MITCH P. SNYDER

(716) 901-1931 6 Buchannon Drive Apt #313, Carlisle PA, 17013 mps6411@psu.edu

EDUCATION

Penn State Dickinson Law Carlisle, PA
J.D. Candidate 2022 Rank: 17/74 GPA: 3.52
Involvement: ***Dickinson Law Review*** (Managing Editor), **Moot Court Society** (Advisory Board), **National Trial Team** (Competition Team), Federalist Society (Class Representative), and Criminal Law Society (President).
Honors: Thomas A. Beckley Award in Legal Writing, George F. Douglas, Jr. Memorial Award in Trial Advocacy, and CALI Excellence for the Future Award for Advocacy I (Trial Advocacy).
Publication: Mitch P. Snyder, Comment, *Cyberterrorism and the Public Safety Exception to Miranda*, 126 DICK L. REV. (forthcoming).

Dickinson College Carlisle, PA
Bachelor of Arts (Majors: Economics; Law & Policy) 2019
Involvement: Mock Trial Team (Vice President, Captain), PA Federation of College Republicans (State Chairman), Economics Dept. (Teaching Assistant), and Swing Dance Club (President).
Honors: American Mock Trial Association Intercollegiate Championship Top Attorney Award 2017; American Mock Trial Association Regional Top Attorney Awards: 2016, 2017, 2018, 2019.

EXPERIENCE

The Honorable Joseph F. Leeson Jr. Allentown, PA
U.S. District Court for the Eastern District of Pennsylvania May 2021 – August 2021
Judicial Intern

- Drafted bench memoranda to Judge Leeson regarding pending motions before the court including a memorandum regarding whether to grant a motion to dismiss in an employment discrimination case.
- Conducted time sensitive research for both civil and criminal cases.

U.S. Department of Justice Washington, D.C.
Civil Division, Constitutional & Specialized Tort Litigation January 2021 – May 2021
Legal Intern

- Prepared discovery, depositions, and other pre-trial materials including drafting deposition questions for an expert witness that were used by the assigning attorney during the deposition.
- Drafted briefs, motions, and memoranda including a memorandum outlining what is required to establish an Eighth Amendment claim of deliberate indifference against a supervisory defendant.

Cumberland County District Attorney's Office Carlisle, PA
Appellate Division August 2020 – May 2021
Law Clerk (Certified Legal Intern)

- Drafted briefs filed with the Pennsylvania Supreme Court, Superior Court, and Commonwealth Court including a brief arguing the Defendant should be designated a sexually violent predator.
- Conducted non-jury trials, summary appeals hearings, preliminary hearings, and suppression hearings before the Pennsylvania Court of Common Pleas including the office's first successful suppression motion following the ruling in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020).

U.S. Attorney's Office for the Middle District of Pennsylvania Harrisburg, PA
Legal Intern June 2020 – August 2020

- Drafted briefs, motions, and memoranda of law including a brief in opposition to defendants' motion to dismiss that was filed with the U.S. District Court for the Middle District of Pennsylvania.
- Conducted time sensitive research for ongoing civil and criminal cases.

INTERESTS

Swing dancing, watching classic television, theater, and camping.

Dickinson Law Advising Transcript

Name: **Mitchell Snyder**
Student ID: **995820335**

Campus ID: MPS6411
Print Date: 06/05/2021
Requestor: Mitchell Snyder

Beginning of Dickinson Law Record

Fall 2019

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
REQ	901	Civil Procedure	4.000	4.000	B+	13.320
REQ	904	Criminal Law	3.000	3.000	A-	11.010
REQ	905	Leg Arg & Fact Per	3.000	3.000	B	9.000
REQ	908	Prob Solving I	2.000	2.000	H	0.000
REQ	913	Torts	4.000	4.000	B	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.240	Term Totals	16.000	16.000	14.000	45.330
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.240	Comb Totals	16.000	16.000	14.000	45.330

CUM RANK: 28/78
SEM RANK: 28/78

Cum GPA	3.240	Cum Totals	16.000	16.000	14.000	45.330
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.240	Comb Totals	16.000	16.000	14.000	45.330

Spring 2020

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
REQ	902	Constitutional Law	3.000	3.000	CR	0.000
REQ	903	Contracts	4.000	4.000	CR	0.000
REQ	907	Contexts & Compet	2.000	2.000	CR	0.000
REQ	909	Prob Solving II	3.000	3.000	CR	0.000
REQ	912	Property	4.000	4.000	CR	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	16.000	16.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	16.000	16.000	0.000	0.000
Cum GPA	3.240	Cum Totals	32.000	32.000	14.000	45.330
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.240	Comb Totals	32.000	32.000	14.000	45.330

Summer 2020

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
BAR	911	Evidence	4.000	4.000	A	16.000

Dickinson Law Advising Transcript

Name: **Mitchell Snyder**
Student ID: **995820335**

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	4.000	4.000	4.000	16.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	4.000	4.000	4.000	16.000
Cum GPA	3.410	Cum Totals	36.000	36.000	18.000	61.330
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.410	Comb Totals	36.000	36.000	18.000	61.330

Fall 2020

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
BAR	907	Conflict of Laws	3.000	3.000	B+	9.990
BAR	916	PA Criminal Law	2.000	2.000	B+	6.660
CCURR	901	DLaw Rev Assoc Editor	1.000	1.000	CR	0.000
EXPIN	906	Intern Basic	3.000	3.000	CR	0.000
REQ	910	Prob Solving III	2.000	2.000	A-	7.340
REQ	911	Pro Rep	3.000	3.000	B+	9.990
SEMNR	918	Law Practice Mngmt Smnr	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.540	Term Totals	17.000	17.000	13.000	45.980
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.540	Comb Totals	17.000	17.000	13.000	45.980
CUM RANK: 17/75						
Cum GPA	3.460	Cum Totals	53.000	53.000	31.000	107.310
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.460	Comb Totals	53.000	53.000	31.000	107.310
SEM RANK: 22/81						

Spring 2021

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
CCURR	901	DLaw Rev Assoc Editor	1.000	1.000	CR	0.000
CCURR	911	Moot Court Advisory Board	1.000	1.000	CR	0.000
CERT	912	Federal Courts	3.000	3.000	B+	9.990
EXPIN	907	Intern Intermed	3.000	3.000	CR	0.000
EXPSK	901	Appellate Advocacy	2.000	2.000	A-	7.340
EXPSK	902	Advocacy I	4.000	4.000	A	16.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.700	Term Totals	14.000	14.000	9.000	33.330
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.700	Comb Totals	14.000	14.000	9.000	33.330
SEM RANK: 20/80						
CUM RANK: 17/74						
Cum GPA	3.520	Cum Totals	67.000	67.000	40.000	140.640
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.520	Comb Totals	67.000	67.000	40.000	140.640

Dickinson Law Advising Transcript

Name: **Mitchell Snyder**
Student ID: **995820335**

Fall 2021

Program: Dickinson Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
BAR	905	Unincorp Bus Ent	3.000	0.000		0.000
BAR	908	Con Law II	3.000	0.000		0.000
BAR	909	Criminal Procedure	3.000	0.000		0.000
CCURR	909	DLaw Rev Ed Brd	2.000	0.000		0.000
CERT	907	Election Law	2.000	0.000		0.000
CERT	909	Employment Law	3.000	0.000		0.000
ELECT	997	Special Topics	1.000	0.000		0.000
Course Topic:		Government Independent Counsel				

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	17.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	17.000	0.000	0.000	0.000
Cum GPA	3.520	Cum Totals	84.000	67.000	40.000	140.640
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.520	Comb Totals	84.000	67.000	40.000	140.640
Dickinson Law Career Totals						
Cum GPA:	3.520	Cum Totals	84.000	67.000	40.000	140.640
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.520	Comb Totals	84.000	67.000	40.000	140.640

DUE TO COVID-19, A MANDATORY CREDIT/NO CREDIT GRADING SYSTEM WAS ADOPTED FOR DICKINSON LAW COURSES FOR SPRING 2020.

End of Dickinson Law Advising Transcript

March 29, 2021

Honorable Peter Phipps

Dear Judge Phipps. I enthusiastically recommend Mitchell Snyder for a clerkship in your chambers. Mitch was a student in two of my law school courses. He is intelligent, hard-working, energetic, deeply interested in the law and a wonderful companion.

I can imagine that you might have applicants with slightly better academic credentials than Mitch, but, having been a Third Circuit law clerk myself, I am very much aware that personality plays a major role in the successof a chambers during the court's term. Mitch is plenty smart and is a through researcher and a very good writer; he was selected for the Law Rview on the basis of a writing competition. He wrote an excellent seminar paper for me that demonstrated his thorough and thoughtful research ability and his very strong writing skills. Mitch definitely wants to be a litigator and I predict that during his third yeat of law school he will be the leader of our school's interscholastic mock trial team.

I am very confident that Mitch would make a great contribution to your work and i hope that you will meet him to discover for yourself his enhusiaistic and deep interest in the law.

Sincerely yours,

Peter G. Glenn
Dean Emeritus
Penn State Dickinson Law

717-580-6067

Katherine C. Pearson
Professor of Law
Arthur L. and Sandra Piccone Faculty Scholar
Dickinson Law
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May 17, 2021

The Honorable Elizabeth W. Hanes
United States District Court
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Application of Mitch P. Snyder for Federal Clerkship

Dear Judge Hanes:

I am pleased to be writing a professional reference for Mitch P. Snyder. Mitch has taken two courses with me: Contracts during his first year, and Conflict of Laws during his second year of classes. He earned a strong B+ in the latter course, and wrote a very strong exam in Contracts, although the semester was officially changed to a "credit/no-credit" system because of the disrupting effect of the initial lockdown during the Covid-19 pandemic.

