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V. CIVIL RIGHTS

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Pleasant Grove v. Summum

07-665


Summum, a religious organization, requested to place a monument in a Pleasant Grove city park. The monument would display the beliefs of the Summum, known as the “Seven Aphorisms.” The park already contained monuments including one of the Ten Commandments donated by the Fraternal Order of Eagles. The city denied the request and codified its policy regarding monuments to be displayed in parks. Summum brought suit claiming that the city’s policy violated the First Amendment. The district court denied preliminary injunctive relief because Summum could not prove that it would prevail on First Amendment grounds. The Tenth Circuit reversed and ordered the city to immediately erect and display the “Seven Aphorisms” monument.

Questions Presented: (1) Whether a monument donated to a city park remains protected speech of the donor, even though the monument is displayed and controlled by the municipality. (2) Is a municipal park a public forum under the First Amendment for erection and permanent display of monuments proposed by private parties? (3) Did the Tenth Circuit err by ordering the immediate erection and display of the plaintiff’s monument?

SUMMUM, a corporate sole and church, Plaintiff-Appellant
v.
PLEASANT GROVE CITY, Defendant-Appellee

Court of Appeals of the Tenth Circuit

Filed April 17, 2007

[Excerpt: Some footnotes and citations omitted.]

TACHA, Chief Circuit Judge.

The Plaintiff-Appellant Summum, a religious organization, filed suit under 42 U.S.C. § 1983 for violation of its First Amendment rights against the Defendants-Appellees, the City of Pleasant Grove, its mayor, city administrator, and city council members. Summum appeals the District Court’s denial of its request for a preliminary injunction. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and reverse the District Court’s decision.

BACKGROUND

A city park in Pleasant Grove, Utah, contains a number of buildings, artifacts, and permanent displays, many of which relate to or commemorate Pleasant Grove’s pioneer history. For example, the park contains one of Pleasant Grove’s first granaries, its first city
hall, and its first fire department building. For purposes of this appeal, the most important structure is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971, two years after it established a local chapter in Pleasant Grove.

In September 2003, Summum, a religious organization with headquarters in Salt Lake City, Utah, sent the mayor of Pleasant Grove a letter requesting permission to erect a monument containing the Seven Aphorisms of Summum in the city park. In its letter, Summum stated that its monument would be similar in size and nature to the Ten Commandments monument already present in the park. Approximately two months after Summum made its request, the mayor sent Summum written notification that the city had denied its request because the proposed monument did not meet the city’s criteria for permanent displays in the park. According to the letter, all permanent displays in this particular park must “directly relate to the history of Pleasant Grove” or be “donated by groups with long-standing ties to the Pleasant Grove community.” The following year, in August 2004, the city passed a resolution codifying and expanding upon its alleged policy for evaluating requests for permanent displays in the park. The resolution contains a number of factors the city council must consider in deciding whether a proposed display meets a historical relevance requirement. In May 2005, Summum renewed its request, sending the mayor another letter with substantially the same language as the first letter.

When the city did not respond to its second request, Summum filed suit in federal district court seeking declaratory and injunctive relief, as well as monetary damages, for Pleasant Grove’s violation of Summum’s free speech rights under the U.S. Constitution and for the city’s violation of the Utah Constitution’s free expression and establishment provisions. Summum contends that the city violated its rights by excluding its monument while allowing other permanent monuments of an expressive nature (e.g., the Ten Commandments) to be displayed in the park. In an oral ruling on various motions, the District Court denied Summum’s request for a preliminary injunction requiring the city to permit the display of Summum’s monument in the park. Summum subsequently appealed this decision, arguing that the District Court abused its discretion in denying the injunction based on Summum’s First Amendment claim.

DISCUSSION

I. Preliminary Injunction Standard

We review a district court’s decision to deny a motion for a preliminary injunction for abuse of discretion, which we have characterized as “an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.” Schrier v. Univ. of Colorado, 427 F.3d 1253, 1258 (10th Cir. 2005). “A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings.” Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1252 (10th Cir. 2006). In reviewing the district court’s decision, “[w]e examine the . . . court’s underlying factual findings for clear error, and its legal determinations de novo.” Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002).

To prevail on a motion for a preliminary injunction in the district court, a moving party must establish that:

1. [he or she] will suffer irreparable injury unless the injunction issues;
2. the threatened injury . . .
outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

But because a preliminary injunction is an extraordinary remedy and is intended “merely to preserve the relative positions of the parties until a trial on the merits can be held,” we have held that the moving party must meet a heightened standard when requesting one of three types of historically disfavored injunctions.

The three types of disfavored injunctions are “(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.” O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (en banc). When a preliminary injunction falls into one of these categories, it “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” Id. A district court may not grant a preliminary injunction unless the moving party “make[s] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.” Id. at 976.

In this case, the preliminary injunction clearly falls within two categories of disfavored injunctions: it alters the status quo and is mandatory. An injunction alters the status quo when it changes the “last peaceable uncontested status existing between the parties before the dispute developed.” Schrier, 427 F.3d at 1260 (quotations omitted). The last uncontested status between Summum and Pleasant Grove was one of no relationship between the two parties. Because Summum’s monument is not currently displayed in a Pleasant Grove city park, an injunction ordering Pleasant Grove to permit the display of Summum’s monument clearly changes the status quo. In addition, by requiring the city to make arrangements for the display of Summum’s monument, an injunction would mandate that the city act and would require the district court to supervise the city’s actions to ensure it abides by the injunction. Because an injunction would “affirmatively require” Pleasant Grove “to act in a particular way” and would require ongoing court supervision, it is a mandatory injunction. Because the injunction falls into two disfavored categories, Summum must have made “a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms” to prevail on its motion at the district court level.

Based on the record, we cannot discern whether the District Court applied this heightened standard. In its oral ruling, the court simply noted that it denied Summum’s motion because it failed to establish a substantial likelihood of success on the merits. The court did not analyze the other three factors or explicitly state that it applied a heightened standard to Summum’s request. But even if the District Court concluded that Summum could not prevail using the lesser standard, it certainly would reach the same conclusion under the heightened standard. Although the “failure of the district court to apply the correct standard” to a request for a preliminary injunction “amounts to an abuse of discretion,” any abuse in this case was in Summum’s favor. We therefore assume that the District Court applied the heightened standard and review the court’s legal conclusions and findings of fact for abuse of discretion.
II. Preliminary Injunction Analysis

In its oral ruling on Summum’s motion for a preliminary injunction, the District Court indicated that Summum would not prevail on the merits if Pleasant Grove proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral. After finding that the facts regarding the city’s policy (or lack thereof) were in dispute, the court concluded that Summum had not established a substantial likelihood of success on the merits. It therefore denied Summum’s motion without addressing the other three factors required for issuance of a preliminary injunction.

As we explain below, the District Court abused its discretion by analyzing Summum’s First Amendment claim under the incorrect legal standard. But rather than remanding to the District Court for the appropriate analysis, we find the record sufficiently developed to allow us to determine whether Summum has met its burden under the four factors necessary to prevail on its motion.

A. Substantial Likelihood of Success on the Merits

1. Identifying the nature of the relevant forum

To determine the appropriate First Amendment standard under which to review the city’s denial of Summum’s request, the reviewing court must engage in a “forum analysis.” The characterization of the forum at issue is crucial because “the extent to which the Government can control access depends on the nature of the relevant forum.” Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). In identifying the relevant forum, the court looks at both “(1) the government property to which access is sought and (2) the type of access sought.” Summum v. City of Ogden, 297 F.3d 995, 1001 (10th Cir. 2002). In this case, Summum seeks to display its monument among other monuments in Pleasant Grove’s city park. The permanent monuments in the city park therefore make up the relevant forum.

Having identified the relevant forum, the reviewing court must also determine whether the forum is public or nonpublic in nature. In general, the forum will fall into one of three categories:

(1) a traditional public forum (e.g., parks and streets), (2) a designated public forum (i.e., the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now “designated public forum”), or (3) a nonpublic forum (i.e., the government retains the right to curtail speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum’s particular official uses).

In the case before us, the District Court indicated that the applicable analysis is whether Pleasant Grove’s policy is reasonable and viewpoint neutral. The court therefore analyzed the city’s actions using the standard associated with a nonpublic forum.

The city park is, however, a traditional public forum. Indeed, the Supreme Court has characterized streets and parks as “quintessential public forums,” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983), because people have traditionally gathered in these places to exchange ideas and engage in public debate:
In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Id. Because the park is a public forum, the city’s restrictions on speech are subject to strict scrutiny.

Moreover, the city cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action. In short, the nature of the forum in this case is public.

Pleasant Grove contends that our decisions in City of Ogden and Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997), support its argument that the monuments and other structures in the city park constitute a nonpublic forum. But in both City of Ogden and Callaghan, the property at issue could not be characterized—by tradition or government designation—as a public forum. City of Ogden, 297 F.3d at 1002; Callaghan, 130 F.3d at 916-17. Conversely, in the present case, the property is a park, the kind of property which has “immemorially been held in trust for the use of the public.” Hague, 307 U.S. at 515. In this way, the present case more closely resembles the facts in Eagon. In Eagon, individuals sued Elk City for violation of their free speech rights after the city excluded their display from “Christmas in the Park,” an annual event during which individuals and groups were allowed to erect displays in Ackley Park. 72 F.3d at 1483. In conducting our forum analysis, we characterized the relevant forum as “Ackley Park during the ‘Christmas in the Park’ event” and held that the forum was a traditional public forum, in which “content-based restrictions on speech are valid only if necessary to serve a compelling state interest and if narrowly drawn to achieve that end.” Id. at 1487. Similarly, the fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the nature of that forum.

By applying the standard associated with a nonpublic forum, the District Court committed an error of law. In a nonpublic forum, content-based restrictions on speech are permissible as long as they do not discriminate on the basis of the speaker’s viewpoint and are reasonable. Perry Educ. Ass’n, 460 U.S. at 49. But in a public forum, content-based restrictions are presumptively invalid. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). In order for a content-based restriction to survive strict scrutiny, the government must “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” Perry Educ. Ass’n, 460 U.S. at 45. As we explain below, Pleasant Grove has failed to justify its restriction on speech under this standard.

[In a footnote, the court notes exceptions the Supreme Court has found, but asserts that the Supreme Court has not extended those exceptions to the context of the present case, so “the case is best resolved through the application of established forum principles.”]

2. Application of strict scrutiny to content-based restrictions in a traditional public forum

Pleasant Grove concedes that its restriction on speech in the park is content based. By requiring that monuments meet the city’s historical relevance criteria, the city excludes
monuments on the basis of subject matter and the speaker's identity. Because the city's restrictions are content based, they may not be analyzed under the less exacting intermediate scrutiny applied to content-neutral restrictions regulating the time, place, or manner of expression in public forums.

We must therefore determine whether Pleasant Grove has demonstrated that application of its historical relevance criteria will, "more likely than not, be justified by the asserted compelling interests." Gonzales, 126 S. Ct. at 1219. Even though the injunction in this case is disfavored and Summum's request is therefore analyzed under a heightened standard, in the context of a First Amendment challenge, Pleasant Grove bears the burden of establishing that its content-based restriction on speech will "more likely than not" survive strict scrutiny. See Ashcroft, 542 U.S. at 666 ("As the Government bears the burden of proof on the ultimate question of [the restriction's] constitutionality, [the moving party] must be deemed likely to prevail unless the Government has shown that [the moving party's] proposed less restrictive alternatives are less effective than [the restriction].").

Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum's monument. The only interest Pleasant Grove asserted is an interest in promoting its history. The city's failure to offer any reason why this interest is compelling is sufficient for Summum to meet its burden in demonstrating a substantial likelihood of success on the merits.

But even if we assume that Pleasant Grove's stated interest is compelling, the city has also failed to establish that the content-based exclusion of Summum's monument is "necessary, and narrowly drawn," to serve the city's interest in promoting its history. As the Supreme Court has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the effect of the regulation into the governmental interest.

Furthermore, the city may not use content-based restrictions to advance a particular ideology. The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas.

In addition to the city's stated interest in promoting its history, the 2004 city resolution governing monuments in the park contains aesthetic and safety justifications for the speech restriction. Cities have substantial interests in the aesthetic appearance of their property. To further these interests, Pleasant Grove may pass a reasonable content-neutral resolution regulating the time, manner, or place of speech in the park. For example, it could ban all permanent displays of an expressive nature by private individuals.

Here, however, the city has furthered its objectives by passing a content-based resolution, which excludes all speech that does not meet its historical relevance criteria; the resolution is therefore subject to strict scrutiny. We need not decide whether the city's interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests. The city has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content. Rather, the distinction between monuments with particular historical content and monuments lacking this content "bears no relationship whatsoever" to the resolution's stated
interests in aesthetics and safety. The city may not burden speech that does not present the danger the regulation seeks to address: “Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.”


Summum’s monument is similar in size, material, and appearance to the Ten Commandments monument already displayed in the park. The city’s exclusion of the monument based on its content cannot be justified by an interest in aesthetics or safety.

Because Pleasant Grove has not demonstrated that application of its historical relevance criteria is more likely than not to be justified by its stated interests, we conclude that Summum has established a substantial likelihood of success on the merits and proceed to a determination of whether Summum has satisfied its burden under the remaining three factors necessary for a preliminary injunction.

**B. Irreparable Injury**

The second factor we must consider in determining whether Summum is entitled to a preliminary injunction is whether Summum will suffer irreparable harm if denied an injunction. Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, (1976). For this reason, we have assumed irreparable injury when plaintiffs are deprived of their commercial speech rights even though restrictions on commercial speech are subject to intermediate scrutiny, not strict scrutiny as in the case before us. If we can assume irreparable harm in the context of commercial speech, we can surely assume irreparable harm when the government deprives an individual of speech in a traditional public forum subject to the highest scrutiny. Given the character of the deprivation in this case (i.e., exclusion from a traditional public forum), we hold that Summum has established it will suffer irreparable harm if the injunction is denied.

**C. Balance of Harms**

Next, we consider whether the First Amendment injury to Summum outweighs any prospective injury to Pleasant Grove in the event the injunction is granted. Pleasant Grove argues that it will suffer substantial harm because, if Summum is allowed to display its monument, the city will be inundated with requests from other individuals and the park will be flooded with monuments. But the city’s potential harm must be weighed against Summum’s actual First Amendment injury. The record contains no evidence to support Pleasant Grove’s contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park. The city’s speculative harm cannot outweigh a First Amendment injury, especially because Summum has established a substantial likelihood of success on the merits. We therefore hold that Summum has made a strong showing with regard to the balance of harms.

**D. Public Interest**

Lastly, we consider whether granting the injunction would be contrary to the public interest. We have held that preliminary injunctions which further plaintiffs’ free speech rights are not adverse to the public interest. Because an injunction requiring the city to permit the display of Summum’s
monument will further free speech rights, the injunction is clearly in the public interest.

CONCLUSION

We hold that Summum has met its burden under all four factors necessary for a preliminary injunction and has made the strong showing required under the heightened standard for disfavored injunctions.

[REVERSED AND REMANDED.]
These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007. The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. See Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O’Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order.

Because the panel’s opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel’s opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute
government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. *Wells v. City & County of Denver*, 257 F.3d 1132, 1141-43 (10th Cir. 2001). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-06 (10th Cir. 2002). It follows that these cases necessarily implicate government regulation of private speech.

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *City of Ogden*, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. *Pleasant Grove*, 483 F.3d at 1050; *Duchesne*, 482 F.3d at 1269. The panel's claim that access “is relevant in defining the forum, but ... does not determine the nature of that forum,” *id.* at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. *See Cornelius*, 473 U.S. at 801. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). *Perry* also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. *See Cornelius*, 473 U.S. at 801 (“*Perry* ... examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situ.”) (citation omitted). As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are “quintessential public forums,” *see Perry*, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In *Perry*, the Court noted that parks are “places which by long tradition or by government fiat have been devoted to assembly and debate,” and “which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.* (quotation omitted) (emphasis added). ...
short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City’s Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land....

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-107 (2001); City of Ogden, 297 F.3d at 1002 n.4; Callaghan, 130 F.3d at 914. In the present cases, the city governments have not allowed the kind of “general access” or “indiscriminate use” of park property that is a hallmark of a designated public forum. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-107 (2001); City of Ogden, 297 F.3d at 1002 n.4; Callaghan, 130 F.3d at 914. In the present cases, the city governments have not allowed the kind of “general access” or “indiscriminate use” of park property that is a hallmark of a designated public forum. Summum v. Callaghan, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (citing Cornelius, 473 U.S. at 803; Perry, 460 U.S. at 47). Instead, they have “create[d] a channel for a specific or limited type of expression where one did not previously exist,” Child Evangelism Fellowship, 457 F.3d at 382, and have thus established limited public fora. As discussed supra, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only “selective access to some speakers or some types of speech in a nonpublic forum.” Callaghan, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes—in the case of Pleasant Grove, to memorialize the city’s history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks. Cornelius, 473 U.S. at 806.

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel’s faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel’s legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

These opinions hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow
the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content—unless their reasons for refusal rise to the level of "compelling" interests. See Summum v. Duchesne City, 482 F.3d 1263, 1274 (10th Cir. 2007); Summum v. Pleasant Grove City, 483 F.3d 1044, 1054 (10th Cir. 2007). . . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Significantly, the religious nature of the donated monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks—as "traditional public forums"—must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but—contrary to these opinions—the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the Duchesne case, the Ten Commandments monument is apparently the only fixed monument in the park. In Pleasant Grove, the other permanent structures and monuments "relate to or commemorate Pleasant Grove's pioneer history." 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in these parks. It follows that any messages conveyed by the monuments they have chosen to display are "government speech," and there is no "public forum" for uninhibited private expression.

In Van Orden v. Perry, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a state display, and applied Establishment Clause doctrines applicable to government speech. Id. at 692 (calling the monument "Texas' display"). Various courts of appeals have reached the same conclusion on similar facts. ACLU Nebraska Foundation v. City of Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005) (Eagles monument "installed . . . by the City" and counted as "City’s display");
Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state).

Our own leading precedent on government speech confirms these holdings. Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city’s holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141-42. Wells employed a four-part analysis derived from the Eight Circuit’s Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio. In both Wells and Knights, the governmental or private character of the speech was in doubt because “ownership” could not be clearly established. Did the holiday decor belong to the city or to the private donors in Wells? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than Wells, because ownership of the “speech” in these cases is clear: the Ten Commandments monument in Duchesne was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in Pleasant Grove was donated by the Fraternal Order of Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the Wells test would nonetheless be dispositive: The cities exercised total “control” over the monuments, 257 F.3d at 1141, and they bore “ultimate responsibility” for the monuments’ contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that—sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266-67. Cf. Serra v. U.S. General Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from Wells is that in the Summum cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in Wells Denver bore “ultimate responsibility for the content of the display.” 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel’s forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public
forums, but the government's "own speech . . . is controlled by different principles." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995). Specifically, "when the State is the speaker, it may make content-based choices." Id. at 833. See also Rust v. Sullivan, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause—and need not alter its speech to accommodate the views of private parties. Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000) . . . In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

Other circuits have reached this conclusion in similar cases. See Tucker v. City of Fairfield, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."). . . .

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court's recent decisions in McCreary County v. ACLU, 545 U.S. 844 (2005), and Van Orden v. Perry, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels' decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decisions should be corrected.

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the
support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?

As Supreme Court precedent makes clear, the type of speech does not, and should not, determine the nature of the forum. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993). . . . If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. See id. at 429-30 (“It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.”); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995). . . .

Judge McConnell’s dissent would have us ignore these well-established forum principles when the government does not “by word or deed” create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical medium of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks The Great Gatsby is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government’s ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts). We note this distinction in both opinions. Summum v. Pleasant Grove City, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007); Summum v. Duchesne City, 482 F.3d 1263, 1269 n.2 (10th Cir. 2007). In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning all permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. See, e.g., Johanns v. Livestock Marketing Ass’n, 544 U.S. 550, 560 (2005). . . . The four-factor approach to government speech that we adopted in Wells v. City and County of Denver, 257 F.3d 1132, 1140-42 (10th Cir. 2001), reflects the Supreme Court’s focus on whether the message is the government’s own. But contrary to Judge McConnell’s dissent, we said nothing in Wells that suggests our
government speech inquiry turns on the ownership of the physical medium conveying the speech at issue. Indeed, the second Wells factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the content of that speech. See id. at 1142. A city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell's dissent advocates, and it is most apparent in the dissent's equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing Van Orden v. Perry, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a “state display” for purposes of the Establishment Clause. See id. at 692 (holding that “Texas’ display of this monument” did not violate the Establishment Clause). The simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government displays a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. See Pleasant Grove City, 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). Van Orden and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state action violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the message that monument conveys into state speech.

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. . . .

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly contrary to established First Amendment principles. See Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795-96 (4th Cir. 2004). . . . Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.
“With the Commandments, Must City Make Room?”

Washington Post
April 1, 2008
Robert Barnes

The Supreme Court said yesterday that it will decide whether a city’s decision to place a monument to the Ten Commandments in a public park means it also must make room for the display of other directives purportedly sent from above.

In this case, [Pleasant Grove v. Summum,] a religious group that operates from a pyramid outside Salt Lake City wants to place what it calls the Seven Aphorisms in a city park, contending that the words are lesser-known instructions that Moses received from God.

Pleasant Grove City, Utah, said no. But a federal appellate court has agreed with the religious group Summum—founded in 1975 by its leader, Summum “Corky” Ra—that if a city accepts the Ten Commandments, it opens itself to requests from others and may not discriminate.

Unlike the Supreme Court’s most recent cases over government display of the Ten Commandments, the Utah case is a free-speech challenge that does not involve the Constitution’s provision on establishment of religion. It will be heard next term.

Pleasant Grove City, one of several Utah municipalities that received monument requests from Summum, is represented by Jay Sekulow of the American Center for Law and Justice.

It said in a statement that letting the lower court’s ruling stand “could force local governments across the country either to dismantle a host of monuments, memorials, and other displays including long-standing patriotic and historical displays” or open up the public spaces “to all comers.”

The city says that once it accepted the Ten Commandments from the Fraternal Order of Eagles in 1971, the display became “government speech” rather than private speech, and it does not have to be balanced with other viewpoints.

“In short, accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny,” the city’s brief said, nor would erecting a monument to a war hero allow the display of a monument denouncing war.

But a panel of the U.S. Court of Appeals for the 10th Circuit in Denver said the city did not come up with the monument to the Ten Commandments, a private group did. Its placement in a public park, a traditional venue for public speech, meant that government could not discriminate if other groups wished to display their beliefs. The full appeals court split 6 to 6 on the issue, which meant the panel’s ruling held.

Washington lawyers Pamela Harris and Walter Dellinger, representing Summum, urged the court not to review what they said was a “narrow and fact-specific decision” and said there is no reason to believe that “a plague of offensive monuments will clutter public spaces throughout the country” if the ruling is allowed to stand.
The 10th Circuit Court of Appeals in Denver has denied a request for a larger rehearing on the issue of the Summum religious group’s ability to erect a display next to displays of the Ten Commandments in the city parks of Duchesne and Pleasant Grove.

In a published opinion issued Friday evening, 10th Circuit judges were split 6-to-6 on whether to grant requests by Duchesne and Pleasant Grove cities to have all 12 of the 10th Circuit judges rehear the case.

Called an “En Banc” hearing, a panel of all 12 appellate judges can hear a case. Such a decision carries some heavy legal weight, which can impact other appellate courts across the country.

A three-judge panel of the 10th Circuit handed down a decision last April that determined that members of Summum had a right under the First Amendment of the U.S. Constitution to erect a display of its Seven Aphorisms next to displays of the Ten Commandments.

The ruling was similar to one the 10th Circuit issued in 2002 against Ogden City, forcing the city to relocate its display of the Ten Commandments onto nearby private property. All three city displays were donations from the Fraternal Order of Eagles many years ago.

Friday’s tie vote lets stand the appellate court’s decision.

The group Summum claims its religion is based on traditions dating back to the ancient Egyptians.
PLEASANT GROVE—A monument listing the Seven Aphorisms of the Summum faith could soon accompany a monument to the Ten Commandments in Pioneer Park.

A ruling released Tuesday by the 10th U.S. Circuit Court of Appeals says the group has a right under the First Amendment to display a monument in the park until a lawsuit between the Summum faith and Pleasant Grove city is resolved.

Now city officials must decide if they will appeal the preliminary injunction, remove their existing monument or do nothing.

“We’re still trying to figure out what the rationale behind the ruling was and what exactly it was (the 10th U.S. Circuit Court) ruled against,” said Pleasant Grove Mayor Mike Daniels. “Until we get those details, we won’t have an answer.”

If the city does nothing, a new monument representing the Summum philosophy could appear in the park, which the city says has been established to host historical relics that are of significance to the city.

If the city appeals the process, the preliminary injunction will not take effect until a secondary decision is made. If the city removes its monument, it is likely the Summum group will no longer pursue its lawsuit, said Summum attorney Brian Barnard of the Utah Legal Clinic in Salt Lake City.

“That changes the situation drastically because our presentation is, if (Pleasant Grove) is allowing one person to (display a monument) in the city park, they can allow everybody, but if they’re not going to allow everybody, that changes the landscape dramatically,” Barnard said. “It may well be that Pleasant Grove says, ‘We’ll just take the monument down,’ but that’s not my client’s desire. Their desire is to be able to put up their monument and share their Seven Aphorisms with the world just like the Ten Commandments are shared with the world.”

The Seven Aphorisms of the Summum faith—which was founded in Utah in 1975—deal with the principles of psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect and gender. The philosophy also incorporates modern mumification.

According to Daniels, the aphorisms are not appropriate for the park because they do not represent a connection to the community. The Ten Commandments monument was donated by the Fraternal Order of Eagles, whose members performed hours of service for the city, Daniels said. If the city were to remove the existing monument to avoid erecting the aphorisms, Daniels said, residents would likely be upset.

“I think there’s already a sense of concern from the majority of people in the area that somehow their rights are being infringed upon by a minority that’s not even represented here in the area, and I’d have to agree with them from that perspective,” Daniels said. “I think the community would not react favorably.”

The Summum group originally approached Pleasant Grove in 2003 with the request that
it be allowed to erect a monument. Pleasant Grove denied the group’s proposal, and a lawsuit ensued in 2005.

The city is now joined with Duchesne, which also has a Ten Commandments monument in its city park, in a court battle against the Summum group.

“My understanding is that (the lawsuit is), for lack of a better word, a scavenger hunt for Ten Commandments monuments in the state, to try to have them removed,” said Edward White III, an attorney with the Thomas More Law Center in Michigan, who is representing Duchesne and Pleasant Grove. “There were nine monuments on public properties in Utah in the beginning, and now there are only two left.”

According to a Web site run by Summum, the group believes the Seven Aphorisms were received on a tablet by Moses before he received the Ten Commandments. When Moses saw the Israelites were not prepared to accept the aphorisms, he broke the tablet and revealed its principles to a select few, they believe.

Although Barnard says the lawsuit has been pending until now, a trial date is scheduled to discuss the issue in September.
A monument declaring Summum’s Seven Aphorisms won’t be coming to a Pleasant Grove city park anytime soon.

During a hearing Wednesday, U.S. District Judge Dee Benson denied a motion by Summum for leave to erect their monument next to an existing Ten Commandments display.

The Salt Lake-based religious group is currently locked in a legal battle with the city of Pleasant Grove over the display. In a federal suit, the group says it has a constitutional right to erect its monument in a park owned by the city. But city officials say they have a long-standing, albeit unwritten, policy of only allowing monuments that pertain to the city’s history or by those with long-standing ties to the Pleasant Grove community. They say Summum lacks both of these.

Brian Barnard, attorney for Summum, said the park is a traditional public forum and that when the Fraternal Order of Eagles donated the Ten Commandments monument to the city around 1970, the group had only been in Pleasant Grove two years. Barnard said this challenges the city’s long-standing ties policy.

Barnard also pointed out that the city accepted a Sunstone taken from the LDS temple at Nauvoo, Ill., donated by a Pleasant Grove resident. The stone is displayed in the park, Barnard said.

Barnard argued that the city cannot be selective about what monuments it accepts based on the subject and cannot discriminate if they disagree with the subject.

Benson admitted the city has an “uphill road” in justifying the long-ties argument but historic relevance is a larger issue. Last year the U.S. Supreme Court ruled that displays of the Ten Commandments can be allowed on government property as long as the focus is on historic relevance, such as among a display of historic monuments. The Supreme Court ruled, however, that Ten Commandments displays that focus on religion are not allowed.

The comparison was made to Summum’s similar suit against Ogden over a similar monument outside the city’s old City Hall. That case went to the 10th Circuit Court of Appeals, which overturned a lower court ruling in favor of Ogden. The circuit court ruled that Ogden’s monument lacked historic significance and the monument was removed from city property and relocated nearby on private property.

A third lawsuit filed against Duchesne is pending before the 10th Circuit after city officials there deeded the land under the monument to a private citizen in an effort to avoid legal controversy.

Benson said if Pleasant Grove can prove its policy is “viewpoint neutral” then the city would prevail.
Attorney Francis Manion said there is a difference between expressing viewpoints verbally and erecting a permanent structure. Manion said he believes the city can prove that although the policy wasn’t written, it has been in place for decades.

Trying to have some sense of humor, Benson asked both sides if they could resolve the issue without his help. “Can you settle this thing?” Benson said. “Maybe you can let them have five commandments.”

Outside court, Manion said the serious reality is that the city and Summum are not likely to find a settlement and that the case is likely to go before Benson for a bench trial.
PLEASANT GROVE—Pleasant Grove could avoid pending litigation by allowing a Utah-based religious group to erect a monument near the city’s Ten Commandments display, says an attorney who has threatened the city with court action.

The group, Summum, wants to display its “Seven Aphorisms”—religious principles that guide Summum’s followers—in a Pleasant Grove park where a Ten Commandments monument has sat for more than 30 years.

“We would like to erect a monument similar in size and nature in that same city park,” said Summum President Ammon Ra in a letter to Pleasant Grove Mayor Jim Danklef. “Displaying our aphorisms along with the Ten Commandments would serve the public good and make the world a better place.”

Danklef said the city is still pondering whether it will challenge demands to remove the monument, but allowing Summum to build a monument will not be part of the decision. Summum officials had asked that the city respond to its request by yesterday.

“We haven’t answered them yet, but I don’t think we’ll do that (let them build a monument),” Danklef said. “We haven’t discussed it as a council. We think we’ve got some things going for us.”

The religious group, founded in 1975, has sought to build monuments denoting their Egyptian-based beliefs in other Utah cities where Ten Commandments monuments have figured into church-state separation litigation, including Salt Lake City and Ogden.

The 10th Circuit Court of Appeals in Denver ruled in 1997 in the Salt Lake case that the Ten Commandments monument could stay on public property surrounding the City-County building if Summum was allowed to erect its own monument. Salt Lake officials instead moved the monument to private land.

The group later filed suit against Ogden after city officials rejected a request to allow a “Seven Aphorisms” monument in a garden that also displayed the Ten Commandments. Ogden also chose to move its Ten Commandments monument onto private property.

Summum’s attorney, Brian Barnard—who has sent two letters to Pleasant Grove officials threatening court action—said he believes the religious group’s request fits into the concept the city attorney has suggested as a defense for keeping the monument. City attorney Christine Petersen said last week that because the Ten Commandments monument is in a park with other memorials and displays honoring the city’s heritage, the city believes a court challenge could be defeated. Barnard said adding Summum’s monument would broaden the park’s reach.

“A dispute over something like this does not do any good for the city or for the people of the city,” Barnard said.

Pleasant Grove received its Ten Commandments monument in 1971 from
the Fraternal Order of Eagles. Terry Carlson, a former president of the Pleasant Grove Eagles chapter, said Barnard is making an issue of something that really isn’t such a big deal.

