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Section 3: Business Law Panel

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III. Business Law Panel

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Digital Realty Trust, Inc. v. Somers

16-1276

Ruling Below: *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (C.A.9 (Cal.), 2017)

Former employee brought action against employer for violation of whistleblower protection provision of Dodd–Frank Wall Street Reform and Consumer Protection Act. The United States District Court for the Northern District of California, Edward M. Chen, J., denied employer's motion to dismiss and certified interlocutory appeal. Employer appealed. The Court of Appeals for the Ninth Circuit affirmed.

Question Presented: Whether the anti-retaliation provision for “whistleblowers” in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the act’s definition of “whistleblower.”

Paul SOMERS, Plaintiff-Appellee,

v.

DIGITAL REALTY TRUST INC., a Maryland corporation; Ellen Jacobs, Defendants-Appellants.

United States Court of Appeals, Ninth Circuit

Decided on March 8, 2017

[Excerpt; some citations and footnotes omitted]

SCHROEDER, Circuit Judge:

INTRODUCTION

This appeal presents an issue of securities law that has divided the federal district and circuit courts. It results from a last-minute addition to the anti-retaliation protections of the Dodd-Frank Act (“DFA”) to extend protection to those who make disclosures under the Sarbanes-Oxley Act and other laws, rules, and regulations. 15 U.S.C. § 78u-6(h)(1)(A)(iii). The underlying issue is whether, in using the term “whistleblower,” Congress intended to limit protections to those who come within DFA's formal definition, which would include only those who disclose information to the Securities

and Exchange Commission (“SEC”). See 15 U.S.C. § 78u-6(a)(6). If so, it would exclude those, like the plaintiff in this case, who were fired after making internal disclosures of alleged unlawful activity.

The Fifth Circuit was the first to weigh in on the question and strictly applied DFA's definition of “whistleblower” to the *1047 later anti-retaliation provision, so as to require dismissal of the plaintiff's action in that case because he did not make his disclosures to the SEC. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013). It therefore rejected the SEC's regulation adopting a contrary interpretation. *Id.* at 630.

The Second Circuit, viewing the statute itself as ambiguous, applied Chevron deference to the SEC's regulation. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). That regulation, in effect, interprets the provision to extend protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC. 17 C.F.R. § 240.21F-2.

The district court in this case followed the Second Circuit's approach, denied Defendant's motion to dismiss, and certified an interlocutory appeal. We agree with the district court that the regulation is consistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the government. This intent is reflected in the language of the specific statutory subdivision in question, which explicitly references internal reporting provisions of Sarbanes-Oxley and the Securities Exchange Act of 1934 ("Exchange Act"). In view of that language, and the overall operation of the statute, we conclude that the SEC regulation correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC. We therefore affirm.

BACKGROUND

Plaintiff-Appellee, Paul Somers, was employed as a Vice President by Defendant-Appellant, Digital Realty Trust, Inc. ("Digital Realty"), from 2010 to 2014. According to Somers's complaint in district court, he made several reports to senior management regarding possible securities law violations by the company, soon after which the company fired him. Somers was not able to report his concerns to the SEC before Digital Realty terminated his employment.

Somers subsequently sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Exchange Act. That section, entitled "Securities Whistleblower Incentives and Protection," includes the anti-retaliation protections created by DFA. Digital Realty sought to dismiss the DFA claim on the ground that, because Somers only reported the possible violations internally and not to the SEC, he was not a "whistleblower" entitled to DFA's protections.

The district court, in a published opinion, denied Digital Realty's motion to dismiss the DFA claim. The court conducted an extensive analysis of the statutory text, DFA's legislative history, and the procedural and practical implications of harmonizing the narrow definition of "whistleblower" with the broad protections of the anti-retaliation provision. *Somers v. Dig. Realty Tr. Inc.*, 119 F.Supp.3d 1088, 1100–05 (N.D. Cal. 2015). The court observed that "[a]t bottom, it is difficult to find a clear and simple way to read the statutory provisions of Section 21F in perfect harmony with one another." *Id.* at 1104. Having analyzed the tension between the definition and anti-retaliation provisions, the district court deferred to the SEC's interpretation that individuals who report internally only are nonetheless protected from retaliation under DFA. *Id.* at 1106. The district court certified the DFA question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), *id.* at 1108, and we subsequently granted Digital Realty's Petition for Permission to Appeal.

DISCUSSION

The case must be seen against the background of twenty-first century statutes to curb securities abuses. Congress enacted the Sarbanes-Oxley Act in 2002, following a major financial scandal. Its purpose was "[t]o

safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation.” *Lawson v. FMR LLC*, — U.S. —, 134 S.Ct. 1158, 1161, 188 L.Ed.2d 158 (2014). As a key part of its safeguards, Sarbanes-Oxley requires internal reporting by lawyers working for public companies. See 15 U.S.C. § 7245. This is in addition to internal reporting by auditors, which was already mandated by the Exchange Act. See 15 U.S.C. § 78j-1(b). Further, Sarbanes-Oxley requires that companies maintain internal compliance systems that include procedures for employees to anonymously report concerns about accounting or auditing matters. See 15 U.S.C. § 78-j-1(m)(4), 7262. It also provides protections to these and other “whistleblower” employees in the event that companies retaliate against them. 18 U.S.C. § 1514A(a). Sarbanes-Oxley expressly protects those who lawfully provide information to federal agencies, Congress, or “a person with supervisory authority over the employee.” *Id.* Like Sarbanes-Oxley, DFA was passed in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008. See Samuel C. Leifer, Note, Protecting Whistleblower Protections in the Dodd-Frank Act, 113 Mich. L. Rev. 121, 129–30 (2014) (discussing the mortgage crisis and Congress's response). In enacting DFA, Congress said the main purposes included “promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system” and “protect[ing] consumers from abusive financial services practices.” Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). DFA provided new incentives and employment protections for whistleblowers by adding Section 21F to the Securities Exchange Act of 1934. Section 21F defines a whistleblower as, “any individual who provides, or 2 or more

individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6). This definition thus describes only those who report information to the SEC.

The anti-retaliation provision in question in this case is found in a later subsection of Section 21F. It provides broad protections and states:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

- (i) in providing information to the Commission in accordance with this section;
- (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
- (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A). The issue in this case concerns subdivision (iii), which gives whistleblower protection to all those who make any required or protected disclosure under Sarbanes-Oxley and all other relevant laws.

Subdivision (iii) was added after the bill went through Committee. There is no legislative history explaining its purpose, but its language illuminates congressional intent. By broadly incorporating, through subdivision (iii), Sarbanes-Oxley's disclosure

requirements and protections, DFA necessarily bars retaliation against an employee of a public company who reports violations to the boss, i.e., one who “provide[s] information” regarding a securities law violation to “a person with supervisory authority over the employee.” 18 U.S.C. § 1514A(a). Provisions of Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting. Auditors, for example, must “as soon as practicable, inform the appropriate level of management” of illegal acts, and only after such internal reporting may auditors bring their concerns to the SEC. 15 U.S.C. § 78j-1(b). Leaving employees without protection for that required preliminary step would result in early retaliation before the information could reach the regulators. As the Second Circuit noted, “[I]f subdivision (iii) requires reporting to the [SEC], its express cross-reference to the provisions of Sarbanes-Oxley would afford an auditor almost no Dodd-Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the Commission, and any retaliation would almost always precede Commission reporting.” *Berman*, 801 F.3d at 151. Sarbanes-Oxley likewise requires lawyers to report internally, 15 U.S.C. § 7245, and the SEC’s Standards of Professional Conduct set forth only limited instances in which an attorney may reveal client confidences to the SEC, 17 C.F.R. § 205.3(d)(2). The attorney would be left with little DFA protection.

That DFA’s definitional provision describes “whistleblowers” as employees who report “to the Commission” thus should not be dispositive of the scope of DFA’s later anti-retaliation provision. Terms can have different operative consequences in different contexts. See *King v. Burwell*, —U.S.—, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483

(2015). The use of a term in one part of a statute “may mean [a] different thing[]” in a different part, depending on context. See *id.* at 2493 n.3. This is true even where, as here, the statute includes a definitional provision: “[Statutory d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012). DFA’s anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally. See *King*, 135 S.Ct. at 2493 n.3. Its terms should be enforced.

Reading the use of the word “whistleblower” in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent. As the Second Circuit pointed out, subdivision (iii) would be narrowed to the point of absurdity; the only class of employees protected would be those who had reported possible securities violations both internally and to the SEC, when the employer—unaware of the report to the SEC—fires the employee solely on the basis of the employee’s internal report. See *Berman*, 801 F.3d at 151–52. This reading is illogical. Employees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally. See *id.* Reporting to the SEC brings a higher likelihood of a problem being addressed, along *1050 with an increased risk of employer retaliation, whereas internal reporting may be less efficient but safer. *Id.* As we have seen, Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. *Id.* at 152–53. The anti-retaliation provision would do

nothing to protect these employees from immediate retaliation in response to their initial internal report. A strict application of DFA's definition of whistleblower would, in effect, all but read subdivision (iii) out of the statute. We should try to give effect to all statutory language. See *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (rejecting a statutory construction that would render a term “insignificant, if not wholly superfluous”); see also *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1133 (9th Cir. 2016).

We recognize there is intercircuit disagreement. The Second Circuit in *Berman* disagreed with the Fifth Circuit, which had earlier applied the formal definition of whistleblower to limit the scope of the anti-retaliation provision. *Asadi*, 720 F.3d at 630. The *Asadi* decision reasoned that if DFA protected the same conduct that Sarbanes-Oxley did, then the Sarbanes-Oxley enforcement scheme would be rendered moot or superfluous, on the theory that no one would use it. See *id.* at 628–29. The Fifth Circuit pointed out that Sarbanes-Oxley lacks DFA's double damage provision, has a shorter statute of limitations, and has more extensive administrative requirements. *Id.* But as the SEC has pointed out in its amicus brief in this case, DFA's enforcement scheme is not more protective in all situations and would not swallow Sarbanes-Oxley because Sarbanes-Oxley offers a different process from DFA. Sarbanes-Oxley may be more attractive to the whistleblowing employee in at least two important ways. First, Sarbanes-Oxley provides for adjudication through administrative review, with the Department of Labor taking responsibility for asserting the claim on the whistleblower's behalf. 18 U.S.C. § 1514A(b)(2). This procedure would likely be significantly less costly and stressful for whistleblowers than having to

file an action in federal court, pursuant to DFA's enforcement scheme. See 15 U.S.C. § 78u-6(h)(1)(B). Second, while DFA provides for awards of double back pay, 15 U.S.C. § 78u-6(h)(1)(C), Sarbanes-Oxley allows employees to recover “all relief necessary to make the employee whole,” including compensation for special damages, 18 U.S.C. § 1514A(c). An employee who has suffered more substantial emotional injury than financial harm would likely be better off with Sarbanes-Oxley's allowance for special damages. See *Jones v. SouthPeak Interactive Corp.*, 777 F.3d 658, 672 (4th Cir. 2015) (joining the Fifth and Tenth Circuits in concluding that emotional distress damages are available under Sarbanes-Oxley as “special damages”). DFA's protection for internal reporting therefore does not render Sarbanes-Oxley's enforcement scheme superfluous. The statutes provide alternative enforcement mechanisms.

For all these reasons, we conclude that subdivision (iii) of section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. We also agree with the Second Circuit that, even if the use of the word “whistleblower” in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference. In 2011, the SEC issued Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2, pursuant to its rule-making authority under 15 U.S.C. § 78u-6(j). The SEC's rule *1051 in our view accurately reflects Congress's intent to provide broad whistleblower protections under DFA. The Rule says that anyone who does any of the things described in subdivisions (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection, including those who make internal

disclosures under Sarbanes-Oxley. They are all whistleblowers. The Rule is quite direct: “For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if: ... [y]ou provide that information in a manner described in [the anti-retaliation provision] of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).” 17 C.F.R. § 240.21F-2.

The regulation accurately reflects congressional intent that DFA protect employees whether they blow the whistle internally, as in many instances, or they report directly to the SEC. The district court correctly so recognized.

The judgment of the district court is **AFFIRMED**.

* * *

OWENS, Circuit Judge, dissenting:
I agree with the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013), and Judge Jacobs' dissent in *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145, 155–60 (2d Cir. 2015), and therefore respectfully dissent. Both the majority here and the Second Circuit in *Berman* rely in part on *King v. Burwell*, — U.S. —, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015), to read the relevant statutes in favor of the government's position. In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level. Cf. *John Carpenter's The Thing* (Universal Pictures 1982).

“U.S. high court to review scope of Dodd-Frank whistleblower protections”

Reuters

Sarah N. Lynch

June 26, 2017

The U.S. Supreme Court agreed on Monday to consider whether corporate insiders who blow the whistle on their employers are shielded from retaliation if they only report alleged misconduct internally rather than to the government's Securities and Exchange Commission.

The justices will hear Digital Realty Trust Inc's appeal of a lower court ruling in favor of Paul Somers, an executive fired by the San Francisco-based company after he complained internally about alleged misconduct by his supervisor but never reported the matter to the U.S. Securities and Exchange Commission.

The case hinges on the SEC's whistleblower protection rules required by the 2010 Dodd-Frank Wall Street reform law.

The court agreed to take up the case on the last day of a nine-month session. The court will hear the case during the next term that starts in October.

The SEC rules, adopted in 2011, prohibit corporate employers from retaliating in any way against whistleblowers who try to report allegations of securities law violations.

They also give the SEC the power to offer monetary awards to whistleblowers whose tips lead to successful enforcement actions.

Digital Realty Trust argues the anti-retaliation protections do not apply to people who fail to report their allegations to the SEC because the law defines a whistleblower as a person who reports possible securities violations to the SEC.

If the Supreme Court ultimately sides with the company, then it would force corporate whistleblowers to report wrongdoing to the SEC in order to be protected from retaliation.

Such a result could deter people from reporting misconduct internally first, said Jordan Thomas, a partner at Labaton Sucharow who represents SEC whistleblowers.

"I think both corporate whistleblowers and corporations should hope that the Supreme Court finds that internal reporting is sufficient to have the anti-retaliation protections because if not, sophisticated corporate whistleblowers will bypass internal reporting systems and report directly to the SEC," he said.

Digital Realty Trust, a real estate investment trust company, became entangled in the dispute over whistleblower protection after it fired Somers, its former vice president of portfolio management.

Somers had complained internally that his supervisor had eliminated some internal controls and hid major cost overruns on a project in Hong Kong.

After he was fired, he sued the company in November 2014, saying he was protected from retaliation as a whistleblower under the Dodd-Frank law.

The company tried unsuccessfully to quash his claim in the United States District Court for the Northern District of California.

While the case was on appeal before the 9th U.S. Circuit Court of Appeals, a divided 2nd U.S. Circuit Court of Appeals panel ruled in a similar case that people who only report misconduct internally are whistleblowers who merit protection from retaliation.

The 9th Circuit later affirmed the California finding, with the SEC also filing a friend of the court brief in the case and participating in oral arguments in support of Somers.

Both the 2nd and 9th Circuit opinions are at odds with the 5th U.S. Circuit Court of Appeals, which previously held that whistleblowers must report to the SEC in order to receive protective status.

“The Bumpy Road To Protection For Internal Whistleblowers”

Law360

Ryan S. Hedges, Brooke E. Conner

March 27, 2017

Two recent court decisions are just the latest developments in the bumpy road to protection for internal corporate whistleblowers, a prominent issue that has sparked outspoken advocacy from the U.S. Securities and Exchange Commission, and may be increasingly likely to draw the U.S. Supreme Court’s attention. On March 8, 2017, a split Ninth Circuit panel ruled in favor of extending Dodd-Frank’s anti-retaliation protections to whistleblowers who choose to report suspected securities law violations internally to their employers, but who do not report directly to the SEC. On March 20, 2017, the Supreme Court declined to review a case out of the Sixth Circuit in which the district court had dismissed the case and ruled that Dodd-Frank’s whistleblower protections applied only to those who report to the SEC. In that case, the Sixth Circuit had affirmed on other grounds, so the Dodd-Frank issue was not squarely in play on certiorari. But, in light of the widening circuit split on the issue, it seems likely that the Supreme Court’s recent denial of certiorari will not be its final say on the topic.

The crux of the legal debate centers on whether the whistleblower protection provision in Section 922 of Dodd-Frank protects whistleblower reports that are made

internally within a company but not to the SEC. Section 21F(a)(6) of Dodd-Frank defines a “whistleblower” as “any individual who provides ... information relating to a violation of the securities laws to the Commission.” However, Dodd-Frank’s anti-retaliation provisions, specifically Section 21F(h)(1)(A)(iii), prohibit retaliation against “whistleblowers” who make disclosures that are required or protected under the Sarbanes-Oxley Act, the Securities Exchange Act and “any other law, rule or regulation subject to the jurisdiction of the [SEC],” which, under certain circumstances, would include only internal reports. It is no surprise that the arguably confusing statutory provisions have caused the SEC to adopt rules clarifying its position and have resulted in opposing judicial opinions in multiple circuit courts.

The SEC’s Strong Record in Favor of Broad Whistleblower Protection

The SEC’s position on the issue has been well-documented through agency rule-making, as well as in numerous amicus briefs filed in federal cases across the country since the implementation of Dodd-Frank. From a policy perspective, the SEC believes that internal company reporting by employees is essential in order to deter, detect and halt unlawful conduct that may harm investors. To that end, the SEC views the Dodd-Frank

anti-retaliation provisions as a welcome supplement to the existing securities-law enforcement regime because the provisions encourage robust compliance programs and internal investigations of whistleblower reports.

Thus, the SEC has supported broad whistleblower protection in the face of legal challenges and has taken all steps available to encourage reporting and prohibit retaliation.[1] In May 2011, the SEC issued regulations providing that internal whistleblowers are protected from retaliation under Dodd-Frank, even if they report only to their employers and not to the SEC.[2] The SEC accomplished this by promulgating two separate definitions of the word “whistleblower” — one that applies to whistleblower awards and confidentiality provisions and one that applies for purposes of Dodd-Frank’s anti-retaliation protections. Just over four years later, in August 2015, the SEC issued an “interpretive rule” reaffirming its view that individuals who have not reported to the SEC are protected from retaliation by an employer.[3]

The SEC has been very active in litigation pertaining to this issue in federal district and appellate courts across the country.[4] The SEC’s amicus briefs filed in these cases have asked courts to rely on the agency’s adopted regulations prohibiting employers from retaliating against “individuals who report to persons or governmental authorities other than the Commission,” including employees who make “the disclosures that are required or protected under the Sarbanes-Oxley Act” or other securities laws.[5] In October 2016, Jane Norberg, chief of the SEC’s Office of

the Whistleblower, reiterated the SEC’s position that it is “committed to protecting whistleblowers from retaliation and will continue to file briefs as appropriate in support of whistleblower protection.” Moreover, in 2016 the SEC initiated its own litigation to enforce whistleblower protection, bringing its first stand-alone enforcement action against a company for unlawful retaliation without an underlying securities violation,[6] as well as enforcement actions based solely on restrictive language contained in companies’ standard separation agreements, and not relating to the underlying allegations reported by a whistleblower.[7]

Under the SEC’s formal whistleblower program, created as part of Dodd-Frank, an individual who provides the SEC with original information leading to an enforcement action that results in over \$1 million in monetary sanctions is eligible to receive an award of 10 percent to 30 percent of the amount collected. The whistleblower program encourages internal reporting of possible violations by offering additional economic incentives to do so in the first instance.[8] Based on the success of the whistleblower program, the SEC has a vested interest in expanding protections for those individuals who choose to report possible misconduct, whether they choose to do so internally or directly to the SEC.[9]

On the other hand, many companies facing legal action for alleged retaliation have vehemently opposed the SEC’s position and argued against extending whistleblower protections to non-SEC reports, hoping to eliminate a potential cause of action that

could be asserted by terminated employees. In response to the SEC's concerns, companies have argued that Congress has taken clear and effective action to address potential abuse of whistleblowers through the plain language of Dodd-Frank and Sarbanes-Oxley. Thus, companies insist that whistleblower qualification under Dodd-Frank requires more than merely performing existing job duties, which for many employees includes assessing compliance with the law and reporting issues internally. Companies may also have a valid interest in protecting their right to make reasonable employment decisions based on false reports made in bad faith, or for legitimate alternative business reasons, without fear of a retaliation lawsuit.

