purpose of compelling compliance with any of the other [termination] covenants of its dealer contract," nor were there any "facts in the record showing any substantial restraint of trade resulting solely from this restrictive clause.[46]

Even in the absence of the *Snap-On* precedent, the case law does not support such a broad reading of "unfair methods of competition" that it would include a *per se* approach banning even temporally and geographically reasonable non-compete clauses. The Supreme Court's decision in *FTC v. Sperry & Hutchinson Co.* represents perhaps the broadest interpretation of the FTC's Section 5 prohibitive power. In that case, the Court held that the FTC was not "arrogat[ing] excessive powers to itself if", in forbidding certain conduct, it "consider[ed] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[47] As the Court further explained, Congress refrained from defining "unfair methods of competition" because "there is no limit to human inventiveness in this field,"[48] and so if the FTCA simply prohibited the conduct already defined in the other acts, it "would be quite possible [for anti-competitive actors] to invent others."[49]

Noncompete agreements, however, already existed—and indeed were prevalent—at the time the Sherman Act, the Clayton Act, and the FTCA were being drafted.[50] This is thus not a case of the FTC reaching conduct "invented" after other "unfair" conduct had already been prohibited, and thus arguably abiding by the spirit of the FTCA, but rather a case of the FTCA determining that conduct explicitly not forbidden by Congress (in drafting the Sherman, Clayton, and FTC Acts) and actively allowed by the courts is, in fact, a *per se* unfair method of competition.

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[46] 321 F.2d at 837.
[47] *Id.* at 244.
[48] 405 U.S. 233, 240 (1972) (citing H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914)).
[49] *Id.* (citing Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914)).
[50] *A Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

Furthermore, several formative circuit decisions after *Sperry* was decided have made clear that there are limits to the FTC's prohibitive power when it has attempted to move beyond conduct otherwise subject to antitrust laws. One of the decisions dealt specifically with the Agency's definition of "unfair methods of competition."[51] In *E.I. du Pont de Nemours & Co. v. FTC*, the FTC argued that Du Pont and other manufacturers of lead antiknock gasoline additive had engaged in unfair methods of competition in violation of Section 5 of the FTCA's prohibition on unfair method of competition by "'facilitat[ing] consciously parallel pricing at identical levels."[52] The court disagreed and vacated the commission's order, holding that in prohibiting behavior that "does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character" the FTC was opening the door to an "arbitrary or capricious administration of § 5."[53] The court continued, finding that "in the absence of proof of a violation of the antitrust laws or evidence of [the types of behavior delineated above], business practices are not 'unfair' in violation of § 5 unless those practices either have anticompetitive purpose or cannot be supported by an independent legitimate reason."[54]

As seen above, non-compete agreements are not a *per se* violation of the antitrust laws. Thus, under *E.I du Pont*, the FTC would only be able to ban them if the conduct was "collusive, coercive, predatory, or exclusionary in character" or were anticompetitive in nature and could not be supported by an independent legitimate reason. In other words, it would require the FTC engaging in precisely the case-by-case analysis the agency now wishes to forgo.

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[51] The other two cases are, respectively: Boise Cascade Corp. v. FTC, 637 F.2d 573, 581-2 (9th Cir. 1980) (rejecting the FTC's argument that a "non-collusive pricing method to be illegal despite an absence of some reliable indicator that the practice had an effect"); and Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980) (refusing to extend Section 5's reach to a monopolist's behavior that affected competition in a market not their own).
[52] E.I. du Pont de Nemours, 729 F.2d at 135-6.
[53] *Id.* at 138.
[54] *Id.* at 140.

The FTC is thus proposing a rule in conflict with decades of antitrust jurisprudence—what is more, the FTCA's structure and legislative history suggests that Congress did not even intend to grant this type of substantive rulemaking to the Commission in the first place.

III. Congress Did Not Delegate "Unfair Methods" Legislative Rulemaking Authority to the FTC

As set forth in the preamble to the proposed rule, the FTC contends that Section 6(g) of the FTCA grants the FTC the ability to promulgate and enforce substantive rules banning conduct that the Agency believes falls under Section 5's prohibition, and that therefore, taken together, the two sections provide the Commission with the authority to issue a regulation declaring non-competition agreements to be an unfair method of competition.[55]

The legislative history and structure of the FTCA, however, do not support the Commission's view that its Section 6 rulemaking authority extends to the Section 5 prohibitions.

(A) FTCA's Structure and Legislative History

Section 5 is the Act's substantive core—prohibiting "unfair methods of competition, and unfair or deceptive acts or practices"—that sets forth the FTC's adjudicatory functions and delineates the specific process by which the Agency can enforce its prohibitions.[56] Specifically, this section gives the FTC the ability to file complaints, hold hearings, and issue cease and desist orders.[57] Section 5 does not, however, grant the agency power to adopt legislative rules. Meanwhile, Section 6 generally sets forth the FTC's investigatory functions.[58] Unlike Section 5, it does not contain any substantive provisions. The sections do not cross-reference one another and—besides the FTC's current contention that Section 6(g) allows for additional Section 5 powers—have seemingly no

[55] 88 Fed. Reg. at 3499.
[56] 15 U.S.C. § 45.
[57] *Id.*
[58] 15 U.S.C. § 46.

interplay between them. Indeed, the legislative history demonstrates that the two sections reflect the House and Senate's differing ideals of the agency and its role.

The original House Bill, H.R. 15613, was drafted to "create a Federal Trade Commission [and] to define its powers, and duties".[59] H.R. 15613 essentially "provided for an investigatory tribunal with little or no power beyond that which is the necessary accompaniment of investigation."[60] "The commission was to have *no* quasi-judicial authority through which it could act affirmatively."[61] There was therefore no prohibition on unfair methods of competition.

This vision of the FTC is reflected in what is now Section 6, which retains some of H.R. 15613's original language and most of its ideas. The House considered amendments—and entirely separate bills—that would have authorized the new agency to promulgate rules and regulations prohibiting unfair trade practices, but never acted upon them. For example, Representative Lafferty proposed adopting an amendment that would have allowed the Commission "to *make*, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition by this or any other Act."[62] This change was not adopted. Representative Morgan also attempted to modify the bill by adding a provision that "authorized and empowered [the commission] *to make and establish rules and regulations*" because he feared that "under the provisions of the act [as it was written] the commission [has virtually] no power to … regulate the practices of corporations[.]"[63] The Morgan amendment was soundly rejected by the House.[64] As the FTC itself has recognized, "the legislative history clearly shows that the House was determined to withhold

[59] H.R. 15613, 63d Cong. (1914).
[60] W.H.S. Stevens, *The Trade Commission Act*, 4 AM. ECON. REV. 840, 843 (1914); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 59 ("The [House's] proposed Commission would have little real power.").
[61] Brief for Federal Trade Commission, National Petroleum Refiners Association et al. v. Federal Trade Commission et al., 482 F.2d 672 (D.C. Cir. 1973) (Appendix) (emphasis added) [hereinafter FTC Brief Nat'l Petroleum].
[62] H.R. Rep. No. 63-533, at 20-21 (emphasis added).
[63] 15 Cong. Rec. 9047, 9049 (1914).
[64] *Id.* at 9049-50.

substantive rulemaking authority from a commission which was contemplated to be merely a source of information for the Congress and the President."[65]

Given that Section 6(g) was nested within a draft of a bill exclusively granting investigatory functions and omitting any mention of substantive authority, the clear implication is that the language likely did not refer to the agency's ability to promulgate substantive rules and regulation. Because "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," [66] Section 6(g) almost certainly refers only to the Commission's ability to promulgate procedural rules meant to guide its investigative conduct.

When the House Bill was forwarded to the Senate for consideration, the Senate Committee on Interstate Commerce struck everything out besides the enacting clause.[67] The Senate's revision of the bill delineated an enforcement agency rather than what it considered a relatively toothless investigatory bureau.[68] This vision of the FTC is reflected in Section 5, which, like with Section 6 and the House's original bill, retains much of the Senate's initial language. Notably missing from the Senate's draft—and, in turn, from Section 5—is any provision granting rulemaking authority to the Commission. Thus, "it is obvious that the Senates debates on this bill … have no application to the Section 6(g) rulemaking authority as it was ultimately enacted".[69]

Following the Senate's passage of its version of the bill, both Houses agreed to a Conference Committee to try and reconcile the differences between the competing visions of the FTC. Neither bill considered by the Conference Committee allowed for any type of substantive rulemaking: the House affirmatively rejected substantive rulemaking power, both by neglecting to act on specific bills granting this power and by rejecting amendments to H.R. 15613 that would have offered the

[65] FTC Brief Nat'l Petroleum at 31.
[66] Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).
[67] S. 4160, 63d Cong. (1914) (amending H.R. 15613 (1914)); *see also* STEVENS, *supra* note 60 at 842.
[68] *See generally* S. 4160.
[69] FTC Brief Nat'l Petroleum at 27.

proposed Commission this power, while the Senate drafted no provision even suggesting granting such power. Thus, despite the Conference adopting language that ultimately became Section 6(g), pursuant to established practices for reconciling bills in conference the Conference Committee could not have proposed granting the FTC substantive rulemaking power, as neither bill being considered contemplated such authority.[70]

Statements made during the Conference further solidify the notion that Congress never intended, and indeed actively resisted, giving the FTC substantive rulemaking authority. For example, conferee Senator Cummins stated that the Act did not, and could not, confer authority upon the Commission "to prescribe a code of rules governing the conduct of the business men of this country[.]"[71] Another conferee, Senator Walsh, clarified that the Senate was "not going to give to the new trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted[.]"[72] Members of the House present during the Conference Committee expressed a similar understanding of the FTC's legislative powers. For example, Representative Covington stated that the FTC would "not be exercising power of a legislative nature" in issuing its orders and stated that the FTC's only power to deal with an existing method of competition was to determine whether the behavior "was unreasonable" and, if so, to order the alleged culprit to "cease and desist".[73]

(B) The Magnuson-Moss Act

[70] *See* Lory Breneman, Senate Manual Containing the Standing Rules, Orders, Laws, and resolutions Affecting the Business of the United States Senate at 51 (1999) ("Conferees shall not insert in their report matter not committed to them by either House[.]").
[71] 51 Cong. Rec. 12916 (1914) (statement of Senator Cummins).
[72] *Id.* at 14932 (statement of Senator Walsh).
[73] *Id.* (statement of Representative Covington).

Some fifty years after the FTCA was enacted, the FTC began promulgating substantive rules via Section 6(g) of the FTC.[74] This newfound assertion of authority was tested in court for the first, and only, time in 1973. In *Nat'l Petroleum Refiners Ass'n v. FTC*,[75] the D.C. Circuit affirmed the Commission's averment of rulemaking power, holding that the "'rules and regulations' [provision] in Section 6(g) should be construed to permit the Commission to promulgate binding *substantive* rules as well as rules of procedure[.]"[76] The court reasoned that it should "interpret liberally broad grants of rule-making authority,"[77] because the availability of substantive rule-making gives any agency an "invaluable resource-saving flexibility in carrying out its task[.]"[78] The court additionally examined the FTCA's legislative history and found that "while the legislative history of Section 5 and Section 6(g) is ambiguous, it … does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules" and "that the specific intent of [the enacting] Congress here cannot be stated with any assurance."[79]

The court's reasoning essentially mirrors the following syllogism: an agency can carry out its purpose more effectively if it has rulemaking power; there is no conclusive evidence that Congress did *not* intend to grant the FTC rulemaking power; therefore, the FTCA should be understood as granting rulemaking power.[80] This is the only case the FTC cites in in its Notice of Proposed Rulemaking to support its claim that "[t]aken together, Sections 5 and 6(g) provide the Commission with the authority to issue regulations declaring practices to be unfair methods of competition."[81]

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[74] Public Statement, Federal Trade Commission, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2023) ("In the 1970's the Commission began to use its unfairness authority to legislate against perceived violations of 'public policy.'").
[75] 482 F.2d 672 (D.C. Cir. 1973).
[76] *Id.* at 697 (emphasis added).
[77] *Id.* at 680.
[78] *Id.* at 681.
[79] *Id.* at 686 (cleaned up).
[80] While debatably acceptable then, this approach is disfavored under modern jurisprudence and understandings of the major questions and nondelegation doctrine and would likely not withstand scrutiny. *See* discussion *infra* Part IV and V.
[81] Notice of Proposed Rulemaking, at 8.

The scope and lasting validity of *Nat'l Petroluem* is called into question by Congress's enactment, two years later, of the Magnuson-Moss Act.[82] Section 202 of the Magnuson-Moss Act served to "clarif[y] the power of the [FTC] to issue substantive [consumer-protection rules]".[83] Section 202 created a novel rulemaking scheme that applied specifically to the FTC's power to promulgate "consumer-protection" rules.[84]

More pertinently, the Act stated that this new grant of power "shall not affect any authority of the Commission to prescribe rules … with respect to unfair methods of competition in or affecting commerce."[85] This can be interpreted either as an implicit endorsement that the FTC has such authority or, alternatively, that the newly established authority for consumer protection rulemaking does not extend to unfair methods of competition. Elsewhere, Commission Chair Lina Kahn has argued that, in enacting Magnuson-Moss, Congress intended to impose additional burdens on consumer-protection rulemaking, while allowing unfair methods rulemaking to remain governed by the comparatively lenient Administrative Procedure Act (APA).[86] There are several issues with this understanding of the Act.

First, at best, Magnuson-Moss is silent on the question of the FTC's rulemaking authority for unfair methods of competition. It does not provide for any rulemaking for unfair methods of competition, and the reservation clause—that its amendments "shall not affect *any* authority of the Commission to prescribe rules … with respect to unfair methods of competition,"[87]—does not confirm that the FTC has such authority. To the contrary, the choice of the word "*any* authority"

[82] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975.
[83] S. Rep. 356, at 12347 (1974) (Conf. Rep.).
[84] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 § 202.
[85] *Id.* § 202(2).
[86] Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, CHI. L. REV. 357, 378-9 (2020).
[87] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 § 202(2) (emphasis added).

rather than "*the* authority" suggests that Congress was not weighing in on the subject one way or the other.

Second, it is notable that Congress chose to be silent on this rulemaking authority while it laid out a precise scheme for rulemaking in the area of consumer protection. Pursuant to the maxim *expression unius est exclusion alterius* ("the expression of one thing is the exclusion of the other"), the Magnuson-Moss Act should be read to deliberately exclude the grant of unfair methods of competition rulemaking authority to the FTC. Otherwise said, the fact that Congress failed to set forth any similar guidelines for the FTC's unfair methods rulemaking power can be understood as confirming that no such authority exists.

Third, the legislative history does not support a conclusion that Congress intended to confer such authority through its silence. For instance, Representative Broyhill, in expressing his support of the Act, explained that "[t]he rulemaking provision … does not affect any authority the FTC might have to promulgate rules [with] respect to 'unfair methods of competition'" because he did "not believe that the FTC has any such authority."[88] He continued: unfair method of competition rules "would obviously have a far more pervasive effect than rules defining unfair or deceptive acts or practices, and I would feel very uncomfortable giving such antitrust rules the same effect as this bill gives consumer practices rules[.]"[89]

It seems the Commission itself agreed with this interpretation of the Magnuson-Moss Act since, until the rule in question here, and over a period that spanned eight presidential administrations and 18 FTC chairs,[90] the FTC did not attempt to promulgate a single unfair method of competition rule.

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[88] S. Rep. 356, at 12348 (statement of Representative Broyill) (1974) (Conf. Rep.).
[89] *Id.*
[90] *List of Chairs of the Federal Trade Commission*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/List_of_chairs_of_the_Federal_Trade_Commission.

The most that can be said for the Magnuson-Moss Act is that Congress could have, but did not, expressly disavow the holding of the D.C. Circuit in the *National Petroleum* case. That argument might be more persuasive if *National Petroleum* had been a Supreme Court decision, which it was not. In any event, the Supreme Court has cautioned against inferring congressional intent from congressional inaction.[91]

In sum, neither the FTCA nor the Magnuson-Moss Act explicitly grant the Commission substantive unfair method of competition rulemaking authority. Under modern jurisprudence, this is enough to find that the FTC cannot promulgate its *per se* ban on non-compete agreements.

IV: The major questions doctrine

Even those who believe Congress intended to give the agency the power to promulgate rules prohibiting unfair methods of competition cannot aver that Section 5 and Section 6(g) unambiguously grant that power. If the major questions doctrine is applied—as recent precedent indicates it will be—this ambiguity is enough to find that the FTC lacks the rulemaking authority to promulgate a *per se* ban on non-compete provisions in employment contracts.

The major questions doctrine is a canon of statutory interpretation that necessitates Congress speak clearly when authorizing an agency to exercise powers of vast economic and political significance.[92] As the Court noted in *Whitman v. American Trucking Association,* Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[93]

[91] *See, e.g.,* Burns v. U.S., 501 U.S. 129, 136 (1991) ("[N]ot every silence is pregnant.") (citing State of Illinois Dept. of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).
[92] *See* Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-5 (1984).
[93] Whitman v. American Trucking Association, 531 U.S. 457, 468 (2001).

In the 2022 *West Virginia v. EPA* decision, considered by some to portend a revival of the major questions doctrine,[94] the Supreme Court explained that an agency's exercise of power involves a major question where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[95]

What the doctrine is thus protecting against is an agency (1) assuming significant economic and political power through (2) ambiguous text devoid of a clear Congressional intent granting such significant power. Both of these elements are present in the FTC's proposed ban on noncompete clauses.

First, the ban would have major implications for the U.S. economy. Approximately 20 percent of the American workforce is currently bound by a non-compete agreement.[96] Even proponents of the rule (including the Agency) admit, and largely base their support for the rule on, the significant effects it would have on the economy.[97] In its Notice of Proposed Rulemaking, the FTC estimates that "the proposed rule … would increase workers' total earnings by $250 to $296 billion per year."[98]

Precedent suggests that this constitutes significant enough economic power. For example, in *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, the Court held that because the Center for Disease Control and Prevention's proposed moratorium on eviction during the COVID-19 public health emergency would have had a $50 billion impact on the economy, the "sheer scope of [the

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[94] *See, e.g.,* Jaclyn Lopez, *The major questions doctrine post-West Virginia v. EPA*, ABA (Jan. 3, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/january-february-2023/the-major-questions-doctrine/.
[95] West Virginia v. EPA, 597 U.S. ____ at 17 (2022).
[96] STARR, *supra* note 2, at 5.
[97] *See, e.g.,* Press Release, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.
[98] Notice of Proposed Rulemaking, at 103.

agency's] claimed authority" counseled against the agency's interpretation.[99] When, by the FTC's own calculation, the potential impact of the non-compete clause ban would be five times larger, it is likely the Court finds that the proposed rule would have a significant economic effect.

Second, even under the most generous interpretation of Section 6(g) and Section 5, and certainly of Magnuson-Moss's silence on the matter, Congress did not provide a "clear statement" allowing for such power. Indeed, the mere fact that it is *debatable* whether Congress delegated this power to the FTC is "very persuasive [evidence] that it did not."[100]

The D.C. Circuit's reasoning in *Nat'l Petroleum* would not survive the Supreme Court's modern understanding and application of the major question doctrine. As aforementioned, in *Nat'l Petroleum*, the court found that it was not an "implausible" interpretation of the Act to read it as withholding unfair methods of competition substantive rulemaking power,[101] and that the enacting Congress' specific intent "cannot be stated with any assurance."[102] The Court has clarified that this is the exact issue the major questions doctrine should defend against.[103] Specifically, the Court has recently held that where an agency is asserting "[e]xtraordinary grants of regulatory authority", "unprecedented" in nature and accomplished through "modest words, vague terms, or subtle devices", "both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[104] The Court wrote added that for an agency to convince it otherwise, "something more than

[99] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2022).
[100] Interstate Com. Commission v. Railway Co., 167 U.S. 479, 494 (1897) ("the fact that [whether the agency had a specific rulemaking power] is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such power is never to be implied.").
[101] Nat'l Petroleum Refiners Ass'n, 82 F.2d at 685.
[102] *Id.* at 681.
[103] West Virginia, 597 U.S. at 18-9.
[104] *Id.*

a merely *plausible* textual basis for the agency action is necessary … [t]he agency instead must point to clear congressional authorization for the power it claims."[105]

The FTC *is* asserting an extraordinary and unprecedented grant of power, based on a merely plausible (if not unlikely) interpretation of 6(g) and the Magnuson-Moss Act. Pursuant to *West Virginia*, and contrary to what the D.C. Circuit held in *Nat'l Petroleum*, this is enough to counsel against the Agency's action.