“All he’s doing is getting a whole bunch of free publicity,” Carlson said. “He has nothing that he’s expecting to gain out of this, other than to have it moved.”

Salt Lake City attorney Frank Mylar said he is willing to help to keep the monument at its current location, an inconspicuous city park at 100 N. 100 East. Mylar is enlisting the help of Francis Manion, senior counsel at the American Center for Law and Justice. Manion is considered an expert in the defense of public displays of Ten Commandments monuments.

Carlson believes that even if the city enlists the help of national public interest law firms, the whole tiff is a big waste of time.

“I think he (Barnard) ought to find something better to do than go around looking for monoliths that aren’t hurting anybody or anything,” he said. “If he wants to complain or protest about something, tell him to protest about something that is worthwhile. This (the Ten Commandments monument) isn’t hurting anybody. All it can do is good.”
PLEASANT GROVE—Attorney Brian Barnard is out to rid city-owned land of monuments containing the Ten Commandments . . . if he can find them.

Barnard says a 1973 10th Circuit Court of Appeals lawsuit indicates there are nine Ten Commandments monuments in Utah—all donated by the Fraternal Order of Eagles (FOE) in the late ‘60s and ‘70s.

As of Tuesday, Barnard had located eight. His latest discovery sits inconspicuously behind an antique shop in a Pleasant Grove park at 100 N. 100 East.

“I wonder if Pleasant Grove felt slighted because no one was picking on them,” Barnard joked.

If that were true, a letter sent to Pleasant Grove Mayor Jim Danklef on Tuesday—threatening litigation if the stone monument is not moved to private property—has remedied the slight.

“It does come as a surprise to us,” said City Administrator Frank Mills. “We thought we had it in a pretty prominent position.”

“We are taking a look at the different options of what we think will best represent the citizens and feeling of Pleasant Grove,” he added.

The letter represents the latest move in an ongoing effort that started in 1994 to force cities and counties to remove religious emblems from public property. Proponents say the effort is meant to enforce church and state separation.

The effort initiated by the religious group Summum—which sought to erect a monument in Salt Lake City denoting their Egyptian beliefs alongside one of the donated Ten Commandment monuments—has resulted in the removal of six public monuments to private locations following lawsuits and threatened litigation.

In 1997, the 10th Circuit ruled in the Salt Lake case that the Ten Commandments monument could stay on public property only if Summum was allowed to erect its own monument containing the faith’s “Seven Aphorisms,” which include principles of vibration, opposition and psychokinesis.

Salt Lake moved its Ten Commandments monument to private property instead. Two years later, after a similar lawsuit, Ogden did the same. Other cities, fearing litigation, made pre-emptive moves.

“Our goal was to make certain that the Ten Commandments would not become something that would divide our community,” said Provo spokesman Mike Mower.

Provo moved its monument from city-owned Memorial Park to the corner of Tabernacle Park, which is owned by The Church of Jesus Christ of Latter-day Saints. Millimeters away from the busy intersection of Center Street and University Avenue, the
monument is prominently displayed for passing cars and pedestrians.

“We were thrilled to get the monument placed in an area where it is more visible,” Mower said.

Barnard, who is now working on behalf of the Society of Separationists, said he also hopes that people will pay attention to the monuments ... as long as they aren’t on city land.

In Pleasant Grove, however, it appears most people weren’t even aware of the monument.

“It’s in Pleasant Grove?” asked Debbie Wilkins, a parks and recreation employee unfamiliar with the monument. Her reaction is typical of most residents.

“Very, very few people know where it is at,” said Scott Carlson, secretary for the Pleasant Grove FOE aerie. “And if they look at it, they wouldn’t know what it is or where it came from.”

Carlson, who had few kind words for Barnard, said his group is willing to display the monument at the aerie but doesn’t see a conflict between church and state.

“We don’t feel it’s a religious thing,” Carlson said. “The Ten Commandments rule us all, no matter our religion.”

Barnard begs to differ.

“For Pleasant Grove to be displaying a commandment that says keep holy the sabbath and you should have no God before me—that tells me that Pleasant Grove is supporting a particular religious thought.”

And while Barnard searches for the elusive ninth monument, some residents wonder what his next targets might be. Perhaps cities with religion-linked names like Nephi or Moses Lake, Wash.?

“I guess it depends on which Moses they were named after,” Barnard responded.

Current status of eight Ten Commandment monuments donated by the Fraternal Order of Eagles:

- Ogden—lawsuit, moved to private property
- Salt Lake—lawsuit, moved to private property
- Murray—letter, moved to private property
- Tooele—letter, moved to private property
- Roy—letter, moved to private property
- Provo—moved to private property
- West Valley City—always on private property
- Pleasant Grove—letter, remains on public property
- The location of a ninth monument referred to in a 1973 10th Circuit Court of Appeals ruling is currently unknown.
Plaintiff worked for Defendant for thirty years. In 2002, defendant commenced an investigation into allegations of sexual harassment in the workplace. During the investigation, Plaintiff was interviewed and told investigators that she had been sexually harassed. The investigation concluded with a finding of inappropriate conduct, but no disciplinary action was taken. Following the conclusion of the investigation, Plaintiff and two other employees who reported harassment were fired. Plaintiff filed a charge with the EEOC, alleging unlawful retaliation for her participation in the investigation. The district court granted summary judgment for the defendant, and the Sixth Circuit upheld the judgment.

Question Presented: Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer’s internal investigation of sexual harassment?
2001, when Metro hired Dr. Gene Hughes as the employee relations director for the Metro School District. As employee relations director, Hughes was responsible for, inter alia, investigating complaints of discrimination. In May 2002, an attorney for the Metro Legal Department contacted the Human Resources Department after Jennifer Bozeman, an attorney with Metro Legal, learned from another Metro employee that there were several employees within the administrative offices that had expressed concern about specific incidents of inappropriate behavior by Hughes. Because Hughes would normally have been responsible for investigating complaints of sexual harassment, this complaint was instead brought to the attention of Dr. Pedro Garcia, the director of schools. Metro then assigned Veronica Frazier, the assistant director of human resources, to investigate the complaint. In carrying out the investigation, Frazier contacted employees who worked with Hughes in the Metro administrative offices and asked them to come to her office so that she could interview them. One of the employees so approached was Crawford.

In July 2002, Crawford went to the legal department as requested and Frazier questioned her about Hughes. Crawford told the investigators that Hughes had sexually harassed her and other employees. According to Crawford, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes’s actions. Frazier’s investigation concluded that Hughes had engaged in inappropriate and unprofessional behavior, though not to the extent of Crawford’s allegations. It appears that no disciplinary action was taken against Hughes; the investigators did recommend training and education for the staff.

According to Crawford, during the investigation, three employees made statements that Hughes had engaged in sexually inappropriate conduct, and after the sexual harassment investigation, these three employees were immediately investigated on other grounds and all promptly discharged. Crawford herself was terminated in January 2003 after having been accused of embezzlement and drug use, charges which she states were “ultimately found to be unfounded.” In June 2003, Crawford filed a charge of discrimination with the EEOC alleging retaliation, and after receiving her notice of right to sue, she brought this suit.

**III**

Title VII provides that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter [(“the opposition clause”)], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [(“the participation clause”)].” 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of unlawful retaliation under Title VII, Crawford must demonstrate by a preponderance of the evidence that: “(1) [she] engaged in activity that Title VII protects; (2) defendant knew that [she] engaged in this protected activity; (3) the defendant subsequently took an employment action adverse to the plaintiff; (4) a causal connection between the protected activity and the adverse employment action exists.” *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Upon appeal, Crawford claims that
her actions during the internal investigation constitute both opposition to a practice made unlawful by Title VII and participation in an investigation under Title VII, and that she therefore engaged in activity that Title VII protects. As did the district court, we hold that precedent compels a contrary conclusion.

First, Crawford’s actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: “complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer—e.g., former employers, union, and co-workers.” Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII “demands active, consistent ‘Opposing’ activities to warrant . . . protection against retaliation.” Bell v. Safety Grooving and Grinding, LP, 107 F. App’x 607, 610 (6th Cir. 2004).

Crawford’s actions consisted of cooperating with Metro’s investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier’s questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

Second, Crawford’s participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not a protected activity under the participation clause. We have held that “Title VII protects an employee’s participation in an employer’s internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge.” Abbott, 348 F.3d at 543. In Crawford’s case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement. Courts have generally held that the participation clause does not protect “an employee’s participation ‘in an employer’s internal, in-house investigation, conducted apart from a formal charge with the EEOC’; at a minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII.” Id.

Crawford argues that we should break from the general trend requiring a formal EEOC charge to have been filed or the machinery of Title VII otherwise invoked before the participation clause takes effect. Crawford points to the Supreme Court’s decision in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), which created an affirmative defense against an employer’s vicarious liability for sexual harassment by its employees when: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Id. at 805-07. Crawford hypothesizes that after Faragher, an employer could implement formal sexual harassment policies and reporting requirements, investigate complaints made to management, and then such investigations would serve as an affirmative defense to vicarious liability arising out of claims of sexual harassment.
She then argues that if the participation clause does not protect participation in internal investigations made in the absence of an EEOC charge, employees called in such investigations will know that they may be fired if they testify negatively, and will stay silent. She concludes that employers, lacking corroborating witnesses, will not take action to remedy sexual harassment, while being simultaneously shielded from vicarious liability by the Faragher affirmative defense.

As an initial matter, this foreboding scenario is predicated upon a lax reading of Faragher. In order to be entitled to an affirmative defense, an employer must exercise “reasonable care.” Id. Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be “reasonable.” Courts have held that an anti-harassment policy designed to deter sexual harassment can help an employer meet its burden as to the first element of the Faragher test only if the policy is “both reasonably designed and reasonably effectual” and not administered “in bad faith.” See, e.g., Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999). A policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the Faragher defense at risk.

This court has stated that the purpose of Title VII’s participation clause “is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged. Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause.” Booker v. Brown and Williamson Tobacco Co., Inc., 879 F.2d 1304, 1313 (6th Cir. 1989). The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them. We will not alter this limit delineated by the language of Title VII and recognized by this court and others.

IV

Accordingly, for the reasons set out above, we AFFIRM the district court’s grant of summary judgment.
WASHINGTON—The Supreme Court agreed Friday to decide whether employees are protected from being fired or demoted if they cooperate with an internal investigation of a supervisor who is accused of discrimination.

Under federal law, it is illegal to discriminate against employees based on their race, religion or sex. The law also protects from retaliation workers who file a federal civil rights lawsuit or a federal discrimination complaint.

But several lower courts have ruled recently that this protection does not extend to employees who participate in internal investigations by private companies or public agencies, but do not file their own lawsuits or federal complaints.

This creates a huge gap in the law, civil rights lawyers say, particularly for problems such as sexual harassment in the workplace. The high court itself advised employers they should encourage workers to confidentially report examples of harassment.

Yet some judges have ruled the law does not protect employees who make such reports.

The justices voted to hear an appeal from Vicky S. Crawford, a longtime school payroll employee in Nashville who was fired shortly after agreeing to speak to a school official who was investigating allegations of sexual harassment by a supervisor.

Although Crawford was not the first to raise the allegations, she and several other women told the investigator of crude comments and lewd gestures that they said Gene Hughes made. She reported that Hughes had “put his crotch up to [her] window” and that he once “grabbed her head and pulled it to his crotch.”

Despite these reports, Hughes, the school district’s employee relations director, was not disciplined. But soon after the investigation ended, Crawford and the two other employees who reported his alleged behavior were fired. School officials accused Crawford, a 30-year veteran, of “neglect of duty” and drug use.

Crawford sued the Metropolitan Government of Nashville for violating her rights under the Civil Rights Act of 1964. She contended her firing was triggered by her reports of sexual harassment by Hughes. The U.S. Equal Employment Opportunity Commission approved her suit.

But a federal judge and the U.S. Court of Appeals in Cincinnati dismissed her suit before a trial, saying she was not protected from being fired for cooperating with the internal probe.

The appellate judges said Crawford had not filed a formal complaint of discrimination with the Equal Employment Opportunity Commission. She was merely a witness to the harassment, not the prime victim, they said. They reasoned that the law protects employees only when they file official charges, not when they cooperate with an
employer's internal investigation.

U.S. Solicitor General Paul D. Clement joined with Crawford's lawyers in urging the court to hear her appeal and to rule in her favor. Internal investigations are "an integral part" of enforcing the civil rights law in the workplace, he said. These investigations will not work unless "employees who give candid testimony are protected against retaliation," he said.

The justices are expected to hear *Crawford v. Metropolitan Government of Nashville* in late April and issue a ruling by July.
Despite two solid victories for workers in job bias cases in the Roberts Court recently and what some consider “surprising” votes by the two newest justices in those cases, plaintiffs’ and management attorneys hesitate to predict a significant shift away from the U.S. Supreme Court’s generally pro-employer stance of recent years.

But what is significant and evident from the decisions on May 27 is that all but two of the justices now accept that protection from retaliation for making a discrimination claim—even if not mentioned in the text of a statute—is encompassed by the express right in federal civil rights laws to be free from discrimination. *CBOCS West v. Humphries*, No. 06-1431; *Gomez-Perez v. Potter*, No. 06-1321.

“It’s definitely true that the perception in past years has been the Court is more hostile to plaintiffs, but the one employment area where that can’t be argued now is retaliation,” said employment law scholar Melissa Hart of the University of Colorado School of Law.

Employers had argued in the two recent retaliation cases that the justices had “let loose the beast” with their 2006 decision in *Burlington Northern v. White*, 548 U.S. 53, espousing a sweeping view of the anti-retaliation provision in Title VII of the Civil Rights Act of 1964, and that they should go no further, noted Hart.

“But the underlying message in the two decisions is that the retaliation claim is part and parcel of the anti-discrimination right,” she said.

**AFFIRMING PLAINTIFFS’ RIGHTS**

The high court has had several opportunities now to curtail retaliation rights by job-bias plaintiffs but either has expanded or affirmed them, agreed management attorney Joel Rice, of counsel to the Chicago office of Atlanta’s Fisher & Phillips. “It does seem as if the Court has had almost a special solicitude for people bringing claims of retaliation,” he said.

This could be just one of those “anomalies” where there happens to be a flurry of cases that go one way, Rice said.

“But these decisions indicate the court takes seriously an individual’s right to bring a complaint.”

And while both sides weigh the practical impact of the decisions issued on May 27, they also note the court is not done with this area of employment law. A closely watched retaliation case already has been docketed for argument next term. It goes to the heart of employers’ efforts to avoid or respond to discrimination claims: their internal investigations of discrimination complaints. *Crawford v. Metropolitan Govt. of Nashville*, No. 06-1595.

“I’m hesitant to say I’m confident about the next retaliation case,” said employee counsel Lisa Banks, partner at Washington’s Katz, Marshall & Banks. “I don’t know what these
decisions portend for the future, but they give us hope it’s not a lost cause which was everyone’s fear about the Roberts Court.”

In the *CBOCS West* decision, a 7-2 majority held that Section 1981 of the Civil Rights Act of 1866, which bars race discrimination in the making and enforcing of contracts, encompasses retaliation claims. And, in *Gomez-Perez*, a 6-3 majority ruled that the provision covering federal employees in the Age Discrimination in Employment Act also prohibits retaliation against federal employees who complain of age discrimination. Both laws were silent on retaliation.

Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. voted with the majority in *CBOCS*; the only dissenters were justices Antonin Scalia and Clarence Thomas. Alito wrote the majority opinion in *Gomez-Perez*; Roberts, Scalia and Thomas dissented.

Central to both decisions was stare decisis—the majority’s faithfulness to prior rulings—here: *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005). *Sullivan* recognized retaliation claims under Section 1982 of the 1866 statute, and the Court relied upon it to find anti-retaliation rights under Title IX of the Education Amendments in the *Jackson* case.

A number of management attorneys said they were surprised when the justices agreed to decide *CBOCS* in particular because, they claim, the circuits generally agreed that retaliation claims were available under Section 1981.

“The Court confirmed what we all thought to be the case—the viability of Section 1981 retaliation claims,” said management attorney Sarah Kelly, member at Philadelphia’s Cozen O’Connor. “The puzzle to me was why did they take the case?”

Management and employee attorneys suggested the answer may be simply that the justices never had ruled on the issue under both statutes and sought to clarify the law. But some attorneys and scholars also suggested that in granting review, at least four justices initially may have thought they could undo the *Jackson* decision.

*Jackson* was a controversial, 5-4 ruling. Justice Sandra Day O’Connor was the key majority vote. Justice Anthony M. Kennedy had dissented. Buttressing its vulnerability was the fact that Alito had dissented in the earlier and major retaliation ruling in *Burlington Northern*, and Roberts had voiced clear hostility toward implied causes of action.

“I thought both cases would come out 5-4 for the employers,” said employment scholar Paul Secunda of the University of Mississippi School of Law. But Kennedy, Alito and Roberts defied expectations.

“For Alito to come back in *Gomez-Perez* and provide protection under the ADEA was really eye-opening,” said Secunda.

Twenty years ago, the Court “stumbled badly” when, in a series of devastating rulings, it gave civil rights laws a “wooden reading,” said employee counsel Paul Mollica, a partner at Chicago’s Meites, Mulder, Mollica & Glink. Congress fairly swiftly reversed most of those rulings, he noted.

With its series of retaliation decisions, “the Court seems more attentive to continuity in the law and not upsetting settled expectations,” he said. “They know there’s a
huge number of these cases on federal dockets. They’re looking for ways to achieve consensus, if not unanimity.”

Justice Stephen Breyer found consensus through the long lens of stare decisis.

“I do wonder if this was more the institutional desire not to be revolutionary than stare decisis,” said Colorado’s Hart. “To have ruled for employers, they really would have been saying, ‘What all the courts are doing, we’re just going to change.’ That would have been uncomfortably revolutionary.”

But there is little consensus among practitioners on both sides about the impact of the most recent rulings.

“I could see this decision increasing the number of plaintiffs who will use Section 1981 as a fallback to Title VII,” said Fisher & Phillips’ Rice. “Certainly there are a number of plaintiffs who will assert claims under both already, but this will further encourage them. In general, Section 1981 tends to be a little underutilized.”

Management counsel Diana Hoover, partner in the Houston office of Chicago’s Mayer Brown, said that the implications of retaliation claims under Section 1981 for small employers could be “staggering.”

Title VII applies only to companies with 15 or more employees, she noted. Section 1981 covers all employers.

“One of the biggest problems for employers is no cap on damages under Section 1981, but there is a cap under Title VII based on size of the employer,” she said.

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Although Banks was not confident predicting the outcome of the next retaliation case, Colorado’s Hart said she was now more confident of a ruling in the Crawford case in favor of employees because of the high court’s most recent decisions.

Crawford arises from complaints by female employees, other than the plaintiff, of serious sexual harassment by a director. In an internal investigation by the employer, the plaintiff, who had worked for city government for 30 years, was interviewed and recounted sexually harassing incidents by the director against her. She and three other employees who had given supporting testimony subsequently were investigated for allegedly unrelated infractions and fired.

The 6th U.S. Circuit Court of Appeals ruled that the plaintiff’s participation in the investigation was unprotected by Title VII’s anti-retaliation provision.

“I think there are good arguments on both sides of that issue,” said Cozen’s Kelly.

“For employers, you want to encourage them to conduct their own investigations and not to be hamstrung by thinking every person contacted is going to become the source of a separate claim against them,” Kelly said.

Mississippi’s Secunda said, “I just don’t see how you can have a meaningful enforcement scheme if you don’t protect people cooperating in the investigation. The recent decisions bode well for Crawford, but I wouldn’t necessarily connect the dots.”

In the job bias area, the term overall has been fairly successful for employees, both sides agreed.

Hart suggests the Court may be more expansive—and thus more pro-employee—
in bias cases involving the underlying right, but much more restrictive—and more pro-employer—in cases involving procedural requirements, as in last term’s highly controversial pay discrimination case, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162.

Secunda suggests a divide on certain areas of employment law: more pro-worker in discrimination and Employee Retirement and Income Security Act cases, and more pro-employer in traditional labor law cases.

“I would say they’re leaning back towards the center, but the assessment is still out,” he said. “We still have a number of cases yet this term.”
The Supreme Court made it easier yesterday for workers in most parts of the country to sue employers for retaliating against them when they complain about sexual harassment or other discrimination. The court ruled that employees may collect damages, even in some cases where the punishment did not involve getting fired or losing wages.

The decision, which had the full support of eight justices, expands the legal rights of millions of workers who are covered by Title VII of the 1964 Civil Rights Act, the main federal law against job discrimination, and their employers. Justice Samuel A. Alito Jr. agreed with the result but differed from the majority reasoning.

By setting a single national rule to define what constitutes retaliation, the court brought a measure of clarity to an area of law that generates thousands of cases per year, but had produced conflicting interpretations of Title VII in the lower courts.

Now, many retaliation cases that had previously been dismissed because the facts were not in dispute are likely to go to trial. That will encourage lawyers for alleged victims to take on more cases, and, accordingly, raise companies’ costs for lawyers and defensive management practices.

In the case decided yesterday, Burlington Northern and Santa Fe Railway Co. v. White, No. 05-259, forklift operator Sheila White had won $43,500 in damages and medical expenses from a federal jury, which found that her boss responded to her complaints about co-workers’ sexual harassment by transferring her to a more arduous job and suspending her for 37 days without pay.

She was later reinstated and awarded back pay, and Burlington Northern argued in the Supreme Court that this ending should have negated her retaliation suit.

The railroad said that the law requires a link between the alleged retaliation and a permanent employment decision such as termination or a pay cut. The Bush administration agreed with that view, though it believed that White should win her case, even under the company’s interpretation.

But Justice Stephen G. Breyer wrote that, under the circumstances, the railroad’s actions would have been enough to deter a reasonable employee from making a charge in the first place. This, he wrote, is the proper definition of illegal retaliation, and should set the standard for all future cases.

Without a robust anti-retaliation law, Breyer noted, the law’s basic purposes could be undercut, since fewer victims might complain.

“Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends,” Breyer wrote.
Breyer concluded that even some actions that take place outside the workplace can qualify as retaliation, if they are serious enough. As an example, he cited a previous case in which an employer had filed a false criminal charge against an employee who had complained about discrimination.

"Justice Breyer’s standard opens the door to claims based on actions that before today companies would not have suspected were actionable," said Daniel P. Westman, a lawyer with the firm Morrison & Foerster who represents employers in job discrimination cases. "Companies will have to be much more careful as to how they manage employees who are covered by Title VII."

The opinion also reflected a widely shared sense at the court that employment discrimination law has to be flexible enough to account for the realities of a diverse modern workplace, in which the same action by an employer could have different effects depending on the employee.

Citing a past case in which a mother of a disabled child had sued for retaliation because she was put on a shift that made it hard for her to spend days at home, Breyer wrote that “a schedule change may make little difference to many workers, but may matter enormously to a young mother with school age children.”

Even refusing to invite a worker to lunch can be retaliation, Breyer wrote, if it is “a weekly training lunch that contributes significantly to the employee’s professional advancement.”

“All people protected against job discrimination benefit from this decision, whether it be sexual harassment, or discrimination in hiring, promotions or pay,” said Marcia D. Greenberger, co-president of the National Women’s Law Center, which filed a friend of the court brief supporting White on behalf of more than 30 organizations. “If the Court had upheld the standard urged by the railroad and the administration, it would have created a hole in civil rights protections big enough to drive a forklift through.”

Breyer’s opinion was endorsed by a broad liberal-conservative majority on the court, with only Alito writing in a concurring opinion that he saw “practical problems” with the majority’s approach. Like the Bush administration, Alito argued that retaliation claims should be limited to those involving the terms or conditions of employment—but that White should win the case, even under that more restrictive legal standard.

In its ruling yesterday, the court adopted the relatively pro-plaintiff rule that had been previously outlined by the federal circuit courts of appeals based in Chicago and Washington, D.C., and rejected the more restrictive standard that had prevailed in five other regions of the country.

Only in the Western states could yesterday’s ruling limit retaliation suits, because the San Francisco-based appeals court had endorsed an even more pro-plaintiff standard than the Chicago and D.C. courts.

Unlawful retaliation lawsuits were already somewhat easier for employees to win than lawsuits claiming discrimination only.

As a result, retaliation claims under Title VII nearly doubled between 1992 and 2005, from 10,499 to 19,429, according to the Equal Employment Opportunity Commission’s caseload. They constitute a quarter of the EEOC’s cases.
The plaintiffs’ daughter claimed that an older boy on the bus forced her to expose herself. Her story was investigated by the school and the police, but they were unable to corroborate it. The plaintiffs were unsatisfied with the school’s efforts, and so filed suit under Title IX of the Education Amendments and Section 1983 of Title 42 of the USC. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), has been interpreted to provide an implied private right of action for sex discrimination by federally funded educational institutions. Section 1983 of Title 42 of the United States Code creates an express remedy for violations of the U.S. Constitution. Three courts of appeals have held that Title IX’s implied remedy does not foreclose Section 1983 claims to enforce the Constitution’s prohibition against invidious sex discrimination. In contrast, four circuits, including the First Circuit in this case, have held that Title IX’s implied right of action is the exclusive remedy for sex discrimination by federally funded educational institutions.

**Question Presented:** Whether Title IX’s implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.
alleged) are outlined in the district court's exegetic opinion on summary judgment, see Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 259-61 (D. Mass. 2006), and we assume the reader's familiarity with that account. Consequently, we furnish here only a brief synopsis of the details directly relevant to our analysis.

On the morning of February 14, 2001, Jacqueline Fitzgerald, a kindergarten student, informed her parents, Lisa Ryan and Robert Fitzgerald, that each time she wore a dress to school—typically, two to three times a week—an older student on her school bus would bully her into lifting her skirt. Lisa Ryan Fitzgerald believed that these incidents accounted for recent changes in Jacqueline's behavior. She immediately called the principal of Jacqueline's school, Frederick Scully, to report the allegations. The school system employed a prevention specialist, Lynda Day, whose responsibilities included responding to reports of inappropriate student behavior and instituting warranted disciplinary measures. Scully and Day met with Jacqueline and her parents later that morning. Because school officials were unable to identify the alleged perpetrator from Jacqueline's sketchy account, they arranged for her to observe students disembarking from the school bus. This surveillance took place over the next two days. Jacqueline identified the perpetrator as Briton Oleson, a third-grader. That same day, Scully and Day questioned Briton, who steadfastly denied the allegations. Day then interviewed the bus driver and a majority of the students who regularly rode the bus. Despite these efforts, she was unable to corroborate Jacqueline's version of the relevant events.

Shortly thereafter, the Fitzgeralds told Scully that Jacqueline had furnished additional details about her ordeal. She now said that, in addition to pressing her to lift her dress, Briton had bullied her into pulling down her underpants and spreading her legs. Scully immediately scheduled a meeting with the Fitzgeralds in order to discuss this new information. He also re-interrogated Briton and followed up on some of the interviews that Day had conducted.

By this time, the local police department had launched a concurrent investigation. This probe was handled by a detective specializing in juvenile matters, Reid Hall, who among other things questioned both Jacqueline and Briton. Hall found Briton credible, and the police department ultimately decided that there was insufficient evidence to proceed criminally against him. Relying in part on this decision and in part on the results of the school's own investigation, Scully reached a similar conclusion as to disciplinary measures.

During the currency of these probes, the Fitzgeralds had been driving Jacqueline to and from school. In late February, the school offered to place her on a different bus or, alternatively, to leave rows of empty seats between the kindergarten students and the older pupils on the original bus. The Fitzgeralds rejected these suggestions. The school's primary suggestion—switching buses—attracted special indignation; in the Fitzgeralds' eyes, the school was punishing Jacqueline rather than Briton (who would continue to ride the original bus).

The Fitzgeralds countered with a series of other alternatives, such as placing a monitor on the bus or transferring Briton to a different bus. The superintendent of the school system, Russell Dever, declined to
implement any of these proposals.

Although her parents' actions ensured that there were no further incidents aboard the school bus, Jacqueline asserted that she had several unsettling interactions with Briton as the school year progressed. Some were casual encounters in the hallways. The most notable interaction, however, occurred during a mixed-grade gym class. This was an episode in which a gym teacher randomly required Jacqueline to give Briton a “high five.”

Each incident was acknowledged by Scully as soon as it was reported, and there is no claim that Scully failed to address these incidents. In any event, Jacqueline stopped participating in gym class and began to miss school with increasing frequency.

In April of 2002, the Fitzgeralds sued two defendants—the elementary school’s governing body (the Barnstable School Committee) and the superintendent—in the federal district court. Their complaint included (i) a claim against the School Committee for violation of Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681-1688; (ii) claims against both the School Committee and the superintendent under 42 U.S.C. § 1983; and (iii) a miscellany of state-law claims against both defendants.

In due season, the defendants filed an omnibus motion to dismiss. Ruling *ore sponte*, the district court (Keeton, J.) granted the motion as to the section 1983 and state-law claims but denied it as to the Title IX claim. Following the completion of discovery, the School Committee moved for summary judgment on the latter claim. The district court (Young, J.) obliged. *See Hunter*, 456 F. Supp. 2d at 266. This timely appeal ensued.

II. THE TITLE IX CLAIM

We begin with the plaintiffs' contention that the district court erred in granting summary judgment on the Title IX claim. We afford de novo review to that ruling and, in so doing, we apply the same legal standards that pertained in the lower court. Thus, we may affirm this disposition only if the facts contained in the summary judgment record, viewed in the light most congenial to the nonmovants (here, the Fitzgeralds), show beyond legitimate question that the movant (here, the School Committee) is entitled to judgment as a matter of law.

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We turn next to the substantive law that governs the claim in question. Title IX provides, in relevant part, that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Although the statute does not contain an explicit private right of action as a vehicle for enforcing its commands, the Supreme Court has interpreted it to confer such a right. Under this judicially implied private right of action, aggrieved parties may recover pecuniary damages for violations.

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. . . Title IX does not make an educational institution the insurer either of a student’s safety or of a parent’s peace of mind. Understandably, then, “deliberate indifference” requires more than a showing that the institution’s response to harassment was less than ideal. In this context, the term requires a showing that the institution’s response was “clearly unreasonable in light
of the known circumstances.” *Davis*, 526 U.S. at 648. Relatedly, to “subject” a student to harassment, the institution’s deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it.

In this instance, three basic points are not in dispute. First, it is uncontradicted that the elementary school is a creature of the School Committee; that the School Committee is a recipient of federal funds; and that, therefore, the School Committee is legally bound to comply with the strictures of Title IX. Second, the parties agree that the School Committee acquired actual knowledge of the school-bus harassment on February 14, 2001, (when Lisa Ryan Fitzgerald reported what Jacqueline had told her). Third, it cannot be gainsaid that, if true, Jacqueline’s allegation—that she was forced to pull up her skirt, drop her underpants, and spread her legs—constituted severe, pervasive, and objectively offensive harassment.

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To begin, the school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents’ concerns. Given its inability to corroborate Jacqueline’s allegations and the termination of the police investigation with no recommendation for further action, the defendants’ refusal to institute disciplinary measures against Briton was reasonable. Title IX was not intended either to pretermit thoughtful consideration of students’ rights or to demand a gadarene rush to judgment. After all, in situations involving charges of peer-on-peer harassment, a public school has obligations not only to the accuser but also to the accused.

The school’s prompt commencement of an extensive investigation and its offer of suitable remedial measures distinguish this case from cases in which courts have glimpsed the potential for a finding of deliberate indifference.

The plaintiffs suggest that the adequacy of the School Committee’s response is undermined by its offer of unsuitable remedial alternatives. They point out that they proposed other remedial measures, such as the placement of a monitor on Jacqueline’s school bus, which the school rejected. They insist that an educational institution, acting in good faith, would have embraced these proposals. The problem, however, is that this line of argument misconstrues the nature of Title IX liability for peer-on-peer sexual harassment. As we have said, the statute does not require an educational institution either to assuage a victim’s parents or to acquiesce in their demands.