Federal Circuit Split — Conflicting Interpretations of Whistleblower Protection

The recent Ninth Circuit ruling (discussed above and below) followed two prominent conflicting decisions in other federal circuit courts. In *Asadi v. G.E. Energy (USA) LLC*, the Fifth Circuit was the first to consider the issue and held that whistleblowers who did not report to the SEC had no claim for retaliation against their employers under Dodd-Frank.[10] The court chose to “start and end [its] analysis with the text of the relevant statute,” holding that the definition of “whistleblower” must be applied consistently throughout the statute, thereby requiring whistleblowers to report to the SEC in order to become eligible for anti-retaliation protection.[11] The Fifth Circuit found that the relevant statutory provisions were not inconsistent when applied to an employee

who complained to both the SEC and his or her employer, as such employee would qualify as a “whistleblower” under the statutory definition and therefore would be entitled to protection from retaliation. The Fifth Circuit pointed out that if a whistleblower qualified for retaliation protection under Dodd-Frank based on the individual's qualification as a whistleblower under Sarbanes-Oxley, such a result would effectively moot Sarbanes-Oxley's distinct protections.[12]

The Second Circuit rejected this analysis in *Berman v. Neo@Ogilvy LLC* and found that non-SEC reporting whistleblowers are entitled to protection from employer retaliation.[13] The court found Dodd-Frank's definition of whistleblower inconsistent with its anti-retaliation provisions, and it therefore applied Chevron deference to the SEC's regulations interpreting the statute.[14] The Second Circuit noted that the Dodd-Frank anti-retaliation provisions would be narrowed to the point of absurdity if SEC reporting were a requirement for protection. In such a scenario, the only protected individuals would be those who reported possible securities violations both internally and to the SEC and were then fired solely on the basis of the internal report.[15] Despite the circuit split caused by the Second Circuit's opinion, the defendants in *Berman* did not seek Supreme Court review of the decision.

Ninth Circuit's Recent Ruling Widens the Circuit Split

More recently, in *Somers v. Digital Realty Trust Inc.*, the Ninth Circuit affirmed a district court ruling that a former employee

was entitled to sue his former employer over his termination after he reported suspected securities law violations to his employer but not to the SEC.[16] The Ninth Circuit panel majority found that Dodd-Frank “unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally,” and it reasoned that requiring a whistleblower to have reported to the SEC in order to benefit from Dodd-Frank’s anti-retaliation provisions would unjustly limit the intended protections for whistleblowers and would “make little practical sense.”[17] The court expressed concern that such a requirement may provide an incentive for companies to immediately terminate complaining employees in the hopes that they have not yet shared their concerns with the agency, thereby avoiding a potential retaliation claim. The court recognized that since certain of Sarbanes-Oxley’s provisions require internal reporting before external reporting for certain individuals, failing to protect internal reporters “would result in early retaliation before the information could reach the regulators.”[18] The court expressly agreed with the Second Circuit’s reasoning in *Berman*, including that the SEC’s regulations are entitled to deference and that the SEC’s position “correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC.”[19]

The dissent simply stated that the statute’s definition of whistleblower should be applied consistently throughout the statute, in accordance with the Fifth Circuit’s opinion in *Asadi*. The dissent also took issue with the majority’s reliance on a 2015 Supreme Court

decision in *King v. Burwell*,[20] which found that a defined statutory term could be interpreted differently depending on the context of different statutory sections.

The scope of Dodd-Frank whistleblower protection has been presented in at least two other courts of appeals. As discussed above, the Supreme Court recently declined to review the *Verble* case out of the Sixth Circuit, which had sidestepped the issue by finding that a potential whistleblower’s claims were too vague.[21] The issue is also presented for decision in a case currently pending in the Third Circuit.[22]

Expanded Whistleblower Protection — Ripe for Repeal or Reversal?

Given the present uncertainty in the law, it is not readily apparent how the change in administration may affect the SEC’s well-defined position on whistleblower protection, if at all. The SEC may prefer the status quo, since encouraging and protecting internal reporters from retaliation may allow companies to investigate issues internally and potentially minimize SEC inquiries resulting from whistleblower reports. On the other hand, the anti-retaliation provisions may be subject to scrutiny given that President Donald J. Trump and congressional Republicans have pledged to roll back many Dodd-Frank regulations, although President Trump’s nominee for SEC chair, Walter “Jay” Clayton, revealed at his confirmation hearing that he would have no immediate plans to broadly attack Dodd-Frank’s mandates if he is confirmed. In addition, the new administration may prefer that anti-retaliation provisions not be extended to employees who do not report to the SEC if

that is viewed as imposing a greater burden on employers.

On the enforcement front, many commentators have noted that SEC chair nominee Clayton, a partner at a New York law firm who has not held any government position, may not be as aggressive as recent former federal prosecutors who served as chair, which could result in fewer enforcement actions to protect whistleblowers. Others have been outspoken in their criticism of the SEC's current stance — and of Dodd-Frank itself — including Paul Atkins, a former SEC commissioner and adviser to President Trump, who has argued in favor of requiring whistleblowers to report internally before going to the SEC. Exactly how the new administration and SEC leadership will view Dodd-Frank's whistleblower protections and the SEC's well-documented position on the issue remains to be seen.

Irrespective of the possible legislative and executive developments, it is likely that anti-retaliation provisions will continue to face significant scrutiny in the courts. If the issue is squarely presented and the Supreme Court weighs in on the circuit split, President Trump's selected Supreme Court nominee, Judge Neil Gorsuch, could take part in deciding the issue if he is confirmed. Given his well-documented history as an originalist and textualist, and as a skeptic of deference to agencies, Judge Gorsuch, if confirmed, may be inclined to follow the Fifth Circuit's approach in *Asadi*, strictly applying Dodd-Frank's whistleblower definition rather than looking to the SEC's interpretation of the provisions and its asserted entitlement to

deference to its own rule-making. Thus, should the SEC choose to maintain the status quo on the regulatory front, the Supreme Court's resolution of the circuit split may result in a rollback of protections for non-SEC reporting whistleblowers nonetheless.

Even if the Supreme Court chooses to limit Dodd-Frank's anti-retaliation provisions to SEC reports, it is unclear how much employers stand to gain. If an employee is required to report to the SEC prior to termination in order to later bring a retaliation claim against an employer, companies may face increased regulatory scrutiny as a result. Additional SEC investigations of whistleblower reports may occur before companies are able to fully investigate the reported misconduct themselves. Moreover, even if the whistleblowers do not report to the SEC, employees who report internally could continue to seek recourse from retaliation under Sarbanes-Oxley. Employers will continue to be obligated to investigate whistleblower allegations and to provide an independent basis for terminating any whistleblowers, lest it appear to regulators that steps were taken to conceal misconduct. Under the circumstances, a potential lawsuit by a former employee may not be the most distressing of the risks facing companies that receive a whistleblower complaint.

No matter what happens, whistleblower protection is not an issue employers can afford to take lightly. Companies should not discount the importance of effective whistleblower reporting infrastructure and anti-retaliation training. This is particularly important in the Second Circuit and Ninth Circuit, where employers are more likely to

be sued by terminated employees who report internally without going to the SEC. Companies should continue to retain experienced outside counsel to investigate whistleblower claims as soon as a report is received. Companies contemplating the termination of an employee who may be considered a whistleblower should involve outside counsel in that process and should work to ensure that any termination is well-documented. If a company discovers that a whistleblower claim has merit, it should consult with outside counsel regarding how best to remediate the misconduct and to consider whether a self-report to the SEC is warranted. In any event, however a whistleblower chooses to report potential misconduct, a company's response may be subject to scrutiny by the government or the courts.

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“Supreme Court To Consider The Scope Of Dodd-Frank Whistleblower Provisions”

Lexology

July 6, 2017

On June 26, 2017, the United States Supreme Court granted the petition for certiorari of Digital Realty Trust Inc. (“Digital Realty”) to consider whether the anti-retaliation provision for whistleblowers in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission (“SEC”) and thus arguably fall outside Dodd-Frank’s definition of a “whistleblower.” In March, the United States Court of Appeals for the Ninth Circuit ruled, in a 2-1 decision, that the term “whistleblower” extends protection to employees making internal disclosures of alleged unlawful activity, and does not limit protection under Dodd-Frank to employees reporting potential violations to the SEC. The Ninth Circuit’s decision widened an existing split between the Second and Fifth Circuits, making the issue ripe for review.

I. Background

Respondent, Paul Somers, was employed by Petitioner, Digital Realty, from 2010 to 2014. During that time, Somers made reports to senior management alleging federal securities laws violations by Digital Realty. Shortly after he raised these concerns internally, and before he made any report to the SEC, Digital Realty terminated Somers’

employment. Following his firing, Somers sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”), which contains anti-retaliation provisions added by Dodd-Frank.

At the district court level, Digital Realty moved to dismiss the retaliation claim on the ground that Somers was not a “whistleblower” entitled to Dodd-Frank’s protections because he merely reported possible violations internally and not to the SEC. The district court denied Digital Realty’s motion to dismiss holding that individuals who report internally are protected from retaliation under Dodd-Frank. Digital Realty appealed to the Ninth Circuit.

II. The Ninth Circuit’s Decision

The Ninth Circuit panel began its discussion by acknowledging the split between the Second and Fifth Circuits. The Fifth Circuit held in *Asadi v. G.E. Energy (USA), L.L.C.* that Dodd-Frank’s anti-retaliation provision requires a whistleblower to make a report to the SEC in order to be covered, rejecting the SEC’s regulation adopting a contrary interpretation. The Second Circuit held in *Berman v. Neo@Ogilvy LLC* that the provision extends protections to all those

who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC.

Next, the court chronicled the contours of a robust twenty-first century financial regulatory framework it described as created specifically to curb securities abuses. To frame the case against this regulatory backdrop, the court focused on provisions of the Sarbanes-Oxley Act (“SOX”) including internal reporting requirements for lawyers, requirements for anonymous reporting avenues within corporate compliance regimes, and most importantly, whistleblower protections for employees. The court acknowledged SOX’s express protections of those who lawfully provide information to federal agencies, Congress, or “a person with supervisory authority over the employee.” With respect to Dodd-Frank, the court reasoned that, like SOX, the legislation was passed in the wake of a financial scandal with the primary aims of improving accountability and transparency in the financial system, and protecting consumers from abusive financial practices.

As the court observed, Dodd-Frank created incentives and protections for whistleblowers by adding Section 21F to the Exchange Act. Unlike SOX, however, Section 21F defines a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC].” On its face, this definition describes a whistleblower as a person who reports information directly to the SEC. The issue in *Somers* arises out of a later subsection of Section 21F – specifically

subdivision (iii) – wherein whistleblower protection extends to individuals who make any “required or protected” disclosure under SOX and all other relevant laws. Subdivision (iii) was added after the bill went through Committee, so there is no meaningful legislative history on it.

Although legislative history is not helpful, the Ninth Circuit found that the language of subdivision (iii) “illuminates congressional intent.” The Ninth Circuit found that, by incorporating SOX’s disclosure requirements and protections through subdivision (iii), Congress meant for Dodd-Frank to bar retaliation against an employee of a public company who “provide[s] information . . . to a person with supervisory authority over the employee.” Citing a similar analysis from the Second Circuit, the Ninth Circuit drew attention to the “absurdities” potentially created by a different interpretation, explaining that, “if subdivision (iii) requires reporting to the [SEC], its express cross-reference to the provisions of Sarbanes-Oxley would afford an auditor almost no Dodd-Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the [SEC], and any retaliation would almost always precede [SEC] reporting.” Even though Dodd-Frank’s definition of “whistleblowers” is limited to those persons who report to the SEC, the Ninth Circuit posited that terms can have different operative consequences in different contexts, and therefore was comfortable accepting that the term “may mean a different thing in a different part, depending on context.” The court stated that interpreting the word “whistleblower” to incorporate the

earlier, narrower definition of the Exchange Act would “make little practical sense” and “undercut congressional intent.” Citing again to the Second Circuit’s similar reasoning in *Berman*, the Ninth Circuit concluded that a strict application of Dodd-Frank’s definition “would, in effect, all but read subdivision (iii) out of the statute.”

Furthermore, unlike the Fifth Circuit in *Asadi*, the court accorded deference to the SEC rules adopted in 2011 that contain the more expansive definition of “whistleblower” and found that those rules reflected Congressional intent to provide broad whistleblower protection. With those bases, the court held that any employee who takes any action described in subdivisions (i), (ii), or (iii) of the anti-retaliation provision – including, by reference to SOX, reporting “to a person with supervisory authority over the employee” – is entitled to protection as a whistleblower. The Ninth Circuit concluded that the interpretation accurately reflects Congressional intent that Dodd-Frank protects employees “whether they blow the whistle internally” or report directly to the SEC.

III. Digital Realty’s Petition to the Supreme Court

On April 25, 2017, Digital Realty filed a petition of certiorari for review of the Ninth Circuit’s decision. Digital Realty argued that the Supreme Court should grant the petition because the “case presents a straightforward conflict among the courts of appeals on an important and recurring question involving the interpretation of the Dodd-Frank Act” that “cries out for the Court’s review.” In his response, Somers argued that the case does

not warrant further review because “the circuit conflict is shallow and may ultimately resolve itself.” Somers stated that “the SEC did not participate in the Fifth Circuit (but did in the [Second and Ninth Circuits]), so there is no split at all in cases directly involving the agency tasked with enforcing the statute.” Additionally, he stated that there “is good reason to believe the Fifth Circuit will reconsider its position, especially if additional circuits continue lining up against it.” The Supreme Court granted Digital Realty’s petition on June 26, 2017, and will hear the case during the October term. A date for oral argument has not been set.

“9th Circ. Says Dodd-Frank Protects Non-SEC Whistleblowers”

Law360

Carmen Germaine

March 8, 2017

A divided Ninth Circuit panel ruled Wednesday that the Dodd-Frank Act’s anti-retaliation protections extend to whistleblowers who haven’t reported to the U.S. Securities and Exchange Commission, widening a circuit split and affirming that a former Digital Realty Trust Inc. employee can sue over his termination.

The Ninth Circuit opinion widens a circuit split between the Fifth Circuit and the Second Circuit over how the Dodd-Frank Act defines a "whistleblower." (AP)

A split three-judge panel affirmed U.S. District Judge Edward M. Chen’s decision denying Digital Realty’s bid to dismiss former Vice President of Portfolio Management Paul Somers’ claims that the technology-related real estate investment trust discriminated against him for being openly gay and then fired him in retaliation for his complaints about a supervisor’s actions.

While the panel noted that an earlier section of the Dodd-Frank Act defines a “whistleblower” as someone who reports to the SEC, the judges said using that definition in the act’s later anti-retaliation provisions and effectively limiting protections to employees who have already reported to the government would “make

little practical sense and undercut congressional intent.”

“DFA’s anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally,” Judge Mary M. Schroeder wrote for the panel. “Its terms should be enforced.”

Judge John B. Owens wrote a brief dissent saying he would agree with the Fifth Circuit that the anti-retaliation subdivision should be read using the same definition of whistleblower outlined earlier in the statute.

The opinion widens a circuit split between the Fifth Circuit, which held in 2013 in its *Asadi* case that only those who report to the SEC are whistleblowers, and the Second Circuit, which ruled in 2015 that the retaliation provision was ambiguous and that courts must defer to the SEC’s guidance.

The Sixth Circuit considered similar issues in an appeal brought by a former Morgan Stanley employee but dodged the question after ruling that his claims were too vague to afford him whistleblower protections; the employee has since filed a petition for U.S. Supreme Court review. Meanwhile, the Third Circuit is also weighing the issue in an appeal brought by a former in-house tax attorney for Vanguard Group Inc.

Somers brought his case in November 2014, alleging that he was discriminated against as an openly gay man while employed at Digital Realty from July 2010 to April 2014, despite successful performance, and ultimately terminated based on “vague, trivial and false allegations of misconduct” after he complained to senior management that a senior vice president had eliminated some internal corporate controls in violations of the Sarbanes-Oxley Act. Judge Chen denied Digital Realty’s motion to dismiss the suit in May 2015.

The anti-retaliation provision in question, subdivision (iii) of Section 21F of Dodd-Frank, prohibits employers from discharging or discriminating against a whistleblower who makes disclosures that are required or protected by Sarbanes-Oxley.

The Ninth Circuit noted that the provision was added after Dodd-Frank had gone through committee and has no legislative history explaining its purpose. But the panel said the incorporation of Sarbanes-Oxley’s disclosure requirements made it clear that the provision was intended to bar retaliation against employees of public companies who report violations “to the boss.”

Using the narrower definition of whistleblower outlined earlier in Dodd-Frank would effectively narrow subdivision (iii) “to the point of absurdity,” the panel wrote, because under that reading the provision would only protect employees who have reported both internally and to the SEC but are fired solely because of the internal report.

“This reading is illogical,” Judge Schroeder wrote. “Employees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally.”

In so holding, the panel relied on the U.S. Supreme Court’s 2015 decision in *King v. Burwell*, which upheld the Affordable Care Act’s grant of tax credits to individuals in all states after finding language defined one way in another section of the statute could be read to have a different meaning in the challenged clause, depending on the context.

Judge Owens wrote a paragraph dissent disagreeing with the majority’s reliance on *King v. Burwell*.

“In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level,” Judge Owens wrote, citing John Carpenter’s 1982 film “*The Thing*.”

Circuit Judges Mary M. Schroeder, John B. Owens and Kim McLane Wardlaw sat on the panel for the Ninth Circuit.

Representatives for Somers and Digital Realty Trust did not immediately respond to requests for comment.

Somers is represented by Stephen F. Henry.

Digital Realty Trust is represented by Brian T. Ashe, Tamara H. Fisher, Kiran A. Seldon and Kyle A. Petersen of Seyfarth Shaw LLP.

The SEC is represented by Stephen G. Yoder, Anne K. Small, Sanket J. Bulsara, Michael A. Conley and Thomas J. Karr.

The case is Paul Somers v. Digital Realty Trust Inc. et al., case number 15-17352, in the U.S. Court of Appeals for the Ninth Circuit.

Christie v. National Collegiate Athletic Association

16-476

Ruling Below: *National Collegiate Athletic Association v. Governor of New Jersey*, 832 F.3d 389, 391 (C.A.3 (N.J.), 2016)

Professional and amateur sports leagues brought action to enjoin New Jersey from giving effect to law partially repealing state's prohibitions against sports wagering. The United States District Court for the District of New Jersey, Michael A. Shipp, J., finding that state's law violated Professional and Amateur Sports Protection Act (PASPA), entered summary judgment in leagues' favor and issued permanent injunction. State appealed. The Court of Appeals for the Third Circuit, Rendell, Circuit Judge, affirmed.

Question Presented: Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; National Basketball Association, a joint venture; National Football League, an unincorporated association; National Hockey League, an unincorporated association; Office of the Commissioner of Baseball, an unincorporated association doing business as Major League Baseball

v.

GOVERNOR OF the State of NEW JERSEY; David L. Rebeck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; New Jersey Thoroughbred Horsemen's Association, Inc; New Jersey Sports & Exposition Authority

Stephen M. Sweeney, President of the New Jersey Senate; Vincent Prieto, Speaker of the New Jersey General Assembly (Intervenors in District Court), Appellants in 14-4568 Governor of New Jersey; David L. Rebeck; Frank Zanzuccki, Appellants in 14-4546 New Jersey Thoroughbred Horsemen's Association, Inc., Appellant in 14-4569

United States Court of Appeals, Third Circuit

Decided on August 9, 2016

[Excerpt; some citations and footnotes omitted]

RENDELL, Circuit Judge:

The issue presented before the en banc court is whether SB 2460, which the New Jersey Legislature enacted in 2014 to partially repeal certain prohibitions on sports

gambling (the “2014 Law”), violates federal law. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act (“PASPA”). A panel of this Court affirmed this ruling in a divided opinion which was subsequently vacated

upon the grant of the Petition for Rehearing en banc. We now hold that the District Court correctly ruled that because PASPA, by its terms, prohibits states from authorizing by law sports gambling, and because the 2014 Law does exactly that, the 2014 Law violates federal law. We also hold that we correctly ruled in *Christie I* that PASPA does not commandeer the states in a way that runs afoul of the Constitution.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

PASPA defines “governmental entity” to include states and their political subdivisions. It includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA’s

enactment. New Jersey did not do so, and thus the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey’s struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place....

The amendment thus permitted the New Jersey Legislature to “authorize by law” sports “wagering at casinos or gambling houses in Atlantic City,” except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to “authorize by law” sports “wagering at current or former running and harness horse racetracks,” subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey.