The Court is especially skeptical, and thus especially likely to invoke the major questions doctrine, when an agency "claim[s] to discover in a long-extant statute an unheralded power … in the vague language of an ancillary provision of the Act … [that] had rarely been used in the preceding decades."[106] For example, in *Nat'l Federation of Independent Business v. Occupational Safety and Health Administration*, where the Court invalidated the Occupational Safety and Health Administration's (OSHA) mandate that workers obtain a COVID-19 vaccine or subject themselves to frequent testing, the Court found that it was "telling that OSHA, in its half century of existence" had never relied on the provision in question to regulate "occupational hazards" to such a degree.[107] The FTC has *never* issued a unfair method of competition rule in its existence. Further, Section 6(g) is an ancillary provision of the Act, placed in the middle of a section otherwise exclusively detailing the investigative powers of the agency.[108] Following recent Supreme Court precedence, this counsels against allowing for this assertion of power.

Finally, in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, the Court held that the Food and Drug Administration (FDA) lacked authority to regulate tobacco products as customarily marketed because of, *inter alia*, the "FDA's consistent and repeated statements that it lacked

[105] *Id.* at 19 (citation omitted) (emphasis added).
[106] *Id.* at 20 (citation cleaned up).
[107] NFIB v. OSHA, 595 U.S. ____ (2022) at 6-8.
[108] *See supra* Part II.

authority under the FDCA to regulate tobacco [as customarily marketed]."[109] The FTC has likewise consistently and repeatedly averred that it lacked substantive rulemaking authority.

In December of 1914, after the bill had passed, economist W.H.S. Stevens—employed as a Special Expert by the FTC[110]—penned the first comprehensive account of the FTCA.[111] Stevens summarized the nascent commission's power over unfair competition as such:

> When the commission believes that an organization is utilizing an unfair method of competition and it appears to it that a proceeding in this respect would be in the interests of the public, the commission issues and serves a complaint stating the charges and giving notice of a hearing at least thirty days after service. The party complained against [then] has the right to appear and show cause why an order should not be entered requiring him to desist from the violation of law charged in the complaint …. [t]he new law, therefore, has *merely conferred upon the commission the quasi-judicial function of passing upon the fair or unfair character of a given method*[.][112]

The FTC subsequently tried to clarify any confusion as to its rulemaking power in its 1922 *Annual Report*, asserting that "[o]ne of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it," and that it hoped outsiders would soon understand that "the commission can not (sic) and will not function" in this manner.[113] Several decades later, Paul R. Dixon, the Commission's chairman from 1961 to 1969, and again briefly in 1976, agreed, testifying before Congress that the FTC did not have such authority, going so far as to say that "no one has ever been foolish enough at the Commission yet to try to write [substantive] law under 6(g)".[114]

V: The non-delegation doctrine

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[109] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000).
[110] Meeting of Federal Trade Commission (May 6, 1916), https://www.ftc.gov/sites/default/files/attachments/ftc-minutes-early-years/apr-sep1916.pdf.
[111] *See generally* STEVENS, *supra* note 60.
[112] *Id.* at 851-2 (emphasis added).
[113] Nelson B. Gaskill et al., ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION, at 36 (1922).
[114] *Hearings on S. 1666 and 1663 Before the SubComm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. 169-70 (1963) (statement of Chairman Dixon).

Even if—contrary to what the legislative history suggests—Congress did intend to consign unfair methods rulemaking power to the FTC, the proposed Non-Compete Clause rule would still be invalid, as it represents an impermissible delegation of legislative authority under the non-delegation doctrine. The non-delegation doctrine is a tenet of administrative law, based upon separation of power principles, asserting that Congress cannot delegate its legislative powers to other entities, including independent agencies.[115]

The Court has held that the non-delegation doctrine requires that a statutory delegation to an independent agency have an "intelligible principle" to guide its application.[116] The Court has historically been flexible in its understanding of what constitutes an "intelligible principle" and has correspondingly not struck down a statute on non-delegation grounds since 1935.[117] However, this means neither that the doctrine is entirely toothless nor that the current Court is not willing and ready to temper this flexibility. As Commissioner Wilson's dissenting statement to the Notice of Proposed Rulemaking outlined, five current Supreme Court justices (*i.e.,* the current majority) have expressed a willingness to reconsider this charitable interpretation of the non-delegation doctrine.[118] For instance, in his *Gundy v. United States* dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, maintained that the current understanding of the "'intelligible principle' … has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked,"[119] and that "[t]he framers understood, too, that it would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and

[115] *See, e.g.,* Mistretta v. U.S., 488 U.S. 361, 371-2 (1989).
[116] *See id.* at 372 (Finding that "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.") (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).
[117] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).
[118] Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, at 12 n. 61 (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-concerning-notice-proposed-rulemaking-non.
[119] Gundy v. U.S., 133 S. Ct. 2116, 2139 (2019) (Gorsuch J., dissenting).

then assign others the responsibility of adopting legislation to realize its goals."[120] Perhaps foreshadowing what the Court would hold were the FTC's abrogation of substantive rulemaking power to find its way there, Justice Gorsuch concluded: "If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing … conduct for a half-million people."[121] Under the Commission's present interpretation of the FTCA, Congress would have given the executive branch a blank check to govern the conduct of *all* employees and employers, including an immediate change in employment contract for 20 million workers—a figure dwarfing the half-million alluded to above.

This case may present an ideal one for the Supreme Court to revive the doctrine. For one, the grant of legislative power here would be awesome: the FTC would be able to prohibit any behavior it deemed "unfair", unbeholden by any court precedent or current antitrust laws.[122] More, a finding that this Congressional delegation of power (assuming of course there even is one) runs counter to the non-delegation doctrine would be accurately following the precedent set the last time the Court struck down a statute on non-delegation grounds: *A.L.A. Schechter Poultry Corp. v. U.S*, 295 U.S. 495 (1935).[123]

In *A.L.A. Shechter Poultry Corp.*, the Court was faced with a complaint that the National Industrial Recovery Act of 1933 (NIRA) had impermissibly delegated legislative powers by giving the President authority to approve "codes of fair competition" for a trade or industry.[124] The Court struck down this provision as an unconstitutional delegation by Congress of legislative power. Notably, in doing so, the Court explicitly distinguished the FTC's ability to prohibit "unfair methods

[120] *Id.* at 2133.
[121] *Id.* at 2144.
[122] *See supra* Part II.
[123] While subsequent cases have perhaps narrowed the holding in *A.L.A. Schechter*, the case itself has never been overturned.
[124] A.L.A. Schechter Poultry Corp., 295 U.S. at 839-40.

of competition" from the grant of power in the NIRA: while the Court acknowledged that "unfair methods of competition" in the context of the FTCA had a "broad[] meaning that … does not admit of precise definition,"[125] it explained that, unlike with the power the President was claiming under the NIRA, the FTC was still required to determine "unfair methods of competition" on a case-by-case basis "in the light of *particular competitive* conditions" and that the "[p]rovision was made for formal complaint, for notice and hearings, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority." [126]

The distinction drawn in *A.L.A. Shecter* between the NIRA and the FTCA—a distinction preserving the constitutionality of the FTCA—would dissipate if the Commission now regarded Section 5 and Section 6(g) as giving it the same sort of legislative authority.

Conclusion

The FTC's proposed ban would negate over 30 million current non-compete provisions in employment contracts; it would affect salaries by approximately $300 billion a year; and it would preempt nearly every state's laws. This is an "elephant" in the truest sense of the word.

The procedural justification for this unprecedented step is at best questionable—at worst, it is virtually non-existent. The Commission is relying on a store of authority cached in a Section of the FTCA exclusively referring to the FTC's investigative powers,[127] and arguing that it allows the Commission to promulgate substantive rules based on prohibitions found in a different—and independently written—section of the Act. In other words, a "mousehole".

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[125] *Id.* at 532.
[126] *Id.* at 533 ("What are 'UNFAIR METHODS OF COMPETITION' are thus to be determined in particular instances[.]")
[127] 15 U.S.C. § 46(g); *see supra* Part III.

True, an Agency is owed a level of deference in interpreting a "statutory scheme it is entrusted to administer".[128] But the Agency's interpretation must still be a permissible construction of the statute and rule in question.[129]

Here, the structure, text, and legislative history of the FTCA and the Magnuson-Moss Act all counsel against the Commission's interpretation. The revived major questions doctrine requires an agency to point to clear congressional authorization before making policy choices with sizeable implications. And the non-delegation doctrine—rooted in separation of power principles—countervails against congressional delegation of awesome legislative power. Otherwise put, the FTC's interpretation is not a permissible one.

The FTC makes legitimate arguments about the coercive and oppressive nature of many employer-employee non-compete covenants. But it should not be—and is not—up to the Agency to promulgate a novel rule banning them. Congress has acted before when it determined that the FTCA needed reform;[130] if it determines that non-compete provisions are *per se* "unfair methods of competition", it can act again.

[128] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984).
[129] *Id.* at 843.
[130] *See* Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975

Applicant Details

First Name	**Ethan**
Middle Initial	**J**
Last Name	**Mandelbaum**
Citizenship Status	**U. S. Citizen**
Email Address	**ethan.mandelbaum@columbia.edu**
Address	**Address** Street **435 West 31st Street Apt 47C** City **New York** State/Territory **New York** Zip **10001** Country **United States**
Contact Phone Number	**9089565163**

Applicant Education

BA/BS From	**Tufts University**
Date of BA/BS	**May 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**First Year Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Greene, Jamal
jamal.greene@law.columbia.edu
212-854-5865
Kendall, George
george.kendall@squirepb.com
Briffault, Richard
richard.briffault@law.columbia.edu
212-854-2638

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ethan Mandelbaum
435 West 31st Street, Apt 47C
New York, NY 10025
(908) 956-5163
ethan.mandelbaum@columbia.edu

June 2, 2023

The Honorable Kiyo Matsumoto
United States District Court, Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a recent graduate of Columbia Law School, and I write to apply for a clerkship in your chambers for the 2025-26 term or any term thereafter. I would be honored to accept an opportunity to interview with you.

I hope to pursue a career as an Assistant United States Attorney and aim to gain practical experience through a clerkship. I have sharpened my legal skills through positions at Cooley LLP, the Squire Patton Boggs Public Service Initiative, and the US Attorney's Office in the Eastern District of New York. In addition, I completed a year-long supervised research paper on whether the doctrine of settled expectations protected by due process justifies judicial review of restrictive state election laws.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Jamal Greene (212-854-5865, jamal.greene@law.columbia.edu) and Richard Briffault (212-854-2638, richard.briffault@law.columbia.edu), as well as George Kendall, my former professor and supervisor for the Death Penalty Appeals Externship I completed in Fall 2021 (212-872-9834, george.kendall@squirepb.com). Assistant United States Attorney Nick Moscow, my supervisor at EDNY (nicholas.moscow@usdoj.gov, 718-757-5462), and former United States Solicitor General Donald Verrilli (Donald.Verrilli@mto.com), my professor in the Roberts Court Seminar at Columbia, have also agreed to serve as professional references in support of my application.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Ethan Mandelbaum

ETHAN J. MANDELBAUM

435 W 31st Street, Apt. 47C, New York, NY 10001
(908) 956-5163 • ethan.mandelbaum@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. received May 2023
Honors: James Kent Scholar (1L & 2L), Harlan Fiske Stone Scholar (3L)
Activities: *Columbia Journal of Law & Social Problems*, Staff Editor (2L), Notes Editor (3L)
Torts Teaching Assistant to Professor Vincent Blasi (Fall 2022)
Research Assistant to Professor Jamal Greene (Fall 2022)
Academic Coach for Constitutional Law, Torts, Contracts (2L)
Note: *Settled Expectations and Judicial Review of State Election Law Rollbacks*

TUFTS UNIVERSITY, Medford, MA
B.A., *magna cum laude,* in Political Science received May 2020
Honors: Pi Sigma Alpha (National Political Science Honors Society)
Activities: Tufts Election Commission, Chair

EXPERIENCE

Cooley LLP, New York, NY
Litigation Summer Associate (offer to return extended and accepted) Summer 2022
Reviewed documents for internal investigation into potential securities fraud violations by public company. Helped craft mosaic theory defense for potential criminal defendant facing an insider trading investigation. Researched and drafted arguments for conflict of law, contract issues for both plaintiff and defendant clients.

SQUIRE PATTON BOGGS PUBLIC SERVICE INITIATIVE, New York, NY
Death Penalty Appeals Extern Fall 2021
Researched, outlined, and developed arguments to be made before Texas Court of Criminal Appeals in "actual innocence" case. Wrote legal memoranda on scientifically questionable expert testimony and laches in post-conviction appeals. Visited and interviewed clients in Arkansas high-security prisons to help build case in class action litigation on prison conditions during COVID-19 pandemic.

US ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Criminal Division Intern Summer 2021
Returned to EDNY Organized Crime & Gangs Section. Wrote legal memoranda on issues including attempted witness tampering, identity theft and conspiracy withdrawal. Prepared materials submitted to the court, including search warrants and opposition to motions for compassionate release and habeas review.

TUFTS SUMMER SCHOLAR, Somerville, MA
Research Fellow Summer 2019
Designed and conducted research project analyzing the relationship between civic engagement and voting behavior.

US ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Criminal Division Intern Summer 2018
Assisted federal prosecutors in the Organized Crime & Gangs Section with all aspects of trial preparation. Sifted through wiretaps, phone calls, emails and phone contents to find evidence to be used in trials.

OFFICE OF STATE SENATOR WILLIAM BROWNSBERGER, Boston, MA
Legislative Intern Spring 2018
Researched proposed policies, drafted policy memoranda, attended briefings and hearings.

INTERESTS: Yankees, Running, Poker, Movies, Skiing, Philosophy, Making Spotify playlists

Columbia
Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

05/18/2023 00:39:07

Program: Juris Doctor

Ethan J Mandelbaum

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L6630-1	Journal of Law and Social Problems		0.0	CR
L6271-1	Law and Legal Institutions in China	Liebman, Benjamin L.	3.0	A-
L6274-3	Professional Responsibility	Fox, Michael Louis	2.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A
L6250-1	Immigration Law	Gupta, Anjum	3.0	A
L6630-1	Journal of Law and Social Problems		0.0	CR
L8253-1	S. Congressional Oversight - Past, Present, & Future	Lowell, Abbe D.	2.0	A-
L6685-1	Serv-Unpaid Faculty Research Assistant	Greene, Jamal	2.0	CR
L6822-1	Teaching Fellows	Blasi, Vincent	3.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6038-1	Climate Change Law and Policy	Gerrard, Michael	3.0	A
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L6630-1	Journal of Law and Social Problems		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A-
L8659-1	S. The Roberts Court [Minor Writing Credit - Earned]	Metzger, Gillian; Verrilli, Donald B.	2.0	A-
L6683-2	Supervised Research Paper	Briffault, Richard	1.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

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Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6791-1	Ex. Constitutional Rights in Life and Death Penalty Cases	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	A
L6791-2	Ex. Constitutional Rights in Life and Death Penalty Cases - Fieldwork	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	CR
L6630-1	Journal of Law and Social Problems		0.0	CR
L6169-1	Legislation and Regulation	Briffault, Richard	4.0	A-
L6675-1	Major Writing Credit	Briffault, Richard	0.0	CR
L6683-1	Supervised Research Paper	Briffault, Richard	2.0	A
L6822-1	Teaching Fellows	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	A
L6108-3	Criminal Law	Liebman, James S.	3.0	A-
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6130-6	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR
L6121-15	Legal Practice Workshop II	Statsinger, Steven	1.0	P
L6116-3	Property	Glass, Maeve	4.0	A
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Lynch, Gerard E.	4.0	A-
L6133-3	Constitutional Law	Greene, Jamal	4.0	A+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-25	Legal Practice Workshop I	Statsinger, Steven; Yoon, Nam Jin	2.0	P
L6118-1	Torts	Blasi, Vincent	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0
Total Earned JD Program Points: 83.0

Honors and Prizes

UNOFFICIAL

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	James Kent Scholar	2L
2020-21	James Kent Scholar	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

UNOFFICIAL

Columbia Law School

June 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: ***Recommendation for Ethan Mandelbaum***

Dear Judge Matsumoto:

I write to recommend Ethan Mandelbaum for a clerkship in your chambers. Ethan is one of the top students in his class, and I have no doubt that he will be an excellent law clerk.

Ethan was a student in my first year Constitutional Law class in Fall 2021, where he achieved the highest score on the final exam and the only A+ grade I awarded in the class. The exam was wide-ranging, covering the scope of substantive due process and constitutional equality guarantees, the theoretical basis for the commerce power, the federal government's power to impose vaccination requirements (well before it actually did so) under the commerce, spending, and taxing powers, and the scope of permissible federal antidiscrimination mandates. Ethan's top performance speaks to his intellectual agility, his organizational skill, his writing ability, and his preparation.

More generally, I could not have asked for more of Ethan in the course. This was a "small group" of 31 students, and so Ethan and his classmates were on call more frequently than they would have been in a larger class. He was consistently well-prepared both when he was on call and when he was not. Ethan also regularly attended office hours and asked incisive questions in that setting, which contributes to my confidence in his high level of intelligence, his deep curiosity about the law, his capacity for listening and not just speaking, and his pleasant disposition.

I recall a particular set of interactions in the spring of 2022, in which Ethan was taking a second course with me—the Law of the Political Process, in which he also excelled—when a conversation that began with Ethan's questions about the relationship between state power to set voter qualifications in federal elections and federal power to override state time, place, and manner regulations in the same elections veered organically into the Purcell doctrine, the Supreme Court's emergency docket, the Roberts Court's religious freedom jurisprudence, and constitutional law pedagogy.

Ethan's interests run broad and deep. He has achieved an A-level grade in nearly every course he has taken at Columbia; he is an academic coach for other students in Constitutional Law, Torts, and Contracts; and he was a teaching assistant in Torts in the fall of 2022. Ethan's wide range of interests and capabilities led me, after the semester was complete, to offer Ethan a position as a research assistant. He provided excellent state and federal legislative research on a difficult, wide-ranging topic in preparation for a book on I am writing on constitutional fidelity. He took direction well, was self-motivated, developed an independent research plan, and delivered timely, concise, and immensely helpful research memos. He was a spectacular research assistant.

All of which is to say that Ethan marries all of the qualities one would want to see in a law clerk. I will add that, as a nationally ranked high school debater and coach, Ethan is accustomed to viewing legal issues from 360 degrees of perspective. He'll be a great law clerk, and I recommend him without hesitation.

Thank you for your consideration. Please do not hesitate to contact me if I can be of further help in your decision process.

Sincerely,

Jamal Greene
Dwight Professor of Law

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

June 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

My name is George H. Kendall. I currently direct a pro bona project - The Public Service Initiative - at Squire Patton Boggs (US) LLP. Our focus is largely upon indigent men and women as well as juveniles in the criminal justice system, whose cases are complex and usually will require years to resolve. Our clients come largely from the American South, as while the need for pro bona representation is substantial in all jurisdictions, it is particularly so in most southern states. Typically, our docket has several capital cases, cases with formidable innocence claims, and ones concerning highly restrictive prison policies. We try cases, we handle complicated post-conviction matters, and we appear before both the state and federal appellate courts. In addition, we typically work closely each Term on a few cases before the Supreme Court, usually in the capacity of aiding counsel of record with the party briefing and coordinating amicus filings.