Mitch has natural talents as an oral advocate and he is a delight to have in the classroom, even when (or, perhaps, especially when) we disagree about certain principles. He appreciates a good discussion, and he understands how to both listen and explain his positions, using precedent and classic approaches to statutory construction based on thorough research.

Mitch is a hard worker, always prepared, very serious about his studies (while maintaining a sense of humor, with an easy laugh), and produces careful, thoughtful analysis. Indeed, I notice that he has carefully researched and considered his options for judicial clerkships and I think he will be a very good judicial clerk. He is the kind of lawyer who will go above and beyond expectations to get the job done. His writing is strong and getting stronger, especially with his work as an associate editor for the Dickinson Law Review. From what I can tell, he works well with his fellow students and is always quick to volunteer for committees, an extra task or to serve as a mentor for prospective or current students.

Please do not hesitate to contact me if you have any questions or would like to discuss Mitch's background in greater detail. Mitch and I chat regularly, and I have encouraged him to think about a judicial clerkship. If my father were still alive and still sitting on the federal bench (in Arizona), I would not hesitate to recommend him as I consider Mitch Snyder to be a very strong candidate.

Sincerely,

Katherine C. Pearson
Professor of Law

WRITING SAMPLE

Mitch Snyder
6 Buchannon Drive Apt #313
Carlisle, PA, 17012
(716)-901-1931

This writing sample is an argument section from an Appellant's brief written for my appellate advocacy class. This brief has not been edited by anyone other than me.

In the attached brief, the question before the court is whether the District Court erred when it denied the Appellant's Motion for a Protective Order because the anonymous email in question constituted commercial speech. In this case, an anonymous individual using the pseudonym Joey Smith emailed the General Service Administration ("GSA") informing it that Certified Construction Inc. ("Certified"), a contractor the GSA was considering hiring, was engaging in criminal activity. Certified later learned Smith's email was sent from an IP address owned by Certified's competitor Performance Construction Inc. ("Performance"). Certified served Performance with a discovery request asking for all information related to the identity of Smith. Performance moved for a Protective Order. The District Court denied Performance's motion holding that Smith's email constituted commercial speech. Performance appealed the District Court's decision to the Third Circuit under the collateral order doctrine for *de novo* review.

ARGUMENT

The U.S. Supreme Court has held that the First Amendment "protects the right to engage in anonymous communication, and that protection extends to the Internet."[1] Further the Court has explained that "The First Amendment is implicated by civil subpoenas seeking the identity of anonymous individuals."[2] Therefore, Certified Construction, Inc.'s Interrogatories and Request for Production of Documents that seek the identity of Joey Smith implicate the First Amendment. Under First Amendment precedent, the District Court erred when it denied Performance Construction, Inc.'s Motion for a Protective Order on the grounds Smith's email constituted commercial speech.

I. Smith's anonymous email does not meet the requirements to be considered commercial speech.

Commercial speech is defined as "expression[s] related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services."[3] This Court has recognized three

1. *Raw Films, Ltd. v. John Does 1–15*, No. 11–cv–7248, 2012 WL 1019067 (E.D.Pa. Mar. 26, 2012) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997))

2. *Id.* (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).

3. *In re Orthopedic Bone Screw Products Liability Litigation*, 193 F.3d 781, 793 (3d Cir.1999) (quoting *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d. Cir.1990)).

factors which must be considered when determining whether speech is commercial: "(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech[?]"[4]

A. Smith's anonymous email is not an advertisement.

Black's Law Dictionary defined advertising as the "action of drawing the public's attention to something to promote its sale."[5] Smith's email simply does not meet this definition. First, the email was sent to the General Services Administration ("GSA"). It was not directed—or made available to—the public. Rather, this email was a "concerned citizen" writing to the government to express their opinion about a public issue.[6] Second, nowhere in the email does Smith attempt to draw attention to something to promote its sale.[7] Therefore, this factor weighs towards a finding the Smith's email was not commercial speech.

B. Smith's anonymous email does not make references to a specific product or service he could provide.

4. *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 137 (3d Cir. 2020).

5. *Advertising*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. R–10.

7. *See id.*

In *United States v. Bell*, this court elaborated on what would constitute specific products or services.[8] This court explained that a website contained "specific products" when it listed different form letters that visitors could purchase.[9] Similarly, the website contained "specific services" when it stated the owner of the website could help visitors prepare those letters.[10] Nowhere within Smith's email are references made to "specific products or services" that Smith could provide to the GSA. Rather, the email is merely Smith's opinion about a public issue that involved the GSA. Therefore, this factor weighs towards a finding that Smith's email was not commercial speech.

C. There is no evidence that Smith had an economic motivation in sending the anonymous email.

Lastly, there is no evidence provided within the record that established Smith had an economic motivation for sending the email. While it is true that Smith sent the email from an IP address owned by Performance Construction Inc., this alone does not provide sufficient evidence to establish that Smith had an economic motivation. Whether companies want them to or not, individuals use workplace computer networks for personal use regularly. If Smith is an employee of

8. *United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005).

9. *Id.*

10. *Id.*

Performance Construction Inc.—which there is no evidence of— he could have sent the email while on a break, at lunch, or after hours. That said, no matter where or when the email was sent, there is no evidence Smith had any economic motivation in sending it. In fact, the only evidence of Smith's motivation found within the email points to Smith having a political not economic motivation.[11] Therefore, the lack of evidence to establish economic motivation makes this factor weight towards a finding that Smith's email is not commercial speech.

Based on the factors discussed above, Smith's anonymous email does not meet this court's requirements to be considered commercial speech.

II. Smith's anonymous email is protected political speech under the First Amendment.

The Supreme Court has long recognized that political speech is "central to the meaning and purpose of the First Amendment."[12] The Court has also recognized that the First Amendment protects the right to speak anonymously.[13] This protection has been explicitly extended to include anonymous political speech.[14] In this case,

11. *See* R–10.

12. *Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876, 882 (2010)).

13. U.S. CONST. amend. I; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

14. *Id.* at 349.

Smith's email was anonymous political speech deserving the full protection of the First Amendment.

The Supreme Court has defined protected political speech as any of the following: speech about public issues, persuasive speech seeking support for a political cause or viewpoint, and speech advocating for political reform.[15] Smith's anonymous email meets the definition of all three categories of political speech.

First, Smith's email is addressing an important public issue—who will receive taxpayer dollars to build the new Federal Courthouse in Harrisburg, PA. Smith's email begins by stating that he is writing as a "concerned citizen" about the "contractors bidding to build the new federal courthouse in Harrisburg, PA."[16]

Second, Smith's email seeks to persuade governmental officials that his political viewpoint is correct. Smith tries to convince the government officials that business who do work with Syria should not receive taxpayer money.[17]

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15. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (holding that the First Amendment afford the "broadest protection" to political expressions regarding "public issues."); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[P]ersuasive speech seeking support for particular causes or for particular views on economic, political, or social issues."); *Meyer v. Grant*, 486 U.S. 414, 422 (1988) ("[A]dvocacy of political reform… falls squarely within the protections of the First Amendment.").

16. R–10.

17. *Id.*

Third, Smith's email advocates for political reform. Specifically, the email advocates for government officials to reform the criteria for a contractor to be granted a government contract.[18] Specifically, the email states Smith's belief that the government should not allow Certified Construction. Inc.— and contractors like them who do work with Syria—to receive taxpayer money.[19] The email advocates for a change in government policy about bidding which amounts to political reform.

The United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[20] This debate unquestioningly includes those who speak out about public issues anonymously. The United States' history has been substantially shaped by anonymous political speech. For example, the Federalist Papers—widely recognized as one of the most fundamental texts for understanding the meaning of the U.S. Constitution—was a work of anonymous political speech. Smith's email follows in this tradition of anonymous political speech. Specifically, Smith tried to make his personal concerns known to his government.

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18. *Id.*

19. *Id.*

20. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

In making its determination, this Court should not take into consider whether it agrees with or condones the opinions expressed within Smith's email. Additionally, this Court should not consider where the email was sent from in determining whether it constitutes protected political speech. Whether Smith authored the email in the office, in his home, or on a bench in a park does not change the content and personal nature of the email. To determine whether Joey Smith's anonymous email constitutes political speech this Court must look to the text of the email itself.

Based on the arguments outline above, Smith's anonymous email is protected political speech within the scope of the First Amendment.

III. To properly balance the interests of a Plaintiff's discovery request and the First Amendment rights of a John Doe defendant, this court should adopt the *Pilchesky test* outlined by the Pennsylvania Superior Court.

The Third Circuit has not adopted a test to determine whether to disclose the identity of a John Doe defendant in a defamation suit. However, the Pennsylvania Superior Court had created a test which is directly on point.

In *Pilchesky v. Gatelli*, the Pennsylvania Superior Court laid out a four-factor test to determine whether to disclose the identity of a John Doe defendant in a defamation case.[21] These factors include: (1) whether the John Doe defendant

21. *Pilchesky v. Gatelli*, 12 A.3d 430, 445 (Pa. Super 2011).

received proper notification of the petition to disclose his identity and reasonable opportunity to contest the petition; (2) whether plaintiff presented sufficient evidence to establish a *prima facie* case for all elements of a defamation claim such as would survive a motion for summary judgement; (3) whether the plaintiff submitted an affidavit asserting the request information is sought in good faith, is unavailable by other means, directly relates to the claim, and is fundamentally necessary to secure relief; and (4) the court must expressly balance the defendant's First Amendment rights against the strength of the Plaintiff's *prima facie* case.[22]

In *Kuwait & Gulf Link Transp. Company v. Doe*, the Superior Court applied the *Pilchesky test* to determine whether to disclose the identity of a John Doe defendant.[23] Here, the Plaintiff sued competitors and a John Doe defendant alleging defamation, and other claims, arising out of letter pseudonymous written and sent to the U.S. government.[24] This letter alleged the Plaintiff had violated U.S. law by doing business with Iranian entities.[25] The court held that the Plaintiff did not provide sufficient evidence to establish a prima facie case and that the strength of

22. *Id.* at 442.