After voters approved the sports-wagering constitutional amendment, the New Jersey

Legislature enacted the Sports Wagering Act in 2012 (“2012 Law”), which provided for regulated sports wagering at New Jersey’s casinos and racetracks. The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues¹ sued to enjoin the 2012 Law as violative of PASPA. The New Jersey Parties did not dispute that the 2012 Law violated PASPA, but urged instead that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass’n v. Governor of New Jersey* (Christie I).

In *Christie I*, we rejected the New Jersey Parties’ argument that PASPA was unconstitutional by commandeering New Jersey’s legislative process. In doing so, we stated that “[n]othing in [PASPA’s] words requires that the states keep any law in place. All that is prohibited is the issuance of gambling ‘license [s]’ or the affirmative ‘authoriz[ation] by law’ of gambling schemes.” The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey’s prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and “authorizing” was not allowed by PASPA. We rejected that argument, observing that “PASPA speaks only of ‘authorizing by law’ a sports gambling scheme,” and “[w]e [did] not see how having no law in place governing sports wagering is the same as authorizing it by law.” We further emphasized that “the lack of

an affirmative prohibition of an activity does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people.” In short, we concluded that the New Jersey Parties’ argument rested on a “false equivalence between repeal and authorization.” The New Jersey Parties appealed to the Supreme Court of the United States, which denied certiorari.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events....

The 2014 Law specifically prohibited wagering on New Jersey college teams’ competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to “persons 21 years of age or older situated at such location[s],” namely casinos and racetracks.

II. Procedural History and Parties’ Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014

Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues, and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the “New Jersey Enjoined Parties”). The District Court interpreted Christie I as holding that PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that the 2014 Law runs afoul of PASPA because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law does not constitute an authorization in violation of PASPA and it is consistent with Christie I because the New Jersey Legislature effected a repealer as Christie I specifically permitted.

The Leagues urge that the 2014 Law violates PASPA because it “authorizes by law” sports wagering and also impermissibly “licenses” the activity by confining the repeal of gambling prohibitions to licensed gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses. The United States submitted an amicus brief in support of the Leagues.

A panel of this Court affirmed in a divided opinion, which was subsequently vacated. Because we, sitting en banc, essentially agree with the reasoning of the panel majority's opinion, we incorporate much of it verbatim in this opinion.

III. Analysis

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge the 2014 Law's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regard to the 2014 Law, that “[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress...” New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that “[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry.” And New Jersey State Senator Joseph Kyrillos stated that “New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy” and that “[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino industry.” PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities. Simply put, “[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and

profit from the activity—engender strong views.” While PASPA's provisions and its reach are controversial (and, some might say, unwise), “we are not asked to judge the wisdom of PASPA” and “[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law.” We echo *Christie I* in noting that “New Jersey and any other state that may wish to legalize gambling on sports ... are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or ... may choose to undo PASPA altogether.” Unless that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for “a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact” sports gambling. We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that “[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people” and that “[w]e do not see how having no law in place governing sports wagering is the same as authorizing it by law.” But this is not a situation where there are no laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad

laws prohibiting sports gambling would apply to the casinos and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word “authorize” means, *inter alia*, “[t]o empower; to give a right or authority to act,” or “[t]o permit a thing to be done in the future.” The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants urge that because the 2014 Law is only a “repeal” removing prohibitions against sports gambling, it is not an “affirmative authorization” under *Christie I*. To the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning. Moreover, we do not adopt the District Court's view that the options available to a state are limited to two. Neither of these propositions were necessary to their respective rulings and were, in essence, *dicta*. Furthermore, our discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Law's legality because the question presented here is straightforward—i.e., what does the law

do—and does not turn on the way in which the state has enacted its directive.

The presence of the word “repeal” does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain, and no one may engage in such conduct except those singled out in the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.

Third, the exception in PASPA for New Jersey, which the State did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to “a betting, gambling, or wagering scheme ... conducted exclusively in casinos ..., but only to the extent that ... any commercial casino gaming scheme was in operation ... throughout the 10-year period” before PASPA was enacted. The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's one-year exception for New Jersey would have been superfluous. We will not read statutory provisions to be

surplusage. In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that “[t]he provisions of this act ... are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact” sports wagering. This conveniently mirrors PASPA's language providing that states may not “sponsor, operate, advertise, promote, license, or authorize by law or compact” sports wagering.

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. In the same vein, the New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact. Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or extensive regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is “authorization” by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

B. PASPA Does Not Impermissibly Commandeer the States

Appellants expend significant effort in this appeal revisiting our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states. They root this effort in the District Court's erroneous conclusion that PASPA presents states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions. In *Christie I*, we engaged in a lengthy discussion to rebut Appellants' assertion that if we conclude that New Jersey's repeal of its prohibition is not permitted by PASPA, then it has unconstitutionally commandeered New Jersey. In so doing, we discussed the Supreme Court's clear case law on commandeering. Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants' attempt to call it into question using the 2014 Law as an exemplar.

1. Anti-Commandeering Jurisprudence

As we noted in *Christie I*, the Supreme Court's anti-commandeering principle rests on the conclusion that “Congress ‘lacks the power directly to compel the States to require or prohibit’ acts which Congress itself may require or prohibit.” In our prior survey of the anti-commandeering case law in *Christie I*, we grouped four commandeering cases upholding the federal laws at issue into two categories: (1) permissible regulation in a pre-emptible field; and (2) prohibitions on state action. The Supreme Court has struck down federal laws on anti-commandeering grounds in only two cases, *New York v. United States* and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). We summarize our prior review below.

First, congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves. In *Hodel*, the Supreme Court upheld the constitutionality of a law that imposed federal standards for coal mining. The law left states a choice. A state could “assume permanent regulatory authority over ... surface coal mining operations” and “submit a proposed permanent program” that “demonstrate[s] that the state legislature has enacted laws implementing the environmental protection standards ... and that the State has the administrative and technical ability to enforce the[] standards.” However, if a state chose not to assume regulatory authority, the federal government would “administer[] the Act within that State and continue[] as such unless and until a ‘state program’ [wa]s approved.” As we described in *Christie I*:

The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them “to expend any state funds,” nor coerced them into “participat[ing] in the federal regulatory program in any manner whatsoever.” The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress “chose to allow the States a regulatory role.” As the Court later characterized *Hodel*, the scheme there did not violate the anti-commandeering principle because it “merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field.”

The Supreme Court's opinion in *F.E.R.C. v. Mississippi* the following year confirmed its view that a law does not unconstitutionally commandeer the states when the law does not impose federal requirements on the states, but leaves states the choice to decline to implement federal standards.

Second, the Supreme Court has found Congress's prohibition of certain state actions to not constitute unconstitutional commandeering. In *South Carolina v. Baker*, the Court upheld federal laws that prohibited the issuance of bearer bonds, which required states to amend legislation to be in compliance. As we characterized this case in *Christie I*:

The Court concluded this result did not run afoul [of] the Tenth Amendment because it did not seek to control or influence the manner in which States regulate private parties but was simply an inevitable consequence of regulating a state activity. In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply subjected a State to the same legislation applicable to private parties.

Later, in *Reno v. Condon*, the Court upheld the constitutionality of a law that prohibited states from releasing information gathered by state departments of motor vehicles. The Court ultimately concluded that the law at issue “d[id] not require the States in their sovereign capacity to regulate their own citizens[,] ... d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals.”

As noted above, the Supreme Court has invalidated laws on anti-commandeering grounds on only two occasions. In *New York*,

the Supreme Court struck down a “take-title” provision whereby states were required to take title to radioactive waste by a specific date, at the waste generator's request, if they did not adopt a federal program. As we stated in *Christie I*, the provision “compel[led] the states to either enact a regulatory program, or expend resources in taking title to the waste.” The Supreme Court ultimately concluded in *New York* that the take-title provision “crossed the line distinguishing encouragement from coercion.” Similarly in *Printz v. United States*, the Supreme Court concluded that Congress “may neither issue directives requiring the States to address particular problems, nor command the States' officers ... to administer or enforce a federal regulatory program.”

2. PASPA Does Not Violate Anti-Commandeering Principles

We continue to view PASPA's prohibition as more akin to those laws upheld in *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*, and distinguishable from those struck down by the Supreme Court in *New York* and *Printz*. Our articulation of the way in which PASPA does not violate anti-commandeering principles warrants refinement, however, given the way in which the 2014 Law attempted to skirt PASPA and the thrust of Appellants' arguments in this appeal.

In an attempt to reopen the anti-commandeering question we previously decided, Appellants creatively rely on certain language that was used in *Christie I*. In pressing for a declaration that PASPA unconstitutionally commandeered the states in *Christie I*, Appellants characterized PASPA as requiring the states to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition. In response,

we opined that Appellants' position “rest[ed] on a false equivalence between repeal and authorization,” implying that a repeal is not an authorization. Before us now Appellants urge that “[t]his Court held [in *Christie I*] that PASPA is constitutional precisely because it permits States to elect not to prohibit sports wagering, even if affirmatively authorizing it would be unlawful.” Appellants are saying, in effect, “We told you so”—if the legislature cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books, and PASPA unconstitutionally commandeers the states. We reject this argument.

That said, we view our discussion in *Christie I* regarding the relationship between a “repeal” and an “authorization” to have been too facile. While we considered whether repeal and authorization are interchangeable, our decision did not rest on that discussion. Today, we choose to excise that discussion from our prior opinion as unnecessary dicta. To be clear, a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, “authorization” under PASPA. However, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.

Appellants urge that our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states rested on our view that PASPA allows states to “choos[e] among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.” This is correct. PASPA does not command states to take affirmative

actions, and it does not present a coercive binary choice. Our reasoning in *Christie I* that PASPA does not commandeer the states remains unshaken.

Appellants characterize the 2014 Law as a lawful exercise in the space PASPA affords states to create their own policy. They argue that without options beyond a complete repeal or a complete ban on sports wagering, such as the partial repeal New Jersey pursued, PASPA runs afoul of anti-commandeering principles. This argument sweeps too broadly. That a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster. The issue of the extent to which a given repeal would constitute an authorization, in a vacuum, is not before us, as it was not specifically before us in *Christie I*. However, as the Leagues noted at oral argument before the en banc court, not all partial repeals are created equal. For instance, a state's partial repeal of a sports wagering ban to allow de minimis wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law. We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.

Appellants seize on the District Court's erroneous interpretation of *Christie I*'s anti-commandeering analysis—namely, that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books—to once again urge that if PASPA commands such a choice, then it is comparable to the challenged law in New York. First, unlike the take-title provision included in the statute at issue in New York, PASPA's text does not present

states with a coercive choice to adopt a federal program. To interpret PASPA to require such a coercive choice is to read something into the statute that simply is not there.

Second, PASPA is further distinguishable from the law at issue in New York because it does not require states to take any action. In New York, the Supreme Court held that a federal law that required states to enact a federal regulatory program or take title to radioactive waste at the behest of generators “crossed the line distinguishing encouragement from coercion.” Unlike the law at issue in New York, PASPA includes no coercive direction by the federal government. As we previously concluded in *Christie I*, PASPA does not command states to take any affirmative steps:

PASPA does not require or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.*, to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no directives requiring the States to address particular problems and no commands to the States’ officers to administer or enforce a federal regulatory program.

Put simply, PASPA does not impose a coercive either-or requirement or affirmative command.

We will not allow Appellants to bootstrap already decided questions of PASPA’s constitutionality onto our determination that the 2014 Law violates PASPA. We reject the notion that PASPA presents states with a coercive binary choice or affirmative command and conclude, as we did in *Christie*

I, that it does not unconstitutionally commandeer the states.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We continue to find PASPA constitutional. We will affirm.

FUENTES, joined by RESTREPO, Circuit Judges, dissenting:

In November 2011, the question of whether to allow sports betting in New Jersey went before the electorate. By a 2-1 margin, New Jersey voters passed a referendum to amend the New Jersey Constitution to allow the New Jersey Legislature to “authorize by law” sports betting.¹ Accordingly, the Legislature enacted the 2012 Sports Wagering Act (“2012 Law”). The Sports Leagues challenged this Law, claiming that it violated the Professional and Amateur Sports Protection Act’s (“PASPA”) prohibition on states “authoriz[ing] by law” sports betting.² In *Christie I*, we agreed with the Sports Leagues and held that the 2012 Law violated and thus was preempted by PASPA. We explained, however, that New Jersey was free to repeal the sports betting prohibitions it already had in place. We rejected the argument that a repeal of prohibitions on sports betting was equivalent to authorizing by law sports betting. When the matter was brought to the Supreme Court, the Solicitor General echoed that same sentiment, stating that, “PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA’s enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.”

So New Jersey did just that. In 2014, the New Jersey Legislature repealed certain sports betting prohibitions at casinos and gambling houses in Atlantic City and at horse racetracks in the State (“2014 Repeal”). In addition to repealing the 2012 Law in full, the 2014 Repeal stripped New Jersey of any involvement in sports betting, regulatory or otherwise. In essence, the 2014 Repeal rendered previous prohibitions on sports betting non-existent.

But the majority today concludes that the New Jersey Legislature's efforts to satisfy its constituents while adhering to our decision in *Christie I* are still in violation of PASPA. According to the majority, the “selective” nature of the 2014 Repeal amounts to “authorizing by law” a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority infers the authorization by law. I cannot agree with this interpretation of PASPA.

PASPA restricts the states in six ways—a state cannot “sponsor, operate, advertise, promote, license, or authorize by law or compact” sports betting.⁴ The only one of these six restrictions that includes “by law” is “authorize.” None of the other restrictions say anything about how the states are restricted. Thus, I believe that Congress gave this restriction a special meaning—that a state's “authoriz[ation] by law” of sports betting cannot merely be inferred, but rather requires a specific legislative enactment that affirmatively allows the people of the state to bet on sports. Any other interpretation would be reading the phrase “by law” out of the statute.

Indeed, we stated exactly this in *Christie I*—that all PASPA prohibits is “the affirmative ‘authoriz[ation] by law’ of gambling schemes.” Thus, we explained, nothing prevented New Jersey from repealing its

sports betting prohibitions, since, “in reality, the lack of an affirmative prohibition of an activity does not mean it is affirmatively authorized by law.” As we noted, “that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to ‘authorize [it] by law.’ ” The Legislature itself “saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the [2012 Law] was required.” In short, we explained that there was a false equivalence between repeal and authorization.

With the 2014 Repeal, the New Jersey Legislature did what it thought it was permitted to do under our reading of PASPA in *Christie I*. The majority, however, maintains that the 2014 Repeal “authorizes” sports wagering at casinos, gambling houses, and horse racetracks simply because other sports betting prohibitions remain in place. According to the majority, “[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks,” and thus “the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.” But I believe the majority is mistaken as to the impact of a partial repeal. A repeal is defined as an “abrogation of an existing law by legislative act.” When a statute is repealed, “the repealed statute, in regard to its operative effect, is considered as if it had never existed.” If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed. The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey

never prohibited sports wagering at casinos, gambling houses, and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. Contrary to the majority's position, the permission to engage in such an activity is not affirmatively granted by virtue of it being prohibited elsewhere.

To bolster its position, the majority rejects our reasoning in *Christie I*, stating that “[t]o the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning.” I continue to maintain, however, that the 2014 Repeal is not an affirmative authorization by law. It is merely a repeal—it does not, and cannot, authorize by law anything.

In my view, the majority's position that the 2014 Repeal “selectively grants permission to certain entities to engage in sports gambling” is simply incorrect. There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling. Rather, the 2014 Repeal is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports betting and requires the State to abdicate any control or involvement in sports betting. The majority fails to explain why a partial repeal is equivalent to a grant of permission (by law) to engage in sports betting.

Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering

could occur? Surely no conceivable reading of PASPA would preclude a state from restricting sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.

The majority also fails to illustrate how the 2014 Repeal results in sports wagering pursuant to state law when there is effectively no law in place as to several locations, no scheme created, and no state involvement. A careful comparison with the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and created a licensing scheme for sports wagering pools at casinos and racetracks in the State. This comprehensive regime required close State supervision and regulation of those sports wagering pools. For instance, the 2012 Law required any entity that wished to operate a “sports pool lounge” to acquire a “sports pool license.” To do so, a prospective operator was required to pay a \$50,000 application fee, secure Division of Gaming Enforcement (“DGE”) approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from the DGE and the Casino Control Commission (“CCC”). In addition, the betting regime required entities to, among other things, submit extensive documentation to the DGE, adopt new “house” rules subject to DGE approval, and conform to DGE standards. This, of course, violated PASPA in the most basic way: New Jersey developed an intricate scheme that both “authorize[d] by law” and “license[d]” sports gambling. The 2014 Repeal eliminated this entire scheme. Moreover, all state agencies with jurisdiction over state casinos and racetracks, such as the DGE and the CCC, were stripped of any sports betting oversight.

The majority likewise falters when it analogizes the 2014 Repeal to the exception

Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to “a betting, gambling, or wagering scheme ... conducted exclusively in casinos[,] ... but only to the extent that ... any commercial casino gaming scheme was in operation ... throughout the 10-year period” before PASPA was enacted. Setting aside the most obvious distinction between the 2014 Repeal and the 1992 exception—that it contemplated a scheme that the 2014 Repeal does not authorize—the majority misses the mark when it states: “If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception.” Congress did not, however, perceive, or intend for, private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering undertaken pursuant to state law. That the 2014 Repeal might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment, and the majority's reliance on such a possibility is misplaced. The majority is also wrong in a more fundamental way. The exception Congress offered to New Jersey was exactly that: an exception to the ordinary prohibitions of PASPA. That is to say, with this exception, New Jersey could have “sponsor[ed], operate[d], advertise[d], promote[d], license[d], or authorize[d] by law or compact” sports wagering. Under the 2014 Repeal, of course, New Jersey cannot and does not aim to do any of these things.

Because I do not see how a partial repeal of prohibitions is tantamount to authorizing by law a sports wagering scheme in violation of PASPA, I respectfully dissent.

VANASKIE, Circuit Judge, dissenting.

While Congress “has the authority under the Constitution to pass laws requiring or

prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” Concluding that the Professional and Amateur Sports Protection Act (“PASPA”), was a congressional command that States must prohibit wagering on sporting events because it forbids the States from “authoriz[ing] by law” such activity, I dissented from the holding in *Christie I* that PASPA was a valid exercise of congressional authority. My colleagues in the majority in *Christie I* disagreed with my conclusion because they believed that States had the option of repealing existing bans on sports betting. In upholding PASPA, *Christie I* rejected New Jersey's argument that a repeal of its ban on sports betting would be viewed as effectively “authoriz[ing] by law” this activity. *Christie I* declared that New Jersey's “attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization.” I viewed that “false equivalence” assertion with considerable skepticism. My skepticism is validated by today's majority opinion. The majority dodges the inevitable conclusion that PASPA conscripts the States to prohibit wagering on sports by suggesting that some partial repeal of the ban on sports gambling would not be tantamount to authorization of gambling.

Implicit in today's majority opinion and *Christie I* is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling. While the author of *Christie I* finds that New Jersey's partial repeal at issue here is not the equivalent of authorizing by law wagering on sporting events, today's majority concludes otherwise. This shifting line approach to a State's exercise of its sovereign authority is

untenable. The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options when it comes to sports wagering. Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny. Accordingly, as I did in *Christie I*, I dissent.

I.

According to the majority, “a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, ‘authorization’ under PASPA.” The majority also claims “a state's partial repeal of a sports wagering ban to allow de minimis wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law.” Thus, according to the majority, the 2014 Law is a partial repeal that is foreclosed by PASPA, but “other options may pass muster” because “not all partial repeals are created equal.”

Noticeably, the majority does not explain why all partial repeals are not created equal or explain what distinguishes the 2014 Law from those partial repeals that pass muster. To further complicate matters, the majority continues to rely on *Christie I*, which did “not read PASPA to prohibit New Jersey from repealing its ban on sports wagering” and informed New Jersey that “[n]othing in [PASPA's] words requires that the states keep any law in place.”

A.

Christie I “[r]ecogniz[ed] the importance of the affirmative/negative command

distinction,” and “agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to ‘accomplish exactly what the commandeering doctrine prohibits’ by stopping the states from ‘repealing an existing law.’ ” *Christie I*, however, discounted concerns regarding PASPA's affirmative act requirement because *Christie I* “[d]id not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.” According to *Christie I*, PASPA is constitutional because “[n]othing in [PASPA's] words requires that the states keep any law in place.” This conclusion formed the premise for the conclusion in *Christie I* that PASPA passed constitutional muster.

