography as described under subsection (ii), the Ginzburg pandering rationale is of no relevance....

In sum, the Government urges us to read the PROTECT Act as writing the Ginzburg pandering rationale into the law. We note that at least one state law concerning obscene visual depictions of children has succinctly done just that. See, e.g., Ala.Code § 13A-12-195 (2005). But the Government asks us to stretch that rationale much farther, to support pandering as an independent crime rather than only as evidence of the crime of obscenity or child pornography. We believe such an interpretation of Ginzburg butts directly against the holding of Free Speech Coalition and, accordingly, find that Ginzburg does not rescue the PROTECT Act pandering provision from substantial overbreadth.

4. The Protect Act Pandering Provision Is Not Justified by Legislative Findings

The pandering provision of the PROTECT Act, for reasons we have discussed, is inconsistent with Miller and Ferber, as reaffirmed in Free Speech Coalition, and is not sustainable under Ginzburg. The Government, however, seeks to justify its prohibitions in other ways.

First, noting the state's compelling interest in protecting children from those who sexually exploit them, Congress relies on Ferber and Osborne for the proposition that this interest extends to stamping out the market for child pornography. Congressional Findings (501) at (2)-(3). However, Congress has not adequately explained why the mere pandering of otherwise legal material should be prohibited in the pursuit of this interest.

In the PROTECT Act's Conference Report, Congress mentions that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R.Rep. No. 108-66, Title V, at 62 (2003). This appears to be a resurrection of the market-deterrence theory advanced by the Government, and rejected by the Court, in Free Speech Coalition. As the Court recognized, the prohibitions of "real" child pornography in Ferber and Osborne were upheld on a production-based rationale. The Court in Ferber allowed market deterrence restrictions because they destroyed the profit motive to exploit real children. Congress has again failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children.
engaging in sexually explicit conduct.

Next, the Government points to the legislative findings of the PROTECT Act that articulate the difficulties in successful prosecution of child pornography possession cases where advancements in computer technology allow images to be so altered as to cast reasonable doubt on whether they involve real children. See Findings 501 at (10)-(13). Congress characterizes the pandering provision as "an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes." S.Rep. No. 108-2, Title VIII, at 23 (2003)(remarks of Sen. Patrick Leahy). . . . Without such prosecutorial tools, it argues, the child pornography market will flourish, harming real children. See Findings 501 at (13).

This argument not only attempts, once again, to revive the rejected market proliferation rationale but also disregards the firmly established principle that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." Free Speech Coalition, 535 U.S. at 255, 122 S.Ct. at 1404. And when the "technical reason" is that the material being described or exchanged does not fall within one of the two proscribable categories—but instead is legal child erotica, innocent pictures of children arousing only in the minds of certain viewers, or non-existent—the Government cannot circumvent the criminal procedure process. In a non-commercial setting, in which most child pornography is discussed and exchanged, pandering at most either raises actionable suspicion that illegal materials are possessed or is evidentiary of the social merit of questionable materials. The Government must do its job to determine whether illegal material is behind the pander.

The Government urges that we consider this simply an inchoate crime, arguing that only those with specific intent to traffic in illegal child pornography will be ensnared and noting, for example, that offers to buy or sell illegal drugs can be punished even if no drugs actually exist . . . Further, the intent element only applies to one portion of the provision—promoting material in a manner "that is intended to cause another to believe" it is illicit—and, to be a violator, one need not intend to distribute illegal materials, but only intend that another believe the materials one has are lascivious. Also, a defendant may be liable for promoting, distributing, or soliciting perfectly legal materials that only he or she personally believes are lascivious . . . Finally, with any inchoate offense the government must show some substantial movement toward completing the crime, must prove, in other words, something beyond mere talk. Under the PROTECT Act pandering provision, mere talk is all that is required for liability and that does not square with Supreme Court First Amendment jurisprudence.

In sum, we recognize that Congress has a compelling interest in protecting children and, to that end, may regulate in interstate commerce settings the distribution or solicitation of the materials described in subsections (i) (obscene child pornography) and (ii) ("real" child pornography) of the PROTECT Act pandering provision. However, the pandering provision goes much farther than that. The provision abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep, and the reasons the Government offers in support of such limitations have no justification in the Supreme Court's First Amendment precedents. Accordingly, we find it unconstitutionally overbroad.
H. Williams's Vagueness Challenge

The Government contends that, since the written plea agreement references only Williams's right to appeal his pandering conviction on grounds of overbreadth, he has waived his vagueness challenge. We disagree. We recognize that vagueness and overbreadth doctrines, although "logically related and similar," are distinct. *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). However, plea bargains, as we have noted, are like contracts and should be interpreted in accord with the parties' intent. *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir.2005). . . . The record in this case clearly reflects the parties' intent to preserve Williams's constitutional challenges under both overbreadth and vagueness doctrines. That the written memorialization of that agreement omitted the latter of these related grounds is insufficient to support waiver.

Laws that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). Thus, to pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357, 103 S.Ct. at 1858 (1983); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F.3d 1542 (11th Cir.1997). Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe. *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

In this case, considering a penal statute that both restricts speech and carries harsh criminal penalties, it is not at all clear what is meant by promoting or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe" that touted or desired material contains illegal child pornography. This language is so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed. Moreover, the proscription requires a wholly subjective determination by law enforcement personnel of what promotional or solicitous speech "reflects the belief" or is "intended to cause another to believe" that material is illegally pornographic. Individual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates. See *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (holding unconstitutionally vague an anti-loitering ordinance, which defined loitering as remaining in place with "no apparent purpose," finding that standard "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene.") . . .

* * *

Even more complex is the determination of what constitutes presentation in a "manner that is intended to cause another to believe" that material contains illegal child pornography. Let us consider, for example, an email entitled simply "Good pics of kids in bed." Let us also imagine that the "pics" are
actually of toddlers in footie pajamas, sound asleep. Sender One is a proud and computer-savvy grandparent. Sender Two is a chronic forwarder of cute photos with racy tongue-in-cheek subject lines. Sender Three is a convicted child molester who hopes to trade for more graphic photos with like-minded recipients. If what the statute required was a specific intent to traffic in illegal child pornography, the identity of the sender and the actual content of the photos would be probative. Senders One and Two would be off the hook while Sender Three may warrant further investigation.

But again, the pandering provision requires no inquiry into the actual nature or even existence of the images and provides no affirmative defense that the underlying materials are not, in fact, illegal child pornography. The offense is complete upon communication “in a manner that,” in the discretionary view of law enforcement, “is intended to cause another to believe” that materials are illegal child pornography. Here, the “manner” of presentation, as well as the plainly legal underlying material, are identical in all three instances. And Sender Two clearly intended that his recipients believe, however briefly, that the attached photos were sexually explicit depictions of minors.

***

We again recognize that Congress may regulate the distribution or solicitation of the illegal materials described in subsections (i) (obscene child pornography) and (ii) (“real” child pornography) of the pandering provision. If that were all the provision did, we would find no constitutional infirmity on vagueness grounds. However, the statute is unnecessarily muddled by the nebulous “purported material” and “reflects the belief, or is intended to cause another to believe” language. Because of this language, the pandering provision fails to convey the contours of its restriction with sufficient clarity to permit law-abiding persons to conform to its requirements. Because of this language, the provision is insusceptible of uniform interpretation and application by those charged with the responsibility of enforcing it. Accordingly, we find it impermissibly vague.

III. WILLIAMS’S *Booker* CHALLENGE

A. Standard of Review

Where, as here, there is a timely objection, we review a defendant’s *Booker* claim in order to determine whether the error was harmless. *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir.2005). There are two harmless error standards, one of which applies to *Booker* constitutional errors, the other to *Booker* statutory errors. Statutory errors are subject to the less demanding test that is applicable to non-constitutional errors. A non-constitutional *Booker* error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the sentence, or had but very slight effect. *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir.2005). If one can say with fair assurance that the sentence was not substantially swayed by the error, the sentence is due to be affirmed even though there was error. *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir.2005). Because this is a *Booker* statutory error case we will apply that standard.

B. No Reversible *Booker* Error

Williams was assessed (1) a two-level sentence enhancement for use of a computer for transmission, receipt or distribution of child pornography (2) a two-level sentence enhancement for possession of child pornography because the pornographic
material at issue involved minors under age twelve, and (3) a four-level sentence enhancement because the material involved portrayed sadistic or masochistic conduct or other depictions of violence. Because these enhancements were applied under a mandatory guidelines scheme, error occurred. See United States v. Shelton, 400 F.3d 1325, 1331 (11th Cir.2005). However, because Williams admitted to the factual basis for his sentence, which included the facts underlying these enhancements, there was no Sixth Amendment Booker error. See United States v. Shelton, 400 F.3d 1325, 1331 (11th Cir.2005).

We conclude that, viewing the proceedings in their entirety, the sentence was not substantially swayed by the statutory error. Williams was sentenced above the bottom of the 57 to 71 month guideline range for the possession count, and the district court, exercising its discretion, expressly declined his request for a lower sentence within that range. The court also stated that, even if not bound by the guidelines, it had doubts that the sentence would be any lower, and it may have been higher. While the judge declined to issue an alternative sentence in anticipation of Blakely’s application to the guidelines given the then-settled state of that issue in this circuit, he explained his decision thoroughly enough that we are confident that he would not lower the sentence in this case on remand.

IV CONCLUSION

In the wake of Free Speech Coalition, sexually explicit speech regarding children that is neither obscene nor the product of sexual abuse of a real minor retains protection of the First Amendment. We believe the Court’s decision in Free Speech Coalition leaves Congress ample authority to enact legislation that allows the Government to accomplish its legitimate goal of curbing child abuse without placing an unacceptably heavy burden on protected speech. Certainly Congress took many cues from the Court in drafting the legislation at issue in this case.

Given the unique patterns of deviance inherent in those who sexually covet children and the rapidly advancing technology behind which they hide, we are not unmindful of the difficulties of striking a balance between Congress’s interest in protecting children from harm with constitutional guarantees. However, the infirmities of the PROTECT Act pandering provision reflect a persistent disregard of time-honored and constitutionally mandated principles relating to the Government’s regulation of free speech and its obligation to provide criminal defendants due process. Because we find the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional, we reverse Williams’s conviction under that section. However, because we find no reversible Booker error in his sentencing for possession of illegal child pornography, we affirm his sentence of 60-months imprisonment.

CONVICTION REVERSED AND SENTENCE ON COUNT ONE VACATED; SENTENCE ON COUNT TWO AFFIRMED.
WASHINGTON, March 26—The Supreme Court agreed Monday to undertake its latest effort to define the permissible boundary between free speech and the government’s prohibition of child pornography.

The justices agreed to hear a government appeal of a ruling issued last year by the federal appeals court in Atlanta that overturned part of a recent federal law aimed not only at the sexual exploitation of real children but also at computer-generated or enhanced images that help sustain the market for child pornography.

The appeals court, the United States Court of Appeals for the 11th Circuit, said that while the statute’s goal was one of “extraordinary importance,” its prohibition against “pandering” child pornography was too broadly worded and too vague to satisfy the First Amendment. “Congress may not burn the house to roast the pig,” the court said.

In appealing to the Supreme Court, Solicitor General Paul D. Clement said the provision, a portion of a 2003 law known as the Protect Act, was “totally consistent with the Constitution” because it was aimed at a form of speech that was not entitled to constitutional protection.

“The court of appeals’ misguided invalidation of the law undermines Congress’s effort to protect children by eliminating the widespread market in child pornography,” the government’s appeal said. In another part of the brief, however, Mr. Clement said the government had invoked the section at issue “only rarely.”

Congress passed the law to respond to a Supreme Court decision the year before that invalidated the Child Pornography Prevention Act of 1996. “Protect” is an acronym for the statute’s formal title, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today.

The appeals court invalidated a section known as the “pandering” provision, which makes it a crime to advertise, promote, distribute or solicit “any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material contains” either “an obscene visual depiction of a minor engaging in sexually explicit conduct” or such a visual depiction of an “actual minor.”

In other words, the government told the Supreme Court, the law allows prosecution of those who “make direct requests to receive, or offers to provide, what purports to be illegal material, regardless of whether the government can prove that such material is in fact real child pornography or that it even exists.” The minimum sentence is five years.

The appeals court’s decision came in an appeal brought by a man, Michael Williams, who was caught in a federal sting operation soliciting and offering child pornography in an Internet chat room. Secret Service agents obtain a warrant and searched his home,
finding two computer hard drives with images of minors engaged in sexually explicit conduct.

The appeals court found that the photographs were "unquestionably" of "real" children, so that the case did not raise a question about the definition of "virtual" child pornography. The problem, the appeals court held, was with the absence of language in the law that would limit its application to commercial transactions.

While commercial promotion of child pornography would lack constitutional protection, the appeals court said, "the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment."

Without such a limitation, the court continued, the law could apply to "any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal pornography," and could subject such a person to up to 20 years in prison, even if the material was nothing more than "a video of 'Our Gang,' a dirty handkerchief, or an empty pocket."

Congress's effort in the 2003 law to define the crime precisely was a response to the Supreme Court's dissatisfaction with the earlier law, so broadly written, Justice Anthony M. Kennedy wrote for the majority, that it could have turned a modern production of "Romeo and Juliet" into a criminal act. Juliet was supposed to be only 13, Justice Kennedy noted, so her portrayal as a young teenager could well be a "visual depiction" of a minor, or one who appeared to be a minor, engaged in sexually explicit conduct, in violation of the law.

The court will hear the new case, United States v. Williams, No. 06-694, in its next term.

Also on Monday, the court declined to revisit the question of the circumstances under which courts can award visiting rights to grandparents over the objection of a child's parents. It let stand a decision by the Pennsylvania Supreme Court that upheld a visiting order without requiring proof that denying visits would harm the child. The case was Fausey v. Hiller, No. 06-863.
“Court First to Strike Pandering Provision of Child Porn Law”

The Recorder
April 11, 2006
Alyson M. Palmer

ATLANTA—Congress’ quick fix to a child pornography law struck down in 2002 by the U.S. Supreme Court failed last week before the Eleventh Circuit U.S. Court of Appeals.

The April 6 decision, the first by a federal appeals court declaring a particular provision of the law unconstitutional, may have minimal practical impact given the relatively rare use of that provision.

But it is significant to First Amendment jurisprudence and will no doubt give prosecutors and legislators headaches.

The provision struck made it a felony—carrying at least five years of prison time—to promote, distribute or solicit material in a way intended to cause others to believe that the material is legally obscene or depicts a minor engaging in sexually explicit conduct.

A three-judge panel found the provision against promotion of such material vague and overbroad because, in essence, it could criminalize legal speech. The panel’s opinion was written by Senior Judge Thomas Reavley, visiting from the Fifth Circuit, and joined by Eleventh Circuit Judges Rosemary Barkett and Charles Wilson.

The provision struck by the court—sometimes called the “pandering” provision—is part of the federal legislation known as the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003. Signed by President Bush in 2003, the legislation was Congress’ response to a 2002 U.S. Supreme Court decision that struck down the prior law. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

That decision, which split the court 6-3, struck down as overbroad an aspect of the prior statute that included within the definition of child pornography computer-generated images that appeared to show minors engaged in sexually explicit conduct. Writing for the majority, Justice Anthony Kennedy also found fault with the prior “pandering” provision to the extent that it included within its child pornography definition material promoted in such a way that it “conveys the impression” that it shows a minor engaged in sexually explicit conduct.

Reavley’s Eleventh Circuit opinion quoted fears expressed by Sen. Patrick Leahy, D-Vt., during the debate over Congress’ attempt to fix the law after it was struck down by the high court.

Leahy, the ranking Democrat on the Senate Judiciary Committee, said the proposed changes “federally criminalize[s] talking dirty over the Internet or the telephone when the person never possesses any material at all.”

“In a non-commercial context,” wrote Reavley, “any promoter—be they a braggart, exaggerator or outright liar—who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or
she actually has is a video of ‘Our Gang,’ a dirty handkerchief or an empty pocket.”

The provision is overbroad, the judge added, also because criminal liability under the provision could be based on the “perverted but privately held belief” that certain materials are “lascivious.” Most pedophiles find “virtually all” depictions of children erotic, said the court, but “we may not outlaw the thoughts conjured up by those legal materials.”

Jeffrey Douglas, chair of the board of the Free Speech Coalition, a trade organization for adult entertainment businesses that challenged the old law before the Supreme Court, said that the Eleventh Circuit’s decision was “inevitable” following the 2002 ruling.

“While everyone abhors the idea of sexually exploiting children,” said Douglas, also a criminal defense attorney in Santa Monica, “there is a legal difference between an idea and an act, and Congress attempted to criminalize the idea again, and the Supreme Court and now the Eleventh Circuit has essentially said you can’t do that.”

As an example of what the Eleventh Circuit’s decision means, Douglas noted that the term “Lolita” is highly suggestive of child molestation, but the novel by that name may be written without exploiting any child.

“If I were to offer to distribute Lolita material there are law enforcement agents that would line up between here and Atlanta to prosecute me because of what that phrase or term conveys,” he said. “But you can’t do that.”

The case came from a federal prosecution in Miami. Alicia Valle, special counsel to U.S. Attorney R. Alexander Acosta, said Friday that prosecutors would make a determination whether to seek further review of the Eleventh Circuit panel’s decision soon but would have no further comment.

The government’s Eleventh Circuit brief argued that the pandering provision of the PROTECT Act was significantly different from the law struck down by the Supreme Court in 2002 and “does not prohibit a substantial amount of protected speech in relation to the statute’s plainly legitimate sweep.”

Ironically, the appellate decision may be of no practical help to the party who raised the challenge to the law.