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### III. THE SECTION 1983 CLAIMS

In addition to the claim brought directly under Title IX, the plaintiffs advanced claims against the School Committee and Superintendent Dever under 42 U.S.C. § 1983. That statute provides a right of action for any person who, at the hands of a state actor, has experienced “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. For this purpose, municipal officials are considered to be state actors.

In this instance, the plaintiffs seek to use
section 1983 to redress deprivations of both a federal statutory right (implicating Title IX) and a federal constitutional right (implicating the Equal Protection Clause). At an early stage of the litigation the district court, ruling from the bench, found these claims precluded under applicable Supreme Court doctrine. Because the court decided this question on a motion to dismiss, its disposition engenders de novo review. In conducting this review, we consider the statutory claims and the constitutional claims separately.

A. The Statutory Claims

Generally speaking, section 1983 may be used to redress the deprivation of a right guaranteed by a federal statute. But that general proposition is festooned with exceptions. One familiar exception is that section 1983 cannot be used to enforce a statutory right when that statute’s remedial scheme is sufficiently comprehensive as to demonstrate Congress’s intent to limit the available remedies to those provided by the statute itself. This limitation ensures that plaintiffs cannot circumvent the idiosyncratic requirements of a particular remedial scheme by bringing a separate action to enforce the same right under section 1983.

The plaintiffs do not dispute the force of this principle but, rather, argue that Title IX’s remedial scheme is not sufficiently comprehensive to evince Congress’s intent to preclude section 1983 enforcement actions. They point out that the primary means of enforcement set out in the statute itself is the withholding of federal funds, see 20 U.S.C. § 1682, and they attach great significance to the fact that this mechanism is rarely used. Thus, they visualize section 1983 actions as a necessary complement to the administrative under-enforcement of Title IX rights.

This argument is poorly conceived. One flaw is that preclusion doctrine is concerned with what Congress intended and what remedies it deemed appropriate—not with how vigorously others (including the Executive Branch) may choose to enforce those remedies. Moreover, taking Executive Branch enforcement into account would work a de facto delegation of legislative power to the Department of Education; in effect, the Department would be granted the power to determine the availability of section 1983 remedies through the modulation of its enforcement activity. Yet we have not been directed to any language in Title IX suggesting such a delegation, and we do not believe that any such language exists.

An even more conspicuous flaw is that the plaintiffs’ argument ignores the availability of a private judicial remedy under Title IX itself. The case at hand is a paradigmatic example of both the existence and the utility of that remedy.

The plaintiffs would have us disregard the availability of this important anodyne because it is judicially implied rather than discernible on the face of the statute. Although there is some support for that thesis, see Cmty. for Equity v. Mich. High Sch. Athl. Ass’n, 459 F.3d 676, 690-91 (6th Cir. 2006); Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997), we are not persuaded that this view is correct.

The test for section 1983 preclusion does not turn on whether private causes of action under a particular statutory scheme are explicit or implicit. The dispositive criterion revolves around congressional intent: Did Congress intend the remedial scheme under the statute to be exclusive? That intent may be demonstrated either “by express provision or other specific evidence from the statute itself.” Wright v. Roanoke Redevel. &
That “specific evidence” goes beyond the explicit provisions of the statute and includes its legislative history.

Several years ago the Supreme Court conducted a thorough review of the legislative history of Title IX and determined that Congress intended to create a private right of action. This is the private right of action that courts, including this court, have found to be implicit in the text of Title IX. We, like the majority of the other courts of appeals that have addressed the issue, believe that this private right of action must be considered as part of the warp and woof of Title IX’s overall remedial scheme for purposes of preclusion analysis.

That conclusion is of decretory significance here. In all of the cases in which the Supreme Court has found that section 1983 is available to redress the deprivation of a federal statutory right, it has emphasized that the underlying statute did not allow for a private right of action (express or implied). By contrast, whenever the underlying statute contained a private right of action (express or implied), the Court has deemed that fact to be strong evidence of congressional intent to preclude parallel actions under section 1983. Thus, the existence of a private judicial remedy often has proved to be, in practical effect, “the dividing line between those cases in which [the Court has] held that an action would lie under § 1983 and those in which [it has] held that it would not.” City of Rancho Palos Verdes, 544 U.S. at 121.

The plaintiffs acknowledge that Title IX, as authoritatively interpreted, confers an implied private right of action. They note, however, that this right of action is a more restrictive remedy than that afforded by section 1983. One major distinction is that, unlike section 1983, Title IX does not supply a right of action against individual school officials (such as Superintendent Dever) for monetary relief.

In our view, that distinction makes no difference. Precedent teaches that a remedial scheme can be considered comprehensive for purposes of preclusion analysis without affording a private right of action for monetary relief against every potential wrongdoer. The key case is Smith, in which the Supreme Court discerned a comprehensive remedial scheme sufficient to preclude section 1983 actions despite the total absence of any private rights of action against individual state actors for monetary relief.

Given this precedent, we see no problem in holding section 1983 actions, including section 1983 actions against individuals, precluded by Title IX, even though such a holding would deprive plaintiffs of the right to seek relief against the individuals alleged to have been responsible for conduct violative of Title IX. After all, Title IX “amounts essentially to a contract between the Government and the recipient of funds,” Gebser, 524 U.S. at 286 (emphasis supplied), and, accordingly, it makes perfect sense that Congress would aim the weaponry of Title IX at that recipient—not at the recipient’s staff. Sanctioning section 1983 actions against individual school officials would permit an end run around this manifest congressional intent and must, therefore, be deemed precluded.

To sum up, an action against the offending educational institution itself is what Congress thought appropriate for the enforcement of Title IX’s guarantees. In explicating this private right of action, the Supreme Court, consistent with its discernment of Congress’s intent, imposed
important limits on liability. These include the requirement, in peer-on-peer sexual harassment cases, that the educational institution have actual notice of the harassing conduct.

It is uncertain whether these circumscriptions would carry over if section 1983 actions were permitted against educational institutions and school officials. Either way, however, such an action would not square with congressional intent. Were the circumscriptions carried over, a section 1983 action would be redundant; were they not, the availability of the action would undermine the implied private right of action that Congress intended. Seen in this light, we think that Title IX’s remedial regime is, to borrow a phrase from the Court, “incompatible with individual enforcement under § 1983.” Blessing v. Freestone, 520 U.S. 329, 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997).

To say more on this point would be supererogatory. We conclude that the remedial scheme of Title IX is sufficiently comprehensive to demonstrate Congress’s intention to preclude the prosecution of counterpart actions against state actors—entities and individuals alike—under section 1983. We therefore uphold the lower court’s ruling that the plaintiffs’ Title IX claims, brought under the mantle of section 1983, are precluded.

B. The Equal Protection Claims

In addition to precluding section 1983 claims based on the particular federal statutory regime, a sufficiently comprehensive remedial scheme also may preclude constitutional claims that are virtually identical to those that could be brought under that regime. See Smith, 468 U.S. at 1011 (finding it “difficult to believe” that Congress intended a section 1983 action under the Education of the Handicapped Act given the “comprehensive nature of the procedures and guarantees set out in the [statute]”). Specifically, the Smith Court held that Congress intended the Education of the Handicapped Act (EHA) to be the “exclusive avenue” through which the plaintiff could assert due process and equal protection claims “virtually identical” to their EHA statutory claims.

The parallel to this case is striking: the plaintiffs’ equal protection claim is virtually identical to their claim under Title IX. And they offer no theory of liability under the Equal Protection Clause other than the defendants’ supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced.

This then brings us to the second step in the inquiry: whether Congress intended these virtually identical constitutional claims to be precluded by Title IX. We conclude that our previous observations on the possibility of enforcing Title IX through the instrumentality of section 1983 apply with equal force here, notwithstanding the slight differences in context.

The comprehensiveness of Title IX’s remedial scheme—especially as embodied in its implied private right of action—indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution’s response. It follows that the plaintiffs’ equal protection claims are also precluded.
We add a coda. Our holding on this point should not be read to imply that a plaintiff may never bring a constitutionally based section 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action. For example, when a plaintiff sues an individual who is himself alleged to be immediately responsible for the injury, such an action may lie regardless of whether the claim sounds in equal protection or some other constitutional theory. This is as it should be: when a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution, a claim premised on that independent wrong would not be “virtually identical” to the main claim.

That is not the case here. The plaintiffs have not named Dever as a defendant based on any independent wrongdoing on his part but, rather, based on his role as the School Committee’s ultimate decision-maker. See Appellants’ Br. at 52-53. Accordingly, their section 1983 claim against him, like their section 1983 claim against the School Committee, is precluded by Title IX’s remedial scheme.

IV. CONCLUSION

To summarize succinctly, we take into account the totality of the circumstances surrounding the alleged harassment, including events that transpired subsequent to the school-bus encounters. Seen through that wide-angled lens, the School Committee’s response cannot, as a matter of law, be characterized as clearly unreasonable. Thus, the School Committee cannot be held liable under Title IX for deliberate indifference. We also conclude that the plaintiffs’ claims brought pursuant to section 1983 were properly dismissed on the ground that those claims, as presented in this case, are precluded by Title IX’s comprehensive remedial scheme.

This is an unfortunate case. If Jacqueline’s allegations are true, she is a victim—but that is not reason enough to impose on the defendants duties that range beyond the carefully calibrated boundaries of Title IX. That would be a decision for Congress, not for the courts. For our part, we need go no further.

AFFIRMED.
On Monday, the court agreed to decide whether a law known as Title IX, which bars sex discrimination in schools and colleges that receive federal money, provides the exclusive route to court for discrimination victims.

This case, *Fitzgerald v. Barnstable School Committee*, No. 07-1125, is an appeal by the parents of a kindergarten student in Hyannis, Mass., who was sexually harassed on the school bus by an 8-year-old boy. (Under Supreme Court precedents, sexual harassment is a form of sex discrimination.) The parents sued after concluding that school officials had not responded appropriately to their complaint about their daughter's treatment.

The lower courts ruled that Title IX, which does not encompass suits against individuals and also contains a number of other limitations, provided the exclusive remedy. The question is whether the parents can also invoke the much broader and more straightforward federal civil rights law known as Section 1983. The intersection of these two statutes is a complex issue that is likely to attract considerable attention in the education world.
A school can be sued for deliberate indifference to student-on-student sexual harassment, even though the victim was not subject to severe and pervasive harassment after the school learned of the conduct, the 1st Circuit has ruled in Fitzgerald v. Barnstable School Committee.

The plaintiffs notified the superintendent at their daughter’s elementary school that an older student had repeatedly bullied their daughter into raising her skirt on the school bus. School officials met with the parents that morning and the school initiated an investigation that failed to corroborate the allegations. As a result, the accused student wasn’t disciplined.

The plaintiffs sued under Title IX and Sect. 1983, claiming the investigation was unreasonable and the school’s actions permitted further interaction between the accused and their daughter.

The court agreed that a school could be held liable for deliberate indifference to sexual harassment.

“[Schools] may run afoul of Title IX not merely by ‘caus[ing]’ students to undergo harassment but also by ‘making them liable or vulnerable’ to it. Under [this broader formulation], a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution’s response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity,” the court said.

However, in this case, the court determined that the “fact that subsequent interactions between [the victim] and [the accused] occurred does not render the [school] deliberately indifferent. To avoid Title IX liability, an educational institution must act reasonably to prevent future harassment; it need not succeed in doing so,” the court said.

The court also rejected Sect. 1983 as a means to enforce rights under Title IX:

“[T]he plaintiffs’ argument ignores the availability of a private judicial remedy under Title IX itself,” it concluded.
A Section 1983 action brought by a couple who accused a school district and its superintendent of insufficiently protecting their kindergartner from alleged sexual harassment by an older student was precluded by Title IX of the Civil Rights Act, the 1st U.S. Circuit Court of Appeals has decided.

The plaintiff parents argued that Title IX’s remedy scheme—which does not offer a private right of action against individual actors—was insufficiently comprehensive for the statute to be intended as an exclusive avenue of relief for such claims.

But the 1st Circuit disagreed, affirming a U.S. District Court judge’s dismissal of the Sect. 1983 claim.

“Given [U.S. Supreme Court] precedent, we see no problem in holding section 1983 actions, including section 1983 actions against individuals, precluded by Title IX,” wrote Judge Bruce M. Selya for the court. “[T]he remedial scheme of Title IX is sufficiently comprehensive to demonstrate Congress’s intention to preclude the prosecution of counterpart actions against state actors entities and individuals alike—under section 1983.”

The court also affirmed another U.S. District Court judge’s finding that the district’s response to the child’s allegations was sufficient to satisfy Title IX itself.


Circumvention Prevention?

John M. Simon of Boston, who represented the defendants, praised the decision for recognizing the “daunting challenges” faced by school administrators in maintaining a safe school environment.

He added that the decision is particularly important because it blocks future plaintiffs from circumventing under the guise of a constitutional or statutory violation “the very demanding requirements” for liability under Title IX.

“Congress intended that Title IX govern claims of peer sexual harassment in education,” said Simon. “Litigants, at least in the 1st Circuit, are now stuck with that.”

Plaintiffs’ counsel Wendy A. Kaplan of Boston called the ruling a “cutback” on civil rights.

“The decision really gives schools wide latitude to ignore the interests of their students and to not take any interest in protecting the welfare of their students,” said Kaplan, who called Title IX “basically useless,” pointing out that the U.S. Department of Education has not filed a Title IX enforcement action in a harassment case in 35 years.

“The courts and the Education Department won’t enforce Title IX [unless it is related to athletics],” she said. “This court allowed the school to totally disregard the interests of a 5-year-old girl, and I think this has wide-ranging and negative effects.”
Nonetheless, the plaintiffs will not appeal the decision, said Kaplan.

"We think our chances of prevailing at the Supreme Court level are unrealistic given the present makeup of the court," she noted.

**Alleged Harassment**

On Feb. 14, 2001, a kindergarten student in Barnstable informed her parents, plaintiffs Lisa Ryan and Robert Fitzgerald, that each time she wore a dress to school, a boy in the third grade would bully her into lifting it up.

The girl’s mother reported the allegations to the school principal. The school’s investigation apparently did not corroborate the girl’s version of the events.

Shortly afterward, the girl told the plaintiffs that, in addition to pressing her to lift her dress, the third-grader bullied her into pulling down her underpants and spreading her legs.

The principal met with the plaintiffs to discuss the allegations, questioned the third-grader and followed up on earlier interviews with the bus driver and children who rode the bus.

The local police department was investigating the case at the same time. After questioning both the girl and her alleged harasser, a detective decided that there was not enough evidence to proceed criminally.

The principal reached a similar conclusion regarding disciplinary measures.

While the investigations were proceeding, the plaintiffs had been driving their daughter to and from school until, in late February, the school offered to place the girl on a different bus or to have the bus driver keep empty two rows of seats between the kindergartners and older students.

The plaintiffs rejected these solutions, viewing them as punitive toward their daughter. They suggested instead that the school place a monitor on the bus or transfer the third-grader to another bus.

The school superintendent declined to implement their suggestions.

The girl later reported several more uncomfortable interactions with the third-grader that year, both in the school hallway and in a mixed-grade gym class.

Though the principal apparently acknowledged and addressed each incident, the girl stopped participating in gym class and accumulated an increasing number of absences from school.

In April 2002, the plaintiffs sued the Barnstable School Committee and the superintendent in U.S. District Court.

They brought a Title IX claim against the School Committee, alleging that school officials’ response to the alleged harassment failed to satisfy statutory requirements.

The plaintiffs also brought a 42 U.S.C. Sect. 1983 claim against the School Committee and the superintendent, alleging that their conduct as state actors deprived the plaintiffs of their rights under both Title IX and the Equal Protection Clause of the U.S. Constitution.

U.S. District Court Judge Robert E. Keeton dismissed the Sect. 1983 claim. Following discovery, U.S. District Court Judge William G. Young granted summary judgment on the Title IX claim. The
plaintiffs’ appeal followed.

Claim Preempted

The 1st Circuit rejected the plaintiffs’ argument that because Title IX was under-enforced and offered no private judicial remedy, its remedy scheme was insufficiently comprehensive to preclude their Sect. 1983 claim.

First, Selya explained, the preclusion doctrine is concerned with which remedies Congress has deemed appropriate, not with the intensity with which other entities enforce them.

Additionally, “the plaintiffs’ argument ignores the availability of a private remedy under Title IX itself,” the judge continued, pointing out that the Supreme Court had interpreted such a right in its 1979 decision in Cannon v. Univ. of Chi.

With respect to the plaintiffs’ contention that Title IX’s private remedy is insufficiently comprehensive since it does not allow an action against individual school officials, Selya said the distinction was irrelevant.

“Precedent teaches that a remedial scheme can be considered comprehensive for purposes of preclusion analysis without affording a private right of action against every private wrongdoer,” said the judge. “Sanctioning section 1983 actions against individual school officials would permit an end run around this manifest congressional intent and must, therefore, be deemed precluded.”

The court also upheld Keeton’s dismissal of the Title IX claim itself.

“The [school’s] actions may not have constituted an ideal response to the complaint of harassment,” said Selya. “But Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective—whether the institution’s response . . . is so deficient as to be clearly unreasonable.”

In this case, the school’s response could not be characterized “in that derogatory manner,” the court concluded.
AT&T v. Hulteen

07-543


Plaintiffs were employees of AT&T and predecessor companies and took maternity leave between 1968 and 1976 before the enactment of the Pregnancy Discrimination Act. In calculating service credits for pension and other benefits, Plaintiffs were not allowed to count their maternity leave since the company’s policy at the time of the leave only allowed for a limited amount of maternity leave. Plaintiffs sued, claiming that AT&T must calculate their service credits based on the PDA even though the PDA was not in effect at the time of their leave. The Ninth Circuit ruled in favor of Plaintiffs.

Question Presented: Before passage of the Pregnancy Discrimination Act of 1978 (PDA), it was lawful to award less service credit for pregnancy leave than for other temporary disability leaves. Gilbert v. Gen. Elec. Co. 429 U.S. 125 (1976). Accordingly, the questions presented are:

1. Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies.

2. Whether the Ninth Circuit’s finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

Noreen HULTEEN; Eleanora Collet; Linda Porter; Elizabeth Snyder; Communications Workers of America, Plaintiffs-Appellees

v.

AT&T Corporation, Defendant-Appellant

United States Court of Appeals for the Ninth Circuit

Decided August 17, 2007

[Excerpt: Some footnotes and citations omitted.]

WARDLAW, Circuit Judge:

This appeal presents an issue previously decided on virtually identical facts sixteen years ago in Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991). There, we held that Pacific Bell violated Title VII in calculating retirement benefits after the effective date of the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), when it gave service credit in those calculations for all pre-PDA temporary disability leave taken by employees except leave by reason of pregnancy. Pallas, 940 F.2d at 1326-27.
Here, a three-judge panel of our court, in a now-withdrawn opinion, held that AT&T Corporation ("AT&T"), successor in interest to Pacific Bell and Pacific Telephone and Telegraph ("PT&T"), did not violate Title VII by engaging in identical conduct. The panel reasoned that Pallas no longer controlled because it was inconsistent with intervening Supreme Court authority governing retroactivity principles. Hulteen v. AT&T Corp., 441 F.3d 653, 664 (9th Cir. 2006) (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)). Because we conclude that Pallas is not "clearly irreconcilable" with intervening authority, see Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), we affirm the district court's application of Pallas to the undisputed facts presented here and its award of summary judgment against AT&T. We further hold that our conclusion in Pallas that calculation of service credit excluding time spent on pregnancy leave violates Title VII was, and is, correct.

I.

Noreen Hulteen, Eleanora Collet, Linda Porter, Elizabeth Snyder and the Communications Workers of America, AFL-CIO (collectively "Hulteen"), brought this suit to challenge AT&T's use of a facially discriminatory service credit policy to calculate employee pension and retirement benefits. Each of the individual plaintiffs took pregnancy leave between 1968 and 1976. They would have enjoyed more favorable benefits or retirement opportunities had they, at the time that they parted from AT&T, been given full service credit for their pre-PDA pregnancy leaves.

Congress passed the PDA in 1978. Amendments to the Civil Rights Act of 1964, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978). The PDA clarified that Title VII prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions," as discrimination "because of sex." 42 U.S.C. § 2000e(k). The PDA further provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Id. Thus, Title VII, as amended by the PDA, requires employers to accord women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave.

From as early as 1914, AT&T, along with its predecessor companies PT&T and Pacific Bell, has used a Net Credited Service ("NCS") date to calculate employee benefits, including eligibility for early retirement and pension payment amounts. The NCS date is an employee's original hire date, adjusted forward in time for periods during which no service credit accrued. An earlier NCS date places an employee in a superior position for service-related determinations such as job bidding, vacation time and retirement benefits.

Before August 7, 1977, AT&T and its predecessor companies classified pregnancy leave as personal leave. An employee on personal leave received a maximum of thirty days NCS credit, whereas there was no limit on the amount of NCS credit for employees on temporary disability leave. . . .

On August 7, 1977, PT&T adopted the Maternity Payment Plan ("MPP"). The MPP extended the maximum pregnancy NCS credit to thirty days before delivery and a maximum of six weeks after delivery. The MPP also allowed pregnant employees to work until the onset of the pregnancy.
disability. On April 29, 1979, the effective date of the PDA, PT&T adopted the Anticipated Disability Plan ("ADP"). The ADP replaced the MPP and provided service credit for pregnancy leave on the same terms as other temporary disability leave. No service credit adjustments or changes to the NCS date were made for female employees who had taken pregnancy leave under either the MPP or the pre-1977 system. In 1984, ownership of PT&T was transferred to AT&T. The NCS credit calculation method described above remains in force at AT&T, notwithstanding AT&T's operations within the Ninth Circuit and our controlling decision in *Pallas*.

Noreen Hulteen retired involuntarily in 1994 as part of an AT&T reduction in force. She has 210 days of uncredited pregnancy leave that resulted in reduced pension benefits. Eleanora Collet retired voluntarily under an incentive program in 1998 with 261 days of uncredited pregnancy leave. Linda Porter is a current employee with seventy-three uncredited days from pregnancy leave and forced leave before the onset of her pregnancy disability. Elizabeth Snyder terminated her employment voluntarily in 2000, and has sixty-seven days of uncredited pregnancy and unrelated temporary disability occurring during her pregnancy leave. The AT&T plan administrator, in 2000, authorized a credit for Snyder’s first thirty days of her 1974 pregnancy leave “as was the policy at the time,” changing her NCS date from July 29, 1966 to June 29, 1966.

* * *

Hulteen brought suit, alleging, inter alia, that AT&T violated Title VII in its calculation of NCS credit. On cross-motions for summary judgment, the parties stipulated to all of the material facts. Applying *Pallas*, the district court granted Hulteen’s motion for summary judgment on the Title VII claim. AT&T timely appealed, and on March 8, 2006, a panel of our court reversed the district court, holding that *Pallas* gave “the PDA impermissible retroactive effect under controlling law today.” *Hulteen*, 441 F.3d at 655. Judge Rymer dissented, arguing that because there appears to be “no acceptable basis . . . to overrule *Pallas*, and AT&T offers no reason for distinguishing it, . . . *Pallas* remains binding and controls disposition of this case.” *Id.* at 670. A majority of the active judges of this court voted in favor of rehearing en banc. We consider the appeal anew.

II.

We review de novo the district court’s grant of summary judgment. “We must determine, viewing the evidence in the light most favorable to [AT&T], the non-moving party, whether . . . the district court correctly applied the substantive law.” *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

A.

The district court correctly held that our decision in *Pallas* compels the conclusion that AT&T violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed Hulteen. Lana Pallas was a former Pacific Bell employee who took pregnancy leave before the PDA was enacted. *Pallas*, 940 F.2d at 1325. “In 1987, Pacific Bell instituted a new retirement benefit for management employees called the ‘Early Retirement Opportunity.’” *Id.* at 1326. To qualify for the benefit, an eligible employee had to accrue twenty years of service as measured by the same NCS system applied to Hulteen. *Id.*. Pallas was denied eligibility because a
pregnancy-related leave taken in 1972 deprived her of the necessary amount of service credit by some three or four days. *Id.*

The district court dismissed Pallas’s Title VII sex discrimination claim for failure to state a claim, and we reversed. In doing so, we criticized reliance on the Supreme Court’s decisions holding that challenges based on disparate impacts resulting from a facially neutral bona fide seniority system must be brought during a limitations period running from the date the system was adopted. *Id.* at 1326-27 (citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989) (holding that “when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory adoption which triggers the limitations period”), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-58 (1977)).

We found *Lorance* and *Evans* inapposite for two reasons. First, because the discriminatory program that gave rise to the lawsuit was instituted in 1987, Pallas’s claim “could not have been brought earlier.” *Id.*

Second, we concluded that, unlike the facially neutral seniority credit policy in *Evans*,

the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women. The system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.

*Id.* at 1327. We therefore held, relying on *Bazemore v. Friday*, 478 U.S. 385 (1986), that Pacific Bell’s decision to discriminate against Pallas in 1987 was actionable because “liability may be imposed” for a pre-Title VII discriminatory policy to the extent it is perpetuated in post-Title VII employment decisions. *Pallas*, 940 F.2d at 1327 (citing *Bazemore*, 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part) (“Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.”)).

***

. . . Pacific Bell adopted a policy that calculates pregnancy leave differently than other temporary disability leave, and it engages in intentional discrimination each time it applies the policy in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA. 940 F.2d at 1327.

In *Pallas*, we did not address whether the PDA had retroactive effect because Pallas’s complaint alleged that a post-PDA determination—the calculation of benefits after the PDA was enacted—discriminated against women on the basis of their pre-PDA pregnancy leaves.

B.

AT&T admits that under *Pallas* its current conduct in calculating retirement benefits excluding pre-PDA pregnancy leave violates Title VII. AT&T argued to our three-judge panel that *Landgraf* worked a “sea-change” in retroactivity principles. Thus, AT&T continued, *Landgraf* is intervening authority with which the decision in *Pallas* is “clearly
irreconcilable,” a retroactivity argument the panel majority embraced. However, as Judge Rymer’s dissenting opinion ably points out, AT&T’s Landgraf argument fails. We adopt Judge Rymer’s reasoning:

[We] read Landgraf as refining, rather than sea-changing, the landscape[,] for the Court explicitly drew upon Justice Story’s “influential definition” of retroactivity in Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 766-69, F. Cas. No. 13156 (1814), to make clear how courts should determine whether a statute operates retroactively:

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates “retroactively” comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

... 

When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 268, 269-70, 280[1] (internal citations omitted).

[We] do not believe that the reasoning or theory of Pallas is so irreconcilable with the reasoning or theory of Landgraf as to give [a three-judge] panel license to overrule it. Pallas held that the actionable conduct was PT&T’s decision to discriminate against the employee on the basis of pregnancy when she applied for, and was denied, early retirement. The decision to deny benefits was made in the post-PDA world. As we emphasized in United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810 (9th Cir. 1995), if “the law changes the legal consequences of conduct that takes
place after the law goes into effect, the law operates on that conduct prospectively.” *Id.* at 814. This being the case, and assuming (without deciding) that Congress intended the PDA to have prospective effect only, *Pallas* was premised on a discrete act—the decision to deny a retirement benefit—that gave rise to a current violation of the PDA. Given *Pallas*’s finding of a current violation, the Act operated prospectively on that decision.

*Hulteen*, 441 F.3d at 666-67 (Rymer, J., dissenting).

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III.

A plain reading of Title VII supports the legal conclusion reached in *Pallas*. By passing the PDA, Congress clarified that discrimination “because of sex” under Title VII included discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e(k). It further added the requirement that employers treat “women affected by pregnancy . . . the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” *Id.*

In interpreting this additional requirement, we must begin with the text of the statute... . .

The ordinary meaning of “affected” is “[a]cted upon, influenced, or changed.” *The American Heritage Dictionary of the English Language* 28 (4th ed. 2000); see also *Black’s Law Dictionary* 62 (8th ed. 2004) (defining “affect” as “[m]ost generally, to produce an effect on; to influence in some way”). Applying the ordinary meaning of the term “affected” here leads to the conclusion that although Hulteen was affected by pregnancy when she took pregnancy leave, she was again “affected by pregnancy” when AT&T calculated her retirement benefits in 1994, deliberately choosing to use an NCS date that would deprive her of benefits received by those who were not “affected by pregnancy” by excluding her earlier pregnancy leave from the later calculation of benefits. It was well within AT&T’s ability and control to calculate Hulteen’s benefits in 1994 giving her service credit for the time she spent on pregnancy leave, and to thus avoid violating the PDA. AT&T simply chose to continue its systematic discrimination against women, based on pregnancy, even after Congress made it illegal.

In 1991, Congress amended the Civil Rights Act to make it clear, if *Pallas* had not already done so, that an employer who adopts a seniority system for an intentionally discriminatory purpose commits an unlawful employment practice “when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.” Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1078-79 (Nov. 21, 1991). Congress thus clarified that injury occurs at the time that the seniority system is applied to the aggrieved party because that is when the employee is actually harmed by the deprivation of benefits... . .

AT&T applied its discriminatory seniority system to Hulteen in 1994, causing her to be deprived of early retirement benefits and
thus injuring her. AT&T never asserted that it could not credit Hulteen with pregnancy leave when it denied and/or calculated her benefits. Indeed, AT&T and Hulteen stipulated not only to the number of days each plaintiff was penalized within the charging period for past pregnancies but also to AT&T’s ability to add service credit to an employee’s length of service. Instead of engaging in its discriminatory calculation and defending the EEOC charge and this litigation, AT&T could have simply credited the applicable number of days to each plaintiff’s NCS date when it calculated her benefits.

** **

IV.

The district court properly applied our decision in *Pallas* to conclude that AT&T’s post-PDA benefits calculations violated the PDA. *Pallas* was, and remains, good law. We therefore affirm the district court’s summary judgment in favor of Hulteen, Collet, Porter, Snyder and CWA on their Title VII sex discrimination claims.

**AFFIRMED.**

Dissent

O’SCANNLAN, Circuit Judge:

By concluding that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991) remains good law, the majority erroneously perpetuates a circuit split with the Sixth and the Seventh Circuits. I believe that *Pallas* was wrong then and is wrong now. Because this en banc court can and should overrule *Pallas* and follow the Seventh Circuit’s well-reasoned decision in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir.), I must respectfully dissent from the majority’s conclusion that the sex discrimination claims in this case are timely.

I.

[Restatement of AT&T’s seniority system, previous treatment of maternity leave, and the individual circumstances of the plaintiffs.]

II.

A.

** ***

In 1978 ... Congress passed the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, which became effective on April 29, 1979, and amended Title VII to define “because of sex” or “on the basis of sex” to include discrimination based on pregnancy. 42 U.S.C. § 2000e(k). The PDA states in relevant part:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

...  

Id.

An individual must file charges of discrimination under Title VII within 180
days "after the alleged unlawful employment practice occurred," unless the employee has first instituted proceedings with a state or local agency, in which case the period is extended to 300 days. 42 U.S.C. § 2000e-5(e)(1). The dispositive issue in this case is whether Hulteen timely filed a sex discrimination action within the specified period of limitations.

As the Supreme Court has repeatedly stressed, we must "identify with care the specific employment practice that is at issue" when determining whether the sex-discrimination action is timely. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2167 (2007). There are three possible candidates in this case: (1) AT&T's adoption of its pregnancy leave rules before the enactment of the PDA; (2) AT&T's application of those leave rules to adjust Hulteen's NCS date before the enactment of the PDA; and (3) AT&T's calculation of Hulteen's retirement benefits in 1994 based, in part, on the NCS date it consistently maintained for her without retroactively adjusting that date for pre-PDA pregnancy leave. The time to challenge the first and second possible employment practices, however, has long since expired. Accordingly, relying on our prior decision in Pallas, Hulteen points us to the third alternative employment practice in 1994 when AT&T declined to grant retroactive NCS credit for pre-PDA pregnancy leave before it calculated her retirement benefits.