23. *Kuwait & Gulf Link Transp. Company v. Doe*, 216 A.3d 1074 (Pa. Super. 2019).

24. *Id.* at 1080.

25. *Id.*

their case was outweighed by the First Amendment rights of the John Doe defendant.[26]

In this case, the Appellant has already conceded that the Appellee has met the first and third factors of the *Pilchesky* test.[27] Therefore, this analysis will focus on the second and fourth factors.

A. Certified has not presented sufficient evidence to establish a *prima facie* case for *all* elements of its defamation claim such as would survive a motion for summary judgement.

Under Pennsylvania Law, [28] Certified must prove seven elements to establish a prima facie case for defamation: "(1) the defamatory nature of the communication; (2) publication by the defendant; (3) the application of the communication to the plaintiff; (4) a recipient's understanding of the communication's defamatory meaning; (5) a recipient's understanding that the communication was intended to apply to plaintiff; (6) special harm resulting to the plaintiff from its publication; and

26. *Id.* at 1092–93.

27. (R-31).

[28]. The *Erie* doctrine requires a federal court sitting in diversity apply state substantive law and federal procedural law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Frankentek Residential Sys., LLC v. Buerger*, 15 F. Supp. 3d 574, 580 (E.D. Pa. 2014). Plaintiff Certified brought this defamation claim under Pennsylvania law. (R-2–9) Therefore, this court must apply Pennsylvania substantive law to determine whether a *prima facie* case exists.

(7) abuse of a conditionally privileged occasion."[29] Certified has not presented sufficient evidence to establish *all* the elements of a *prima facie* defamation claim.

First, Certified has not provided sufficient evidence to establish the defamatory nature of Smith's email. Simply put, Smith's statements are not actionable as defamation because they are statements of opinion rather than statements of fact. The question of "[w]hether a particular statement constitutes a fact or an opinion is a question of law for the trial court to determine."[30] Courts have held that "[a] statement in the form of an opinion is actionable only if it may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion."[31] In this case, the opinions in Smith's letter did not imply the existence of undisclosed false facts. The simple expression of an opinion, without the existence of undisclosed false facts, is not enough to support an action for defamation "no matter how unjustified and unreasonable the opinion may be or how derogatory it is."[32] In *Kuwait* case, the John Doe defendant claimed the Plaintiff had

29. *Franklin Prescriptions, Inc. v. The New York Times Co.*, 267 F. Supp. 2d 425, 434 (E.D. Pa. 2003).

30. *Mathias v. Carpenter*, 587 A.2d 1, 3 (Pa.Super. 1991).

31. *Kuwait*, 216 A.3d at 1086.

32. *Mathias*, 587 A.2d at 3.

broken the law by doing business with Iranian business entities.[33] The court held that the statements that the Plaintiff had broken the law "constituted subjective opinions" and were not actionable as defamation.[34] The Appellant submits that Smith's opinions about the legality of Certified's actions should also be considered "subjective opinions." Based on the arguments and precedent outlined above, Certified has failed to provide sufficient evidence to establish the defamatory nature of the statements.

Second, Certified has not provided sufficient evidence to establish who published the letter. While Certified alleges that Performance directed the publication of the letter, it has not provided sufficient evidence to support its accusation.[35] In fact, the only evidence produced by Certified that links Performance to Smith's letter is that it was sent using an IP address belong to Performance. However, this alone is not enough to establish Performance's involvement in directing the letters publication. Smith could have used the Performance network to send the email before work, at lunch, on a break, after work, or even during work

33. *Kuwait* 216 A.3d at 1087.

34. *Id.*

35. *See* R–2.

hours in a private capacity. Simply put, Certified has not provided sufficient evidence to prove this element.

Based on the arguments outlined above, Certified has not provided sufficient evidence to establish a *prima facie* case for all elements of its defamation claim such as would survive a motion for summary judgement. Therefore, Certified does not meet the second factor of the *Pilchesky test.*

B. Smith's First Amendment rights greatly outweigh the strength of Certified's *prima facie* case.

In conducting the fourth factors balancing test, the *Pilchesky* court explained the reviewing court should consider both the defamatory nature of the comments and the quantity and quality of evidence presented to support the defamation claim.[36] These factors should then be weighed against the John Doe defendant's First Amendment rights.[37]

As discussed in the previous section the defamatory nature of the comments is questioned as the statements made by Smith constitute subjective opinions under existing precedent. Moreover, Certified has not presented either quantity or quality evidence to support their allegations.

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36. *Pilchesky*, 12 A.3d at 445.

37. *Id.*

Smith's First Amendment rights should be weighed heavily against Certified's defamation claim. The U.S. Supreme Court has recognized that the First Amendment affords the "broadest protection" to political expressions about "public issues" because this speech is crucial to self-governance.[38] Smith's email is clearly political speech about a "public issue." For that reason, Smith's First Amendment rights greatly outweigh the strength of Certified's *prima facie* case.

CONCLUSION

For the foregoing reasons, Performance Construction, Inc. respectfully requests that the District Court's order dated December 24, 2020 be vacated, and this case be remanded for further consideration consistent with this court's ruling.

38. *Buckley*, 424 U.S. at 14; R*epublican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 414 (E.D. Pa. 2016).

Applicant Details

First Name	**Patton**
Last Name	**Solowey**
Citizenship Status	**U. S. Citizen**
Email Address	**pwsolowey@email.wm.edu**
Address	**Address** Street **24 Johns Way** City **Newfield** State/Territory **New Jersey** Zip **08344** Country **United States**
Contact Phone Number	**8568850161**

Applicant Education

BA/BS From	**Richard Stockton College of New Jersey**
Date of BA/BS	**May 2017**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 22, 2021**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Grove, Tara Leigh
tgrove@law.ua.edu
(205) 348-2302
Larsen, Allison Orr
amlarsen@wm.edu
(757) 221-7985

References

List of Professional References

Danielle Walsh, Deputy City Solicitor in the Affirmative & Special Litigation Unit at the Philadelphia Law Department.
Danielle supervised me during my summer internship at the Law Department from June 1, 2020 to July 31, 2020.
Phone: (978) 807-6124
Email: danielle.walsh@phila.gov

Mason Lowe, Professor of the Practice of Law at William & Mary Law School.
Professor Lowe was my writing professor for all of my first year, and I also studied Evidence and Professional Responsibility with him. Additionally, I served as his Teaching Fellow for a year (August 2019 to May 2020), helping him teach Legal Writing to a section of first year students.
Phone: (202) 607-1697
Email: melowe01@email.wm.edu

Allison Orr Larsen, Professor of Law, Director of the Institute of Bill of Rights Law.
I took Administrative Law with Professor Larsen in Spring 2020, and I am currently working on an Independent Research Paper with her on the legislative veto.
Phone: (434) 249-1104
Email: amlarsen@wm.edu

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

PATTON W. SOLOWEY
1105 Carter Braxton Lane • Williamsburg, VA 23188 • pwsolowey@email.wm.edu • (856)-885-0161

April 26, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year student at William & Mary Law School seeking a clerkship in your chambers for the 2022-2024 term. I am ranked in the top 10 percent of my class and serve as the Executive Editor of the *William & Mary Law Review*. As a student with a demonstrated commitment to public service, I would value the opportunity to serve Virginia and its legal community by clerking in your chambers.

I have developed the research, writing, and analytical skills in professional and academic settings that will enable me to succeed as a clerk. As a judicial intern for the Honorable Ann M. Donnelly for the Eastern District of New York, I honed those skills by conducting research, writing draft opinions, and presenting my findings. Preparing to present to my supervising clerks required me to thoroughly research a topic, analyze that research, and write a concise and compelling argument to assist them in their decision-making process. I will continue to grow my research, writing, and analytical skills as a law clerk for Judge James A. Kenney on the Maryland Court of Special Appeals for a one-year term upon graduation. Additionally, as the Executive Editor of the *William & Mary Law* Review, I have refined those same skills, as well as my editing skills, by editing entire articles for publication at various stages of the editing process.

Furthermore, I work as a student advocate in the Appellate and Supreme Court Clinic where I have drafted an amicus brief addressing First Amendment concerns related to speech about jury nullification. I have also served as a legal practice fellow, where I taught a group of 13 first-year students how to properly do citations and helped teach them their first-year writing course. The skills I've developed through my coursework, extracurricular activities, and also through my job opportunities will allow me to successfully serve as a clerk in your chambers.

Please find enclosed my resume, law school transcript, a writing sample, a list of references, and two letters of recommendation.

Thank you for your consideration of my application. I would be grateful for an opportunity to discuss my qualifications for this position in an interview.