Since 2011, my PSI colleagues and I have taught an externship at Columbia Law School. The semester-long course is a mix of classroom discussion about the increasingly challenging constitutional and federalism legal doctrines that govern the administration of capital punishment, the adjudication of state and federal habeas corpus petitions, and scope of state and federal constitutional rights. Each student also is assigned challenging projects from one or more of our cases. This can involve research and preparing arguments for an upcoming motion, analysis of the record in preparation for depositions, and field investigation. We keep the class small, to no more than eight students. We tell them we expect their best work as we have little margin for error. Each is expected to come to class prepared to participate. Deadlines on assignments are treated like filing deadlines; if you require additional time, you need to seek an enlargement well in advance of the previously-agreed upon deadline.

I include this wind-up because it is important for you to know we come to know the strengths and talents of our students. One of the great pleasures of both teaching the doctrine and supervising the case work each year is to work closely with them.

Ethan was a highly motivated student who came to class prepared to participate. He not only would be well familiar with the readings, but he would also have thought about the strengths and deficiencies of the doctrine as applied to the real world. As someone who hopes one day be a federal prosecutor, he expressed concern about the poor quality of representation indigent clients receive, even those facing capital punishment. He studied closely the jurisprudence that currently governs jury selection and death qualification in capital cases and became concerned that process was not consistent with seating impartial jurors. Again and again, our class discussions were broadened and sharpened by Ethan's contributions.

Ethan's field work focused on assignments from two capital cases where there are strong claims of innocence, and with a civil case concerning COVID-19 and incarcerated prisoners. He prepared well researched and drafted memos on laches and time of death issues for one case, and looked closely at whether we could establish a client's new evidence of innocence was sufficiently persuasive to excuse a tardy filing. He also raised his hand to visit clients in a southern prison concerning COVID policies. For three days, he traveled with project colleagues to three prisons and interviewed several clients in that law suit.

I served as Ethan's principal supervisor. Having worked with law students for nearly four decades, I appreciate how valuable their contributions can be, particularly when they receive clear direction and periodic oversight. Repeatedly, Ethan carefully and creatively considered the issue of his focus before he put pen to paper. Each of his field assignments were very useful to our representation.

We very much enjoyed working with Ethan, both in the classroom and with his case projects. I have no doubt he would be a resourceful, hard-working clerk who would do whatever it takes to get the case right.

I am happy to speak directly to you if that would be useful.

Sincerely,

George H. Kendall

George Kendall - george.kendall@squirepb.com

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Ethan Mandelbaum

Dear Judge Matsumoto:

I am writing in support of Ethan J. Mandelbaum of the Columbia Law School class of 2023, who is applying to you for a clerkship. Ethan is a very strong student with excellent research, analytical, and writing skills. I am sure he will make a superb law clerk.

I know Ethan primarily from supervising his major research paper, which considered the constitutional arguments that could be made to challenge state laws that make it harder to vote, such as by reducing the number of early voting days or adding new requirements for voters requesting mail-in ballots. Ethan did a careful, thorough job of canvassing the academic literature. He considered and critiqued a range of legal theories and researched all the relevant case law. I was particularly impressed by the fact that although Ethan began the project with the intention of making the case for the unconstitutionality of voting "rollback" laws, he ultimately concluded that in most situations rollbacks are constitutional even if, from his perspective, undesirable as a policy matter. In light of his comprehensive treatment of the subject and the rigor of his analysis, he easily deserved the A that I gave him.

Ethan was also a student in my Legislation & Regulation class. Ethan was an engaged participant in class discussions and consistently demonstrated facility with the complex course material. He was always prepared and his questions, answers, and comments were always on point. Ethan did well on the final exam and received an A- for the course.
Ethan has had a very good academic record at Columbia. He was a James Kent Scholar in his 1L year, which put him in the top ten percent of his class. Based on his grades, I believe he will be a Kent Scholar again as a 2L. He is a Notes Editor of the Columbia Journal of Law and Social Problems, and has been a faculty teaching assistant, and an academic coach for three first-year courses.

In my conversations with Ethan, I have consistently found him to be smart, thoughtful, serious, and pleasant. Based on his strong academic record, his excellent research skills, his analytical ability and his personal qualities, I am very happy to recommend him to you for a clerkship.

Please call me at 212-954-2638 if I can of any further assistance to you in assessing Ethan's clerkship application.
Sincerely,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

Writing Sample

Ethan J. Mandelbaum
435 W 31st Street Apt 47C
New York, NY 10001
(908) 956-5163

I prepared the following draft of a letter in opposition to a defendant's motion for compassionate release and resentencing as an intern for the US Attorney's Office in the Eastern District of New York. The letter argues that both compassionate release and resentencing would be inappropriate for the defendant, a convicted mafia leader. The Court ultimately denied the defendant's motion. I have received permission from my previous employer to use this letter as a writing sample. Certain details about the defendant's medical record have been redacted to protect his privacy.

Dear Judge Garaufis:

The government respectfully submits this letter in opposition to petitioner Robert Lino's June 1, 2021 Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A)(i) and for resentencing under 28 U.S.C. § 2255 ("Mot."). Lino, who pled guilty to racketeering (including participation in multiple murder conspiracies and one murder), was sentenced in 2004 to 324 months' imprisonment. He has neither met the exacting standards for a habeas petition under Section 2255, nor demonstrated the applicability or advisability of Section 3582 relief in his case. His sentence was lawfully imposed, and he does not contend otherwise. Moreover, he has received both doses of the Pfizer COVID-19 vaccine and has not otherwise shown either that there are "extraordinary and compelling circumstances" in his case meriting release or that the sentence imposed by the Court is not appropriate under 18 U.S.C. § 3553(a). As set forth in greater detail below, Lino also has not shown either that release could be appropriate or that it would be appropriate in light of the danger he poses to the community, the need for the sentence imposed to reflect the seriousness of the offense and promote respect for the law, deter criminal conduct and protect the public from further crimes.

I. Background

A. Lino's criminal conduct

Lino's arrest was part of a years-long federal investigation into La Cosa Nostra in the New York City area. (Presentence Investigation Report ("PSR") ¶ 12).[1] The investigation and trial showed that members and associates of the Bonanno Crime Family, including Lino, an acting captain, committed numerous crimes including murder, arson, extortion, loansharking, illegal gambling and money laundering. (PSR ¶¶ 6, 9, 12-43, 60).

As an acting captain, Lino oversaw a crew of made members and associates and was responsible for supervising their criminal activities. (Id. ¶ 7). The crew's soldiers and associates were required to provide a portion of their earnings to the defendant. In turn, the defendant reported to and shared the proceeds of his crew's criminal activity with the administration of the Bonanno Crime Family. (Id.).

For example, in August 1981, Lino killed Dominick Napolitano, a captain in the Bonanno Crime Family. (PSR ¶ 25). Bonanno Crime Family leaders ordered Napolitano's murder because he introduced an undercover federal agent into the Family's affairs. (Id.). Napolitano was lured to an associate's basement under the false pretense of attending a meeting. (Id.). Once inside the house, Napolitano was shoved down the basement steps and Lino and another member of the Bonanno Crime Family shot him. (Id.). Napolitano's body was found over a year later in Staten Island by teenagers, buried in a shallow grave. (Id.).

In December 1987, Lino was present at a warehouse when other members of the Bonanno Crime Family murdered Gabriel Infanti. (PSR ¶ 29). Infanti's murder was ordered

[1] The PSR is attached hereto as Exhibit 1. Because the exhibits include medical and other personal information, the government is filing the exhibits under seal.

because he failed to successfully complete other ordered murders. (Id.). Infanti's body was covered in lye prior to being buried and has never been found. (Id.)

Between December 1989 and January 3, 1990, Lino conspired with other members of the Bonanno Crime Family to murder Louis Tuzzio after Tuzzio injured a Gambino Crime Family associate while murdering a third individual. (PSR ¶ 32). Tuzzio was lured to a location under false pretenses and Lino shot and killed him. (Id.).

In approximately 1992, the petitioner also participated in the murder of Robert Perrino. Specifically, as he stated during his plea allocution, he "cleaned up." (PSR ¶ 33). Perrino's remains were found in a Staten Island dump, over a decade later, in December 2003. (Id.).

B. Lino's guilty pleas and sentencing

On June 14, 2000, Lino was arrested on racketeering charges that were filed in the United States District Court for the Southern District of New York. On February 15, 2001, he pled guilty to racketeering and racketeering conspiracy. (PSR ¶¶ 99-100). Pursuant to that plea, the defendant admitted to racketeering acts involving securities fraud, money laundering conspiracy, and fraud. (Id.) The loss to investors in connection with the defendant's fraud exceeded $20,000,000. (Id.) On July 20, 2001, the defendant was sentenced principally to 83 months' incarceration (the "SDNY Sentence").

On April 3, 2003, while the defendant was serving the SDNY Sentence, he was transferred to the Eastern District of New York to face additional charges. (Id. ¶ 111). On March 18, 2004, the defendant pled guilty pursuant to a plea agreement to one count of racketeering, in violation of 18 U.S.C. §§ 1962(c) and 1963. (Id. ¶ 1). As a part of this plea, Lino admitted to racketeering acts including operating an illegal gambling business, profiting from unlawful gambling activity, conspiracy to make extortionate extensions of credit, conspiracy to murder Tuzzio, conspiracy to murder Perrino and the murder of Tuzzio. (Id.).

On November 12, 2004, the Court sentenced Lino principally to 324 months' incarceration, to run concurrently to the SDNY Sentence.

C. Lino's Motion and Request for Compassionate Release

On January 15, 2021, the defendant submitted a request for compassionate release to the Warden at FCI Butner. The warden denied the request on January 27, 2021. (Ex. 2). The request was based on the risk presented should the defendant contract COVID-19.

On June 1, 2021, the defendant filed the instant motion pursuant to 28 U.S.C. § 2255 claiming that he should be resentenced because at the time of sentencing this Court did not consider his future treatment for [REDACTED] or the current COVID-19 pandemic in sentencing, or in the alternative pursuant to 18 U.S.C. § 3582(C)(1)(A)(i), he should be granted compassionate release for the same reasons. (Mot. at 4, 10).

The undersigned obtained the defendant's medical records for the past year from the Bureau of Prisons ("BOP"), which are filed under seal as Exhibits 4 and 5. The records reveal that Lino, who is 54 years old, has [REDACTED]. All of these conditions appear well-controlled at this time. Lino previously suffered from [REDACTED]. Lino is fully ambulatory and engages in all normal activities of daily living.

D. BOP's Response to the COVID-19 Pandemic and Vaccinations

The BOP took action to prevent inmates from widespread COVID-19 contamination. BOP's aggressive efforts have extended to FCI Butner, which houses approximately 2,244 inmates. At present, there are no inmates who are reported positive for COVID-19. The latest statistics are available at http://www.bop.gov/coronavirus.

Lino has been administered both doses of the vaccine produced by Pfizer. Ex. 3 at 1. At Butner, where the defendant is held, BOP has fully vaccinated 896 staff members, and 2,443 inmates. http://www.bop.gov/coronavirus.

II. Applicable Law

A. Section 2255

Under 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner in custody pursuant to a sentence imposed by a federal court "may move the court which imposed the sentence to vacate, set aside or correct the sentence" if the "sentence was imposed in violation of the Constitution or laws of the United States . . . ," was issued by a court that lacked jurisdiction, was in excess of the lawful maximum or "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a); see also Adams v. United States, 372 F.3d 132, 134 (2d Cir. 2004) (noting that "[Section] 2255 is the appropriate vehicle for a federal prisoner to challenge the imposition of his sentence" (citing Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997)). Relief under Section 2255 is generally available "only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (internal quotation marks omitted).

B. Timing of a Motion under Section 2255

Section 2255 provides that defendants may move for relief within one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). Courts regularly apply the limitations period under Section 2255 to dismiss petitions without reaching their merits. See, e.g., Rosa v. United States, 785 F.3d 856, 860 (2d Cir. 2015); Tellado v. United States, 745 F.3d 48, 52 (2d Cir. 2014); Moshier v. United States, 402 F.3d 116, 118-19 (2d Cir. 2005); Anderson v. United States, 612 F. App'x 45, 47 (2d Cir. 2015); Darby v. United States, 508 F. App'x 69, 70 (2d Cir. 2013).

Where a defendant files a claim after the applicable statutory deadline, a court may find it to be "equitably tolled" and nevertheless permit it to proceed. However, equitable tolling has been fashioned as an extreme remedy, warranted in only the most extraordinary and rare

circumstances. See Rosa, 785 F.3d at 861 n.5; Harper v. Ercole, 648 F.3d 132, 136 (2d Cir. 2011); Walker v. Jastremski, 430 F.3d 560, 564 (2d Cir. 2005); Doe v. Menefee, 391 F.3d 147, 159 (2d Cir. 2004). To earn application of equitable tolling, the "petitioner must demonstrate that he acted with reasonable diligence during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances beyond his control prevented successful filing during that time." Baldayaque v. United States, 338 F.3d 145, 151 (2d Cir. 2003). The doctrine is rarely applicable because, "[a]s a general matter, [the Second Circuit] set[s] a high bar [for] deem[ing] circumstances sufficiently 'extraordinary' to warrant equitable tolling."). Dillon v. Conway, 642 F.3d 358, 363 (2d Cir. 2011).

Equitable tolling is appropriate where, for example, there is a delay in notifying the prisoner of applicable law, where officials intentionally destroy the petitioner's work product, or where the petitioner is duped into refraining from filing a timely action. See Diaz v. Kelly, 515 F.3d 149, 155 (2d Cir. 2008) (holding state court's prolonged delay of seven months in notifying petitioner about relevant ruling warranted equitable tolling

C. Reviewing Motions under Section 2255

In a Section 2255 petition, the burden is on the petitioner to show that their sentence is unconstitutional or otherwise contrary to law. Indeed, "[h]abeas corpus is not a neutral proceeding in which the petitioner and the State stand on an equal footing. Rather, it is an asymmetrical enterprise in which a prisoner seeks to overturn a presumptively valid judgment of conviction." Pinkney v. Keane, 920 F.2d 1090, 1094 (2d Cir. 1990). "Because we accord a presumption of validity to a judgment on collateral review, it is the petitioner who bears the burden of proving that he is being held contrary to law; and because the habeas proceeding is civil in nature, the petitioner must satisfy his burden of proof by a preponderance of the evidence." Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011) (citing Parke v. Raley, 506 U.S. 20, 31 (1992)).

D. Section 3582 Motion for Compassionate Release

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act on December 21, 2018, provides in pertinent part:

> (c) Modification of an Imposed Term of Imprisonment. —The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved

> portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction . . .
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

Further, 28 U.S.C. § 994(t) provides that "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of Title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[2]

The United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines") policy statement at § 1B1.13 provides that the Court may grant release if "extraordinary and compelling circumstances" exist, "after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," and the Court determines that "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." Although the Second Circuit has concluded that this policy statement is not currently binding in connection with motions filed by defendants, see United States v. Brooker, 976 F.3d 228, 238 (2d Cir. 2020), the courts of appeals have recognized that it continues to provide important "guideposts," United States v. McGee, 992 F.3d 1035, 1048 (10th Cir. 2021); see United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020) ("The substantive aspects of the Sentencing Commission's analysis in § 1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons'; a judge who strikes off on a different path risks an appellate holding that judicial discretion has been abused.").[3]

District courts in this Circuit and elsewhere have concluded that § 1B1.13 bears on Congress's intent in enacting the First Step Act even if it no longer binds district courts. In United States v. Ebbers, for example, Judge Caproni concluded that § 1B1.13 is "anachronistic," but explained that it "is, nonetheless, helpful in defining a vague standard." 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020). And in United States v. Thrower, Judge Ross concluded that, although "[t]he Sentencing Commission's policy statement explicating 'extraordinary and compelling reasons'

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[2] The inmate does not have a right to a hearing. Rule 43(b)(4) of the Federal Rules of Criminal Procedure states that a defendant need not be present where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." Dillon v. United States, 560 U.S. 817, 827-28 (2010) (observing that, under Rule 43(b)(4), a defendant need not be present at a proceeding under 18 U.S.C. § 3582(c)(2)).

[3] Although the government believes Brooker was wrongly decided and reserves the right to argue that a court's discretion in finding "extraordinary and compelling circumstances" is constrained by § 1B1.13 at any future stage of litigation, the government recognizes that this Court is bound by the Second Circuit's decision unless or until it is withdrawn or reversed.

under § 3582(c)(1)(A)(i) is not binding on a district court, . . . it does provide some guidance." No. 04-CR-903 (ARR), 2020 WL 6128950, at *3 (E.D.N.Y. Oct. 19, 2020).

In application note 1 to the policy statement, the Commission identifies the "extraordinary and compelling reasons" that may justify compassionate release. The note provides as follows:

> 1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2) [regarding absence of danger to the community], extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> (A) Medical Condition of the Defendant.—
>
> (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is—
>
> (I) suffering from a serious physical or medical condition,
>
> (II) suffering from a serious functional or cognitive impairment, or
>
> (III) experiencing deteriorating physical or mental health because of the aging process,
>
> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> . . .
>
> (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

"It is a defendant's burden to show that he or she is entitled to a sentence reduction under the compassionate release statute." United States v. Reid, No. 05-CR-596 (ARR), 2021 WL 837321, at *3 (E.D.N.Y. Mar. 5, 2021) (alteration, quotation marks and citation omitted); United States v. Pellegrino, 492 F. Supp. 3d 65, 68 (E.D.N.Y. 2020) ("A defendant seeking relief under Section 3582(c)(1)(A) 'bears the burden of showing that his release is justified.'") (quoting United States v. Patterson, No. 06-CR-80 (NRB), 2020 WL 3451542, at *1 (S.D.N.Y. June 23, 2020)).

As the terminology in the statute makes clear, compassionate release is "rare" and "extraordinary." United States v. Willis, 382 F. Supp. 3d 1185, 1188 (D.N.M. 2019) (citations omitted).

III. Analysis

A. Lino Is Not Entitled to Relief Under Section 2255

1. Lino's motion is untimely because it relies exclusively on events from prior to June 1, 2020

Lino's motion begins with the assertion that his petition is timely because the sentencing court was not aware of COVID-19 or Lino's subsequently diagnosed health issues. Mot. at 3-5. Lino does not assert, however, that his medical condition has worsened since his [REDACTED] treatment ended in October 2019. Instead, Lino argues that "[t]he corona[]virus pandemic gripped the United States prison system at the end of April 2020, therefore this petition is filed timely." Mot. at 1. But even if the Court accepts that COVID-19 did not provide a basis for a motion until the end of April 2020,[4] the Motion was filed in June 2021 and is therefore still untimely. 28 U.S.C. § 2255(f)(4).

The time limitation has not been equitably tolled by some government misconduct, notwithstanding Lino's cited authority regarding cases in which evidence was "secreted" or "withheld" by the government. Cf. Mot. at 6. A litigant seeking equitable tolling "must show both that he 'diligently' pursued his rights and that 'some extraordinary circumstance . . . prevented timely filing.'" Jenkins v. Greene, 630 F.3d 298, 302 (2d Cir. 2010) (quoting Holland v. Florida, 560 U.S. 631, 649 (2010) (alteration in original)). The petitioner offers no explanation for his late filing. Instead, he asserts that his motion is timely, belying any argument that he could not have met the one-year statute of limitations deadline.

2. Lino does not allege a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact

Lino does not argue that the sentencing court lacked jurisdiction or a lawful or constitutional basis to impose the sentence that it imposed. But "'collateral attack on a final judgment in a criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.'" Graziano v. United States, 83 F.3d 587, 589-90 (2d Cir. 1996) (per curiam) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995) (some internal quotation marks omitted)). Lino does not purport to identify any error made by the sentencing court (much less an error of constitutional dimension). Instead, he argues that circumstances that developed after the sentencing affect the advisability of the sentence. Cf. Mot. at 6-7 ("There was no way that Judge Garaufis would have known the future devastation,

[4] COVID-19's threat was in fact known within BOP facilities before late April 2020 and formed the basis of motions before that time. See, e.g., United States v. Cohen, No. 18-CR-602 (WHP), 2020 WL 1428778 (S.D.N.Y. Mar. 24, 2020) (denying COVID-19 based compassionate release motion because of lack of exhaustion).

lock downs, deaths, loss and illness that was to face the United States and the rest of the world . . . two decades ago [when] Lino was being sentenced. Moreover, the Court would never have imagined at the time of Lino's sentencing the [REDACTED] that Lino would ultimately suffer.").