According to the decision, federal prosecutors in Miami charged Michael Williams after he traded messages with an undercover agent posing as a minor in a chat room. Federal agents seized images of minors engaging in sexually explicit conduct from Williams’ hard drive, the decision added.

In addition to receiving a five-year sentence on his pandering conviction, Williams also received a five-year sentence—to run at the same time as the other sentence—for possession of child pornography. The appeals court rejected Williams’ arguments that he was improperly sentenced on the possession count, leaving his five-year sentence intact.

“It’s really a pyrrhic victory at this point,” said Luis Guerra, a Miami attorney who represented Williams, adding that he still was very pleased with the decision on the pandering provision. Guerra said that his client was considering whether or not to seek a rehearing or review by the Supreme Court.
Court on the sentencing ruling.

Guerra said that the attorneys were not First Amendment experts but “felt comfortable” handling the matter because “it was so obvious to us that this statute was problematic.”

Jennifer Kinsley, a criminal defense attorney in Cincinnati who handles First Amendment matters, suggested that few defendants may be helped directly by Williams’ partial victory.

“[I]t is exceedingly rare that a defendant is charged with promotion, since the penalties for possession are so high and the burden of proof is so low,” said Kinsley in an e-mail.

“So I don’t really think the case will be that significant in terms of impacting other defendants’ convictions.”

However, Kinsley added that she thought the decision might call into question the constitutionality of laws that criminalize an adult soliciting an undercover police officer posing as a juvenile for sex.

The case is *United States v. Williams*, 04-15128 (11th Cir. April 6, 2006).

*Alyson M. Palmer is a reporter with the Fulton County Daily Report, a Recorder affiliate based in Atlanta.*
Congress’ second attempt to criminalize the distribution of “virtual child pornography” over the Internet—the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act)—was recently held unconstitutional by the U.S. Court of Appeals for the Eleventh Circuit in \textit{U.S. v. Williams}, \textit{\_\_\_\_F3d \_\_\_\_}. 2006 WL 871200 (Fla, 4/6/06).

While not yet having received the public attention as an earlier decision in this line of jurisprudence, \textit{Ashcroft v. Free Speech Coalition}, 535 US 234 (2002), \textit{Williams} continues the judiciary’s trend of making it difficult for the legislative branch to find a solution to the conflict between constitutionally protected speech and the legitimate interests of keeping minors safe from sexual predators.

A review of these legislative attempts and the federal decisions holding them unconstitutional will illuminate the difficulties already encountered by lawmakers as well as demonstrate the problems that lie ahead for future attempts to resolve this difficult conflict.

The Child Pornography Protection Act of 1996 (CPPA) was enacted with the intention of creating, as noted by the U.S. Supreme Court in \textit{Ashcroft}, criminal sanctions against “not only pornographic images made using actual children, but also ‘any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture’ that ‘is, or appears to be, of a minor engaging in sexually explicit conduct,’” under 18 USC 2256(8)(B).

A second CPPA provision, 18 USC 2256(8)(D), likewise criminalized “the production or distribution of pornographic material pandered as child pornography.”

The Free Speech Coalition, described in \textit{Ashcroft} as “an adult-entertainment trade association,” filed suit in the Northern District of California seeking injunctive and declaratory relief out of fear the CPPA would have an adverse effect on the industry. Their suit claimed the phrases “appears to be” and “conveys the impression” were “overbroad and vague” and created a “chilling effect” on the production of First Amendment protected art.

The majority in \textit{Ashcroft} initially observed that these CPPA provisions targeted a “range of sexually explicit images . . . that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology.”

The majority opinion went on to state that the broad language of “appears to be” and “conveys the impression” could be used to prosecute numerous “mainstream” artistic endeavors, including movies involving adult actors merely playing the role of a minor.

Justice Kennedy pointed to the paintings of Gingerich, the photographs of Raffaelli and
the films “Traffic,” “American Beauty” and “Romeo and Juliet” as examples of “virtual depictions” of sexual activity that could arguably fit within the definition of child pornography under 18 USC 2256(8)(B).

A careful reading of his opinion, however, was believed to provide a roadmap of compliance by those in law enforcement looking to draft new legislation intended to withstand future First Amendment scrutiny.

Justice Anthony Kennedy noted that “freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” He remarked that the two CPPA provisions at issue failed to include the four-prong obscenity language standard set forth in Miller v. California, 413 US 15 (1973) (i.e., “the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value”).

Hence, it appeared that one easy solution for Congress would have been to enact a virtual child pornography statute that included the obscenity three-prong standard as an element of the offense. Justice Kennedy’s opinion did, nevertheless, provide a second possible method of withstanding constitutional attack in the future.

His opinion analyzed, at some length, how the Court had previously found a valid limitation of free speech protection in New York v. Ferber, 458 US 747 (1982), which held that a state had a substantial interest in protecting real children from harm by criminalizing the distribution of actual child pornography. The Court extended this valid state interest to the mere possession of such items in Osborne v. Ohio, 495 US 103 (1990).

In contrast, Justice Kennedy stressed in Ashcroft that while the government attempted to claim 18 U.S.C. 2256(8)(B)’s prohibition of virtual child pornography protected against harm to real children, “the causal link is contingent and indirect.” Instead, he noted the “harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” The clear implication here is that if Congress could establish a more direct “causal link” or some “quantifiable potential for subsequent criminal acts,” future legislation might be held constitutional.

PROTECT Act

In response to Ashcroft, Congress enacted the PROTECT Act, which attempted to include the suggested solutions in Justice Kennedy’s opinion.

One would hope that Congress learned the following lessons from Ashcroft in drafting new legislation: (1) avoid overbroad language, (2) adopt the full three-prong Miller obscenity standard, and (3) adopt specific legislative findings supporting the need for criminalizing virtual child pornography. Williams found the PROTECT Act failed in successfully meeting any of these goals.

The defendant in Williams was caught in one of the commonplace undercover sexual predator stings in which a law enforcement officer visits Internet chatrooms. In this case, the defendant, after meeting the undercover in a “public” chatroom, engaged the undercover in a private online communication.
While still participating in a private chat, the two initially exchanged non-pornographic depictions of young girls. Next, the defendant told the undercover he had “hard core” images of his own daughter, indicating he was willing to trade with the undercover if the latter had similar depictions.

After the undercover sent more non-pornographic pictures, the defendant announced in the public chatroom that the undercover was “a cop” because the undercover refused to send sexually explicit depictions of children. The undercover immediately responded by announcing that the defendant was really the “cop.”

The defendant fell for this trap by posting a hypertext link in the public chatroom so that anyone could click on it to access child pornography. The defendant added to this link a statement in the chatroom bragging that he could not be a cop because he was willing to post such an “uplink” while the undercover would not do the same.

The defendant was prosecuted for both the possession and the distribution of child pornography. A plea arrangement was worked out so the defendant could admit his guilt to both the possession and distribution, but still appeal the PROTECT Act distribution provisions to the Eleventh Circuit as being unconstitutionally overbroad and vague.

The new, promoting child pornography provisions of the PROTECT Act made it a crime to distribute the visual depiction of both an “actual minor” and an “obscene visual depiction of a minor” engaging in sexually explicit conduct. So it appeared Congress did link obscenity to virtual child pornography.

The problem the circuit found, however, was that the PROTECT Act’s definition of obscenity used only one of the three prongs of the Miller standard (the “lacking serious literary, artistic, political or scientific value” prong).

At one point in Williams, the court seemed to imply that Congress may regulate “obscene child pornography,” presumably if the entire Miller definition had been utilized, but the court found other deficiencies with the act.

For example, the description of what constitutes distributing child pornography is someone who “adVERTISES, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that material or purported material” that fits the definition of child pornography.

The circuit court found such language objectionable on multiple grounds. First, the use of the term “purported material” could be considered to include someone who claims he is distributing child pornography when he is sending legal depictions of children (such as a non-provocatively posed nude child).

This, the court found, criminalizes not the validly objectionable act of the distribution of the child pornography, but the “speech promoting and soliciting such material.” It noted that the foundation of protected speech is the right to openly speak about objectionable topics.

Also problematic were such “muddled” and “nebulous” phrases as “purported material” and “reflects the belief, or is intended to cause another to believe.”
The *Williams* decision concluded its analysis of the PROTECT Act’s constitutionality by remarking that the distribution provisions “fail to convey the contours of its restrictions with sufficient clarity to permit law-abiding persons to conform to its requirements.” Hence, they are “insusceptible of uniform interpretation and application by those charged with the responsibility of enforcing” them and, therefore, are unconstitutionally vague.

Williams also appears to subtly suggest there are other weaknesses in the PROTECT Act, without using them as grounds for reversal. For example, the legislative memorandum supporting the act focused almost exclusively on the technological advances in modern computer-generated images creating virtually indistinguishable depictions of child pornography while abandoning other supporting grounds listed in the memorandum.

Likewise, the court mentioned other potentially vague words and phrases found elsewhere in the act, some closely mirroring the CPPA language found objectionable in Ashcroft, but never specifically ruled on such language being a basis for reversal.

**New York Law**

In New York, the *Ashcroft* and *Williams* decisions are basically a non-issue. The state’s child pornography provisions are worded to require that the “sexual performance” be done “by a child.”

The obvious question then becomes, how does a prosecutor prove the depicted person engaged in pornographic acts is, in fact, a child?

One way to prove the age of a child would be to call an expert in the approximation of age based on an examination of developmental characteristics and other physical traits. But does the law require such evidence to sustain a conviction?

At least three post-Ashcroft federal decisions have ruled that juries, on their own, are capable of distinguishing between real and virtual images, *U.S. v. Kimler*, 335 F3d 1132 (10th Cir, 2003); *U.S. v. Deaton*, 328 F3d 454 (8th Cir, 2003); *U.S. v. Hall*, 312 F3d 1250 (11th Cir, 2003). *cert den.*, 538 US 954.

The leading New York case on disseminating indecent material to minors, *People v. Foley*, 94 NY2d 668 (2000), likewise appears to imply support of a jury’s ability to make a similar determination.

**Conclusion**

Whether it is the Communication Decency Act of 1996, which was ruled unconstitutional in *Reno v. ACLU*, 521 US 844 (1997), or the Child Online Protection Act of 1998, found unconstitutional in *Ashcroft v. ACLU*, 535 US 564 (2002), or New York’s Disseminating Indecent Material to Minors in the Second Degree, held unconstitutional in *American Library Association v. Pataki*, 969 FSupp 160 (SDNY, 1997), or the CPPA or PROTECT Act provisions cited in this article, lawmakers continue to struggle with drafting legislation designed to protect minors online consistent with First Amendment protections.

Whether the fault lies with imprecise legislative draftsmanship or with the structural nature of the Internet itself is still a bit unclear, although a combination of the two is probably closest to the truth.

Ultimately, the only real solution might be
to retool the Internet with appropriate controls, checks and balances imposed from birth. While that seems a daunting task, the development of a “second Internet” has been talked about for the past several years. Hopefully, the mistakes in governing the first one will be minimized with the second because the alternative—a retrofitting of regulations and supervision of cyberspace as it exists today—just may be impossible.

Stephen V. Treglia is an assistant district attorney in Nassau County and chief of the office’s technology crime unit.
Respondents filed suit under the Age Discrimination in Employment Act ("ADEA") against Federal Express, alleging a pattern of discrimination against older couriers. One of the respondents filed an "intake questionnaire" with the Equal Employment Opportunity Commission ("EEOC") and two others filed charges with the EEOC and received right-to-sue letters in response; the remaining respondents did not file any charges with the EEOC. The District Court dismissed the suit without reaching the merits, finding that none of the fourteen plaintiffs had filed timely or valid charges with the EEOC, but the Second Circuit reversed the dismissal and held in favor of petitioners, allowing eleven of the fourteen original plaintiffs to piggyback on the single complaint of plaintiff Kennedy.

Questions Presented: Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue the Supreme Court has examined but not yet decided, that an "intake questionnaire" submitted to the EEOC may suffice for the charge of discrimination that must be submitted pursuant to the ADEA, even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.
District Court for the Southern District of New York (McKenna, J.) dismissed the claims as time-barred, concluding that each named plaintiff failed to comply with the ADEA’s time limit requirements under 29 U.S.C. § 626(d).

We disagree with the district court’s dismissals of the plaintiffs’ claims. Specifically, we hold that plaintiff Patricia Kennedy’s Intake Questionnaire and accompanying verified affidavit, filed with the Equal Employment Opportunity Commission (“EEOC”), constituted an EEOC “charge” that satisfactorily fulfilled the ADEA’s exhaustion requirements even though the EEOC never notified, or investigated, the employer. Furthermore, we conclude that Kennedy’s EEOC charge was sufficient to permit the eleven named plaintiffs that never filed EEOC charges to take advantage of the “single filing” or “piggybacking” rule and thereby satisfy the ADEA’s exhaustion requirements.

Finally, with respect to plaintiffs George Robertson and Kevin McQuillan, two individuals who did individually file administrative charges and received right-to-sue letters, we conclude that the district court erred in determining that these plaintiffs did not file their charges within 300 days after the alleged unlawful practice occurred, as is required by 29 U.S.C. § 626(d). We remand, however, for the district court to decide in the first instance whether the complaint, fleshed out by Robertson’s affidavit, was sufficient to withstand a motion dismiss based on the ADEA’s requirement that a claimant who receives a right-to-sue letter must bring suit in federal court within 90 days of receipt of the letter. See 29 U.S.C. § 626(e). Accordingly, we reverse in part, vacate in part, and remand for further proceedings in accordance with this opinion.

BACKGROUND

This case requires us to consider various time limits imposed on plaintiffs seeking to sue their employer under the ADEA. Appellants (also referred to as “Holowecki plaintiffs”), residents of several states, filed an April 30, 2002, complaint on behalf of themselves and other similarly situated FedEx couriers. The complaint alleged, inter alia, that, through policies initiated in 1994 and 1995—such as “Best Practices Pays” (“BPP”) and “Minimum Acceptable Performance Standards” (“MAPS”)—and through a pattern and practices that continued thereafter, FedEx had discriminated based on age. The Holowecki plaintiffs contended that BPP, MAPS, and related policies were intended to encourage older workers to leave the company before they wished to retire and to mask FedEx’s efforts to terminate older workers based on age discrimination.

According to the complaint, for instance, after the initial implementation of the BPP and MAPS, FedEx continued to increase performance goals and apply these new goals in a way that discriminated against older couriers. . . .” Over time, however, [FedEx] treated the goals as the minimum acceptable number of stops that older couriers were required to make to retain their positions. . . . Older couriers, according to the complaint, were more often “written up” for occasional failures. . . . The complaint alleged a series of additional discriminatory practices. . . .

The district court dismissed the Holowecki plaintiffs’ complaint without reaching the merits, ruling that all fourteen named plaintiffs failed to satisfy the ADEA’s time limit requirements, see 29 U.S.C. § 626, and declining to exercise supplemental jurisdiction over plaintiffs’ state law claims. Under 29 U.S.C. § 626(d) (“Section 626(d)"),
an aggrieved person must file an EEOC charge at least 60 days prior to initiating an ADEA suit in federal court. In addition, if the allegedly discriminatory act occurs in a “deferral state,” a state that has its own age discrimination law and its own age discrimination remedial agency, the charge must be filed within the earlier of 300 days after the alleged unlawful practice occurred or thirty days after a complainant receives notice of the termination of state law proceedings. It is undisputed that all of the states relevant to this action are deferral states.

Unlike Title VII, the ADEA does not require an aggrieved party to receive a right-to-sue letter from the EEOC before filing suit in federal court. However, in the event that the EEOC issues a right-to-sue letter to an ADEA claimant, the claimant must file her federal suit within 90 days after receipt of the letter.

While the ADEA’s time limit requirements are subject to equitable modification or estoppel, Dillman v. Combustion Eng'g, Inc., 784 F.2d 57, 59 (2d Cir.1986), ADEA time limits “are not to be disregarded by courts out of a vague sympathy for particular litigants,” Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

Three of the named Holowecki plaintiffs filed charges with the EEOC or an authorized state agency (collectively referred to as “EEOC”) before bringing suit in federal court and eleven did not. Plaintiff Kennedy, a resident of Florida, filed an EEOC Intake Questionnaire form and accompanying verified affidavit on December 3, 2001, and an EEOC charge form on May 30, 2002. Kennedy did not receive a right-to-sue letter in conjunction with either of these filings. The verified affidavit, accompanying the Intake Questionnaire form, consisted of over four pages of text and alleged that FedEx had instituted a number of policies and practices that discriminated based on age. It stated, for instance, that “as a result of [the Best Practice Pays] policy and procedure changes,” FedEx had “fired and/or constructively terminated” older couriers and had otherwise discriminated against older couriers. Moreover, it named several practices, such as FedEx’s goals with respect to the number of stops per hour, that had increasingly gotten worse since the initiation of the BPP and MAPS.

The district court determined (1) that Kennedy’s EEOC Intake Questionnaire and affidavit was not an EEOC “charge” and therefore did not satisfy Section 626(d)’s requirement that a claimant file a charge before bringing suit in federal court, and (2) that Kennedy’s May 30, 2002, EEOC charge form was untimely because it was not filed 60 days prior to filing the April 30, 2002, ADEA complaint in federal court. See 29 U.S.C. § 626(d). Appellee does not dispute that Kennedy’s EEOC Intake Questionnaire form and accompanying affidavit would satisfy the 60 and 300 day time limits set out in 29 U.S.C. § 626(d) if we consider them to be an EEOC charge. In appellee’s view, however, the EEOC Intake Questionnaire and accompanying affidavit do not satisfy Section 626(d) because they are not properly considered to be an EEOC “charge.”