Respectfully,

Patton W. Solowey

Patton W. Solowey

PATTON W. SOLOWEY

1105 Carter Braxton Lane • Williamsburg, Virginia 23188 • pwsolowey@email.wm.edu • (856)-885-0161

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2021
G.P.A.: 3.7, Class Rank:15/179

Honors: ***William & Mary Law Review***, Executive Editor
Honor Council, Associate Justice
Phi Delta Phi Honor Society

Activities: Legal Practice Fellow (Teaching Assistant for the Legal Practice Program)
Teaching Assistant (The Federal Courts)
Equality Alliance, Representative
Dean's Advisory Committee on Equity & Inclusion

Stockton University, Galloway, New Jersey
B.S., Business Studies, Finance concentration, Economics Minor May 2017
G.P.A.: 3.95

EXPERIENCE

The Honorable James A. Kenney, III, Senior Judge August 2021 to August 2022
Maryland Court of Special Appeals, Leonardtown, Maryland
Law Clerk. Anticipated responsibilities include conducting legal research, preparing bench memoranda, and assisting in the drafting of opinions.

William & Mary Law School, Williamsburg, Virginia November 2020 to May 2021
Research Assistant to Dean A. Benjamin Spencer. Responsibilities include legal research and writing specifically tailored to updating Wright & Miller's Federal Practice & Procedure treatise.

William & Mary Appellate and Supreme Court Clinic, Williamsburg, Virginia August 2020 to May 2021
Student Advocate. Advocate for clients involving First, Fourth, or Eighth Amendment violations in various Courts of Appeals throughout the country. Identified appropriate cases for the clinic to pursue through research and monitoring the federal dockets. Drafted an amicus brief and related motions. Participated in moots to prepare colleagues for arguments in the federal circuit courts.

City of Philadelphia Law Department, Philadelphia, Pennsylvania June to August 2020
Affirmative and Special Litigation Unit Intern. Worked on a brief in opposition to a preliminary injunction and drafted objections to document requests and research memoranda. Researched and wrote memoranda on a wide range of issues including: The First Amendment, standing to challenge statue removal, procurement bid disputes, and the constitutionality of eviction freezes.

The Honorable Ann M. Donnelly, U.S. District Judge May to July 2019
U.S. District Court for the Eastern District of New York, Brooklyn, New York
Judicial Intern. Researched substantive and procedural issues for a motion for a new trial in a forced labor case, a choice of law issue in a contract dispute, and a Second Amendment claim. Drafted opinions and orders for a social security appeal, writ of habeas corpus, First Amendment claim, and an insurance indemnification claim for Judge's review. Met with clerks often to receive feedback on drafts. Observed court and trial proceedings.

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.

- Except as noted below, students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.

- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be a reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is conceivable that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.

- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

COVID-19 PANDEMIC: GRADES FOR THE SPRING 2020 TERM

In response to disruption caused by the global COVID-19 pandemic, the William & Mary Law School faculty voted to require that every course taught at the Law School during the Spring 2020 term be graded Pass/Fail. This change to Pass/Fail grading for the Spring 2020 term will impact students in our Classes of 2020, 2021, and 2022, including in the assignment of class ranks. Students in the Class of 2022 will first be assigned class ranks following completion of the Fall 2020 term. The class ranks of the students in the Class of 2021 will next be recalculated following completion of the Fall 2020 term. The class ranks of the students in the Class of 2020 will next be recalculated following completion of the Spring 2020 term.

Transcript Data

STUDENT INFORMATION

Name : Patton W. Solowey

Curriculum Information

Current Program

Juris Doctor

College: School of Law

Major and Law, Law

Department:

DEGREES AWARDED

Applied: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: School of Law

Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	72.000	72.000	72.000	51.000	190.10	3.72

INSTITUTION CREDIT **-Top-**

Term: Fall 2018

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	A-	4.000	14.80	
LAW	102	LW	Civil Procedure	A-	4.000	14.80	
LAW	107	LW	Torts	A	4.000	16.00	
LAW	130	LW	Legal Research & Writing I	A-	2.000	7.40	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	53.00	3.78
Cumulative:	15.000	15.000	15.000	14.000	53.00	3.78

Unofficial Transcript

Term: Spring 2019

Subject	Course	Level	Title	Grade	Credit	Quality	R

					Hours	Points
LAW	108	LW	Property	A-	4.000	14.80
LAW	109	LW	Constitutional Law	A	4.000	16.00
LAW	110	LW	Contracts	B+	4.000	13.20
LAW	132	LW	Legal Research & Writing II	A	2.000	8.00
LAW	133	LW	Lawyering Skills II	P	2.000	0.00

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	14.000	52.00	3.71
Cumulative:	31.000	31.000	31.000	28.000	105.00	3.75

Unofficial Transcript

Term: Fall 2019

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	309	LW	Evidence	A-	3.000	11.10	
LAW	411	LW	Antitrust	A-	3.000	11.10	
LAW	415	LW	The Federal Courts	A-	3.000	11.10	
LAW	477	LW	Section 1983 Litigation	A-	3.000	11.10	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	12.000	44.40	3.70
Cumulative:	44.000	44.000	44.000	40.000	149.40	3.73

Unofficial Transcript

Term: Spring 2020

Term Comments: Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to choose ordinary letter grades.

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	P	2.000	0.00	
LAW	140A	LW	Adv Writing&Practice:Appellate	P	2.000	0.00	
LAW	401	LW	Crim Proc I (Investigation)	P	3.000	0.00	
LAW	453	LW	Administrative Law	P	3.000	0.00	
LAW	720	LW	Trial Advocacy	P	3.000	0.00	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	0.000	0.00	0.00
Cumulative:	58.000	58.000	58.000	40.000	149.40	3.73

Unofficial Transcript

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	400	LW	First Amend-Free Speech & Pres	A-	3.000	11.10	
LAW	410	LW	Conflict of Laws	A-	3.000	11.10	
LAW	619	LW	Supreme Court Seminar	A-	2.000	7.40	
LAW	760	LW	Wm & Mary Law Review	P	3.000	0.00	
LAW	788	LW	Appellate & Supr Ct Clinic I	A-	3.000	11.10	

Term Totals (Law - First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	11.000	40.70	3.70
Cumulative:	72.000	72.000	72.000	51.000	190.10	3.72

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

Total Institution:	72.000	72.000	72.000	51.000	190.10	3.72
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	72.000	72.000	72.000	51.000	190.10	3.72

Unofficial Transcript

COURSES IN PROGRESS **-Top-**

Term: Spring 2021

Subject	Course	Level	Title	Credit Hours
LAW	320	LW	Business Associations	4.000
LAW	412	LW	Legis/Statutory Interpretation	3.000
LAW	760	LW	Wm & Mary Law Review	2.000
LAW	789	LW	Appellate & Sup Ct Clinic II	3.000

Unofficial Transcript

Tara Leigh Grove
Charles E. Tweedy, Jr., Endowed Chairholder of Law
Director, Program in Constitutional Studies

University of Alabama School of Law
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(205) 348-2302 (o)
(703) 786-9731 (c)

April 27, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is with great pleasure and enthusiasm that I recommend Patton Solowey for a judicial clerkship. Patton was an excellent student in my Federal Courts class in the fall 2019 semester, when I was a professor at William and Mary Law School. He earned an A- with one of the strongest exams in the class. Patton has also excelled in many other aspects of his law school life. He was elected as the Executive Editor of the William and Mary Law Review and serves as a Teaching Assistant for the Legal Practice Program. I believe that Patton will make a terrific law clerk, and I cannot recommend him more strongly.

Patton has strong research and writing skills and is an extremely hard worker. I had an opportunity to witness these skills first-hand, when I assisted Patton with his student note. Patton opted to write about a timely and important topic: legislative standing. And over the course of just a few months, Patton mastered the (intricate!) case law in this area as well as the scholarly debates. In the end, Patton suggested a measured approach. Legislators, he argued, should presumptively have standing to bring suit to challenge executive action that prevents lawmakers from voting on certain issues, such as emoluments or nominations. But, Patton argued, this presumption can be overcome if, for example, a private party has standing to bring the same claim. Whether or not one agrees with Patton's bottom line, one can appreciate that the paper is painstakingly researched, well-organized, and forcefully argued.

Given Patton's research and writing skills, I am not at all surprised that he was selected for the William and Mary Law Review—or that he later earned one of the top positions on the Review. Nor am I surprised that Patton was asked to help other students with their writing through his service as a Teaching Assistant for the Legal Practice Program.

Patton further demonstrated his analytic and writing skills on his Federal Courts exam. Patton did a masterful job with some of the trickier parts of the exam. The second question invited students to consider a prisoner's attempt to challenge under 42 U.S.C. § 1983 a prison disciplinary proceeding. Patton correctly recognized that, under the facts presented, the entire § 1983 challenge could be barred under Heck v. Humphrey, and that the members of the Prison Review Board might well be entitled to absolute immunity. Patton did a wonderful job with both issues—as well as a challenging application of the Supreme Court's Monell line of decisions. I should also underscore that Patton's exam was one of the best in the class; he missed earning an A by just a few points.

Patton also loves the law. It was a delight to have him in class, because he was always eager to dive into the intricacies of federal jurisdiction—standing, abstention, sovereign immunity, and even the independent and adequate state law ground doctrine (one of my personal favorites!). Given his passion for the law, Patton would be a joy in any judicial chambers.

In short, I believe that Patton has the writing skills, intellectual curiosity, and work ethic to be a terrific law clerk. He will also undoubtedly go on to be a great lawyer.

If I can be of any more assistance, please do not hesitate to contact me via email (tgrove@law.ua.edu) or by phone (703-786-9731). I wish you the best of luck with your selection process.