Lino's claim is that his situation has changed, therefore his sentencing was illegal because these changes were not considered at his sentencing. If this proposition were true, many or most defendants would be eligible for resentencing, and every prisoner sentenced before the pandemic would be entitled to habeas relief. The petitioner does not allege that he is being deprived of prescription medication and acknowledges that he "remains under doctor's care" and "has follow-up appointments with specialists." Mot. at 5. Petitioner's claims regarding his health pertain only to the hypothetical in which either his care or access to medicine are terminated. See Mot. at 10 ("The B.O.P. is entrusted and has an obligation and duty to care for an [sic] 54 year-old very sick man…The Court cannot take the chance that the BOP will properly care for Mr. Lino.").

The standard for a claim under the Eighth Amendment is "deliberate indifference" to a prisoner's needs. Wilson v. Seiter, 501 U.S. 294, 302 (1991) ("Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind."). Lino does not have a valid Eighth Amendment claim because BOP officials did not intentionally create the conditions he describes, including the pandemic and his [REDACTED]. Moreover, Lino concedes he is getting the care he needs. Cf. Mot. at 5 ("Lino has follow-up appointments with specialists."). His claims regarding the pandemic are only about general prison conditions which—far from being ignored—have been addressed by his (and widespread) vaccination. See Mot. at 7 ("Lino… has been subjected not only to deplorable conditions of a BOP institution but subject to the extreme stress of a BOP attempting to combat the spread of COVID 19"); see also Wilson, 501 U.S. at 305 ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.").

B. Lino Is Not Entitled to Compassionate Release

To qualify for compassionate release under Section 3582(c)(1)(A)(i), a defendant must demonstrate the existence of "extraordinary and compelling" circumstances and show that release is appropriate under the relevant sentencing factors. Lino has neither pointed to exceptional circumstances, nor articulated a reason—other than his illness, which, while sad, is not exceptional—why the lawfully imposed, low-end Guidelines sentence for his violent racketeering activities must be reconsidered. It should not.

1. Lino has not shown that his circumstances are "extraordinary and compelling"

Lino offers two explicit bases which he contends are "extraordinary and compelling circumstances:" the side effects of his [REDACTED] and the COVID-19 pandemic. (Mot. at 8). In light of his vaccination, Ex. 3, neither of these non-extraordinary circumstances provides a basis for the Court to override the sentence, which the petitioner agreed to with the government in a plea deal which was accepted by this Court pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). (ECF No. 851 at 3).

a. The side effects from Lino's [REDACTED] are not an extraordinary circumstance meriting resentencing

The history of "compassionate release" and Congress's use of the phrase "extraordinary and compelling reasons" in § 3582(c)(1)(A) makes clear that Congress did not intend to grant district courts unfettered authority to reduce a defendants' sentence for any reason. Even after Brooker, courts must find "extraordinary and compelling reasons" to grant a motion. United States v. Jaramillo, --- F. App'x ---, 2021 WL 2224370, at *1 (2d Cir. June 2, 2021) (affirming district court's holding that, pre-vaccination, sleep apnea, breathing conditions, sleeping disorders, circulatory and respiratory issues, prediabetes, anxiety disorders, and hypertension, in combination, did not constitute "extraordinary and compelling" circumstances).

Though his [REDACTED] treatment ended in 2019, Lino nevertheless complains of health problems, specifically [REDACTED]. In particular, he claims [REDACTED]. (Mot. at 5). Lino's medical records do not corroborate that he has sought treatment for [REDACTED], but moreover, these conditions are not "extraordinary." Lino does not allege that his conditions "substantially diminish" his ability "to provide self-care in the environment of a correctional facility" because [REDACTED]. Moreover, he currently sees specialists for these conditions. See U.S.S.G. § 1B1.13 App. Note 1(A). Lino is simply one more inmate with medical issues; many of the inmates within the BOP system, particularly those at FMC Butner, suffer from medical conditions substantially more serious than Lino's.

Medical records supplied by the BOP indicate that [REDACTED] and his condition is being monitored, and he is fully ambulatory and engages in all normal activities of daily living. As recently of May 4, 2021, Lino visited with medical staff and raised "no complaints." Ex. 4 at 12. At a preventive care visit on May 10, 2021, he reported no significant changes to his condition and the medical staff indicated that he was "[c]ounseled on [REDACTED] and [REDACTED]." Id. at 2.

b. The risk of COVID-19 is not extraordinary or compelling because Lino was vaccinated

In light of Lino's vaccination, the fact that COVID-19 exists does not constitute an extraordinary or compelling circumstance. "[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread." United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020); see also United States v. Roeder, 807 F. App'x 157, 161 n.16 (3d Cir. 2020) ("[T]he existence of some health risk to every federal prisoner as the result of this global pandemic does not, without more, provide the sole basis for granting release to each and every prisoner within our Circuit.").

In this case, there is no exceptional threat to Lino's health. In February and March 2021, Lino received two doses of the Food and Drug Administration ("FDA")-approved Pfizer vaccine. (Ex. 3 at 1). See FDA Decision Memorandum, Pfizer – Dec. 11, 2020, https://www.fda.gov/media/144416/download. Thus, Lino has provided effective "self-care"

against the virus and does not present any extraordinary and compelling reason allowing compassionate release.[5]

2. The relevant Section 3553(a) factors favor a sentence of at least 324 months

Even "if the defendant is eligible [for compassionate release], the court must determine whether, and to what extent, to exercise its discretion to reduce the sentence." United States v. Moore, 975 F.3d 84, 89 (2d Cir. 2020). In exercising its discretion, the district court must consider the factors set forth in 18 U.S.C. § 3553(a) "to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). These factors gave the Court pause in evaluating whether a 27-year sentence was sufficient in light of the defendant's commission of multiple, gruesome murders. See Ex. 6 at 11 ("[O]ne of the elements of my concern is the fact that I presided over a trial in which there was ample testimony that this defendant was involved in committing two extremely wanton, gruesome and premeditated murders."). The defendant's participation in these murders was in furtherance of the violent Bonanno Crime Family, in which he had a leadership role. PSR ¶ 60.

Lino is a violent person who was implicated in multiple murders and played a particularly violent role in at least two. PSR ¶¶ 25, 29-30, 32-33. These murders were carried out pursuant to orders from leadership of the Bonanno Crime Family, a violent criminal organization that devastated the lives of its members, rivals, and friends and family members of anyone whom it encountered. The Court noted at sentencing that the defendant's racketeering was "like a Greek tragedy. There are no winners . . . Victims are losers, perpetrators are losers, families of the victims, families of perpetrators. No happiness comes from these events." Ex. 6 at 24.

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[5] Recent decisions overwhelmingly agree with the conclusion that defendants who have recovered from or were vaccinated against COVID-19 cannot demonstrate extraordinary and compelling health reasons meriting compassionate release. See, e.g., United States v. Godoy-Machuca, No. 16-CR-1508, 2021 WL 961780, at *2 (D. Ariz. Mar. 15, 2021) (defendant also recovered from COVID-19, providing an additional measure of protection); United States v. Grummer, No. 08-CR-4402, 2021 WL 568782, at *2 (S.D. Cal. Feb. 16, 2021) (denying compassionate release to defendant with several chronic medical conditions when defendant had been fully vaccinated against COVID-19); United States v. Wakefield, No. 19-CR-95, 2021 WL 640690, at *3 (W.D.N.C. Feb. 18, 2021) (obesity, diabetes, and hypertension, but defendant previously tested positive, and had received the first dose of the vaccine; "because he has already contracted the virus and recovered without complication, and because he is in the process of being vaccinated, the Defendant cannot meet his burden of establishing that his COVID-19 risk is an extraordinary and compelling reason for his release."); United States v. Roper, No. 16-CR-335, 2021 WL 963583, at *4 (E.D. Pa. Mar. 15, 2021) ("The risk posed to an inoculated Mr. Roper is not an extraordinary and compelling reason for his release."); United States v. Beltran, No. 16-CR-4, 2021 WL 398491, at *3 (S.D. Tex. Feb. 1, 2021) (denying compassionate release to defendant with underlying health conditions when defendant had received first vaccine dose); see also United States v. Lipscomb, No. 18-CR-34, 2021 WL 734519, at *2 (M.D. Fla. Feb. 25, 2021) (inmate received both doses of a vaccine; "What's more, this demolishes Lipscomb's conclusory contention BOP is not taking adequate precautions. . . . This does not suggest BOP is taking COVID-19 lightly or not protecting Lipscomb.").

During the two decades that Lino committed crimes on behalf of this violent enterprise, he ran gambling businesses and loansharking operations and served as acting captain within the Family. PSR ¶ 60. Moreover, Lino helped Bonanno Crime Family members and associates kill at least four people, three because the victim was believed to have assisted law enforcement efforts (knowingly or unknowingly) to investigate the Family. PSR ¶¶ 25 (Napolitano), 29 (Infanti), 30-32 (Tuzzio) and 33 (Perrino).

The defendant's total commitment to his vicious criminal enterprise remains apparent to this day. He refused to acknowledge the existence of the enterprise at his plea or sentencing proceeding, and his willingness to kill people who endangered the enterprise through law enforcement investigations or through reckless violence with rival groups merits substantial punishment.

Releasing this defendant, whose multiple "gruesome" crimes lack any mitigating factors, would send the message that no sentence would survive a violent criminal's first encounters with the aging process. Cf. 18 U.S.C. § 3553(a)(2)(B). This Court should not send that signal. A substantial sentence was necessary in 2004 to ensure that violent racketeers knew that any consequences for their actions would be severe. That message would be undercut if sentences for defendants like Lino were artificially shortened because of medical conditions. That is emphatically true where, as here, the defendant's medical conditions would not preclude him from resuming a leadership role in the same criminal enterprise on whose behalf he has murdered multiple people—an eventuality the Court should guard against by ensuring that the defendant serves his lawfully, and justly, imposed term of 324 months' imprisonment.

IV. Conclusion

For the foregoing reasons, the Court should deny Lino's motion for relief pursuant to 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c)(1)(A)(i).

Applicant Details

First Name	**Jordyn**
Last Name	**Manly**
Citizenship Status	**U. S. Citizen**
Email Address	**jmanly@paulweiss.com**
Address	**Address** Street **10 E. 29th St. Apt. 22D** City **New York** State/Territory **New York** Zip **10016** Country **United States**
Contact Phone Number	**6072799100**

Applicant Education

BA/BS From	**Simon Fraser University, Canada**
Date of BA/BS	**June 2019**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 14, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Langfan Family First-Year Moot Court Competition**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 9, 2023

Jordyn Manly
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The Honorable Kiyo A. Matusmoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am a current Associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP, and wish to apply for a clerkship in your chambers for the 2025-2026 term or any term thereafter. By clerking, I hope to further hone my legal research and writing skills while gaining a unique perspective of advocacy from the eyes of the judiciary.

By participating in various clinics and practicums during my time at Cornell Law School, I have gained significant experience with collaborative and detail-oriented work and have developed my research, writing and analytical skills. As a General Editor for the Cornell Law Review, I was able to further refine these skills while writing my Note, entitled *Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior*, which was published last year. Over the past three years, I have been able to draw upon both my academic and previous work experience to demonstrably strengthen my research and writing skills while working as a judicial intern for the Eastern District of New York and, more recently, as a Summer Associate and Associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP. I am confident that my legal research and writing capabilities, project management skills, and collaborative nature will allow me to make a meaningful contribution to your chambers.

Enclosed please find a resume, law school transcript, undergraduate transcript, and writing sample. In addition, you will find letters of recommendation from Cornell Law School professors Hans, McKee, and Yale-Loehr. Should you require additional information, please do not hesitate to contact me.

Thank you for your time and consideration.

Sincerely,

Jordyn Manly

Jordyn Manly

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EDUCATION

Cornell Law School, Ithaca, NY — May 2022
Juris Doctor, magna cum laude, Order of the Coif

GPA: 3.95, Rank: 5th
Honors: *Cornell Law Review*, General Editor
CALI Awards in Asylum and Convention Against Torture Appellate Clinic, Immigration & Refugee Law, and Social Science and Law
John J. Kelly Memorial Prize for scholarship, fair play, and good humor
Activities: Teaching Assistant for Constitutional Politics, Nature and Functions of Law, and Psychology and Law
Jewish Law Students Association, Treasurer

Simon Fraser University, Burnaby, BC — May 2019
Bachelor of Arts in Criminology

GPA: 3.83
Honors: Dean's Honor Roll (GPA above 3.5); President's Honor Roll (GPA above 4.0)

EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY — Summer 2021; September 2022 – Present
Associate

- Prepared witness outlines, drafted pre- and post-trial memoranda, and assisted in all stages of LCIA arbitration
- Drafted dispositive motions filed in federal court
- Researched and drafted briefs and memoranda in a wide variety of civil litigation matters including employment disputes, ERISA proceedings, trade secret actions, FOIA appeals, and class action lawsuits
- Participated in weekly FTCA settlement negotiations with the DOJ on behalf of families separated at the border

Cornell Asylum and Convention Against Torture Appellate Clinic, Ithaca, NY — January 2021 – May 2022
Clinic Participant

- Represented asylum applicants in appeals before the Second Circuit and Board of Immigration Appeals
- Developed theory of appeal; drafted and filed federal appellate petitions and substantive motions

United States District Court for the Eastern District of New York, Brooklyn, NY — May – August 2020
Judicial Intern to the Honorable Ann M. Donnelly

- Wrote memoranda, drafted decisions and orders on motions to dismiss and other dispositive motions

Ministry of the Attorney General, Crown Attorney's Office, Toronto, ON — June – August 2019
Summer Intern, Homicide Division

- Examined witness statements, evidence, and police statements to determine strength of Crown's case

Greenspan Partners LLP, Toronto, ON — Summers 2015 – 2018
Summer Law Student

- Conducted one-on-one witness interviews and assisted in client-intake interviews
- Engaged in trial preparation: wrote memoranda of law, and composed questions for cross-examination

PUBLICATIONS

Jordyn Manly, Note, *Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior*, 107 CORNELL L. REV. 567 (2022)

Cornell Law School - Grade Report - 06/02/2022

Jordyn R Manly

JD, Class of 2022

Course	Title	Instructor(s)	Credits	Grade	
Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 5001.3	Civil Procedure	Gardner	3.0	A-	
LAW 5021.2	Constitutional Law	Tebbe	4.0	A	
LAW 5041.2	Contracts	Hillman	4.0	A	
LAW 5081.5	Lawyering	McKee	2.0	A-	
LAW 5151.2	Torts	Heise	3.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8968
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8968

^ Dean's List

Spring 2020 (1/14/2020 - 5/11/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 5001.1	Civil Procedure	Cavanagh	3.0	SX	
LAW 5061.3	Criminal Law	Ohlin	3.0	SX	
LAW 5081.5	Lawyering	McKee	2.0	SX	
LAW 5121.3	Property	Underkuffler	4.0	SX	
LAW 6822.1	Social Science and the Law	Hans	3.0	SX	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	0.0	0.0	N/A
Cumulative	31.0	31.0	31.0	31.0	16.0	16.0	3.8968

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6002.1	Bioethics: From Nuremberg to Modern Times	Obasogie	1.0	A	
LAW 6433.101	Ethics in Policing	Gagan	3.0	A-	
LAW 6511.1	Intellectual Property	Liivak	3.0	A	
LAW 6861.601	Supervised Teaching	Hans/Rachlinski	3.0	SX	
LAW 7311.1	Immigration and Refugee Law	Yale-Loehr	3.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	10.0	10.0	4.0000
Cumulative	44.0	44.0	44.0	44.0	26.0	26.0	3.9365

^ Dean's List

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6264.1	Criminal Procedure - Investigations	Colb	3.0	A-
LAW 6401.1	Evidence	Weyble	3.0	A
LAW 6861.604	Supervised Teaching	Chutkow	2.0	SX
LAW 7072.101	Animal Rights	Colb	3.0	S
LAW 7801.301	Asylum and Convention Against Torture Appellate Clinic	McKee/Yale-Loehr	4.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	10.0	10.0	3.9010
Cumulative	59.0	59.0	59.0	59.0	36.0	36.0	3.9266

^ Dean's List

Fall 2021 (8/24/2021 - 12/3/2021)

LAW 6641.1	Professional Responsibility	Wendel	3.0	A
LAW 6861.606	Supervised Teaching	Chutkow	2.0	SX
LAW 7739.101	The Role of the State Attorney General	Callery/McArdle	3.0	A
LAW 7810.301	Advanced Asylum and Convention Against Torture Appellate Clinic	McKee/Kelley-Widmer	3.0	A
LAW 7833.301	Criminal Defense Trial Practicum - Local Court	Salisbury	4.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	13.0	13.0	4.0000
Cumulative	74.0	74.0	74.0	74.0	49.0	49.0	3.9461

^ Dean's List

Spring 2022 (1/25/2022 - 5/2/2022)

LAW 7810.301	Advanced Asylum and Convention Against Torture Appellate Clinic	McKee	4.0	A	CALI
LAW 7925.301	New York Attorney General Practicum 1	Callery/Grossman/Sutton	6.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	10.0	10.0	10.0	10.0	4.0	4.0	4.0000
Cumulative	84.0	84.0	84.0	84.0	53.0	53.0	3.9501

^ Dean's List

Total Hours Earned: 84

Received JD magna cum laude on 05/29/2022

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Please accept this letter as my recommendation for Jordyn Manly, who is applying for a clerkship in your chambers. Jordyn is a superb writer with an outstanding ability to research and concisely analyze complex legal issues. She will make an excellent clerk.

I am very familiar with Jordyn's abilities because I have taught her for three semesters: two semesters in Lawyering, a course that introduces first-year law students to legal research, writing, and analysis; and one semester in the Asylum & Convention Against Torture Appellate Clinic, which accepts only eight second- and third-year law students. At the end of her first semester in law school, Jordyn earned an A- in Lawyering. Because I had to curve such a small group of students (only 35 that semester), an A- grade encompassed a wide range of abilities, and Jordyn was at the top of that range. In the second semester, Jordyn produced the best persuasive memo in class. My personal notes on that memo said, "Killed it. Very clear law . . . very well-organized. Everything on point with theory. Strong use of case-based argument and facts." Her rewrite of that memo was even stronger, which demonstrated to me that she cared about the work and was willing to put her best effort into the assignment. This was particularly notable since the course had become pass-fail during the middle of the semester because of COVID-19. Further, the assignment itself was substantively difficult, addressing asylum, a complex area in immigration law. Jordyn had to extract the facts from a hearing transcript, witness declaration, and multiple country-conditions reports, and argue that her client was eligible for asylum on the ground of his imputed political opinion. She accomplished these tasks with aplomb.

In the Asylum Clinic, Jordyn and her teammate produced an excellent brief—one of the best I have seen in the clinic, which I have co-directed for eleven years. This brief addressed legal and factual errors made by the Board of Immigration Appeals and the immigration judge, who denied our client's asylum and Convention Against Torture claims. Jordyn chose to argue our client's Convention Against Torture claim since she had already written on an asylum claim in Lawyering, further demonstrating her willingness to take on challenges. She did such an excellent job that our co-counsel, a managing attorney at Catholic Charities in New York City, repeatedly commented on it.

Finally, Jordyn has a cheerful demeanor, is highly professional, and is a pleasure to work with. Her communication style is direct but always courteous. For example, I made a mistake when critiquing one of her papers in Lawyering, a mistake she caught when I returned the paper to her. I was so impressed with the way she politely called it to my attention that, afterwards, I offered to write her a recommendation should she ever need one. And I am happy that she has called on me for this task!