Accepting Hulteen's argument that such calculation in 1994 constituted a new and current violation of Title VII, the majority holds that her Title VII action is timely. In so concluding, the majority perpetuates Pallas's error by breathing new life into an expired sex discrimination claim. On virtually identical facts, the Seventh Circuit reached the opposite conclusion in Ameritech. Because I believe the Seventh Circuit's decision faithfully applies controlling Supreme Court precedents and the relevant provisions of Title VII, I would follow that court's reasoning.

III.

"The outcome of this case," as the Seventh Circuit recognized, "turns on which of two competing lines of authority provide a better 'fit' here." Ameritech, 220 F.3d at 822. The Seventh Circuit followed United Air Lines v. Evans, 431 U.S. 553 (1977), and its progeny. In Pallas, on the other hand, this court followed Bazemore v. Friday, 478 U.S. 385 (1986). Because the majority follows Pallas today, the Bazemore and Evans line of cases deserve careful attention.

A.

In Bazemore, the North Carolina Agricultural Extension Service ("Service") maintained two separate, racially segregated work forces and paid black employees less than white employees prior to the enactment of Title VII. 478 U.S. at 390-91 (Brennan, J., joined by all other Members of the Court, concurring in part). After the enactment of Title VII, the Service integrated the workforce, but the pay disparity between black employees and white employees in the same positions remained. Id. The Supreme Court held that the Service was not liable for the discriminatory acts that occurred prior to the enactment of Title VII and therefore "recovery may not be permitted for [pre-Title VII] acts of discrimination." Id. at 395. However, the Supreme Court concluded that the pay disparity that remained after the enactment of Title VII was unlawful because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior
to the effective date of Title VII.” *Id.* at 395-96.

B.

1.

The Supreme Court’s decision in *Evans* represents the fountainhead for the competing line of authority. In *Evans*, United Air Lines (“United”) maintained a policy of refusing to allow its female flight attendants to be married. 431 U.S. at 554. Evans married in 1968 and therefore was forced to resign pursuant to United’s no-marriage policy. *Id.* Previously, the Seventh Circuit held that United’s policy violated Title VII. *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.). Evans, however, was not a party to *Sprogis* and failed to initiate any proceedings against United within the period of limitation for that past act of discrimination. *Evans*, 431 U.S. at 555. After United ended the no-marriage policy, United rehired Evans in 1972 as a new employee, but refused to give her seniority credit for any prior service with United. *Id.* Evans conceded that it was too late to bring an action for her forced termination, but asserted that “United [was] guilty of a present, continuing violation of Title VII and therefore that her claim is timely.” *Id.* at 557.

Evans argued that “the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination.” *Id.* at 557. Rejecting that argument, the Court emphasized that “United’s seniority system *does* indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists.” *Id.* at 558 (first emphasis added). Concluding that none did, the Court explained that “[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . [I]t is merely an unfortunate event in history which has no present legal consequences.” *Id.* at 558.

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C.

*Bazemore* stands for the general proposition that an employment practice coupled with discriminatory intent within the charging period gives rise to a current violation of Title VII, even if related to past, uncharged discriminatory acts. See *Ledbetter*, 127 S. Ct. at 2174. The *Evans-Ricks-Ledbetter* line of authority stands for the proposition that an act within the charging period that gives present effect to past discriminatory acts, without more, does not give rise to a current violation. Hulteen’s case turns on whether AT&T calculated her benefits in 1994 with the requisite discriminatory intent (*Bazemore*) or whether that calculation simply gave effect through the NCS date of past, uncharged discriminatory acts (*Evans-Ricks-Ledbetter*).

In *Ameritech*, the Seventh Circuit found the *Evans* line of authority controlling because of the “fact, simplistic as it may seem, that [the] case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time.” *Ameritech*, 220 F.3d at 823. *Pallas* and the majority today, on the other hand, reached the contrary conclusion, finding that *Bazemore* was the “controlling Supreme Court precedent” for two reasons: “First, the discriminatory program which gave rise to this suit, the Early Retirement Opportunity, was instituted in 1987. . . .
Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program. . . . Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women.” 940 F.2d at 1327. With respect, Pallas was clearly wrong. The Supreme Court’s logic in Evans, Ricks, and Ledbetter dictates the outcome of the case before us today.

1.

The Supreme Court’s most recent decision in Ledbetter confirms that under Evans “current effects alone cannot breathe life into prior, uncharged discrimination.” Ledbetter, 127 S. Ct. at 2169. The charging period (here, the 180 days during which Hulteen was required to file a charge with the EEOC), “is triggered when a discrete unlawful practice takes place.” Id. Such a discrete unlawful practice requires the coalescence of two elements: (1) an employment practice (defined as “a discrete act’ or single ‘occurrence’ that takes place at a particular point in time’”); and (2) discriminatory intent. Id. at 2169, 2171. Here, the majority concludes that the AT&T’s denial of benefits under the retirement plan in 1994 is an “employment practice.” Ante, at 10041-42. But that alone is insufficient. Ledbetter requires concurrent discriminatory intent.

a.

***

The problem with the majority’s conclusion that the NCS seniority system is facially discriminatory because the NCS date reflects AT&T’s pre-PDA pregnancy leave rules is that it necessarily depends on a retroactive application of the PDA. Before the enactment of the PDA, the Supreme Court had concluded in Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343, that classifications based on pregnancy involved no facial gender-based discrimination. Id. at 134-36, 138; see also Nashville Gas Co. v. Satty, 434 U.S. 136, 140, [*1023] 98 S. Ct. 347, 54 L. Ed. 2d 356 (1977) (“Petitioner’s decision not to treat pregnancy as a disease or disability for purpose of seniority retention is not on its face a discriminatory policy.”). Pallas concluded that the NCS seniority system was facially discriminatory because it “distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.” 940 F.2d at 1327. This conclusion therefore rests on a silent premise that gives impermissible retroactive effect to the PDA.

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D.

In sum, because there is no evidence that AT&T acted with the requisite discriminatory intent in 1994 when it calculated Hulteen’s retirement benefits based in part on the NCS seniority system, Bazemore is inapposite. Without more, the NCS seniority system simply gives present effect to a past pre-PDA incident. Under Evans that pre-PDA incident is “merely an unfortunate event in history [with] no present legal consequences.” 431 U.S. at 558. For this reason, the Supreme Court’s logic in the Evans line of authority, reinforced weeks ago in Ledbetter, controls the outcome of this case. Under that line, “[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent
nondiscriminatory acts that entail adverse effects resulting from the past discrimination." Ledbetter, 127 S. Ct. at 2169 (emphasis added). The time for Hulteen to have challenged AT&T’s pre-PDA pregnancy leave rules has long since expired.

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VI.

As Judge Dumbauld lamented in his dissent to Pallas, we consider “a melancholy tale of things done long ago, and ill-done.” 940 F.2d at 1327 (Dumbauld, J., dissenting) (quoting John Ford, The Lover’s Melancholy). Because Pallas invented a timely Title VII violation where the determination of benefits simply gave present effect to past, unchallenged acts, contrary to Supreme Court authority, it must be overruled. Because the majority today erroneously embraces Pallas and perpetuates a circuit split with the Sixth and Seventh Circuits, I must respectfully dissent.
Noreen Hulteen gave birth to a daughter, Rachael, in 1968, when she was 34. While on maternity leave, she required surgery and wound up missing 240 days of work. Hulteen, 74, contends that her employer, Pacific Bell—now AT&T—did not properly weigh her pregnancy leave into her retirement and other benefits. Yesterday, the U.S. Supreme Court agreed to review the issue in [AT&T v. Hulteen] a case that could affect thousands of women who are near or at retirement age.

The case centers on whether women who took pregnancy leave before 1979, when the Pregnancy Discrimination Act went into effect, should be entitled to the benefits the law provides. AT&T has argued that it is not required to credit retroactively the time women spent on maternity leave before the legislation’s enactment.

The Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights Act of 1964, prohibits discrimination on the basis of pregnancy and allows those on maternity leave the same coverage as other medical leave. Before the law, AT&T classified maternity leave as personal leave, allowing for only 30 days of coverage. Those on disability leave had unlimited coverage. AT&T changed its policy when the act went into effect, effectively treating pregnancy leave the same as temporary disability leave.

Hulteen and three other women sued AT&T in the U.S. Court of Appeals for the 9th Circuit for violation of the Pregnancy Discrimination Act, arguing that the company did not properly calculate their pension and retirement benefits under the law. The court ruled in August that pregnancy leave taken before the discrimination act must be treated the same as disability leave. Hulteen and the other women took pregnancy leaves between 1968 and 1976.

The U.S. Supreme Court agreed to take up the matter at the urging of the Bush administration after AT&T appealed the case.

"We are gratified that the court has agreed to hear our appeal," said AT&T spokesman Walt Sharp.

Judith E. Kurtz, a San Francisco-based attorney for Hulteen and the others, characterized the case as "the second generation of pregnancy discrimination." She said, "Women who were discriminated against back in the '70s are being discriminated against again."

Kurtz successfully represented other women in a similar suit in 1991, Pallas v. Pacific Bell. The 9th Circuit’s decision against AT&T in Hulteen v. AT&T relied heavily upon the Pallas case. The ruling awarded tens of millions of dollars to its plaintiffs, Kurtz said.

In 2000, the 7th Circuit Court ruled in a similar case, Ameritech Benefit Plan Committee v. Communication Workers of America, that workers were not entitled to
retroactive seniority credit for pregnancy leave that occurred before the Pregnancy Discrimination Act.

“We’re hopeful,” Kurtz said. “We were litigating the issue 25 years ago. We thought that we were right then, and we think that we’re right now.”

The U.S. Supreme Court case is *AT&T v. Hulleen*, 07-543.
A federal appeals court overturned an earlier ruling Friday and ordered a boost in retirement benefits for female AT&T employees who took pregnancy leave before 1979, the year that federal law banned discrimination based on pregnancy.

The women, who may number in the hundreds nationwide, according to their lawyer, were allowed up to 30 days of paid leave during pregnancy before 1979. Employees of AT&T and its predecessor, Pacific Telephone & Telegraph, who took disability leave during the same period were entitled to be paid as long as they were disabled.

The disparity was also reflected in retirement payments, both before and after 1979, which credited workers for periods of paid leave but not for unpaid leave. A three-judge panel of the Ninth U.S. Circuit Court of Appeals in San Francisco ruled 2-1 in March 2006 that the women were not entitled to equal benefits, but the full court then ordered a hearing by a larger panel, which ruled 11-4 in the women’s favor on Friday.

The suit was filed in San Francisco in 2001 by four women as a proposed nationwide class action.

“No one disputes that women who were out on pregnancy leave before 1979 are today getting less than their counterparts who worked exactly the same number of days for AT&T,” said Hugh Hewitt, a lawyer for the women. The question that the court answered, he said, is “whether or not it can be corrected by law.”

AT&T, which has denied acting illegally, could appeal to the Supreme Court. The ruling conflicts with decisions by two other appeals courts in similar cases, a disagreement that increases the likelihood of Supreme Court review.

Congress passed the Pregnancy Discrimination Act after the Supreme Court ruled in 1976 that unequal treatment of pregnant employees did not constitute sex discrimination. Once the law took effect in 1979, AT&T granted pregnant employees full credit for time spent on leave, but did not equalize retirement credits for pre-1979 leaves.

As a result, the four women in the lawsuit lost between six months and a year of retirement credit, their lawyers said.

The disputed issue in the case was whether the women’s claim required retroactive enforcement of the Pregnancy Discrimination Act against conduct by AT&T—granting less paid leave for pregnancy than for other disabilities—that was legal before 1979.

The Supreme Court has frowned on retroactive enforcement of new laws that affect private rights and obligations, saying such laws must apply only to future acts unless Congress clearly intended them to cover past acts as well. But the appeals court majority said it wasn’t applying the 1979
law to AT&T’s pre-1979 limitations on disability benefits, but instead to its post-1979 decision to pay lesser retirement benefits to the same employees.

AT&T “continues to operate its (retirement) system in a discriminatory fashion” by paying retirees less because they took pregnancy leaves, said the majority opinion by Judge Kim Wardlaw. Dissenting Judge Diarmuid O’Scannlain said the ruling was based on acts that were legal at the time.
The Supreme Court is staying out of a dispute over whether women who were denied job seniority credit when they took pregnancy leave during the 1960s and 1970s can, as a result, be given smaller retirement benefits today.

The court, without comment, turned down arguments by female Ameritech phone company workers that relying on an old pregnancy-leave policy to deny or reduce current benefits “clearly discriminates against female workers.”

During the 1960s and 1970s, the portion of AT&T that later became Ameritech allowed women who took pregnancy leave to count only 30 days of the leave toward their seniority credit. Workers on leave for other disabilities received seniority credit for the entire leave.

In 1979 Congress enacted the Pregnancy Discrimination Act, which barred discrimination against pregnant workers. The company changed its policy but not the seniority of workers who took pregnancy leave before then.

Ameritech was created in 1984 as a result of the AT&T breakup. Ameritech was taken over by SBC Communications Inc. in 1999.

Ameritech created several early retirement plans starting in 1991. They were challenged by women who missed becoming eligible for early retirement because of lost seniority during their pregnancies.
Regional Pacific Bell has agreed to pay $25 million to settle a lawsuit brought by 10,000 female employees, many of them near retirement age, who were denied credit toward their pension when they took pregnancy leave.

The settlement will affect a generation of Pacific Bell employees who had their babies before the 1979 Pregnancy Discrimination Act, which entitles women on pregnancy leave to the same benefits as others on disability.

The pregnancy leave issue is becoming hotly debated in the workplace.

Similar lawsuits have been filed in New York, Cincinnati and other parts of the country by women who became working mothers 20 or 30 years ago and now are eligible for pensions.

The Pacific Bell suit, filed in San Francisco in 1989, is the first in California to address the issue. A hearing will be held today before U.S. District Judge D. Lowell Jensen in Oakland, who will decide whether to approve the settlement.

“It’s hard for women now to understand what we were dealing with,” said Lana Pallas, a Pacific Bell employee for 24 years who filed the initial lawsuit. “I think that the settlement is basically fair.”

Pallas, 49, was forced to take a personal leave when she gave birth to her daughter in 1972. In 1987, when she applied for an early retirement program, she discovered that she was four days short because the company did not grant her service credit during part of her pregnancy leave.

Pallas worked in the company’s offices in Riverside and San Ramon.

The settlement in the class action lawsuit comes after a long court battle and applies to all women who were on Pacific Bell’s payroll as of Jan. 1, 1984.

The women were represented by Equal Rights Advocates, a San Francisco public advocacy group that specializes in sex discrimination cases, and the Communications Workers of America, the union that represents the Pacific Bell employees.

Judith Kurtz, a San Francisco lawyer for Equal Rights Advocates, called the pregnancy suits “second-generation cases” involving women who were twice denied workplace benefits—first when they were pregnant and then decades later when they become eligible for pension benefits.

“These women who are now retiring are finding that they are still carrying the burden of what happened to them 20 or 30 years ago,” she said.

The issue is particularly significant in the telecommunications industry where women for decades dominated the lower-paying
jobs, working as telephone operators and secretaries.

Some suits in other states have been settled. But Mary O’Melveny, a lawyer for the union, said that this is the most far-reaching agreement because it not only provides $25 million to 10,000 current and former employees, it also restores their seniority credit.

She said that Pacific Bell changed its policy after the 1979 law went into effect, but failed to correct its past practices and restore credit to female employees.

She noted that before 1979, an employee who was out on disability because of a broken leg or a vasectomy was eligible for benefits and service credits, but those same benefits were denied women on pregnancy leave.

“It’s a very significant settlement,” O’Melveny said.

John Britton, a spokesman for Pacific Bell, confirmed that the San Francisco-based company had reached a settlement in the case. “Pacific Bell believes that our actions all along were appropriate,” he said. “We think what’s best now is to put this matter behind us.”

Pallas said that she filed the suit after she was compelled to work four more years after she was denied the early retirement program in 1987.

In 1972, she said that she wanted to come back to work six weeks after she had had a cesarean section and her doctor cleared her to go back to work.

But Pacific Bell’s company doctor recommended that she take a leave of three months. After she protested, she was allowed to come back to work a month later than she had originally planned.

She left Pacific Bell in 1991 and now works for another company. She says she has no hard feelings for her former company and still does consulting work for them.

Pallas said she pursued the case as a matter of principle and was encouraged by her daughter, who is now 27. She noted that her own mother, who also worked for Pacific Bell and is 69, is among those who will be eligible for benefits from the settlement.
In a victory for working mothers, a federal court has allowed a woman to sue Pacific Bell for sex discrimination because the company refused to credit her pregnancy leave toward retirement benefits.

The U.S. 9th Circuit Court of Appeals in San Francisco ruled 2-1 Monday that companies must count pregnancy leave toward retirement benefits as they would other temporary disability leaves, even if the leaves were taken before the 1979 federal law banning discrimination based on pregnancy.

Lawyers for Lana Pallas, a single mother and longtime worker who sued Pacific Bell, said the ruling could benefit thousands of women employed at hundreds of firms throughout the nine Western states covered by the 9th Circuit.

Many corporations don’t give women workers retirement credit for pregnancy leaves taken before 1979, the lawyers said, including other “Baby Bell” companies created with the breakup of AT&T.

“That’s current discrimination,” said Maria Blanco, a lawyer with Equal Rights Advocates, a San Francisco public interest law firm representing Pallas. “Any employer who has a similar policy is violating the law.”

Pac Bell spokesman Dick Fitzmaurice said lawyers for the San Francisco-based firm had not seen the court order and could not comment, but believed the company had followed the law. He said the company still denies full retirement credit for pregnancy leaves taken before 1979.

Pac Bell has about 58,000 workers in California and Nevada, mostly women.

Pallas, 41, went to work for Pac Bell in 1967. She requested a pregnancy leave in 1972, but the firm, following widespread corporate policy at the time, required her to take a personal leave.

In 1987, Pac Bell offered employees of more than 20 years an early retirement, including an immediate monthly pension and continuing health benefits.

Pac Bell denied Pallas’ application on the ground that she was three days short of 20 years.

Pallas, now a product designer at the telephone company, said she wanted to leave the firm to become a real estate broker, but needed the benefits for herself and her daughter.

She sued the company, claiming that its refusal to count her pregnancy leave like any other temporary disability leave violated the 1979 federal Pregnancy Discrimination Act.

The company said it had followed the law because all female employees who took pregnancy leaves after 1979 were allowed disability leave and received full credit for retirement. The firm contended it did not have to count pregnancy leaves taken before 1979.
1979 toward retirement benefits.

U.S. District Judge D. Lowell Jensen in San Francisco agreed with Pac Bell, and in 1988 threw the case out.

But the appeals court said the firm’s policy amounted to current discrimination because it has continued to give more retirement credit to women who took other types of disability leave before 1979 than it gives women who took pregnancy leaves during the same period.

Labor organizations challenged an Idaho statute barring local government employees from conducting payroll deductions for “political activities.” Appellees contend that the statute is a violation of their First Amendment rights. The Ninth Circuit Court of Appeals held that the statute should be reviewed under strict scrutiny, because it is content based, and the state had failed to prove that local government payrolls are nonpublic fora in which the state is allowed to place content-based restrictions.

Question Presented: Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?
We hold that Idaho Code § 44-2004(2), as applied to local government employers, violates the First Amendment because it is a content-based law for which the State officials assert no compelling justification. Moreover, the State officials have not demonstrated that the law should be reviewed under the more relaxed standard applicable to speech restrictions in nonpublic fora. In particular, they have not shown that the State of Idaho may properly assert a proprietary interest in controlling access to the payroll systems that constitute the fora in this case. Case law suggests that the authority over local governments the State possesses by operation of law is not enough to associate the local workplaces or payroll deduction programs with the State of Idaho, and the State officials have adduced no specific evidence that the State actually does own, administer, or control the payroll deduction programs.

Standard of Review

We review de novo the district court’s decision on cross-motions for summary judgment.... We must decide whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Mixed questions of law and fact and ultimate conclusions of law receive de novo review. We may affirm the district court’s grant of summary judgment on any ground supported by the record.

Factual and Procedural Background

In 2003, the Idaho legislature enacted the VCA, a series of amendments to Title 44 of the Idaho Code, including an amendment to Chapter 20 (“Right to Work”). The Chapter 20 amendment states: “Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.” “Political activities” are defined as “electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure.” Idaho Code § 44-2602(1)(e).

Plaintiffs filed suit challenging the constitutionality of the VCA, naming as defendants Bannock County Prosecuting Attorney Mark Heideman, Idaho Attorney General Lawrence Wasden, and Secretary of State Ben Ysursa (collectively, “Defendants”). Plaintiffs sought declaratory and injunctive relief from enforcement of § 44-2004(2) as violative of their rights to free speech and equal protection under the First and Fourteenth Amendments.

Defendants conceded that several provisions of the VCA were unconstitutional because they restricted the ability of labor organizations to solicit political contributions, namely, Idaho Code § 44-2601 to -2605. On cross-motions for summary judgment with respect to the remaining substantive provision banning payroll deductions for political activities, the district court held that the payroll deduction prohibition violated the First Amendment to the extent it applied to local government employers and private employers. It also held, however, that the payroll deduction ban could be applied constitutionally to the State’s own payroll system, i.e., to employees of the State of Idaho. Accordingly, the court granted in part and denied in part both motions. Ysursa and
Wasden ("Appellants") now appeal the district court's ruling that § 44-2004(2) is unconstitutional with respect to local government employers and school district employers.

Analysis

Idaho Code § 44-2004(2) burdens speech by diminishing Plaintiffs' ability to conduct any of the activities defined by the Idaho Code as "political." The term "political activities" is broadly defined to include virtually all types of electioneering, including "electoral activities" as well as spending on behalf of or against candidates, ballot measures, political action or issue committees, or parties.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment renders that prohibition applicable to the States.

This restriction on voluntary political contributions burdens political speech, which is protected by the First Amendment; indeed, political speech is a "central concern" of First Amendment jurisprudence.

The law does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult. The district court found that unions face substantial difficulties in collecting funds for political speech without using payroll deductions because of their members' concerns over identity theft associated with other electronic transactions, as well as the time-consuming nature of face-to-face solicitation. The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech, and § 44-2004(2) is properly viewed as a regulation of protected speech.

The law on its face prohibits payroll deductions only for political activities. This is subject-matter discrimination, which is a form of content discrimination.

Ordinarily, because we are dealing with content-based restriction of political speech, we would evaluate its validity under strict scrutiny. Indeed, content-based regulations of speech are generally presumptively invalid, under the rationale "that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992). To be constitutional, § 44-2004(2) must be narrowly tailored to serve a compelling interest. As Appellants proffer no compelling interest in favor of the law, both sides agree that it would easily fail strict scrutiny.

Strict scrutiny, however, is not applied in all circumstances involving content-based restrictions. Appellants contend that two excepted circumstances apply here, and it is to that argument that we now turn.

I. Government-Subsidized Speech

In general, government may refrain from paying for speech with which it disagrees. The nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence.

Applying this doctrine, the district court held that the State of Idaho could properly
forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. The parties appear to be in agreement as to this point, and the holding is unchallenged on appeal. As the district court noted, however, there is no subsidy by the State of Idaho for the payroll deduction systems of local governments.

II. Forum Analysis

In certain cases, regulation of speech on government property is not subject to strict scrutiny. In particular, it is well established “that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.” Davenport, 127 S. Ct. at 2381. Appellants invoke this doctrine, arguing that the proper way to view the statute is to look at the payroll deduction programs of local governments as nonpublic fora belonging to the State. Appellants argue that § 44-2004(2) is therefore valid because it is viewpoint neutral, applying to all employers and to any type of political contribution, and assert that the restriction “is plainly reasonable given Idaho’s interest in its payroll system not assisting or having the appearance of assisting with political matters.”

A.

Government regulation of speech in public spaces has historically been governed by the public forum doctrine. The extent to which the government can control access depends on the nature of the relevant forum. The traditional public forum includes property characterized, “by long tradition or by government fiat” as “devoted to assembly and debate.” Perry Educ. Ass’n, 460 U.S. at 45 (noting that streets and parks are the quintessential examples of public fora). The government may exclude speakers from a traditional public forum “only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.” Cornelius, 473 U.S. at 800.

In comparison, “designated public fora” are created where the government has opened public property for expressive activity. If the government has opened the property to a class of speakers, rather than offering selective access to individual speakers, the property is a designated public forum with respect to all speakers within that class. The state may also designate a public forum for discussion of certain subjects. In a designated public forum, content-based prohibitions on speech, including the exclusion of particular speakers, “must be narrowly drawn to effectuate a compelling state interest.” Perry Educ. Ass’n, 460 U.S. at 46. In other words, as long as the forum is open, the state is bound by the same standards as apply to the traditional public forum.

Finally, a nonpublic forum has been characterized as “[a]ny public property that is not by tradition or designation a forum for public communication.” Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 907 (9th Cir. 2007). For example, in International Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (“ISKCON”), the Court declared airport terminals to be a nonpublic forum because, although speech activity occurs in airport terminals, their tradition and purpose is to facilitate passenger air travel and serve as a commercial enterprise, not to promote
expression. The government may limit access to "a nonpublic forum to activities compatible with the intended purpose of the property." Perry Educ. Ass'n, 460 U.S. at 49.

A "forum" does not need to be a physical place. For example, in Cornelius, the Supreme Court held that a charity drive within federal workplaces constituted a forum. The Court reasoned that the relevant forum should be determined on the basis of the type of access sought by the speaker to the relevant property, and the NAACP did not claim any general right of access to the federal workplace outside of the charity drive. Thus, the Court considered the relevant forum to be the charity drive itself rather than the federal workplace.

Following Cornelius, the relevant forum in this case would be the payroll deduction programs of the local governments, as Plaintiffs seek access to this part of local government workplaces. Appellants assert that the payroll deduction programs are nonpublic fora. The government may place content-based limits on speech in a nonpublic forum, "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. Appellants assert that § 44-2004(2) meets this test.

Nevertheless, Plaintiffs argue strenuously that forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are "property" of the State of Idaho in any sense, and the State of Idaho therefore cannot assert an interest in protecting the fora. To resolve this question, we consider first the required relationship between the government entity seeking to impose a free speech restriction and the forum in which it is imposed. We then examine the relationship between the State of Idaho and the workplaces of its local governments.

B.

In ISKCON, the Court explained the rationale for forum analysis as follows: "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." 505 U.S. at 678. Thus, in these situations, the role of the government has changed from regulator to something akin to that of a private landowner, with at least some of the associated exclusionary rights.

Forum analysis developed in battles over access to physical spaces, such as streets, buses, and airports, where property law provides a ready guide to the scope of the government’s rights. Supreme Court precedent accordingly suggests that a forum may be subject to government control where the government entity maintains a proprietary relationship over the relevant property. For example, in ISKCON, the Court noted specifically that the Port Authority of New York and New Jersey, the entity which had adopted the speech-restricting regulation, owned and operated the airport terminals which constituted the property subject to the challenged regulation. 505 U.S. at 675.

By contrast, the mere possession of legal authority to regulate an entity, without more, represents an insufficient level of control over that property to claim the forum in the name of the State. In Consolidated Edison, the Supreme Court rejected an attempt by the State of New York, acting through the New York Public Service Commission, to
regulate Consolidated Edison’s monthly bill inserts. 447 U.S. at 532-33. The State argued that it was entitled to treat the billing envelope as “subject to the State’s plenary control” because of the State’s regulatory interest in controlling operations of a public utility. The Court held that the State’s legitimate regulatory interest in controlling Consolidated Edison’s activities did not alter the nature of the property as private; therefore, case law governing rights of access to governmental property did not apply.

C.

Reviewing the relationship between the State of Idaho and the workplaces of local governments, we conclude that Appellants have failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems. The State’s relationship with the local governments instead resembles that of a regulator who possesses broad powers over them.

Appellants’ evidence of control over local governments is similar to that presented by the State of New York in Consolidated Edison. Appellants rely exclusively on the state legislature’s authority over Idaho’s political subdivisions, arguing that the state’s power to regulate various aspects of local government necessarily gives it the right to control access to the local governments’ payroll deduction programs. They point out that the legislature may create, control, alter and abolish local governments as it sees fit, subject only to the limits of the Idaho Constitution, citing State ex rel. Hays v. Steunenberg, 5 Idaho 1, 45 P. 462, 463 (Idaho 1896). Appellants discuss the doctrine of preemption of municipal law by State law, note that local governments may levy taxes only to the extent they are authorized to do so by the legislature, and note the limits on the borrowing capabilities of counties, cities, and school districts, citing Idaho Const. art. XII, 6; id. art. XIII, 4.

Appellants note that school districts are supervised and controlled by the State Board of Education, which must approve the changing of school district boundaries, the addition or subtraction of territory, and the creation of new districts. Appellants also highlight Common School District No. 61 v. Twin Falls Bank & Trust Co., 50 Idaho 711, 4 P.2d 342 (Idaho 1931), which states that school districts are agencies of the state. Finally, school districts can only exercise implied powers consistent with those expressly granted by the legislature.

As illustrated by Consolidated Edison, however, the generalized lawmaking power held by the legislature with respect to a state’s political subdivisions does not establish that the state is acting as a proprietor with respect to the property of local governments. In Consolidated Edison, the New York legislature had granted the Public Service Commission broad regulatory powers over Consolidated Edison. The Court nevertheless found this broad grant of authority insufficient to render Consolidated Edison’s billing envelopes a forum of the Public Service Commission. Here, nothing in the Idaho Code suggests that Idaho is the proprietor of the local government workplaces or their payroll deduction programs. The statutes instead suggest the opposite—that the State has granted units of local government the right to own and control their own property, independent of the State’s control.

Many units of local government in Idaho are expressly declared to be independent corporate bodies, suggesting independent powers of management and governance as compared with state agencies, which lack a
similarly corporate status.

Case law has also recognized that local governments are distinct entities from the State of Idaho.

Of particular importance to forum analysis, the legislature has granted many local governmental units various powers to acquire, hold, and convey real and personal property. These rights of ownership are clearly independent of the State itself, as other portions of the Code discuss the ability of the local government units to grant property to the State or to other political subdivisions of the State. For example, school districts have the same property transfer rights vis-a-vis the State as they have vis-a-vis other government entities. Appellants presented no evidence that local workplaces are treated differently than other types of property owned by local government.

In sum, the State’s broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission’s regulatory powers over Consolidated Edison. Local governments are independent corporations and many are explicitly granted the right to own and control their own property. Lacking any evidence of the State’s proprietary relationship with the local government workplace, Appellants’ assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State must fail.

D.

When pressed at oral argument, Appellants conceded that the State of Idaho is not the proprietor of local government workplaces or their payroll deduction programs. Nevertheless, Appellants suggest that Consolidated Edison, involving use of private property, is fundamentally different from the situation presented here, and that Plaintiffs’ focus on property ownership and control is inapposite. They emphasize that, unlike private corporations such as Consolidated Edison, local governments are exclusively creatures of the State’s creation; therefore, the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who “owns” them.

We do recognize that the forum doctrine’s stated roots in property rights has been subject to some criticism. There is some support in the caselaw for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity. Under this approach, the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules in the forum.

In United States Postal Service v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981), for example, the Court applied forum analysis to privately owned mailboxes. Clearly, no proprietary relationship exists between the government and private mailboxes. Nevertheless, the Court compared the government’s rights with respect to the mailboxes to those of a private owner and declared that the State had the ability to preserve “property under its control.” Cited laws controlling the use of mailboxes included a federal regulation designating the boxes as “authorized deposito[ies]” of mail and federal criminal laws affording such boxes protection against damage and the destruction of the mail contained therein. Indeed, the boxes only became “mailboxes” because of the government’s daily use of the
boxes for that purpose; in that sense, their essential character was completely controlled by the government.