Remarkably, the majority chooses to “excise that discussion from our prior opinion as unnecessary dicta.” *Maj. Op.*, at 401. This cannot be the case, however, because that discussion was the cornerstone of the holding in *Christie I*.

Indeed, to rationalize its conclusion in *Christie I*, the *Christie I* majority had to expressly reject the notion that when a state “choose [s] to repeal an affirmative prohibition of sports gambling, that is the same as ‘authorizing’ that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it.” This aspect of *Christie I* was not peripheral to the ultimate holding because *Christie I* specifically “agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to ‘accomplish exactly what the commandeering doctrine prohibits’ by stopping the states from ‘repealing an existing law.’ ” Thus, to resolve the issue before it, *Christie I* necessarily had to give this issue the “full and careful consideration of the court.”

In giving the issue its full and careful consideration, Christie I explained that the notion that a “repeal” could be the same as an “authorization” was “problematic in numerous respects.” Christie I did “not see how having no law in place governing sports wagering is the same as authorizing it by law.” Christie I recognized a distinction between affirmative commands for actions and prohibitions, and explained that there was “a false equivalence between repeal and authorization.” Thus, as a matter of statutory construction, and to avoid “a series of constitutional problems,” Christie I specifically held that if the Court did not distinguish between “repeals” (affirmative commands) and “authorizations” (affirmative prohibitions), the Court would “read[] the term ‘by law’ out of [PASPA].”

I dissented from that opinion because “any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory.” The decision to base Christie I on a distinction between affirmative commands for action and affirmative prohibitions was “untenable,” because “affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct.” As I explained, basing Christie I on such an illusory distinction raises constitutional concerns because “[a]n interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn” by the Supreme Court.

B.

After Christie I, a state like New Jersey at least had the choice to either “repeal its sports wagering ban,” or, “[o]n the other hand ... keep a complete ban on sports gambling.” The Christie I majority found that this choice was not too coercive because it left “much

room for the states to make their own policy” and left it to a State “to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.”

Today's majority makes it clear that PASPA does not leave a State “much room” at all. Indeed, it is evident that States must leave gambling prohibitions on the books to regulate their citizens. A review of the four Supreme Court anti-commandeering cases referenced by the majority is illuminating.

1.

The first two anti-commandeering cases that the majority reviews are *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, and *F.E.R.C. v. Mississippi*. As the majority points out, these cases address “permissible regulation in a pre-emptible field.” In analyzing these cases, however, the majority overlooks the main rule announced by the Supreme Court in situations where there is an exercise of legislative authority under the Commerce Clause or where Congress preempts an area with federal legislation within its legislative power. In such situations, States have a choice: they may either comply with the federal legislation or the Federal Government will carry the legislation into effect.

This rule was announced in *Hodel*, where the Supreme Court explained that “[i]f a State does not wish to ... compl[y] with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government.” The same theme repeated itself in *F.E.R.C.*, as the Supreme Court focused on “the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards.” In both cases, the Supreme Court was clear that there must be some choice for

the states to make because without it “the accountability of both state and federal officials is diminished.”

Indeed, in *New York v. United States*, the Court explained that a State's view on legislation “can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case ... it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” The Supreme Court reiterated this point in *Printz v. United States*, explaining that, “[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.” Thus, States must be given a choice because the Supreme Court is concerned that “it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”

As the majority explains, while “PASPA's provisions and its reach are controversial (and, some might say, unwise)... we are duty-bound to interpret the text of the law as Congress wrote it.” Because the majority has excised the distinction between a repeal and an authorization, the majority makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State “shall ... authorize by law” sports gambling. In the face of such a congressional directive, “no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”

2.

This leads to the other two anti-commandeering cases reviewed by the majority: *South Carolina v. Baker*, and *Reno v. Condon*. The majority explains that these cases address permissible “prohibitions on state action.” Again, however, the majority seems to overlook the animating factor for each of these opinions. In both *Baker* and *Reno* the Supreme Court explained that permissible prohibitions regulated State activities. The Supreme Court has never sanctioned statutes or regulations that sought to control or influence the manner in which States regulate private parties.

For example, in *Baker*, the Supreme Court reviewed a challenge to the Internal Revenue Code's enactment of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which prohibited States from issuing unregistered bearer bonds. Notably, when reviewing the case, the Court specifically found that it did not need to address “the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests” because the Court found that the commandeering concerns “in *FERC* [were] inapplicable to § 310.” Importantly, the Court distinguished § 310 from the statute in *F.E.R.C.* because the Court found that “Section 310 regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties.” Similarly, in *Reno*, the Court addressed a statute that did not require (1) “the States in their sovereign capacity to regulate their own citizens,” (2) “the ... Legislature to enact any laws or regulations,” or (3) “state officials to assist in the enforcement of federal statutes regulating private individuals.” It was only on these bases that the Supreme Court found the statute at issue in *Reno* was “consistent with

the constitutional principles enunciated in New York and Printz.”

Unlike the statutes at issue in Baker and Reno, however, PASPA seeks to control and influence the manner in which States regulate private parties. Through PASPA, Congress unambiguously commands that “[i]t shall be unlawful for ... a governmental entity to ... authorize by law” sports gambling. 28 U.S.C. § 3702. By issuing this command, Congress has set an impermissible “mandatory agenda to be considered in all events by state legislative or administrative decisionmakers.”

3.

The logical extension of the majority is that PASPA prevents States from passing any laws to repeal existing gambling laws. As the majority correctly notes, “[t]he word ‘authorize’ means, inter alia, ‘[t]o empower; to give a right or authority to act,’ or ‘[t]o permit a thing to be done in the future.’ ” Because authorization includes permitting a thing to be done, it follows that PASPA also prevents state officials from stopping enforcement of existing gambling laws. States must regulate conduct prioritized by Congress.

It is true that civil actions to enjoin a violation of PASPA “may be commenced in an appropriate district court of the United States by the Attorney General of the United States.” But it can hardly be said that the United States Attorney General bears the full regulatory burden because, through PASPA, Congress effectively commands the States to maintain and enforce existing gambling prohibitions.¹

PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never

considered Congress' legislative power to be so expansive.

II.

It is now apparent that Christie I was incorrect in finding that “nothing in [PASPA's] words requires that the states keep any law in place.” With respect to the doctrinal anchors of Christie I, the cornerstone of its holding has been eroded by the majority, which has excised Christie I's discussion regarding “a false equivalence between repeal and an authorization.” Notably, that discussion was included in Christie I to avoid “a series of constitutional problems.” Today's majority makes it clear that passing a law so that there is no law in place governing sports wagering is the same as authorizing it by law.

I dissented in Christie I because the distinction between repeal and authorization is unworkable. Today's majority opinion validates my position: PASPA leaves the States with no choice. While Christie I at least gave the States the option of repealing, in whole or in part, existing bans on gambling on sporting events, today's decision tells the States that they must maintain an anti-sports wagering scheme. The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity. Accordingly, I dissent.

“New Jersey’s Appeal of Sports Betting Ban Heads to Supreme Court”

The New York Times

Nick Corasanti, Joe Drape

June 27, 2017

The Supreme Court agreed on Tuesday to hear an appeal from Gov. Chris Christie and the state of New Jersey to allow betting on professional and collegiate sports at the state’s casinos and racetracks.

The case, which the court will hear in the fall, will be a major test for the federal ban on sports betting as established by the Professional and Amateur Sports Protection Act, known as Pasma, which Congress passed in 1992 outlawing betting on amateur or professional athletes except in four states that already had operations.

New Jersey has been fighting either to overturn the federal ban or to find a way to work around it since 2011, when voters in the state approved a nonbinding resolution to allow sports betting. The effort has since been supported by Democratic and Republican legislators as a way to help shore up the sagging Atlantic City casinos and state racetracks.

But the effort was met with lawsuits from the N.C.A.A. and the four major sports leagues after Mr. Christie signed a law in 2014 to allow sports betting. The challenges wound their way through numerous lower courts, finally reaching the United States Court of Appeals for the Third Circuit in Philadelphia,

which issued a ruling last year upholding the federal ban.

In a news conference in Trenton on Tuesday, Mr. Christie said he was “thrilled” by the decision of the court.

“The fact that the Supreme Court granted cert. in this case is a very good sign for sports betting having a future in New Jersey,” he said. “I’m encouraged by it. We’re not declaring victory, but at least we’re in the game, and that’s what we want to be.”

The decision by the Supreme Court to hear the case comes as a bit of a surprise after Jeffrey B. Wall, the acting solicitor general of the United States, asked the court in May not to hear the case.

Numerous states, including Pennsylvania, New York and California, have recently pushed bills to legalize sports betting. Sports betting podcasts like “Against All Odds” regularly crack the top sports charts on iTunes. Daily fantasy sports sites like DraftKings and FanDuel, which offer a very specific type of sports wagering, remain quite popular.

At stake is a significant amount of money. In Nevada, where sports betting is legal, it is now an industry of nearly \$5 billion a year. Industry and law enforcement officials

estimate that more than \$150 billion is placed annually with illegal bookmakers and with offshore accounts.

With that much at stake, the American Gaming Association announced the creation of a coalition this month encompassing attorneys general, the police, policy makers and others to advocate a repeal of the federal ban.

“We are pleased the Supreme Court appears to have responded favorably to our arguments as to why they should hear this important case,” said Geoff Freeman, the president and chief executive of the gaming association. “And we are hopeful their engagement will provide further encouragement for Congress to take the steps necessary to create a regulated sports betting marketplace in the United States.”

In a recent meeting with reporters for The New York Times, Mr. Freeman said his organization had detected a new willingness among the sports leagues to make sports betting legal. Adam Silver, the commissioner of the N.B.A., has been forthright in calling for legal betting and the openness that accompanies it. Rob Manfred, the commissioner of Major League Baseball, has acknowledged that a sports betting market would continue to fuel fan interest in baseball.

The N.F.L., long an opponent of the bill, has signaled a softening of that stance in recent months with the commissioner, Roger Goodell, saying the league’s thinking on sports gambling was “evolving,” a shift underscored in March when team owners

approved the move of the Oakland Raiders to Las Vegas.

Mr. Freeman, however, acknowledged that the N.C.A.A. remained the most concerted opponent to legalized sports gambling, noting that collegiate athletes are unpaid amateurs. He said one possible solution would be to prohibit betting on college football and basketball.

The N.C.A.A. did not immediately comment on the decision by the Supreme Court to hear the case.

While the court has offered no indication of how it might rule or why it was moving forward with the case, some industry advocates viewed the decision as a sign that the federal ban might be nearing its end.

“Paspas’s days may be numbered,” said Daniel Wallach, a sports and gambling lawyer from Florida, who has tracked the case closely. “The court can overturn federal statute and provide a free and clear pathway for Congress to take this up. It’s the perfect time for the leagues, casino industry and Congress to come together, and I think it potentially opens sports betting up nationally by the 2018 N.F.L. season.”

“Supreme Court Still Mulling Over Hearing New Jersey Sports Betting Case”

Forbes

Darren Heitner

January 17, 2017

The U.S. Supreme Court previously set today, January 17, as the date that it would likely decide whether to hear an appeal brought by the State of New Jersey in its attempt to legalize sports betting within its borders. While the odds of the U.S. Supreme Court accepting certiorari and hearing New Jersey's case remain slim (approximately 1% of petitioned cases are heard by the Court), proponents of the legalization of sports betting in New Jersey may have earned a small win based on the Court's delay.

New Jersey remains hopeful that it will be able to provide sports betting similar to Las Vegas. (Photo by Ethan Miller/Getty Images)

Instead of deciding whether it would hear the case, the U.S. Supreme Court announced that it would wait on the U.S. Solicitor General to weigh in on the issue. It is a better outcome for the pending appeal than the more than 130 cases that had their petitions to be heard denied earlier today.

"The Acting Solicitor General is invited to file a brief in these cases expressing the views of the United States," states the U.S. Supreme Court's order.

As noted by John Brennan of *The Record*, history would not necessarily bode well for

New Jersey, despite the U.S. Supreme Court determining that it needs a bit more time to ruminate on the case. The federal government has previously taken the position that coincides with the big four U.S. professional sports leagues (NFL, MLB, NBA, NHL) as well as the NCAA, which have opposed the legalization of full-fledged sports betting beyond Nevada's borders. The prohibition dates back to 1992, when Congress passed a law, the Professional and Amateur Sports Protection Act (PASPA), which makes it unlawful for any governmental entity to sponsor, operate, advertise, promote, license or authorize any betting, gambling or wagering scheme based on games played by amateur or professional athletes.

However, a new U.S. Solicitor General will soon be in place under President-Elect Donald Trump, whom may not follow the course set by prior administrations.

The U.S. Solicitor General will consider the claims raised by New Jersey, which include the state's position that PASPA is unconstitutional. New Jersey has stated that it is against the U.S. Constitution for the federal government to usurp state rights and provide Nevada with the ability to control a robust

sports betting scheme while denying New Jersey and other states the same opportunity.

There is no clear timetable as to when a brief will be filed by the U.S. Solicitor General. In the meantime, the State of New Jersey and those hoping to overturn PASPA will be paying close attention to President-Elect Trump's choice for the position. Above The Law has delivered an educated guess as to the list of names that Trump may be currently considering.

“New Jersey’s attempt at legalized sports betting suffers another big setback in court”

The Washington Post

Matt Bonesteel

August 9, 2016

The U.S. Third Circuit Court of Appeals on Tuesday upheld the prohibition of sports gambling in New Jersey, ruling that the state’s 2014 attempt at legalizing the practice violated the Professional and Amateur Sports Protection Act (PASPA), the 1992 federal law that prohibits sports gambling in all but four states: Nevada, Oregon, Montana and Delaware.

New Jersey has made two attempts at legalizing sports gambling in an attempt to shore up the lagging fortunes of the state’s Atlantic City casinos, which have been decimated by the spread of legalized casino gambling in neighboring states. The state has been opposed by the NCAA, MLB, NBA, NFL and NHL, who have long argued that the expansion of legalized gambling violates federal law.

The leagues won their first victory in U.S. District Court, and last August a three-judge panel of the Third Circuit Court of Appeals ruled that New Jersey’s most recent attempt to legalize sports gambling, in 2014, amounted to a de facto authorization, in violation of PASPA, even though the state only wanted to repeal its laws prohibiting sports betting and would not actually be

involved in the regulation of sports gambling, leaving that to the casinos and racetracks.

In turn, New Jersey asked that the entire Third Circuit panel hear its argument, a so-called en banc hearing that is granted only under exceptional circumstances. In February, state attorneys presented their case before all 12 active judges of the Third Circuit.

In a 10-to-2 vote, the Third Circuit sided Tuesday with the NCAA and the sports leagues, though two of the judges wrote dissenting opinions.

“We now hold that the District Court correctly ruled that because PASPA, by its terms, prohibits states from authorizing by law sports gambling, and because the 2014 Law does exactly that, the 2014 Law violates federal law,” Judge Marjorie Rendell wrote in the majority opinion, adding that PASPA is indeed constitutional because it does not commandeer the states to enforce a federal law not expressly written into the Constitution.

In his dissent, Judge Julio M. Fuentes writes that New Jersey’s attempted repeal of its sports gambling prohibitions did not amount

to an authorization of sports betting in the state because New Jersey would not be officially regulating sports gambling, instead merely allowing it. A literal reading of PASPA would allow such a move, Fuentes writes. Judge Thomas I. Vanaskie, in a separate dissent, repeated his earlier assertion that PASPA as a whole is unconstitutional.

Bot Fuentes and Vanaskie had sided with New Jersey in previous court decisions.

According to sports-law expert Daniel Wallach, New Jersey has until Nov. 7 to petition the U.S. Supreme Court to hear the case, and State Sen. Raymond Lesniak, a longtime supporter of legalized gambling, told ESPN's David Purdum that the state will do exactly that. Both Wallach and Lesniak both have their doubts about whether the Supreme Court will hear the case, with Lesniak on Tuesday calling it "a long shot."

Wallach does note, however, that the rise of daily fantasy sports and the specific legalization of DFS in certain states may pave the way for legalized sports gambling overall in the United States, especially in light of the fact that the professional leagues have financial agreements with DFS companies in place. States that have legalized DFS could argue that the Department of Justice is selectively enforcing PASPA by prohibiting sports gambling but allowing legalized DFS.

"They can't have it both ways. Either PASPA applies to both or to neither," Wallach says.

Jesner v. Arab Bank, PLC

16-499

Ruling Below: *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (C.A.2 (N.Y.),2015)

United States and foreign nationals, who were injured or captured by terrorists overseas, or family members and estate representative of those who were injured, captured, or killed, brought actions against bank which allegedly financed and facilitated activities of organizations that committed attacks that took place in Israel, the West Bank and the Gaza Strip, alleging violations of Anti-Terrorism Act (ATA), the Alien Tort Statute (ATS), and federal common law. Actions were consolidated. The United States District Court for the Eastern District of New York, Brian M. Cogan, J., dismissed claims. Plaintiffs appealed. The Court of Appeals for the Second Circuit affirmed.

Question Presented: Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.

In re ARAB BANK, PLC ALIEN TORT STATUTE LITIGATION.

United States Court of Appeals, Second Circuit

Decided on December 8, 2015

[Excerpt; some citations and footnotes omitted]

SACK, Circuit Judge:

The plaintiffs in this case filed five separate lawsuits between 2004 and 2010 in the United States District Court for the Eastern District of New York against the defendant. The plaintiffs are aliens who were injured or captured by terrorists overseas, or family members and estate representatives of those who were injured, captured, or killed. The plaintiffs seek judgments against Arab Bank, PLC—a bank headquartered in Jordan with branches in various places around the world—for allegedly financing and facilitating the activities of organizations that committed the attacks that caused the plaintiffs' injuries. It is undisputed that, as a

PLC,⁴ Arab Bank is a corporation for purposes of this appeal.

The plaintiffs allege violations by Arab Bank of the Anti-Terrorism Act (the “ATA”), the Alien Tort Statute, and federal common law. The ATS differs from the ATA in that, among other things, it provides jurisdiction only with respect to suits by “aliens,” while the ATA provides jurisdiction only for suits by “national[s] of the United States.”

Between 2007 and 2010, the plaintiffs' federal common-law claims were dismissed as redundant and lacking what the district court called a “sound basis.” On May 24, 2013, the defendant also moved to dismiss

the plaintiffs' ATS claims, arguing that the law of this Circuit prohibits ATS suits against corporate entities. In their briefing in the district court, the plaintiffs responded to the defendant's arguments on their merits but also argued, in the alternative, that if the district court granted the defendant's motion, it should also reinstate the plaintiffs' federal common-law claims or permit the plaintiffs to plead related non-federal common-law claims.

On August 23, 2013, the district court issued the following order:

The law of this Circuit is that plaintiffs cannot bring claims against corporations under the ATS. A decision by a panel of the Second Circuit “is binding unless and until it is overruled by the Court en banc or by the Supreme Court.” Because the Supreme Court affirmed [this Circuit's *Kiobel* decision] on other grounds, the Second Circuit's holding on corporate liability under the ATS remains intact. Nothing in the Supreme Court's affirmance undercuts the authority of the Second Circuit's decision. Plaintiffs' request to reinstate their federal common law claims or, in the alternative, assert non-federal common law claims is denied. The federal common law claims were dismissed not only as redundant, but also because Plaintiffs offered “no sound basis” for them. Plaintiffs also offer no sound basis for repackaging these claims under unidentified “non-federal common law” theories.

Soon thereafter, judgments on the pleadings were entered in each of the individual cases as to the ATS claims. The plaintiffs filed timely appeals as to these claims.

On appeal, the plaintiffs argue principally that this Circuit's opinion in *Kiobel v. Royal Dutch Petroleum Co.*, aff'd on other grounds, when analyzed in light of the Supreme

Court's decision in *Kiobel II*, is no longer “good law,” or at least, does not control this case. The plaintiffs also contend that the facts alleged sufficiently touch and concern the territory of the United States as required under *Kiobel II* to support jurisdiction, although they request that we remand to the district court for an initial decision on this issue. Finally, and in the alternative, the plaintiffs request the opportunity either to reinstate their federal common-law claims or to amend their pleadings in order to plead non-federal common-law claims.