Plaintiff Robertson, a resident of Illinois, filed an EEOC charge on December 1, 2000, and Plaintiff McQuillan, a resident of New York, filed an EEOC charge on September 11, 1998. Although there was no question as to whether these constituted EEOC “charges” or as to whether these were filed 60 days prior to the initiation of the April 30, 2002, federal complaint, the district court found that they failed to meet the Section 626(d) requirement that the EEOC charge be filed within 300 days after the occurrence of the allegedly
discriminatory acts. Appellee argued below that these two plaintiffs, both of whom received right-to-sue letters from the EEOC, failed to satisfy the requirement that they bring their April 30, 2002, federal suit within 90 days of receipt of the letters. See 29 U.S.C. § 626(e). After McQuillan filed his September 11, 1998, charge, the EEOC issued a right-to-sue letter on June 11, 1999. Appellee argues that Robertson's right-to-sue letter was received on or about April 25, 2001, but Robertson states, “under penalty of perjury,” that it was received shortly after February 7, 2002, and thus satisfies Section 626(e) because it was received within 90 days of the April 30, 2002, federal suit. After Robertson filed his December 1, 2000, charge with the EEOC, providing a Lake Villa, Illinois address, the EEOC sent Robertson a right-to-sue letter, dated April 25, 2001. According to Robertson's declaration, submitted to the district court in opposition to appellee’s motion to dismiss, he moved from Lake Villa in March of 2001 and requested that the United States Postal Service forward his mail. The April 25, 2001, right-to-sue letter, however, somehow did not reach Robertson. In January or February of 2002, Robertson contacted the EEOC because he had not heard anything since the filing of his charge. In response, on February 7, 2002, the EEOC sent Robertson the April 25, 2001, right-to-sue letter. According to the record, eleven of the Holowecki named plaintiffs never filed anything approximating an EEOC charge. These non-filing plaintiffs claimed that their suit nonetheless did satisfy ADEA time limit requirements because of the single filing, or “piggybacking,” rule. According to the piggybacking rule, “where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same time frame.” Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir.1986). In cases such as this, when the allegedly discriminatory activity affects a large group, piggybacking is not allowed unless the filed charge provides “some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim.” Tolliver. 918 F.2d at 1058.

An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge. See Levy v. United States Gen. Accounting Office, 175 F.3d 254, 255 (2d Cir.1999) (per curiam); see also Snell, 782 F.2d at 1100. As noted by other Circuit Courts of Appeals, allowing an individual who has previously filed a charge to abandon that charge and piggyback onto the charges of another individual would too often frustrate the EEOC's statutorily mandated efforts to resolve an individual charge through informal conciliation. See, e.g., Gitlitz v. Compagnie Nationale Air France, 129 F.3d 554, 557-58 (11th Cir.1997). We agree with this analysis.

The eleven non-filing plaintiffs (also referred to as “the piggybacking plaintiffs”) present three piggybacking theories on appeal, all of which the district court rejected. They argue that they can piggyback onto (1) Kennedy's December 3, 2001, EEOC Intake Questionnaire and accompanying affidavit or (2) Robertson's December 1, 2000, EEOC charge, both of which, in their view, satisfy the ADEA's time limit requirements. Additionally, the piggybacking plaintiffs contend that they can piggyback onto timely EEOC charges filed by parties to a separate Florida lawsuit that was dismissed prior to the initiation of this claim, Freeman v. Federal Express Corp., No. 99-2466 (M.D.Fla. Sept. 25, 2000), aff'd, 2002 WL 187185 (11th Cir. Jan. 14, 2002), because the charges filed by
those individuals put the EEOC and FedEx on notice about its allegedly nationwide discriminatory practices. None of the Freeman plaintiffs are parties to the Holowecki suit. None of the Holowecki named plaintiffs were parties to the Florida lawsuit, although some of them unsuccessfully tried to join in an amended Freeman complaint that the Florida district court dismissed as moot. See Bost v. Federal Express Corp., 372 F.3d 1233, 1236-37 (11th Cir. 2004).

DISCUSSION

We construe the district court’s ruling as a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) rather than a dismissal for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) does not apply because the ADEA’s time limits, which are subject to equitable modification, are not jurisdictional in nature. See Dillman, 784 F.2d at 59.

In reviewing the Rule 12(b)(6) ruling, it is proper for this court to consider the plaintiffs relevant filings with the EEOC and the declaration that Robertson submitted to the district court.

I. Kennedy’s EEOC Intake Questionnaire and Affidavit

Both Kennedy and the piggybacking plaintiffs argue that, based on the circumstances of this case, Kennedy’s EEOC Intake Questionnaire and accompanying affidavit constitute an EEOC “charge.” Accordingly, they contend, it is timely in accordance with 29 U.S.C. § 626(d) because it is a “charge” that satisfies both the 60 day and 300 day time limits. The piggybacking plaintiffs further argue that the scope of Kennedy’s charge is sufficient to incorporate their age discrimination claims, thereby permitting them to piggyback. We agree on both accounts and reverse the district court’s dismissal of these plaintiffs’ claims.

A. Meaning of EEOC “Charge”

In order to decide whether Kennedy’s EEOC Intake Questionnaire and accompanying affidavit constitutes an EEOC charge we first turn to the meaning of the statutory term “charge.” The ADEA requires the filing of a timely charge with the EEOC but does not define the term “charge.” See 29 U.S.C. § 626(d). The EEOC has established interpreting regulations that specify the requisite information that must appear in a “charge.” See 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. The required content is minimal. For instance, a charge “is sufficient” when the EEOC receives “a . . . writing” (or information that an EEOC employee reduces to a writing) from the person making the charge that names the employer and generally describes the allegedly discriminatory acts. See id. § 1626.8(b) (citing id. § 1626.6). According to the regulations, a charge also “should contain,” but is not required to contain, other information such as the full contact information for the employer and the individual filing the charge, and a “clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices.” See id. § 1626.8(a)(1)-(5).

Some Circuits have imposed an additional requirement, the “manifest intent” rule, that is not explicitly stated in the statute or interpreting regulations. According to these courts, for a written submission to the EEOC to constitute a “charge” it must manifest an individual’s intent to have the agency initiate its investigatory and conciliatory processes. An oft-cited proposition of the Third Circuit is that “[i]n order to constitute a charge that satisfies the requirement of section 626(d), notice to the EEOC must be of a kind that would convince a reasonable person that the...
grievant has manifested an intent to activate
the Act’s machinery.” Bihler v. Singer Co.,
710 F.2d 96, 99 (3d Cir.1983); see Wilkerson
v. Grinnell Corp., 270 F.3d 1314, 1319 (11th
Cir.2001); Steffen v. Meridian Life Ins. Co.,
859 F.2d 534, 542 (7th Cir.1988).

We agree with this proposition and hold that a
writing submitted to the EEOC containing the
information required by EEOC interpreting
regulations is an EEOC “charge” for purposes
of Section 626, only when the writing
demonstrates that an individual seeks to
activate the administrative investigatory and
conciliatory process. We also agree that
“notice to the EEOC must be of a kind that
would convince a reasonable person that the
grievant has manifested an intent to activate
the Act’s machinery.” Bihler, 710 F.2d at 99.

This interpretation of the meaning of “charge”
recognizes that providing the EEOC with an
opportunity “to eliminate the discriminatory
practice or practices alleged, and to effect
voluntary compliance with the requirements
of [the ADEA] through informal methods of
conciliation, conference, and persuasion,” 29
U.S.C. § 626(b). is “an essential element” of
the ADEA’s statutory scheme, cf. Francis v.
City of New York, 235 F.3d 763, 768 (2d
Cir.2000). Receiving a charge provides the
EEOC with an opportunity to notify the
prospective defendants and seek conciliation.
See Tolliver, 918 F.2d at 1057: see also
Dezaio v. Port Auth. of N.Y. & N.J., 205 F.3d
62. 65 (2d Cir.2000). Without notice from the
complainant, the EEOC is not provided with
an opportunity to fulfill this statutory purpose.
See Schroeder v. Copley Newspaper, 879 F.2d
266. 269 (7th Cir.1989).

While we fully recognize that administrative
exhaustion is an important aspect of the
ADEA, if an individual satisfactorily notifies
the EEOC of her charge, she is not foreclosed
from federal suit merely because the EEOC
fails to follow through with notifying the
employer and attempting to resolve the matter
through “conciliation, conference, and
persuasion.” 29 U.S.C. § 626(b). To require
this would be to hold individuals accountable
for the failings of the agency. Moreover, we
see no reason to require that the EEOC have
provided misleading information to a
complainant about the status of her charge.
Regardless of what the EEOC communicates
or fails to communicate to a party, a written
filing that complies with the ADEA and
contains the information required by EEOC
interpreting regulations is an EEOC “charge”
as long as it demonstrates a party’s intent to
activate the administrative process.

This Court has recognized, in the ADEA
context, that it is not required that the EEOC
has actually taken action before an individual,
who otherwise satisfactorily filed a charge,
can bring suit in federal court. Hodge, 157
F.3d at 167-68. In Hodge, we allowed a
federal ADEA suit to go forward even though
the EEOC had not terminated its
investigation. In that case, the investigation of
the charge had been held up due to the
withdrawal of plaintiff’s initial administrative
charge pursuant to an agreement that was later
demed invalid. Id. We concluded that
plaintiff need not re-file a charge or seek to
reopen the administrative proceedings. Id.
Since the EEOC had the charge for more than
the “60-day period that Congress established
for the EEOC to investigate or attempt
conciliation before the ADEA 
pa
tiff is
allowed to file suit in court.” we saw “no
statutory purpose to be served by a refiling or
reopening requirement, the effect of which
would be the imposition of additional delays,
including another 60-day waiting period.” Id.
at 168. We cited Bihler, 710 F.2d at 99 n. 7,
for the proposition that “[s]uch a holding
would establish a prerequisite to suit beyond a
prospective plaintiff’s control and therefore
would be contrary to the spirit and purpose of
the Act.” *Hodge*, 157 F.3d at 168. This reasoning equally applies when an individual has manifested her intent to activate the administrative process. A complainant should not be held accountable if the EEOC fails to follow through after that complainant has provided written notice to the EEOC “that would convince a reasonable person” that she intends “to activate the Act’s machinery,” *Bihler*, 710 F.2d at 99.

B. Kennedy’s EEOC Questionnaire as EEOC Charge

Now that we have described the requirements for an EEOC “charge” we turn to the particular circumstances of this case. Kennedy filed her EEOC Intake Questionnaire and accompanying affidavit (“questionnaire”) with the EEOC on December 3, 2001, more than 60 days prior to initiating this suit on April 30, 2002, and alleged discriminatory acts that occurred within 300 days of the filing of the questionnaire. See 29 U.S.C. § 626(d). The relevant question on appeal is whether this otherwise timely filing with the EEOC constituted a “charge.” We conclude that Kennedy’s questionnaire constituted an EEOC “charge” because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy’s intent to activate the EEOC’s administrative process.

First, Kennedy’s questionnaire satisfies the EEOC’s interpreting regulations specifying the required content that must appear in a “charge.” See 29 C.F.R. §§ 1626.3, 1626.6, 1626.8(b). By stating that FedEx was discriminating against her and others because of their age, Kennedy’s questionnaire certainly alleged that the defendant had engaged in “actions in violation of the Act,” as is required by 29 C.F.R. § 1626.3. Moreover, the questionnaire form and accompanying four-page verified affidavit, were a “writing” that named the employer and generally described the alleged discriminatory act, as is required by 29 C.F.R. §§ 1626.6 and 1626.8(b). The affidavit detailed numerous instances of alleged discrimination, such as FedEx’s implementation of various aspects of the “Best Practices Pays” and “Minimum Acceptable Performance Standards” programs. . . .

Second, the content of the questionnaire evidenced Kennedy’s intent to activate the administrative process. The forceful tone and content of the affidavit should have alerted the EEOC that the filing was meant to be an EEOC “charge.” For instance, the affidavit states that, in years past, Kennedy has “threatened to stand up for [her] rights” but that “[i]n the past several months” she had “come to realize that by doing nothing” she had allowed FedEx to continue its discriminatory practices against her. As further indication that Kennedy intended to activate the administrative process, by checking the “consent” box on the questionnaire form, Kennedy consented to the disclosure of her identity to the employer that allegedly discriminated against her. This demonstrates Kennedy’s desire to move the investigatory and conciliatory process forward. Moreover, the EEOC form, on which Kennedy submitted her affidavit, itself indicated that the case was currently “open.” Also suggested that her filing would be sufficient to initiate the administrative process. Finally, and perhaps most telling, the affidavit unambiguously states, “[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of Best Practice Pays/High-Velocity Culture Change.” In light of these facts, we conclude that Kennedy provided written notice to the
EEOC “that would convince a reasonable person” that Kennedy intended “to activate the Act’s machinery,” see Bihler, 710 F.2d at 99. The EEOC erred by failing to act in response to Kennedy’s manifested intent.

FedEx argues that the fact that Kennedy later filled out an actual EEOC charge form indicates that her earlier intention was not to file a “charge.” Some courts have followed this logic to some extent. See Bost, 372 F.3d at 1241; Diez v. Minnesota Mining & Mfg. Co., 88 F.3d 672, 677 (8th Cir.1996). There is nothing in the record, however, that indicates that Kennedy, by also filing a charge form, was doing anything more than supplementing her earlier charge, or acting out of a surfeit of caution. Therefore, based on the circumstances of this case, we conclude that the content of Kennedy’s questionnaire sufficiently demonstrated her intent to activate the administrative process and her later filing of an EEOC charge form does not compel us to find otherwise.

Having established that the questionnaire in this case was a “charge,” we turn to the piggybacking plaintiffs’ theory that they can use Kennedy’s charge to satisfy the ADEA’s time limit requirements because Kennedy’s affidavit identified discriminatory treatment that is similar to the acts described in the complaint and alleges that a large group of workers have experienced similar discrimination. See Tolliver, 918 F.2d at 1056-58. We agree with this theory.

Like the Holowecki complaint, Kennedy’s questionnaire described the allegedly discriminatory policies, such as the Best Practices Pays, Minimum Acceptable Performance Standards, and other discriminatory practices, in detail. Kennedy’s questionnaire also provided notice that the policies were affecting a wide range of FedEx employees. The affidavit stated, for instance, that the Best Practice Pays policy “has systematically targeted myself and others.” [A. 158] Moreover, it stated that “management has continually picked at me and other older couriers emotionally and financially by changing our ‘start times’” and that Kennedy knew she was “not alone” because “many older couriers” shared her “doubts and fears.” Kennedy concluded by stating that FedEx must be forced to stop its discriminatory policies so that “we can finish out our careers” absent discriminatory practices.

Because we agree that the piggybacking plaintiffs can piggyback onto Kennedy’s charge, there is no reason for this court to address the two other piggybacking theories presented on appeal. Therefore, we are left only to deal with the two remaining named plaintiffs who individually filed administrative charges with the EEOC.

II. Robertson’s EEOC Charge

It is undisputed that Robertson’s charge was filed more than 60 days prior to the initiation of the Holowecki suit. The district court held, however, that the Robertson charge was nonetheless untimely under Section 626(d) because it was filed more than 300 days after the implementation of the allegedly discriminatory policies alleged in the complaint. Specifically, the district court found the charge untimely because it was submitted “over six years after plaintiffs claim the policies were implemented.” Appellee also challenges the Robertson charge on an additional timeliness ground not specifically addressed in the district court’s opinion, arguing that Robertson did not file suit in federal court within 90 days of his receipt of a right-to-sue letter. In violation of Section 626(e). We find that, if we accept the allegations in the complaint as true, Robertson’s charge was not filed more than
300 days after the implementation of the discriminatory policies alleged, and we therefore vacate the district court's dismissal of his claim on that basis. However, because it was not reached below, we remand for the district court to address whether Robertson's suit was untimely because it was not filed within 90 days of receiving the right-to-sue letter.

Robertson's charge unambiguously included references to allegedly discriminatory practices that took place within the 300-day period and did not even mention any particular FedEx policies or acts that were initiated more than 300 days before the filing of the charge. Instead Robertson's January 2, 2001, charge alleged that FedEx refused to allow Robertson to take accrued leave in August 2000, and terminated him on September 8, 2000, based on age and disability discrimination. Both of these acts occurred less than 300 days before Robertson filed his January 2, 2001, charge. The district court's reference to alleged discriminatory acts that occurred outside the 300-day period is simply a misreading of the allegations in the complaint. We therefore vacate the district court's dismissal on the basis that Robertson's charge was untimely, and remand for the district court to consider whether Robertson filed suit within 90 days of receiving the right-to-sue letter.

III. McQuillan's EEOC Charge

As with Robertson, we disagree with the district court's determination that McQuillan failed to file within 300 days after the alleged unlawful practice occurred. McQuillan's charge, which was signed on September 11, 1998, challenges his termination from employment, which occurred on March 31, 1998. There is no doubt that the charge described acts that allegedly occurred within the required 300-day period. Because we vacate the district court's dismissal of McQuillan's claim on this ground, we remand for the district court to consider in the first instance appellee's argument that McQuillan's suit was not filed within 90 days of receiving the right-to-sue letter.

CONCLUSION

The judgment of the District Court is REVERSED with respect to all of the named plaintiffs, except Robertson and McQuillan. The District Court's dismissal of Robertson's and McQuillan's claims is VACATED. The case is REMANDED for further proceedings consistent with this opinion.
WASHINGTON—The Supreme Court said Monday that it will consider whether an age discrimination lawsuit against FedEx Corp. can proceed.

At issue is whether a group of 14 FedEx employees, led by Patricia Kennedy and Paul Holowecki, followed proper procedures in suing FedEx for age discrimination.