I have no doubt that Jordyn will be an excellent clerk and attorney, regardless of where her career takes her. Please feel free to call me on my cell (607.280.7665) should you need any further information.

Sincerely,

Estelle M. McKee

Clinical Professor of Law (Lawyering)

Estelle McKee - emm28@cornell.edu - (607) 255-5135

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to offer my strongest endorsement of Jordyn Manly who has applied for a judicial clerkship with you. Jordyn is an outstanding student at Cornell Law School. She has excelled in all ways during her time here. Based on her accomplishments and my own direct experience with her, I am confident that she will be an excellent clerk and I encourage you to consider her application most carefully.

I met Jordyn last year when she enrolled in my Social Science and Law course as a 1L student in the spring of 2020. During their first year, 1L students choose one elective in addition to taking the standard first year courses. The Social Science and Law course takes a critical approach to analyzing the potential contributions (and, I should add, also the perils) of lawyers' use of social science research in litigation. The semester was demanding in so many ways, as the health crisis from COVID-19 required us to move to online instruction halfway through the semester. Jordyn stood out as an active and engaged participant both before and after the change, contributing thoughtful commentary and moving the discussion forward. Despite the many challenges that she and other 1L students faced that semester, Jordyn took them in stride, mastering the material and performing at a top level. Like many law schools, Cornell Law School shifted to all pass-fail grading that semester. Knowing that they were not being graded, other students might have worked less diligently. Not Jordyn. Her exam performance and overall course contributions were the best in the class, and she received the CALI award for that course.

Her excellence in my course is in keeping with her overall performance in law school. In addition to excelling in her classes, she also serves as a General Editor of the Cornell Law Review. I was delighted to see that her Note, "Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior," was recently accepted for publication in a forthcoming Cornell Law Review issue. She also served superbly as a teaching assistant for a popular Psychology and Law course that Professor Jeffrey Rachlinski and I co-teach to Cornell undergraduates. The course was particularly challenging for teaching assistants as it included 160 students, all of whom participated remotely in accordance with Cornell's COVID-19 protocol for large classes. Both Professor Rachlinski and I were extremely grateful to Jordyn for all she contributed to make the course a good educational experience for our students, despite the trying circumstances.

In addition to all she has learned at Cornell Law School, Jordyn has developed a broad range of legally relevant experience. She worked as a summer law student for four summers, from 2015 to 2018, at a top Toronto criminal defense firm, Greenspan Partners LLP. Then, Jordyn interned during the 2019 summer for the Ministry of the Attorney General in Toronto and worked with prosecutors. She told me that it was extremely beneficial to see the work of the criminal courts through both the prosecution and defense perspectives. Last summer, she worked as a judicial intern for Judge Ann Donnelly in the U.S. District Court of the Eastern District of New York, continuing to expand and enrich her perspective on the litigation process.

These diverse experiences and her coursework have reaffirmed for Jordyn her keen interest in litigation practice. A judicial clerkship with you would augment and enrich her understanding of judicial perspectives on litigation. She also recognizes how the clerkship experience will help her perfect her already strong legal analysis and writing ability. In turn, her superb legal research and writing skills and collaborative approach will contribute positively to the work of your chambers.

I recommend Jordyn Manly to you without reservation. Should you wish to discuss any aspect of her application, please do not hesitate to contact me.

Sincerely,

Valerie P. Hans, Ph.D.

Charles F. Rechlin Professor of Law

Valerie Hans - vh42@cornell.edu - 607-255-0095

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

This is a letter of recommendation on behalf of Jordyn Manly. I first got to know Jordyn in Fall 2020, when she was a 2L in my immigration and refugee law class. Jordyn was well-prepared for every class and gave insightful comments throughout the semester. Jordyn completed a number of written assignments for the class, participated in a mock congressional hearing, and completed a final exam that included having to analyze a potential Supreme Court immigration case. I gave her an A+ in the class, which she easily deserved and which was especially good considering she was only a 2L at the time and there were several 3Ls in the class. Jordyn received the CALI award for having the highest grade and being the best student in the class.

I also know Jordyn from her work in the Asylum and Convention Against Torture Appellate Clinic in Spring 2021, which I co-direct with Estelle McKee. Although I didn't directly supervise Jordyn in our asylum clinic, I reviewed a draft of a brief she and her teammate wrote in their Second Circuit appeal on behalf of an asylum applicant from El Salvador. The draft brief was one of the best drafts I have seen in the 15+ years I have run the asylum clinic. I had very few comments to improve the draft, either substantively or stylistically.

As a former law clerk to a federal judge myself, I know the importance of hiring someone with an excellent combination of legal research skills, writing ability, intellectual firepower, and the ability to work well with others. Jordyn combines all four characteristics incredibly well. Moreover, she is nice, mature, and easy to work with. She always completed her work on time, even though she had many other commitments, including law review, moot court, and other classes.

For all these reasons, I enthusiastically recommend Jordyn for a clerkship with you.

If you have any questions, please call me at (607) 379-9707.

Sincerely,

Stephen W. Yale-Loehr

Professor of Immigration Law Practice

Stephen Yale-Loehr - swy1@cornell.edu - 607-254-4759

Jordyn Manly

10 E. 29th St.., Apt. 22D, New York, NY 10016 | 607-279-9100 | jmanly@paulweiss.com

WRITING SAMPLE

I prepared the attached memorandum for my 1L Legal Research and Writing class at Cornell Law School. This assignment required drafting a persuasive brief in support of a client's application for asylum in the United States. It is entirely based on research I conducted using Westlaw and Lexis Advance.

This memorandum has not been edited by anyone other than myself, and was not revised after receiving feedback from others.

Jordyn Manly
Attorney for Applicant
Erie County Legal Services
237 Main Street, Suite 400
Buffalo, NY 14203
Phone: 716-660-1300

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
BUFFALO, NEW YORK

In the Matter of	)	
	)	
Antonio Manuel RIVAS,	)	
	)	File No.: A208-255-989
Applicant,	)	
	)	
In Removal Proceedings.	)	
	)	

APPLICANT'S BRIEF IN SUPPORT OF ASYLUM APPLICATION

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INTRODUCTION

Though the journey through Mexico was treacherous, Antonio Rivas knew that his only option was to make it to the United States. Returning home would mean risking his life. Returning home would mean going back to Ixquisis, a town ruled by a powerful gang of narco-traffickers. In the small border town, narcotics traffickers ("narcos") exercised vast authority by claiming and controlling large areas of land, violently opposing anyone who posed a threat to their territory.

A threat was how the narco-traffickers saw Rivas, an employee of land development company PDH, whose building of a hydroelectric plant challenged the narcos' authority by threatening their territory—the very source of their power. The narcos perceived Rivas as supporting PDH, imputing to him an anti-authority political opinion. This imputed opinion became the central reason for their brutal attack that had left Rivas bloody and bruised on the side of the road, semi-conscious and unable to speak.

To deny Rivas' asylum claim would be to deny a young man the opportunity to live without fear, to live without constantly wondering if today would be the last day he would ever see his parents and four younger siblings. Is this what we as Americans stand for?

STATEMENT OF THE CASE

In Guatemala, narcotics traffickers ("narcos") operate across the country, claiming and exerting control over large areas of land. Ex. 5, at 3. The narcos are resistant to anyone entering their land and will mount an opposition to anyone who

tries to enter it. *Id*. Thus, significant community tension arises from foreign companies who engage in land development projects in Guatemala, exacerbated by a lack of environmental standards and minimal governmental oversight. *Id.* at 2. The government does little to monitor the ways in which foreign companies are using Guatemalan land. *Id.* at. 2-3.

Promoción y Desarrollos Hídricos ("PDH")

Promoción y Desarrollos Hídricos ("PDH") is a foreign development company that began building a hydroelectric plant in Ixsquisis in 2009. Ex. 3, at 1. Ixquisis, a small town near the Mexican border, is one area in which the narcos operate by exerting control over land. *Id.* at 2; Ex. 5, at 3. Ixquisis is an ideal location for the narcos, as it sees little development, very few police, and is home to an illegal landing strip. Ex. 3, at 2. PDH's hydroelectric plant poses difficulties for the narcos' operations due to the increase in local traffic and heightened police presence. *Id*. The narcos are therefore supporting indigenous protesters, who oppose PDH's hydroelectric plant on environmental grounds. *Id*. The narcos may pose as community members pretending to protest on the basis of environmental concerns. Ex. 5, at 3. The narcos may also be community members themselves, with local people being involved in narcotics trafficking. *Id*.

On three occasions, protesters violently attacked PDH's hydroelectric plant in Ixsquisis. While the government may paint opponents to development as narcotics traffickers, here, the attackers with armed with high-caliber firearms, the exact

kind used by the narcos. *Id*. at 2. PDH workers were killed, and others left injured. *Id*.

The Attack of Antonio Rivas

Applicant Antonio Rivas was born in Guatemala, and at age eighteen began working to financially support his family. Ex. 3, at 1. In 2015, Rivas was hired as a security guard for PDH, staffing security posts around the plant while wearing his uniform with "PDH" in large letters on the back. *Id*.

In 2017, Rivas, clad in his PDH uniform, was travelling home from work on a road leading to the hydroelectric plant used only by PDH workers. *Id*. at 2-3. Seeing someone struggling with their car on the road, Rivas pulled over to help. *Id*. at 3. Four masked men, speaking both the local indigenous language and Spanish, got out of the car. *Id*. The men asked, "how can you work for a company that is poisoning the water you drink?" and insisted that Rivas stop working for PDH and help them instead. *Id*. Rivas refused, saying "PDH gives people good jobs and I support them!" *Id*. The men immediately began to beat him, punching, kicking, slapping, and hitting him in the neck with their high-caliber firearms, the same ones used by the narcos. *Id*. at 2-3. Rivas was left bleeding and bruised on the side of the road, semi-conscious and barely able to speak. *Id*. at 3. While recovering at home, Rivas received an anonymous phone call, saying "we will finish you off next time" and "you and all of PDH had better get out of Ixquisis." *Id*.

Worried for his son's life, Rivas' father sold the family's land and gave what little money he made to Rivas so that he could escape Guatemala. *Id*. In September

of 2017, after attempting to cross into the United States, Rivas was apprehended in Arizona and detained for a month. *Id.* at 4. In August of 2018, Rivas submitted an asylum application in this Immigration Court. Ex. 2, at 1. The parties have stipulated that Rivas has met all of the elements of asylum except for political opinion and nexus.

ARGUMENT

I. THE IMMIGRATION JUDGE SHOULD FIND APPLICANT ANTONIO RIVAS ELIGIBLE FOR ASYLUM BECAUSE THE POLITICAL OPINION IMPUTED TO HIM BY HIS PERSECUTORS WAS A CENTRAL REASON FOR HIS PERSECUTION.

Support for PDH is a political opinion because PDH's land development threatens the political status quo by challenging the authority of the narco-traffickers ("narcos") in Ixquisis. The narcos, Rivas' persecutors, imputed this political opinion to him because they perceived him to support PDH as a result of his employment with, and expressed statement of support for, the company. This perception was at least one central reason for the narco-traffickers' persecution of Rivas because PDH's land development in Ixquisis represented a challenge to their authority—authority based on their control of large areas of land. In Ixquisis, it is precisely this control of land that allows the narcos to maintain their status as the area's ruling regime.

An applicant is eligible for asylum when they demonstrate that their actual or imputed political opinion was at least one central reason for their past persecution. *See* 8 U.S.C. § 1158 (2008).

Here, the Immigration Judge should find that Antonio Rivas is eligible for asylum because his perceived support for PDH, the political opinion imputed to him by his persecutors, was at least one central reason for his persecution.

A. Support for PDH is a political opinion because PDH's land development threatens the political status quo by challenging the authority of Guatemala's narco-traffickers, who act as the ruling regime in Ixquisis.

In determining if an opinion is political, courts must consider the case-specific political context. *See Zhang v. Gonzales*, 426 F.3d 540, 547 (2d Cir. 2005). Although political issues typically involve the government, political issues in some countries may involve governing entities outside of the formal institutions of government when such entities act as the ruling regime. *See Hernandez-Chacon v. Barr,* 948 F.3d 94, 104 (2d Cir. 2020) (concluding that El Salvador's MS Gang acted as the ruling regime by controlling large areas of land, and the applicant's resistance to the gang's sexual demands thereby challenged the authority of the ruling regime).

Therefore, an opinion can be political when it challenges the authority of the ruling regime, even if the opinion initially seems economic. *See Zhang*, 426 F.3d at 548; *Osorio v. I.N.S.*, 18 F.3d 1017, 1029-1030 (2d Cir. 1994) (finding that the applicant's union activities advocating for higher wages and reinstatement of workers, though appearing to be economic in nature, were fundamentally political

because they threatened the status quo by presenting as opposition to governmental policies).

Here, support for PDH is a political opinion within the political context of Guatemala. In many areas of Guatemala such as Ixquisis, the narcos, though not part of the formal institutions of government, act as the ruling regime. The narcos do so by claiming and controlling large areas of land. Ex. 5, at 3. *See Hernandez-Chacon*, 948 F.3d at 104 (concluding that the MS Gang in El Salvador, through control of land, acted as the ruling regime despite being an entity outside of the formal institutions of government).

Although PDH employees benefit financially from their work, support for PDH is not merely economic. Support for PDH, a company advocating for land development, is a political opinion because it threatens the political status quo by challenging the authority of the narcos, Ixquisis' ruling regime. The narcos' authority is challenged by land development because such authority relies on their control over the land. The narcos operate in Ixquisis because it is home to little development and very few police. Ex. 3, at 2. PDH and its supporters are threatening the political status quo by building a hydroelectric plant, thereby increasing development and police presence in the area. *See Osorio*, 18 F.3d at 1029-1030 (finding union support for workers to constitute a political opinion by threatening the political status quo).

B. Rivas' persecutors imputed a political opinion to Rivas because they perceived him to support PDH due to his employment for PDH.

A political opinion may be the applicant's actual opinion or one imputed to them, even if mistakenly imputed. *See Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005). A political opinion is imputed to an applicant if their persecutors perceive them to hold that opinion, a perception which may be based on the applicant's associations or activities. *See id.* at 130 (finding that the Chinese authorities could have imputed an anti-government political opinion to the applicant due to his activities in selling outlawed Falun Gong literature, even though he did not support the Falun Gong movement and only sold the literature for profit).

Here, Rivas' persecutors imputed a political opinion to him by perceiving him to support PDH. Rivas' persecutors perceived him to support PDH based on his association with, and activities for, PDH. *See Gao*, 424 F.3d at 129 (finding that the authorities perceived the applicant to support the Falun Gong movement on the basis of his activities in selling outlawed Falun Gong literature). Rivas' uniform displaying "PDH" in large letters on the back associated him with PDH while he engaged in work activities. Ex. 3, at 1. Moreover, Rivas explicitly told his persecutors that "PDH gives people good jobs and I support them!" providing further evidence that Rivas' persecutors would perceive him to support PDH. *Id.* at 3.

C. Rivas' perceived support for PDH was at least one central reason for the narco-traffickers' persecution of him because both the persecutors' own statements and the surrounding political context demonstrate that the narco-traffickers' motive was to stop PDH's development of land in Ixquisis which challenged their authority.

An applicant need not provide direct evidence of their persecutor's motive to establish that their actual or imputed political opinion was at least one central reason for their persecution. *See Zhang*, 426 F.3d at 545. Direct evidence in the form of the persecutors' own statements, however, may offer insight into the motive for the persecution. *See Acharya v. Holder*, 761 F.3d 289, 300 (2d Cir. 2014) (finding that the Maoists' explicit mention of the applicant's political association with the Nepali Congress during the attack provided direct evidence that they were motivated by the applicant's political opinion). Nevertheless, an applicant need only provide some circumstantial evidence of their persecutor's motive. *See Zhang*, 426 F.3d at 545. Circumstantial evidence may be found by examining the political context of the persecution. *See Vumi v. Gonzales*, 502 F.3d 150, 156 (2d Cir. 2007).

Where an applicant's persecutors had more than one motive for persecution, the applicant need only show that their actual or imputed political opinion was at least one central reason for the persecution, and not merely incidental or subordinate to another reason. *See In Re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007).

Here, Rivas' imputed support for PDH was at least one central reason for his persecution, as both the direct and circumstantial evidence demonstrate. Rivas' persecutors explicitly mentioned his association with PDH when they attacked him,

providing direct evidence that they were motivated by his association with the company. Ex. 3, at 3. *See Acharya*, 761 F.3d at 300 (finding that the Maoists' explicit mention of the applicant's political association with the Nepali Congress during the attack provided direct evidence that their motivation for persecution stemmed from this association). However, even if such statements had not been made by Rivas' persecutors, an abundance of circumstantial evidence demonstrates that the persecutors' motive stemmed from Rivas' perceived support for PDH. Considering the Guatemalan political context, Rivas' persecutors use of narcos-type firearms and gang-style ambush attack indicate that his persecutors were narcos. Ex. 3, at 2-3. Though the persecutors spoke both Spanish and the local indigenous language, this is not surprising since narcos in the past have posed as members of the indigenous community or may even be local indigenous people who are involved in narco-trafficking. Ex. 5, at 3.

While Rivas' persecutors may have been partly motivated by their own desire to stop PDH's land development, the pro-PDH opinion that they imputed to Rivas was still a central reason for their persecution. It was not merely an incidental or subordinate reason because had they not imputed such an opinion to him, they would not have persecuted him. Rivas' persecutors attacked him on the road leading to PDH's hydroelectric plant, one used only used by PDH workers, demonstrating that his persecutors intended to persecute PDH supporters. Further, only after Rivas refused to stop working for PDH and stated that "PDH gives people good jobs and I support them!" did his persecutors begin to physically attack him. *Id*. By

scaring PDH workers into no longer working for PDH or leaving Ixquisis, the narcos aimed to disable PDH from advancing their land development projects. In this way, the narcos could retain their control over the land and thus their authority as the ruling regime.

CONCLUSION

Applicant Antonio Rivas seeks for the Immigration Judge to find him eligible for asylum in the United States. For the aforementioned reasons, the Court should grant Rivas' claim for relief.

Respectfully submitted this 2 day of April, 2020.

Jordyn Manly

Applicant Details

First Name	**Casey**
Last Name	**Mason**
Citizenship Status	**U. S. Citizen**
Email Address	**cem113@duke.edu**
Address	**Address** Street **600 Willard Street #669** City **Durham** State/Territory **North Carolina** Zip **27701** Country **United States**
Contact Phone Number	**3017676386**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2019**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 6, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Siegel, Neil S.
Siegel@law.duke.edu
919-613-7157
Rich, Rebecca
rich@law.duke.edu
919-613-7143
Bradley, Kathryn Webb
Kbradley@law.duke.edu
(919) 613-7014

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cassandra Mason
600 Willard Street #669
Durham, NC 27701

The Honorable Kiyo A. Matsumoto
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am writing to express my sincere interest in clerking for you during the 2025-2026 term following my clerkship with Judge Rosemary S. Pooler on the Second Circuit. I am a third-year student at Duke University School of Law and expect to graduate with my J.D. in May of 2023. I look forward to moving to New York City to practice upon graduation, and I would be honored to serve my community early in my career as a judicial clerk.

I believe I can ably support the work of your chambers and thrive in the fast-paced environment of E.D.N.Y. As an intern with the North Carolina Department of Justice's Special Litigation Section and a Summer Associate at Cravath, Swaine & Moore LLP, I researched many complex topics and drafted several motions filed in state and federal courts, gaining both substantive lawyering skills and the ability to manage multiple important projects at once. I have also enjoyed mentoring fellow Duke Law students as both a Legal Writing Tutor and a Notes Editor for the *Duke Law Journal*, strengthening my own writing ability in the process. Finally, I have had tremendous opportunities to engage in pro bono work at Duke Law, including working in the Wrongful Convictions Clinic to exonerate a client who has spent most of his life unjustly incarcerated. These experiences have solidified my interest in public service and given me the confidence to succeed as a clerk in your chambers.