BACKGROUND

I. The Plaintiffs' Claims

The plaintiffs in the underlying cases are U.S. and foreign nationals who have brought suit against Arab Bank for its alleged role in facilitating terrorist operations that harmed the plaintiffs. While the underlying cases contain differing factual allegations, they are, as the plaintiffs assert, “based on the same nucleus of [purported] material facts.” In recounting those facts to this Court, the plaintiffs' briefing relies heavily on the operative, amended complaint in *Zur v. Arab Bank, PLC*. In providing a summary of the facts of this case, we therefore draw, at times verbatim, from the district court's thorough opinion addressing a previous motion to dismiss by Arab Bank in *Zur*.

According to the plaintiffs, over the past two decades, four prominent Palestinian terrorist organizations—the Islamic Resistance Movement (“HAMAS”), the Palestinian Islamic Jihad (“PIJ”), the Al Aqsa Martyrs' Brigade (“AAMB”), and the Popular Front for the Liberation of Palestine (“PFLP”) (collectively “the terrorist organizations”)—have conducted widespread murderous attacks, including suicide bombings, against citizens of Israel—mostly Jews. The terrorist

organizations allegedly arranged those attacks in part by promising, and later delivering, financial payments to the relatives of “martyrs” who were killed—along with those who were injured or captured—while perpetrating the attacks.

The plaintiffs assert that the terrorist organizations funded these attacks in two ways. The organizations solicited public and private donations directly and deposited them in bank accounts throughout the Middle East. The organizations also raised funds through affiliated, purportedly charitable proxy organizations, including two entities created in Saudi Arabia: the Popular Committee for Assisting the Palestinian Mujahideen and the Saudi Committee for Aid to the Al-Quds Intifada (the “Saudi Committee”). These two organizations allegedly set up their own bank accounts, under the shared label “Account 98,” at various banks in Saudi Arabia in order to hold funds collected for the families of “martyrs.”

According to the amended complaint, Arab Bank—one of the largest financial institutions in the Middle East, with branches and subsidiaries in more than twenty-five countries, including a New York branch that provides clearing and correspondent banking services to foreign financial institutions—deliberately helped the terrorist organizations and their proxies to raise funds for attacks and make payments to the families of “martyrs.” The plaintiffs further allege that Arab Bank used some of those facilities—the New York branch among them—to support the terrorist organizations in three ways.

First, Arab Bank allegedly maintained accounts that the terrorist organizations used to solicit funds directly. The plaintiffs allege, with respect to HAMAS specifically, that Arab Bank “collected” funds into HAMAS accounts in its Beirut, Lebanon, and Gaza

Strip branches. Supporters knew to donate to HAMAS directly through Arab Bank because the HAMAS website directed supporters to make contributions to Arab Bank's Gaza Strip branch, and because there were various advertisements publicized throughout the Middle East calling for donations to Arab Bank accounts. According to the plaintiffs, Arab Bank knew that the donations were being collected for terrorist attacks.

Second, Arab Bank allegedly maintained accounts that proxy organizations and individuals used to raise funds for the terrorist organizations. For example, according to the amended complaint, Arab Bank maintained accounts, solicited and collected donations, and laundered funds for some of the purported charitable organizations that acted as fronts for the terrorist organizations. Arab Bank also maintained accounts for individual supporters of terrorist organizations such as HAMAS and al Qaeda. Again, responsible officials at Arab Bank purportedly knew that the accounts of these various organizations and individuals were being used to fund the suicide bombings and other attacks sponsored by the terrorist organizations.

Third, Arab Bank allegedly played an active role in identifying the families of “martyrs” and facilitating payments to them from the Saudi Committee's “Account 98” funds, on behalf of the terrorist organizations. According to the plaintiffs, Arab Bank first worked with the Saudi Committee and HAMAS to finalize lists of eligible beneficiaries. Arab Bank then created individual bank accounts for the beneficiaries and facilitated transfers of “Account 98” funds into those accounts, often routing the transfers through its New York branch in order to convert Saudi currency into Israeli currency. Once the accounts were filled, Arab Bank provided instructions to the public

on how to qualify for and collect the money, and made payments to beneficiaries with appropriate documentation.

The plaintiffs allege that Arab Bank's involvement with the terrorist organizations—particularly its facilitation of payments to the families of “martyrs”—incentivized and encouraged suicide bombings and other murderous acts that harmed the plaintiffs.

II. Procedural History

The plaintiffs in the consolidated cases filed five separate lawsuits between 2004 and 2010 in the United States District Court for the Eastern District of New York against Arab Bank alleging variations on the theme of the foregoing facts. All five lawsuits included tort claims under the ATS. At the district court level, these cases were consolidated, along with six others, for discovery and pre-trial proceedings.

On August 23, 2013, the district court dismissed the plaintiffs' ATS claims on the basis of *Kiobel I*. At the time, ATS claims were the only ones remaining in three of the five cases before the district court: *Jesner*, *Lev*, and *Agurenko*. Final judgments were therefore filed in each of those cases on August 28, 2013. The two remaining actions, *Almog* and *Afriat–Kurtzer*, involved both ATS claims and ATA claims, the latter of which remained intact after the district court's August 23, 2013 order. As a result, partial final judgments as to the ATS claims were issued in those cases on October 16, 2013.

The plaintiffs in all five cases appealed to this Court from the judgments on the pleadings regarding their ATS claims. On December 10, 2013, the plaintiffs collectively moved to consolidate the appeals. We granted that motion on January 6, 2014.

For the following reasons, we affirm the judgments of the district court.

DISCUSSION

I. Standard of Review

“We review de novo a district court's decision to grant a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).” In doing so, we “employ[] the same ... standard applicable to dismissals pursuant to [Federal Rule of Civil Procedure] 12(b)(6).” Thus, we “accept[] as true factual allegations made in the complaint, and draw[] all reasonable inferences in favor of the plaintiffs.” “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ”

II. Corporate Liability Under the Alien Tort Statute

We conclude that *Kiobel I* is and remains the law of this Circuit, notwithstanding the Supreme Court's decision in *Kiobel II* affirming this Court's judgment on other grounds. We affirm the decision of the district court on that basis. We do so despite our view that *Kiobel II* suggests that the ATS may allow for corporate liability and our observation that there is a growing consensus among our sister circuits to that effect. Indeed, on the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide.

A. The Decisions in *Kiobel I* and *Kiobel II*

To repeat: The ATS provides, in full, that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In *Kiobel I*, the panel divided over the breadth of liability recognized by the “law of

nations”—and, consequently, on whether corporations may be held liable under the ATS.

The majority opinion, written by Judge Cabranes and joined by then-Chief Judge Jacobs, concluded that the ATS does not permit claims against corporations because “[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights.” This conclusion was based on the majority’s view that the law of nations must affirmatively extend liability to “a particular class of defendant, such as corporations,” before that class of defendant may be held liable for conduct that violates a substantive norm of customary international law. As precedential support for that view, the majority cited footnote 20 in *Sosa v. Alvarez-Machain*. In *Sosa*, commenting on the portion of the opinion that instructed “federal courts ... not [to] recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted,” the Supreme Court stated that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”

Judge Leval, *Kiobel I*’s third panel member, filed an opinion concurring in the judgment for the defendant, but sharply contesting the majority’s conception of liability under the law of nations. He described “[i]nternational law, at least as it pertains to human rights,” as “a sparse body of norms ... prohibiting conduct,” which lacks comprehensive rules regarding liability and so “leaves the manner of enforcement ... almost entirely to

individual nations.” Judge Leval argued that *Sosa*’s footnote 20 is consistent with that view inasmuch as it does no more than caution courts to defer to the law of nations on the scope of liability in those exceptional cases where customary international law affirmatively bars recovery against private actors:

If the violated norm is one that international law applies only against States, then a private actor, such as a corporation or an individual, who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then a private actor, such as a corporation or an individual, has violated the law of nations and is subject to liability in a suit under the ATS. The majority’s partial quotation out of context, interpreting the Supreme Court as distinguishing between individuals and corporations, misunderstands the meaning of the passage.

Under that view, the ATS does not prohibit corporate liability *per se*. Instead, if unspecified by the international law in question, the scope of liability under the ATS is appropriately classified as a question of remedy to be settled under domestic law.

The plaintiffs in *Kiobel I* obtained a writ of certiorari from the United States Supreme Court. In its eventual opinion on the merits, the Supreme Court described the case’s rather arduous path to and before it:

The [United States District Court for the Southern District of New York] dismissed [several ATS] claims, reasoning that the facts alleged to support those claims did not give rise to a violation of the law of nations. The court denied respondents’ motion to dismiss

with respect to the remaining claims, but certified its order for interlocutory appeal [to the Second Circuit] pursuant to § 1292(b). The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. We granted certiorari to consider that question. After oral argument, we directed the parties to file supplemental briefs addressing an additional question: “Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” We heard oral argument again and now affirm the judgment below, based on our answer to the second question.

Thus, the Supreme Court first agreed to review the judgment of this Court. After being supplied with briefing and conducting oral argument directed to the analysis we had employed in *Kiobel I*, the Court decided to address a different issue. The Court concluded not that *Kiobel I* was right on the law, but that it was right in its conclusion because of the presumption against extraterritoriality. The Court observed that “all the relevant conduct took place outside the United States,” which justified dismissal of the plaintiffs’ ATS claims.

B. The Impact of *Kiobel II* on *Kiobel I*

Although the route the Supreme Court took to its decision in *Kiobel II* seems to suggest that the Court was less than satisfied with our approach to jurisdiction over the cases on appeal under the ATS, it neither said as much nor purported to overrule *Kiobel I*. The two decisions adopted different bases for dismissal for lack of subject-matter jurisdiction. Whatever the tension between them, the decisions are not logically inconsistent.

The Supreme Court chose to affirm *Kiobel I* on extraterritoriality grounds without reaching the corporate liability question. But because both of these questions concern the proper interpretation of the ATS itself, and because the ATS is strictly jurisdictional, it follows that both of these questions are jurisdictional. Regarding corporate liability, *Kiobel I* held that federal courts lack jurisdiction over ATS suits against corporations; as to extraterritoriality, *Kiobel II* held that federal courts lack jurisdiction over ATS suits based solely on extraterritorial conduct unless that conduct sufficiently touches and concerns the territory of the United States. Taken together, they require that if either the defendant in an ATS suit is a corporation, or the ATS suit is premised on conduct outside the United States that does not sufficiently touch and concern the territory of the United States, or both, the federal court in which the suit was brought lacks jurisdiction.

Generally speaking, “this panel is bound by prior decisions of this court unless and until the precedents established therein are reversed en banc or by the Supreme Court.” We have recognized, though, that there is an exception to this general rule when an “intervening Supreme Court decision ... casts doubt on our controlling precedent.” “[F]or this exception to apply, the intervening decision need not address the precise issue already decided by our Court.” Instead, there must be a conflict, incompatibility, or “inconsisten[cy]” between this Circuit’s precedent and the intervening Supreme Court decision. The effect of intervening precedent may be “subtle,” but if the impact is nonetheless “fundamental,” it requires this Court to conclude that a decision of a panel of this Court is “no longer good law.”

Kiobel II does cast a shadow on *Kiobel I* in several ways.

First, in *Kiobel II*, the Supreme Court stated that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices” to displace the presumption against extraterritorial application. The implication of a statement that mere corporate presence is insufficient would seem to be that corporate presence may, in combination with some other factual allegations, be sufficient—so jurisdiction over ATS suits against corporations is sometimes proper. Indeed, if corporate liability under the ATS were not possible as a general matter, the Supreme Court’s statement about “mere corporate presence” would seem meaningless. Accordingly, *Kiobel II* appears to suggest that the ATS allows for some degree of corporate liability.

Second, *Kiobel II* embraced an interpretation of *Sosa* that seems to us to be more consistent with Judge Leval’s *Kiobel I* concurrence than the majority opinion. According to the Supreme Court, “[t]he question under *Sosa*” is “whether [a federal] court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.” The Supreme Court further stated that the ATS empowers federal courts to recognize such a cause of action “under federal common law” to enable litigants to bring “private claims” based on “international law violations.” *Kiobel II* thus appears to reinforce Judge Leval’s reading of *Sosa*, which derives from international law only the conduct proscribed, leaving domestic law to govern the available remedy and, presumably, the nature of the party against whom it may be obtained. If that is so, *Kiobel II* suggests that *Kiobel I* relies in part on a misreading of *Sosa*.

Third, *Kiobel I* and *Kiobel II* may work in tandem to narrow federal courts’ jurisdiction under the ATS more than what we understand

Congress may have intended in passing the statute. As Justice Breyer noted in his *Kiobel II* concurrence, the basic purpose of the ATS is to provide compensation to foreign plaintiffs injured by “pirates,” “torturers,” “perpetrators of genocide,” and similar actors. Together, *Kiobel I* and *Kiobel II* put such aggrieved potential plaintiffs in a very small box: The two decisions read cumulatively provide that plaintiffs can bring ATS suits against only natural persons, and perhaps non-corporate entities, based on conduct that occurs at least in part within (or otherwise sufficiently touches and concerns) the territory of the United States. At a time when large corporations are often among the more important actors on the world stage, and where actions and their effects frequently cross international frontiers, *Kiobel I* and *Kiobel II* may work together to prevent foreign plaintiffs from having their day in court in a far greater proportion of tort cases than Congress envisioned when, centuries ago, it passed the ATS.

Our reading of *Kiobel II* is bolstered by what appears to be a growing consensus among our sister circuits that the ATS allows for corporate liability. To date, the other circuits to have considered the issue have all determined that corporate liability is possible under the ATS.

For those reasons, *Kiobel II* may be viewed as an “intervening Supreme Court decision that casts doubt on [*Kiobel I*],” even though it does not “address the precise issue” of corporate liability. *Kiobel II* suggests a reading of the ATS that is at best “inconsistent” with *Kiobel I*’s core holding, which along with the views of our sister circuits indicates that something may be wrong with *Kiobel I*.

We nonetheless decline to conclude that *Kiobel II* overruled *Kiobel I*. We think that

one panel's overruling of the holding of a case decided by a previous panel is perilous. It tends, in our view, to degrade the expectation of litigants, who routinely rely on the authoritative stature of the Court's panel opinions. It also diminishes respect for the authority of three-judge panel decisions and opinions by which the overwhelming majority of our work, and that of other circuits, is accomplished. We will leave it to either an en banc sitting of this Court or an eventual Supreme Court review to overrule *Kiobel I* if, indeed, it is no longer viable.

If this Court declines to overrule *Kiobel I* (either on the merits or by refusing to proceed en banc), the Supreme Court would, of course, be able to do so should it choose to hear the case. The Supreme Court granted certiorari on this issue in 2011 when it first decided to hear an appeal from *Kiobel I*. Having nonetheless avoided addressing the issue directly in *Kiobel II*, perhaps it would decide to grant certiorari on this issue again—especially in light of the divergence of federal case law since.

Finally, the district court dismissed the plaintiffs' ATS claims solely on corporate liability grounds under *Kiobel I*. It is well settled that “we may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court.” However, we have discretion to choose not to do so based on prudential factors and concerns.

It is tempting to seek to avoid grappling with issues requiring an analysis of the relationship between *Kiobel I* and *Kiobel II* and the continuing viability of *Kiobel I* simply by affirming the district court's judgments on the basis of *Kiobel II* alone. We nevertheless decline to do so for several reasons. First, inasmuch as the district court did decide the case based solely on a mechanical application of *Kiobel I*, if it is “good law,” an affirmance on the basis of

Kiobel I is the simplest, most direct route to that result. By contrast, in order to affirm on the grounds that law established by *Kiobel II* prohibits the assumption of jurisdiction in this case, we would have to decide in the first instance that the alleged activities underlying the plaintiffs' claims do not touch and concern the United States sufficiently to justify a conclusion that the district court had subject matter jurisdiction under *Kiobel II*'s extraterritoriality test. It seems to us to be unwise to decide the difficult and sensitive issue of whether the clearing of foreign dollar-denominated payments through a branch in New York could, under these circumstances, displace the presumption against the extraterritorial application of the ATS, when it was not the focus of either the district court's decision or the briefing on appeal.

Moreover, deciding this appeal solely on the basis of *Kiobel I* may well further the development of the law of this Circuit in this regard. If *Kiobel I* remains authoritative, litigants would benefit from the settling of expectations that clarification would bring. And if the rule of *Kiobel I* does not prevail, then leaving it unnecessarily “on the books” is worrisome—it may result in the dismissal of cases that are meritorious, including possibly multidistrict litigations that are randomly assigned to the district courts in this Circuit. Perhaps more insidiously, plaintiffs with ATS claims against corporations that turn out to be permissible might well be dissuaded from asserting them in this Circuit despite their ultimate merit. We therefore affirm on the basis of the holding of *Kiobel I*.

III. Common Law Claims

The plaintiffs request that if we affirm the dismissal of their ATS claims—as indeed we do—we reinstate the “general federal

common law” claims asserted in their complaints (to which they refer on appeal as their “general common-law tort” claims), which the district court dismissed as redundant and lacking a “sound basis.” Alternatively, the plaintiffs request leave to amend their complaints in order to re-plead under state or foreign law the claims that they originally pleaded under federal common law. We decline both requests.

First, we will not reinstate the plaintiffs' federal common-law causes of action because we discern no basis for such nebulous, non-statutory claims under federal law.

As for leave to amend the complaints, “we review [the district court's refusal to allow such amendment] only for abuse of discretion which ordinarily we will not identify absent an error of law, a clearly erroneous assessment of the facts, or a decision outside the available range of permitted choices.” While “[l]eave to amend should be freely granted, ... the district court has the discretion to deny leave if there [was] a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party

The plaintiffs have spent more than ten years litigating the matters before us but have not specified any particular state or foreign common-law theory on which they seek to recover. To be sure, they have in their complaints and in their briefing on appeal asserted that they may recover under general principles of joint-venture liability, agency, reckless disregard, intentional injury of others by a third party, reckless disregard, wrongful death, survival, and negligent or intentional infliction of emotional distress. But their short and conclusory statements to this effect, untethered to the law of any particular jurisdiction or any serious attempt at explanation, did not put the defendant on

notice of specific state or foreign common-law claims that it might be called upon to defend against in this litigation. The plaintiffs have had ample time to develop and assert such theories. The district court did not abuse its discretion in denying leave to amend because permitting the plaintiffs to repackage their federal common-law claims as state or foreign common-law claims at such a late stage would, we think, do a disservice both to the courts in which they chose to litigate their claims, and to the defendant, which must prepare itself to defend against them.

Permitting the plaintiffs in *Jesner*, *Lev*, and *Agurenko* to amend their complaints would, moreover, have been futile. Following the dismissal of the plaintiffs' ATS claims, the only basis on which the district court might exercise jurisdiction over these actions would be diversity of citizenship. But “diversity is lacking ... where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens.” Here, there are aliens on both sides of the litigation—plaintiffs are aliens (only aliens can bring ATS claims), and so is the defendant, a citizen of Jordan—and the *Jesner*, *Lev*, and *Agurenko* plaintiffs do not seek to assert any other federal claims that might provide a basis for federal-question jurisdiction. For these reasons, permitting the *Jesner*, *Lev*, and *Agurenko* plaintiffs to amend their complaints to assert non-federal common-law claims would be fruitless.

The district court therefore acted within its discretion in declining to permit the plaintiffs to amend their complaints.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of the district court.

“Supreme Court to Weigh if Firms Can Be Sued in Human Rights Cases”

The New York Times

Adam Liptak

April 3, 2017

The Supreme Court agreed on Monday to decide whether corporations may be sued in American courts for complicity in human rights abuses abroad.

The case concerns Arab Bank, which is based in Jordan and has been accused of processing financial transactions through a branch in New York for groups linked to terrorism. The plaintiffs in the case seek to hold the bank liable for attacks in Israel and in the Palestinian territories by Hamas and other groups.

The case turns on the meaning of the Alien Tort Statute, a cryptic 1789 law that allows federal district courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The law was largely ignored until the 1980s, when federal courts started to apply it in international human rights cases. A 2004 Supreme Court decision, *Sosa v. Álvarez-Machain*, left the door open to some claims under the law, as long as they involved violations of international norms with “definite content and acceptance among civilized nations.”

The federal appeals courts are divided over whether corporations may be sued under the law.

The Supreme Court had agreed to decide the question once before, in 2011, in *Kiobel v. Royal Dutch Petroleum*. The Obama administration urged the court to rule that corporations could be subject to the law.

After hearing arguments on the question in 2012, the Supreme Court asked the parties to brief and argue a broader issue: whether American courts may ever hear disputes under the law for human rights abuses abroad, whether the defendant was a corporation or not.

In 2013, the court said that there was a general presumption against the extraterritorial application of American law, ruling against Nigerian plaintiffs who said foreign oil companies had aided in atrocities by Nigerian military and police forces against Ogoni villagers.