The Memphis-based company is arguing that the suit should be dismissed because Kennedy did not file a formal charge alleging age discrimination with the Equal Employment Opportunity Commission until after she sued FedEx. The other employees joined Kennedy’s complaint.

Federal law requires plaintiffs to file a complaint with the EEOC and wait 60 days before they sue an employer, FedEx says. The law is intended to give the EEOC the opportunity to notify the company accused of discrimination, investigate the charges and seek to resolve them before a suit is filed, the company said.

The plaintiffs respond that a form Kennedy filed with the EEOC in December 2001 included the information necessary to comply with that law, and that the suit she and her colleagues filed in April 2002 should be allowed to proceed.

A district court dismissed the case, but the U.S. Second Circuit Court of Appeals, based in New York City, ruled in March 2006, that the case should be allowed to proceed. The court found that the EEOC’s failure to follow through on Kennedy’s complaint and notify FedEx should not preclude the plaintiffs’ right to sue.

The justices won’t hear arguments in the dispute until the Supreme Court’s next term, which begins in October.
An employee satisfied the Age Discrimination in Employment Act’s exhaustion requirement by filing an intake questionnaire with the EEOC, the 2nd Circuit has ruled [in Federal Express Corporation v. Holowecki].

The employee, along with 11 other plaintiffs, brought suit alleging that her employer engaged in a pattern and practice of employment procedures that discriminated on the basis of age. A judge dismissed the complaint on the ground that the plaintiffs did not satisfy the ADEA’s time limit requirements.

But the 2nd Circuit reversed, holding that one employee’s EEOC intake questionnaire and accompanying verified affidavit “constituted an EEOC ‘charge’ that satisfactorily fulfilled the ADEA’s exhaustion requirements even though the EEOC never notified, or investigated, the employer.”

The court stated that “a writing submitted to the EEOC containing the information required by EEOC interpreting regulations is an EEOC ‘charge’ . . . when the writing demonstrates that an individual seeks to activate the administrative investigatory and conciliatory process.”

Furthermore, “if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through ‘conciliation, conference, and persuasion.’” To impose such a requirement, the court reasoned, “would be to hold individuals accountable for the failings of the agency.”

Here, the court said that the other plaintiffs, who never filed EEOC charges, could “take advantage of the ‘single filing’ or ‘piggybacking’ rule and thereby satisfy the ADA’s exhaustion requirements” because the affidavit outlined similar discrimination experienced by a large group of workers.
Gilbert F. had attended a private school in New York since Kindergarten that offered special education services. In 1999, the Board of Education conducted its annual review and determined that Gilbert was still in need of special education and placed him at a public school program with a teacher to student ratio of 15:1. Gilbert’s father, Tom F., kept him at the private school where the classroom size was 8:1. In 2000, Tom F. applied to the board for reimbursement of education expenses. Although local and state administrative bodies determined that Tom F. should be reimbursed, the school district refused to pay, claiming that the Individuals with Disabilities Education Act (IDEA) precluded the father from reimbursement, because Gilbert had never attended a public institution. The school district filed suit in the Southern District of New York to overturn the state’s determination that the school district owed reimbursement. The District Court Judge overturned the decision, holding that the IDEA did bar reimbursement in this instance. However, the Second Circuit Court of Appeal, in a summary order, reversed that determination and remanded the matter for further proceedings in light of its decision in Frank G. v. Bd. of Educ., which held that the IDEA did not preclude reimbursement when a student had not previously received special education and related services.

**Question Presented:** Whether the IDEA permits tuition reimbursement where a child has not previously received special education from a public agency.
Department State Review Officer (SRO), who affirmed the IHO’s determination. The school board filed suit in the Southern District of New York. The District Judge held that the IDEA precluded reimbursement, since Gilbert had never received special education from a public school before his placement in a private institution. Tom F. now appeals that judgment.]

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of district court be, and it hereby is, VACATED and REMANDED for further proceedings in light of this Court’s decision in Frank G. v. Board of Education of Hyde Park, 459 F.3d 356 (2d Cir. 2006).

FRANK G. and Dianne G., Parents of a Disabled Student, Anthony G., Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HYDE PARK, Central School District,
Defendant-Appellant.

United States Court of Appeals for the Second Circuit

Decided July 27, 2006

[Excerpt: Some citations omitted.]

KORMAN, District Judge:

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DISCUSSION

Congress enacted the IDEA to promote the education of children with disabilities, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs [and] . . . to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1). A free appropriate public education “must include ‘special education and related services’ tailored to meet the unique needs of a particular child, and be ‘reasonably calculated to enable the child to receive educational benefits.’” Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998).

The key element of the IDEA is the development of an IEP for each handicapped child, which includes “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 368, 105 S. Ct. 1996 (1985). The IEP is collaboratively developed by the parents of the child, educators, and other specialists. . . .

If a state fails in its obligation to provide a free appropriate public education to a handicapped child, the parents may enroll
the child in a private school and seek 
retroactive reimbursement for the cost of the 
private school from the state. In 
determining whether parents are entitled to 
reimbursement, the Supreme Court has 
established a two pronged test: (1) was the 
IEP proposed by the school district 
inappropriate; (2) was the private placement 
appropriate to the child’s needs. See 
*Burlington*, 471 U.S. at 370, 105 S. Ct. 
1996. Moreover, because the authority to 
grant reimbursement is discretionary, 
“equitable considerations [relating to the 
reasonableness of the action taken by the 
parents] are relevant in fashioning relief.” 
*Burlington*, 471 U.S. at 374, 105 S. Ct. 
1996.

Parents seeking reimbursement for a private 
placement bear the burden of demonstrating 
that the private placement is appropriate, 
even if the proposal in the IEP is 
inappropriate. Nevertheless, parents are not 
barred from reimbursement where a private 
school they choose does not meet the 
IDEA definition of a free appropriate public 
education. . .

Subject to the foregoing exceptions, the 
same considerations and criteria that apply 
in determining whether the School District’s 
placement is appropriate should be 
considered in determining the 
appropriateness of the parents’ placement. 
Ultimately, the issue turns on whether a 
placement—public or private—is 
“reasonably calculated to enable the child to 
receive educational benefits.” *Bd. of Educ. v. 
Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 
73 L. Ed. 2d 690 (1982). While the IDEA 
does not require states to “maximize the 
potential of handicapped children,” *Rowley*, 
458 U.S. at 213, 102 S. Ct. 3034, it must 
provide such children with “meaningful 
access” to education, *Walczak*, 142 F.3d at 
133. With these goals in mind, we have held 
that for an IEP to be reasonably calculated to 
enable a child to receive an educational 
benefit, it must be “likely to produce 
progress, not regression.” *Id.* at 130. Courts 
must, therefore, “examine the record for any 
‘objective evidence’ indicating whether the 
child was likely to make progress or regress 
under the proposed plan.” *Id.* Thus, “in the 
regular classrooms of a public school 
system, the achievement of passing marks 
and regular advancement from grade to 
grade will be one important factor in 
determining educational benefit.” *Rowley*, 
458 U.S. at 207 n. 28, 102 S. Ct. 3034. 
Although it is more difficult to assess the 
significance of grades and regular 
advancement outside the context of regular 
public classrooms, these factors can still be 
helpful in determining the appropriateness 
of an alternative educational placement.

No one factor is necessarily dispositive in 
determining whether parents’ unilateral 
placement is “reasonably calculated to 
enable the child to receive educational 
benefits.” *Rowley*, 458 U.S. at 207, 102 S. 
Ct. 3034. Grades, test scores, and regular 
advancement may constitute evidence that a 
child is receiving educational benefit, but 
courts assessing the propriety of a unilateral 
placement consider the totality of the 
circumstances in determining whether that 
placement reasonably serves a child’s 
individual needs. To qualify for 
reimbursement under the IDEA, parents 
need not show that a private placement 
furnishes every special service necessary to 
maximize their child’s potential. They need 
only demonstrate that the placement 
provides “educational instruction specially 
designed to meet the unique needs of a 
handicapped child, supported by such 
services as are necessary to permit the child 
to benefit from instruction.” *Rowley*, 458 
U.S. at 188-89, 102 S. Ct. 3034.

With this as a backdrop, we turn to two of 
the principal arguments of the School
District, namely, that the enrollment of Anthony at Upton Lake was not appropriate to his needs and that, because Anthony had not previously received special education and related services, his parents are not entitled to reimbursement even if Upton Lake provided him with an appropriate special education. The School District describes the latter argument as its “absolute defense.”

1. The Appropriateness of the Upton Lake Placement

The court found that Anthony’s placement at Upton Lake was appropriate. The court agreed with the IHO, that Anthony benefited from the smaller class size at Upton Lake. Evidence included dramatic improvement on the Stanford Achievement Test.

2. The School District’s “Absolute Defense”

The School District argues that it has “an absolute legal defense” to Anthony’s parents’ claim for reimbursement, even if Upton Lake provided him with an appropriate public education. This defense is based on one of the 1997 amendments to the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii), which the School District argues, “established a statutory threshold for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district.” Specifically, it argues that it may deny reimbursement to the parents of disabled students who had enrolled them in regular public or private schools prior to the emergence of the need for a free appropriate public education to meet their unique needs. Only after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement. Because Anthony never received special education and related services from a public agency prior to his enrollment at Upton Lake, the School District argues, his parents are not entitled to reimbursement for his tuition there.

The justification offered for this argument is the assertedly plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes reimbursement to the parents of a disabled child, “who previously received special education and related services under the authority of a public agency” and who enrolled the child in a private elementary or secondary school without the consent or referral of the private agency, “if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to enrollment.” 20 U.S.C. § 1412(a)(10)(C)(ii). Because the authority granted by this subsection applies to the reimbursement of parents of disabled children, “who previously received special education and related services under the authority of a public agency,” the School District argues that it should be read as implicitly excluding reimbursement to parents who enrolled their child in a public or private school before the need for a free appropriate special education manifested itself. “The clear implication of the plain language, however, is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent’s unilateral placement of the child in private school.” Bd. of Educ. v. Tom F., 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005). We disagree.

As in all statutory interpretation cases, we
begin with the language of the statute. Our first task “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). Our inquiry ends, if the language of the statute is unambiguous and “the statutory scheme is coherent and consistent,” unless the case comes within the category of cases in which the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms. *Id.* at 450, 459, 122 S. Ct. 941. If, however, the terms of a statute are ambiguous, “we resort to the canons of statutory construction to help resolve the ambiguity.” *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006). Moreover, while the Supreme Court has said that it “rarely” invokes the need to avoid an absurd result to override the plain language of a statute, *Barnhart*, 534 U.S. at 459, 122 S. Ct. 941, we have long held that where a statute is ambiguous, it “should be interpreted in a way that avoids absurd results.” *See, e.g., United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

Whether a statute is plain or ambiguous “is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). We have applied a similar approach in determining whether a provision of a contract is ambiguous. Specifically, we have held that “[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.” *O’Neil v. Retirement Plan for Salaried Employees of RKO, Inc.*, 37 F.3d 55, 59 (2d Cir. 1994).

The plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services. Indeed, the School District’s need to rely on an inference to be drawn from the plain language, rather than the language itself, suggests a degree of ambiguity that would not necessarily be present if § 1412(a)(10)(C)(ii) was the only section of the IDEA that spoke to the issue of the remedy that a district court may award. This section, however, is not the only section or even the principal section of the IDEA that speaks to this issue.

Another section of the IDEA, 20 U.S.C. § 1415(i)(2)(C), authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to “grant such relief as [it] determines is appropriate.” In *Burlington*, the Supreme Court held that the identically worded predecessor of this section, 20 U.S.C. § 1415(e)(2) (1984), authorized the equitable remedy of tuition reimbursement to parents who had enrolled their disabled child in a private school while they successfully litigated the issue of the inappropriateness of his public placement. Then-Justice Rehnquist explained the reasoning of the decision as follows:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent
other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that “appropriate” relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Prospective relief alone is not a sufficient remedy because the process of obtaining the relief “is ponderous” and a “final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.” *Id.* at 370, 105 S. Ct. 1996. Under these circumstances, “it would be an empty victory to have a court tell [parents who placed their child in a private school] several years later that they were right,” yet deny them reimbursement for the placement. *Id.* “If that were the case,” Justice Rehnquist concluded. “the child’s right to a free appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant ‘appropriate’ relief Congress meant to include retroactive reimbursement as an available remedy in a proper case.” *Id.*

The language of § 1415(e)(2), upon which *Burlington* relied, was unchanged by the 1997 revision of the IDEA and continues to provide that the court “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). The reenactment of § 1415(e)(2), without change, is significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment. Whether 20 U.S.C. § 1412(a)(10)(C)(ii), upon which the School District relies, was intended to eliminate the power of a district court to grant the relief to which Anthony’s parents would otherwise be entitled, involves a question to which the IDEA does not provide an unambiguous answer. Indeed, the assertedly “clear implication of the plain language” of § 1412(a)(10)(C)(ii), *Tom F.*, 2005 WL 22866, at *3, is inconsistent with the clear implication of § 1412(a)(10)(C)(i), which in relevant part provides that the obligation of a state to offer a free appropriate education “does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.” The implication of this subsection is that reimbursement is available where, as here,
the agency failed to make a free public education available to the child.

Under these circumstances, we think it is hardly clear from the fact that § 1412(a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. Our conclusion is supported by the cases in which a party relies on the Latin maxim "expressio unius est exclusio alterius," that the express statutory mention of certain things impliedly excludes others not mentioned. The School District may not invoke this maxim here, because it "applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded." United States v. City of New York, 359 F.3d 83, 98 (2d Cir. 2004). Nevertheless, even where the maxim is otherwise applicable, the Supreme Court has not treated as conclusive the inference that Congress intended to exclude that which it did not explicitly include. Instead, it has treated the maxim "as but an aid to construction." Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 n. 8, 64 S. Ct. 120, 88 L. Ed. 88 (1943). Indeed, only recently the Supreme Court held that "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003).

Where, as here, the terms of a statute are ambiguous, we turn to the "traditional canons of statutory construction to resolve the ambiguity." United States v. Peterson, 394 F.3d 98, 105 (2d Cir. 2005). "Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text," Nat'l. Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001), several rules are particularly helpful in interpreting the statutory provision at issue in this case. Where the terms of a statute are ambiguous, we "focus upon the 'broader context' and 'primary purpose' of the statute." Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG, 335 F.3d 52, 57 (2d Cir. 2003). Ultimately, as Justice Jackson observed, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." Joiner, 320 U.S. at 350-51, 64 S. Ct. 120.

A second and related rule of statutory construction is that the meaning of an ambiguous statutory provision is "clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217-18, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001). The rule is particularly applicable here, because the issue involves an ambiguity created by the tension between different sections of the IDEA rather than the interpretation of an ambiguous word or phrase.

Applying these rules in the present case, we again observe that the express purpose of the IDEA is to ensure that a free appropriate public education is "available to all children with disabilities." Indeed, the IDEA is the legislative centerpiece of "an ambitious federal effort to promote the education of handicapped children." Voluntown, 226
F.3d at 62. Its central purpose is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” and “to ensure that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA also provides that a state’s eligibility for IDEA funding is that it make available “free appropriate public education . . . to all children with disabilities.” 20 U.S.C. § 1412(a)(1).

One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents’ placement is determined to be proper and the proposed IEP is determined to be inadequate. While the manner in which the authority is exercised may be guided by the various subsections of § 1412(a)(10), which mainly codified existing law in significant respect, Voluntown, 226 F.3d at 69 n. 9, nothing in the legislative history (to be discussed shortly) suggests that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private placement where a free appropriate public education had not been provided under the circumstances here.

The Supreme Court has also instructed us that, because “[t]he [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.” Burlington, 471 U.S. at 372, 105 S. Ct. 1996. The construction of the § 1412(a)(10)(C)(ii) that the School District urges upon us would defeat both purposes of the IDEA. The construction we adopt is the only one that “produces a substantive effect that is compatible with the rest of the law.” Cleveland Indians Baseball Co., 532 U.S. at 217-18, 121 S. Ct. 1433.

[The court looked at the final rule: to construe an ambiguous statute so as to avoid absurd results. The court determined that parents who plan to reject the proposed IEP and subsequently give such notice to the agency, should not be forced to first enroll their children in the proposed placement only to pull them back out, in order to receive reimbursement. If the proposed placement was indeed inappropriate, the child’s health would be jeopardized.]

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[The court noted that its interpretation of the statute was consistent with that of the Department of Education’s Office of Special Education & Rehabilitative Services, who had written in a letter their belief that actual receipt of special education from a public agency is not a prerequisite for reimbursement.]

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Contrary to the School District’s argument, the legislative history does not alter our conclusion. . . One of the changes to the IDEA is the addition of 20 U.S.C. § 1412, the purpose of which is explained as follows:

Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines
that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency’s consent). Previously, the child must have had received special education and related services under the authority of a public agency.

At best, this language is an awkward paraphrase of the ambiguous statutory language which refers to “the parents of a child with a disability, who previously received special education and related services under the authority of a public agency.” Again, the statutory language does not expressly exclude reimbursement where special education and related services have not been previously provided, it only provides a basis for the argument that Congress implicitly excluded reimbursement in these circumstances. The district judge in Tom F., however, read the language in the House Report to require explicitly that the child “must” have “[p]reviously . . . received” such services as a condition to the receipt of reimbursement of his parents. 2005 WL 22866, at *3. We cannot agree.