I have enclosed my resume, Duke Law transcript, and writing sample for your review. I have also included recommendation letters from Professors Neil Siegel, Kathryn Bradley, and Rebecca Rich. Please let me know if you need additional information. Thank you so much for your consideration.

Respectfully,
Cassandra Mason

Cassandra Mason

600 Willard Street #669
Durham, NC 27701

cassandra.mason@duke.edu
(301) 767-6386

6827 4th Street NW #303
Washington, DC 20012

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2023

GPA:	3.84, *Top Five Percent of Class*
Honors:	Duke Law Journal, *Notes Editor*
	Dean's Award for Highest 1L Grade, *Criminal Law*
	James S. Bidlake Memorial Award for Superior Achievement in Legal Analysis, Research and Writing
Note Topic:	*Evaluating Remedies for Domestic Violence Victims in North Carolina Using an International Human Rights Framework*
Activities:	If/When/How Lawyering for Reproductive Justice, *VP of Pro Bono*
	Wrongful Convictions Clinic, *Student Attorney*
	Legal Writing Tutor

University of North Carolina, Chapel Hill, NC
Bachelor of Arts in Political Science and Economics, *Highest Distinction*, 2019

GPA:	3.88
Thesis:	*Gender and Bipartisanship: Evidence from the United States House of Representatives*
Honors:	Highest Honors in Political Science
	Buckley Public Service Scholar
Activities:	Alpha Phi Omega National Service Fraternity, *Membership Chair*
	Economics Peer Tutor

EXPERIENCE

The Honorable Rosemary S. Pooler, U.S. Court of Appeals for the Second Circuit, Syracuse, NY
Judicial Law Clerk, 2024-25 term, *expected*

Cravath, Swaine & Moore LLP, New York, NY
Summer Associate, May 2022 – July 2022

- Engaged in ongoing defense of Fortune 100 company; tasks included assisting with drafting motions and expert reports, helping with deposition preparation, and researching Delaware case law.
- Independently drafted reply brief in support of motion to dismiss in complex securities fraud dispute.
- Collaborated daily with small team of associates and partners on case management and strategy.

North Carolina Department of Justice, Raleigh, NC
Extern, Special Litigation Section, Aug. 2021 – Dec. 2021

- Assisted with Section's representation of State of North Carolina in complex litigation, including matters related to constitutional questions, civil rights disputes, and criminal appeals.
- Researched and created internal memoranda on numerous substantive and procedural questions.
- Drafted criminal appellate briefs, motions to dismiss, and various other filings for state and federal courts.
- Prepared for and attended depositions, mediations, hearings, and Fourth Circuit oral arguments.

Duke Law Health Justice Clinic, Durham, NC
Intern, May 2021 – July 2021

- Advised low-income clients with HIV, cancer, and other serious illnesses on accessing Social Security and private disability benefits.
- Drafted wills, powers-of-attorney, advance directives, and other end-of-life documents.
- Independently managed caseloads and oversaw all aspects of client representation, from initial client intake to final document signing.

Cassandra Mason

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2020 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Sachs, S.	4.1	4.50
Contracts	Haagen, P.	3.6	4.50
Torts	Beskind, D.	3.5	4.50
Legal Analysis, Research, Writing	Rich, R.	*Credit Only*	0.00
Professional Development	Multiple	*Credit Only*	1.00

2021 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Siegel, N.	3.8	4.50
Criminal Law	Farahany, N.	4.2	4.50
Property	Bradley, K.	3.5	4.00
Legal Analysis, Research, Writing	Rich, R.	4.1	4.00

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Business Associations	Fletcher, G.	3.8	4.00
Ethics	Richardson, A.	3.7	2.00
Human Rights Advocacy	Huckerby, J.	3.7	2.00
Externship	Gordon, A.	*Credit Only*	5.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Rights Colloquium	Lemos, M.	3.9	2.00
Evidence	Beskind, D.	4.2	4.00
Federal Courts	Siegel, N.	4.0	4.00
Trusts & Estates	Coleman, D.	3.5	3.00
Reproductive Justice Readings	Bradley, K.	*Credit Only*	1.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Corporate Crime	Buell, S.	4.0	4.00
First Amendment	Benjamin, S.	4.0	3.00
Law & Literature: Race & Gender	Jones, T.	3.8	3.00
Wrongful Convictions Clinic	Coleman, J.	3.5	4.00
Transgender Issues Readings	Simmons, A.	*Credit Only*	1.00

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Rights Litigation	Miller, D.	--	3.00
Criminal Procedure	Griffin, L.	--	3.00
Judicial Decisionmaking	Lemos, M.	--	3.00
Negotiation	Thomson, C.	--	3.00

TOTAL CREDITS: 87
CUMULATIVE GPA: 3.84

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Cassandra Mason

Dear Judge Matsumoto:

I enthusiastically recommend Cassandra Mason for a clerkship in your chambers. Casey has abundant intellectual horsepower and serious legal acumen (those are not the same things). She also cares about the implications of legal ideas for the lives of real people, especially women. I enjoy having her in my classes. I am confident that she will succeed as a law clerk and a non-profit lawyer focused on reproductive justice and pro-choice advocacy.

During the Spring 2021 semester, Casey was a student in my first-year course in Constitutional Law. Students in the class studied constitutional provisions, historical practices, social movements, and judicial decisions constituting the U.S. system of government and protecting select individual rights (especially equal protection and modern substantive due process). In addition to studying legal doctrine, students were required to engage diverse historical understandings and theoretical perspectives on the American constitutional system. It was a large class by Duke Law standards (eighty-two students), but I had ample opportunity to evaluate her. She was always prepared when I called on her, and we met over Zoom to talk about clerkships. It was obvious to me from our conversation that she is strongly committed to clerking.

I offer a demanding course in Constitutional Law, and I administer a difficult final examination. The Law School mandates a median grade of 3.3. Based on her excellent exam performance and her solid course participation, Casey earned a 3.8, one of the highest grades in the class. (By the way, her 4.1 in Civil Procedure with Professor Stephen Sachs, who is now on the faculty at Harvard Law School, speaks volumes about Casey's ability. Professor Sachs teaches an extraordinarily demanding course in Civil Procedure. And the fact that Casey has two additional first-year grades that are above a 4.0 is kind of ridiculous.)

I was very pleased that Casey enrolled in my Federal Courts course this past spring. As I have told her and her classmates, I regard the class as one of the most difficult that the Law School offers—and as essential for clerking and litigating. Many Duke Law students shy away from Federal Courts because of its frightening reputation and potentially negative impact on their GPAs. Not Casey. Once again, she was prepared whenever I called on her, and I enjoyed getting to know her better over lunch with a few of her classmates as well as through other communications outside of class. Judging from her record of accomplishment so far, I expected Casey to do very well in the class, and I ended up being right: she wrote one of the very best exams in a sixty-student class and earned a stellar 4.0 in the course. Federal Courts, like several of her other classes, will help set her up for success as a law clerk and in her career in reproductive justice and abortion-rights advocacy.

I expect that Casey would fit in well in the close confines of your chambers. She is hard-working, understated, respectful, and caring. She also seeks a mentoring relationship with the judge for whom she clerks. She told me that she was inspired by the stories I tell my students about my past relationship with Associate Justice Ruth Bader Ginsburg (for whom I clerked).

Please feel free to contact me if I can be of additional help as you consider Casey's application. It would be my pleasure to speak with you about her.

Sincerely yours,

Neil S. Siegel
David W. Ichel Professor of Law and Political Science
Director, Duke Law Summer Institute on Law and Policy

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Cassandra Mason

Dear Judge Matsumoto:

I am a member of the writing faculty at Duke University School of Law and had the pleasure of teaching Cassandra (Casey) Mason in my first-year writing course in 2020-21. In addition, Casey worked under my supervision as a writing tutor for first-year legal writing students. I am delighted to write as a reference for Casey. She is a precise, thoughtful writer, a diligent student, and a lovely human being. She will be an exceptional law clerk.

Before I review Casey's work, let me first give some background about the first-year writing course at Duke. The year-long course is called Legal Analysis, Research, and Writing. As the name implies, it includes instruction not just in the mechanics of legal writing, but also in research skills, complex analysis, and the careful construction of legal arguments. Students complete a range of writing assignments—from short outlines and office memos to trial and appellate briefs. During Casey's 1L year, all 1L Duke law classes were online, but the workload and expectations of my legal writing class did not change, and it was still graded.

Casey did extremely well in this difficult, labor-intensive class. She received the highest grade in my class, a 4.1, and as a result, she won a James S. Bidlake Memorial Award for Superior Achievement in Legal Analysis, Research, and Writing. On the Duke Law grading scale, we aren't required to give grades above a 4.0, but we can do so for exceptional performance. Casey certainly deserved the exceptional grade. She was one of those rare students who always "got it," beginning in the first week of law school and continuing to the end of the spring semester. (Her impressive GPA is evidence of this as well, of course!) In my class, Casey very quickly mastered the basic structure of legal writing and demonstrated thorough, well-reasoned, sound legal analysis on every assignment. Even on ungraded assignments that often result in a mediocre effort from many students, Casey took initiative to challenge herself and produce top-quality work.

In addition, Casey is an absolutely elegant writer. Her prose is clear, concise, and lovely to read. Her attention to detail in grammar, document presentation, and citation is exceptional. I always tell students that their goal as a writer should be for the reader to pick up their brief and be carried away by its arguments without anything about the writing getting in the way. As a 1L in my class, Casey achieved this goal consistently. Sometimes after I finished reading her assignments, I would have to go back and look again to see if there was anything I could find to comment on because they were just that well written. Casey's research skills are also impressive. She did not shy away from the diligent, close reading that's required to excel at research. The research assignments she submitted were among the most detailed and thorough in the class.

On a personal level, Casey was a pleasure to teach. I am fortunate to be able to say that about many of my students, but Casey is one of those unique Duke Law students that make my job truly a delight. One of the things I like most about Casey is that she is both fabulously talented and refreshingly humble. She takes her work seriously without taking herself too seriously. She is friendly and engaged. In legal writing, she attended Zoom classes and participated regularly, she visited my office hours to ask nuanced questions about her assignments, and she worked hard. She was typically very well-prepared, both for class and for our individual meetings in conferences and office hours.

As I mentioned above, based on her strength as a legal writer and her steady, reliable, and warm personality, I hired Casey as a writing tutor in Fall 2021. As a tutor, she conducted one-on-one sessions with 1Ls who were identified by their legal writing professors as needing assistance with writing basics like grammar, punctuation, or efficiency. This is a relatively new program at Duke Law, and the hiring process is quite selective—Casey was one of only six tutors in the program. She excelled in the role. She was professional and responsive as an employee, and her reports of tutoring sessions were detailed and timely. As a tutor, she was well-prepared, attentive, and encouraging. Last spring, I met with a 1L in my class who had just had a tutoring session with Casey. He had been struggling all year with wordiness and attention to detail in his writing and was feeling frustrated after receiving a low grade on a recent major assignment. He talked about the tutoring session with Casey as a real gamechanger in helping him understand how to effectively and efficiently edit his own writing, and he scheduled another session with her. I can report that his writing improved substantially on his final assignment of the year.

Rebecca Rich - rich@law.duke.edu - 919-613-7143

I am pleased to give Casey my absolute highest recommendation. She will be an asset in any judicial chambers. If you have further questions, please contact me at (919) 613-7143 or rich@law.duke.edu.

Sincerely yours,

Rebecca Rich
Clinical Professor of Law
Assistant Director of Legal Writing

Rebecca Rich - rich@law.duke.edu - 919-613-7143

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 02, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Cassandra Mason

Dear Judge Matsumoto:

I am writing to offer my very enthusiastic recommendation for Cassandra ("Casey") Mason, a third year student at Duke Law School who has applied for a judicial clerkship with you. Casey is a talented and thoughtful young woman who will be a delight to have in chambers.

Casey was a student in my Property Law course during the spring 2021 semester. Although this very large lecture class was conducted entirely on Zoom due to the pandemic, she was fully engaged throughout the semester. She performed well when called on, volunteered regularly, and was always prepared. Students were allowed to earn extra credit by submitting news articles related to the course material, and Casey took full advantage of the opportunity, submitting the maximum number of articles and offering thoughtful comments about each.

Casey's exam was quite well done. The exam contained three questions, two involving complex and lengthy hypotheticals, and one focusing on policy. I set very tight word limits, which required students to be extremely thoughtful in crafting their answers. In the two questions with hypotheticals, Casey was able to analyze the legal rights and responsibilities of a number of parties, articulate and apply appropriate balancing tests to a nuisance claim, explain various doctrines relating to easements and covenants, accurately apply the Rule Against Perpetuities to an ambiguous conveyance, evaluate the respective rights of landlords and tenants, and assess ownership and intellectual property rights in a handwritten notebook. In the policy question, which asked students to determine how the U.S. Supreme Court should resolve the then-pending case of *Cedar Point Nursery v. Hassid*, Casey offered an extremely thorough and well-reasoned argument that demonstrated a solid understanding of the law and policy relating to constitutional Takings doctrine.

I had the chance to get to know Casey better last spring through an ad hoc seminar on Reproductive Justice. Our ad hoc seminar program allows students to craft a course on a legal issue of particular interest. Students are responsible for recruiting classmates to participate in the seminar and for finding a faculty member willing to supervise the undertaking. The students then work together to create a syllabus of readings and other materials, which must be approved by the Dean's Office. Our ad hoc seminars are offered on a pass/fail basis and are worth a single credit for a semester's work, which does not come close to approximating the amount of work involved. In addition to helping to organize the course, each student in this spring's ad hoc seminar was expected to lead a class session and submit three short papers reflecting on the topics discussed. I was impressed by the terrific job Casey and her classmates did in structuring the seminar, finding appropriate materials, and inviting experts as guest speakers. I have supervised other ad hoc seminars in past years, and this was easily among the best. The session Casey led on reproductive technologies was well constructed and led to an energetic discussion among her classmates. Her reflection papers were all well-written and thoughtful. In each, she was willing to challenge her own assumptions, learn from others, and confront difficult issues of law and policy.

Casey's consistently strong performance in her classes confirms her academic prowess. Her activities outside the classroom shed light on her other talents. Her writing skills are confirmed by her position on the *Duke Law Journal* and her work as a legal writing tutor. She is actively involved in public service and pro bono work through her leadership in a student reproductive justice organization, her service as an intern in our Health Justice Clinic, and her externship with the North Carolina Department of Justice.

I have been consistently impressed by Casey's many gifts. She is intellectually curious, capable of thinking deeply about complex problems, and a skilled and confident writer, all essential to a successful judicial clerkship. She is self-confident, focused, and grounded, attributes that allow her to manage a busy workload with aplomb. As if that were not enough, she is also simply a very nice young woman who will be a joy to work with every day.

Casey hopes to build a career as a litigator and understands the value of a judicial clerkship to that path. As a former judicial clerk and litigation law firm partner myself, I fully concur with Casey's assessment and am delighted she has chosen to seek a clerkship with you. I expect that she will make the most of the many opportunities such a clerkship will give her and that you will be proud to have her as a member of your courthouse family.

Kathryn Webb Bradley - Kbradley@law.duke.edu - (919) 613-7014

For all of these reasons, I urge you to give Casey your most serious consideration. If you have any questions or would like to discuss Casey further, please do not hesitate to contact me.

Sincerely yours,

Kathryn W. Bradley
Professor Emerita of the Practice of Law

Kathryn Webb Bradley - Kbradley@law.duke.edu - (919) 613-7014

Cassandra Mason
600 Willard Street #669
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cassandra.mason@duke.edu

WRITING SAMPLE

I wrote this appellate brief for my Legal Analysis, Research, and Writing course at Duke University School of Law in the spring of 2021. In this brief, we were asked to write on behalf of a media company that was sued in a class action lawsuit for allegedly disclosing users' data in violation of the Video Privacy Protection Act.

For brevity, I have omitted the Table of Contents and Table of Authorities. I am happy to provide the full appellate brief upon request.

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUE

Is an individual who downloads a free mobile app to access free videos a "subscriber" under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710(a)(1)?

STATEMENT OF THE CASE

Plaintiff-Appellant Christine Landgraf filed a class action complaint in the United States District Court for the Eastern District of Virginia against Defendant-Appellee East Coast E-News, Inc. ("E-News") on January 24, 2020. JA1. She seeks injunctive relief, other equitable relief, and damages under the VPPA. JA12–13.

The VPPA provides that "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person." § 2710(b)(1). The statute defines "consumer" as any "renter, purchaser, or subscriber of goods or services from a video tape service provider." § 2710(a)(1).

E-News is a media company that produces news content and offers it to the public on several platforms, including a mobile app. JA1. In May 2019, Landgraf visited the Google Play Store on her Android smartphone and downloaded the free E-News app. JA3. After consenting to receive push notifications from the app, Landgraf was directed to the app's main interface, where she was able to browse news articles and video clips. Id. She was never asked to register or pay for any content that she accessed on the app. Id.

Landgraf alleges that each time she used the E-News app, E-News recorded her activities within the app. JA11. It then sold that record, which included the titles of the videos she watched, her GPS coordinates, and the unique Android ID associated with her device, to the data analytics company Adobe. JA8. Adobe used this information to build an individualized profile of Landgraf's activities in its database. Id. Such profiles are common in the digital media industry; they are often used for targeted advertising, sold to other data companies, or both. JA2.

E-News filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) based on Landgraf's failure to adequately plead facts to support that she was a "subscriber" under the VPPA. JA20. Landgraf did not claim to be a "renter" or "purchaser" in her complaint since the E-News app is free. JA22. While the Fourth Circuit had not yet addressed the issue of whether one who downloads a free app is a subscriber, the Eleventh Circuit had previously answered in the negative. See Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1258 (11th Cir. 2015) ("[T]he free downloading of a mobile app on an Android device to watch free content, without more, does not a 'subscriber' make."). While another circuit reached the opposite conclusion, see Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016), the District Court found the Eleventh Circuit's reasoning and conclusion more persuasive. JA22. Therefore, it granted E-News's Motion to Dismiss on January 15, 2021. JA23.

Landgraf filed a Notice of Appeal on February 5, 2021. JA24. She now asks this Court to decide whether an individual who downloads a free mobile app is a "subscriber" under the VPPA. Id.

ARGUMENT

AN INDIVIDUAL WHO DOWNLOADS A FREE APP TO ACCESS FREE CONTENT IS NOT A SUBSCRIBER UNDER THE VPPA.

Congress enacted the VPPA, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 U.S.C. § 2710 (2018)), in response to what it viewed as an unacceptable public violation of a prominent figure's right to privacy. S. Rep. No. 100-599, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5. In 1987, a Washington, D.C. newspaper published a story on Judge Robert H. Bork containing the names of 146 videos that he and his family had rented from a video store. Id. At the time, the Senate Judiciary Committee was holding hearings on Judge Bork's nomination to the Supreme Court, and many Committee members denounced the video store's disclosure to the newspaper. Id. Months later, Congress passed the VPPA to "make[] each of us a little freer to read and watch what we choose without public scrutiny." 134 Cong. Rec. S5397-01 (1988) (statement of Sen. Patrick Leahy).

The VPPA is not—and was not intended to be—a broad, all-encompassing privacy statute. Rather, it was enacted in response to an unusual public disclosure and applies to a specific, limited class of individuals: "renter[s], purchaser[s], or subscriber[s]." § 2710(a)(1). The plain meaning of "subscriber" in § 2710(a)(1) requires an enduring relationship between an individual and a provider, most likely involving payment. This plain meaning is supported by Congress's deliberate choice not to use more encompassing language and the public policy ramifications of an alternative interpretation. Landgraf did not establish the requisite relationship with E-News by merely downloading its free mobile app. Therefore, the decision of the District Court should be affirmed.

Statutory interpretation is a question of law, Chandris, Inc. v. Latsis, 515 U.S. 347, 369 (1995), and questions of law are reviewed de novo, Pierce v. Underwood, 487 U.S. 552, 558 (1988).

A. "Subscriber" does not encompass an individual who downloads a free mobile app, given the plain meaning of the word and the statutory context.