Sincerely,

/s/

Tara Leigh Grove
Charles E. Tweedy, Jr., Endowed Chairholder of Law
Director, Program in Constitutional Studies
University of Alabama School of Law

Tara Leigh Grove - tgrove@law.ua.edu - (205) 348-2302

Allison Orr Larsen
Professor of Law and Director, Institute of the Bill of Rights Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-7985
Fax: 757-221-3261
Email: amlarsen@wm.edu

April 27, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a law professor at William & Mary and a student of mine, Patton Solowey, has applied to be your law clerk. Patton is among the top two or three most intellectually curious students I have ever taught and he is very bright (in the top 10% of his class and on Law Review). Patton is quintessential law clerk material.

I first met Patton in administrative law in his second year. Patton kept me on my toes. He was thoroughly engaged in the material every day, and his questions revealed that not only did he understand the concepts in the reading but that he could also see the next step in the analysis. He was quick to spot contradictions in doctrine, and he could understand the application of even the most difficult theories. Patton was an active participant in class but he never speaks just to hear himself talk. His contributions to class discussion were always relevant, concise, and revealed a true understanding of the topic at hand. Due to the COVID-19 pandemic and the mandatory switch to pass-fail grading in the spring 2020 I was only able to award Patton a “pass” in administrative law, but his exam was very well written and would have scored very well relative to his peers on any grading scale.

Over the course of the semester Patton became a frequent guest in my office hours and it was there that I got to know him quite well. At William & Mary it is common to encounter bright students like Patton, but it is far more rare for me to find a creative academic mind like Patton’s. During our conversations after class Patton stumbled on not one but two fantastic paper ideas that I was genuinely enthusiastic about – they are not typical student ideas but very sophisticated observations about contradictions in cases and theories. I agreed to supervise both of them as independent projects because I thought they showed such promise. Patton is a “lover of the law” as they say. He is simply a delight to teach and mentor; I think he will thrive as a law clerk.

As you can see from his transcript, Patton is a star here at William & Mary. He is in the top of the class and holds a leadership position on the William & Mary Law Review. He is also a leader outside of the classroom as well; his service with the Honor Council, the Equality Alliance, and the Dean’s Advisory Council on Equality and Inclusion demonstrate that Patton uses his talents to make his community a stronger and better place.

Finally, allow me just a personal word about Patton. I know from having clerked twice myself (for Judge Wilkinson on the U.S. Court of Appeals for the Fourth Circuit and for Justice Souter at the Supreme Court) that the recipe for a good year in a small chambers very much depends on having the right personality ingredients. Patton is a delight. He is kind and has a good sense of humor. I found myself frequently offering parts of my own day in our conversation because he is so relatable and warm. I think you would find him to be a terrific law clerk and then a good friend for years to come.

Please feel free to contact me if I can be of further assistance.

Sincerely,

/s/

Allison Orr Larsen

Professor of Law and Director, Institute
of the Bill of Rights Law
William & Mary Law School
amlarsen@wm.edu; (757) 221-7985

Patton W. Solowey
1105 Carter Braxton Lane | Williamsburg, Virginia 23188
pwsolowey@email.wm.edu

WRITING SAMPLE

I prepared this brief during the spring 2020 semester in my Advanced Appellate Writing Course. This writing sample is an excerpt from my brief and it only covers the first question presented. This brief was not a collaborative effort; it is my own work and has not been edited by others.

STATEMENT OF JURISDICTION

This is a direct appeal of Anthony I. Stark's conviction in a federal criminal case. Jurisdiction was conferred upon the district court under 18 U.S.C. § 3231. The appellate jurisdiction for the Thirteenth Circuit Court of Appeals is proper under 18 U.S.C. 3742(a), 28 U.S.C. § 1291, and the Federal Rule of Appellate Procedure 4(b). Defendant Anthony I. Stark gave timely notice of his appeal.

QUESTIONS PRESENTED

I. WHETHER THE POLICE VIOLATED THE FOURTH AMEDNEMNT WHEN THEY CONDUCTED AN INVESTIGATORY STOP OF A VAN BASED SOLELY ON AN ANONYMOUS TIP THAT ONLY IDENTIFIED PHYSCIAL CHARACTERISTICS OF THE VAN AND OCCUPANTS AND ONLY ALLEGED THE POSSIBILITY OF ILLEGAL ACTIVITY.

II. WHETHER THE POLICE'S USE OF AN UNMANNED SURVEILLANCE DRONE TO CONDUCT A WARRANTLESS SEARCH OF ANOTHER'S PROPOERTY VIOLATED THE HOMEOWNER'S FOURTH AMENDMENT RIGHTS, WHEN THAT DRONE OPERATES CONTRARY TO FAA REGULATIONS, OPERATES OUTSIDE OF NAVIGABLE ARISPACE, AND IS EQUIPPED WITH ADVANCED SURVEILLANCE TECHNOLOGY.

STATEMENT OF THE CASE

I. Factual Background

During the evening on November 18, 2018, DEA Agent Peggy Carter received a call at approximately 7:30 reporting that Rising Tide local farm was selling something "other than vegetables."[1] The caller claimed he was a buyer for a local steakhouse and that he had seen plants resembling marijuana being loaded into a van while he picked up produce.[2] Agent Carter was

[1] JA 10.
[2] JA 10.

subsequently informed that the van was a sky-blue Chevy with the farm's symbol on the side, and the man driving the van was wearing aviator glasses and was accompanied by a young woman. [3]

Agent Carter drove towards the steakhouse to talk with the unnamed tipster when she happened upon the van in question.[4] She immediately conducted an investigatory stop of the van without investigating the call or speaking with the unidentified informant.[5] When the agents pulled over Anthony Stark, he was driving two miles under the speed limit and was not informed that he had violated any traffic laws.[6] A subsequent search of the van yielded a firearm but no drugs.[7] After conducting the investigatory stop, Agent Rhodes went through call logs and discovered that a similar call had come in a few months before from the same number.[8] Agent Carter thought Agent Rhodes "went to the restaurant a couple of days later" to speak with the tipster.[9]

Following the investigatory stop and before conducting the unmanned drone surveillance, the agents watched the farm for two days.[10] They saw expensive cars, vans from local restaurants, and families using a security gate to enter and leave after a few minutes.[11] The agents noted a privacy fence erected around the entire farm.[12] Stark erected the privacy fence and security gate because he was protecting his experimental crops, however, he did not install netting over the entire farm to prevent observation from above.[13]

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[3] JA 10.
[4] JA 10.
[5] JA 10, 12.
[6] JA 17.
[7] JA 12.
[8] JA 15.
[9] JA 12.
[10] JA 15.
[11] JA 15.
[12] JA 15.
[13] JA 18, 20.

Then, on November 21, 2018, Agent James Rhodes used a drone to surveil the property for several hours.[14] The drones is outfitted with advanced camera equipment capable of 180x magnification which is similar to scientific telescopes used by universities, and the drone is capable of flying for several hours without refueling.[15] Agent Rhodes is certified by the FAA to be a drone pilot.[16]

While positioned two miles away from the farm, where they were unable to see the drone as Agent Rhodes operated it, he flew the drone over the farm for several hours.[17] Rhodes flew the surveillance drone above the tree cover most of the time but repeatedly dipped below the tree line to get a better vantage point.[18] The search warrant later obtained by the agents relied upon information and pictures acquired in the search of the farm and the earlier search of the van.[19] The police then executed the search warrant on December 1, 2018, seizing evidence found on the farm.[20]

II. Prior Proceedings

Anthony Stark was indicted by the Grand Jury for Possession of a Firearm by a Convicted Felon and Possession of Marijuana with the Intent to Distribute an amount greater than 1,000 kilograms.[21] Stark filed a motion to suppress the evidence obtained during the seizure and search of both the van and his farm.[22] After a hearing on the motion to suppress, the district court found that the tip was not anonymous, the seizure was proper, and the use of drones to surveil the property

[14] JA 16.
[15] JA 14.
[16] JA 16.
[17] JA 16, 22-23.
[18] JA 16.
[19] JA 4.
[20] JA 2-3.
[21] JA 3.
[22] JA 3.

was also proper.[23] Mr. Stark entered conditional guilty pleas on both counts, preserving his right to appeal the district court's denial on the motions to suppress.[24] Stark then timely noted his appeal to the United States Court of Appeals for the Thirteenth Circuit.[25]

STANDARD OF REVIEW

When reviewing a district court's ruling on a motion to suppress, this Court reviews the factual findings for clear error and the legal determinations de novo.[26]

SUMMARY OF THE ARGUMENT

Reasonable suspicion was wholly lacking when the agents conducted an investigatory stop of Stark's van. The tip provided by the unnamed local produce buyer could only identify the physical characteristics of the van and the driver, as well as simply allege the possibility of illegal activity occurring. Of critical importance was the tip's inability to predict any of Stark's future movements.

The drone surveillance was an unconstitutional search in violation of the Fourth Amendment. Stark exhibited an expectation of privacy by erecting security measures throughout his property, and society is willing to recognize the expectation to be free from warrantless drone surveillance as reasonable. The evidence observed during the drone surveillance was not observed with the naked eye while officers were in navigable airspace. Rather, the officers operated the drone two miles away and were unable to see the drone as it was operated, contrary to FAA regulations.

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[23] JA 25.
[24] JA 25-26, 28, 31-32.
[25] JA 37.
[26] *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. McKenzie-Gude*, 671 F.3d 452, 458 (4th Cir. 2011).