A natural reading of the word “previously,” in the context of a report detailing changes to the IDEA, would suggest a reference to the IDEA’s previous requirements. Thus, the first sentence of the paragraph unequivocally provides reimbursement for a private placement “when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency’s consent.” The second sentence explains that “[p]reviously, the child must have received special education and related services under the authority of a public agency.” (emphasis added). To paraphrase the words of the Supreme Court in an analogous context, Lindh v. Murphy, 521 U.S. 320, 330, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), “[a] thoughtful Member of the Congress” reading this explanation for a change in prior law would have very likely concluded (1) that “previously,” meaning prior to the proposed amendment to the IDEA, parents could receive reimbursement for a private placement only if the child received special education and related services under the authority of a public agency and (2) that the change afforded by the proposed amendment would permit funding even where the disabled child had not previously received such special education and related services. This is just the opposite of what the School District and Tom F. argue is the clearly expressed intent of Congress.

The House Report gives no indication that Congress intended to amend the IDEA’s rules regarding tuition reimbursement. Indeed, the House Report makes no reference to prior law on the issue and expresses no intent to limit the discretion that Burlington vested in district courts to award reimbursement pursuant to 20 U.S.C. § 1415(i)(2)(B). Nor does it explain the reason why it attached the condition at issue here to private placement reimbursement. Indeed, the House Report is as significant for what it does not say as for what it does say.

[The court declined to pay any deference to the confusing legislative history, although it declined to accept Justice Scalia’s argument that such history should never be used.]

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This brings us to the last leg of the School District’s argument—its reliance on Greenland Sch. Dist. v. Amy N., 358 F.3d
150 (1st Cir. 2004). Greenland held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement. Id. at 159-60. . . . We do not regard Greenland as dispositive.

Greenland's discussion of 20 U.S.C. § 1412(a)(10)(C)(ii) arose from its perceived need to deal with the subsection immediately preceding it. Again, this subsection, § 1412(a)(10)(C)(i), says that a local education agency is not required to pay for the cost of education, including special education and related services, "if that agency made a free public education available to the child and the parents elected to place the child in such private school or facility." This language troubled the Greenland Court, because it implied that parents are entitled to reimbursement if a free appropriate public education was not provided "where, as here [in Greenland], the local education agency was never informed while the child was in public school that the child might require special education services." 358 F.3d at 159. This "seeming ambiguity," according to Greenland, "disappears when considered in light of the section's affirmative requirement that 'the parents of a child with a disability, who previously received special education and related services under the authority of a public agency' can receive reimbursement for their unilateral placement of the child in private school only 'if [a] court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.'" Id. Greenland continued as follows:

These threshold requirements are key to this case: tuition reimbursement is only available for children who have previously received "special education and related services" while in the public school system (or perhaps those who at least timely requested such services while the child is in public school). There is no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland. There is also no dispute that she was removed from Greenland for reasons having nothing to do with any issue about whether Katie was receiving [a free appropriate public education].

The Greenland Court then went on to deny the parents' claim for reimbursement because of their failure to alert the School District of Katie's need for special education and related services while she was in public school. We agree completely with the result reached in Greenland. Indeed, we reached the same result in Voluntown, without reference to § 1412(a)(10)(C)(ii).

Our problem with the analysis in Greenland is that it assumes that the ambiguous language of § 1412(a)(10)(C)(ii) is clear by adding the word "only" to the language of the subsection. Indeed, not a single word of the language we have emphasized in the foregoing quote appears in the language of the subsection. This includes the suggestion that a child in public school need not have previously received "special education and related services;" the child need only have made a request for it while in a public school. Simply stated, without discussion or analysis, Greenland resolved the issue of the ambiguity of § 1412(a)(10)(C)(ii) by simply amending the language itself.
Moreover, it did so in a way, perhaps inadvertently, that implicitly suggested an arbitrary distinction between children enrolled in a regular public school and children enrolled in a regular private school. Perhaps even more troubling is that none of this discussion was necessary, because the subdivision immediately following § 1412(a)(10)(C)(ii) makes “clear Congress’s intent that before parents place their child in private school, they must at least give notice to the school that special education is at issue.” Greenland, 358 F.3d at 160 (emphasis in original). Indeed, the latter subsection expressly states that “[t]he cost of reimbursement described in clause (ii) may be reduced or denied,” if the prescribed notice is not given, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), or “upon a judicial finding of unreasonableness with respect to actions taken by the parents,” 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Separate and apart from subsection 1412(a)(10)(C)(ii), we have held that it is inequitable to permit reimbursement under the circumstances in Greenland. As we have observed: “[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child’s IEP.” M.C., 226 F.3d at 68. Indeed, in Carmel, where the district judge followed the analysis of Greenland as it related to § 1412(a)(10)(C)(ii), she also denied reimbursement on the alternative ground that “the parents are not equitably entitled to tuition reimbursement.” Id. at 407.

Unlike the parents of the child in Greenland, who provided “no notice at all to the school system before Katie’s removal from Greenland that there was any issue about whether Katie was in need of special education,” 358 F.3d at 160, in the instant case, Anthony’s parents provided the School District with ample notice that he was in need of special education and the School District evaluated his needs in 2000, when he was classified as learning disabled, and again in 2001 at the request of his parents. When the School District provided Anthony with an IEP that Anthony’s parents believed was inappropriate, Anthony’s parents gave timely notice of their dissatisfaction to the School District. Before his enrollment in Upton Lake, the School District had every opportunity to evaluate Anthony in the regular private school that he was attending and determine whether “a free appropriate public education can be provided in the public schools.” Id. After forcing a hearing before an IHO, it conceded that it had failed to provide the free appropriate public education required by the IDEA. Section 1415(i)(2)(B), as construed by the Supreme Court in Burlington, provides an ample basis for the award of reimbursement to Anthony’s parents. Section 1412(a)(10)(C)(ii) does not prohibit it.

We have considered carefully the other arguments raised by the School District and conclude that they are without merit. Accordingly, the judgment of the district court is AFFIRMED.
The U.S. Supreme Court has agreed to step into one of the most contentious and costly areas of special education law by accepting [New York City Bd. of Ed. v. Tom F.,] a case involving a parent’s efforts to seek public reimbursement for a private school placement of his child.

The justices in their next term will take up a case in which the New York City school system is balking at reimbursing a parent for private school tuition when his child never spent any time in the city’s public schools.

In its appeal, the 1.1 million-student New York district contends that it offered an appropriate placement for Gilbert Freston, now 17, but that the boy’s father, Thomas E. Freston, never planned to accept it. The father says that the district failed to meet his son’s needs.

The Supreme Court held in a 1985 case, Burlington School Committee v. Massachusetts Department of Education, that under the federal Individuals with Disabilities Education Act, parents who “unilaterally” remove their children from public schools and enroll them in private schools are entitled to public reimbursement when courts later determine that the school district’s placement was inappropriate and that the private school placement was appropriate.

Although no reliable statistics are readily available, such reimbursements are routinely ordered by lower federal courts under the proper circumstances, and school districts say they are a significant expense.

Michael Best, the general counsel of the New York City district, said that the school system paid tuition for 2,240 unilateral placements during the 2005-06 school year. He estimates that half those cases involved students who had never attended New York City public schools. The average tuition cost for unilateral placements that year was $29,000, bringing the district’s total outlay to about $6.5 million for that school year.

Mr. Best said that the city is willing to pay for private school tuition when it cannot provide an appropriate placement for a child. But that’s just not true in the case accepted by the high court, he maintained. And the argument that students have to suffer in public school placements “is a complete red herring,” he said.

“That assumes that if a kid has to go to public school to get special education, it’s somehow going to be bad,” he said. “That’s completely wrong.”

Public School First?

Mr. Freston, the parent in New York City Board of Education v. Tom F. (Case No. 06-637), is a co-founder of the cable channel MTV and a former Viacom Inc. executive who reportedly received a severance package of $85 million when he was ousted as the president and chief executive officer of the media company last year.

Neal Rosenberg, Mr. Freston’s lawyer, said that the special education case is not about money. Mr. Freston sought an individualized education program for his son.
from the New York City district because he wanted the boy to receive transportation services and because of the principles involved, he said. His son was entitled to an education provided by the city, Mr. Rosenberg said.

“I have never found a parent who was grateful that they had a handicapped child so that they could get the district to subsidize the education of that child,” Mr. Rosenberg said. The district’s arguments that prior enrollment in public school should be a prerequisite to reimbursement are saying, in effect, that parents “have to make a guinea pig of their child,” he said.

Mr. Freston enrolled Gilbert in the Stephen Gaynor School in New York City, a private school for children with special needs, in the fall of 1995, when the boy was 6. In 1997 and 1998, the New York City district established an individualized education plan for Gilbert, which the school district acknowledged was inadequate, Mr. Rosenberg said. The district reimbursed Mr. Freston approximately $36,000 for those two years. Mr. Freston donated the money received from the public school system district to the private school, his lawyer said.

In 1999, the district offered a different placement for Gilbert. Despite never having visited the public school suggested for his son, or any of the other public schools suggested for him in the past, the district’s brief says, Mr. Freston again sought reimbursement, this time for about $18,000 for the 1999-2000 school year.

Mr. Best said that the district, in making an effort to re-evaluate some tuition-reimbursement cases, zeroed in on this case because Gilbert Freston had never attended public school.

But in April 2001, a state special education hearing officer determined that the district had not met its burden of proving that its recommended placement was appropriate for the student. On appeal, a state review officer upheld the hearing officer’s decision.

The school system prevailed, however, when it took the case to U.S. District Court in Manhattan. In a July 2005 decision, U.S. District Judge George B. Daniels wrote that the text of the IDEA suggests “that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent’s unilateral placement of the child in private school.”

The father appealed and last year, a three-judge panel of the U.S. Court of Appeals for the 2nd Circuit, in New York City, overruled the district court, applying the reasoning of a recent decision the 2nd Circuit court had made in a similar case, Frank G. v. Board of Education of Hyde Park Central School District.

In that case, a different 2nd Circuit panel said the argument that parents first have to enroll their child in a public school places them “in the untenable position of acquiescing to an inappropriate placement in order to seek reimbursement from the public agency that devised the inappropriate placement.”

In its appeal to the Supreme Court, the New York City district argues that the 2nd Circuit court’s ruling conflicts with a 1997 amendment to the IDEA. The district believes the amendment made clear that the statute does not require a district to reimburse parents when the district offers an appropriate placement but the parents voluntarily place the child in
a private school.

‘A New Issue’

Allan G. Osborne Jr., a former president of the Education Law Association and the author of several books and papers on special education law, said he was surprised that the Supreme Court chose now to take up a case involving tuition reimbursement when the student had not attended public school first.

“It’s an issue that I think has not been fully litigated by the lower courts,” said Mr. Osborne, who is also the principal of Snug Harbor Community School, a public elementary school in Quincy, Mass.

“This is a new issue because it involves some of the newer amendments to the IDEA,” he said, referring to provisions in the 1997 reauthorization of the law.

“It’s a situation that probably occurs fairly rarely, that you would have a child that has never come to public school,” Mr. Osborne said. “But in some of your bigger city districts, it could come up more often.”

He added, “Even if it doesn’t come up very much, when it does come up its very important, because it’s a lot of money.”

Julie Wright Halbert, the legislative counsel of the Council of the Great City Schools, said the outcome of the case is important to the members of her group.

“There’s no question that the cost and burden is significant,” she said.

The case adds to a list of three major IDEA cases the high court has accepted over the past two years. Just last week, the justices heard arguments on whether nonlawyer parents can represent their children in federal court in special education cases.
Paying for private school is no hardship for Tom Freston, the former chief executive of Viacom, the company that runs MTV and Comedy Central. He left with a golden parachute worth $85 million.

But he says New York City should reimburse him for educating his son in a private school for children with learning disabilities, where the tuition is $37,900 a year. In 1997, his son, then 8, was found to be lagging in reading, though not in math. The city offered the child a coveted spot in the Lower Laboratory School for Gifted Education, a competitive school on the Upper East Side that also has classes for students with moderate disabilities. He would have been placed in a classroom with 15 students, and given speech and language therapy.

Mr. Freston, though, wanted a class of only eight students for his son, in a smaller setting. Without trying Lab, he put his child in the Stephen Gaynor School on the Upper West Side, where students, in Gaynor’s language, display “learning differences.” While the city is required by federal law to pay for private programs for disabled children when it cannot provide appropriate programs, city officials said the Lab program was suitable for Mr. Freston’s son and wanted him to try it. After two years of reimbursing the Frestons for a large part of the private school tuition, the city stopped.

The result has been a seesawing lawsuit that the United States Supreme Court recently took for review. The question: Do school districts have to pay for private school for disabled children if the families refuse to try out public programs?

School systems around the country are closely watching the case. Almost seven million students nationwide receive special-education services, with 71,000 educated in private schools at public expense, according to the United States Department of Education. Usually school districts agree to pay for these services after conceding they cannot provide suitable ones.

In New York City, for example, 147,000 of the 1.1 million public school children receive special-education services; 7,445 of them, most severely handicapped, attend private schools at taxpayer expense because the city agrees that it cannot properly instruct them, said Lindsey Harr, a spokeswoman for the city education department.

City officials say that is not the case with Mr. Freston’s son, or with other children whose families reject the public school system outright. In 2005-6, 2,240 families sued the city for tuition reimbursement for private schools they attended. Half those children never sampled a public school, said Michael Best, the education department’s counsel, and the taxpayer tab is well over $30 million.

“What we’re talking about is parents who have never worked with the school system to find appropriate placement,” Mr. Best said. “They’re making a unilateral decision
to place kids in private school. We shouldn’t have to pay for it if we can supply the appropriate services.”

Mr. Freston’s lawyer, Neal H. Rosenberg, said the city effectively acknowledged it could not provide proper services by paying tuition at Gaynor for two years. Mr. Freston himself declined to be interviewed for this column. But in a statement, he said his lawsuit was about principle, not money.

“While I was fortunate to have the means to provide such an opportunity for my child, many families are not able to do so,” he said. His goal, he added, is to make sure that all families of disabled children “have access to an appropriate special educational program.” He has used the roughly $50,000 in reimbursements he has received to finance tutoring for lagging first graders at Public School 84 on the Upper West Side.

The Freston case is another in the history of the nation’s 32-year-old special-education law that raises uncomfortable questions. The Individuals with Disabilities Education Act, passed under a different name in 1975, protects disabled children in ways mainstream children are not, because historically children with disabilities were ill served. But today it can end up financing top-of-the-line programs for disabled students while students in overcrowded or poorly taught mainstream classrooms do not have recourse to private schools.

The Council of the Great City Schools, a coalition of 66 urban systems, has supported the city in the case with a friend-of-the-court brief. Julie Wright Halbert, legislative counsel for the group, said some parents might ask a city’s specialists to evaluate their children while planning all along to send them to private schools, banking on a district’s being too burdened to contest the reimbursements. “Many wealthy, well-educated people are gaming the system in New York City and around the country,” she said.

Some champions of special education programs argue that it is unfair to force children to enroll in public programs just to prove the programs are weak. Matthew Lenaghan, deputy director of Advocates for Children, points out that finding strong instruction promptly is essential. “If a child has autism, does that student have to try a program he knows is inadequate?” he said. Similarly, Scott Gaynor, head of the Gaynor school, said “the goal here is to catch a child before they fail.”

Voucher advocates are closely watching the case because they feel taxpayers should allow all children, whether handicapped or not, to choose private schooling for themselves and recover the public money that would otherwise have been spent on them. “The first obligation should be to the needs of children, not to the need of any public school system,” said Jay P. Greene, professor of education reform at the University of Arkansas.

In some ways, the case has been outrun by realities. Mr. Freston’s son is now 17 and has long since rejoined mainstream classes, a success for which Mr. Freston credits private schooling. But it is not clear how his son would have fared at the Lab School.

The case also has a paradox at its heart. Current thinking—and the special-education law itself—urges that disabled children be placed in the “least restrictive environment”—preferably in mainstream classes. But Mr. Freston fought to keep his child in an environment where he would be surrounded only by children with disabilities.
A Federal appeals court has rejected an interpretation of the Individuals with Disabilities Act that would have placed restrictions on parents who sought private school tuition reimbursement for the special education needs of their children.

The decision will be published Monday.

The ruling from the U.S. Court of Appeals for the Second Circuit came in Frank G. v. Bd. of Educ. of Hyde Park, 04-CV-4981.

While the unanimous ruling affirmed a lower court's decision in the case, it simultaneously rejected the conclusion of another trial court in Bd. of Educ. v. Tom F., 2005 WL 22866.

In Tom F., Southern District Judge George B. Daniels ruled that 1997 amendments to the disabilities act clearly stated that when “a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school.”

The Second Circuit last week disagreed with that ruling, saying the plain language of the amendments did not say that reimbursement was only available to parents whose children had previously received special education from a public agency. Such a reading, the court said, would produce “absurd” results.

Judge Edward R. Korman, the chief judge of the Eastern District, sitting by designation, said this view of the statute would “place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement.”

He added: “We decline to interpret 20 U.S.C. 2 §1412(a)(10)(C)(ii) to require parents to jeopardize their child’s health and education in this manner in order to qualify for the right to seek tuition reimbursement.”

In Frank G., Frank and Diane G., the parents of Anthony G., a learning disabled child, fought to obtain $3,600 in tuition reimbursement and more than $45,000 in attorney’s fees from the Hyde Park Central School District in Dutchess County.

Anthony G. was born in May 1991 to a crack-addicted mother. Frank and Diane G. later adopted him. Since the age of 3, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder. By the time he reached the fourth grade at his private school in Newburgh, the Committee on Special Education for the Hyde Park school district had classified him as learning disabled under the disabilities act.