Under such circumstances, one can argue that the state has a sufficient managerial interest in the resource to justify judicial deference to its rules. Deference is appropriate where the government needs to organize itself in an institutional manner. The regular exercise of control over the administrative activities of a particular entity demonstrates that the government is indeed the manager of that entity. Such pervasive management also lessens the likelihood that a decision made in the course of managing an entity, which results in the exclusion of expressive activity, had as its purpose the suppression of expression.

But even if we were to approach forum analysis from the vantage point Appellants urge, it would not alter our conclusion. It is clear that the State of Idaho does not pervasively manage local government workplaces or local government the payroll deduction programs. Appellants cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute, § 44-2004(2). Appellants could cite no other situation in which Idaho has attempted to use its asserted powers to manage the day-to-day operations of local government personnel. The unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects—the denial of payroll deductions for the purpose of stifling political speech. Appellants have failed to establish that local governments' payroll deduction programs involve Idaho's discretion and control over the management of its own internal affairs, such that the programs should be considered a nonpublic forum of the State.

Much of First Amendment analysis balances interests; forum analysis attempts to balance the interests of the government in controlling access to its property with the speech interests of the parties who wish to gain access to the property. In this case, Appellants have established generally that the State of Idaho has the ultimate power of control over the units of government at issue but have not established that the State actually operates or controls the payroll deduction systems of local units of government. This suggests that the State of Idaho did not establish the forum and does not currently operate the forum. Consequently, the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities.

We therefore conclude that Appellants' assertion that local government payroll deduction systems are nonpublic fora of the State of Idaho is unsupported by law or facts. The public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program. Accordingly, we apply the strict scrutiny analysis described above, and because § 44-2004(2) fails strict scrutiny, we hold the statute unconstitutional as applied to local government employers. The district court's grant of summary judgment in favor of Plaintiffs that Idaho Code § 44-2004(2) is unconstitutional with respect to local units of government, including school districts, is

**AFFIRMED.**
An Idaho state law that bars school districts and other local government agencies from making deductions from employees’ paychecks for political causes will be reviewed by the U.S. Supreme Court.

Last week, the court accepted the state’s appeal in *Ysursa v. Pocatello Education Association* (Case No. 07-869), in which Idaho is defending the federal constitutionality of a provision under its “right to work” laws. The provision, passed in 2003 under a measure known as the Voluntary Contributions Act, has been backed in Idaho and in other states by anti-union groups.

The action is the latest sign of renewed interest on the Supreme Court in legal issues surrounding public-employee unions, such as the rules about representation fees for workers who refuse to join the union. The court upheld a Washington state law last year that requires unions to secure the consent of nonmembers to use their representation fees on political activities. . . .

And in February, the court accepted review of a case that will explore whether nonunion public employees may be forced to pay agency fees for the costs of union litigation not directly related to their workplace’s bargaining unit. That case, *Locke v. Karass* (No. 07-610), will be argued in the court’s next term, as will the newly granted Idaho case.

The Idaho Education Association, its Pocatello affiliate, and several other public-employee unions in the state, which rely on the deductions to help pay for their political action committees, challenged the Idaho law.

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit, in San Francisco, ruled unanimously in October that the provision as applied to local government employers violates the First Amendment free-speech and association rights of the unions.

“This restriction on voluntary political contributions burdens political speech,” the 9th Circuit court said. “The law does not prohibit [the unions] from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult.”

**Similar Ruling**

In its appeal to the Supreme Court, Idaho said the 9th Circuit “has made a striking and unprecedented incursion into the authority of state legislatures to control the employment practices of political subdivisions.”

“The concern here is with the ability of the Idaho legislature to control payroll practices of local governmental entities,” Clay Smith, the state’s deputy attorney general, said last week in an interview. “We believe the legislature has the reasonable authority to do that without being compromised by the First Amendment.”

The Idaho teachers’ union and the other public-employee unions had urged the high
court not to review the case. They noted that the U.S. Court of Appeals for the 10th Circuit, in Denver, had recently made a similar ruling in striking down Utah’s version of the Voluntary Contributions Act, and thus no conflict existed among the federal appeals courts on the issue...

“In reaching out to ban local governmental entities from allowing their employees to use the local governmental entity’s payroll system to transmit lawful political contributions, Idaho plainly acted as a regulator” of a speech forum, and not as a “proprietor” of one, the unions’ brief said in arguing that the 9th Circuit panel had applied the correct analysis.

“In Idaho, more than in many states, the mantra has always been local control,” said John E. Rumel, the general counsel of the 11,000-member IEA. “We felt there was just no good reason for the state to be reaching out to regulate local payroll systems.”

‘Paycheck Protection’

In a friend-of-the-court brief filed in support of Idaho’s appeal, the National Right to Work Legal Defense Foundation and other groups said the 9th and 10th Circuit rulings conflicted with a 1998 ruling by the U.S. Court of Appeals for the 6th Circuit, in Cincinnati, that upheld an Ohio law similar to Idaho’s.

“The 9th Circuit effectively treats public payrolls as akin to a public park in which a union, or any other entity, is entitled to fundraise, notwithstanding a payroll’s primary (perhaps only) use, which is to pay employees,” the right-to-work group’s brief said.

Stefan H. Gleason, a vice president of the Springfield, Va.-based foundation, said the public-employee unions, often led by the politically powerful teachers’ unions, “oppose any infringement whatsoever on their special privileges.”

The right-to-work groups have long sought to get states to adopt various forms of what they call “paycheck protection” measures for workers who do not want to join the unions or who do not want their mandatory representation fees to go for the unions’ political causes.

The anti-union groups have acknowledged that even in states that have adopted such measures, the laws have not been very effective in curbing the influence of unions. Still, the Supreme Court’s recent foray back into this arena has the anti-union forces excited.

“It appears the Supreme Court is more interested in re-examining these cases involving union special privileges,” Mr. Gleason said.

In its decision last year in Davenport v. Washington Education Association, the court unanimously upheld the Washington state authorization requirement for nonunion members’ agency fees to be used for political causes, a provision opposed by the unions.

But in what the unions considered a silver lining, the justices declined the invitation of right-to-work groups to reconsider some of their core precedents on agency fees to make collection from nonmembers more difficult.
Northwest Professional Educators (NWPE), Idaho’s only nonunion professional educators organization, applauds the United States Supreme Court for granting review of the Ninth Circuit’s decision invalidating Idaho’s Voluntary Contributions Act (VCA) (Ysursa v. Pocatello Education Association).

Originally passed in 2003, the VCA is a law that prohibits payroll deductions for union dues for certain purposes, including political activities. Challenged by the Idaho Education Association, the law was ruled unconstitutional by the state’s high court.

Currently, teachers are obligated to pay for the state and national unions’ political activity with general union dues in order to exercise their local collective bargaining rights as members of a local National Education Association affiliate. Refusing union membership on political grounds deprives teachers of their collective bargaining rights even though they must abide by the collective bargaining agreement.

Connie Prow, NWPE member in Bruneau-Grandview School District, stated in a declaration supporting the VCA, “The Voluntary Contributions Act gives us the chance to have a say and not be intimidated into belonging to organizations that do not represent all that we stand for.”

Cindy Omlin, Executive Director of Northwest Professional Educators, stated, “We are grateful that the United States Supreme Court has taken this case. Without the protection of the VCA, hundreds of dollars are taken from union teachers’ paychecks that are directed to state and national political activity that runs afoul of teachers’ beliefs and interests. Teachers should have the right to engage in local collective bargaining without having their paychecks picked for unrelated state and national union politics.”

Northwest Professional Educators is a nonprofit, non-union, professional educators’ organization focused on students as educators’ highest priority and improving the professionalism of education. NWPE welcomes educators of any education entity including teachers, administrators and support staff, and provides members with liability insurance, legal services, professional development resources, teacher scholarships/classroom mini-grants, and a voice on education issues. NWPE is an affiliate of the Association of American Educators.
Union leaders are hailing a federal ruling that strikes down a 2003 Idaho law banning payroll deductions for political contributions.

"It would have affected a union's ability to collect money for political purposes," said Lewiston firefighter Steve Repp, president of Lewiston's chapter of the International Association of Firefighters. "Where part of the rub came in with it, it specifically targeted labor organizations."

U.S. District Court Judge B. Lynn Winmill declared the Voluntary Contributions Act a violation of the First Amendment in his 15-page ruling issued Nov. 23.

The law raised a firestorm of protests from teacher and firefighter unions as Republican leadership pushed the law in 2003.

Unions argued the law was designed to punish them for supporting moderate Republicans and Democrats. Backers of the law argued it protected workers from paying dues for political activities they may not have supported.

Lewiston's senator, whose district has a strong union presence, took heat for supporting the law as a member of leadership.

The law wasn't payback, said Sen. Joe Stegner, R-Lewiston, who is assistant majority leader.

"I don't believe it was a punitive effort on the part of leadership," said Stegner. "I viewed the issue as an individual's protection issue versus the interests of a larger group."

Stegner voted in favor of the law despite believing it might not pass constitutional muster.

"If we go through that (court challenge) process, at least we end up with a little more definitive information," said Stegner. "I don't disagree that it might not be expensive from time to time . . . but I don't believe it's an absolute waste."

Winmill rejected all of the state's arguments, but conceded the state is free to ban payroll deductions for its own employees, "where the state bears any part of the cost of setting up or maintaining the payroll deduction."

Since Idaho is a Right to Work state, wrote Winmill, employees don't have to join unions, let alone approve payroll deductions.

The judge was unconvinced such payroll deductions amounted to coercion. In fact, wrote Winmill, the ban could force "unions to engage in face-to-face solicitation, a technique fraught with the potential for coercion."

He ridiculed the state's contention that the law protected employees who forget they authorized a payroll deduction.

Noting the law struck down an annual re-authorization requirement, Winmill asked why a ""forgetful-employee' rationale"
should only apply to political deductions:

"Is there something about political deductions that makes them particularly forgettable? Nothing comes to mind. Indeed, it is impossible to imagine that employees are blasé about the money being deducted from their wages."

As union leaders welcome the ruling, they have not forgotten the law’s sting.

"There seems to be an appearance that they (lawmakers) don’t care for labor unions and they don’t care for public employees," said Repp, whose local union is working toward creating its own political action committee. "That’s not the Legislature as a whole . . . but certainly key people in leadership have shown that to be their true colors."

Stegner said the ruling should put the issue to rest.

"I’m not surprised nor am I particularly disappointed in the outcome," said Stegner. "And I don’t expect any re-attempt by the Legislature to revisit that issue in this upcoming session."

He added, "I could be wrong."
The Maine State Employees Association (MSEA) is the collective bargaining union for all public employees in the state of Maine. MSEA is entitled to collect fees from employees who are not members of the union in order to cover expenses related to collective bargaining. MSEA is affiliated with the national Service Employees International Union (SEIU) and pays a fee to maintain that affiliation and contribute to the efforts of SEIU, including litigation costs. Plaintiffs are nonmembers of MSEA who objected to their fees being used for "extra-unit litigation" costs by SEIU that were not directly related to the Maine employees. They claim that use of their nonmember fees violates their First Amendment rights. The First Circuit Court of Appeals disagreed, ruling that nonmember fees could be used for extra-unit litigation as long as the litigation satisfied the "germaneness" test established by the U.S. Supreme Court in Lehnert v. Ferris Faculty Ass'n.

Question Presented: In Ellis v. Railway Clerks, this Court unanimously "determined that the [Railway Labor Act], as informed by the First Amendment, prohibits the use of dissenters' [union] fees for extraunit litigation." Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 528 (1981) (opinion of Blackmun, J., citing Ellis, 466 U.S. 435, 453 (1984)). In Lehnert, a four-member plurality therefore held "that the Amendment proscribes such assessments in the public sector." Id. Moreover, Justice Scalia's separate opinion, concurring in part in the judgment announced by Justice Blackmun, reasoned that "there is good reason to treat [Ellis and the Court's other statutory cases] as merely reflecting the constitutional rule." Id. at 555.

May a State, nonetheless, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside of a nonunion employee's bargaining unit?

Daniel B. LOCKE, et al., Plaintiffs-Appellants,  
v.  

United States Court of Appeals for the First Circuit

Decided August 8, 2007

[Excerpt: Some footnotes and citations omitted.]

LIPEZ, Circuit Judge. This case raises a significant question under the First Amendment: may a union,
functioning as the exclusive bargaining agent for certain state employees, charge nonmembers for litigation expenses incurred by its national affiliate, if that litigation is substantively related to the bargaining process and is funded through a pooling arrangement? Two other circuits have responded in the affirmative; one has answered in the negative. Our reading of the Supreme Court’s most recent decision on this subject leads us to reply in the affirmative and hold that “extra-unit litigation” may be charged to nonmembers where it satisfies the “germaneness test” that generally applies to other pooled resources. See Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991). We therefore affirm the district court’s entry of summary judgment for the union and against the nonmember employees.

I.

A. Factual Background

Both parties moved for summary judgment below; none of the material facts are in dispute.

The Maine State Employees Association (“MSEA”) is a union representing state workers, and has been designated by the state as the exclusive bargaining agent for certain employees of its executive branch. Under MSEA’s collective bargaining agreement, it must provide certain administrative services for all of these employees, regardless of whether they elect to join the union. As a result, MSEA is entitled to receive a “service fee” (also known as an “agency fee”) from those nonmember state employees whom it represents. The state and MSEA negotiated a new collective bargaining agreement in 2005, which included a provision requiring all nonmember employees to begin paying this service fee as of July 1, 2005. The service fee is intended to be equal to the amount of union dues minus those expenses not related to the provision of collective bargaining and contract administration services. In other words, MSEA is permitted to charge nonmember employees their share of all expenditures related to its services as the exclusive bargaining agent; those MSEA expenditures that are not related to bargaining and contract administration, such as political campaign donations or benefits provided only to members, cannot be “charged” to the nonmembers.

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MSEA’s expenditures include the affiliation fee that it pays to the Service Employees International Union (“SEIU”) to maintain its affiliation relationship with that organization. MSEA’s July [2005] notice also included financial information for SEIU and classified as chargeable that proportion of its affiliation fee that represented SEIU’s expenditures on chargeable activities. In other words, all of SEIU’s activities that were comparable to those undertaken by MSEA, and which MSEA deemed chargeable in the calculation of the service fee, were included in the calculation of the proportion of MSEA’s affiliation fee that could be charged to nonmembers.

MSEA included in its calculation of chargeable expenditures those costs of litigation (by both itself and SEIU) that was germane to collective bargaining. This meant that nonmembers contributed, through their service fees, to some litigation that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states. Included within this general category of expenditures were the salaries of SEIU’s
lawyers, and other costs of providing legal services to bargaining units throughout the country. Costs of litigation that was not related to collective bargaining, however, were not included in the service fees assessed to MSEA’s nonmembers.

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Some nonmembers challenged the service fee and an arbitration was scheduled for all objections. The arbitration took place in December 2005, and the arbitrator issued a decision in May 2006, upholding MSEA’s service fee calculation. In accord with the notice, all fees paid by nonmembers were held in escrow until after the arbitrator’s decision was announced.

B. Procedural Background

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On appeal, the nonmember employees raise only two issues. First, they claim that SEIU’s expenditures on litigation related to or on behalf of other bargaining units (also known as “extra-unit litigation” expenses) are not chargeable to nonmembers under the First Amendment because “the State of Maine has no ‘compelling state interest’ in SEIU’s far-flung litigation activities nationwide.” Second, the appellants claim that the “district court erred when it held that the constitution imposes no obligation to calculate an adequate advance reduction of the fee.”

II.

The first issue in this case, the chargeability of extra-unit litigation that is related to collective bargaining and that is subject to a pooling arrangement, requires us to examine a series of Supreme Court decisions and to resolve an area of uncertainty. Although none of the Supreme Court’s opinions has squarely addressed the issue presented in this case, we explain below our view that the constitutionality of charging extra-unit litigation costs to nonmember employees turns on the same “germaneness” test that applies to all other pooled services under Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991).

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C. Ellis v. Brotherhood of Railway Clerks

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[In Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984),] the Court . . . addressed the particular expenditures that were challenged by nonmembers. In evaluating these expenditures, the Court recognized that the agency-shop arrangement inherently entailed some “significant impingement on First Amendment rights” because the nonmember employees were, for the sake of peaceful labor relations, being required to “support financially an organization with whose principles and demands [they] may disagree.” Id. at 455. The Court nonetheless recognized that this infringement of constitutional rights had been permitted, by its prior decisions in Hanson and Street, because of the strong governmental interests at stake. With those preliminary considerations in mind, it articulated the standard for permissible charges to nonmembers as
issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448. Pursuant to this standard, only those expenditures arising from activities related to the union’s duty of representation to all of the employees in the bargaining unit could be charged to all employees.

One of the six specific expenditures at issue in Ellis was litigation costs. The Court held:

The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.

Id. at 453. Consistent with Ellis’ general definition of relevance (or “germaneness,” as the Court would later describe it), which focuses on activities that are related to a union’s collective bargaining duties, litigation expenses chargeable to nonmembers would also have to be related to the bargaining process for the particular local unit. Extra-unit litigation, by definition, could not satisfy this standard.

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E. Lehnert v. Ferris Faculty Association

In Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991), the Court addressed, for the first time, the chargeability of “pooled expenses.” The defendant union in Lehnert was a local affiliate of both a state union (the Michigan Education Association, or “MEA”) and a larger, national union (the National Education Association, or “NEA”). It paid affiliation fees to the MEA and the NEA; these fees, along with the fees paid by all other local affiliates, were used by the state and national unions to support various activities at the state and national level. The affiliation fees also ensured the local unit’s access to the MEA’s and NEA’s resources when the unit needed them (and the correlative availability of those resources to other local units when they were in need). The union passed a portion of its affiliation fees obligation on to nonmembers, by counting a percentage of the affiliation fees within the chargeable category of expenditures. That chargeable category was calculated by dividing the MEA’s and NEA’s total expenditures by those expenditures it made on “chargeable” activities. The nonmember plaintiffs in Lehnert challenged the amount of the service fee, based on the inclusion of certain expenditures in the category of “chargeable” expenses.

The Lehnert Court began by reviewing the relevant precedents and deriving from them
a three-part test for determining whether a particular union expenditure is chargeable to nonmembers: “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” *Id.* at 519.

The Court then analyzed the nonmembers’ claim “that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit.” *Id.* at 522. It focused on the language from *Hanson* requiring that expenditures charged to nonmembers be “germane” to collective bargaining and concluded that such expenditures need not have “a direct relationship” to the nonmembers’ bargaining unit in order to satisfy the germaneness prong of the chargeability test. *Id.* at 522-23. The Court explained:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local’s affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit’s protection, even if it is not actually expended on that unit in any particular membership year.

*Id.* at 523. Thus the nonmembers’ service fees could include “their pro rata share of the costs associated with otherwise chargeable activities of [the local unit’s] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees’ bargaining unit.” *Id.* at 524. In other words, the Court concluded that the use of a pooling or affiliation arrangement, with its requirement that a local union pay an affiliation fee to the state or national union, would not render expenditures that were otherwise chargeable (that is, substantively relevant to collective bargaining) non-germane to the local bargaining unit.

The Court cautioned, however, that the permissibility of pooling arrangements “does not serve to grant a local union carte blanche to expend dissenters’ dollars for bargaining activities wholly unrelated to the employees in their unit.” *Id.* The *Lehnert* Court, therefore, adopted a different standard of germaneness than that used by the *Ellis* Court. While *Ellis* defined germane activities as those directly related to the local unit’s bargaining process, 466 U.S. at 448, *Lehnert* recognized germaneness as having two distinct components: charged expenditures must be (1) substantively related to collective bargaining, and (2) “for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization,” 500 U.S. at 524. Thus, *Lehnert* defined germaneness more broadly to take account of the nature of affiliation relationships and the pooling of resources characteristic of such relationships.

[Discussion of the dicta in multiple opinions addressing the use of pooled expenses for extra-unit litigation. No opinion garnered a majority.]

In light of this fractured opinion, *Lehnert* did not resolve the specific question before us in this case: whether a union may charge nonmembers for expenses related to litigation conducted by a national affiliate, if the litigation is substantively related to the
bargaining process and is funded through a pooling arrangement. Lehnert did provide the framework, however, for analyzing the question.

III.

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B. MSEA’s Extra-Unit Litigation Charges

In granting summary judgment for MSEA, the district court held “as a matter of law that the inclusion of the cost of extra-unit litigation does not violate Plaintiffs’ constitutional rights.” Locke v. Karass, 425 F. Supp. 2d 137, 147 (D. Me. 2006). It cited the decisions of the Sixth and Third Circuits, and stated that “[t]hose circuit courts that have ruled on the issue have found that it is constitutionally permissible for unions to include extra-unit litigation expenses in the service fees charged to nonmembers.” Id. at 146-47.

The appellants argue that the district court failed to give due weight to the Supreme Court’s earlier decision in Ellis, which stated that “[t]he expenses of litigation not having [] a connection with the bargaining unit are not to be charged to objecting employees.” 466 U.S. at 453. They claim that this language is dispositive and bars the union from charging nonmembers for any extra-unit litigation costs. In addition, they cite to Justice Blackmun’s opinion in Lehnert, representing four Justices, and its endorsement of the Ellis per se prohibition on charging for extra-unit litigation, 500 U.S. at 528, in support of their argument. They also contend that our decision in Romero v. Colegio de Abogados de Puerto Rico, 204 F.3d 291, 299 (1st Cir. 2000), is controlling here because, they say, it holds that charging nonmembers for litigation, other than that conducted by or for the particular bargaining unit, is unconstitutional.

In response, MSEA argues that Ellis is not relevant to this case because it did not address the chargeability of pooled resources, and its discussion of extra-unit litigation is therefore inapplicable to the facts here. The union also challenges appellants’ reliance on Romero, arguing that its discussion of chargeability for extra-unit litigation was dicta. MSEA urges us to adopt the reasoning of the Third and Sixth Circuits, finding that the three-part Lehnert test should apply to extra-unit litigation in the same way that it applies to all other pooling arrangements.

We agree with MSEA that both Lehnert’s germaneness definition and three-part chargeability test are applicable here. Like the Third Circuit, we believe the chargeability of extra-unit litigation “lies in the intersection of the Ellis and Lehnert holdings,” 330 F.3d at 135. The Ellis decision holds that nonmembers cannot be charged for litigation that does not “concern” their own bargaining unit. 466 U.S. at 453. While the language in Ellis suggests, at first blush, that only litigation by or for the particular bargaining unit involved can be charged to nonmembers, a closer reading of the opinion reveals a more limited holding. As Otto noted, the Ellis court was not confronted with a pooling arrangement, 330 F.3d at 136; its decision pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate) meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time. Moreover, the litigation that was deemed nonchargeable in Ellis was specifically defined as “litigation not involving the negotiation of agreements or settlement of grievances.” 466 U.S. at
440. Therefore, the import of the decision in *Ellis*, relying on a narrow definition of germaneness, is limited by its factual background (i.e., a direct funding arrangement).

*Lehnert* addressed a different factual context—a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*. 500 U.S. at 523-24. The best way to reconcile *Ellis* and *Lehnert* is to recognize this distinction. *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit’s direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*’s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Under *Lehnert*, an activity is germane if it is substantively related to bargaining and will “ultimately inure to the benefit of the members of the local union,” 500 U.S. at 524. Where a unit enters a pooling arrangement, the pool itself provides a benefit to the local unit. As noted in *Otto*, the pooling arrangement is akin to insurance, whereby the local unit contributes certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them. See *id.* at 522-24. This arrangement, therefore, differs in kind from unilateral, non-reciprocal contributions to extra-unit litigation (of the sort at issue in *Ellis*), for which a bargaining unit would have no reasonable expectation of any return benefit. The funding mechanism used is critical to a determination of which definition of germaneness ought to apply. The *Ellis* definition assumes, and thereby requires, a direct source of funding, whereas the *Lehnert* definition of germaneness assumes the existence of an affiliation or pooling relationship. As this case involves extra-unit litigation funded through a pooling agreement, we conclude that the *Lehnert* definition of germaneness should apply.

* ***

Therefore, we apply the *Lehnert* three-prong test to determine whether MSEA’s contributions to SEIU’s litigation efforts were properly chargeable. If the SEIU litigation was “germane” to MSEA’s collective bargaining duties, as that term was defined in *Lehnert*, if it was justified by the government’s interests in labor peace and prevention of free riders, and if it did “not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop,” 500 U.S. at 519, the costs of MSEA’s contribution to that litigation were chargeable to the appellants.

The appellants have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy this test. Instead, relying on *Ellis*, and Justice Blackmun’s treatment of extra-unit litigation costs in *Lehnert*, they have argued only that, as a matter of law, extra-unit litigation could not be deemed “germane,” and hence the costs associated with it could not be charged to nonmembers. Having rejected that argument, we are bound to conclude that the costs at issue here do satisfy the chargeability test, as there has been no dispute regarding the second and third prongs of the test.

In addressing this extra-unit litigation issue, the district court held “as a matter of law[,] that the inclusion of the cost of extra-[unit]
litigation does not violate Plaintiffs' constitutional rights." 425 F. Supp. 2d at 147. Viewed in isolation, apart from the arguments framed by the parties, that language might be read to endorse a per se rule that all extra-unit litigation can be charged to nonmembers. However, as we have noted, the parties did not dispute whether the litigation charges were "germane," as that term was defined in Lehnert. Therefore, the district court must have assumed, consistent with the representations made to it, that the extra-unit litigation charges before it were "germane" within the meaning of Lehnert. On the basis of that understanding, we agree with the district court's disposition of the extra-unit litigation issue.

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AFFIRMED.

LYNCH, Circuit Judge, joining and concurring.

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The very narrow issue raised by this case is whether Local 1989's agency shop fees must exclude SEIU's extra-unit litigation expenses from the usual rule for calculating chargeable extra-unit expenses. Lehnert ruled that chargeability of extra-unit expenses is subject to "a case-by-case analysis." 500 U.S. at 519. Chargeable activities must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an [agency shop]." Id. There is no dispute that the extra-unit litigation by SEIU was "germane" in that pertinent sense. The question plaintiffs present is a categorical one—are extra unit litigation expenses so different from other extra-unit expenses that they should per se be treated differently for agency fee purposes? As described well in Judge Lipez's opinion, Lehnert did not directly answer the question. I think the answer is, clearly, "No."

The First Amendment is not violated by allowing extra-unit litigation expenses to be charged according to the same criteria of germaneness as other extra-unit expenses. Extra-unit litigation expenses are not analytically different from other pooled extra-unit expenses. The National Labor Relations Board, an administrative body with particularized expertise in administering labor disputes under the NLRA, has so held for over a decade.

The free rider problem, which justifies both local and extra-unit agency fees, exists equally for litigation costs as for other extra-unit costs. Extra-unit litigation can create common benefits or avoid common detriments. Litigation conducted by national unions frequently establishes precedent that redounds to the benefit of a union local and the employees it represents, even when the local is not a named party. For example, terms within a collective bargaining agreement may not yet have been established as having a particular meaning, and extra-unit litigation could establish a union-friendly definition. Or a local may believe that a particular practice common to its segment of an industry is an actionable unfair labor practice and contractual violation, but the national may decide for strategic reasons that a lawsuit is better brought with an extra-unit plaintiff. In return for these considerable benefits, a local union need pay an affiliation fee to the national. There is no reason to think, and no evidence presented by the plaintiffs to prove, that the
free rider problem is eliminated simply because the common extra-unit benefit is obtained through litigation. In fact, such a position "overlooks the economic interdependence of bargaining units." *Int'l Ass'n of Machinists, 133 F.3d* at 1016.

Further, if a particular extra-unit lawsuit is too remote and indirect in benefit to a local bargaining unit, or if a national union brings a suit for purposes totally unrelated to its collective bargaining duties, that problem may be addressed by a particularized germaneness inquiry. The existence of this mechanism to determine germaneness itself argues against any per se exclusion of extra-unit litigation expenses. If a case is brought to advance a political position, then the *Lehnert* rule itself will exclude that litigation from the agency fee.

A contrary rule would result in significant practical detriment for both local and national unions. Adopting plaintiffs' proposed rule would lead to reducing unions' ability to draw on funds for litigation related to collective bargaining. There would be a concomitant reduced capacity to bargain effectively on behalf of all employees. Ultimately, chipping away at the scope of properly chargeable expenses could jeopardize the income stream of unions.

Under *Lehnert*, the marginal burden on the First Amendment rights of non-union employees imposed by adding germane extra-unit litigation fees to the agency fee is minimal. On the facts here, the financial burden for extra-unit litigation costs is very small. The added burden on the plaintiffs' expressive and associative rights could not amount to any significant diminution—let alone infringement—of First Amendment rights.

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WASHINGTON—The Supreme Court on Tuesday stepped into a dispute over a labor union’s use of fees paid by nonunion employees to finance the labor organization’s court battles in other states.

Twenty state workers in Maine are challenging the expenditure by the labor union that bargains on their behalf.

The nonmembers are required to pay a service fee for the union’s collective bargaining efforts and contract administration.

The Service Employees International Union relies on portions of the fees to subsidize lawsuits concerning SEIU units other than Local 1989 to which the 20 current and former state employees belong.

At issue is whether a state can condition public employment on the paying of fees for such purposes.

This case is the latest instance of the justices addressing issues that could erode the power of labor unions. Last June, the court ruled that states may force public sector labor unions to get consent from workers before using their fees for political activities.

Three months ago, the court agreed to decide the validity of a state law that limits employers’ ability to weigh in on union organizing.

Union officials have no legal authority to make nonunion public servants in Maine pay for union activity across the nation, said Stefan Gleason, vice president of the National Right to Work Foundation.

The group’s legal arm is representing the Maine workers and has had 14 of its cases, all targeting labor unions, heard at the Supreme Court.

The case is Locke v. Karass, docket number 07-610.
A state employees’ union could charge nonmembers a “service fee” for litigation expenses incurred by its national affiliate and funded through a pooling arrangement, the 1st U.S. Circuit Court of Appeals has held.

But the 1st Circuit disagreed, finding that this “extra-unit litigation” satisfied the “germaneness” test articulated in the U.S. Supreme Court’s 1991 decision in *Lehnert v. Ferris Faculty Ass’n*. “Where litigation is funded through a pooling arrangement [between national and local affiliates], the *Lehnert* definition of germaneness applies and the affiliation relationship between the national union and the local unit will be sufficient to demonstrate that the expenditures will ‘inure to the benefit’ of the local unit,” wrote Judge Kermit V. Lipez for the court.

“The extra-unit litigation costs [in this case] were substantially related to the bargaining process,” Lipez continued. “Those costs are chargeable to the nonmember appellants without offending the First Amendment. “

W. James Young of the National Right to Work Legal Defense Foundation in Springfield, Va., and Stephen C. Whiting of Portland, Maine, represented the nonmember employees.

Washington lawyers Robert W. Alexander and Jeremiah Collins represented the union.

Extra-Unit Litigation Fees

The Maine State Employees Association, a union representing state workers in Maine, is designated under state law as the exclusive bargaining agent for certain employees in Maine’s executive branch.

As the exclusive bargaining agent, MSEA is required to provide administrative services to all employees in that unit, whether or not they are members of the union.

In 2005, the state and MSEA negotiated a new collective bargaining agreement that included a provision requiring all nonmember employees to begin paying a “service fee” to cover expenditures related to bargaining and contract administration. These service fees could not be used for political activities or for benefits provided only to members.

MSEA also maintained a “pooling arrangement” with the Service Employees International Union, a national organization, under which MSEA paid SEIU an “affiliation fee” in return for services, personnel and resources when MSEA might need them.