The starting point for statutory analysis is the "language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). Courts presume that "legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Under its ordinary meaning, "subscriber" refers to an individual who has established an ongoing relationship with a provider. The statutory context of § 2710(a)(1) suggests that, under the VPPA, Congress intended that such a relationship must include payment.

1. The plain meaning of "subscriber" requires an ongoing relationship between the individual and the provider of goods and services.

This Court "customarily turn[s] to dictionaries for help in determining whether a word in a statute has a plain or common meaning." Blakely v. Wards, 738 F.3d 607, 611 (4th Cir. 2013) (quoting Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 298 (4th Cir. 1998)). When Congress enacted the VPPA in 1988, "subscriber" had an unambiguous, ordinary meaning. One dictionary defined "subscribe" as "to agree to receive and pay for a periodical, service, theater tickets, etc. for a specified period of time." *Subscribe*, Webster's New World Dictionary (3d College ed. 1988). Another similarly defined "subscribe" as to "pay, esp. regularly, for membership in an organization, receipt of a publication, etc." *Subscribe*, Oxford Desk Dictionary (American ed. 1995). The "common thread" between these definitions "is that 'subscription' involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity." Ellis, 803 F.3d at 1256. A single interaction will not suffice—there must be some combination of "payment, registration,

commitment, delivery, [expressed association,] and/or access to restricted content." Id. (alteration in original) (quoting Yershov v. Gannet Satellite Info. Network, Inc., 104 F.Supp.3d 135, 147 (D. Mass. 2015)).

As the world moved into the digital age, the common understanding of "subscriber" expanded to include online agreements and activities. See *Subscription*, American Heritage Dictionary (5th ed. 2011) ("An agreement to receive or be given access to electronic texts or services, especially over the Internet."). But the fundamental understanding of "subscriber" has not changed since the VPPA's enactment. "Whatever the nature of the specific exchange, what remains is the subscriber's deliberate and durable affiliation with the provider . . .." Austin-Spearman v. AMC Network Ent. LLC, 98 F.Supp.3d 662, 669 (S.D.N.Y. 2015). Individuals might now read the news online instead of receiving print copies on their doorsteps, or pay for a monthly streaming service instead of cable. But the requirement of a continuous relationship or association between subscriber and provider endures.

An individual who downloads a free app to stream video content has not met the plain meaning requirements to be a subscriber. Downloading an app does not "involve some or most" of the elements of a subscription. See Ellis, 803 F.3d at 1256 (quoting Yershov, 104 F.Supp.3d at 147). There is no commitment required—the downloader need not pay a fee, create an account, sign up to receive periodic services or exclusive content, or indicate in any way that he or she intends to use the app regularly. Such a user may never even open the app or delete it at any point with no further consequences. Downloading a free app is merely analogous to "adding a particular website to one's Internet browser as a favorite, allowing quicker access to the website's content." Id. at 1257.

To illustrate this point, one may consider the popular subscription streaming service Netflix. Netflix subscribers pay a monthly fee and, in exchange, are given access to Netflix's broad library of content. Netflix also provides a mobile app to allow its subscribers to access content on their phones. Any individual, regardless of his or her relationship with Netflix, may download and even consent to receive push notifications from this app. But if the downloader has not established an agreement to pay Netflix for video content, the app is essentially useless. While downloading the app provides a convenient way to access Netflix's library, "without more, [this] does not a 'subscriber' make." See id. at 1258.

2. The statutory context of § 2710(a)(1) strongly suggests that "subscriber" requires an element of payment.

The plain meaning of a statutory term does not turn solely on its dictionary definition. Yates v. United States, 574 U.S. 528, 537 (2015). "Rather, [t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." Id. (alterations in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). The statutory context of § 2710(a)(1) suggests that, though an ongoing commitment or exchange is sufficient, Congress intended that a "subscriber" under the VPPA must have made a payment.

Under the canon *noscitur a sociis*—a word is known by the company it keeps—a court must "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." Id. at 543 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)). In the VPPA's definition of "consumer," the word "subscriber" must be interpreted together with the accompanying words "renter" and "purchaser." See § 2710(a)(1). Renting and purchasing both unambiguously require payment. See *Renter*, Webster's New World Dictionary (3d College

ed. 1988) (defining "renter" as "a person who pays rent for the use of property"); *Purchase*, Webster's New World Dictionary (3d College ed. 1988) (defining "purchase" as "to obtain for money"). Since "subscriber" is the last entry in a list of words that require payment, it can appropriately be read as similarly requiring payment. Interpreting "subscriber" to include one who downloads a free app to stream free content would render it inconsistent with the neighboring payment words, violating Congress's presumed intent.

Further, the title of the provision in question supports that Congress intended for the VPPA to cover only paid transactions. See INS v. Nat'l Ctr. for Immigrants' Rts., Inc., 502 U.S. 183, 189 (1991) (noting that the title of a section may aid in interpreting the meaning of the statutory text). This provision's title is "Wrongful disclosure of video tape rental or sale records." 18 U.S.C. § 2710. Congress selected the words "rental" and "sale" in naming this statute—again words that unambiguously require payment. See *Sale*, Webster's New World Dictionary (3d College ed. 1988) (defining "sale" as "exchange of property of any kind, or of services, for an agreed sum of money"). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Crespo v. Holder, 631 F.3d 130, 136 (4th Cir. 2011). In other words, courts presume that Congress chooses the words it uses carefully and deliberately. See id. It is unlikely that Congress would deliberately select terms requiring payment for the statute's title, but not intend for the conduct covered under the statute to require payment.

Therefore, based on the plain language and context of § 2710(a)(1), an individual must establish an enduring relationship with a provider, most likely as part of a financial exchange, to be a "subscriber." A downloader of a free app does not meet these requirements. "[W]hen the

meaning of a statute's terms is plain, [a court's] job is at an end." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020).

B. Congress could have used language that encompasses a broader scope of individuals but chose not to.

The plain meaning of "subscriber" is supported by Congress's use of more expansive language in other similar privacy statutes. See Elm Grove Coal Co. v. Dir., OWCP, 480 F.3d 278, 294 (4th Cir. 2007) (holding that courts may consider "other relevant statutes" when performing statutory construction). For example, in defining which devices can be used to intercept wire, oral, or electronic communications, § 2510 of the Electronic Communications Privacy Act ("ECPA") refers to instruments "furnished to the subscriber *or user* by a provider" and "used by the subscriber *or user*." Electronic Communications Privacy Act, 18 U.S.C. § 2510(5)(a) (emphasis added). In the ECPA, Congress did not intend for "subscriber" to encompass users, since such an interpretation would impermissibly render the word "user" superfluous. See Hibbs v. Winn, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."). Rather, Congress used both "subscriber" and "user" to expand the scope of individuals covered under the statute beyond just subscribers. See § 2510(5)(a). Similarly, Congress was free to use more expansive language in the VPPA—perhaps by including "user" or "viewer" in the definition of "consumer." But Congress used no such language, demonstrating its intent to exclude such individuals from the VPPA's protections. See id. § 2710.

Further, had Congress wished to broaden the scope of those covered under the VPPA to include downloaders of free apps, it could have done so when it amended the statute in 2012. See Pub. L. 112-258, 126 Stat. 2414 (2012) (codified as amended at 18 U.S.C. § 2710 (2018)). In the amendment, Congress expanded the VPPA's consent requirements "to reflect the realities of the

21st century." 158 Cong. Rec. H6850 (2012) (statement of Sen. Robert Goodlatte). Had Congress believed the term "consumer" needed expanding in light of the evolving privacy concerns of the digital era, it undoubtedly would have done so—for example, by including "a visitor of a website or free mobile app" in the definition of "consumer." Instead, Congress made clear that the amendment "does not change the scope of who is covered by the VPPA." Id. (statement of Sen. Robert Goodlatte). Since Congress did not extend VPPA protections to those who download mobile apps when it had the opportunity to do so, respectfully, it is not within the authority of this Court to do so now.

In sum, Congress used broad language in other privacy statutes but chose not to use such language when it enacted or amended the VPPA. This decision demonstrates that Congress meant for the VPPA to be narrowly construed and not encompass mere downloaders of mobile apps.

C. The plain meaning of "subscriber" supports an important policy consideration that is consistent with Congress's intent.

Though "policy arguments cannot supersede the clear statutory text," Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2002 (2016), in this case, the ordinary meaning of the term "subscriber" supports an important policy consideration. Interpreting "subscriber" under the VPPA to include every downloader of a free app would be devastating to the digital media industry.

The business model of the app industry is centered around collecting and disclosing individual app users' data. JA2. For example, app providers generate revenue by selling data directly to third-party marketers or disclosing it to analytics companies that create user profiles for targeted advertising. Id. In fact, many apps are only free because the creators can make money from disclosing user data. Patience Haggin & Jeff Horwitz, *Apple's Move to Block User*

Tracking Spawns New Digital Ad Strategies, The Wall Street Journal (March 26, 2021, 5:30 AM), https://tinyurl.com/dynuye8. If all downloaders of mobile apps were considered subscribers, providers would no longer be permitted to disclose user data freely to generate revenue. This change would lead to a significant decline in app profitability, decreasing the incentives for creators to develop new apps and reducing innovation and competition in the app market. Users would also suffer consequences—they might have to pay for apps that they had been accustomed to downloading for free or might find that their favorite app is no longer available. Such a significant disruption to a $400 billion industry would undoubtedly ripple through other sectors of the economy as well. See id. (noting that digital advertising is a $400 billion industry).

Congress had the policy of supporting economic interests in mind when it enacted the VPPA. Congress did not intend for the VPPA solely to protect consumer privacy; it also carved out ways for a provider to disclose consumer data as necessary to support its business model. For example, one VPPA provision allows for the disclosure of consumer information "to any person if the disclosure is incident to the ordinary course of business of the video tape service provider." § 2710(b)(2)(E). To discern Congress's intent in enacting a statute, a court may turn to the statute's legislative history. Stewart v. Iancu, 912 F.3d 693, 702 (4th Cir. 2019). Here, the Senate Report states that § 2710(b)(2)(E) "allows disclosure to permit video tape service providers to use … computer services[] and similar companies for marketing to their customers." S. Rep. No. 100-599, at 14 (1988).

The Report makes clear that Congress did not wish to restrict data disclosures in a way that is harmful to business interests—it explicitly protected such disclosures for financially beneficial purposes, such as marketing. See id. This Court has stated that it may not "extend

[statutes] beyond what appears to be the legislative intent." Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 796 (4th Cir. 1941). Interpreting "subscriber" to encompass a downloader of a free mobile app would dramatically restrict the provider's ability to disclose user data freely to generate revenue. Congress intended to avoid such financial harms when it enacted the VPPA.

* * *

In sum, § 2710(a)(1) requires that an individual establish an ongoing relationship with a provider—likely including payment—to qualify as a "subscriber." Here, Landgraf merely downloaded a free app onto her phone to stream free video content. Thus, she did not establish the requisite continuous relationship or affiliation to be considered a "subscriber" under the VPPA. The judgment of the District Court should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed.

Date: March 30, 2021

Respectfully submitted,

_____

Cassandra Mason

Attorney for Appellee

Applicant Details

First Name	**Morgan**
Last Name	**Mason**
Citizenship Status	**U. S. Citizen**
Email Address	**MorganSMason@gmail.com**
Address	**Address** Street **523 W 11th St** City **Claremont** State/Territory **California** Zip **91711** Country **United States**
Contact Phone Number	**3302214426**

Applicant Education

BA/BS From	**University of Tennessee-Knoxville**
Date of BA/BS	**May 2015**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 1, 2018**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Vanderbilt Moot Court Competition, Fall 2016**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy**

Recommenders

Yanez, Melanie
MWYanez@milbank.com
Kewalramani, Shashi
shashi_kewalramani@cacd.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Morgan Mason

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May 1, 2023

The Honorable Kiyo A. Matsumoto
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am writing to apply for a clerkship in your chambers beginning in October 2025. I attended Vanderbilt University Law School, where I was an editor of the *Vanderbilt Law Review*. I then spent four years as a litigation associate at Milbank LLP in New York and am currently a term law clerk for U.S. Magistrate Judge Shashi Kewalramani in the Central District of California.

As an attorney with federal litigation experience, clerkship experience, and strong research and writing skills, I believe that I would make a valuable addition to your chambers. In law school, my Note was published by the *Vanderbilt Law Review En Banc*, and I received the Stanley Rose Book Award for my article on intentionalism as a mode of legal interpretation. At Milbank, I worked on a range of challenging matters, including *In re Financial Oversight and Management Board for Puerto Rico* (D.P.R.) and *Mad Dogg Athletics, Inc. v Peloton Interactive Inc.* (E.D. Tex.). My memoranda, briefs, and motions were consistently recognized as clear and thorough. And during my time with Judge Kewalramani, I have developed a reputation for drafting publication-ready orders quickly and accurately.

Clerking is an unparalleled opportunity both to serve the interests of justice and hone your legal skills under the guidance of a master practitioner. I admire your record on the bench, and it would be an honor to work in your chambers.

Please find accompanying this letter my resume, transcript, and writing sample. The writing sample is a memorandum I wrote at Milbank regarding legislative privilege. Letters of recommendation will be submitted by Judge Shashi Kewalramani and Milbank Special Counsel Melanie Westover Yanez. Please let me know if I can provide any additional information. Thank you for your time and consideration.

Respectfully,

Morgan Mason

Morgan Mason

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LEGAL EXPERIENCE

U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Riverside, CA
Law Clerk for U.S. Magistrate Judge Shashi Kewalramani *August 2022 – August 2023*

Research, draft, and edit pre-trial and dispositive orders—including orders to compel, orders to dismiss, and orders on summary judgment—for civil rights, state and federal habeas corpus, and Social Security Administration cases. Research and draft orders and memoranda regarding civil discovery disputes. Attend and assist in discovery and settlement conferences. Manage federal criminal docket.

MILBANK LLP, New York, NY
Litigation Associate *Summer 2017, September 2018 – June 2022*

Represented financial institutions, public companies, and private individuals in range of litigation including commercial, white collar, patent, constitutional, and bankruptcy before state and federal courts. Engaged in all aspects of litigation from pretrial investigation through resolution. Researched and drafted memoranda, briefs, and motions. Participated in strategy conferences with clients and consultants. Prepared counsel and witnesses for depositions and defense of depositions.

ENVIRONMENTAL PROTECTION AGENCY, Washington, DC
Honors Law Clerk for the Toxics Release Inventory Program *May 2016 – July 2016*

Drafted and edited guidance documents and proposed rulemakings.

EDUCATION

VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, TN
Juris Doctorate, May 2018 GPA: 3.63 (school does not rank)

Honors and Activities: VANDERBILT LAW REVIEW, En Banc Editor; Dean's List; Phi Delta Phi Honor Society; Vanderbilt Mock Trial Competition, Semifinalist; Vanderbilt Moot Court Competition, Fall 2016; Environmental Law Society, Treasurer, 2016-17; Criminal Practice Clinic, 2017; Stanley D. Rose Memorial Book Award for Best Essay on Legal History or Jurisprudence, 2018

UNIVERSITY OF TENNESSEE, Knoxville, TN
Bachelor of Arts, Political Science and History, *summa cum laude*, May 2015 GPA: 3.99

Honors and Activities: Phi Beta Kappa Honor Society; National Society of Collegiate Scholars; Dean's List, All Semesters; Staff Writer for *The Tangerine*

OCCIDENTAL COLLEGE, Los Angeles, CA
August 2011 – May 2012 GPA: 3.73

Honors and Activities: Dean's List; Varsity Football

PUBLICATIONS

Morgan S. Mason, Note, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 VAND. L. REV. EN BANC 157 (2018)

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VANDERBILT UNIVERSITY

Name : Morgan Samuel Mason
Student # : 000432087
Birth Date : 10/20

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Degree(s) Awarded

Degree: Doctor of Jurisprudence
Confer Date: 2018-05-11
Major: Law

Prior Degree(s)

University of Tennessee [Knoxville]
Bachelor of Arts 2015-05-09

Academic Program(s)

Award: Stanley D. Rose Memorial Book

Law J.D.
Law Major

Law Academic Record (4.0 Grade System)

2015 Fall

LAW	6010	**Civil Procedure**	4.00	**B+**	13.20
Instructor:		Suzanna Sherry			
LAW	6020	**Contracts**	4.00	**A**	16.00
Instructor:		Michael Bressman			
LAW	6040	**Legal Writing I**	2.00	**B+**	6.60
Instructor:		Jennifer Swezey Jason Sowards			
LAW	6060	**Life of the Law**	1.00	**P**	0.00
Instructor:		Erin O'hara Terry Maroney			
LAW	6090	**Torts**	4.00	**A-**	14.80
Instructor:		James Rossi			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	14.00	50.60	3.614
CUMULATIVE:	15.00	14.00	50.60	3.614

2016 Spring

LAW	6030	**Criminal Law**	3.00	**A**	12.00
Instructor:		Terry Maroney			
LAW	6050	**Legal Writing II**	2.00	**B**	6.00
Instructor:		Jennifer Swezey Jason Sowards			
LAW	6070	**Property**	4.00	**A-**	14.80
Instructor:		Michael Vandenbergh			
LAW	6080	**Regulatory State**	4.00	**B+**	13.20
Instructor:		Ganesh Sitaraman			
LAW	7078	**Constitutional Law I**	3.00	**A-**	11.10
Instructor:		James Blumstein			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	16.00	57.10	3.568
CUMULATIVE:	31.00	30.00	107.70	3.590

2016 Fall

LAW	5750	**Law Review**	0.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	5900	**Moot Court Competition**	1.00	**P**	0.00
Instructor:		Susan Kay			
LAW	7116	**Corporations & Bus. Ent.**	4.00	**A-**	14.80
Instructor:		Phillip Ricks			
LAW	7126	**Crim Pro: Investigation**	3.00	**A-**	11.10
Instructor:		Christopher Slobogin			
LAW	7161	**Election Law Litigation**	1.00	**P**	0.00
Instructor:		Kareem Crayton			
LAW	7184	**Environmental Law I: Public**	3.00	**A-**	11.10
Instructor:		Michael Vandenbergh			
LAW	7711	**Trademarks**	1.00	**P**	0.00
Instructor:		Kent Jordan			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	13.00	10.00	37.00	3.700
CUMULATIVE:	44.00	40.00	144.70	3.617

2017 Spring

LAW	5750	**Law Review**	1.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	7124	**Criminal Pro:Adjudicatio**	3.00	**A-**	11.10
Instructor:		Nancy King			
LAW	7180	**Evidence**	4.00	**A**	16.00
Instructor:		Edward Cheng			
LAW	7561	**Policing in the 21st Century**	1.00	**P**	0.00
Instructor:		Arjun Sethi			
LAW	7638	**Remedies**	3.00	**B**	9.00
Instructor:		Sean Seymore			
LAW	8190	**Securities Regulation**	3.00	**A-**	11.10
Instructor:		Yesha Yadav			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	13.00	47.20	3.630
CUMULATIVE:	59.00	53.00	191.90	3.620

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2017 Fall

Term Honor: Dean's List

LAW	5750	**Law Review**	1.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	6749	**Criminal Practice Clinic**	3.00	**P**	0.00
Instructor:		Susan Kay			
LAW	7111	**Corporate Litigation**	1.00	**P**	0.00
Instructor:		Justin Shuler Sam Glasscock			
LAW	7440	**Law Review Pub Note**	1.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	7600	**Professional Respons.**	3.00	**A**	12.00
Instructor:		David Hudson			
LAW	8040	**Constitutional Law II**	3.00	**A-**	11.10
Instructor:		Sara Mayeux			
LAW	9078	**Judicial Activism Seminar**	3.00	**A**	12.00
Instructor:		Suzanna Sherry			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	9.00	35.10	3.900
CUMULATIVE:	74.00	62.00	227.00	3.661

2018 Spring

LAW	5750	**Law Review**	1.00	**P**	0.00
Instructor:		Sean Seymore			
LAW	7006	**Advanced Legal Research**	2.00	**P**	0.00
Instructor:		Larry Reeves			
LAW	7038	**Campaign Finance & Elect**	2.00	**B+**	6.60
Instructor:		John Ryder			
LAW	7198	**Fed Courts & Fed System**	3.00	**B-**	8.10
Instructor:		Brian Fitzpatrick			
LAW	7472	**Marijuana Law and Policy**	3.00	**A**	12.00
Instructor:		Robert Mikos			
LAW	7511	**Multidistrict Litigation**	1.00	**P**	0.00
Instructor:		Margaret Williams			
LAW	7656	**Sports Law II**	2.00	**A-**	7.40
Instructor:		David Williams			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	14.00	10.00	34.10	3.410
CUMULATIVE:	88.00	72.00	261.10	3.626

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BART P. QUINET
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Date: 11/20/2020

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Academic Calendar: The academic year consists of fall and spring semesters and a summer term. The Doctor of Medicine program is offered on a year term.