Both school district personnel and an independent doctor evaluated Anthony in summer 2001. The doctor concluded that Anthony should receive individual attention in a small class, perhaps with 12 students. The school district, however, developed an independent education plan for Anthony that would have placed him in a regular-size
class of 26 to 30 students at a public school and provided him with additional services. Diane G. requested a hearing from the school district, and asked it to provide these services at Anthony’s private school. She stressed that the class size was too large. The hearing did not take place until November and December of that year, and Anthony’s parents decided to enroll him in a new private school beforehand.

The school district argued that this placement was inappropriate, but Southern District Judge Charles L. Brieant eventually reversed the decision of a hearing officer and ruled in favor of the parents. He awarded the tuition reimbursement and about $35,000 in legal fees, though he expressed concern about the sum of the fees compared to the tuition.

No Ambiguity

On appeal to the Second Circuit, the school district argued that Anthony’s parents were not entitled to reimbursement or fees because of the holding in Tom F., which it described as an “absolute defense.” The Second Circuit disagreed and affirmed Judge Brieant.

The statute in question, 20 U.S.C. § 1412(a)(10)(C)(ii), authorizes reimbursement to the parents of a disabled child “who previously received special education and related services under the authority of a public agency” and who enrolled the child in a private school, “if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to enrollment.”

Judge Korman said the school district was relying on ambiguity in the statute for its position, and noted that other sections of the statute, and its legislative history, lead the court to a different conclusion about when reimbursement was appropriate.

“The plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services,” the judge wrote. “Indeed, the School District’s need to rely on an inference to be drawn from the plain language, rather than the language itself, suggests a degree of ambiguity that would not necessarily be present if § 1412(a)(10)(C)(ii) was the only section of the IDEA that spoke to the issue of the remedy that a district court may award.”

Judges Rosemary S. Pooler and Sonia Sotomayor concurred on the ruling.

Mark I. Reisman represented Frank and Diane G. James P. Drohan of Donoghue, Thomas, Auslander & Drohan represented the school district.
The city could save millions of dollars under a new ruling, which found that special-education students who never try public school are ineligible for reimbursement for private-school expenses.

The decision by Judge George Daniels of federal District Court in Manhattan found that the family of a boy identified as Gilbert F. didn’t have the right to be reimbursed for tuition because Gilbert had never attended public school. He began attending a private special-education program in kindergarten at the Stephen Gaynor School on the Upper West Side.

Judge Daniels’s ruling overturned a 2000 decision by the city’s impartial hearing officer and another decision by the state Education Department’s state review officer.

It could send shock-waves through the growing community of parents who have never sent their children to public school but petition the city each year to pay for all or part of the youngsters’ tuition at private school.

In the last school year, the city Department of Education spent more than $12 million reimbursing the families of about 1,000 special-education students who had never attended public school despite the department’s recommendations. The number of families applying for reimbursement has more than tripled since the 1997-98 school year.

Yesterday, department officials said they were pleased with the decision. “We believe this is a sound decision and are pleased that the court agreed with our view,” the department’s general counsel, Michael Best, said.

The lawyer who represented Gilbert and his father, Neal H. Rosenberg, called the decision “very bad.”

“I don’t understand why the board is applauding itself here,” Mr. Rosenberg said last night in a telephone interview. “It’s almost like they are thrilled that a judge says they’re not obligated to provide services that they themselves recommend.”

He said his client and the city agreed that Gilbert needed special-education services. The question was whether the special services would be provided by the public-school system or by a private school. The city paid part of Gilbert’s tuition for the first two years of his schooling. In the third year the city refused to settle with the family, which led to a hearing and then more than four years of litigation.

Mr. Rosenberg said if Judge Daniels’s decision is upheld, some special-education students who try the public schools might be successful, but others will fail.

“It is asking a lot of parents to make a guinea pig of their child,” he said. “The risk society runs here is that the year will be so unsuccessful as to require two years or three years to make up for the bad year.”

Other lawyers who represent special education students whose families sue for
reimbursement had similar opinions.

"It's going to be a disaster for parents who don't want to put their children in peril and in harm," one attorney, Regina Skyer, said. She said parents shouldn't have to put their children into public schools and watch them fail before being able to put them into private schools.

Another lawyer, Phyllis Saxe, who entered the field after her experience convincing the city to pay for the private education of a daughter with cerebral palsy, said she is "devastated" by the decision.

"I feel extremely bad for the special education children," she said. "It's a terrible emotional blow to hear that not only is your child disabled but that there is no recourse."

She said if parents start trying out public-school programs and then pulling out their children to place them in private schools, "you're going to have a lot of children who are going to be disturbed in addition to being disabled."

The executive director of Advocates for Children, Jill Chaifetz, said most of her clients are poor and can't afford private lawyers, and thus will not be affected by the ruling. But she said in many cases there aren't appropriate placements for special-education students in public schools.

"The real issue here is to get more appropriate programs for kids with disabilities in the school system so they don't need to make use of the private schools," she said.

The chairwoman of the City Council's Committee on Education, Eva Moskowitz, said although she doesn't think parents should be granted a "free pass" for private school if the public schools can meet their child's needs, there's a shortage of good special-education programs in the public system.

"This ruling will result in students being forced to try a public-school program even if the public-school system offers no appropriate program," the Manhattan Democrat said.

Mr. Rosenberg said he would advise the boy's father, identified as Tom F., to appeal.
“Ex-MTV Big Takes on Schools”

Daily News (New York)
February 27, 2007
Erin Einhorn

Multimillionaire businessman Tom Freston—the man who founded MTV—was last night revealed to be the driving force behind a Supreme Court battle to help city schoolkids with special needs.

Freston, who can afford to send his son to any school in the world, is pushing his case because of principle, his lawyer said.

Freston landed at the center of [Bd. of Ed. of the City School District of the City of New York v. Tom F..] the controversial case over whether taxpayers should cover private tuition at a special school for his son, who has learning disabilities. The court yesterday agreed to hear the “Tom F” case, which could affect thousands of kids around the country who have special needs that their parents say cannot be addressed by their local public schools.

The Daily News has identified “Tom F” as Freston, who helped found the MTV Networks in 1981 and went on to take over Viacom. He was fired last September and was paid as much as $84.8 million in severance.

Freston, who lives in an upper East Side mansion once owned by Andy Warhol, could easily have paid his son’s tuition at the Stephen Gaynor School, a private academy on the upper West Side for kids with learning disabilities, but he pursued the case on moral grounds, his lawyer said.

“He felt his son’s rights were being violated—rights guaranteed to him under federal law,” said lawyer Neal Rosenberg.

“For him it was a moral issue. It wasn’t a financial issue.”

Freston’s son, now 17, received three years of tuition reimbursement from the city under a federal law requiring school districts to pay for kids they can’t educate. In 1999, the city objected.

The teenager never attended a public school; city lawyers argued that federal law guarantees tuition only to children who had “previously received special education and related services” from the public schools.

School officials said his son’s needs could have been met at the highly respected Lower Lab public school in Manhattan.

Freston won appeals to city and state administrative judges. The city appealed to the federal courts.

“There are millions and millions of dollars at stake here for school districts,” said Education Department lawyer Michael Best. “If parents can force us to pay for private school placement when we’re perfectly capable of providing that child with a place in the public schools, then it’s a needless waste of money that should be going to public schools.”

Best said 2,240 parents requested an average of $29,000 in tuition during the last school year. Of those cases, Best estimated that roughly half could be affected by the Tom F case.

Many families have legitimate claims, Best
said, but "sometimes parents do try to take advantage of the system."

Rosenberg said Freston has not sought reimbursement since 1999, when he began appealing his case, and that Freston contributed the $50,000 he received for three years of Gaynor tuition to a special fund at the school.

Head of School Scott Gaynor confirmed Freston contributed $100,000 about five years ago for a free tutoring program for public-school kids in the school’s W. 90th St. neighborhood. Special education advocates say many of the families getting tuition are poor or middle class, and some worry that Freston’s wealth could harm the cause.

“This case has dangerous implications for my clients,” said lawyer Regina Skyer, who represents disabled children. If parents have to send their kids to a public school before they can seek tuition, “it’ll force parents into feeling they’ll have to put their child in harm’s way.”
LaRue v. DeWolff, Boberg & Associates

(06-856)


DeWolff, Boberg, & Associates administers an ERISA-regulated 401(k) retirement savings plan for its current and former employees. LaRue, a participant in the plan since 1993, states that he directed the administrators, who are also fiduciaries, to make certain changes to the investment strategy for his plan. LaRue argues that neglecting to make the requested changes amounts to a breach of fiduciary duty. Having not made those changes, it caused a loss of over $150,000 in interest revenue for his retirement plan. LaRue filed suit for the losses or similar relief under 29 U.S.C. § 1132(a)(3).

Questions Presented: Whether §502(a)(2) of ERISA permits a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach; and whether §502(a)(3) permits a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?

James LaRUE,
Plaintiff-Appellant

v.

DeWOLFF, BOBERG, & ASSOCIATES, INC., et al.,
Defendants-Appellees

United States Court of Appeals
for the Fourth Circuit

Decided June 19, 2006

[Excerpt: some footnotes and citations omitted]

WILKINSON, Circuit Judge:

The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.

We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while § 1132(a)(3) does in
some cases furnish individualized remedies, the Supreme Court’s decisions in Mertens v. Hewitt Associates, 508 U.S. 248, . . . compel the conclusion that it does not supply one here. Plaintiff has alleged no unjust enrichment, unlawful possession, or self-dealing on the part of defendants, and the remedy he seeks falls outside the scope of the “equitable relief” that § 1132(a)(3) authorizes.

II.

[The court states that Congress intended to uniformly regulate employee benefit plans. One of the principal sections of ERISA was to preempt state law causes of action and provide only specified remedies. See § 1132(a).]

III.

Plaintiff first suggests that remuneration of his plan account finds express authorization in the text of 29 U.S.C. § 1132(a)(2). That subsection allows for a civil action “by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.” Section 1109, in turn, provides that [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . . 29 U.S.C. § 1109(a).

Plaintiff’s argument regarding the applicability of § 1132(a)(2) is made for the first time on appeal. Even if the argument were not therefore waived, see, e.g., Jones v. Liberty Mut. Ins. Co. (In re Wallace & Gale
Co.), 385 F.3d 820, 835 (4th Cir.2004), he could not succeed on the merits. Recovery under this subsection must “inure[ ] to the benefit of the plan as a whole,” not to particular persons with rights under the plan. Russell, 473 U.S. at 140. . . .” A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.” Russell, 473 U.S. at 142, 105....

It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants’ failure to follow plaintiff’s own particular instructions, thereby breaching a duty owed solely to him.

We are therefore skeptical that plaintiff’s individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as § 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff’s personal plan account, which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief.

This case is much different from a § 1132(a)(2) action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants. . . . In such a case, the “remedy will undoubtedly benefit [the plaintiff] and other participants in the [p]lan,” but “it does not solely benefit the individual participants.” Smith, 184 F.3d at 363 (emphasis added). . . . Here, by contrast, plaintiff seeks to particularize the recovery to himself. Section 1132(a)(2) is not a proper avenue for him to obtain such relief.

IV.

We thus turn to plaintiff’s second theory of relief, which relies on a different ERISA remedial provision, 29 U.S.C. § 1132(a)(3). That section authorizes a civil action by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Plaintiff contends that the “make whole” relief he seeks constitutes one of the forms of “other appropriate equitable relief” that the provision authorizes.

A.

In construing the scope of § 1132(a)(3), the Supreme Court has stressed that the term “equitable” is one of limitation. In Mertens v. Hewitt Associates, the Court held that the phrase “equitable relief” refers only to “those categories of relief that were typically available in equity” in the days of the divided bench. 508 U.S. at 256, 113 S.Ct. 2063. . . . The Court reasoned that other sections of ERISA expressly refer to “equitable or remedial relief,” 29 U.S.C. § 1109(a), and “legal or equitable relief,” e.g., id. § 1132(g)(2)(E), thereby demonstrating that “equitable relief” connotes only a subset of the full palliative spectrum. See Mertens, 508 U.S. at 258, 113 S.Ct. 2063. The Court refused to “read the statute to render the modifier superfluous,” id., a construction
that would undermine Congress's exclusive remedial scheme by opening a back door through which uninvited remedies might enter, id. at 257, 113 S.Ct. 2063.

The particular definition of "equitable" that the Court has adopted finds support in a well-known principle of statutory construction. "The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961). Section 1132(a)(3) expressly mentions the right to "enjoin" certain acts or practices "or...to obtain other appropriate equitable relief" (emphasis added). The understanding of what "equitable" means in this context is necessarily informed by its association with injunctive relief, the quintessential exemplar of a remedy that equity alone would typically provide.

Determining the applicability of § 1132(a)(3) therefore requires a court to examine whether the form of relief a plaintiff seeks is, like an injunction, historically one that a court of equity rather than a court of law would have granted. See *Sereboff*, 126 S.Ct. at 1874. The Supreme Court has, in addition to injunctions, listed mandamus and restitution as examples of traditional equitable remedies. See *Mertens*, 508 U.S. at 256, 113 S.Ct. 2063. Subsequent decisions of both the Supreme Court and this court have been wary of expanding the list beyond these archetypes and their closely related kin. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489... .

B. *Mertens* and its progeny compel the conclusion that the remedy plaintiff desires falls outside the scope of § 1132(a)(3). As in *Mertens*, although he "often dance[s] around the word," what plaintiff "in fact seek[s] is nothing other than compensatory *damages*—monetary relief for all losses...sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255, 113 S.Ct. 2063. "Money damages are, of course, the classic form of *legal* relief," id., and have therefore remained conspicuously absent from the list of traditional equitable remedies available under § 1132(a)(3), id. at 256.

While that list does include "restitution," id., this form of recovery is not so broad as to include the compensatory relief that plaintiff seeks. As the Supreme Court explained in *Great-West Life & Annuity Insurance Co. v. Knudson*, "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212, 122 S.Ct. 708. In particular, "for restitution to lie in equity," as opposed to at law, "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Id. at 214, 122 S.Ct. 708... .

The Supreme Court's most recent § 1132(a)(3) decisions demonstrate how the absence of unjust possession is fatal to an equitable restitution claim. In *Knudson*, the Court denied a restitutionary remedy under § 1132(a)(3) where "'the funds to which petitioners claimed an entitlement' were not in Knudson's possession, but had instead been placed in a 'Special Needs Trust' under California law." *Sereboff*, 126 S.Ct. at 1874 (quoting *Knudson*, 534 U.S. at 207, 214, 122 S.Ct. 708) (internal alterations omitted). More recently in *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Court allowed a claim for equitable restitution to proceed where "Mid Atlantic sought specifically
identifiable funds that were within the possession and control of the Sereboffs.” Id. (internal quotation marks omitted). The Court in Sereboff reaffirmed the possession requirement it had announced in Knudson, but found that the “impediment to characterizing the relief in Knudson as equitable [was] not present” in the Sereboffs’ case. Id.

The impediment is, however, present in this case, and it precludes plaintiff from recovering under an equitable restitution theory. Plaintiff does not allege that funds owed to him are in defendants’ possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the value of defendants’ nonexistent gain, but by the value of his own loss—a measure that is traditionally legal, not equitable. . . . Thus, at core, he seeks “to obtain a judgment imposing a merely personal liability upon the defendant[s] to pay a sum of money.” Knudson, 534 U.S. at 213, 122 S.Ct. 708 (internal quotation marks omitted). As Knudson explained, historically “[s]uch claims were viewed essentially as actions at law.” and they are therefore unavailable under § 1132(a)(3). Id.

C.

Plaintiff attempts to avoid this conclusion by arguing that his requested “make whole” relief represents something entirely different from the types of remedies that we or the Supreme Court have heretofore considered in the context of § 1132(a)(3). In particular, he emphasizes that this case involves a situation where a participant or beneficiary is suing a fiduciary for a breach of fiduciary duty. In his view, the scope of “equitable” remedies available in such a case is broader than when a fiduciary sues a beneficiary (as was the case in Knudson and Sereboff) or when a beneficiary sues a non-fiduciary (as was the case in Mertens). Unlike either of those scenarios, the argument goes, this case can be analogized to a common law breach-of-trust action by a beneficiary seeking to recover lost trust profits, a remedy that trust treatises have labeled “equitable.” See Restatement (Second) of Trusts §§ 197, 205(c) (1959). . . .

The governing precedent, however, does not point as plaintiff suggests. In fact, Mertens squarely “rejected the claim that the special equity-court powers applicable to trusts define the reach of [§ 1132(a)(3)].” Knudson, 534 U.S. at 219, 122 S.Ct. 708; see Mertens, 508 U.S. at 256-57, 113 S.Ct. 2063. While the generally exclusive jurisdiction of equity courts over breach-of-trust suits renders all remedies in such cases “equitable” in the sense that a court of equity has power to grant them, “equitable” in the context of § 1132(a)(3) has a narrower meaning. Mertens, 508 U.S. at 256, 113 S.Ct. 2063. Under Mertens, “the relevant question is . . . whether a given type of relief was available in equity courts as a general rule.” Rego v. Westvaco Corp., 319 F.3d 140, 145 (4th Cir.2003) (emphasis added), rather than merely in the context of “the particular case at issue,” Mertens, 508 U.S. at 256, 113 S.Ct. 2063. “Equitable relief” therefore does not encompass the “many situations—not limited to those involving enforcement of a trust—in which an equity court could,” by virtue of its jurisdiction over the claim at issue, “grant legal remedies which would otherwise be beyond the scope of its authority.” Id.

That plaintiff can analogize this suit to a common law breach of trust action therefore proves of no avail in characterizing the relief he seeks as equitable. Plaintiff admits that he lacks support for the notion that “make whole” relief was available in equity outside the context of trusts. It is therefore
impossible for us to conclude that such relief “was available in equity courts as a general rule,” Rego, 319 F.3d at 145.