As part of the service fee it collected from nonmembers, MSEA included a proportion
of the affiliation fee it paid to SEIU covering activities it deemed relevant to the services it provided to nonmembers. Included in this calculus were litigation costs incurred by SEIU that MSEA considered germane to collective bargaining.

As a result, nonmembers were contributing, through their service fees, to “extra-unit litigation” that was not necessarily conducted for their own benefit, but for the benefit of other units and SEIU itself. Some of this litigation, they alleged, involved out-of-state matters.

A group of 20 nonmember employees challenged this service fee and the case went to arbitration in December 2005.

In May 2006, the arbitrator upheld the service fee calculation.

The nonmembers subsequently filed suit against MSEA and SEIU in U.S. District Court, claiming that the inclusion of extra-unit litigation costs in their service fees violated their First Amendment freedom-of-association rights because the state had no compelling state interest in SEIU’s national litigation activities.

U.S. District Court Judge George Z. Singal granted summary judgment for the unions, and the nonmembers appealed.

‘Lehnert’ Test

On appeal, the 1st Circuit acknowledged that no U.S. Supreme Court decision directly addressed whether nonmembers could be charged a “service” fee to help cover extra-unit litigation conducted by a national affiliate but funded in part by the local unit through a pooling arrangement.

The nonmember employees urged the 1st Circuit to follow the 10th Circuit’s 1991 decision in Pilots Against Illegal Dues v. Air Line Pilots Ass’n (PAID).

In that case, the 10th Circuit held that litigation conducted by a national affiliate was not germane to the local unit—and thus not chargeable to nonmembers—because it did not directly concern or benefit the local unit.

However, the 1st Circuit felt this approach went too far.

“This approach effectively prevents unions from charging nonmembers for any extra-unit litigation because, by definition, extra-unit litigation will not directly involve or concern the nonmembers’ unit,” said Lipez.

Instead, the court looked to the 6th and 3rd circuits, which ruled in 1995 and 2003 respectively, that under the germaneness test laid out by the Supreme Court in Lehnert, extra-unit litigation was chargeable to nonmembers as long as such expenses are shown to be related to collective bargaining and thus potentially “inure to the benefit” of the local unit.

The 1st Circuit then applied the germaneness test—as well as the other two prongs of Lehnert’s chargeability test—to this case.

“If the SEIU litigation was ‘germane’ to MSEA’s collective bargaining duties, as that term was defined in Lehnert, if it was justified by the government’s interests in labor peace and if it did not ‘significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop,’ the costs of MSEA’s
contribution to that litigation were chargeable to the [nonmembers],” said Lipez, quoting from Lehnert.

Because the nonmembers had not alleged that the extra-unit litigation expenses failed to satisfy any of these criteria—instead arguing that extra-unit litigation expenses could not be considered germane as a matter of law—the 1st Circuit concluded that the costs were indeed chargeable.
WASHINGTON—In a setback for organized labor, the Supreme Court ruled Thursday that states may bar public employee unions from using compulsory dues for political purposes unless individuals give their explicit approval. The 9-0 ruling opens the door for states to pass laws restricting use of union dues.

Nationwide, 12 million workers in public- and private-sector jobs are required to pay dues or fees to a union even if they elect not to join, and the National Right to Work Committee and other opponents of unions have fought these forced dues as unconstitutional.

President Bush and other conservatives have campaigned in favor of “paycheck protection” laws to limit the political use of union dues, long a major source of funding for Democratic candidates. Thursday’s ruling in favor of such a law in Washington state implicitly endorsed those efforts.

But these laws have gained little traction in Congress or around the nation. Twice in the last decade, California voters have rejected ballot initiatives that would have required unions to ask the permission of employees before using their dues for politics. The most recent defeat came in 2005, when Proposition 75, strongly backed by Gov. Arnold Schwarzenegger, lost by 7 percentage points.

While some union foes called the court’s ruling an important victory and predicted it would lead to other such laws, the National Right to Work Committee acknowledged that the court decided a narrow issue and that its direct effect figures to be limited.

The justices did not say it was unconstitutional to require schoolteachers and other public employees to pay dues to a union, as anti-union groups had hoped. Rather, it said only that states that allow public sector unions may also protect the rights of dissidents.

At issue before the court was a unique Washington state law that said unions may not collect fees from a nonmember and spend this money on politics unless “affirmatively authorized by the individual.” The state’s largest teachers union challenged this rule in court, and the Washington Supreme Court struck down the restriction as a violation of the union’s rights.

“The Supreme Court had no difficulty overturning that decision in Davenport vs. Washington Education Assn.

"Unions have no constitutional entitlement to the fees of nonmember employees," Justice Antonin Scalia said.

“It is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees,” he said, referring to the “agency shop” laws in many states that permit such arrangements in the public sector.

Nationwide, 28 states authorize public unions to collect mandatory fees from all
employees, while 22 states forbid it.

Requiring unions to obtain an explicit approval from dissident teachers before spending their dues money is a "modest limitation . . . on the union's exercise of this extraordinary power" to collect forced dues from all teachers, Scalia continued.

The decision maintains the uneasy compromise that the court set in the 1970s when unions took hold in the public sector, organizing schoolteachers, firefighters, police officers and other public employees.

On the one hand, unions can require all employees to pay fees or dues to cover the cost of collective bargaining, at least in states that authorize "agency shop" rules. But in 1977 the court said dissident employees have a free-speech right not to be forced to pay for political causes they oppose.

But reconciling those two principles continues to pose problems. Union leaders prefer a rule that allows them to use dues money except when dissidents object and seek a refund in writing. Anti-union activists have fought this approach, saying it gives unions too much leeway to spend the money of dissidents.

Anti-union activists and union officials were divided on whether Thursday's decision would prove significant.

"We are thrilled. This is a clear victory for the 1st Amendment rights of teachers not to fund political activity against their will," said Michael Reitz, a lawyer for the Evergreen Freedom Foundation in Olympia, Wash., which supported the dissident teachers. The ruling "paves the way for state legislatures to adopt paycheck protection across the country."

However, Stefan Gleason, a vice president of the National Right to Work Committee, called the decision a disappointment. "America's workers laboring under compulsory unionism are little better off after today's ruling," he said.

He said he hoped the high court would go further and say it was unconstitutional to force nonmembers to pay hundreds of dollars a year to a union. "The solution is to stop forced union dues in the first place," he said in an interview. "The paycheck protection laws are misguided and ineffective. It's not a good strategy to pursue."

The nation's largest teachers union said the decision "will have little or no practical impact." Indeed, Washington's law was the only one of its kind, and it no longer applies, as the Legislature later amended it in favor of the unions.

Bob Chanin, general counsel for the National Education Assn., said, "It is rare that I can honestly say we are pleased with a unanimous Supreme Court decision reversing our win in the court below, but this is one of those occasions."
Public employee unions cannot charge nonmembers for political lobbying and public relations campaigns that are not directly related to efforts to secure a contract, the Supreme Court ruled yesterday.

The case concerned teachers at a Michigan college who were not members of the union but were required by state law to pay a fee for union services.

The teachers challenged the use of that money for activities such as lobbying the legislature to increase spending on education; public relations efforts devoted to the same end; and activities of the parent unions not undertaken directly on behalf of the individual union.

The court ruled 8 to 1 that the use of the money for political lobbying and public relations, except those needed to ratify a contract and obtain the funds to pay for it, violated the free speech rights of the employees who were forced to pay the union for it.

But five justices said it was legal to charge the employees for “their share of the collective bargaining costs of the state or national parent union” even if the activities of the parent unions do not directly produce a “tangible benefit” for the local.

The other four agreed that nonmembers could be charged for some of the costs of parent unions.

Both sides claimed victory in Lehnert v. Ferris Faculty Association.

“Public employee unions spend millions of dollars lobbying state legislatures and Congress and the executive branches on the state and federal level on all sorts of matters, and they can no longer do that with the money of dissenting nonunion public employees,” said Raymond LaJeunesse of the National Right to Work Legal Defense Fund, which represented the nonunion teachers.

From now on, he said, “That money will have to come from those members that voluntarily agree to pay full union dues.” Money spent on lobbying is an important part of the expenditure of public employee unions because they rely on government funding of their members’ jobs.

But union lawyers said they had dodged a potentially lethal bullet with the court’s ruling on the use of nonmember funds to support the activities of state and national unions.

All nine justices agreed that nonmembers could be charged for some of those activities.

This was the kind of a case if it went the wrong way it could have been a disaster. It could have wiped us out,” said Robert Chanin, the lawyer for the union. “The most important issue was whether local bargaining units can charge for the expenses of state and national parent unions. . . . If that had gone the other way, we could have been in serious difficulty.”

In this case, for example, the $284 service
fee charged to Ferris State College teachers who were not members of the union was broken down as $24.80 to the Ferris Faculty Association, $211.20 to the Michigan Education Association and $48 to the National Education Association.

Had all but the $24.80 been deemed off-limits for the union to charge nonmembers, Chanin said, large numbers of employees would have had a new financial incentive to quit the union and pay much less, a potentially devastating threat to the survival of public employee unions. Now, he said, “well over two-thirds of our dues will be chargeable.”

The ruling was splintered. Justice Harry A. Blackmun wrote an opinion joined by Chief Justice William H. Rehnquist and Justices Byron R. White and John Paul Stevens; Justice Thurgood Marshall joined those parts of the opinion upholding the union expenditures.

Justice Antonin Scalia, joined by Sandra Day O’Connor, Anthony M. Kennedy and David H. Souter, agreed with the court’s handling of many of the items. But he said the court was using the wrong test, and that “contributions can be compelled only for the costs of performing the union’s statutory duties as exclusive bargaining representative.”
Plaintiffs were employed by defendants as night watchmen in a commercial office building. In August 2003, the company contracted with a security service company and moved plaintiffs into less desirable positions, such as porters and light duty cleaners. Claiming age discrimination and other violations, the plaintiffs filed grievances with their Union. The Union submitted some claims to arbitration and denied other claims. Plaintiffs then filed a grievance with the Equal Employment Opportunity Commission on the age discrimination claim. Defendants moved to dismiss the claims, arguing that the plaintiffs' Collective Bargaining Agreement contained a clause requiring all claims of discrimination be submitted to arbitration. The Second Circuit held that mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent that they deny covered workers the right to a judicial forum for federal statutory claims.

Question Presented: Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?
BACKGROUND

The following facts are not disputed by the parties.

Plaintiffs are employees of Temco Services Industries ("Temco"), a building service and cleaning contractor. Before August 2003, they worked as night watchmen in a commercial office building owned by Pennsylvania Building Company and 14 Penn Plaza LLC (jointly, the "Company"). Since that time, they have been working as night porters and light duty cleaners in the same building.

Plaintiffs are members of Local 32BJ of the Service Employees International Union ("Union"), and they are covered by the collective bargaining agreement ("CBA") between the Union and the Realty Advisory Board on Labor Relations, Inc. ("RAB"), the multi-employer bargaining association of the New York City real estate industry. The CBA contains a mandatory arbitration clause for discrimination claims, which provides as follows:

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

In or about August 2003, the Company engaged Spartan Security, a security services contractor and affiliate of Temco, to provide certain security personnel, including night watchmen, for the building. Spartan brought in new employees, and plaintiffs, who had been employed as night watchmen, were reassigned to different locations and less desirable positions as night porters and light duty cleaners within the building.

Plaintiffs filed grievances with the Union under the CBA. They claimed that, as the only building employees over the age of 50, they were wrongfully transferred and denied overtime in violation of various provisions of the CBA, including the provision that prohibited discrimination on the basis of age. Plaintiffs’ grievances were submitted to arbitration before the Contract Arbitrator, Earl Pfeffer, who held hearings on eight occasions between February 2, 2004, and March 7, 2005. Shortly after arbitration began, the Union declined to pursue plaintiffs’ claims of wrongful transfer and age discrimination, electing to pursue only the claims regarding denial of overtime on behalf of all plaintiffs and wrongful denial of promotion on behalf of plaintiff Pyett. According to plaintiffs, the Union’s counsel explained to them that “since the Union had consented to Spartan Security being brought into the building,” the Union could not contest their replacement as night watchmen.
by personnel of Spartan Security. On August 10, 2005, the Contract Arbitrator issued his
Opinion and Award, denying plaintiffs’ arbitrated claims in their entirety.

On May 26, 2004, while the arbitration was ongoing, but after the Union declined to submit the age discrimination claims, plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a Dismissal and Notice of Rights on June 29, 2004 for plaintiffs Phillips and O'Connell and on September 14, 2004, for plaintiff Pyett. In each case, the EEOC determined that its "review of the evidence . . . fail[ed] to indicate that a violation ha[d] occurred," and notified each plaintiff of his right to sue. On September 23, 2004, plaintiffs commenced this action against the Company and Temco in the District Court, pursuing those claims that the Union did not submit to arbitration. Plaintiffs alleged that they had been transferred from their positions and replaced by younger security officers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., and the New York City Administrative code, N.Y.C. Admin. Code § 8-107.

Defendants moved for dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), and, in the alternative, to compel arbitration, pursuant to 9 U.S.C. §§ 3 and 4. In an order dated May 31, 2006, the District Court denied both motions. With respect to defendants’ motion to compel arbitration, the District Court referred to its decision in Granados v. Harvard Maintenance, Inc., 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006), where it “concluded based largely on binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.” Pyett v. Pennsylvania Building Co., 2006 U.S. Dist. LEXIS 35952, *11 (S.D.N.Y. June 1, 2006).

In Granados, the District Court relied principally on our Court’s opinions in Fayer v. Town of Middlebury, 258 F.3d 117 (2d Cir. 2001), and Rogers. The District Court recognized the distinction our Court has drawn between arbitration clauses in individual contracts, which are governed by a line of Supreme Court cases represented by Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, (1991), and arbitration clauses in CBAs, which are governed by a line of Supreme Court cases represented by Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The District Court, following Rogers, held that union-negotiated waivers of statutory rights in CBAs were unenforceable and denied defendants’ motion to dismiss. Pursuant to 9 U.S.C. § 16(a)(1)(A) and (B), defendants timely appealed the District Court’s May 31, 2006 order denying their motion to compel arbitration.

DISCUSSION

Defendants argue that Rogers left open the question of whether an arbitration clause in a CBA that clearly waives a covered worker’s right to a judicial forum with respect to statutory claims is enforceable. They contend that such waivers are enforceable under Gilmer, which, they argue, overturned the holding in Gardner-Denver. While conceding that in Gilmer the Supreme Court dealt only with contracts signed by individuals and not CBAs, defendants claim, see Appellants’ Br. 12, that in Wright the Supreme Court made clear its abandonment of Gardner-Denver’s rule that a union may only “waive certain statutory rights related to collective activity,
such as the right to strike,” Gardner-Denver, 415 U.S. at 51. We disagree. Our Court in Rogers squarely decided that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker’s right to a federal forum with respect to statutory rights is unenforceable. We took full account of both Gilmer and Wright and concluded that the Supreme Court’s decision in Gardner-Denver remains good law. Our conclusion in Rogers was an alternative holding, not dicta, and continues to bind our Court. In any event, none of the cases relied upon by defendants persuades us that this holding in Rogers was incorrect.

In Rogers, we considered two issues: whether a mandatory arbitration clause in a CBA is enforceable generally, and whether the language of the particular clause at issue was a “clear and unmistakable waiver” under Wright, 525 U.S. at 80. We held first that Gardner-Denver still governed arbitration provisions in CBAs, notwithstanding the Supreme Court’s holding in Gilmer that an employee who agreed to waive his individual right to a federal forum could be compelled to arbitrate an age discrimination claim. See Rogers, 220 F.3d at 75 (discussing Gilmer, 500 U.S. at 23). Second, we held that the language of the waiver at issue in that case was not “clear and unmistakable” under Wright. See id. at 77. We explained that Gardner-Denver had not been overruled by Wright. Rogers, 220 F.3d at 75 (“[W]hile Wright may have called Gardner-Denver into question, it did not overrule it.”); see also Wright, 525 U.S. at 82 (“We do not reach the question whether such a waiver [under a CBA] would be enforceable.”).

Defendants focus on our comment in Rogers that Wright “could be taken to suggest that, under certain circumstances, a union negotiated waiver of an employee’s statutory right to a judicial forum might be enforceable.” But they ignore our holding, in reliance on Wright and Gardner-Denver, that arbitration provisions contained in a CBA, which waive employees’ rights to a federal forum with respect to statutory claims, are unenforceable. Defendants argue that our statements regarding the enforceability of arbitration provisions in CBAs were dicta because we also concluded that the clause at issue in Rogers was not “clear and unmistakable.” This argument is without merit. We explicitly stated in Rogers that “the rule in Gardner-Denver was sufficient” to decide the case. Rogers, 220 F.3d at 75. An alternative conclusion in an earlier case that is directly relevant to a later case is not dicta; it is an entirely appropriate basis for a holding in the later case. Our reliance on Gardner-Denver in Rogers was an alternative holding; it was thus not dicta.

None of the other Supreme Court cases on which defendants rely casts doubt on our holding in Rogers. For example, they draw our attention to Metropolitan Edison Co. v. N.L.R.B., 460 U.S. 693 (1983), and Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). Metropolitan Edison held that union officials may be bound by union-negotiated agreements to enforce no-strike agreements, and thus waive their right, guaranteed by the National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3), to be free of anti-union discrimination. Metropolitan Edison, 460 U.S at 708. However, rather than supporting the notion that individual rights may be waived by CBAs, as defendants claim, that holding is in line with the Supreme Court’s observation in Gardner-Denver that unions “may waive certain statutory rights related to collective activity, such as the right to strike.” Gardner-Denver, 415 U.S. at 51 (emphasis added). Circuit City addressed an individual’s employment contract, rather
than a CBA, and therefore likewise does not address the issue before us now.

In short, there is nothing that has changed in the nine years since Wright or the seven years since Rogers that compels us to reverse our ruling in Rogers that arbitration provisions contained in a CBA, which purport to waive employees’ rights to a federal forum with respect to statutory claims, are unenforceable.

CONCLUSION

For the foregoing reasons, the order of the District Court is affirmed.
Unionized employers have long been eager to bring their employees' statutory discrimination claims within the ambit of mandatory labor arbitration. But the U.S. Supreme Court's 30-year-old decision in Alexander v. Gardner-Denver Co. has long been understood as the breakwater against any requirement that unionized employees bring their federal discrimination claims to arbitration under their labor agreements, even if those agreements themselves ban discrimination on the basis of race, sex, ethnicity or other protected classification. While the high court's jurisprudence has for almost 20 years staunchly supported arbitration of statutory discrimination complaints if so required by individual employment agreements, labor agreements have been thought by most courts to be a different kettle of fish.

As a result, unionized employers have been required to defend such claims in two forums: first, in labor arbitration as an alleged breach of the collective bargaining agreement (CBA) with the union representing the employees and then again in a court action asserting federal statutory discrimination claims arising from the same operative facts. With the Supreme Court's recent grant of certiorari in 14 Penn Plaza LLC v. Pyett, No. 07-581, those days may be coming to an end.

Second Circuit Found Judicial Forum Waiver Unenforceable

In Pyett, a group of unionized employees were transferred from night watchmen to less desirable positions as night porters when the building they worked for engaged a professional security company and they were transferred to other buildings subject to the same multiemployer CBA—other buildings that, apparently, did not have night watchmen openings. Because the workers replacing them appeared to have been younger, the employees alleged illegal discrimination based on their age. The CBA governing their employment banned discrimination, expressly gave the arbitrator authority to apply statutory discrimination law and asserted that the CBA's grievance and arbitration process was the sole and exclusive remedy for resolving such claims.

The displaced employees filed grievances. While the union brought certain contract-based claims to arbitration, it initially declined to pursue the age discrimination portion of the employees' grievance. The employees filed charges with the Equal Employment Opportunity Commission, and the union shifted ground saying that they could pursue their discrimination claims in the arbitration forum on their own, with private counsel, and at their own expense. This was, it seems, too little too late. The workers filed a discrimination action in federal court, and the court denied the employer's motion to compel arbitration of those claims, ruling that even though the CBA contained a clear and unmistakable waiver of a judicial forum for statutory discrimination claims, such union-negotiated waivers in labor agreements were unenforceable as a matter of law. The 2d U.S. Circuit Court of Appeals affirmed.

Judicial hostility to mandatory arbitration of
statutory discrimination claims came to an end in *Gilmer v. Interstate/Johnson Lane Corp.*, when the Supreme Court held that an employee’s age discrimination claim was subject to compulsory arbitration pursuant to an agreement he had signed when he had registered as a securities representative. In holding the arbitration clause enforceable, the court reiterated its then-recent position that generalized attacks on arbitration were outdated, being “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” The court saw no principled difference between statutory discrimination claims and other statutory claims, such as under federal antitrust and securities laws, which it had previously held were subject to arbitration if that is what the parties contractually agreed to do. The court also favorably noted particular protections in the arbitration procedures at issue in *Gilmer*, including checks to avoid biased arbitration panels, discovery devices and a written arbitration award.

The court’s growing acceptance of arbitration in *Gilmer* and its progeny is in apparent tension with its 1974 decision in *Gardner-Denver*, but not quite. In *Gardner-Denver*, the court held that a discharged employee’s arbitration of his contract-based wrongful discharge claim under the CBA did not foreclose litigation over his statutory race discrimination claim, even though they arose from the same employer action. While the CBA in *Gardner-Denver* prohibited race and other discrimination, the labor arbitrator, as the court saw it, had authority only to serve as “proctor of the bargain” between labor and management and to apply the industrial “law of the shop” to the individual employee’s circumstance, but not to resolve his statutory rights conferred by Congress in passing Title VII of the Civil Rights Act of 1964.

Because the CBA in *Gardner-Denver* did not itself apply to statutory discrimination, all the court actually held was that the pursuit of contractual rights in labor arbitration did not foreclose subsequent pursuit of statutory rights in federal court. Yet the court also made a more sweeping pronouncement: “Of necessity, the rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII” that each employee, individually, be free from invidious discrimination.

The possibility that unions might, in bargaining for a group of employees, negotiate a waiver of their statutory right to a judicial forum of employment discrimination claims was considered by the Supreme Court seven years after *Gilmer* in *Wright v. Universal Maritime Service Corp.* There, it ruled that such waivers would not be enforced if they were not “clear and unmistakable,” but it expressly left unresolved whether such waivers would, if “clear and unmistakable,” be enforceable by federal courts. Because the CBA in *Pyett* expressly made labor arbitration the exclusive remedy for statutory discrimination claims, the issue left open in *Wright* is now squarely before the court.

The unresolved question is whether there is anything inherent in the relationship of a union to the workers it represents that would foreclose such waivers, when they are now fully recognized if made by such workers individually. *Gardner-Denver*, with its hostility to such union-negotiated waivers, was decided in the early years after passage of the 1964 Civil Rights Act. Unions were not then very compliant, and there was legitimate concern about union antipathy to minority interests. As the court put it trenchantly in a case that, following
Gardner-Denver, denied preclusive effect to labor arbitration of an individual's claim of statutory right: "For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens." Perhaps, those sentiments are outdated, as minorities and women have risen to leadership positions in many unions, and unions have had 40 years to accept the strictures of Title VII. Perhaps, courts should no longer presume every union leader is potentially a closet bigot. . . .
Five weeks after he quit his old job to work as a business solutions architect for a Chicago software company, Darryl Cheeks of Des Plaines, Ill., said his new employer asked him to sign an agreement waiving his right to sue.

Job-related disputes, the document explained, would be resolved through mandatory binding arbitration. Cheeks said he felt he had no choice and signed.

“I had already accepted the position. So, at that point, I kind of had to sign it,” said Cheeks, 34, an African-American who is currently pursuing a race discrimination claim against the software company before the Illinois Human Rights Commission because, he said, he believed arbitration wouldn’t be fair.

“[My attorney] told me arbitrators do not tend to be very versed in the law. They are not as keen as judges, [and] they tend to favor big business,” he said.

Cheeks’ experience is just one of several reasons mandatory arbitration has come under attack by workers’ lawyers and employee advocate groups since 1991, when the U.S. Supreme Court upheld the enforceability of such policies.

The agreements are usually presented to employees the first day on the job among a slew of other work papers they are asked to sign. Many people aren’t even aware what they have given up until a dispute arises, critics say. Others argue the process can be cost-prohibitive to workers who may be asked to pay half the arbitrator’s fee, which averages $1,000 a day.

Other critics go even further: Employers paying bribes. Arbitrators reluctant to find against employers or award large damages for fear of not being invited back, commonly known as “repeat player syndrome.” But many critics mainly object to one word: mandatory.

“If it were voluntary and fair, arbitration would be a blessing,” said Lewis Maltby, president of the National Workrights Institute in Princeton, N.J., and a national arbitration expert. “If employers think it’s so wonderful, why don’t they give [workers] the right to choose it?”

Cliff Palefsky, a partner with a San Francisco law firm and co-chairman of the Alternative Dispute Resolution board for the National Employment Lawyers Association, said arbitration sends a message that “if you want to get a job in America, you have to waive your constitutional rights.”

Proponents of mandatory arbitration say concerns about payoffs and collusion are unfounded. They hail the benefits of mandatory arbitration as a cheaper, faster way to settle employment disputes. And they say it takes an average of 30 to 60 days to get a forum date and the process usually lasts no more than five days.

However, a study released in May by watchdog group Public Citizen refutes that claim, saying forum costs—the fee charged by the tribunal that will decide the dispute—
to initiate an arbitration can be up to 5,000 percent higher than the costs of initiating a lawsuit. According to the study, the forum fee for a $60,000 employment discrimination claim in Cook County (Ill.) Circuit Court is $221. The forum fee for the same claim in arbitration would be in excess of $10,000.

Jackson Williams, legislative counsel for Public Citizen and author of the study, said arbitration saves businesses money in two ways: lower attorney's fees and smaller employee awards.

"[Arbitration awards] are 20 percent the amount a court would award," he said.

Unlike in court, though, claims cannot be dismissed in arbitration, supporters point out. There are no legal restrictions such as time-barred evidence or hearsay rules, which may also benefit the employee, said Larry Lorber, a partner for Proskauer Rose in Washington, which represents management.

However, an arbitrator's decision is final. Those who attempt to appeal an arbitration ruling in court usually fail, Lorber said.

Otherwise, in accordance with a due-process protocol established in 1995 by a group of arbitrators and attorneys, arbitration must provide all the rights and remedies the plaintiff would have received in court, including a discovery process, the right to an attorney and damages. Both sides must have a say in selecting the arbitrator.

"If [the policies] are not mutual in every way, they're not enforceable," Lorber said.

Mandatory arbitration of employment disputes once was unique to the securities industry. After the 1991 Supreme Court ruling opened the door to other industries, employers seeking a cheaper way to litigate on-the-job disputes and avoid publicity began adopting mandatory arbitration clauses and making them a condition of employment, which the court also upheld.

Maltby said arbitration shouldn't be "rammed down employees' throats," but he believes employees who are educated about the process would choose it if given the option.

Though juries are described as sympathetic to plaintiffs in employment cases, many cases are thrown out before they ever get to a jury, Maltby said. Jury awards tend to be larger, he said, but only one in six employees get any monetary relief. The cost of retaining an attorney and the long wait for a trial—sometimes years—can deter employees from filing lawsuits. Some can't even get a lawyer to take their case if potential damages are less than $75,000, he said.

However, Williams said that people who cannot get a lawyer to take their case can get assistance through state human rights boards and the Equal Employment Opportunity Commission for free. Also, in a ruling hailed as a victory for employees, the U.S. Supreme Court ruled earlier this year that the Equal Employment Opportunity Commission could seek court relief on behalf of workers bound by mandatory arbitration agreements.

Williams argues that without the threat of bad publicity or large jury awards, there is no deterrent for businesses from allowing discrimination to occur.

"If the civil rights community were
confident arbitration would deter discrimination, we wouldn’t have a problem with it,” he said.

There are some other downsides employees should be aware of. One is fee sharing. Most mandatory arbitration clauses provide that the employer and employee split the arbitrator’s fee. Some require their money upfront. For the employee, the costs could be enough reason to forget the whole thing.

However, court challenges to fee-sharing provisions have seen success if the cost of an arbitrator would prevent the employee from pursuing the claim. Employees should be sure the arbitrator comes from a reputable agency such as AAA; JAMS, formerly Judicial, Arbitration and Mediation Services; or the National Arbitration Forum.

“If it’s not one of the big three, you’re taking a chance. The solo mom-and-pop arbitrators are the ones that are subject to serious conflicts of interest,” Maltby said.
Employers can require most workers to waive their right to file job-related lawsuits, the U.S. Supreme Court ruled yesterday in a decision that could encourage an increasingly popular practice among companies trying to hold down their legal costs.

The court ruled 5 to 4 that a gay former employee of Richmond-based Circuit City Stores Inc. could not sue the company over alleged harassment at work because he had signed an agreement requiring him to submit such claims to an arbitrator rather than filing a lawsuit.

The agreement is enforceable even though the company required the man to sign the agreement as a condition of being hired, and even though he said he had signed it unwittingly, the court decided.

About 10 percent of American workers are covered by similar agreements, which are increasingly used by Wall Street firms, high-tech companies, retailers and other employers seeking to avoid the cost and risks of court cases.

In an arbitration proceeding, the two sides agree to submit their arguments to an independent third party, or arbitrator, who renders a legally binding judgment.

Proponents say workplace arbitration helps both employers and employees by reducing legal expenses and leading to quicker resolution of disputes. Many unions agree in contract negotiations to use arbitration to resolve a variety of workplace disputes.

The Supreme Court ruling applies only to nonunion employees.

But unions and other critics oppose forcing employees to accept broad arbitration agreements as a condition of employment. They argue that those agreements typically favor the employers, who dictate the terms. Often those terms allow the employer to choose the arbitrator, require workers to pay for the process, limit damages and restrict the fact-finding process. Many employees end up dropping their claims rather than paying hefty fees, critics say.

For example, Robert Howe, 68, a former general manager for a Prince George's County car dealer, said he withdrew a job-related complaint after he talked to the American Arbitration Association, which told him it would cost him thousands of dollars to handle his case.

"This does appear to be a dark day for people with employment claims," Paul Bland, a staff attorney for Trial Lawyers for Public Justice, said of the Supreme Court decision.

But business groups hailed the court's decision. "We think that this is good for business, and we think it's good for employees, too," said Stephen Bokat of the U.S. Chamber of Commerce. Arbitration "resolves disputes much more quickly with far less cost for most parties," he said.

Contracts such the one the Circuit City employee signed have become more common as businesses wrestle with the 1991
federal civil rights statute, which allows workers to bring anti-discrimination complaints before juries and to seek punitive damages and damages for emotional distress.

Many states have moved to bar employers from forcing workers to sign agreements to get hired. In the Circuit City case, 22 states’ attorneys general filed briefs asking the court not to rule in favor of the company. Experts said yesterday’s ruling would limit states’ ability to enact such laws.

“This will put a damper on the movement to reform state arbitration law,” said Michael Rubin, the lawyer who represented the Circuit City employee, Saint Clair Adams.

But Rubin added that states can use some of their existing laws to help throw out some mandatory arbitration agreements. The Circuit City case will now go back to the 9th U.S. Circuit Court of Appeals in California.

Adams did not know the details of the agreement when he signed it, Rubin said. Adams does not want to submit his complaint to arbitration, because he believes the terms of the agreement would hurt his chances, Rubin added.

The court’s ruling also left unresolved a related issue that has been the source of several lawsuits: whether some federal anti-discrimination laws override the federal arbitration act. Lower courts have issued mixed rulings on that point.

In 1991, however, the Supreme Court did rule that some employees cannot sue for age discrimination if they earlier agreed to arbitrate such disputes. Yesterday’s Supreme Court decision hinged on the interpretation of a clause in the 75-year-old Federal Arbitration Act, which made contractual agreements that call for arbitration of disputes binding under federal law.

The statute says that provision does not apply to the employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign and interstate commerce.”