Academic Units: Credit hours are semester hours except in the Doctor of Medicine program. Credits in the Doctor of Medicine program are course- or rotation-based.

Accreditation: Vanderbilt University is accredited by the Southern Association of Colleges and Schools.

Release of Information: This document is released at the request of the student and in accordance with the Family Educational Rights and Privacy Act of 1974. It cannot be released to a third party without the written consent of the student.

Course Numbers (effective Fall 2015):

0000-0799 Non-credit, non-degree courses; do not apply to degree program
0800-0999 Courses that will eventually be given credit (e.g., study abroad)
1000-2999 Lower-level undergraduate courses

3000-4999 Upper-level undergraduate courses
5000-5999 Introductory-level graduate and professional courses (including those co-enrolled with undergraduates)
6000-7999 Intermediate-level graduate and professional courses
8000-9999 Advanced-level graduate and professional courses

Additional information on course numbering is available at registrar.vanderbilt.edu/faculty/course-renumbering/.

Course Numbers (prior to Fall 2015):

100- and 1000-level courses are primarily for freshmen and sophomores. May not be taken for graduate credit.

200- and 2000-level courses are normally for juniors and seniors. Selected courses may be taken for graduate credit.

300-, 3000-, and above-level courses are for graduate and professional credit only - unless special permission is granted.

Grading Systems:

For information about grading systems in place prior to the dates listed, visit registrar.vanderbilt.edu/transcripts/transcript-key/.

College of Arts and Science (A&S), effective Fall 1982;
Blair School of Music (BLR), effective Fall 1986;
Divinity School (DIV), effective Fall 1983;
Division of Unclassified Studies (DUS), effective Fall 1982;
School of Engineering (ENG), effective Fall 1991;
Graduate School (GS), effective Fall 1992;
Law School (LAW), effective Fall 1988;
School of Medicine (MED), Medical Masters and other Doctoral Programs, effective Fall 2010;
School of Nursing (NURS), effective Fall 2007;
Peabody College (PC) undergraduate, effective Fall 1990;
Peabody College (PC) professional, effective Fall 1992.

A+	4.3	LAW only
A+	4.0	Not in A&S, DIV (or BLR, PC as of Fall 2012)
A	4.0	
A-	3.7	
B+	3.3	
B	3.0	
B-	2.7	
C+	2.3	
C	2.0	
C-	1.7	
D+	1.3	Not in PC professional, NURS (or GS, MED as of Fall 2011)
D	1.0	Not in PC professional, NURS (or GS, MED as of Fall 2011)
D-	0.7	Not in PC professional, MED, NURS (or GS as of Fall 2011)
F	0.0	

Owen Graduate School of Management (OGSM)

Master of Accountancy, effective Fall 2011.		**All Management Programs,** effective Fall 2007.		
A	4.0	SP	Superior Pass	4.0
A-	3.5	HP	High Pass	3.5
B	3.0	PA	Pass	3.0
B-	2.5	LP	Low Pass	2.5
F	0.0	F	Fail	0.0

School of Medicine (MED) Doctor of Medicine Program, effective 2003.

H	Honors	Superior or outstanding work in all aspects.
HP	High Pass	Completely satisfactory work with some elements of superior work.
P	Pass	Completely satisfactory work in all aspects.
P*	Marginal Pass	Serious deficiencies requiring additional work (temporary grade).
F	Fail	Unsatisfactory work.

Current and Cumulative Statistics:

EHRS	Earned Hours
QHRS	Quality Hours
QPTS	Quality Points
GPA	Grade Point Average (calculated as GPA = QPTS/QHRS)

Other Symbols:

AB	Absent from final examination (temporary grade)**
AU/AD	Audit**
AW	Audit Withdrawal**
CE	Credit by Examination
CR	Credit only (no grade due)
E	Condition, with permission to retake exam (temporary grade)**
H	Incomplete in Arts and Science Honors course (temporary grade)**
	Honors in Divinity School**
I	Incomplete (temporary grade)** +
IP	In Progress (temporary grade)**
LP	Low Pass (DIV only)
M	Absent from final examination (temporary grade)**
MI	Absent from final examination and incomplete (temporary grade)**
NC	No credit toward current degree**
NO EQ	Transfer or study abroad coursework with no Vanderbilt equivalent
P	Pass**
PM	Pass-Medical (GS only)
R	Repeat of previous course
RC	Previous trial of repeated course**
S	Satisfactory**
U	Unsatisfactory**
W	Withdrawal**
WF	Withdrawal while failing**
WP	Withdrawal while passing**
X	Grade unknown, hours earned awarded**

** Does not affect grade point average. (Prior to Fall 2008, the AB, I, M, and MI grades were calculated as an F in A&S and PC.)
\+ May be a permanent grade in DIV, GS, LAW, and MED.

UNIV: Courses offered in the UNIV subject are University Courses. The University Course initiative was developed to promote new and creative trans-institutional learning. For more information, please see vu.edu/university-courses.

For changes to this key since the last revision, please visit registrar.vanderbilt.edu/transcripts/transcript-key/.

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Milbank

MELANIE WESTOVER YANEZ

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December 1, 2020

Dear Judge,

I am writing to enthusiastically recommend Morgan Mason for a federal clerkship. I have worked with Morgan over the past year while he worked as an associate at Milbank LLP. Morgan worked on a variety of assignments on two particularly intense cases and I was impressed with his diligence, abilities and positive attitude. I am confident that Morgan will bring the same valuable qualities to his clerkship.

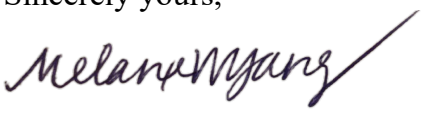
During our work together, Morgan undertook targeted reviews of evidence produced in discovery to identify potential causes of action, he summarized tedious records and communications to facilitate broader analysis, and researched and wrote internal memoranda as well as legal filings. As one example, Morgan researched the nuanced topics of legislative immunity and privilege and prepared an excellent memorandum for the team, including co-counsel on the matter. Morgan's memorandum set forth a clear analysis and prepared the team to argue the matter when it was presented during discovery. In addition, Morgan drafted various motions, including a motion for leave to amend the complaint, prepared for and assisted in depositions on the same federal case, and organized various aspects of preparing for summary judgment and trial.

At all times, Morgan prepared this outstanding work with a positive and inclusive attitude. Morgan works quickly and diligently to prepare the best work product possible, coordinates with other members of the team and is happy to take on more. All of which has been immensely appreciated as he is able to quickly digest

relatively complex issues, both legal and factual, and is able to work independently in reviewing documents, culling out important facts, and organizing those facts in a useful and readable way. He is also able to work independently to progress the case forward. His research was done thoroughly and efficiently.

Overall, it has been a pleasure to work with Morgan. I can recommend him to you as a clerk with confidence that he would do an excellent job and make the most of the experience.

Sincerely yours,



Melanie Westover Yanez

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Shashi Kewalramani
United States Magistrate Judge
3470 Twelfth Street, Suite 380
Riverside, CA 92501
(951) 338-4431

May 15, 2023

Re: Recommendation for Morgan Mason

Dear Judge,

To be succinct, Mr. Mason is one of the best colleagues I have had the privilege of working with in over 25 years of practicing law as a federal district law clerk, attorney at a large firm, a prosecutor at the U.S. Attorney's office, and a U.S. Magistrate Judge. As far as law clerks go, he is the gold standard.

His writing required minimal, if any, substantive or stylistic edits and I could trust that every legal cite he put in a draft order or opinion was accurate and appropriate. He was timely, proactive, required minimal supervision, and I trusted his work implicitly. Perhaps as a result of the breadth of his experience and just how smart and hardworking he is, he appropriately researched issues that took into account the nuances that are often important in deciding an issue.

Finally, and I believe as important as the other aspects of a prospective law clerk, he is a great person to have in chambers. He is funny, warm, open minded, and empathetic and has a wide variety of experiences that not only make him a joy to chat with, but also provide insight into case related issues that arise during the course of litigation. I hope this is helpful and please feel free to call me on cell (714-335-4590) if I can provide any additional information.

Sincerely,

Shashi H. Kewalramani

MILBANK LLP | MEMORANDUM

TO: Files
FROM: Morgan Mason
DATE: November 14, 2020
RE: Legislative Privilege

Overview of Legislative Privilege as Applied to Local Governments:

In federal court, claims of legislative privilege related to acts done in a local legislative capacity are governed by federal common law. *See Pulte Home Corp. v. Montgomery Cnty., Maryland*, No. GJH-14-3955, 2017 WL 2361167, at *2 (D. Md. May 31, 2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015); *Lee v. Virginia State Bd. of Elections*, No. 15-357, 2015 WL 9461505, at *3 (E.D. Va. Dec. 23, 2015).

In "civil suits brought by private plaintiffs to vindicate private rights," the legislative privilege is absolute. *Bethune-Hill*, 114 F. Supp. 3d at 335. It also applies broadly. It protects against discovery into all acts that occur in the "sphere of legitimate legislative activity." *See Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 681 (4th Cir. 1990). The privilege is a shield against the compelled production of documents and deposition testimony. *See id.*; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995). Thus, once a court determines that a party's discovery requests seek information about acts that took place in the "sphere of legitimate legislative activity," legislative privilege may bar the compelled production of discovery. *Pulte Home*, 2017 WL 2361167, at *3.

Actions held to be within the legislative sphere, thus protected by legislative privilege, include debating and enacting a county budget, *see E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. 2011); drafting and passing a county zoning amendment, *see 2BD Assocs. Ltd. P'Ship v. Cnty. Comm'rs for Queen Anne's County*, 896 F. Supp. 528 (D. Md. 1995); delivering an opinion, uttering a speech, haranguing in debate, proposing and/or voting on legislation, publishing, presenting, and using legislative reports, authorizing investigations, holding hearings, and introducing material at committee hearings, *see Board of Supervisors of Fluvanna Cnty. v. Davenport & Co. LLC*, 285 Va. 580, 589 (2013); meeting with constituents to discuss proposed legislation, *see Bruce v. Riddle*, 631 F.2d 272, 274 (4th Cir. 1980); and county governmental entities gathering information and holding public hearings to make recommendations on proposed ordinances, *see Clayland Farm Enters., LLC v. Talbot Cnty., Maryland*, No. CV GLR-14-03412, 2018 WL 4700191, at *4-5 (D. Md. Oct. 1, 2018).

Conversely, activities by local legislators that are administrative in nature are considered outside of the legislative sphere, thus subject to discovery. *See 2BD Assocs.*, 896 F. Supp at 532 ("Courts have appropriately taken great care in differentiating between administrative and legislative acts in the area of zoning."). Activities held to be administrative include a county board upholding the denial of a development permit, *see Crymes v. DeKalb Cnty.*, 923 F.2d 1482, 1485 (11th Cir. 1991) (finding that such a board decision was administrative because it was the

application of existing policy to a specific party);[1] a city planning board imposing conditions on the development of a subdivision, *see Stone's Auto Mart, Inc. v. City of St. Paul*, 721 F. Supp. 206, 210 (D. Minn. 1989); and a county sanitary commission making personnel decisions, *see Washington Suburban Sanitary Comm'n*, 631 F.3d at 183-84 (finding that requests for lists of department employees, the criteria used in making employment decisions, and records of age discrimination allegations all sought administrative information).

Activities by local legislators that involve executive action and/or the *enforcement* of an ordinance have also been considered outside the scope of legislative activity. *See, e.g., Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980) (finding that local officials' actions were not legislative because "they involved application of the Township's general zoning policies … to a particular parcel of land"); *2BD Assocs.*, 896 F. Supp. at 534 (finding that legislative privilege did not prevent discovery regarding "the enforcement of this zoning change against the plaintiff"); *Fralin & Waldron, Inc. v. Cnty. of Henrico*, 474 F. Supp. 1315, 1320-21 (E.D. Va. 1979) (finding that "the Planning Commission [was] engaged in legislation when recommending the land in issue be rezoned…. However, such immunity does not extend to their *executive* actions in enforcing the zoning change by refusing to approve plaintiff's [development plan] or in their alleged attempts to hinder construction of plaintiff's housing project") (emphasis added).

Additionally, courts have found the following activities to be outside of the legislative sphere: illegal acts such as bribery, *see Bruce v. Riddle*, 631 F.2d at 279, and communications between legislators *not* regarding a legislative function, such as discussions on reelection strategy or vacation plans, as long as they did not occur in legislative chambers while in session, *see Fluvanna Cnty.*, 285 Va. at 590.

The legislative privilege can be waived by "explicit and unequivocal renunciations of the protection." *2BD Assocs.*, 896 F. Supp. at 535 (quoting *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979)). Local legislators may so waive legislative privilege by (1) declining to assert the privilege; (2) voluntarily filing a complaint that involves issues protected by legislative privilege or immunity; and (3) making an unequivocal waiver of the protection from inquiry into their legislative motivation in the text of their complaint. *Fluvanna Cnty.*, 285 Va. at 589-90.[2] As discussed *infra*, communications with third parties about potential legislation do not necessarily

[1] *See also Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988) ("[i]f the underlying purpose of zoning activity is to establish *general policy*, then it is legislative … [but if it] 'single[s] out specifiable individuals and affect[s] them differently from others', it is administrative") (emphasis added). However, legislative privilege will still protect general policies enacted by local legislators even where plaintiff asserts those general policies were a pretext to target a specific party. *See 2BD Assocs.*, 896 F. Supp. at 533-34 ("General policy reasons, such as traffic control and protection of residential areas, support the zoning change, and at least theoretically, that change circumscribes the ability to build any travel plaza within the County." This is true even though the "catalyst to action was the proposal of a particular plaza.").

[2] In *Fluvanna Cnty.*, the court found that the county Board of Supervisors waived legislative immunity because the Board never claimed "the protection of legislative immunity;" initiated litigation on matters surrounding its legislative actions that would require the Board to address issues concerning the motivation of its legislators; and supported its complaint stating that the Board relied on alleged misrepresentations in voting to issue the bonds, which would necessarily require inquiry into its motivations in passing the legislation. 285. Va. at 589-90.

break legislative privilege. *See, e.g.*, *Clayland Farm*, 2018 WL 4700191, at *5; *Pulte Home*, 2017 WL 2361167, at *8.

1. What is the source of legislative privilege?

Both the U.S. and Virginia Constitutions have Speech or Debate Clauses that afford legislators immunity and protect them "from being called into an outside forum to defend their legislative actions." *Fluvanna Cnty.*, 285 Va. at 587. By its terms, the U.S. Speech or Debate Clause does not apply to states, and the Virginia Constitution only provides legislative immunity to the General Assembly; as a result, county and municipal legislators are outside the scope of federal and state constitutional legislative immunity provisions. *Id.* at 588. However, local legislators are still protected by legislative privilege through "common law legislative immunity." *Id.* The Supreme Court has held that local legislators are protected under federal common law legislative immunity to the same extent as legislators under the constitutional legislative immunity provisions because "[t]he rationales for according … legislative immunity to federal, state, and regional legislators apply [to local legislators] with equal force." *Id.* (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998)). Common law legislative immunity prevents legislators from being forced to produce materials or to testify regarding "matters of legislative conduct" and applies to local legislators when they are "acting within the scope of legitimate legislative activity." *Id.* at 588-89 (citing *Baker v. Mayor of Baltimore*, 894 F.2d at 681; *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988)).

2. Would communications between two members of a county's Board of Supervisors *not* in closed session be privileged?

Probably yes, as long as the communications related to "legislative activity." Legislative privilege is not limited to activity within the chambers of the legislators; rather "it applies to an ill-defined group of legislative acts." § 5675 Legislative Privilege, 26A Fed. Prac. & Proc. Evid. § 5675 (1st ed.). In *Bruce v. Riddle*, for example, a landowner sued county council members seeking damages after a rezoning decision diminished the value of his property. 631 F.2d at 272. The court found that the council members were acting within the scope of legislative activity when they met with private citizens to discuss aspects of the potential zoning ordinance. *Id.* at 274.

Indeed, according to the Virginia Supreme Court, "A legislator's communication regarding a core legislative function is protected by legislative privilege, regardless of where and to whom it is made." *Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016) (citing *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

That said, where the communications were not "integral steps in the legislative process," they would potentially be discoverable. *See Washington Suburban Sanitary Comm'n*, 631 F.3d at 184. "Legislative acts, the ones for which the immunity and privilege are granted, typically involve the adopt[ion of] prospective, legislative-type rules … that 'establish[ ] ... a general policy' affecting the larger population." *Id.* (quoting *Acevedo–Cordero v. Cordero–Santiago*, 958 F.2d 20, 23 (1st Cir. 1992)). They also generally "bear the outward marks of public decision-making." *Id.* (citing *Baraka v. McGreevey*, 481 F.3d 187, 198 (3d Cir. 2007)). By contrast, legislators' employment and personnel decisions are generally administrative because they most often affect specific individuals rather than formulate broad public policy. *Id.* (citing *Alexander v. Holden*, 66 F.3d 62,

66 (4th Cir. 1995)). Thus, to whatever extent correspondences between county Board members were related to administrative, rather than legislative, acts, they could be subject to discovery.

3. Would discussions about ordinances or legislation *not* ultimately enacted still be privileged?

Probably yes. I was unable to find any cases where plaintiffs sought discovery of materials related to legislation that was not enacted. However, based on existing case law, dicta, and the rationale behind legislative immunity and privilege, even correspondence about unenacted legislation could likely be privileged.

In *Gravel v. United States*, when discussing the parameters of legislative privilege for federal legislators, the Supreme Court found that legislative acts are not all encompassing, that "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage *or rejection* of proposed legislation." 408 U.S. 606, 625 (1972) (emphasis added). Thus, at least under the federal Speech or Debate Clause, even materials regarding unenacted legislation are privileged.

Courts have held that legislative privilege is an essential derivative of legislative immunity and that in order "[t]o preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980). Local legislators "are protected under common law legislative immunity to the same extent … because '[t]he rationales for according absolute legislative immunity to federal, state, and regional legislators apply [to local legislators] with equal force.'" *Fluvanna Cnty.*, 742 S.E.2d at 62-63 (quoting *Bogan v. Scott-Harris*, 523 U.S. at 52).

Given the policy concerns that animate legislative privilege, that these rationales apply to local legislators with equal force as to their federal counterparts, that the Supreme Court has found that rejected legislation can still be privileged under the federal Speech or Debate Clause, and that I have not found any case law suggesting that discussions about proposed local legislation are *not* privileged, I strongly suspect that materials regarding unenacted ordinances would also be subject to legislative privilege.

4. Would conversations between county Supervisors and members of a county Planning Commission be privileged?

Probably yes, if the communications fell within the "sphere of legitimate legislative activity." As long as both entities—the Planning Commission and the Board of Supervisors—were working on and discussing a proposed ordinance, these discussions would likely be privileged.

In *Clayland Farm*, for example, the plaintiff alleged constitutional violations regarding a county's zoning decision. 2018 WL 4700191, at *1. Specifically, the plaintiff sought production of materials from a working group made up of members of the County Planning Commission and members of the Public Works Advisory Board to show evidence of bias in their zoning decision—the county claimed legislative privilege over the documents. *Id.*