The Sixth Circuit has reached a similar conclusion in a case presenting facts nearly identical to those before us here. In Helfrich v. PNC Bank, Kentucky, Inc., 267 F.3d 477 (6th Cir.2001), a beneficiary of an employee 401(k) plan sued a plan fiduciary for failing to comply with written directions to roll over his assets into a specific set of mutual funds. Id. at 479-80. The plaintiff asserted an entitlement to the difference between the “amount he would have earned” had the fiduciary followed his instructions and “the amount he in fact earned” as a result of the fiduciary’s alleged breach of duty. Id. at 480. The court concluded that his requested remedy was unavailable under § 1132(a)(3). Id. at 481-83. It found that the plaintiff could not style his relief as “restitution” when he was measuring recovery by his own losses rather than the defendant’s gains, id. at 482-83, and it rejected a strict congruence between § 1132(a)(3) and the common law of trusts, id. at 482 (citing Mertens, 508 U.S. at 256, 113 S.Ct. 2063). It therefore dismissed the suit because “ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries.” Id. at 482.

As Helfrich shows, the fact that a plaintiff happens to be a participant or beneficiary suing a fiduciary is entirely beside the point in the § 1132(a)(3) inquiry; the status of the parties does not determine the nature of the relief. Many other circuits, both before and after Knudson, have likewise rejected the notion that whether a particular form of relief is “equitable” depends on the identity of the parties. See Pereira v. Farace, 413 F.3d 330, 340 (2d Cir.2005). ... The teachings of Mertens and Knudson oblige us to agree, and plaintiff’s contrary argument therefore fails to cast doubt upon our conclusion that the compensatory relief he seeks is legal, not equitable.

V.

Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of “ensuring fair and prompt enforcement of rights under a plan” on the one hand and “encourag[ing] ... the creation of such plans” on the other. Aetna Health, 542 U.S. at 215, 124 S.Ct. 2488 (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this—where there was no unjust enrichment, unlawful possession, or self-dealing—would seriously deter plan formation and the service of qualified individuals and institutions as fiduciaries. Compare, e.g., Mertens, 508 U.S. at 262-63, 113 S.Ct. 2063 (discussing negative effects of expansive ERISA liability).

Congress’s decision to omit such liability hardly leaves a plan participant or beneficiary in plaintiff’s position without recourse. He could, for example, seek an injunction compelling compliance with his investment instructions, see 29 U.S.C. § 1132(a)(3), or, under appropriate circumstances, bring suit on the plan’s behalf to remove the fiduciary. see 29 U.S.C. § 1109(a). In Congress’s view, such alternative remedies are sufficient to keep fiduciaries from breaches of fiduciary duty that result in no benefit whatsoever to themselves. We possess no authority “to adjust the balance ... that the text adopted by Congress has struck.” Mertens, 508 U.S. at 263, 113 S.Ct. 2063. Accordingly, we AFFIRM the judgment.
WASHINGTON—Employers with defined contribution plans may face more fiduciary liability depending on how the Supreme Court interprets sections of federal pension law [in LaRue v. DeWolff, Boberg, & Assoc.]. . . .

At issue is whether the Employee Retirement Income Security Act allows an individual participant in a defined contribution plan to sue fiduciaries to recover individual plan account losses caused by an alleged fiduciary breach. . . .

The 4th U.S. Circuit Court of Appeals in Richmond, Va., which upheld a lower court decision in the LaRue case, ruled that while ERISA provides that a lawsuit may be brought by a participant against a fiduciary who is liable to make good any losses to the plan due to a fiduciary breach, the remedy is only for entire plans, not for individual accounts.

Additionally, the appeals court noted, in drafting ERISA, Congress sought to balance the protection of participants’ rights with the encouragement of plan formation.

By making fiduciaries liable where there was no “unjust enrichment” to the fiduciary would seriously discourage plan formation and the service of qualified individuals and institutions as fiduciaries, the appeals court said.

In this case, James LaRue, who has participated in Dewolff, Boberg & Associates’ 401(k) plan since 1993, alleges his retirement account is short $150,000 because the management firm, which administers the plan, failed to carry out his directions to make certain investment changes to his account in 2001 and 2002. He sued the firm in 2004.

In an amicus curiae brief encouraging the Supreme Court to review the 4th Circuit ruling, U.S. Solicitor General Paul D. Clement noted that every other courts of appeals that has addressed the issue have all held that ERISA authorizes suits by participants in such instances not withstanding that the recovery will ultimately be allocated to the plan accounts of a limited number of participants. . . .

“This could have a sweeping impact on employers” and other fiduciaries, said Martha N. Steinman, a partner in the executive compensation and ERISA practice of LeBoeuf, Lamb, Greene & MacRae L.L.P. in New York. “Fiduciaries have just been adding increasingly higher levels of risk in terms of potential liability in recent years, which makes a lot of people reluctant to be fiduciaries.” she said. “A reversal in this case will have a significant impact on that.” . . .

But if the Supreme Court rules in favor of plan participants, fiduciaries will be held liable if they are not being “scrupulous and really detailed oriented” in making sure the plan is directing investment decisions exactly the way the participant wants, Mr. Rosenberg said, noting that he believes the Supreme Court will overturn the 4th Circuit.
Another invitation brief is in, and it looks like the Court may have another case for its 2007 line-up: the United States recommended that cert. be granted in No. 06-856, *LaRue v. DeWolff, Boberg & Associates*. . . .

*LaRue* presents two questions: (1) whether, pursuant to Section 502(a)(2) of ERISA, a participant in a defined contribution pension plan may sue to recover losses to the plan caused by a breach of fiduciary duty, even when those losses affected only the participant’s individual account; and (2) whether an action by a plan participant against a fiduciary to recover losses caused by a breach of duty seeks “equitable relief” for purposes of ERISA Section 502(a)(3).

In the view of the U.S., the Fourth Circuit in *LaRue* erred in answering both of the two questions presented in the negative. With regard to the first question, the government explains that ERISA Section 502(a)(2), read in conjunction with Section 409, authorizes a plan participant to bring a suit to recover for the plan “losses to the plan” resulting from a breach of fiduciary duty. The fact that petitioner James LaRue seeks to recover funds (approximately $150,000) that he allegedly lost when respondent failed to make certain investments that he had directed does not, the U.S. contends, take his suit outside the purview of Section 502(a), as any recovery by LaRue will ultimately benefit the plan as a whole by “directly increas[ing] the overall amount of assets held by the plan.” Certiorari is further warranted, the U.S. explains, both because the Fourth Circuit’s holding conflicts with those of the four other courts of appeals that have addressed the question, and because the question presented is one of substantial importance.

With regard to the second question, the United States argues that a suit such as LaRue’s seeks “equitable relief” because “both [his] claim, breach of fiduciary duty, and the relief he seeks, surcharge of the trustee for the losses resulting from the breach, were typically—indeed, exclusively—equitable in the days of the divided bench.” Here, the United States notes, certiorari is warranted because although the Fourth Circuit’s erroneous holding comports with those of five other circuits, the Seventh Circuit has reached the opposite conclusion.

In closing, the United States notes that ERISA was enacted to address “misuse and mismanagement of plan assets by plan administrators,” as well as “to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.” As such, the United States concludes, certiorari should be granted “to clarify that ERISA provides monetary remedies to recompense plans and participants who have been harmed by fiduciary breaches.”
Attorneys for a nationwide management consulting firm involved in a case the Supreme Court is scheduled to hear at its next Term have urged the Justices to dismiss the case as moot. In a motion filed on Monday, counsel for DeWolff, Boberg & Associates Inc. said that the individual who took the case to the Supreme Court has withdrawn all of his funds from his pension plan account, leaving him “with no legally cognizable interest in the outcome of the case.” The motion, re-filed with redactions to protect privacy interests, can be found here. The individual involved has a right to respond.

The case is LaRue v. DeWolff, Boberg & Associates, et al. (docket 06-856). The Court agreed on June 18 to hear the case after seeking the views of the U.S. Solicitor General, who urged the Court to hear and decide both issues raised by James LaRue, a Texan who worked for DeWolff Boberg until 2001.

Thomas P. Gies, a Washington attorney for DeWolff Boberg, told the Court that, in assembling materials for a merits brief in the case, his office “discovered that on July 22, 2006, while the case was still pending before the Fourth Circuit,” LaRue withdraw all of his funds from his account.

In LaRue’s petition, filed last Nov. 6, he raised two issues: whether the Employee Retirement Income Security Act allows a pension plan participant to sue a plan manager or administrator to recover losses that the worker suffered in a personal pension account because of actions by the plan operator, and whether ERISA allows monetary relief, in the form of a court-ordered payback, as a remedy for alleged wrongs by a plan operator.

The Fourth Circuit Court ruled on June 19 last year that LaRue could not assert a claim under ERISA because recovery must benefit the plan as a whole, not a particular plan participant.

Solicitor General Paul D. Clement, in urging the Court to decide the two questions, said they were “important and recurring” issues regarding civil enforcement of ERISA.

DeWolff Boberg’s dismissal motion, however, noted that neither of the two legal claims involves a live controversy, because of LaRue’s withdrawal from the plan. The ERISA provision at issue in the first question raised allows a lawsuit by “a participant, beneficiary, or fiduciary,” the motion said. There is no legal basis, the motion contended, for allowing a former participant in a defined contribution plan to bring a lawsuit under that section to recover damages measured by lost profits. The Supreme Court, it noted, has not addressed the issue.

The provision at issue in the second legal claim, according to the motion, also makes that issue moot. The claim LaRue made under that section, it noted, was that he was only seeking to have the plan reflect what would have been his interest in it. Now that he is a former plan participant, the motion contended, he has no legally cognizable interest in a recovery by the plan.
The Supreme Court, it added, “has recognized that when a petitioner voluntarily changes his status . . . while litigation is pending, that change may render the matter moot by eliminating the petitioner’s legally cognizable interest in his claim.”

Although recommending that the case be dismissed, the motion did suggest that the Court “may wish to consider” deciding now another question that LaRue did not raise in his petition—that is, whether a worker who is no longer a participant in an ERISA plan has a right to sue for damages measured by lost value in his plan. That is an issue on which the lower courts are divided, the motion said.

Submitted along with the motion to dismiss was a sworn declaration by a vice president of DeWolff Boberg, Morgan Buffington, saying that he had learned just this month that LaRue had withdrawn all of his funds and ceased to be a plan participant in July 2006. A statement about his account for the third quarter of 2006, Buffington said, showed a zero balance and a withdrawal of $119,009.13.

At the time of his withdrawal of the funds in July 2006, the declaration said, LaRue “was no longer employed [by the firm] and received no other income” from it, so he “could not make any additional contributions to the plan following his decision to close out his account.”

Forms included with the motion indicated that LaRue has an address in Southlake, Texas.
Plaintiff Ellen Mendelsohn sued her former employer, Sprint/United Management Company, after the company terminated her employment in 2002 as part of an ongoing company-wide reduction in force (RIF). Mendelsohn alleged that Sprint unlawfully discriminated against her in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. After a trial on the merits, a jury returned a verdict for Sprint. Mendelsohn appealed the verdict, arguing that the district court erred in excluding the “me, too” testimony of other former employees who alleged similar discrimination, which she believed demonstrated the pervasive presence of age discrimination at Sprint.

Questions Presented: Whether a district court may properly exclude “me, too” evidence from non-parties, alleging discrimination at the hands of persons who did not play a role in the plaintiff’s adverse employment situation, in employment discrimination cases.
court abused its discretion in excluding the
evidence. We reverse and remand for a new
trial.

I.

[The Court recounts the background and
factual history of the case. Mendelsohn
worked for Sprint from 1989 until
November 2002. At the time, Mendelsohn
was fifty-one years old and the oldest
manager in her unit. Mendelsohn brought
her claim under the ADEA. As evidence of
Sprint’s alleged discriminatory animus
toward older employees, Mendelsohn sought
to introduce evidence that Sprint terminated
two other employees over the age of forty as
part of the same RIF. Prior to trial, Sprint
filed a motion in limine seeking to exclude,
among other things, any evidence of Sprint’s
alleged discriminatory treatment of other
employees. Relying exclusively on
Aramburu v. The Boeing Co., 112 F.3d
1398, 1404 (10th Cir. 1997). Sprint argued
any reference to alleged discrimination by
any supervisor other than Paul Reddick,
Mendelsohn’s supervisor, was irrelevant to
the issue in this case. The district court
granted the motion in part, and limited
Mendelsohn’s evidence to “Sprint
employees who are similarly situated to
her.” To prove the employees were
“similarly situated,” the district court
required Mendelsohn to show Reddick
supervised the employees and Sprint
terminated them in close temporal proximity
to Mendelsohn’s termination. Because
Reddick did not supervise any of the other
employees Mendelsohn sought to place on
the stand, the district court excluded their
testimony at trial. Following the court’s in
limine ruling, Mendelsohn submitted in
writing a proper offer of proof. Following an
eight-day trial, the jury returned a verdict for
Sprint finding Sprint did not discriminate
against Mendelsohn on the basis of age.
Mendelsohn then filed a motion for a new
trial renewing her objections to the district
court’s in limine ruling. See Fed. R. Civ. P.
50(b). The district court denied the motion,
and Mendelsohn timely appealed.]

II.

Mendelsohn argues the district court
committed reversible error by requiring her
to show she and the other employees shared
a supervisor as a precondition for
admissibility of their testimony. According
to Mendelsohn, the testimony of other
employees in the protected age group who
were subject to substantially similar RIF
terminations was relevant and admissible as
reflecting on Sprint’s discriminatory intent
in selecting Mendelsohn to the RIF. Sprint,
on the other hand, maintains any evidence of
its treatment toward other employees is not
relevant to the determination of this action
because the evidence does not make it more
likely that Sprint discriminated against
Mendelsohn.

We review the district court’s ruling to
exclude evidence for an abuse of discretion.
See Whittington v. Nordam Group Inc., 429
F.3d 967, 1000 (10th Cir. 2005). Applying
these standards, we agree with
Mendelsohn that the evidence she sought to
introduce is relevant to Sprint’s
discriminatory animus toward older
workers, and the exclusion of such evidence
unfairly inhibited Mendelsohn from
presenting her case to the jury. See, e.g.,
Beaird v. Seagate Tech., Inc., 145 F.3d
1159, 1168 (10th Cir. 1998) (identifying as a
theory of pretext in RIF cases evidence of an
employer’s general policy of using a RIF to
terminate older employees in favor of
younger employees).
A.

To prevail on a discriminatory discharge claim under the ADEA, a plaintiff bears the burden of proving age was the motivating factor for the employer's decision to terminate her. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). As part of her proof, the plaintiff must persuade the jury that the employer's proffered reason for its conduct is unworthy of belief. See Pippin v. Burlington Resources Oil And Gas Co., 440 F.3d 1186, 1193 (10th Cir. 2006). Because direct testimony as to the employer's mental processes seldom exists, see Reeves, 530 U.S. at 141, evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (“Other evidence that may be relevant to any showing of pretext includes . . . [the employer's] general policy and practice with respect to minority employment.”); see also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 n. 2, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).

We have previously recognized the testimony of employees, other than the plaintiff, concerning how the employer treated them as relevant to the employer's discriminatory intent. See Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990). For example, in Greene v. Safeway Stores, Inc., 98 F.3d 554 (10th Cir. 1996), and Bingman v. Natkin & Company, 937 F.2d 553 (10th Cir. 1991), we recognized evidence the employer had terminated other older employees was relevant as evidence of a pattern of dismissal based on age. Similarly, in Coletti v. Cubb Pressure Control, 165 F.3d 767, 776 (10th Cir. 1999), we found testimony of other employees regarding how defendant treated them relevant to the defendant’s discriminatory intent where “testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motive.”

Sprint would have us extend the “same supervisor” rule announced in Aramburu to this case. In Aramburu, we held in the context of a discriminatory discipline action that plaintiffs seeking to present testimony of other employees who were treated more favorably for violating the same work rule (or another of comparable seriousness) as evidence of discriminatory intent, must show they shared the same supervisor with the proffered witnesses. As we have observed elsewhere: “The ‘same supervisor’ test has been found to be relevant in cases involving allegations of discriminatory disciplinary actions.” Equal Employment Opportunity Comm’n v. Horizon/CMS Healthcare, 220 F.3d 1184, 1198 n. 10 (10th Cir. 2000). In discussing Aramburu, we explained comparison of a supervisor’s disciplinary action with other disciplinary action of the same supervisor is relevant to show the bias of the supervisor. For example:

If X fires A, an Hispanic, for particular misconduct, but gives only a warning to B, a non-Hispanic, for identical misconduct, one might infer that something beyond the misconduct (such as a bias by X against Hispanics) motivated the disciplinary action. But if it was Y, not X, who decided not to impose a harsher sanction against B, one cannot infer that X’s decision to fire A must have been motivated by something other than A’s misconduct. X may simply have a less tolerant view toward misconduct than Y does. Cf. Kendrick, 220 F.3d at 1233 (“Different supervisors will inevitably react
differently to employee insubordination.”). Rivera v. City and County of Denver, 365 F.3d 912, 922 (10th Cir. 2004). This case, on the other hand, is not about individual conduct but about a company-wide policy of which all Sprint’s supervisors were allegedly aware. Accordingly, we decline to extend the “same supervisor” rule beyond the context of disciplinary cases.

Since deciding Aramburu, we have only applied the “same supervisor” rule in the context of alleged discriminatory discipline. See, e.g., MacKenzie v. City and County of Denver, 414 F.3d 1266, 1277 (10th Cir. 2005); Rivera, 365 F.3d at 922; Kendrick v. Penske Transp. Services, Inc., 220 F.3d 1220, 1232 (10th Cir. 2000). For example, in Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University, 245 F.3d 1172 (10th Cir. 2001), a gender discrimination case, we declined to extend the application of the “same supervisor” rule beyond its original context.