Chief Justice John G. Roberts Jr., writing for the majority, wrote that even minimal contact with the United States would not be sufficient to overcome the presumption. “Even where the claims touch and concern the territory of the United States, they must do so with

sufficient force to displace the presumption against extraterritorial application,” he wrote.

But the Supreme Court did not answer the question it had initially agreed to consider, whether corporations are categorically excluded from the law.

The new case, *Jesner v. Arab Bank*, No. 16-499, is likely to produce an answer. It is an appeal from a decision of the United States Court of Appeals for the Second Circuit, in New York, which ruled in favor of Arab Bank, saying that corporations may not be sued under the 1789 law.

The plaintiffs in the case said the bank had “served as the ‘paymaster’ for Hamas and other terrorist organizations, helping them identify and pay the families of suicide bombers and other terrorists.”

The bank responded that it had helped the United States in “the fight against terrorism financing and money laundering” and was not accused by the plaintiffs of being “involved in the planning, financing or commission of the attacks that caused their injuries.”

“DOJ’s curious Supreme Court brief in Arab Bank Alien Tort case”

Reuters

Alison Frankel

June 29, 2017

It’s always fascinating to see how the U.S. solicitor general’s office attempts to reconcile competing executive-branch interests when it files briefs in U.S. Supreme Court litigation affecting the government’s relationships with foreign sovereigns.

The latest example is the Justice Department’s brief in a dispute over whether about 6,000 non-U.S. citizens can use a 1798 law to sue Jordan’s biggest financial institution, Arab Bank, for allegedly facilitating terrorism. The brief preserves the integrity of the solicitor general’s office by repeating arguments the Justice Department made in a 2012 Supreme Court case that raised the exact same question as the Arab Bank case. But the filing also reflects the U.S. State Department’s concerns about alienating an important ally.

That awkward balance could be an opportunity for Arab Bank to get the Supreme Court to look at a second issue in a case the bank is otherwise almost certain to lose.

The Supreme Court granted review of the case, *Jesner v. Arab Bank*, to decide whether the Alien Tort Statute can be asserted against corporations. If that question sounds familiar, it’s because the justices agreed to hear the same issue back in 2011, in *Kiobel v. Royal*

Dutch Petroleum. The Justice Department, siding with the Nigerian plaintiffs in the Royal Dutch case, submitted a brief arguing that the 2nd U.S. Circuit Court of Appeals was wrong to hold that corporations cannot be sued under the ATS. It urged the Supreme Court to reverse the 2nd Circuit and rule that corporations can be liable.

Instead, the Supreme Court changed its mind about what the real issue in the case was. The justices called for additional briefing about whether the ATS extends to conduct outside of U.S. borders. The court’s 2013 *Kiobel* decision held that the ATS presumptively does not apply to overseas conduct but plaintiffs can rebut the presumption by showing “with sufficient force” that their claims “touch and concern the territory of the United States.”

The Supreme Court’s *Kiobel* decision did not directly address whether corporations can be sued so the 2nd Circuit’s *Kiobel* ruling remained intact, as the non-U.S. plaintiffs trying to sue Arab Bank discovered to their detriment in 2015. The plaintiffs, all of whom blame the Jordanian bank for allowing Hamas to finance international terror attacks, moved to revive dismissed ATS claims after the Supreme Court’s *Kiobel* decision. A three-judge 2nd Circuit panel said they still couldn’t sue the bank because *Kiobel* was

still binding 2nd Circuit precedent, and under that precedent, plaintiffs can't assert the ATS against corporations. In 2016, a splintered en banc 2nd Circuit declined to hear the Arab Bank ATS case.

In the plaintiffs' June 20 merits brief, their Supreme Court counsel, Jeffrey Fisher of Stanford's Supreme Court Litigation Clinic, argued that the 2nd Circuit's prohibition on ATS suits against corporations is the result of a misread footnote in a Supreme Court case that only discussed actionable conduct under the ATS, not liability. There's nothing in the text of the ancient statute, which was supposed to address piracy on the high seas, or in its long history to indicate corporations are exempt when they violate international norms, the brief said.

"A business should not be allowed to reap the benefits of incorporation while claiming immunity from liability for noxious acts such as terrorism, slavery, or genocide," Fisher wrote.

The Justice Department's brief, posted Wednesday on the SG's website, completely backed the plaintiffs' interpretation – and Justice's own previous analysis from *Kiobel* – of corporate liability under the ATS. (DOJ's brief was signed by Deputy Solicitor General Edwin Kneedler because Acting SG Jeffrey Wall is recused.) No other federal circuit has adopted the 2nd Circuit's bar on suing corporations under the ATS, the Justice Department pointed out, and "nothing in international law discountenances civil claims against corporations."

By my read, the 2nd Circuit's *Kiobel* prohibition on ATS suits against corporations

is doomed. Even Arab Bank, represented at the Supreme Court by Paul Clement of Kirkland & Ellis, didn't try very hard in its brief opposing Supreme Court review to justify the legal reasoning of the 2nd Circuit's *Kiobel* precedent, though the brief half-heartedly mentioned the U.N. Council on Human Rights "has recognized that international law does not currently impose any direct legal responsibilities on corporations."

But the second half of the Justice Department brief may keep the Arab Bank case from being completely lopsided – if Arab Bank can leverage it to persuade the justices to look beyond the narrow question of corporate liability under the Alien Tort Statute.

The Justice Department's brief didn't stop at that question. It went on to address whether the non-U.S. plaintiffs suing Arab Bank can rebut the presumption against overseas application of the ATS, as the Supreme Court said they must in that 2013 *Kiobel* ruling. According to the Justice Department, non-U.S. plaintiffs can't overcome the presumption just by arguing that foreign banks used automated systems to clear U.S. dollar transactions through banks in the U.S.

"Automated clearance activities alone would not support claims under the ATS," the Justice brief said. "A foreign actor's preference for dollar-denominated transactions, and the consequent likelihood that a transaction will be automatically routed through a bank's U.S. branch or affiliate, are not generally circumstances for which the international community might validly deem the United States to be responsible. Congress did not intend the ATS to 'make the United

States a uniquely hospitable forum for the enforcement of international norms.’ That limitation is difficult to reconcile with an approach under which a claim under the ATS may be premised on the popularity of the dollar as a currency for remunerating foreign illegal activity.”

The Justice Department conceded that our own government has been known to base criminal and forfeiture actions on “foreign misuse of domestic (banking) instrumentalities,” but said the rules are different for private plaintiffs asserting the ATS. That’s especially true, the brief said, when foreign policy is implicated, as it is in the Arab Bank case, which has already frayed the government’s relationship with a crucial friend in military operations against the Islamic State.

The Justice Department did not call on the Supreme Court to expand the Arab Bank case to include whether dollar-clearing is sufficient to provide the requisite “touch and concern” with U.S. territory. It also noted that plaintiffs have alleged more than dollar-clearing against Arab Bank, and that those additional assertions could justify reviving the ATS suit.

The brief asked the Supreme Court to instruct the 2nd Circuit to decide whether the Arab Bank plaintiffs meet the territorial test for an ATS suit – an issue the 2nd Circuit pointedly avoided when it said the case couldn’t be brought because Arab Bank is a corporation.

The big question now is whether Arab Bank, in its response brief, will push for the Supreme Court to go even farther and decide whether what the bank has always described

as mere banking services can give rise to ATS liability. That’s a potentially more difficult question than the 2nd Circuit’s bar on ATS suits against corporations. Global banks have already been spooked by a Brooklyn federal jury verdict holding Arab Bank liable to U.S. citizens in a terror financing suit that parallels the case at the Supreme Court. If the justices decide they’re interested in dollar-clearing transactions and territoriality, international banks will be watching intently.

That’s unlikely to happen, of course. The plaintiffs suing Arab Bank described in detail their evidence that the bank wasn’t just processing transactions by rote but was facilitating money transfers for known Hamas leaders. There’s every reason for the justices to wait for a different case to test the jurisdictional power of dollar-clearing transactions in suits by private citizens.

But Kiobel’s history at the Supreme Court shows that anything can happen. The justices already changed their focus in one ATS case. Who says they won’t do it again?

“Plaintiffs Petition U.S. Supreme Court in High-Profile Alien Tort Statute Case”

Lexology

Emily Holland

November 2, 2016

Plaintiffs in *Jesner v. Arab Bank* have sought certiorari from the United States Supreme Court requesting that the Court take up, and answer, the unresolved question of whether the Alien Tort Statute (ATS) permits corporate liability for violations of the law of nations. Seeking certiorari does not ensure that the Supreme Court will agree to hear the case—the Court agrees to hear only a small fraction of the cases submitted to it for review. In this case, however, the chances of review are somewhat increased because: (i) there is currently a split between the various Courts of Appeal on the question of whether corporate liability is possible in a claim brought under the ATS, and (ii) because the Second Circuit, which decided *Jesner*, specifically noted that the issue could benefit from the Supreme Court’s review.

Briefly, plaintiffs sued Arab Bank, which is one of the largest financial institutions in Jordan, several years ago alleging a variety of claims, including some under the ATS. The plaintiffs, U.S. and foreign nationals who were injured, or whose family members were killed or injured in certain terrorist attacks carried out in Israel, seek to hold the bank responsible for allegedly financing and

facilitating the activities of Hamas, which the United States has labelled a terrorist organization. (Arab Bank previously settled claims brought on the basis of the same conduct by plaintiffs under the U.S. Anti-Terrorism Act, which allows U.S. citizens to pursue claims arising from international terrorism, having lost its bid to avoid liability in court.)

With respect to the ATS claims, the Second Circuit ruled for Arab Bank. The Second Circuit applied an earlier Second Circuit decision and held that ATS does not permit claims against corporations. That case, *Kiobel v. Royal Dutch Petroleum*, went to the Supreme Court, which ultimately decided the case on different grounds, finding that the presumption against extraterritorial application of U.S. law bars ATS claims that lack a sufficient connection to the United States. In rejecting the possibility that the claims presented in *Kiobel* had sufficient connections to the United States to permit them to go forward, the Court ruled that “it would reach too far to say” that [a defendant’s] mere corporate presence [in the United States] suffices.”

The question the Jesner plaintiffs, represented by Stanford Law School and two law firms, now ask the Court to address is the question left unanswered in *Kiobel*: whether a corporation, as opposed to a natural person, can be found liable under the ATS. The certiorari petition notes that several Courts of Appeal—by a margin of, according to the petition, “four to one”—have decided that the ATS permits corporate liability. Plaintiffs also argue that the Supreme Court’s decision in *Kiobel* suggests (or appears to suggest) that the ATS contemplates corporate liability. The petition disputes what it describes as the Second Circuit’s outlier position that, following *Kiobel*’s introduction of the “touch and concern” test, the issue of whether the ATS allows corporate liability will “rarely” matter. In support, and among other arguments, the petition points to another case currently making its way through the Second Circuit, involving terror financing allegations against another financial institution.

In that case, *Licci v. Lebanese Canadian Bank*, the Second Circuit concluded that plaintiffs’ ATS claims had “surpassed [*Kiobel*’s] jurisdictional hurdle,” since the conduct alleged touched and concerned the United States with the requisite “sufficient force” necessary to survive dismissal, and had stated a claim for a violation of the law of nations. Specifically, the court pointed to the bank’s use of a correspondent banking account in New York to facilitate wire transfers to a terrorist organization that enabled and facilitated terrorist rocket attacks harming or killing plaintiffs and their decedents. Ultimately, however, the court determined that the circuit’s bar on corporate liability under the ATS foreclosed the claims.

Back to *Jesner*, Arab Bank’s opposition is due on November 12. The petitioners have consented to any and all amicus briefs, and we expect at least one from Arab Bank.

“Corporate Liability and the ATS: Arab Bank Appeal Continues to Define Kiobel Legacy”

Lawfare Blog

Sarah Freuden, Alex Zerden

December 16, 2015

At a time of heightened concern over a new wave of terrorism financing threats, the decade-long Arab Bank terrorism financing litigation took another turn last week when the Second Circuit denied several thousand terrorism victims the right to pursue claims against the Jordan-based Arab Bank PLC in U.S. federal court. The plaintiffs are non-U.S. victims of Palestinian terrorism from the Second Intifada from 2000-2004 who sued Arab Bank under the Alien Tort Statute (ATS) for alleged financing and facilitation of terrorist organization activities. The Second Circuit’s decision comes at a time when courts across the country are grappling with broader issues of how to handle complex substantive and jurisdictional questions involving foreign companies and extraterritorial conduct.

Last Tuesday, a three-judge panel of the Second Circuit issued a ruling that addressed the narrow but critical issue whether the ATS applies to corporations. Citing the Court’s 2010 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (*Kiobel I*), *aff’d* on other grounds, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (*Kiobel II*), the panel held that it does not, and therefore affirmed the district court’s dismissal of these claims against the Arab

Bank. However, all is not lost for the plaintiffs; the panel also recognized that *Kiobel I* “appears to swim alone against the tide” of sister circuits, which allow for corporate liability under the ATS, and welcomed en banc or Supreme Court review. Plaintiffs’ counsel is also contemplating an appeal.

The ATS is an eighteenth century law that permits foreign plaintiffs to bring suit in federal court for torts “committed in violation of the law of nations or a treaty of the United States.” After laying dormant for much of its existence, the ATS has been used in recent decades to pursue claims against individuals and corporations around the world for human rights violations. The Supreme Court, however, has approached the ATS with some skepticism, and has reined in the use of the statute considerably in recent years. In the seminal ATS case *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), the Supreme Court held that the ATS is a jurisdictional statute, which grants jurisdiction over violations of only those international norms that are binding, specific, and universally accepted, such as piracy and torture.

Kiobel I, the Second Circuit decision on which Tuesday’s Arab Bank ruling is based,

purported to apply *Sosa*. The majority opinion, authored by Judge Cabranes, held that corporations are not subject to liability under the ATS, because the concept of corporate liability has not attained “universal acceptance” in international law. Yet all other Circuits that have addressed the issue have disagreed, assuming or deciding that the ATS permits corporate liability under certain circumstances. This includes the Ninth, D.C., Seventh, Eleventh, Fourth, and Fifth Circuits. Judge Leval likewise came to that conclusion in *Kiobel I*, reasoning in his concurring opinion that “international law takes no position” on whether civil liability should be imposed on particular actors, such as corporations, but “leaves that question to each nation to resolve.”

The Supreme Court granted certiorari in *Kiobel* on the issue of corporate liability, but instead applied the presumption against extraterritoriality and ruled that the case was not actionable, because the alleged violations did not sufficiently “touch and concern” the United States. The ATS is a statute specifically designed to address wrongs committed against non-U.S. nationals, so application of the presumption against extraterritoriality significantly narrows that the scope of actionable claims. Moreover, the Supreme Court’s strict interpretation of the presumption against extraterritoriality in *Kiobel II* and *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), has had, and will continue to have, a resounding impact not only on the viability of ATS cases, but on the viability of all cases involving non-U.S. actors and conduct. The Supreme Court recently granted certiorari in another Second Circuit case, *European Community v. RJR*

Nabisco, concerning the proper application of the presumption against extraterritoriality under RICO. It will be important to watch how the Supreme Court rules in that case, and whether its decision applies beyond the context of RICO.

As for corporate liability under the ATS, the issue remains unresolved. The lack of an outright rejection by the Supreme Court may indicate that such liability is theoretically possible, and some language in *Kiobel II* appears to specifically contemplate corporate liability. The Second Circuit acknowledged as much in the *Arab Bank* decision, noting that “*Kiobel II* suggests a reading of the ATS that is at best ‘inconsistent’ with *Kiobel I*’s core holding.” That, combined with the opposite conclusions of several Circuit Courts indicates that there may be “something wrong” with *Kiobel I*. Yet the Second Circuit “declined to conclude” that *Kiobel II* overruled *Kiobel I*, reasoning it would be preferable to have the issue resolved en banc and/or through further review by the Supreme Court. Therefore, for the moment at least, corporations may be not sued under the ATS in the Second Circuit.

More broadly, beyond the ATS, the *Arab Bank* case exists in a complex legal, policy, and diplomatic space. Along with the non-U.S. ATS victims, nearly 500 American plaintiffs sued under a separate statute, the Anti-Terrorism Act, and are engaged in ongoing settlement negotiations with the *Arab Bank* after achieving a federal jury verdict against the bank in September 2014 and the announcement of a settlement framework on the heels of the damages trial in August 2015. The case has also provoked

a spirited interagency debate pitting the State Department against the Treasury and Justice Departments that implicates diplomatic relations with Jordan and the Palestinian Authority.

Ultimately, another court will have to decide if corporations can be sued under the ATS. However, this Arab Bank decision nudges the issue forward for future resolution and serves as another example to consider when weighing how to address foreign companies and extraterritorial conduct under U.S. law.

National Labor Relations Board v. Murphy Oil USA, Inc.

16-307

Ruling Below: *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (C.A.5, 2015)

Employer filed petition for review of order of the National Labor Relations Board, 361 NLRB No. 72, 2014 WL 5465454, finding that it had unlawfully required employees to sign arbitration agreement waiving their right to pursue class and collective actions. The Court of Appeals for the Fifth Circuit, Leslie H. Southwick, Circuit Judge, granted in part and denied in part.

Question Presented: Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in “concerted activities” in pursuit of their “mutual aid or protection,” 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2.

MURPHY OIL USA, INCORPORATED, Petitioner/Cross–Respondent
v.
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross–Petitioner.

United States Court of Appeals, Fifth Circuit

Decided on October 26, 2015

[Excerpt; some citations and footnotes omitted]

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our

prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the

charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a “Binding Arbitration Agreement and Waiver of Jury Trial” (the “Arbitration Agreement”). The Arbitration Agreement provides that, “[e]xcluding claims which must, by ... law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims ... which relate ... to Individual's employment ... by binding arbitration.” The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act (“FLSA”). Murphy Oil moved to dismiss the collective action and compel individual arbitration pursuant to the Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act (“NLRA”) to engage in Section 7 protected concerted activity.

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by

requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D.R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1).

Following the Board's decision in *D.R. Horton*, Murphy Oil implemented a “Revised Arbitration Agreement” for all employees hired after March 2012. The revision provided that employees were not barred from “participating in proceedings to adjudicate unfair labor practice[] charges before the” Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement. One month later, the General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. We held: (1) the NLRA does not contain a “congressional command overriding” the Federal Arbitration Act (“FAA”); and (2) “use of class action

procedures ... is not a substantive right” under Section 7 of the NLRA. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.

In analyzing the specific arbitration agreement at issue in *D.R. Horton*, however, we held that its language could be “misconstrued” as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). We enforced the Board's order requiring the employer to clarify the agreement. The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to *Murphy Oil* was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that *Murphy Oil* violated Section 8(a)(1) by “requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court.” The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

The Board ordered numerous remedies. *Murphy Oil* was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees' attorneys' fees

incurred in opposing the company's motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are “reasonable and supported by substantial evidence on the record considered as a whole” are upheld. “Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion.” This court reviews the Board's legal conclusions de novo, but “[w]e will enforce the Board's order if its construction of the statute is reasonably defensible.”

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that *Hobson* filed her charge too late after the execution of the Arbitration Agreement and the submission of *Murphy Oil*'s motion to compel in the Alabama litigation. By statute, “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” *Murphy Oil* also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in *Murphy Oil*'s answer to the Board's complaint. They were not, though, discussed in its brief before the Board. “No objection that has not been urged before the Board ... shall be considered by the court....” Similarly,

we have held that “[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions.” While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived.

II. D.R. Horton and Board Nonacquiescence

The Board, reaffirming its D.R. Horton analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that “requir [ed] ... employees to agree to resolve all employment-related claims through individual arbitration.” In doing so, of course, the Board disregarded this court’s contrary D.R. Horton ruling that such arbitration agreements are enforceable and not unlawful. Our decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.

Murphy Oil argues that the Board’s explicit “defiance” of D.R. Horton warrants issuing a writ or holding the Board in contempt so as to “restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt’s directive.” The Board, as far as we know, has not failed to apply our ruling in D.R. Horton to the parties in that case. The concern here is the application of D.R. Horton to new parties and agreements.

An administrative agency’s need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took

place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. The Board may well not know which circuit’s law will be applied on a petition for review. We do not celebrate the Board’s failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence.

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil’s enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. For example, an employer is prohibited from interfering with employees’ exercise of their Section 7 rights. Under Section 7, employees have the right to self-organize and “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. “Wherever private contracts conflict with [the Board’s] functions, they ... must yield or the [NLRA] would be reduced to a futility.” Accordingly, as we held in D.R.