Adams’s attorneys urged the court to conclude that this “exclusion clause” was meant to cover the broadest possible notion of interstate commerce, which, in today’s terms, would include the employment contracts of people who work at retailers such as Circuit City.

The company, however, had argued that the statute meant that only transportation workers’ contracts were meant to be excluded from coverage. That would include airline and railroad employees.

Justice Anthony M. Kennedy, writing for a majority made up of the court’s conservative members, adopted Circuit City’s view. Adams’s interpretation, he argued, “would contradict our earlier cases and bring instability to statutory interpretation.”

In dissent, Justice John Paul Stevens, wrote that the history of the act supports the view that the disputed language “was an uncontroverted provision” that clearly showed that no one “intended or expected that” the law would apply to employment contracts.

Stevens accused the majority of “misusing” the court’s authority to suit their own policy preferences, producing a “sad result” that will hurt employees.
WASHINGTON—Workers generally have a right to go to court to sue their employers for discrimination, the Supreme Court said Monday, even when their unions or companies have a policy calling for arbitration of disputes.

By a 9-0 vote, the justices reversed two lower courts that had blocked a South Carolina longshoreman, who previously had been injured on the job but recovered, from suing his employer.

The shipping firm had refused to rehire Cesear Wright, the longshoreman, because of his back injury, and he sued for damages under the Americans with Disabilities Act.

But the case came to the Supreme Court to test another issue, one that has divided American corporations and civil rights lawyers for much of this decade.

Since 1991, companies have been pressing for the adoption of mandatory arbitration policies as an alternative to costly federal court battles. Some of these are written into union contracts. In other instances, they are included in papers signed by newly hired employees.

Corporate lawyers rely on a 1991 high court ruling that touted the virtues of arbitration as quick and convenient.

But civil rights lawyers have resisted this move as fundamentally unfair to workers. Companies choose the arbitrators who will hear a dispute, and the plaintiffs cannot gather the evidence they need to prove their claims of discrimination, lawyers say. They rely on the federal civil rights laws that, since 1964, have made it illegal for employers to discriminate based on race, sex, religion and ethnicity as well as age and disability.

Two Rulings Against Arbitration

In the last week, the foes of arbitration have won two important court decisions. Neither case finally resolves the issue, however.

Last week, the Supreme Court refused to hear an employer’s appeal in a closely watched California case that rejected “compulsory arbitration” for new employees.

Tonyja Duffield went to work as a stock broker in 1988 and signed a standard industry form requiring arbitration of all disputes. In 1995, she said that she was a victim of sexual harassment at work and sued her employer.

The company sought to have her case thrown out of court and sent to arbitration.

But the U.S. 9th Circuit Court of Appeals ruled that federal civil rights laws trump the binding arbitration clauses. Companies cannot “as a condition of employment, compel persons to forego their right” to go to court, wrote Judge Stephen Reinhardt of Los Angeles. Workers can agree voluntarily to arbitration, but they cannot be forced to do so without their knowledge or consent, he said.
The securities company, backed by the U.S. Chamber of Commerce and several other employer groups, appealed to the high court. But the justices turned down the appeal (Robertson, Stephens & Co. vs. Duffield, 98-237) last week.

Meanwhile, in the case of the South Carolina longshoreman, the more conservative U.S. court of appeals based in Richmond, Va., had ruled that employers can enforce binding arbitration clauses on unwilling workers.

In Wright’s case, his union contract said that “any dispute” over the “terms and conditions of employment” shall be resolved by a grievance committee made up of management and labor representatives. The appeals court said that this clause is “binding” and barred Wright from suing in federal court.

All nine justices voted to reverse that ruling (Wright vs. Universal Maritime Services Corp., 97-889), although Justice Antonin Scalia’s opinion focused on a narrow reason for doing so.

The union contract “does not contain a clear and unmistakable waiver” of the longshoreman’s right to sue, Scalia said.

“The right to a federal judicial forum is of sufficient importance,” he said, that it cannot be casually waived.

But the court stopped short of deciding whether the worker could sue had the contract gone further and absolutely barred employees from going to court.

Predictably, lawyers for plaintiffs and corporations interpreted the outcome differently.

Cliff Palefsky, a San Francisco employment lawyer, said that the decisions show arbitration is falling out of favor.

“I think there is a clear trend here. The court is backing away from Gilmer,” he said, referring to the 1991 ruling that endorsed arbitration.

By contrast, a lawyer for a group of 300 of America’s largest private companies said that Monday’s ruling “was very narrow” and did not disturb the trend toward arbitration.

“I don’t think this is really an anti-arbitration decision,” said Ann Reesman of the Equal Employment Advisory Council. “Gilmer is still alive and well,” she added.
In the wake of the terrorist attacks of September 11, 2001, Javid Iqbal was detained on suspicion of being involved in terrorist activities and was confined in the Metropolitan Detention Center in Brooklyn. For several months during his detention, Iqbal was detained in the Administrative Maximum Special Housing Unit where he alleges he was abused. After being cleared of any terrorism charges but convicted of identity fraud and deported to Pakistan, Iqbal brought suit against several current and former officials from the Department of Justice, the Board of Prisons, and the Federal Bureau of Investigation for violating his constitutional rights. The officials challenged the lawsuit, claiming qualified immunity for their actions. The U.S. District Court for the Eastern District of New York and the Second Circuit Court of Appeals both ruled that the suit could continue.

Questions Presented: (1) Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

(2) Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

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Javid IQBAL, Plaintiff-Appellee,

v.

Dennis HASTY, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons, John ASHCROFT, former Attorney General of the United States, Robert Muller, Director of the Federal Bureau of Investigation, David Rardin, former Director of the Northeast Region of the Bureau of Prisons, Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, Kathleen Hawks Sawyer, former Director of the Federal Bureau of Prisons, Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation, Defendants-Appellants

United States Court of Appeals for the Second Circuit

Decided June 14, 2007

[Expert: Some footnotes and citations omitted.]
These interlocutory appeals present several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11. Several current and former government officials from the Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Prisons ("BOP") appeal from the September 27, 2005, Order of the District Court for the Eastern District of New York (John Gleeson, District Judge) denying in part their motions to dismiss on the ground of qualified immunity. See Elmaghraby v. Ashcroft, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) ("Dist. Ct. op."). Plaintiff-Appellee Javaid Iqbal alleges that the Defendants-Appellants took a series of unconstitutional actions against him in connection with his confinement under harsh conditions at the Metropolitan Detention Center ("MDC") in Brooklyn, after separation from the general prison population. We conclude that the defense of qualified immunity, to the extent rejected by the District Court, cannot be sustained as to any Defendants at this preliminary stage of the litigation except as to the claim of violation of procedural due process rights, and we therefore affirm in part, reverse in part, and remand.

Background

Parties. Iqbal is a Muslim Pakistani currently residing in Pakistan. . . .

Four groups of Defendants have filed appeals from Judge Gleeson's order. The first group consists of former Attorney General John Ashcroft and current FBI Director Robert Mueller. The second group consists of Michael Rolince, former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York Field Office (the "FBI Defendants"). The third group consists of former BOP officials: Kathleen Hawk Sawyer, former BOP Director; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; and Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons (the "BOP Defendants"). The fourth appeal was filed by Dennis Hasty, former MDC Warden. Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States.

Factual allegations. The complaint alleges the following facts, which are assumed to be true for purposes of the pending appeals, as we are required to do in reviewing a ruling on a motion to dismiss. See Hill v. City of New York, 45 F.3d 653, 657 (2d Cir. 1995). The Plaintiff was arrested by agents of the FBI and the Immigration and Naturalization Service on November 2, 2001. Following his arrest, he was detained in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ("ADMAX SHU"), where he remained until he was reassigned to the general prison population at the end of July 2002. On this appeal, we consider only claims concerning the Plaintiff's separation from the general prison population and confinement thereafter in the ADMAX SHU. We do not consider the legality of his arrest or his initial detention in the MDC.

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[The court noted that the complaint further
alleged a standard policy of classifying every Arab Muslim man arrested as "of high interest" and creating the ADMAX SHU specifically for these individuals. It also contains allegations of mistreatment of individuals held in ADMAX SHU (including Plaintiff), consisting of physical and psychological abuse, including beatings, repeated cavity searches, and interference with religious practices.]

The Plaintiff pled guilty on April 22, 2002, and was sentenced on September 17, 2002. He was released from the ADMAX SHU at the end of July 2002, after pleading guilty but before sentencing. Judge Gleeson considered the Plaintiff to be a pretrial detainee throughout his entire time in the ADMAX SHU., Dist. Ct. op., 2005 U.S. Dist. LEXIS 21434, at *15 n.14. The Plaintiff was released from the MDC on January 15, 2003, and thereafter was removed to Pakistan (a fact not in the complaint but undisputed).

**Litigation in the District Court.** The Plaintiff (and his co-plaintiff) commenced this action in May 2004. Their complaint asserted twenty-one causes of action, including both statutory claims and constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The causes of action, and the Defendants against whom they were asserted, are set forth [as follows:]

2. **Fifth Amendment** procedural due process claim based on confinement in the ADMAX SHU: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

3-4. **Fifth and Eighth Amendments**

5. **Sixth Amendment** interference with right to counsel claim: Hasty and MDC staff.

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10. **First Amendment** claim based on interference with religious practice: Hasty and MDC staff.

11. **First Amendment** claim based on religious discrimination: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

12. **Fifth Amendment** race-based equal protection claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

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Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, Hasty, the MDC Warden, and an MDC medical assistant filed motions to dismiss on the grounds that (1) a *Bivens* action was precluded by "special factors," (2) they were protected by qualified immunity; (3) the supervisory defendants were not alleged to have sufficient personal involvement, and (4) Ashcroft, Mueller, the FBI Defendants, and the BOP Defendants were not subject to personal jurisdiction in New York. 

With a few exceptions, Judge Gleeson denied the motions to dismiss.

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**Discussion**

The Defendants appeal from the District
Court’s order denying their motions to dismiss on the ground of qualified immunity. Their arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff’s allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants’ actions were objectively reasonable. Permeating the Defendants’ assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circumstances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.

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Because many of the Defendants’ grounds for asserting an immunity defense overlap with respect to several of the Plaintiff’s allegations, it will be convenient to consider separately each of the Plaintiff’s causes of action with respect to the one or more Defendants against whom it is asserted, rather than consider separately the claims asserted against each Defendant. Before turning to each of the Plaintiff’s allegations, we first consider the legal standards that apply to nearly all of the Plaintiff’s claims and to most of the grounds on which the Defendants assert their qualified immunity defense.

I. General Principles of Qualified Immunity

(a) Standard of review. When a district court denies qualified immunity on a Rule 12(b)(6) motion to dismiss, “we review the district court’s denial de novo, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs’ favor.” Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 250 (2d Cir. 2001).

(b) Appealability. A district court’s denial of qualified immunity is appealable as a collateral order if it turns on an issue of law. See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Thus, a defendant may appeal a district court’s ruling denying qualified immunity when, if a plaintiff’s allegations are assumed to be true, the only question is whether the alleged conduct violated a clearly established right. See Locurto v. Safir, 264 F.3d 154, 163 (2d Cir. 2001).

(c) The qualified immunity defense. Qualified immunity is an immunity from suit and not just a defense to liability. See Saucier v. Katz, 533 U.S. 194, 200 (2001). The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. See id. at 201; see also Scott v. Harris, 127 S. Ct. 1769, 1774 (2007). If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action—that is, “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” See Saucier, 533 U.S. at 202. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law. See Johnson, 239 F.3d at 250.

In determining whether a right was clearly established, the court must assess whether “the contours of the right [were] sufficiently clear in the context of the alleged violation such that a reasonable official would
understand that what he [was] doing violate[d] that right.” Id. at 250-51 (internal quotation marks omitted). To that end, the court should consider what a reasonable officer in the defendant’s position would have known about the lawfulness of his conduct, “not what a lawyer would learn or intuit from researching case law.” Id. at 251 (internal quotation marks omitted).

Furthermore, the court need not identify “legal precedent addressing an identical factual scenario” to conclude that the right is clearly established. Id.; see also Tellier v. Fields, 280 F.3d 69, 84 (2d Cir. 2000) (noting that a law is “clearly established” so long as a ruling on the issue is “clearly foreshadow[ed]” by this Circuit’s decisions).

(d) Personal involvement. Many of the Defendants claim qualified immunity on the ground that the Plaintiff has failed to allege their personal involvement in the challenged actions. All of the appealing Defendants are supervisory officials. The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (discussing section 1983 liability).

Although a lack of personal involvement may be grounds for dismissing a claim on the merits (a ruling that would not be subject to an interlocutory appeal), such a lack is also relevant to a defense of qualified immunity because it goes to the question of whether a defendant’s actions violated a clearly established right. See McCullough v. Wyandanch Union Free School District, 187 F.3d 272, 280 (2d Cir. 1999) (“Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated clearly established law.”). “[O]ur task is to consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal involvement.” Johnson, 239 F.3d at 255.

(e) Pleading requirements. The parties dispute the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage. Although most of the Defendants disclaim requiring the Plaintiff to meet a heightened pleading standard, beyond the requirement of Conley v. Gibson, 355 U.S. 41, 47 (1957), that a complaint “give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests,” see Fed. R. Civ. P. 8(a)(2), all the Defendants make the somewhat similar argument that “conclusory allegations” will not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement, racial and/or religious animus, or conspiracy. BOP Defendant Cooksey explicitly urges us to adopt a heightened pleading standard in Bivens actions.

The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993), the Court rejected a heightened pleading standard in a civil rights action alleging
municipal liability, applying instead only the traditional requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief.”  *Id.* at 168 (quoting Fed. R. Civ. P. 8(a)(2)). In reaching this conclusion, the Court distinguished between municipalities’ immunity from respondeat superior liability and government officials’ qualified immunity from suit.  *See id.* at 166. Arguably, this distinction could permit requiring a plaintiff to satisfy a heightened pleading standard of a cause of action in order to overcome a government official’s defense of qualified immunity. However, the Court’s opinion in *Leatherman* suggests that heightened pleading standards are never permissible except when authorized by Rule 9(b) of the Federal Rules of Civil Procedure.  *See id.* at 168 (noting that Rule 9(b) “do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983”). Indeed, the Court observed that, in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to “weed out unmeritorious claims.”  *Id.* at 168-69.

A more pertinent precedent is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which concerned the adequacy of pleading a Title VII complaint. The Court rejected what had been this Circuit’s rule requiring employment discrimination plaintiffs to allege facts constituting a prima facie case of employment discrimination.  *See id.* at 515. The Court again emphasized that the judicially imposed heightened pleading standard conflicted with Rule 8(a) and that a heightened pleading standard could be attained only “by the process of amending the Federal Rules, and not by judicial interpretation.”  *Id.*

*Leatherman* and especially *Swierkiewicz*—with their insistence that courts cannot impose heightened pleading standards in the absence of statutory authorization—indicate that a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officials, a precept we have heeded since the Supreme Court’s decision in *Swierkiewicz*.

However, a third Supreme Court case, decided between *Leatherman* and *Swierkiewicz*, cryptically suggests that, in some circumstances, a court could require “specific, nonconclusory factual allegations” at the pleading stage in claims against government officials. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), the D.C. Circuit had recognized a heightened burden of proof in cases against government officials alleging unconstitutional motive.  *See id.* at 582-83. The Court observed that the D.C. Circuit had adopted the heightened standard in an attempt “to address a potentially serious problem: Because an official’s state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.”  *Id.* at 584-85. Although the Supreme Court recognized this problem, it rejected the heightened standard of proof.

The Court held that the D.C. Circuit’s rule was not compelled by either the holding or the reasoning of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court had stated that “bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”  *Id.* at 817-18. However, as the Court explained in *Crawford-El*, this statement merely concerned a plaintiff’s attempt to overcome a legitimate qualified immunity defense by alleging malicious intent; this holding was irrelevant to a plaintiff’s burden in alleging a
constitutional violation of which improper motive is an essential element. See 523 U.S. at 588-89. Neither did Harlow's reasoning require a heightened burden of proof: the Court observed that there existed other mechanisms for protecting officials from unmeritorious actions, such as the requirement that the officials' conduct violate clearly established law, the need to prove causation, and procedural protections. See id. at 590-93.

The Court acknowledged that the usual pleading standard would sometimes not preclude at least limited discovery to amplify general allegations. The Court observed that Harlow only "sought to protect officials from the costs of 'broad-reaching' discovery" and that limited discovery is sometimes necessary to adjudicate a qualified immunity defense. See id. at 593 n.14. The Court concluded by observing that "broad discretion" in the discovery process is more "useful and equitable" than categorical rules such as that of the D.C. Circuit. See id. at 601.

What Crawford-El gave civil rights plaintiffs with respect to traditional notice pleading, however, it might have modified by permitting some post-complaint detailing of a claim. In discussing the procedural mechanisms available to judges in civil rights actions, at least those alleging wrongful motive, the Court observed that, before permitting discovery, a court could require a plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." Id. at 598 (internal quotation marks omitted). Perhaps significantly, the Court quoted the phrase "put forward specific, nonconclusory factual allegations" from Justice Kennedy's concurring opinion in Siegert v. Gilley, 500 U.S. 226 (1991), in which he had explicitly advocated a heightened pleading standard for civil rights actions requiring a showing of malice. See id. at 235-36 ("There is tension between the rationale of Harlow and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.").

The First Circuit has remarked that "[w]hatever window of opportunity [it] thought remained open after Crawford-El has been slammed shut by the Supreme Court’s subsequent decision in Swierkiewicz." Educadores Puertorriqueños en Accion v. Hernandez, 367 F.3d 61, 65 (1st Cir. 2004). Most Circuits appear to have rejected a heightened pleading standard. See Doe v. Cassel, 403 F.3d 986, 988-89 & n.3 (8th Cir. 2005) (collecting cases); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002) (same).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). If we were to consider only a narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard. Bell Atlantic held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. See id. at 1961. The Court required, in addition, "enough factual matter (taken as true) to suggest that an agreement was made." Id. at 1965. However, the Court’s explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), was decided half a
century ago. The nature and extent of that alteration is not clear because the Court’s explanation contains several, not entirely consistent, signals, which we consider (not necessarily in the order set forth in the Court’s opinion).

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in Conley of “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Bell Atlantic, 127 S. Ct. at 1968 (quoting Conley, 355 U.S. at 45-46). Bell Atlantic asserted that this “no set of facts” language “has earned its retirement” and “is best forgotten.” Id. at 1969.

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors’ parallel conduct. For example, the Court required “enough factual matter (taken as true) to suggest that an agreement was made,” id. at 1965; “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,” id.; “facts that are suggestive enough to render a § 1 conspiracy plausible,” id.; “allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement,” id. at 1966; “allegations plausibly suggesting (not merely consistent with) agreement,” id.; a “plain statement” (as specified in Rule 8(a)(2)) with “enough heft” to show entitlement to relief, id.; and “enough facts to state a claim to relief that is plausible on its face,” id. at 1974, and also stated that the line “between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability,” id. at 1966 n.5, and that “the complaint warranted dismissal because it failed in toto to render plaintiffs’ entitlement to relief plausible,” id. at 1973 n.14.

Third, the Court discounted the ability of “careful case management,” “to weed[] out early in the discovery process” “a claim just shy of a plausible entitlement.” Id. at 1967 (quoting id. at 1975 (Stevens, J., dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled “the plausibility standard.” Id. at 1968. Indeed, the Court used the word “plausibility” or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court’s linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in Bell Atlantic might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on competitors’ parallel conduct. First, the Court explicitly disclaimed that it was “requir[ing] heightened fact pleading of specifics,” id. at 1974, and emphasized the continued viability of Swierkiewicz, see id. at 1973-74, which had rejected a heightened pleading standard . . .

Second, although the Court faulted the plaintiffs’ complaint for alleging “merely legal conclusions” of conspiracy, Bell Atlantic, 127 S. Ct. at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant “negligently drove a motor vehicle against plaintiff who was then crossing [an
identified] highway,” Fed. R. Civ. P. App. Form 9. See Bell Atlantic, 127 S. Ct. at 1970 n.10. The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, see id., but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, i.e., driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading Bell Atlantic to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the “sprawling, costly, and hugely time-consuming” discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, see id. at 1967 n.6, and expressed concern that such discovery “will push cost-conscious defendants to settle even anemic cases,” id. at 1967. These concerns provide some basis for believing that whatever adjustment in pleading standards results from Bell Atlantic is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to “weed[] out” through case management in the discovery process “a claim just shy of a plausible entitlement to relief,” id. (emphasis added), the Court did not disclaim its prior statement that “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” Leatherman, 507 U.S. at 168-69 (emphasis added). Leaving Leatherman and Crawford-El undisturbed (compared to the explicit disavowal of the “no set of facts” language of Conley) further suggests that Bell Atlantic, or at least its full force, is limited to the antitrust context.

Fifth, just two weeks after issuing its opinion in Bell Atlantic, the Court cited it for the traditional proposition that “[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Erickson, 127 S. Ct. at 2200 (quoting Bell Atlantic’s quotation from Conley) (omission in original).

These conflicting signals create some uncertainty as to the intended scope of the Court’s decision. We are reluctant to assume that all of the language of Bell Atlantic applies only to section 1 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust cases. Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court’s parallel conduct holding as to constitute a necessary part of that holding. See Pierre N. Leval, Judging under the Constitution: Dicta about Dicta, 81 N.Y.U. L. Rev. 1249, 1257 (2006) (“The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.”).

After careful consideration of the Court’s opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead
requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. We will say more about this approach as we apply it below to some of the Plaintiff’s specific allegations.

Notwithstanding what we understand to be the essential message of Bell Atlantic, we acknowledge that we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons. First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. See Swierkiewicz, 534 U.S. at 514-15.

Second, some of the allegations in the Plaintiff’s complaint, although not entirely conclusory, suggest that some of the Plaintiff’s claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff’s claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.

Nevertheless, although Swierkiewicz was decided in the context of Title VII, we are mindful of the Supreme Court’s statement in that decision that heightened pleading requirements “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” Id. at 515 (internal quotation marks omitted). Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in Bell Atlantic, reinforced by the reversal of the Tenth Circuit’s use of a heightened pleading standard in Erickson, we conclude that a heightened pleading rule may not be imposed. . . .

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With these general principles in mind, we turn to the Plaintiff’s specific claims.

II. Procedural Due Process

The Plaintiff alleges that Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, and Hasty adopted a policy under which he was deprived of a liberty interest without any of the procedural protections required by due process of law. His allegation of the deprivation of a liberty interest, even while lawfully confined without bail on criminal charges, is based on his placement in solitary confinement, where he was subjected to needlessly harsh restrictions that were atypical and significant when compared to those in the rest of the MDC population. The Defendants contend that (1) the Plaintiff did not allege that the confinement was punitive; (2) no procedural due process right was violated because the Plaintiff did not have a liberty interest in avoiding extended confinement in the ADMAX SHU and, even if he did, he received all the process that was due; (3) even if the Plaintiff’s procedural due process right was violated, the contours of this right were not clearly established at the time of the events in question; (4) the Defendants’ actions were objectively reasonable in the
post-9/11 context; and (5) the Plaintiff has failed to allege personal involvement.

We are required by the Supreme Court’s decision in *Saucier* to assess these arguments within a two-part framework, asking first whether the alleged facts show a violation of a constitutional right, see *Saucier*, 533 U.S. at 201, and, if so, “whether the right was clearly established . . . in light of the specific context of the case,” see *id.* The first, second, and fifth of the Defendants’ arguments bear on the initial issue of whether a violation has been alleged; the third argument—whether the right was clearly established—is precisely the second issue under *Saucier*; and the fourth argument is often a further component of a qualified immunity defense because even if the law was clearly established, it might have been objectively reasonable, on the facts of a particular case, for a defendant to believe that the actions taken did not violate that established law, see *Johnson*, 239 F.3d at 250.

(a) Has a Violation of a Procedural Due Process Right Been Adequately Pledged?

In assessing the adequacy of the Plaintiff’s pleading of a procedural due process violation we first consider the basic question of whether the Plaintiff has pleaded the existence of a liberty interest and entitlement to procedures that were not provided and then consider the Defendants’ arguments that punitive intent and personal involvement were not adequately pleaded. . . .

[Discussion leading to the conclusion that, given the length of the Plaintiff’s incarceration in the ADMAX SHU and his status as a pretrial detainee, he was entitled to some procedural review.]

(iii) Lack of personal involvement. Defendants Ashcroft and Mueller contend that the Plaintiff has not adequately alleged their personal involvement in the denial of procedural due process because the continued detention decision was made by FBI subordinates. Applying the standards applicable to personal involvement outlined above, we reject this claim at this stage of the litigation. Ashcroft and Mueller are alleged to have condoned the policy under which the Plaintiff was held in harsh conditions of confinement until “cleared” by the FBI. Since the complaint adequately alleges, for purposes of a motion to dismiss, that procedural due process required some procedures beyond FBI clearance, the allegation of condoning the policy of holding the Plaintiff in the ADMAX SHU until cleared suffices, at the pleading stage, to defeat dismissal for lack of personal involvement.

At the other end of the leadership chain, Defendant Hasty asserts his lack of personal involvement because the continued detention decision was made far above his level of responsibility. But this defense also cannot prevail at this stage of the litigation. *Cf. Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) (“Plausible instructions from a superior . . . support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (e.g.[,] . . . exigent circumstances).”). Hasty is alleged to have known of the continued detention in the ADMAX SHU and the absence of procedural protections for the Plaintiff. Whether his conduct as a subordinate was objectively reasonable under all the circumstances is an issue distinct from the adequacy of the pleading of personal involvement.
Between these extremes in the official hierarchy, the lack of adequate allegations of personal knowledge of, or involvement in, the Plaintiff's continued detention is also asserted by the FBI Defendants and the BOP Defendants. However, the complaint at least implicitly alleges the knowledge of the FBI Defendants by stating that they “failed to approve post-September 11 detainees’ release to general population.” With respect to the BOP Defendants, the complaint alleges that BOP Defendant Cooksey “directed that all detainees ‘of high interest’ be confined in the most restrictive conditions possible until cleared by the FBI,” that BOP Defendant Sawyer approved this policy, and that BOP Defendant Rardin, along with others, designed the policy of arbitrary confinement in the ADMAX SHU. The FBI Defendants also dispute their personal involvement in a procedural due process violation by arguing that they could not reasonably be expected to know about the BOP regulations. However, some factual development of this claim would have to precede its determination. Moreover, even absent the FBI Defendants’ knowledge of the BOP regulation, the complaint can support the inference that the FBI Defendants understood that their alleged role in the clearance procedure was linked to a detainee’s release to the general population. This suffices to overcome the defense of no personal involvement at this stage of the litigation.

It is arguable that, under the plausibility standard of *Bell Atlantic*, some subsidiary facts must be alleged to plead adequately that Ashcroft and Mueller condoned the Plaintiff’s continued confinement in the ADMAX SHU, that Hasty had knowledge of that confinement, or that the mid-level Defendants knew the relationship between their clearance procedure and the Plaintiff’s release to the general population. However, all of the Plaintiff’s allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts. This is clearly so with respect to Hasty and the mid-level Defendants. Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies. Sustaining the adequacy of a pleading of personal involvement in these circumstances runs no risk that every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation. And, like the Form 9 complaint approved in *Bell Atlantic*, Iqbal’s complaint informs all of the Defendants of the time frame and place of the alleged violations.

(b) Was the Plaintiff’s Right to Procedural Due Process Clearly Established?

Although we conclude that the Plaintiff has adequately pleaded a violation of a procedural due process right, we also conclude that in this case “officers of reasonable competence could [have] disagree[d],” *Malley v. Briggs*, 475 U.S. 335 (1986), whether their conduct violated a clearly established procedural due process right. Accordingly, the Plaintiff’s right to additional procedures was not clearly established with the level of specificity that is required to defeat a qualified immunity defense. See *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004).
Accordingly, we will direct dismissal of the portions of the Plaintiff’s complaint alleging violations of procedural due process rights.

IV. Excessive Force

The only argument of a Defendant directed to the claim of excessive force is Hasty’s contention that the complaint does not allege his personal involvement.

The complaint alleges that Hasty knew or should have known of the MDC practice of beating detainees in the ADMAX SHU, that he knew or should have known of the propensity of his subordinates to beat the Plaintiff unnecessarily, and that he was deliberately indifferent in failing to take action to curtail the beatings. The complaint also alleges that Hasty chose the officers who worked in the ADMAX SHU.

Applying the standards for supervisory liability, outlined above, see Part I(d), the Plaintiff’s allegations, on a notice pleading standard, see Part I(e), suffice to state a claim of supervisory liability for the use of excessive force against the Plaintiff. See Phelps, 308 F.3d at 187 n.6 (“[A] plaintiff’s allegation of knowledge is itself a particularized factual allegation, which he will have the opportunity to demonstrate at the appropriate time in the usual ways.”). The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty’s knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings.

VIII. Racial and Religious Discrimination

The Defendants argue that they are entitled to qualified immunity on the Plaintiff’s First Amendment claim of religious discrimination and Fifth Amendment claim of racial or ethnic discrimination on three grounds: (1) the Plaintiff has failed to state a violation of clearly established rights, (2) the Plaintiff’s allegations of discriminatory intent are too conclusory, and (3) the Plaintiff has not alleged the personal involvement of Ashcroft and Mueller.

The Defendants argue that the Plaintiff’s allegations of racial, ethnic, and religious animus are too conclusory. But, as discussed above, see Part I(e), Crawford-El indicates that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive. In Phillip, 316 F.3d at 298-99, this Court held that Swierkiewicz’s notice pleading standard applied to a civil rights complaint alleging racial animus. Although recognizing that the complaint did not “contain many evidentiary allegations relevant to intent,” see id. at 299, we found the allegations sufficient to state a claim, observing that the complaint alleged that the plaintiffs were African-American, described the defendants’ actions in detail, and alleged that the plaintiffs were selected for maltreatment “solely because of their color,” id. at 298.

The Plaintiff’s allegations suffice to state claims of racial, ethnic, and religious discrimination. He alleges in particular that the FBI Defendants classified him “of high interest” solely because of his race, ethnic background, and religion and not because of any evidence of involvement in terrorism.
He offers additional factual support for this allegation, stating that “within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as ‘of interest’ to the post-September 11th investigation.” We need not consider at this stage of the litigation whether these allegations are alone sufficient to state a clearly established constitutional violation under the circumstances presented because they are sufficient to state a violation when combined with the Plaintiff’s allegation that he was singled out for mistreatment and for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics.

Finally, Ashcroft and Mueller argue that the Plaintiff failed to allege their personal involvement in any discrimination. However, the complaint alleges broadly that Ashcroft and Mueller were instrumental in adopting the “policies and practices challenged here.” The complaint also alleges that the FBI, “under the direction of Defendant Mueller,” arrested thousands of Arab Muslims and that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” The Plaintiff acknowledges that the FBI Defendants made the determination that Plaintiff was “of high interest,” but this allegation does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined above, see Part I(d). As with the procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated “of high interest” in the aftermath of 9/11. Whether or not the issues of personal involvement will be clarified by court-supervised discovery sufficient to support summary judgment remains to be determined.

***

Conclusion

For the foregoing reasons, the order of the District Court is affirmed as to the denial of the Defendants’ motions to dismiss all of the Plaintiff’s claims, except for the claim of a violation of the right to procedural due process, as to which we reverse. In affirming almost all of the District Court’s ruling, we emphasize that we do so at an early stage of the litigation. We recognize, as did Judge Gleeson in ruling on the Plaintiff’s procedural due process claim, that carefully limited and tightly controlled discovery by the Plaintiff as to certain officials will be appropriate to probe such matters as the Defendants’ personal involvement in several of the alleged deprivations of rights. We are mindful too that, for high-level officials, this discovery might be either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations. We also recognize that the Defendants will be entitled to seek more specific statements as to some of the Plaintiff’s claims and perhaps renew their claims for qualified immunity by motions.
for summary judgment on a more fully developed record.