Aramburu has no application where, as here, plaintiff claims to be a victim of a company-wide discriminatory RIF. Applying Aramburu’s “same supervisor” rule in the context of an alleged discriminatory company-wide RIF would, in many circumstances, make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence. Conceivably a plaintiff might be the only employee selected for a RIF supervised by a particular supervisor. Meanwhile, scores of other employees within the protected group also selected for the RIF might work for different supervisors. In such cases, the constraints of Aramburu would preclude a plaintiff from introducing testimony from those other employees. Applying Aramburu to cases of discrimination based on an alleged company-wide discriminatory RIF would create an unwarranted disparity between those cases where the plaintiff is fortunate enough to have other RIF’d employees in the protected class working for her supervisor, and those cases where the plaintiff is not so fortunate. We do not think such disparity should exist.

B.

The testimony of the other employees concerning Sprint’s alleged discriminatory treatment and similar RIF terminations is “logically or reasonably” tied to the decision to terminate Mendelsohn. Spulak, 894 F.2d at 1156 n. 2 (upholding a district court’s decision to allow former employees in the protected age group to testify about the circumstances surrounding their employment departure). In this case, the other employees’ testimony is logically tied to Sprint’s alleged motive in selecting Mendelsohn to the RIF. Although Mendelsohn and the other employees worked under different supervisors, Sprint terminated all of them within a year as part of an ongoing company-wide RIF. All the employees were in the protected age group, and their selection to the RIF was based on similar criteria. Accordingly, testimony concerning the other employees’ circumstances was relevant to Sprint’s discriminatory intent.

According to the dissent, the evidence Mendelsohn proffered need not be admitted because it is “devoid of independent evidence showing that Sprint had company-wide discriminatory policies.” Dissent at 4. The dissent, however, does not explain what this independent evidence might be. In Gossett, we noted that evidence regarding the discriminatory application of an enterprise-wide policy by other supervisors was admissible when the plaintiff has “other evidence of that policy[.]” 245 F.3d at 1177.
Thus, we required a plaintiff to proffer evidence, other than her own testimony, concerning the alleged application of said policy. In *Gossett*, the plaintiff satisfied this requirement by introducing an affidavit from a former student and professor concerning the application of the policy. *Id.* at 1177, 1179 n. 2.

Similarly, Mendelsohn in this case proffered independent evidence in the form of testimony from other Sprint employees who were similarly terminated during the RIF. The dissent mistakenly reads *Gossett* to require independent evidence apart from that evidence which Mendelsohn has proffered. Reading *Gossett* in such a manner may place an insurmountable evidentiary burden upon a claimant entitled to prove her case of age discrimination by circumstantial evidence. See *Merrick v. Northern Natural Gas Co., Div. of Enron Corp.*, 911 F.2d 426, 429 (10th Cir. 1990)(noting the ADEA does not require an employee to produce direct evidence of discriminatory intent; rather the employee only need show the employer’s proffered justification is unworthy of belief). We respectfully disagree with the dissent’s interpretation of *Gossett*.

Moreover, the dissent claims “the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination.” because the district court admitted into evidence exhibits 3 and 4. Dissent at 2. Those exhibits are a compilation of documents Sprint used during the RIF process that includes spreadsheets containing, among other data, the names and age of Sprint employees who were being considered for termination. In addition, the court permitted Jo Renda, Director of Human Resources, to testify concerning the use of these documents during the RIF process. With the exception of Mendelsohn, however, none of the employees identified in the spreadsheets testified at trial. The dissent fails to recognize the limited purpose for which the district court admitted this evidence as well as the distinct characteristic of the evidence the district court excluded in its ruling on the motion in limine.

Of particular relevance to the case was whether Sprint followed its own procedures when it selected Mendelsohn for the RIF. In fact, the district court denied Sprint’s motion for summary judgment on this very issue. The district court made quite clear that exhibits 3 and 4 as well as Renda’s testimony was allowed to come in for the purpose of determining Sprint’s compliance with its procedures:

> [T]he reason I overruled your motion for summary judgment was because there was, I thought, sufficient evidence in the record that Sprint didn’t follow its own procedures. I think that makes the whole process, you know, fair game. What was the procedure and was it followed? And if this spreadsheet was used as part of the implementation of the RIF and it has ages on it, then I think that it’s fair game for the jury.

* * *

It was never my intention to preclude Plaintiff from putting on evidence about the RIF, how it worked, whether Sprint followed its own RIF procedures, et. cetera.

Aplt’s Supp. Appx. at 88, 92-93. In response to Sprint’s concerns regarding the improper use of this evidence the district court reiterated that its in limine ruling was aimed at excluding “other employees . . . from
coming in and saying, I was RIF’d, it was because of my age” and that the ruling applied to this evidence. Id. at 93-94. The court made clear Mendelsohn’s use of this evidence would have to conform to the in limine ruling. See id. at 55-56. Therefore, these exhibits were not offered for the purpose of showing pretext under the theory Sprint had a policy of favoring younger employees. Instead, the district court admitted this evidence under a different theory of pretext by showing Sprint did not follow its own RIF criteria. In addition, Jo Renda was able to use this evidence to find examples of older employees whom Sprint had retained, even though they were not supervised by Reddick. Thus, the district court’s in limine ruling disadvantaged Mendelsohn further because Sprint was allowed to portray itself as retaining older employees, aside from Mendelsohn, even though these employees were not all supervised by Reddick.

... The nature of the evidence Mendelsohn proffered is vastly different from the evidence the jury considered—merely names and dates of birth. Evidence of an employer’s alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer’s state of mind or attitude toward members of the protected class. See, e.g., McDonnell Douglas Corp., 411 U.S. at 804; Aikens, 460 U.S. at 713-14 n. 2; Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1102-03 (8th Cir. 1988); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1423-24 (7th Cir. 1986). These other employees should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony.

Generally, a court’s evidentiary ruling is entitled to deference. See Shugart v. Central Rural Elec. Co-op., 110 F.3d 1501, 1508 (10th Cir. 1997). But the court’s discretion over evidentiary matters should not unfairly prevent a plaintiff a full opportunity to present her case. See Gossett, 245 F.3d at 1178. Blanket pretrial evidentiary exclusions, in particular, “can be especially damaging in employment cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer’s account of its own motives.” Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990)(citation omitted). The evidence which Mendelsohn seeks to present, “is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer’s explanation” for its motive in terminating Mendelsohn. Greene, 98 F.3d at 561. Age as a motivation for Sprint’s selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint’s selection of other older employees to the RIF.

C.

Finally, Sprint argues the testimony should be excluded under Fed. R. Evid. 403. Rule 403 allows a district court to exclude relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence. Sprint argues that allowing the evidence would prejudice Sprint because it would result in Sprint having to defend multiple claims of discrimination. To be sure, the district court retains its power to limit cumulative and marginally relevant testimony. But otherwise, we disagree. Excluding otherwise admissible evidence under Rule 403 “is an extraordinary remedy
[that] should be used sparingly.” United States v. Roberts, 88 F.3d 872, 880 (10th Cir. 1996). “In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262, 1274 (10th Cir. 2000)(internal quotations omitted). Little doubt exists that the admission of evidence about other alleged episodes of discrimination would inconvenience Sprint. But the fact Sprint would have to rebut this testimony is not in itself enough to outweigh the probative value of Mendelsohn’s proffered evidence. See Bingman, 937 F.2d at 557. Based on the record before us, we cannot say the evidence is unduly prejudicial. 5

Accordingly, for the reasons stated above the district court’s order denying Mendelsohn’s motion for a new trial is reversed. We remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

TYMKOVICH, Circuit Judge, dissenting.

I respectfully dissent because I do not believe the district court abused its discretion in its evidentiary rulings excluding testimony. At the outset, I agree that the district court’s ruling is difficult to decipher, especially looking solely at the minute order. In the context of the trial, however, I think the court’s ruling is clear enough—the proffered testimony from other employees failed to satisfy the relevancy and prejudice requirements of Rule 403. Moreover, I believe the majority makes a mistake in holding that testimony from other employees not similarly situated is admissible even where the plaintiff has made no independent showing of a company-wide policy of discrimination.

A.

A brief review of the evidence the court admitted will place its ruling in perspective. First, despite its pre-trial ruling regarding the witness testimony, the court admitted Exhibits 3 and 4, voluminous documents from Sprint’s “succession planning” file, including notes on employees slated for termination pursuant to the company-wide RIF. Both exhibits show that Sprint kept information on the gender, ethnicity and age of employees alongside other information on their performance and perceived “potential.”

Second, the court also allowed testimony regarding the RIF dismissal of Marc Elster, one of Reddick’s peers who was 51 at the time of his termination.

This evidence shows that the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination proffered by Mendelsohn.

***

Finally, in addition to admitting actual evidence of pretext, the district court rejected a jury instruction proffered by Sprint, which would have instructed jurors to consider only evidence about employees similarly situated to Mendelsohn. The court explained that evidence outside of Reddick’s chain of command had been allowed to come in as relevant to the question of pretext.

In sum, it appears to me that the plaintiff had an adequate opportunity to introduce relevant evidence of Sprint’s corporate
policies and practices surrounding the RIF and argue that the RIF was itself a pretext for age discrimination. I am further convinced of this after studying the proposed testimony of the five witnesses proffered by Mendelsohn and excluded by the district court. Their proposed testimony seems a mixture of hearsay and speculation that would be marginally admissible in any event. I cannot say that the court erred in excluding such testimony under the standards of Rule 403.

I readily admit that the court would not have erred in admitting the evidence. see, e.g., Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990), but I am equally confident that the court did not abuse its discretion in choosing to exclude it.

B.

The larger problem with the majority’s position is it suggests that anecdotal evidence from employees throughout a large organization will be per se admissible when offered in the context of alleged discrimination in a RIF. This appeal illustrates the hazard of such an approach for several reasons.

The first reason is the lack of any statistical or other direct evidence that supports an inference of enterprise-wide discrimination. Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had company-wide discriminatory policies. Even taking as true Mendelsohn’s assertion that these witnesses would provide credible evidence that managers other than Reddick were motivated by discriminatory animus, this does not in and of itself support the conclusion that Reddick was so motivated. Nor does it establish that the RIF’s “subjective criteria” was a pretext for age discrimination. While Sprint may well have had policies designed to discriminate against older employees, without more, the excluded testimony does nothing to establish that fact, nor does it directly support an inference that Mendelsohn’s termination was wrongfully motivated. See Carpenter v. Boeing Co. 456 F.3d 1183 (10th Cir. 2006) (discussing use of statistical evidence to support claim of disparate treatment). The evidence must tend to show that the company had a policy to discriminate, not merely a policy applied in a discriminatory manner by an individual supervisor or supervisors.

The second and more important hazard of the majority’s approach is the narrow reading it gives to Aramburu. The so-called “same supervisor” rule articulated in that case recognizes that where an employee has putatively been fired for the violation of a workplace rule, an inference of discrimination is more likely where the same supervisor disciplines similarly situated employees differently. Aramburu v. The Boeing Co., 112 F.3d 1398, 1403 (10th Cir. 1997).

But it is equally plausible that an employer could have a company-wide policy of using disciplinary actions as a pretext for unlawful discrimination. In such a case, I suspect we would modify the applicable relevancy standard in order to account for and allow evidence of a company-wide policy.

I would do the same in the RIF context and apply the Aramburu rule in cases like this one unless “independent evidence of specific enterprise-wide policy” has been developed. Rivera v. City and County of
Since Mendelsohn did not establish a foundation that the proffered evidence would support such a finding, and since she otherwise had the opportunity to present evidence to the jury of other older employees subject to the RIF, the district court did not abuse its discretion in excluding the additional witness testimony.

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I would do the same in the RIF context and apply the Aramburu rule in cases like this one unless "independent evidence of specific enterprise-wide policy" has been developed. Rivera v. City and County of Denver, 365 F.3d 912, 922 (10th Cir. 2004). Since Mendelsohn did not establish a foundation that the proffered evidence would support such a finding, and since she otherwise had the opportunity to present evidence to the jury of other older employees subject to the RIF, the district court did not abuse its discretion in excluding the additional witness testimony.
The U.S. Supreme Court will use an age-bias lawsuit against Sprint Nextel Corp. to consider limiting the ability of workers to present evidence of discrimination against other employees at trial.

The justices today agreed to hear arguments from Sprint, the nation’s third-largest mobile-phone service provider, in its bid to end an age-bias lawsuit by Ellen Mendelsohn, who lost her job as a manager during layoffs in 2002. Sprint wants the court to reinstate a jury verdict in the company’s favor.

The court will consider the admissibility of what Sprint calls “me, too” evidence—testimony by other alleged victims of discrimination. In ruling against Sprint, a federal appeals court said five of Mendelsohn’s former coworkers should have been allowed to testify in the case.

“For the trial to be fair, district judges must retain the discretion to declare that such proof, whatever its marginal probative value, is unfairly prejudicial,” Sprint argued in court papers, filed in Washington.

AT&T Inc., Honeywell International Inc. and Lockheed Martin Corp. joined Sprint in urging the high court to take up the case, saying the issue is a recurring one in employment-discrimination lawsuits.

In siding with Mendelsohn and ordering a new trial, the Denver-based 10th U.S. Circuit Court of Appeals said the testimony was relevant because the other workers lost their jobs as part of the same layoff. Like Mendelsohn, all five worked for Sprint in Kansas City, Kansas, though they didn’t report to her supervisor.

“The 10th Circuit, like other courts of appeals, addresses on a case-by-case basis the relevance of anecdotal evidence of other discrimination,” argued Mendelsohn, who was 51 when she was fired.

Sprint is based in Reston, Virginia.

The justices will hear arguments during their 2007-08 term, which starts in October.

The case is *Sprint/United Management v. Mendelsohn*, 06-1221.
Workers who believe they lost a job or a workplace opportunity because of their age must offer proof that their age was the motivating factor for what happened to them. Since there is seldom direct evidence of the employer's mindset, lawyers for workers in such cases try to prove a general propensity in the management of the company to favor younger workers. On Monday, the Supreme Court said it will consider, at its next Term, whether a worker claiming discrimination under the Age Discrimination in Employment Act can bring other workers into the case to testify that they, too, were victims of age bias on the job—so-called "me, too" evidence. The other workers would not have been in the case as actual parties, but were available to tell their stories to help prove the claim. (The new case does not involve a claim of a pattern or practice of discrimination based on age, but only a single worker's claim.)

The case[, Sprint/United Management v. Mendelsohn,] involves Ellen Mendelsohn, who worked for a company in Kansas City, Mo., named Sprint/United Management Co. (a subsidiary of Sprint Nextel Corp.) She was on the payroll there from 1989 to November 2002, working in business development activities.

In the fall of 2002, the Sprint unit, hit by the recession that generally spread through the telecom industry, decided to downsize its payroll. Other Sprint units elsewhere were also involved in the cutback, with the release of some 15,000 workers.

Mendelsohn, at the time, was 51 years old. She was laid off—one of 18 persons in her group who lost their jobs in the downsizing. Sprint later claimed that her performance had been weak, and that is why she was included in the group that got laid off. She claimed age bias was the controlling factor, charging company-wide discrimination against older workers. The Equal Employment Opportunity Commission rejected her challenge, finding no evidence of an ADEA violation. She thus was free to sue, and did so.

She asserted in her lawsuit that the bias against her was typical for the Sprint unit. Her lawyers then began assembling proof for the trial.

Mendelsohn's counsel sought to call five other ex-employees of Sprint, all within the 40-and-over age range—the range protected by ADEA from discrimination. They, too, were ready to testify that they also were victims of discrimination, as was Mendelsohn. Sprint lawyers objected, arguing that they were not in the same situation as Mendelsohn, because none of them had worked for the supervisor who made the decision to lay off Mendelsohn. The District Court ruled that only workers laid off by the same supervisor could be called to testify on Mendelsohn's claim, so it barred the prospective witnesses on her side. The case went to a jury, and it ruled in favor of Sprint, finding no discrimination against Mendelsohn.

The case then moved to the Tenth Circuit, which ruled in a 2-1 decision last Nov. 1 that a District Court trying an ADEA case must
admit any testimony of other workers who claimed to suffer the same sort of bias against them—even if they had worked for a different supervisor, or in a different work unit for the same employer. While the Circuit Court said that, in the past, it had limited testimony in a job bias case to that of other workers who had the same supervisor, it stressed that the prior case involved only a claim of discriminatory disciplinary actions, and it had never applied that restriction in any other workplace context.

If “me, too” evidence were excluded when different supervisors were involved, the Circuit Court said, that would make it significantly more difficult in many circumstances to prove discrimination based on circumstantial evidence. Conceivably, an individual worker might be the only employee chosen for a reduction in force by a particular supervisor, but scores of other workers within the 40 and older group might have been treated the same way by other supervisors.

Sprint/United’s petition for review raises this question: “whether a district court must admit ‘me, too’ evidence—testimony by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.” It contends that the Tenth Circuit ruling conflicts with decisions in other circuits—four holding that such evidence is wholly irrelevant, and five excluding it under the Federal Rules of Evidence. The issue, the appeal said, is a recurring question of proof in workplace discrimination cases.

The appeal is supported by the Equal Employment Advisory Council and the Society for Human Resource Management. They contended that admission of “me, too” evidence will prolong litigation in workplace cases, and will unfairly prejudice management as it seeks to defend itself, since management would be forced to justify every other employment decision it had made against any worker who is allowed to come in and testify.

The case will be briefed over the summer, and will be heard sometime in the fall or early winter.