Horton, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question. “[T]he actual practice of employees is not determinative” of whether an employer has committed an unfair labor practice. The Board has said that the test is whether the employer action is “likely to have a chilling effect” on employees' exercise of their rights. The possibility that employees will misunderstand their rights was a reason we upheld the Board's rejection of a similar provision of the arbitration agreement in D.R. Horton. We explained that the FAA and NLRA have “equal importance in our review” of employment arbitration contracts. We held that even though requiring arbitration of class or collective claims in all forums does not “deny a party any statutory right,” an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA.

Murphy Oil's Arbitration Agreement provided that “any and all disputes or claims [employees] may have ... which relate in any manner ... to ... employment” must be resolved by individual arbitration. Signatories further “waive their right to ... be a party to any group, class or collective action claim in ... any other forum.” The problem is that broad “any claims” language can create “[t]he reasonable impression ... that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.” We do not hold that an express statement must be made that an employee's right to file Board charges remains intact before an

employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in D.R. Horton, Murphy Oil added the following clause in the Revised Arbitration Agreement: “[N]othing in this Agreement precludes [employees] ... from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board].” The Board contends that Murphy Oil's modification is also unlawful because it “leaves intact the entirety of the original Agreement” including employees' waiver of their right “to commence or be a party to any group, class or collective action claim in ... any other forum.” This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy “since such a claim could be construed as having ‘commence[d]’ a class action in the event that the [Board] decides to seek classwide relief.”

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's

order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor practices. Section 8(a)(1) provides that an employer commits an unfair labor practice by “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise” of their Section 7 rights, including engaging in protected concerted activity.

The Board said that in filing its dispositive motion and “eight separate court pleadings and related [documents] ... between September 2010 and February 2012,” Murphy Oil “acted with an illegal objective [in]... ‘seeking to enforce an unlawful contract provision’ ” that would chill employees' Section 7 rights, and awarded attorneys' fees and expenses incurred in “opposing the ... unlawful motion.” We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). That decision discussed the balance between an employer's First Amendment right to litigate and an employee's Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. After the Board's General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In

response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees' engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA.

The Board held that the restaurant's lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. The Supreme Court remanded the case for further consideration, stating: “The right to litigate is an important one,” but it can be “used by an employer as a powerful instrument of coercion or retaliation.” To be enjoinable, the Court said the lawsuit prosecuted by the employer must (1) be “baseless” or “lack[ing] a reasonable basis in fact or law,” and be filed “with the intent of retaliating against an employee for the exercise of rights protected by” Section 7, or (2) have “an objective that is illegal under federal law.”

We start by distinguishing this dispute from that in *Bill Johnson's*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as *Bill Johnson's* may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. Though the Board might not need to acquiesce in our decisions, it is a bit bold for

it to hold that an employer who followed the reasoning of our D.R. Horton decision had no basis in fact or law or an “illegal objective” in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Moreover, the timing of Murphy Oil's motion to dismiss when compared to the timing of the D.R. Horton decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

(1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;

(2) January 2012: the Board in D.R. Horton held it to be unlawful to require employees to arbitrate employment-related claims individually, and the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful.

Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not “lack[ing] a reasonable basis in fact or law,” and was not filed with an illegal objective under federal law. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not “baseless.” We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.

“SCOTUS To Decide Arbitration Issue; Unclear If Trump Pick Will Be On Bench In Time”

Forbes

Jessica Karmasek

January 19, 2017

The U.S. Supreme Court last week agreed to review the validity of class action waiver clauses in employer/employee arbitration agreements, and one attorney says its decision could have “important implications” for businesses.

In an order list Friday, the nation’s high court granted petitions for writ of certiorari, or review, in *Epic Systems Corp. v. Lewis*, *Ernst & Young v. Morris* and *NLRB v. Murphy Oil USA Inc.*

Julianna Thomas McCabe is a class action litigator and appellate lawyer with national experience representing clients in the financial services industry. She also chairs Carlton Fields’ National Class Actions practice group.

McCabe, who has represented clients at arbitration and has litigated the enforceability of contractual arbitration clauses under the Federal Arbitration Act, told Legal Newline it “made sense” for the Supreme Court to consolidate the three cases, noting that all three petitions raise an identical issue.

The court now must consider whether the National Labor Relations Act bars enforcement under the FAA, of class action

waiver provisions in an arbitration clause in an employment contract.

“In other words, the question is whether employers can utilize arbitration agreements within employment contracts that require their employees to resolve disputes individually, as opposed to collectively,” McCabe explained.

The court’s decision in the cases aims to resolve a significant split among federal appellate courts.

The Second, Fifth and Eighth circuit courts have held that the FAA requires the enforcement of class action waivers in employment arbitration agreements.

The Seventh and the Ninth circuits have reached the opposite conclusion, holding that such waivers are unenforceable.

In May, the Seventh Circuit ruled against Epic Systems, a Wisconsin-based health-care software company.

Epic required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit collective arbitration or collective action in any other forum.

The Seventh Circuit said in its decision that employers can't prevent class, or collective, actions through waivers in mandatory arbitration agreements.

In August, the majority of a three-judge panel of the Ninth Circuit vacated a district court's order compelling individual arbitration in a class action filed against Ernst & Young by its employees.

The Ninth Circuit sided with the approach of the National Labor Relations Board in ruling that individual arbitration waiver agreements are unenforceable under federal law.

The employees, Stephen Morris and Kelly McDaniel, alleged Ernst & Young, one of the "Big Four" audit firms, misclassified employees to deny overtime wages in violation of the Fair Labor Standards Act and California labor laws.

In *Murphy Oil*, the NLRB had ruled that similar arbitration agreements barring the gas station chain's workers from pursuing class or collective actions were unlawful. However, the Fifth Circuit reversed the board's ruling.

The NLRB, an independent agency of the U.S. government, is charged with investigating and remedying unfair labor practices.

McCabe said it's too early to predict how the court will decide.

"In recent years, the court has issued a series of pro-arbitration opinions, but it has not addressed this precise question," she noted. "The court also is missing one of the conservative members who voted in the majority in each of those prior cases."

The current high court is without Justice Antonin Scalia, who died in February. He served on the high court for nearly 30 years. His death has left eight justices on the court, split 4-4 between being fairly conservative and fairly liberal.

Scalia authored the Supreme Court's 5-4 opinion in *AT&T Mobility v. Concepcion*. In April 2011, the court ruled that companies can enforce contracts that bar class action lawsuits. Meaning businesses that include arbitration agreements with class action waivers can require consumers to bring claims only in individual arbitrations, rather than in court as part of a class action.

Experts called the decision a "game-changer" for class action litigation.

McCabe said the court's current makeup could have an impact on the three cases at issue.

"If the justices deadlock 4-4, each case will be affirmed as decided by the circuit court without an opinion and with no precedential value," she explained.

"That seems unlikely to happen, however, because the court accepted certiorari to resolve a split among the circuit courts as to whether such arbitration clauses are enforceable."

A ninth justice may or may not be confirmed in time to participate, she noted.

"It is unclear whether Democrats in the Senate will attempt to stall or block a new appointee of President-elect Trump," McCabe said.

Either way, the cases have “important implications” for businesses, she said.

“The individual resolution of employment disputes in an arbitral forum is much more cost-effective and private, than the litigation of employment disputes in a class action or collective format in a judicial forum,” McCabe explained.

In recent years, following *Concepcion* and similar decisions, the use of class action waivers in arbitration agreements in various types of contracts has significantly increased.

According to Carlton Fields’ 2016 Class Action Survey, the use of arbitration clauses barring class actions went from a reported 16.1 percent to 39.2 percent from 2012 to 2015.

McCabe said she expects the three cases to be set for oral argument at the end of the current session. The Supreme Court holds oral argument between October and April, and the cases have been allotted a total of one hour for argument.

If the court hears argument by April, a decision could come by late June or early July, when the court recesses for the summer, she said.

“Murphy Oil’s law: Solicitor General’s office reverses course in arbitration cases, supports employers”

SCOTUSblog

Amy Howe

June 19, 2017

It is rare for the Office of the Solicitor General to change its position in a case before the Supreme Court after a change in administrations, even when the party in control of the White House changes. But that is exactly what happened last week, when the Trump administration weighed in on an important arbitration case: The office urged the justices to affirm the same decision that, on behalf of the National Labor Relations Board, it had previously asked them to review and overturn.

The about-face came in *National Labor Relations Board v. Murphy Oil USA*, in which the justices have agreed to decide whether agreements to forgo class actions or collective proceedings and instead resolve employer-employee disputes through individual arbitration are enforceable under the Federal Arbitration Act. In its petition for review on behalf of the NLRB, filed in September 2016, the Solicitor General’s office had argued that such agreements are not, because the National Labor Relations Act protects employees’ ability to engage in joint actions regarding the terms or conditions of their employment. On January 13, 2017, just seven days before the inauguration of President Donald Trump, the Supreme Court granted the NLRB’s petition,

along with two others filed by employers (*Ernst & Young LLP v. Morris and Epic Systems v. Lewis*), and consolidated the three cases for one hour of oral argument.

Under the briefing schedule ordered in the case, the employers in all three cases filed their briefs on June 9, with briefs from the employees and the NLRB to follow on August 9. But on Friday (the deadline under the court’s rules to do so), the United States filed a “friend of the court” brief supporting the employers. The petition for review had been signed by seven lawyers from the NLRB, including its general counsel. Those NLRB lawyers were conspicuously absent from Friday’s brief, which was signed only by lawyers from the Solicitor General’s office. Acting Solicitor General Jeffrey Wall acknowledged that his office had previously filed a petition on behalf of the NLRB, “defending the Board’s view that agreements of the sort at issue here are unenforceable.” But, Wall continued, “since the change in administration, the Office reconsidered the issue and has reached the opposite conclusion.” In particular, Wall explained, the NLRB had not given “adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the” Federal Arbitration Act.

In a press release published on the NLRB's website, the NLRB indicated that Wall had authorized it to represent itself in the Supreme Court proceedings in this case, and nothing in the brief of the United States suggests that the NLRB has changed its position. This means that the NLRB is likely to file its own brief, reiterating its original position in the case, in early August. And if the United States seeks and receives permission to argue in the case, as it virtually always does in cases in which it files "friend of the court" briefs, a lawyer for the United States would argue against a lawyer for a U.S. agency – a phenomenon perhaps even more uncommon than a change in position following a change in administration.

“5th Circ. Reverses NLRB In Murphy Oil Class Waiver Fight”

Law360

Y. Peter Kang

October 26, 2015

The Fifth Circuit on Monday mostly reversed a National Labor Relations Board ruling that found Murphy Oil arbitration agreements barring workers from pursuing class actions unlawful, saying it is bound by a December 2013 decision that rejected the labor board’s ruling in a similar case involving D.R. Horton.

A three-judge Fifth Circuit panel shot down the NLRB’s arguments that Murphy Oil USA Inc.’s arbitration agreement, revised in March 2012 after the board’s decision in the D.R. Horton case, violated the National Labor Relations Act.

“Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here,” the Fifth Circuit wrote in a 13-page published opinion. “Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the revised arbitration agreement as prohibiting the filing of Board charges when the agreement says the opposite.”

But the Fifth Circuit stopped short of granting Murphy Oil’s request for the NLRB to be held in contempt for not following the appeals court’s ruling in the D.R. Horton

case, saying the labor board may not know which circuit court’s law will be applied in various appeals of the NLRB’s rulings.

“We do not celebrate the Board’s failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence,” it said.

The appellate court enforced the NLRB’s order with respect to Murphy Oil workers who were subject to terms of an arbitration agreement before the company made the revisions, saying Murphy Oil will need to change the agreements for any employee still subject to the old contract.

Monday’s ruling follows a June decision by the Fifth Circuit denying the NLRB’s bid for en banc review of Murphy Oil’s appeal, which effectively killed the agency’s attempt to revisit the appellate court’s 2013 rejection of the board’s D.R. Horton decision holding that mandatory arbitration agreements prohibiting workers from pursuing class or collective claims violate federal labor law.

While the NLRB argued that the Fifth Circuit should review whether it misapprehended U.S. Supreme Court precedent in its 2-1 decision that struck down the holding, the appellate court opted on June 24 not to do so, according to court documents.

In the Murphy Oil case, the NLRB doubled down on its controversial conclusion in D.R. Horton, reiterating in an October 2014 decision that making workers agree to individual arbitration of all workplace disputes as a condition of employment violates the NLRA.

During oral argument in August, U.S. Circuit Judge Edith H. Jones told NLRB counsel not to argue the D.R. Horton case.

“We're bound by it,” Jones said, "and I don't think you can expect us to be writing against the binding precedent of this court.”

An attorney for Murphy Oil told Law360 on Monday that it was the decision they expected, but did not elaborate further.

An NLRB attorney declined to comment. An attorney for intervenor Sheila Hobson did not immediately respond to a request for comment late Monday.

U.S. Circuit Judges Leslie H. Southwick, Edith H. Jones and Jerry E. Smith sat on the panel for the Fifth Circuit.

Murphy Oil is represented by Jeffrey A. Schwartz and Daniel D. Schudroff of Jackson Lewis PC.

Worker and charging party Sheila Hobson is represented by Glen M. Connor and Richard P. Rouco of Quinn Connor Weaver Davies & Rouco LLP.

The NLRB is represented by Kira Dellinger Vol, Jeffrey W. Burritt and Linda Dreeben.

The case is Murphy Oil USA Inc. v. NLRB, case number 14-60800, in the U.S. Court of Appeals for the Fifth Circuit.

Patchak v. Zinke

16-498

Ruling Below: *Patchak v. Jewell*, 828 F.3d 995 (C.A.D.C., 2016)

Resident of rural community brought action challenging Secretary of the Interior's decision to take a parcel of land into trust on behalf of the Gun Lake Indian Tribe for casino use pursuant to Indian Reorganization Act (IRA). Tribe intervened as defendant. The United States District Court for the District of Columbia, Richard J. Leon, J., 646 F.Supp.2d 72, dismissed action. Resident appealed. The Court of Appeals, Randolph, Senior Circuit Judge, 632 F.3d 702, reversed and remanded. On remand, resident and tribe cross-moved for summary judgment. The District Court granted intervenor defendant's motion and denied resident's motion based on Congress's enactment of the Gun Lake Act, which reaffirmed the Department of the Interior's decision to take the land into trust for the tribe and removed jurisdiction from the federal courts over any actions relating to such property. Appeal was taken. The Court of Appeals for the D.C. Circuit, Wilkins, Circuit Judge, affirmed, holding that the Gun Lake Act did not encroach upon Article III judicial power of the courts to decide cases and controversies in violation of separation of powers doctrine, the Act did not violate resident's First Amendment right to petition, the Act did not violate resident's right to due process, even if he had a protected property right in his cause of action, and the Act was not an unconstitutional bill of attainder.

Question Presented: Whether a statute directing the federal courts to “promptly dismiss” a pending lawsuit following substantive determinations by the courts (including this court's determination that the “suit may proceed”) – without amending the underlying substantive or procedural laws – violates the Constitution's separation of powers principles.

David Patchak, Appellant

v.

Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior, et al., Appellees

United States Court of Appeals, District of Columbia Circuit

Decided on July 15, 2016

[Excerpt; some citations and footnotes omitted]

Wilkins, Circuit Judge:

David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian

Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court's determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak's claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit, as well as a collateral decision regarding the District Court's denial of a motion to strike a supplement to the administrative record. For the reasons stated below, we affirm the District Court's determination that the Gun Lake Act is constitutionally sound and, accordingly, that Mr. Patchak's suit must be dismissed. We further conclude that the District Court did not abuse its discretion by denying Mr. Patchak's motion to strike a supplement to the administrative record.

I.

The Match–E–Be–Nash–She–Wish Band of Pottawatomí Indians (the Gun Lake Tribe) is an Indian tribe whose members descend from a band of Pottawatomí Indians, led by Chief Match–E–Be–Nash–She–Wish, who occupied present day western Michigan. See Proposed Findings for Acknowledgement of the Match–E–Be–Nash–She–Wish Band of Pottawatomí Indians of Michigan. While the Tribe had been a party to many treaties with the United States government in the 18th and 19th centuries, it only began pursuing federal

acknowledgement under the modern regulatory regime of the Bureau of Indian Affairs, in 1992. The Tribe was formally recognized by the Department of the Interior in 1999. In 2001, the Tribe petitioned for a tract of land in Wayland Township, Michigan—called the Bradley Property—to be put into trust under the IRA. The Tribe sought to use the land to construct and operate a gaming and entertainment facility. The Bureau of Indian Affairs approved the petition in 2005, placing the Bradley Property into trust for the Tribe's use. The Gun Lake Casino opened on February 10, 2011.

David Patchak lives in a rural area of Wayland Township commonly referred to as Shelbyville, in close proximity to the Bradley Property. Mr. Patchak asserts that he moved to the area because of its unique rural setting, and that he values the quiet life afforded him there. Mr. Patchak filed the present lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior for the Bureau of Indian Affairs on August 1, 2008, invoking the court's jurisdiction under the Administrative Procedure Act (APA). Mr. Patchak claimed that he would be injured by the construction and operation of a casino in his community because it would, among other things, irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents. Mr. Patchak argued that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked the authority to put the Bradley Property into trust for the Gun Lake Tribe. The Gun Lake Tribe intervened as a defendant.

In response to Mr. Patchak's complaint, the United States and the Tribe claimed that Mr. Patchak lacked prudential standing because his interest in the Bradley Property was “fundamentally at odds with the purpose of

the IRA” and he therefore did not fall within the IRA’s “zone of interests.” The District Court agreed, and dismissed the complaint for lack of subject matter jurisdiction. Patchak appealed to this Court, and we reversed. The Supreme Court agreed, holding that Patchak did indeed have prudential standing to bring his suit. The case was remanded to the District Court for further proceedings.

In the time between the Supreme Court’s prudential standing determination and the parties’ renewed attention to the case, both the Department of the Interior and Congress weighed in further on the legal status of the Gun Lake Tribe and the Bradley Property, respectively. First, the Department of the Interior issued an Amended Notice of Decision approving an application the Tribe had submitted for two other parcels of land it sought to acquire. As part of this Notice of Decision, the Secretary expressly considered, and confirmed, its authority to take land into trust for the benefit of the Gun Lake Tribe. Second, on September 26, 2014, President Obama signed the Gun Lake Act into law. The substantive text of the Gun Lake Act is as follows:

(a) **IN GENERAL.**—The land taken into trust by the United States for the benefit of the Match–E–Be–Nash–She–Wish Band of Pottawatomí Indians and described in the final Notice of Determination of the Department of the Interior is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) **NO CLAIMS.**—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be

filed or maintained in a Federal court and shall be promptly dismissed.

(c) **RETENTION OF FUTURE RIGHTS.**—Nothing in this Act alters or diminishes the right of the Match–E–Be–Nash–She–Wish Band of Pottawatomí Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band. Gun Lake Act § 2.

Shortly following the enactment of the Gun Lake Act, the parties filed motions for summary judgment. The District Court determined that, as a result of this legislation, it was now stripped of jurisdiction to consider Mr. Patchak’s claim. Rejecting Mr. Patchak’s constitutional challenges to the Gun Lake Act, the District Court granted summary judgment in favor of the Government and the Tribe, and dismissed the case. The District Court also denied Mr. Patchak’s Motion to Strike the Administrative Record Supplement, which had challenged the addition of the Amended Notice of Decision to the record before the court.

Mr. Patchak now appeals those decisions.

II.

The language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction to consider the merits of Mr. Patchak’s complaint, which undisputedly “relat[es] to the land described” in Section 2(a) of the Act. Accordingly, Patchak’s suit “shall not be ... maintained ... and shall be promptly dismissed.” Of course, this is only so if the Gun Lake Act is not otherwise constitutionally infirm, as “a statute’s use of the language of jurisdiction cannot operate as a talisman that ipso facto sweeps aside every possible constitutional objection.” The federal courts have “presumptive jurisdiction

... to inquire into the constitutionality of a jurisdiction-stripping statute.”

Mr. Patchak's constitutional challenges to the Gun Lake Act are pure questions of law that we review de novo.

A.