In sum, the serious allegations of gross mistreatment set forth in the complaint suffice, except as noted in this opinion, to defeat the Defendants’ attempt to terminate the lawsuit at a preliminary stage, but, consistent with the important policies that justify the defense of qualified immunity, the defense may be reasserted in advance of trial after the carefully controlled and limited discovery that the District Court expects to supervise.

**AFFIRMED** in part, **REVERSED** in part, and **REMANDED**.

JOSE A. CABRANES, Circuit Judge, concurring:

I concur fully in Judge Newman’s characteristically careful and comprehensive opinion, which seeks to hew closely to the relevant Supreme Court and Second Circuit precedents, including the Supreme Court’s decision in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007). That said, it is worth underscoring that some of those precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, “the guidance they provide is not readily harmonized.”

Most importantly, the opinion’s discussion of the relevant pleading standards reflects the uneasy compromise—forged partially in *dicta* by the Supreme Court in *Crawford El v. Britton*, 523 U.S. 574 (1998)—between a qualified immunity privilege rooted in the need to preserve “the effectiveness of government as contemplated by our constitutional structure,” *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.35 (1982), and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Here, that uneasy compromise presents itself in a case brought by Javaid Iqbal, a federally convicted felon now residing in his native Pakistan. Iqbal does not challenge his arrest in the aftermath of 9/11, his detention, his conviction, or his apparent subsequent deportation. Iqbal instead challenges his separation from the general prison population at the Metropolitan Detention Center and his treatment during that separation. He claims that his separation stemmed from a general policy authorized at the highest levels of government in the wake of 9/11. But most, if not all, of the assertedly unlawful actions in his complaint—including the decision to place plaintiff in the ADMAX SHU and the abuses which purportedly ensued there—are alleged to have been carried out by defendants much lower in the chain of command.

Nevertheless, as a result of the Supreme Court’s precedents interpreting Rule 8(a), even as modified by the “plausibility standard” established in *Bell Atlantic*, 127 S. Ct. at 1968, it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding Iqbal’s claims. If so, these officials—FBI Director Robert Mueller and former Attorney General John Ashcroft—may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. In *Bell Atlantic*, the Supreme Court has quite rightly expressed concern that “careful case management” might not be able to “weed[] out early in the discovery process” an unmeritorious claim.
in private civil antitrust litigation, see Bell Atlantic, 127 S. Ct. at 1967, and might have limited success in “checking discovery abuse,” id. This concern is all the more significant in the context of a lawsuit against, inter alia, federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity. Even with the discovery safeguards carefully laid out in Judge Newman’s opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

The decision in this case may be required by the faithful application of the relevant precedents by a court of inferior jurisdiction. But a detached observer may wonder whether the balance struck here between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation—a balance compelled by the precedents that bind us—jeopardizes the important policy interest Justice Stevens aptly described as “a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.” Mitchell v. Forsyth, 472 U.S. 511, 541 (1985).
WASHINGTON—The Supreme Court on Monday agreed to decide whether top government officials can be sued for damages by the Muslim men who were rounded up and imprisoned under harsh conditions in the immediate aftermath of the terrorist attacks of Sept. 11, 2001.

The case is an appeal by the Bush administration on behalf of John D. Ashcroft, who at the time was attorney general, and Robert S. Mueller III, then as now the director of the Federal Bureau of Investigation.

The federal appeals court in Manhattan, in a pretrial decision last June, rejected the claims of immunity raised by the two officials, as well as by other defendants, including the former head of the Bureau of Prisons and the former warden of the Metropolitan Detention Center, where many of the men were held. The lower-ranking officials also appealed that ruling to the Supreme Court, but the justices took no action on their petitions on Monday.

The lawsuit was filed by two men, Javaid Iqbal, a Pakistani, and Ehad Elmaghraby, an Egyptian, both of whom were deported after months of confinement in a section of the Brooklyn prison known as Admax-Shu, which stands for administrative maximum special housing unit. Mr. Elmaghraby settled his claims for a $300,000 payment from the government and is no longer in the case.

Mr. Iqbal, who has not settled, was a 33-year-old cable television installer on Long Island at the time of his arrest on Nov. 2, 2001. He lived in Hicksville with his wife, a United States citizen, and had an application pending for a green card. He was charged with document fraud for using a Social Security card that belonged to someone else.

Mr. Iqbal pleaded guilty after several months of confinement in the special unit, where he was subjected to daily body-cavity searches, sometimes several times a day, as well as to beatings and to extremes of hot and cold. He was kept in solitary confinement with the lights in his cell constantly on. He lost 40 pounds during six months in the special unit, before he was placed in the general prison population.

Mr. Iqbal’s lawsuit maintains that he was treated as a “high interest” prisoner solely because of his religion and national origin, under policies and procedures directed by Mr. Ashcroft and Mr. Mueller and carried out by the other defendants. The suit also maintains that the conditions of confinement in the special unit violated minimal constitutional standards, of which the defendants should have been aware.

Although Mr. Iqbal is now the sole plaintiff in his case, the Supreme Court’s decision will affect another lawsuit that raises similar claims on behalf of seven named plaintiffs and a class of hundreds of others. That case, Turkmen v. Ashcroft, was argued before the United States Court of Appeals for the Second Circuit in February.

In refusing the defendants’ request to dismiss the Iqbal case, the Second Circuit found that the accusations, although not yet proven, were at least “plausible.” That was sufficient to permit Mr. Iqbal’s lawyers to
proceed to pretrial discovery to establish the facts, Judge Jon O. Newman wrote for the appeals court.

The government’s appeal maintains that the case against the two high officials should have been dismissed because it was based on nothing but “bare and conclusory allegations” and lacked evidence that the two condoned or even knew about the treatment Mr. Iqbal alleges to have occurred.

The standard for allowing the case to go forward should be higher than mere plausibility, the government said, pointing to recent Supreme Court decisions, including one in an antitrust case last year, that raised the standard for the evidence that plaintiffs must provide at the initial stage in order to withstand a motion to dismiss their lawsuit.

The government’s brief said the “vital importance” of the case, Ashcroft v. Iqbal, No. 07-1015, was “amplified in the context of high-ranking officials charged with responding to an extraordinary national-security crisis like the September 11 attacks.”

In his opinion for the appeals court last June, Judge Newman discounted the relevance of the Sept. 11 context for the rights that Mr. Iqbal was asserting. “The strength of our system of constitutional rights derives from the steadfast protection of those rights in normal and unusual times,” he wrote.

Justice Anthony M. Kennedy, writing for the Supreme Court majority last week in the decision on the rights of the Guantánamo detainees, expressed a similar sentiment when he said that “the laws and Constitution are designed to survive, and remain in force, in extraordinary times.”
A lawsuit challenging the alleged beating and abuse of a Pakastani man at the Metropolitan Detention Center following his arrest in the post-Sept. 11, 2001 roundup of Arab and Muslim men accused of criminal or immigration violations will continue.

The U.S. Court of Appeals for the Second Circuit yesterday broke new ground in the area of qualified immunity as it ruled that former U.S. Attorney General John Ashcroft, FBI Director Robert Mueller and several FBI officials and Bureau of Prisons personnel must continue to litigate the case of Javaid Iqbal before Eastern District Judge John Gleeson.

The circuit suggested that the immunity defense could be reasserted before trial but only after “carefully controlled and limited” discovery supervised by Judge Gleeson.

Mr. Iqbal claimed that his rights were violated when he was placed in solitary confinement from Jan. 8, 2002 until June 2002, beaten by correctional officers, subjected to extreme temperatures, repeatedly stripped and subjected to body cavity searches, shackled whenever he left his cell, and subjected to discrimination based on his racial, ethnic and religious background.

He charged that the decision of the Justice Department to arrest persons “of high interest” after the Sept. 11 attacks led to his segregation in solitary confinement, where he languished while awaiting FBI “clearance” via an order to the Bureau of Prisons, and that his segregation and mistreatment would never have happened without the approval of high-ranking officials.

Those officials, including Mr. Mueller, Mr. Ashcroft and Dennis Hasty, then warden of the detention center, as well as FBI and federal Bureau of Prisons personnel, claimed qualified immunity for the decision to segregate Mr. Iqbal. They also claimed that the special context of post 9/11, specifically the national emergency and the desperate need to track down terror leads, should free them from civil suit even if the qualified immunity privilege did not apply.

Judge Gleeson rejected the bulk of those claims. Yesterday, a panel of Judges Jon Newman, Jose Cabranes and Robert Sack accepted almost all of Judge Gleeson’s findings in this respect when they decided the appeal in Iqbal v. Hasty, 05-5768-cv.

Judge Newman wrote for the court as it sent almost all of the claims back to the Eastern District. The thorniest question facing the panel was what it considered the prevailing confusion over pleading standards for qualified immunity. The privilege is recognized because of the need for public officials to be able to do their jobs without fear of vexatious litigation.

For this reason, issues of qualified immunity are usually decided upfront by judges before burdensome litigation can get under way, and appeals courts hear denials of claims of qualified immunity before discovery gets under way.
Flexible Standard

Judge Newman said the “pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this circuit,” and considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the U.S. Supreme Court’s decision in Bell Atlantic v. Twombly, 127 S.Ct. 1955 (2007).

Bell Atlantic, Judge Newman said, “indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson, 355 U.S. 41 (1957).”

And “some of these signals,” he said, “point toward a new and heightened pleading standard.” But some the signals pointed in the other direction, including the possibility that the court was requiring more than simple notice pleading in the limited context presented by the case—antitrust.

Judge Newman said “We are reluctant to assume that all of the language of Bell Atlantic applies only to Section 1 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust cases.”

In the end, he said “we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”

That said, Judge Newman added, “we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons.”

“First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation,” he said.

“Second, some of the allegations in the plaintiff’s complaint, although not entirely conclusory, suggest that some of the plaintiff’s claims are not based on facts supporting the claim but, rather, on generalized allegations of supervisory involvement,” he said.

“Therefore, allowing some of the plaintiff’s claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.”

The U.S. Supreme Court has warned that a decision on heightened pleading standards requires an amendment to the Federal Rules of Civil Procedure and should not be done through “judicial interpretation.”

So the circuit concluded that “a heightened pleading standard may not be imposed.”

Limited Discovery

Nonetheless, and it is a big nonetheless, the court said that under “the plausibility standard of Bell Atlantic, a conclusory allegation concerning some elements of plaintiff’s claims might need to be fleshed out by a plaintiff’s response to a defendant’s motion for a more definite statement.”

A district court, while mindful of the policy considerations underlying the qualified immunity privilege, “may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s
claims and a plaintiff may probe for such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct.”

Here, where some defendants are current or former senior government officials, Judge Newman said, the district court might want to “structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up in the ranks.”

The circuit quickly rejected defendants’ arguments that the special context of post 9/11 America required dismissal of the case, even as it recognized the “gravity” of the situation and noted emergencies can give officials latitude to take action that would not be constitutional “in normal times.”

“But most of the rights that the plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination,” Judge Newman said. “The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.”

Due Process Claims

The circuit agreed with Judge Gleeson’s position on Mr. Iqbal’s procedural due process claim—that Mr. Iqbal had a “protected liberty interest” to be free from his placement in solitary and subjected to needlessly harsh restrictions compared to the rest of the prison population. Significantly, Judge Newman said, “for at least half (if not all) of plaintiff’s confinement” in what was called the ADMAX Special Housing Unit, he was a pretrial detainee not a convicted prisoner.

Mr. Ashcroft and Mr. Mueller claimed Iqbal had failed to allege their personal involvement in the denial of procedural due process because the decision to continually detain him was made by lower ranking FBI officials. The circuit rejected that argument “at this early stage of the litigation.”

Mr. Hasty had made a similar argument, but from a different perspective, that the decisions were made by higher-ups. That argument was also rejected by the circuit.

And under its reading of Bell Atlantic, the circuit said the personal involvement of FBI and Bureau of Prisons defendants “are entirely plausible.”

But on another question critical to qualified immunity analysis—whether Mr. Iqbal’s right to procedural due process was in this context was “clearly established”—the court said, in this case, and in light of the case law, “officers of reasonable competence” could disagree over whether their conduct violated clearly established procedural due process rights.

On Mr. Mueller’s and Mr. Ashcroft’s assertion of immunity on Mr. Iqbal’s discrimination claims, the circuit said it was too early in the case to dismiss them.

“As with procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have
concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated ‘of high interest’ in the aftermath of 9/11,” Judge Newman said.

“In sum,” he said, “the serious allegations of gross mistreatment set forth in the complaint suffice . . . to defeat the defendants’ attempt to terminate the lawsuit at a preliminary stage, but, consistent with the important policies that justify the defense of qualified immunity, the defense may be reasserted in advance of trial after a carefully controlled and limited discovery that the district court expects to supervise.”
A federal judge in Brooklyn ruled yesterday that former Attorney General John Ashcroft, the director of the Federal Bureau of Investigation and other top government officials will have to answer questions under oath in a lawsuit that accuses them of personally conspiring to violate the rights of Muslim immigrants held in a federal detention center in Brooklyn after 9/11.

The officials had sought to have the lawsuit dismissed without testimony, arguing in part that they had governmental immunity from its claims, that the court lacked jurisdiction because they live outside New York State, and that the Sept. 11 attacks created “special factors” outweighing the plaintiffs’ right to sue for damages for constitutional violations.

But the judge, John Gleeson, of the United States District Court for the Eastern District of New York, rejected those arguments, allowing the case to proceed—and opening the door to depositions of Mr. Ashcroft and the F.B.I. director, Robert S. Mueller III, by lawyers for the two plaintiffs: Ehab Elmaghraby, an Egyptian immigrant who ran a restaurant in Times Square, and Javaid Iqbal, a Pakistani immigrant whose Long Island customers knew him as “the cable guy.”

The lawsuit charges that, solely because of their race, religion or national origin, the two men were physically abused and deprived of due process while being detained for more than eight months in the harsh maximum-security unit of the Metropolitan Detention Center in Brooklyn.

The men, who eventually pleaded guilty to minor criminal charges unrelated to terrorism and were deported, charged that they were repeatedly slammed into walls and dragged across the floor while shackled and manacled.

They said they were kicked and punched until they bled, cursed as “terrorists” and “Muslim bastards,” and subjected to multiple unnecessary body-cavity searches, including one in which correction officers inserted a flashlight into Mr. Elmaghraby’s rectum, making him bleed.

“Our nation’s unique and complex law enforcement and security challenges in the wake of the Sept. 11, 2001, attacks do not warrant the elimination of remedies for the constitutional violations alleged here,” Judge Gleeson wrote in his decision.

Charles Miller, a spokesman for the United States Attorney’s office, said the ruling was under review. “The government has made no determination yet as to what the government’s next step will be,” he said.

The decision was hailed as significant by the plaintiffs’ lawyers, Alexander A. Reinert, of Koob & Magoolaghan, and Haeyoung Yoon, of the Urban Justice Center.

It was also celebrated by lawyers at the Center for Constitutional Rights, which brought a companion lawsuit as a class action on behalf of other immigrant detainees in 2002. The government’s motion to dismiss that suit, using many of the same arguments, is pending before the same judge.
"The fact that Judge Gleeson ruled that this case can keep Ashcroft on the hook—that would never happen in a regular prison-abuse case," said Rachel Meeropol, a lawyer for the Center for Constitutional Rights. "The judge understood that this isn’t just a case about individuals being abused in detention. These are people who were singled out according to a policy created on the highest levels of government."

Judge Gleeson cited a scathing 2003 report by the Justice Department’s inspector general that found widespread abuse of detainees at the Brooklyn center.

The report said that Mr. Ashcroft’s policy was to hold detainees on any legal pretext until the F.B.I. cleared them, even though such clearances took months and many had been picked up by chance, not because they were legitimate terrorism suspects.

"The post-Sept. 11 context provides support for the plaintiffs’ assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process," the judge wrote.

In effect, the judge gave the plaintiffs an opportunity to try to establish the personal involvement of Mr. Ashcroft and other high-ranking defendants through discovery, rather than simply accepting the defense’s argument of immunity at this early stage of the litigation.

The “qualified immunity” that shields government officials "will not allow the attorney general to carry out his national security functions wholly free from concern for his personal liability," Judge Gleeson wrote, quoting a Supreme Court decision that involved then-Attorney General John N. Mitchell’s unauthorized wiretap of a radical group. "He may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States."
WASHINGTON—The Justice Department’s inspector general announced yesterday that investigators had found hundreds of prison videotapes that confirm reports of serious physical and verbal abuse of immigrants detained after the Sept. 11 attacks.

Inspector General Glenn Fine found that "some officers slammed and bounced detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg-restraint chains and punished them by keeping them restrained for long periods of time," according to a report released yesterday.

The report also found that jail personnel improperly taped meetings between detainees and lawyers and overused strip searches.

Fine’s office concluded that as many as 20 guards at the Metropolitan Detention Center (MDC) in Brooklyn, N.Y., were involved in the abuse and recommended discipline or counseling for 12 of those who remain employed there. Four guards no longer work at the prison, but the report said their new employers should be told of the Justice Department findings. The inspector general could not identify the others involved.

Justice Department spokesman Mark Corallo said the agency’s civil-rights division and the U.S. attorney for the Eastern District of New York will review the report and the videotapes to determine if anyone should be prosecuted.

“We agree with the inspector general that even the intense emotional atmosphere surrounding the attacks, particularly in New York City where smoke was still rising from the rubble of Ground Zero, is no excuse for abhorrent behavior by Bureau of Prisons personnel,” Corallo said.

The report said that many of the allegations were confirmed through the viewing of more than 300 videotapes recorded from October to November 2001 that showed detainees being moved around the facility and within cells.

MDC officials repeatedly had told Fine’s investigators that such tapes no longer existed, and many of those interviewed earlier had denied conduct that was confirmed on the tapes. The report also found, however, that many tapes remain missing and that there are unexplained gaps in the footage, despite a requirement to keep such material for two years under U.S. Bureau of Prisons policies.

Yesterday’s findings follow a June report that found “excessively restrictive and unduly harsh” conditions for Sept. 11 detainees.

The earlier report also found “a pattern of physical and verbal abuse,” but concluded that further investigation was necessary. At the time, Justice Department prosecutors had declined to pursue criminal prosecutions.

A federal dragnet after the attacks resulted in the detention of more than 1,200 foreign nationals, including 762 immigration cases examined by Fine. None was ever charged with terrorism-related crimes.
Negusie v. Mukasey

07-499


Negusie, a citizen of Eritrea, was conscripted into the army. Negusie was released from service, but then recalled. Upon his refusal to fight the Eritrean government incarcerated Negusie. After two years of incarceration Negusie was released into military service, in which he worked for four years. During that time he worked on a rotating basis as a prison guard. Negusie managed to stow away on a shipping container bound for the U.S. and upon arrival requested asylum. The Immigration Judge denied Negusie’s request for asylum under numerous sections of the immigration code that state a person is not eligible for asylum if they assisted or participated in the persecution of others because of race, religion, or other specific categories. The Immigration Judge, the Board of Immigration Appeals, and the Fifth Circuit Court of Appeals all denied Negusie’s petition for asylum, stating that he admittedly participated in the persecution of individuals when he acted as a prison guard. The Fifth Circuit’s opinion is in line with the view of the Second Circuit and contradictory to the view taken by the Eighth Circuit. The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A).

Question Presented: Whether this “persecutor exception” prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

Daniel Girmai NEGUSIE, Petitioner,

v.


Court of Appeals for the Fifth Circuit

Decided May 15, 2007

[Excerpt: Some footnotes and citations omitted.]

PER CURIAM:

Eritrean citizen Daniel Girmai Negusie petitions for review of the decision of the Board of Immigration Appeals (BIA) denying his application for asylum and withholding of removal.

Negusie contends that the BIA erroneously determined that he assisted in the
persecution of others on the basis of a protected ground, rendering him ineligible for asylum or withholding of removal, pursuant to 8 U.S.C. § 1158(b)(2)(A)(i) and 8 U.S.C. § 1231(b)(3)(B)(i). Negusie argues both that he did not assist in persecution when he worked as a guard in a military prison and that the record did not indicate that he was involved in any persecution of others on a protected ground.

In his brief to the BIA, Negusie stated that he “did not . . . assist or otherwise participate in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. In fact, he risked his life on numerous occasions to help those who were facing such persecution.” Negusie thus conceded that the prisoners were persecuted on protected grounds. See Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992) (a litigant’s factual assertions ordinarily are binding). Moreover, Negusie testified that, during his own imprisonment, he learned about Protestant Christianity from people who were imprisoned because of their religious beliefs. Additionally, a State Department report from 2004 indicated that the Eritrean government actively persecuted numerous Protestant groups.

The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities’ intentions. Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003). Rather, the inquiry should focus “on whether particular conduct can be considered assisting in the persecution of civilians.” Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981).

Negusie did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, did favors for prisoners, and was reprimanded for doing so. However, he worked as an armed prison guard. He knew about the forms of punishment used by his superior officer. He stood guard while prisoners were kept in the sun as a form of punishment, and he acknowledged that his job description included depriving prisoners of access to showers and fresh air. He also stated that he hated his job because he saw prisoners suffer on a daily basis. The Immigration Judge considered Negusie’s testimony about his redemptive acts of assistance to prisoners and gave that testimony little weight.

The evidence does not compel a conclusion that Negusie did not assist in the persecution of prisoners. See Bah, 341 F.3d at 350. Negusie thus was ineligible for asylum or withholding of removal.

PETITION DENIED.
A federal appeals court withdrew its ruling Friday that declared a Fresno couple eligible for political asylum in the United States despite the husband’s background as a guard in a Cambodian prison where inmates were allegedly persecuted.

The Ninth U.S. Circuit Court of Appeals in San Francisco had ruled in August that Pauline Im had played no more than a marginal role in the mistreatment of prisoners and thus should not be considered a persecutor, which would require that he be deported. The court said Im and his wife, Ngin Sitha, were eligible for asylum because they had shown Im would face political persecution in Cambodia.

But the court withdrew the ruling Friday and said the outcome of the case would depend on another dispute that the U.S. Supreme Court has agreed to hear in the term that starts in October. That case involves a former prison guard in Eritrea, where the inmates included religious minorities who were persecuted.

Enyinwa said the two cases differed because Im had not been armed, played no role in the mistreatment of prisoners and had merely followed superiors’ instructions to lock and unlock cell doors when prisoners were taken for interrogation. The lawyer said he disagreed with the Ninth Circuit’s decision to withdraw its ruling but now expects the court to order a new round of arguments after the Supreme Court rules on Negusie.
"Supreme Court Accepts African Prison Guard’s Asylum Appeal"

ABA Journal
Mar 17, 2008
Debra Cassens Weiss

A former prison camp guard who says he was forced to persecute others in Africa will get a chance to press his case for asylum with the U.S. Supreme Court in Negusie v. Mukasey.

Daniel Girmai Negusie was denied asylum because he helped operate a prison camp in Eritrea during a war with Ethiopia, SCOTUSblog reports. Federal law bars asylum for those who participate or assist in the persecution of others. But Negusie claims in his cert petition . . . that the law doesn’t apply to him because he was forced persecute others under threats of torture or death.

Negusie served two years as a guard until he was able to escape by hiding in a shipping container.

The New Orleans-based 5th U.S. Circuit Court of Appeals had ruled that coercion is irrelevant. Its decision conflicts with the law in at least one other circuit, the cert petition says.

“In a world where the number of civil wars is increasing, and both sides often coerce individuals into military service, this issue is arising with increasing frequency—as demonstrated by the significant number of judicial decisions addressing it,” the petition says. “Capricious variation in the application of this nation’s asylum laws with respect to a frequently recurring issue cannot be tolerated.”
Federal appeals court judges around the nation have repeatedly excoriated immigration judges this year for what they call a pattern of biased and incoherent decisions in asylum cases.

In one decision last month, Richard A. Posner, a prominent and relatively conservative federal appeals court judge in Chicago, concluded that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”

Similarly, the federal appeals court in Philadelphia said in September that it had “time and time again” been forced to rebuke immigration judges for their “intemperate and humiliating remarks.” Citing cases from around the country, the court wrote of “a disturbing pattern” of misconduct in immigration rulings that sent people back to countries where they had said they would face persecution.

The harsh criticism may stem in part from a surge in immigration cases before the federal appeals courts. Immigration cases, most involving asylum seekers, accounted for about 17 percent of all federal appeals cases last year, up from just 3 percent in 2001. In the courts in New York and California, nearly 40 percent of federal appeals involved immigration cases.

The increase occurred after Attorney General John Ashcroft made changes in 2002 to streamline appellate review within the immigration courts, which are part of the Justice Department.

Many federal appeals court judges say those changes essentially shifted work to their courts. The Justice Department counters that the increase is largely unrelated to the Ashcroft changes and is instead the result of a higher rate of appeals in the courts in New York and California.

Jonathan Cohn, a deputy assistant attorney general in the Justice Department, said the quality of the decisions rendered by the immigration courts on the whole was good, noting that the government won more than 90 percent of the cases in the federal appeals, or circuit, courts.

“The circuit courts do not see any of the tens of thousands of correctly decided cases that aliens choose not to appeal,” Mr. Cohn said. “They’re only seeing a fraction of the cases, and only a small fraction of those give rise to criticism.”

But that criticism can be very sharp, particularly given the temperate language that is the norm in the federal appellate courts.

In the Philadelphia decision in September, Judge Julio M. Fuentes of the United States Court of Appeals for the Third Circuit had this to say about Annie S. Garcy, an immigration judge, or I.J., in Newark: “The tone, the tenor, the disparagement, and the sarcasm of the I.J. seem more appropriate to a court television show than a federal court proceeding.”

Judge Garcy ordered Qun Wang returned to China, where he said his wife had been
forcibly sterilized. "He’s a horrible father as far as the court’s concerned," Judge Garcy ruled, saying Mr. Wang was obsessed with having a son and did not pay enough attention to his daughter, who is disabled.

All of that was irrelevant to the issues before Judge Garcy, Judge Fuentes wrote, returning the case to the immigration system for a rehearing before a different judge. "The factual issue before" Judge Garcy, Judge Fuentes wrote, had been only "whether Wang’s wife had been forcibly sterilized and whether, if he returned to China, the Chinese government would inflict improper punishment on him for leaving the country."

Through a spokeswoman, Judge Garcy declined to comment.

In another decision, Judge Marsha S. Berzon of the United States Court of Appeals for the Ninth Circuit, in San Francisco, said a decision by Nathan W. Gordon, an immigration judge, was "literally incomprehensible," "incoherent" and "indecipherable." A crucial sentence in Judge Gordon’s decision, she said, "defies parsing under ordinary rules of English grammar."

Judge Gordon ordered Ernesto Adolfo Recinos de Leon returned to Guatemala, notwithstanding Mr. Recinos’s testimony that he would be persecuted there for his political activities. Judge Berzon sent the case back to the immigration system for another hearing.

Judge Gordon, now retired, did not respond to a request for comment.

A spokesman for the Executive Office for Immigration Review, the unit of the Justice Department responsible for immigration adjudications, declined requests for interviews with officials there but provided answers to written questions.

"We would caution against drawing broad conclusions," the statement said, "from a small number of cases in the federal courts." The nation’s roughly 215 immigration judges, the statement continued, “handle more than 300,000 matters every year,” and “the vast majority of I.J.’s do an excellent job given such a large caseload.”

Denise Noonan Slavin, the president of the National Association of Immigration Judges, a union affiliated with the A.F.L.-C.I.O., said she was concerned about what she called the rising number of "scathing opinions" from federal appeals court judges.

* * * 

Mary M. Schroeder, the chief judge of the Ninth Circuit, which hears almost half of all immigration appeals, said the current system was “woefully inadequate.”

Immigration judges, she said, “are very unevenly qualified, and they work under very bad conditions.”

The people who appear before immigration judges often do not speak English, and their cases often turn in part on changing political and social conditions around the world. In a decision in March, Judge Posner wrote that immigration judges’ “lack of familiarity with relevant foreign cultures” was “disturbing.”

Judge Slavin, who sits in Miami, disagreed, saying she and her colleagues often had a sophisticated understanding of conditions in the most relevant countries, which are China for immigration judges in New York and Philadelphia; Eastern Europe for those in Chicago; Haiti, Columbia and Venezuela for
those in Miami; and Central and South America for those in California.

"I know more about Haitian politics than the people coming before me," Judge Slavin said. But she acknowledged both the difficulty and the importance of her work.

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Judges at the top and bottom of the system blame the administrative body between them, the Board of Immigration Appeals, for the surge in appeals and the mixed quality of the decisions reaching the federal appeals courts. The board is meant to act as a filter, correcting erroneous or intemperate decisions from the immigration judges and providing general guidance. The losing party can appeal the board’s decision to the federal courts.

But the board largely stopped reviewing immigration cases in a meaningful way after it was restructured by Mr. Ashcroft in 2002, several judges said.

Mr. Ashcroft reduced the number of judges on the board to 11 from 23. "They just hacked off all the liberals is basically what they did," said Ms. Rosenberg, who served on the board from 1995 to 2002.

Mr. Ashcroft also expanded the number of appeals heard by a single board member and encouraged the use of one-word affirmances in appropriate cases.

The goal of the changes, Mr. Ashcroft said, was streamlining. The board had a backlog of more than 56,000 cases, which fell to 32,000 by September 2004.

At a conference at New York Law School in September, John M. Walker Jr., the chief judge of the United States Court of Appeals for the Second Circuit, in New York, said the changes at the board level served to transfer its backlog to his court and other federal appeals courts.

"He just moved the problem from one court to another court," Judge Walker said of Mr. Ashcroft.

In the two and a half years after April 2002, said John R. B. Palmer, a staff lawyer at the Second Circuit, his court received twice as many appeals from immigration board decisions as it had in the previous 30 years combined.

Several federal appeals court judges said they were frustrated by the quality of the board’s review of decisions from immigration judges.

In his March decision, Judge Posner wrote that the board often affirmed "either with no opinion or with a very short, unhelpful, boilerplate opinion even when" the immigration judge had committed "manifest errors of fact and logic."

As a consequence, Judge Walker said, "We’re the first meaningful review that the petitioner has."

In its statement, the immigration review office said “we absolutely disagree” with Judge Walker’s comment. “Each decision that comes before the board is carefully reviewed by a staff attorney and at least one board member,” the statement said.

According to the office, the number of one-word affirmances dropped this year, to about 20 percent from about a third in previous years.

The solution to some of what recent criticisms identified as problems, several
federal appeals court judges said, is to add positions to the immigration board and to require judges there to explain the reasons for their decisions.

"At least write a couple of pages, three pages," said Jon O. Newman, a judge on the Second Circuit. "It would really help us."

An article to be published early next year in the Georgetown Immigration Law Journal concludes that the shift toward the federal appeals court "was triggered by the high volume of B.I.A. decisions issued starting in March 2002, and a general dissatisfaction with the B.I.A.’s review.”

In its statement, the immigration review office disagreed.

"The surge in federal appeals," the statement said, "is not related to the board’s increased number of decisions but the rate of appeal.” In some parts of the country, immigrants appeal only 7 percent of the time, the statement said. In the states covered by the federal appeals courts in New York and California, the appeals rate is now more than 30 percent.

At an argument in an appeal of an immigration case in September in Chicago, the three judges on the panel expressed exasperation with the current state of affairs.

“Does the Justice Department have any idea of what is happening to your cases in this court?” Judge Posner asked Cindy S. Ferrier, the government lawyer defending the decision of the immigration judge.

She said yes.

A second judge, Ilana Rovner, offered Ms. Ferrier a measure of sympathy.

"It is so cruel to send a lovely human being like you in here to be a messenger of such madness, such nonsense,” Judge Rovner said.