ARGUMENT

Anthony Stark's motions to suppress evidence for both the investigatory stop and the warrantless drone search should have been granted. The stop was not supported by reasonable suspicion, as the tip lacked the requisite indicia of reliability. Also, the warrantless search of Stark's property was unconstitutional because Mr. Stark exhibited an expectation of privacy, and society is willing to recognize that expectation as reasonable.[27]

I. *The Investigatory Stop Was Not Supported by Reasonable Suspicion*

Agents Carter and Rhodes violated the Fourth Amendment when they conducted an investigatory stop of the van because reasonable suspicion was lacking. Determining reasonable suspicion requires a "totality of the circumstances" approach.[28] The tipster in this case must be evaluated as either a known or anonymous informant, or somewhere in between.[29] It is also necessary to evaluate the "indicia of reliability" of the tip to justify a forcible stop.[30] The factors of veracity, reliability, and basis of knowledge are highly relevant in determining the value of an anonymous report.[31] Another relevant factor is the tipster's ability to predict the suspect's future movements.[32]

A. *The Informant is More Like an Anonymous Informant*

The unnamed tipster from the local steakhouse should be considered anonymous rather than a known citizen informant. *Gates* has recognized that a conscientious assessment of crediting tips is constitutionally required, but a standard that leaves no place for anonymous citizen

[27] *Katz v. United States*, 389 U.S. 347, 361 (1967).
[28] *Illinois v. Gates*, 462 U.S. 213, 230 (1983).
[29] *United States v. Elmore*, 482 F.3d 172, 181 (2d Cir. 2007).
[30] *Adams v. Williams*, 407 U.S. 143, 147 (1972).
[31] *Gates*, 462 U.S. at 230.
[32] *See Alabama v. White*, 496 U.S. 325, 332 (1990).

informants is not.[33] When dealing with anonymous informants, a higher level of corroboration or reliability is required.[34] Additionally, the totality of the circumstances approach mandated by *Gates* and *White* teaches that "informants do not all fall into neat categories of *known* or *anonymous*."[35] It is more useful to think of known reliability and corroboration on a sliding scale.[36] Where informants are known, however, a lesser degree of corroboration is required.[37]

In *US v. Elmore*, the informant, Mazza, provided her name, her relationship with the suspect, and two phone numbers where she could be reached.[38] She also alleged that Elmore was involved in a prior shooting, had a gun in his car, and kept stashes of guns at her apartment as well as another woman's apartment.[39] The police asked Mazza questions about wounds Elmore received the year before in a shooting, and she accurately provided that information, which helped to establish her credibility.[40] Additionally, the police independently investigated the tipster and her relationship with the suspect. This investigation consisted of searching through DMV records to make sure Mazza was a real person, confirming the other woman's address that Mazza provided, finding the suspect's car parked where it was alleged to be, and confirming that the two suspects, Elmore and Sherman, had been accomplices in prior criminal activities.[41] The court held that where a citizen informant's identity is disclosed, although not confirmed to an exact certainty, and there

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[33] *Gates*, 462 U.S. at 238.
[34] *Id.*
[35] *Elmore*, 482 F.3d at 181.
[36] *Id.* at 181.
[37] *Compare Williams*, 407 U.S. at 146-47 (upholding an investigatory stop based solely on an uncorroborated tip from a known and reliable informant), *with White*, 496 U.S. at 331-32 (holding an anonymous tip justified an investigatory stop because the predictive details and the innocent details were corroborated).
[38] *Elmore*, 483 F.3d at 183.
[39] *Id.* at 176.
[40] *Id.*
[41] *Id.*

is independent police work that sufficiently corroborates the tip, there is reasonable suspicion sufficient enough to support an investigatory stop.[42]

In Stark's case, the tip lacks most of the identifying information that was present in *Elmore*.[43] The "local produce buyer" did not provide a name, a phone number where he could be reached, nor did he allege there was illegal activity occurring.[44] Rather, he simply alleged the possibility of some illegal activity occurring coupled with a description of the suspect, not that illegal activity had actually happened. Agent Carter also did not look into any records to verify the identity of the caller, did not ask the caller any clarifying questions to establish his credibility, and she did not confirm that the tipster had any inside or predictive information.[45] Because the information provided by the tipster is lacking in comparison to *Elmore*, the local produce buyer is definitely less known than Mazza.[46] In evaluating the totality of the information provided, it is lacking in comparison to *Elmore* and would likely require more corroboration to establish reasonable suspicion.

In *Elmore*, Mazza provided enough information about herself so she could be contacted later and held accountable if her tip proved to be false, and the court held she was partially known, which requires a lesser degree of corroboration to support reasonable suspicion.[47] The local produce buyer surely falls somewhere in between a known informant and unknown informant. The informant in Stark's case must be less than partially known because the informant in *Elmore* was partially known, and that informant provided much more information than the local produce

[42] *Id.* at 183.
[43] *See id.* at 176.
[44] *See id.* at 176.
[45] *See id.* at 183.
[46] *See id.* at 176.
[47] *Id.* at 181.

buyer.[48] Because Mazza was classified as a partially known informant, and the local produce buyer in this situation remains unnamed, a higher degree of reliability is needed to support a finding of reasonable suspicion.[49] The district court erred when it concluded that there was reasonable suspicion to conduct an investigatory stop because the informant was not anonymous. That determination requires a more thorough analysis of the totality of the circumstances, and the conclusion that there was reasonable suspicion simply because the informant was not anonymous was erroneous.

B. *Totality of the Circumstances show that Reasonable Suspicion was Lacking*

Agent Carter's stop of Stark's van was wholly lacking reasonable suspicion and thus was unconstitutional. The tip did not provide the requisite indicia of reliability to justify an investigatory stop. Further, the agents in this case did not sufficiently corroborate the tip before conducting the seizure, which has consistently been recognized as necessary when the tip itself does not create reasonable suspicion.[50] The tip does not create reasonable suspicion on its own because it only alleges a possibility of illegal activity with the physical description of the suspect.[51]

1. *The Tip Lacked the Required Indicia of Reliability and Did Not Provide Any Predictive Information*

The informant's tip lacked the necessary indicia of reliability to support the investigatory stop. When evaluating whether a tip created reasonable suspicion, it is necessary to take a totality

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[48] *See id.*
[49] *See id.*
[50] *See Florida v. J.L.*, 529 U.S. at 271 ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *White*, 496 U.S. at 331 ("[T]he anonymous tip had been sufficiently corroborated to furnish reasonable suspicion."); *See Elmore*, 482 F.3d at 183 ("A tip from a citizen informant whose identity is disclosed (though not confirmed to a certainty) that is corroborated to a significant degree can support a finding of reasonable suspicion.").
[51] *Florida v. J.L.*, 529 U.S. at 271 ("The reasonable suspicion … requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.").

of the circumstances approach.[52] For a tip to create the reasonable suspicion, it must have the sufficient indicia of reliability, which includes determining the tipster's basis of knowledge, reliability, and veracity.[53] A deficiency in one may be compensated by another factor's strong showing when determining the overall reliability of a tip.[54] The quantity and the quality of the information currently possessed by police and provided by the informant is considered in the reasonable suspicion determination.[55] Lastly, reasonable suspicion cannot arise from a bare-bones tip only describing the physical characteristics of a suspect coupled with an allegation of ongoing criminal activity. [56]

In *Alabama v. White*, a police officer received a call from an anonymous person, explaining that White would leave a particular apartment complex at a specific time in a brown Plymouth station wagon, which had a broken right taillight, that she would go to a named motel, and that she would be in possession of an ounce of cocaine inside of a brown attaché case.[57] The officers immediately went to the apartments, found the station wagon, and waited for the suspect to get into that station wagon. She got into the car and began driving the most direct route to the named motel. Before she got to her destination, the officers stopped her, and a consensual search of the car turned up marijuana in the attaché case and a small amount of cocaine in her purse.[58]

When applying the totality of the circumstances approach, which includes evaluations of the informant's veracity, reliability, and basis of knowledge, the Court found the tip sufficient to

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[52] *White*, 496 U.S. at 328 (citing *Gates*, 462 U.S. at 230).
[53] *Id.* ("[A]n informant's veracity, reliability, and basis of knowledge remain highly relevant in determining the value of his report.") (citations and quotations omitted).
[54] *Gates*, 462 U.S. at 233.
[55] *White*, 496 U.S. at 330 (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).
[56] *Florida v. J.L.*, 592 U.S. 266, 268 (2000).
[57] *White*, 496 U.S. at 327.
[58] *Id.* at 326-37.

support the investigatory stop because it "contained a range of details relating to facts and conditions existing at the time of the tip, [and] to future actions of third parties not easily predicted."[59] These predictive details imparted a higher degree of reliability and veracity because the members of the general public would not be able to predict the future movements of suspects.[60]

In Stark's case, there was no predictive information given in the tip at all. The tip simply alleged that the witness suspected marijuana was being loaded into a van and that a man and a woman were driving the van. Even in *White,* where predictive information was provided in the tip, it was still necessary to corroborate the tip to create reasonable suspicion.[61] A mere suspicion of a member of the public is not enough to support an investigatory stop, as evidenced by the thorough analysis of a tip's predictive ability in *White*.[62] The tip in Stark's case contained completely innocent details of a man and a woman driving a van coupled with the mere suspicion of a layperson that it looked like there was marijuana in that van. Such a tip has already been ruled to be insufficient to support an investigatory stop, as evidenced in *Florida v. J.L.*[63] The tip here is completely lacking any predictive information, only alleges the descriptions of the suspects and a suspicion of illegal activity, and the small identifying information given by the tipster is insufficient to make up for the tip's lack of reliability or veracity.[64]

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[59] *Id.* at 332 (citing *Gates*, 462 U.S. at 245).
[60] *Id.*
[61] *Id.* at 329.
[62] *Id.* at 331-32.
[63] 529 U.S. at 273-74.
[64] *See White*, 496 U.S. at 330 (explaining that the quantity and the quality of information provided is an important factor).