Mr. Patchak first argues that the Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of well-established constitutional principles of the separation of powers. Article III imbues in the Judiciary “the ‘province and duty ... to say what the law is’ in particular cases and controversies.” This endowment of authority necessarily “blocks Congress from ‘requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.’ ”

Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases. Without question, “a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.” This rule is no different when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases. It is well settled that “Congress has the power (within limits) to tell the courts what classes of cases they may decide.” Congress may not, however, “prescribe or superintend how [courts] decide those cases.” Congress impermissibly encroaches upon the judiciary when it “prescribe[s] rules of decision” for a pending case. In short, Congress may not direct the result of pending litigation unless it does so by “supply[ing] new law.” Mr. Patchak argues that the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law.

These principles do not require, as Mr. Patchak suggests, that in order to affect pending litigation, Congress must directly amend the substantive laws upon which the suit is based. Indeed, Supreme Court precedent belies such a contention.

In *Seattle Audubon*, for example, the Supreme Court considered the impact of new legislation on pending cases challenging the federal government's efforts to allow the harvesting and sale of old-growth timber in the Pacific Northwest. The legislation was the Northwest Timber Compromise, a provision of the Department of the Interior and Related Agencies Appropriations Act, 1990. It established rules to govern the forest harvesting at issue in the pending consolidated cases, and spoke expressly to those suits—even identifying them by caption number. If loggers complied with the new rules, Congress posited, they would thereby satisfy the statutory obligations on which the pending environmental litigation rested. The Ninth Circuit held that the Northwest Timber Compromise unconstitutionally dictated the outcome of pending litigation without amending the underlying laws, but the Supreme Court disagreed. The Court held that the legislation effectively “replaced the legal standards underlying the two original challenges ... without directing particular applications under either the old or the new standards.” Because the provision “compelled changes in law,” the Court concluded that the provision “affected the adjudication of the [specifically identified] cases ... by effectively modifying the provisions at issue in those cases.”

The Supreme Court's recent *Bank Markazi* decision likewise applied new legislation to pending litigation. That legislation did not directly amend or modify the particular statute upon which the pending litigation was based. Section 502 of the Iran Threat

Reduction and Syria Human Rights Act of 2012 had been passed in order “[t]o place beyond dispute” the availability of certain assets for satisfaction of judgments rendered in certain specifically identified terrorism cases. The statute was enacted as a freestanding measure, not as an amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA) (which allows American nationals to file suit against state sponsors of terrorism in United States courts, see 28 U.S.C. § 1605A), or the Terrorism Risk Insurance Act of 2002 (TRIA) (which authorizes execution of judgments obtained under the FSIA's terrorism exception against “the blocked assets of [a] terrorist party”). *Id.* Rejecting a challenge similar to the one Mr. Patchak pursues here—that the provision “did not simply amend pre-existing law,” *id.* at 1325—the Court held that “§ 8772 changed the law by establishing new substantive standards.” As the Court explained, “§ 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets.”

Our decision in *National Coalition to Save Our Mall* is also instructive. There, we considered a separation-of-powers challenge to a statute that withdrew from the federal courts subject matter jurisdiction to review challenges to specific executive decisions relating to the placement of the World War II Memorial on the National Mall. In rejecting that challenge, we emphasized that there is no “prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome.” And while this Court “express[ed] no view” on the question whether a court could do so without amending the substantive law on which a pending claim rested, we did note that the provision at issue (Public Law No. 107–11)

“present[ed] no more difficulty than the statute upheld in [*Seattle Audubon*], as Public Law No. 107–11 similarly amend[ed] the applicable substantive law.”

Consistent with those decisions, we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has “changed the law.” More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed.

Mr. Patchak's suit is just such an action. That this change has only affected Mr. Patchak's lawsuit does not change our analysis here, for Congress is not limited to enacting generally applicable legislation. Particularized legislative action is not unconstitutional on that basis alone. “Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid....”

In passing the Gun Lake Act, Congress exercised its “broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as ‘plenary and exclusive.’ ” Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, “[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.”

B.

Mr. Patchak next asserts that the Gun Lake Act burdens his First Amendment right to petition. See U.S. Const. amend. I (“Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.”). The Petition Clause “protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”

The right of access to courts is, without question, “an aspect of the First Amendment right to petition the government.” For example, an individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation. More to the point, the right to access federal courts is subject to Congress's Article III power to define and limit the jurisdiction of the inferior courts of the United States. Congress may withhold jurisdiction from inferior federal courts “in the exact degrees and character which to Congress may seem proper for the public good.”

Moreover, the Gun Lake Act does not foreclose Mr. Patchak's right to petition the government in all forums; it affects only his ability to do so via federal courts. And while he argues that other forms of petition—such as seeking redress directly from the agency—would be futile, Patchak concedes that he is not entitled to a successful outcome in his petition, or even for the government to listen or respond to his complaints. Rightfully so. “Nothing in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.”

By stripping federal courts of subject matter jurisdiction over challenges to the status of the Bradley Property, Congress has made its determination as to what is “proper for the public good.” There is no constitutional infirmity here.

C.

Mr. Patchak also claims that the Gun Lake Act implicates his rights under the Fifth Amendment's Due Process Clause. The Fifth Amendment instructs that the federal government may not deprive individuals of property “without due process of law.” In order to determine whether there has been a violation of due process rights, we undertake a two-part inquiry: first, we must determine whether the claimant was deprived of a protected interest; and second, if the claimant was so deprived, we then consider what process the claimant was due.

Mr. Patchak identifies a potentially protected property interest in his unadjudicated claim. The Supreme Court has “affirmatively settled” that a cause of action is a species of property requiring due process protection. Surely so, as “[t]he hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’ ” Once the legislature confers an interest by statute, it may not constitutionally authorize the deprivation of that interest without implementing appropriate procedural safeguards.

But even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due. As discussed above, the legislature has the power to change the underlying laws applicable to a case while it is pending and, as a result, to alter the outcome of that case.

In *Logan*, the Supreme Court acknowledged that “[o]f course,” a legislature “remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily-created causes of action altogether—just as it can amend or terminate” benefits programs it has put into place. Indeed, “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.” Accordingly, while a cause of action may be a “species of property” that is afforded due process protection, there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action. In such a circumstance, “the legislative determination provides all the process that is due.”

We have no reason to except the Gun Lake Act from this general approach. Congress made a considered determination to ratify the Department of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe, and further to remove any potential impediments to the finality of that decision. It did not violate Mr. Patchak's due process rights by doing so.

D.

Mr. Patchak's final constitutional challenge to the Gun Lake Act is that it constitutes an impermissible Bill of Attainder. Under this provision, Congress may not “enact[] ‘a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.’” A law is prohibited under the Bill of Attainder Clause if two elements are met: (1) the statute applies with specificity; and (2) the statute imposes punishment. We are able to resolve Mr. Patchak's challenge on the second element alone, because the Gun Lake Act is not punitive.

In order to decide whether a statute impermissibly inflicts punishment, we consider each case in “its own highly particularized context.” In so doing, we pursue a three-part inquiry:

(1) whether the challenged statute falls within the historical meaning of legislative punishment;

(2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and

(3) whether the legislative record ‘evinces a congressional intent to punish.’

These factors are considered independently, and are weighed together to resolve a bill of attainder claim. None of the three factors is necessarily dispositive, but this Court has noted that the second factor—what is called the “functional test”—“invariably appears to be the most important of the three.”

Historically, laws invalidated as bills of attainder “offer[ed] a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [Article] I, § 9.” “This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions.” Jurisdictional limitations are generally not of this type.

The second prong of the inquiry, the “functional test,” requires that the legislation have “a legitimate nonpunitive purpose” and that there is “a rational connection between the burden imposed and [the] nonpunitive purposes.” In other words, the means employed by the statute must be rationally

designed to meet its legitimate nonpunitive goals.

The Gun Lake Act passes this test. The Gun Lake Act serves the legitimate nonpunitive purpose of “provid[ing] certainty to the legal status of the [Bradley Property], on which the Tribe has begun gaming operations as a means of economic development for its community.” Congress accomplished this goal by affirming and ratifying the Department of the Interior’s initial decision to put the land into trust for the Tribe in Section 2(a), but also by removing jurisdiction over matters relating to the land in Section 2(b). In point of fact, Congress’s intended goal of providing certainty with respect to the trust land would have been impossible to achieve absent the termination of any outstanding litigation—specifically, Mr. Patchak’s suit. The legislative history reflects an acknowledgement of this fact, noting that Mr. Patchak’s suit “places in jeopardy the Tribe’s only tract of land held in trust and the economic development project that the Tribe is currently operating on the land.” Whatever burden is imposed by Section 2(b), on Mr. Patchak or otherwise, the statute is rationally designed to meet its legitimate, nonpunitive purpose of providing certainty with respect to the trust land.

Finally, the legislative record does not evince a congressional intent to punish. Mr. Patchak has presented no evidence, other than the acknowledgement that his case would be affected, for his claim that Congress purposefully targeted him for retaliation through the Gun Lake Act. While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.

E.

The Government suggests that there is an alternative ground on which we could rule, arguing that the Gun Lake Act provides an exemption to the APA’s waiver of sovereign immunity. While the Government did not make this argument in the proceedings below, sovereign immunity is a threshold jurisdictional question that speaks to the court’s authority to hear a given case, and so we would be well within bounds to consider the question. “Indeed, the ‘terms of the United States’ consent to be sued in any court define that court’s jurisdiction to entertain the suit.” Nevertheless, because we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak’s claim has thus validly been withdrawn, we need not consider the matter further.

III.

In a separate challenge to the proceedings below, Mr. Patchak contends that the District Court erred by permitting the administrative record to be supplemented. We review the District Court’s denial of Mr. Patchak’s Motion to Strike the Administrative Record Supplement for abuse of discretion.

Although this case may not present circumstances typically permitting the agency to supplement the record, see *id.* the District Court’s failure to strike the supplemental information provided to it was not an abuse of discretion.

The District Court denied Mr. Patchak’s Motion to Strike Supplemental Record “[f]or the reasons set forth in the Memorandum Opinion” entered on the same date, the District Court’s determination, at issue in this appeal, that it was without jurisdiction to consider the suit and that the case was to be dismissed in its entirety. The District Court only mentioned the record supplement in the

Procedural Background section of its opinion in order to indicate the “events [that] have altered the legal landscape” in the time since the case was remanded from the Supreme Court. The District Court did not abuse its discretion by referencing that development in this way. Nor did it abuse its discretion by denying a motion to strike a supplement to the record at the same time that it was dismissing the case in its entirety for lack of jurisdiction.

IV.

For the foregoing reasons, the District Court's decisions below are affirmed.

So ordered.

“Justices May Rein In Congress' Ability To Upend Lawsuits”

Law360

Andrew Westney

May 1, 2017

The U.S. Supreme Court agreed Monday to consider whether a federal law meant to end a suit challenging a Michigan tribal casino project is an abuse of congressional authority, a move that comes as the Trump administration's attacks on the judiciary have raised more general separation of powers concerns.

The high court granted certiorari Monday to a petition by David Patchak, who claims the D.C. Circuit's upholding of the Gun Lake Act — which led to the dismissal of his suit over the U.S. Department of the Interior's taking of a parcel of land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' casino — could give Congress the power to stop any lawsuit it wants to.

The court's decision to address the separation of powers issue could put teeth in a long-standing high court precedent meant to prevent Congress from making inroads on judicial authority, attorneys say.

And the justices will weigh the limits of congressional power "at an interesting time, when the question of judicial deference to other branches is very much on people's minds," Sheppard Mullin Richter & Hampton LLP partner Jonathan Meyer said.

The battle between Trump's executive authority and the courts' power has been at

the center of debate over the president's travel ban, with Attorney General Jeff Sessions' recent disparaging comment on a Hawaii federal judge's block of the ban following earlier remarks by the president critical of the federal judiciary.

The Patchak case will now turn public attention to another axis of the federal balance of power, as the justices examine "how much deference can be granted to the legislative branch and how far they can go in approaching judicial function," Meyer said.

The current petition actually marks the second time Patchak's case has reached the high court, after the justices ruled in 2012 that Patchak had standing and the suit could go forward.

Following remand of the case to the district court, Congress passed the Gun Lake Act, which was signed into law by President Barack Obama in 2014. Among its provisions, the statute affirmed the DOI's decision to take the tribal land into trust under the Indian Reorganization Act and stripped Patchak and any other potential claimants of the ability to challenge that decision in federal court.

At the center of Patchak's petition is whether the Supreme Court's 1871 decision in *U.S. v. Klein*, which ruled a law unconstitutional

because it directed a decision in a pending case without amending any law, means the Gun Lake Act is invalid.

That issue was tackled by the high court just last year in its *Bank Markazi v. Peterson* decision, in which the court upheld a 2012 federal law that retroactively made assets linked to Bank Markazi, the Iranian central bank, subject to a judgment in favor of families of the victims of the 1983 Marine Corps barracks bombing in Beirut.

But while the DOI relied on the Bank Markazi ruling in its opposition to Patchak's petition, the justices' decision to take his case may indicate that they're ready to draw a line against Congress treading on the courts' turf, attorneys say.

According to the petition, the law at issue in the Bank Markazi case didn't create a separation of powers violation because it created new substantive legal standards that it allowed a lower court to apply, rather than simply requiring the dismissal of litigation.

"If Congress allows the Gun Lake Act to stand, it's hard to imagine what principled limitation there is on Congress' power to undertake similar legislation, which effectively dictates the outcome of the case after it's already been considered," Scott E. Gant of Boies Schiller Flexner LLP, who represents Patchak in the case, told Law360.

While federal laws intended to stop ongoing litigation haven't been that common historically, a Supreme Court affirmation of the Gun Lake Act might mean they "get a lot less rare in a hurry," according to University of Texas School of Law professor Stephen I. Vladeck, who worked on an amicus brief in

the case submitted by several federal courts scholars.

"We're in an age of rather unprecedented attacks on the federal courts, including by the sitting president, and so it seems like an especially dangerous time for the courts to be giving more power to the political branches," Vladeck said.

And a dissent in the Bank Markazi case by Chief Justice John Roberts, joined by Justice Sonia Sotomayor, hinted at dissatisfaction among at least some of the justices that the decision could be interpreted overly broadly to allow Congress to direct courts to make specific decisions, attorneys say.

Congress' passage of the Gun Lake Act to snuff out Patchak's suit after the high court's first ruling in the case may have increased the justices' willingness to hear the suit again, and may not bode well for the government and the Gun Lake Tribe, attorneys say.

But if the government does win the case, that could set a template for Congress to pass more legislation targeting suits, Mayer Brown LLP special counsel Charles A. Rothfeld said.

"You can imagine all kinds of situations where interest groups or individuals who have particular disputes going on will go to Congress, and Congress could tell the courts to say, 'Alright, suit dismissed, no jurisdiction,'" he said.

"If you have the resources to do that, I think people will increasingly take that tack," Rothfeld said.

Native American tribes will also be watching the case closely, partly out of concern that the

Supreme Court could raise questions around Congress' plenary power with respect to tribes, according to Native American Rights Fund senior staff attorney Richard Guest.

While the Patchak ruling should focus purely on the separation of powers question, "I don't think we want to get into the scope of the authority of Congress to act to the benefit of Indian tribes," Guest said. "I think we're in dangerous territory if we're opening up this case for the justices to opine on that."

And a ruling against the Gun Lake Tribe would allow Patchak to press his underlying claims that the DOI's acquisition of trust land for the tribe's casino is in conflict with the Supreme Court's 2009 *Carcieri v. Salazar* decision, Guest added.

"That's the issue that the tribes are extremely interested in seeing resolved favorably," he said.

Patchak is represented by Scott E. Gant of Boies Schiller Flexner LLP.

The government is represented by Jeffrey B. Wall, Jeffrey H. Wood, William B. Lazarus, E. Ann Peterson and Lane N. McFadden of the U.S. Department of Justice.

The Match-E-Be-Nash-She-Wish Band is represented by Conly J. Schulte and Nicole E. Ducheneaux of Fredericks Peebles & Morgan LLP.

The case is *Patchak v. Zinke et al.*, case number 16-498, in the Supreme Court of the United States.

“Law Blocking Tribal Casino Fight Constitutional, DC Circ. Says”

Law360

Andrew Westney

July 15, 2016

The D.C. Circuit on Friday upheld the dismissal of a Michigan man's challenge to a tribe's casino project on neighboring land, ruling that a federal law specifically passed to prevent a federal court from hearing the case is constitutional.

A unanimous circuit court panel ruled that the Gun Lake Act — signed into law in 2014 to remove a district court's jurisdictional authority over David Patchak's then-pending case and affirm the U.S. Department of the Interior's decision to a parcel of land known as the Bradley Property into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians' Gun Lake Casino — didn't violate his right to petition in court or his due process rights.

Writing for a three-judge panel, Circuit Judge Robert L. Wilkins said that the U.S. Supreme Court's April ruling in *Bank Markazi v. Peterson* and other high court decisions backed Congress' authority to set a new standard to apply to pending litigation without directly amending the substantive laws upon which the suit is based.

The section of the Gun Lake Act taking jurisdiction away from the federal court “provides a new legal standard we are obliged to apply: If an action relates to the

Bradley Property, it must promptly be dismissed,” the panel said. “Mr. Patchak's suit is just such an action.”

And since Congress had the power to change the laws applicable to the case, Patchak wasn't deprived of his due process rights in pursuing claims that the casino would negatively alter the rural character around its location, including his own property, the panel said.

“Even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due,” according to the opinion.

The Match-E-Be-Nash-She-Wish Band selected almost 150 acres in western Michigan to be purchased and placed into a trust by the DOI in accordance with the Indian Reorganization Act, and proceeded to build the Gun Lake Casino, following federal recognition of the tribe in 1998.

Patchak, who lives near the casino, sued then-Secretary of the Interior Ken Salazar in 2008 under the Administrative Procedure Act on the grounds that because the tribe was allegedly unrecognized at the time Congress

passed the IRA in 1934, the land acquisition was unlawful.

President Barack Obama signed the Gun Lake Act into law in 2014. Among its provisions, the statute affirms the agency's decision to take the tribal land into IRA trust and strips potential claimants of the ability to challenge that decision in federal court.

At oral arguments in May, the federal government told the court that the Supreme Court's Bank Markazi ruling on compensation for victims of Iranian-sponsored terrorism bolstered its argument that the Gun Lake Act isn't unconstitutional.

The government argued that the decision, which held that families of the victims of the 1983 Beirut Marine Corps barracks bombing should be allowed to collect a \$1.75 billion award against Iran's central bank, supported the principle that Congress may retroactively change a law applicable to pending litigation.

The D.C. Circuit panel said the Bank Markazi decision, like Patchak's suit, applied new legislation to pending litigation without directly modifying the statute the suit was based on. The Gun Lake Act didn't directly amend or modify the Administrative Procedures Act or the Indian Reorganization Act, under which Patchak brought his claims, but still "amended the substantive law" that applied to the suit, the panel said.

The law didn't violate Patchak's First Amendment right to petition because Congress is allowed to deprive lower federal courts of jurisdiction as it sees fit, and Patchak still has the ability to petition the government administratively even if he

contends that effort would be futile, the panel said.

In order to show a violation of due process rights, Patchak would have had to show he was deprived of a protected interest and then the court would have to assess whether he got the process he was due, according to the opinion. While Patchak could potentially claim a property interest, he wasn't owed a court hearing after Congress passed the Gun Lake Act, the panel said.

And the law isn't a bill of attainder that impermissibly targets an individual through legislation without the protection of a trial because it isn't punitive, the panel said.

In a footnote, the panel said that Patchak's claims relied heavily on how the Supreme Court interpreted the IRA in its 2009 decision in *Carcieri v. Salazar*, but that the court didn't need to reach the merits of those claims.

Sharon Y. Eubanks of Bordas & Bordas PLLC, who represents Patchak, said in a statement Friday that her client is disappointed in the ruling but "this already long battle is anything but over."

Patchak is weighing whether to petition the U.S. Supreme Court to hear the case, and "another fee to trust acquisition on adjacent property may allow Mr. Patchak to finally have a court look at the issue of whether the tribe is even authorized to acquire land for a casino, based on the Supreme Court's decision in *Carcieri*," Eubanks said in the statement.

Representatives for the other parties were not immediately available for comment Friday.

Patchak is represented by Sharon Y. Eubanks of Bordas & Bordas PLLC.

The government is represented by Lane N. McFadden and John C. Cruden of the U.S. Department of Justice, and James V. DeBergh of the U.S. Department of the Interior.

The Gun Lake Tribe is represented by Conly J. Schulte and Nicole E. Ducheneaux of Fredericks Peebles & Morgan LLP.

The case is Patchak v. Jewell et al., case number 15-5200, in the U.S. Court of Appeals for the D.C. Circuit.