Given the tip's inability to provide any predictive information and the fact that the informant is someone less than a partially known informant, it is clear that the tip lacks the necessary indicia of reliability to create reasonable suspicion. The inability to provide any predictive information speaks to the tip's overall unreliability. Although the basis of knowledge is likely sound because the tipster allegedly provided an eyewitness account, an allegation of illegal activity alone is insufficient to automatically create reasonable suspicion. Considering these factors with the agent's lack of independent police work to corroborate the tip shows that the stop of the van was conducted without reasonable suspicion. Therefore, the District Court erred when it simply relied upon the local produce buyer's status as not anonymous in denying the motion to suppress. As the cases explain, more is required than simply labeling an informant as known or anonymous.

2. *The Agents Did Not Corroborate the Tip*

Agents Carter and Rhodes did not conduct any independent police work to corroborate the claim's made in the tip. The Court has consistently recognized the value of corroborating the details of an informant's tip by independent police work.[65] Specifically, when a tip lacks sufficient indicia of reliability because it does not clearly establish the informant's basis of knowledge and veracity, it is possible that reasonable suspicion can still be found if the tip is sufficiently corroborated through independent police work.[66]

In *Elmore*, the tip was sufficiently corroborated by the independent police work.[67] Officers went through DMV records, asked the informant questions that established her reliability, and

[65] *Id.* at 329.
[66] *Elmore*, 482 U.S. at 179.
[67] *Id.* at 183.

corroborated the location of apartments and vehicles that the informant provided.[68] In *Alabama v. White*, officers received an anonymous tip that alleged a woman would leave a specific apartment later in the afternoon, carrying a brown attaché case, get into a specifically described vehicle, and begin driving towards a local motel.[69] The independent police work in that case consisted of officers verifying that the specific car was parked in that apartment complex's lot, observing the suspect get into the described vehicle, and following her as she took the most direct route to the local motel.[70]

In Stark's situation, the officers did not conduct an independent investigation to corroborate the tip received from the local produce buyer, and the tip was not as detailed as the tip in *White*.[71] The tip in Stark's case alleged that there were plants that looked like marijuana being loaded into a sky-blue Rising Tide Farms van, and that van was being driven by a man with sunglasses and a woman was in the passenger seat. The agents wanted to corroborate the tip by going to the restaurant they thought the tipster worked at to ask him questions, but before they were able to corroborate anything, they happened upon the van and immediately stopped it. As explained in *Elmore*, when a tip lacks the required indicia of reliability, it must be corroborated by independent police work to support an investigatory stop.[72] Because the tip already lacks veracity, reliability, and any independent police work necessary to corroborate the tip's details, it is clear that reasonable suspicion was lacking in this case. The district court erred when it did not consider the lack of any independent police work to corroborate the tip, which is crucial to a reasonable suspicion determination.

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[68] *Id.* at 176.
[69] *White*, 496 U.S. at 327.
[70] *Id.*
[71] *See id.*
[72] *Elmore*, 482 F.3d at 179.

C. *There was no Allegation of Reckless Driving or Driving Under the Influence*

When Stark was pulled over by the agents, he was not informed that he had committed any traffic infractions, nor did the tip allege he was driving under the influence. When an eyewitness alleges facts relating to dangerous driving, and the innocent facts are corroborated by independent police investigation, a reasonable police officer can assume the tip is true and conduct an investigatory stop.[73] Of particular importance was that the tip in *Navarette* alleged an ongoing dangerous crime.[74] Specifically, the Court held that officers can "appropriately recognize certain driving behaviors as sound indicia of drunk driving," and that determination of an ongoing dangerous crime was crucial to their finding of reasonable suspicion.[75]

In *Navarette*, the Court explained that the witness's report gave eyewitness knowledge of alleged dangerous driving, and that the basis of knowledge significantly supported the tip's reliability.[76] Further, a driver's claim that another vehicle ran her off the road implies that the informant knows the car was driving dangerously.[77] If this tip was true, then the 911 call made by the eyewitness alleged on ongoing dangerous crime.[78] The tip in *Navarette* alleged that at mile marker 88 on southbound Highway 1 a silver Ford F-150 ran the tipster off the road and was last seen approximately five minutes ago.[79] An officer quickly responded and went to Highway 1 and saw the identified truck still driving southbound, and after following the truck for a few minutes the officer conducted a traffic stop.[80]

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[73] *Navarette v. California*, 572 U.S. 393, 401-2 (2014).
[74] *Id.*
[75] *Id.* at 402.
[76] *Id.* at 397.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 395.
[80] *Id.*

In contrast to *Navarette*, the tip in Stark's case did not allege any driving related misconduct nor did it allege ongoing dangerous activity. Because the Court has recognized that investigatory stops are allowed following a firsthand account of dangerous driving, it is important to point out that there were no allegations of reckless driving in Stark's case. Furthermore, the allegation of wrongdoing in Stark's case was not about an ongoing dangerous crime.[81] Absent an allegation of ongoing dangerous activity, a tip needs more than what was alleged in Stark's case to support a stop.[82] Therefore, because no driving related misconduct was alleged and there was no ongoing dangerous activity, reasonable suspicion was lacking and the investigatory stop was improper.

[81] *Id.* at 401-02.
[82] *See id.*

Applicant Details

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Date of JD/LLB	**May 10, 2019**
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Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**Yes**
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Admission(s)	**New York**

Prior Judicial Experience

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Specialized Work Experience

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References

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

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April 12, 2022

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a 2019 graduate of the University of Michigan Law School and I am writing to apply for the law clerk position in Your Honor's chambers starting in August 2022.

For the past two and a half years, I have worked as an associate at the law firm Cleary Gottlieb Steen & Hamilton LLP in the firm's New York and Washington, DC offices. In the DC office, my practice is focused on general civil litigation and white-collar enforcement matters. While in New York, I was also a part of the firm's bankruptcy practice group. Overall, the work has been rewarding and diverse. For example, in civil litigation, I have had the opportunity to draft district court and appellate briefs; in bankruptcy, I've negotiated disclosure statements and Chapter 11 plans of reorganization; and in white collar enforcement, I have responded to federal agency subpoenas and prepared advocacy materials for government presentations.

Clerking for the federal judiciary has been a goal of mine since graduating law school. I believe I would be a valuable member of your team. I strive for clear, effective writing and I am always looking for opportunities to improve. I enjoy spotting legal issues and analyzing case law. I am passionate about access to justice issues. I have a strong desire to use the skills I have acquired in private practice in service of those who lack the resources to hire expensive legal counsel.

Please see attached for my resume, law school transcript, and writing sample. I also include three professional references below:

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Regards,
Tom Standifer

TOM STANDIFER

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EXPERIENCE

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Associate — October 2019 – current
- Represent clients in complex civil litigation and government investigations.
- Conduct legal research, prepare briefs and legal memoranda, manage document production and review, and negotiate with outside counsel.
- Maintain active pro bono practice with focus on criminal justice, immigration, and housing.
- Supervise paralegals and summer associates.

Summer Associate — May 2018 – August 2018
- Conducted legal research and drafted memoranda for senior attorneys in the firm's litigation practice on issues related to contract law, bankruptcy, and antitrust.

DLA Piper Chile — Santiago, Chile
Legal Intern — May 2017 – July 2017
- Researched legal issues and drafted memoranda related to corporate governance, foreign investment regulations, and Chilean labor standards.

Office of U.S. Senator Barbara Boxer — Washington, DC
Legislative Aide — July 2013 – July 2016
- Prepared research memoranda, drafted talking points, and represented the Senator in meetings with interest groups and constituents on policy areas related to cybersecurity, telecommunications, and privacy.
- Drafted legislation included in the FY2017 National Defense Authorization Act to enhance protections for military whistleblowers and reform administrative appeals at the Boards for Correction of Military Records.
- Managed office's information technology and conducted other administrative tasks.

Nesbitt Research — Washington, DC
Research Associate — November 2011 – July 2013
- Led diligence investigations on behalf of U.S. House and Senate campaigns and produced research reports and issue memoranda for senior leadership in order to craft effective campaign communications strategies.

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COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Adam Pritchard	B+	4	
Criminal Law	David Uhlmann	B+	4	
Legal Practice Skills I	Sammy Mansour	S	2	
Legal Pract: Writing & Analysis	Sammy Mansour	S	1	
Contracts	Gabriel Rauterberg	A-	4	

Winter 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Constitutional Law	Daniel Halberstam	A	4	
Torts	Christina Whitman	A-	4	
Legal Practice Skills II	Sammy Mansour	S	2	
Legislation and Regulation	William Novak	A	3	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporate Lawyer: Law & Ethics	Vikramaditya Khanna	A-	4	
Employment Law	Samuel Bagenstos	P	3	
Contracting in Complex Transac	George Kimball	A	2	
Federal Antitrust	Daniel Crane	A	3	

Winter 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Juvenile Justice Clinic Sem	Kim Thomas, Frank Vandervort	A	3	
Business Basics for Lawyers	Alyssa Martina	S	1	
Administrative Law	Nicholas Bagley	B+	3	
Philosophy of Law	Scott Hershovitz	B+	2	
Juvenile Justice Clinic	Kim Thomas, Frank Vandervort	A-	4	
Couns & Advocacy in Antitrust	Steven Cernak	A+	2	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Good with Words: Speak/ Present	Patrick Barry	S	2	
Anti-corruption Law & Practice	Timothy Dickinson	A-	2	
First Amendment	Don Herzog	B+	4	
Federal Courts	Gil Seinfeld	A-	4	
Civil Law Litigation	Judge Timothy Connors	A-	3	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Interdisc Prob Solv Access to Justice	Justice Bridget McCormack & Kentaro Toyama	A	3	
Evidence	Leonard Niehoff	A-	4	
Documentary and the Law	Joshua Kay & Frank Vandervort	A-	2	
Jurisdiction and Choice of Law	Mathias Reimann	A-	4	

Tom Standifer

ERROR-PRONE AND UNCONSTITUTIONAL: THE PROCEDURAL DUE PROCESS CASE AGAINST STOPPING *SUSPECTED* TERRORISTS FROM PURCHASING FIREARMS

INTRODUCTION

"No fly, no gun. No check, no gun. That ought to be the rule. It is a commonsense rule."[1] This was Senator Richard Blumenthal on the floor of the U.S. Senate arguing for legislation that would prohibit the sale of firearms to individuals on the terrorist watchlist.[2] It was December 2015, and the country had just received news of yet another horrendous terrorist attack in San Bernardino, California.[3] The proposal seems simple, straightforward—why should suspected terrorists have access to firearms? The problem stems from limiting rights based solely on suspicion. What if the government suspected wrong? What procedures can an individual use to contest an erroneous listing?

This Note analyzes the sufficiency of procedural protections in the proposed legislation by focusing on its constitutionality under the Fifth Amendment's due process clause.[4] Part I argues that the terrorist watchlist independently contains serious procedural due process defects, with a specific focus on the No Fly List. Part II argues that tying the right to gun ownership to inclusion on the watchlist makes the existing due process flaws even worse. Part III concludes by arguing that while the constitutionality of the proposed legislation is highly suspect, expanding background checks and focusing on mental health would help address the underlying concerns likely motivating the proposal.

I. TERRORIST WATCHLISTS INDEPENDENTLY POSE CHALLENGING, LARGELY UNSOLVED PROCEDURAL DUE PROCESS QUESTIONS

The Fifth Amendment to the Constitution protects all persons from being "deprived of life, liberty, or property, without due process of law."[5] This constitutional provision requires the

government to provide some amount of process to contest a deprivation of life, liberty, or property. Long understood as a flexible concept,[6] courts conduct a balancing test to determine what procedures are appropriate in each specific case. Originally articulated in *Mathews v. Eldridge*, courts weigh the deprivation against the value of additional procedures and the government's interest in the cost and feasibility of implementation.[7] The central question is whether the procedures are designed in a way to allow an individual a "meaningful opportunity to present their case."[8]

While this test can be applied in a straightforward manner in most circumstances,[9] terrorist watchlisting[10] poses unique procedural due process problems. This is because these cases create a fundamental tension between the constitutional imperative to provide a meaningful opportunity for individuals to contest their inclusion on a watchlist, and the necessity to keep aspects of that methodology secret.[11] For example, until recently, the government would not confirm or deny whether someone was on the No Fly List,[12] a sublist of the primary terrorist watchlist prohibiting individuals from boarding an aircraft.[13] Without knowing why an individual was placed on the No Fly List, it is difficult to imagine how that person would be able to contest the government's action in any significant way.[14] Due to these inherent problems, the Ninth Circuit held in a pre-9/11 immigration case that outside of extraordinary circumstances, the "use of undisclosed information in adjudications should be presumptively unconstitutional."[15]

These challenges to ensuring adequate procedural due process are particularly troubling due to the risk of erroneous listing.[16] One reason for this is structural—the FBI, who handles watchlist nominations for suspected terrorists located within the U.S., is plagued with the kinds of problems inherent in a large bureaucracy. Government audits of FBI watchlist procedures have shown major data management problems—a 2009 report indicated that the Agency failed to

remove individuals from the watchlist in 8% of all cases.[17] While a recent audit suggested the Agency has made substantial improvements, the report still included twelve recommendations focusing on improving basic case management procedures.[18]

There is also a risk of error because of the permissive standard the FBI uses to include a suspect on the terrorist watchlist. Inclusion does not require prior criminal activity—the FBI nominates individuals suspected of terrorism based on "reasonable suspicion."[19] This standard was initially developed for police officers engaging in routine traffic stops.[20] This permissive standard, combined with the inherently imprecise task of predicting future human behavior, may create a space for bias[21] and institutional incentives[22] to enter into watchlist determinations.

At least with regard to the No Fly List cases, this is made even more significant because of the consequences to the individuals erroneously listed.[23] Restrictions on air travel effectively bar individuals from traveling internationally (or strand them in a foreign country) because of the high cost of other travel alternatives.[24] Since watchlist information is shared with twenty-two foreign governments, listing can result in restrictions on travel by other means and even detention and interrogation by those countries.[25] Many listed individuals "were stuck in undesirable regions, separated from their families, unable to pursue their professions, and generally impaired in their livelihoods."[26]

Given the weighty interests on both sides of the *Mathews* balancing test,[27] courts are still grappling with how to achieve the often conflicting goals of vindicating Fifth Amendment due process rights while also protecting the homeland.[28] At least with regard to contesting inclusion on the No Fly List, a recent district court decision determined that providing an individual with an unclassified summary of the reasons for inclusion on the list or providing access to the Agency's rationale to counsel with a security clearance could pass constitutional muster.[29]

However, even if this solution is ultimately followed by higher courts, it may have limited value in situations where more rights are at stake.

II. The Proposed Legislation Would Violate the Fifth Amendment By Exacerbating Existing Due Process Flaws in the Terrorist Watchlist

Given the existing issues with applying the *Mathews* procedural due process test to terrorist watchlist, adding firearm purchases to the equation would only increase constitutional concerns. In contrast to depriving an individual of the right to travel by air, the proposed legislation would link the terrorist watchlist to a right specifically enumerated in the Constitution.[30] In *District of Columbia v. Heller*, the Supreme Court reaffirmed that the constitution guarantees the right to possess a firearm and use it for "traditionally lawful purposes, such as self-defense within the home."[31] In emphasizing the long-standing recognition of this right, the Court clarified that the Second Amendment is a "codified a *pre-existing* right," rather than being affirmatively granted by the provision.[32]

However, supporters of the legislation may point out that the Second Amendment is not an absolute right, and that the United States and many foreign countries have long placed restrictions on the ownership and use of firearms.[33] While this is accurate, the restrictions that have traditionally been recognized are different in kind from what is included in the proposed legislation. Current law, for example, prohibits felons and individuals with mental disabilities from purchasing firearms, but it does not place any restrictions on those suspected of committing a felony or suspected of having a mental disability.[34] The proposed legislation would break with this practice and allow the Attorney General to restrict gun purchases for *suspected* terrorists. The National Rifle Association came out against a similar proposal, emphasizing their belief that terrorists should not be allowed to purchase weapons, but stressing that barring gun sales based

on *suspicion* was a "guilty-until-proven-innocent standard [] completely incompatible with our American system of justice."[35]

Courts applying the *Mathews* test to the proposed legislation would need to balance the core fundamental rights at stake in gun ownership against the interests of national security.[36] The procedures that were approved of in *Latif v. Lynch*[37] may not be sufficient in this context due to the significance of the right at stake. While courts could mandate additional procedures, this may not be possible due to national security concerns.

III. Refocusing the Debate on a More Effective Solution

Even if the proposed legislation could pass constitutional muster, it would not reduce the risk of terrorist-related violence. Omar Mateen, the man who killed 49 people in an Orlando nightclub in July 2016, was not on the terrorist watchlist when he purchased the gun he used to commit that horrific act.[38] While Mateen had been investigated by the FBI for suspected involvement in terrorist activities, the agents conducting the investigation did not find sufficient evidence to justify his continued inclusion on the list.[39] One reaction to this might be to blame the FBI — to argue that Mateen should never have been removed from the watchlist in the first place.[40] However, the reason that individuals are taken off of the watchlist when the FBI completes an investigation is to avoid the implications of never-ending surveillance by the Agency.[41] Similarly, this criticism itself is the kind of feedback that may fuel incentives for overlisting.[42]

Second, a terrorist unable to purchase a firearm because they are on the watchlist could easily turn to other legal means to dodge the restriction. Background checks can be evaded by purchasing weapons through the Internet or at gun shows, making the watchlist restriction immaterial if it required a background check.[43] The existence of these loopholes casts doubt on

claims made by supporters of proposals similar to the proposed legislation. U.S. Senator Chuck Schumer cited 2,233 instances of individuals on the terrorist watchlist attempting to purchase firearms[44] as evidence of the need to block firearm purchases for individuals on the watchlist.[45] However, this data does not take into consideration the likely change in behavior that the proposed legislation would incentivize.

There are far more promising solutions to this problem. Expanding background checks to gun shows and Internet sales would remove a loophole that can be exploited not just by terrorists, but by any individual prohibited from owning a firearm under current law.[46] Likewise, if the goal of the proposed legislation is to prevent gun deaths in the United States, it may be wrongheaded to focus on terrorists. Terrorist gun deaths account for an incredibly small portion of the overall number of gun deaths in the country.[47] Far more gun deaths are due to suicide,[48] and despite prohibitions, existing loopholes allow many mentally ill individuals to have access to firearms.[49]

CONCLUSION

If there are far more effective ways to reduce gun violence in this country, why have proposals like the one in this Note been around for at least the past decade?[50] One answer might be that "cognitive biases and heuristics" cause individuals to overestimate the danger posed by terrorism.[51] Another possibility is that institutional incentives to create larger watchlists may make the danger of terrorism seem more prevalent than it actually is.[52]

Regardless of the reasons, without significant improvements to the procedural avenues for redress, the proposed legislation should be abandoned. While the need to protect national security is indisputably a compelling governmental interest,[53] it should not come at the cost of

core constitutional protections. The threat of gun violence in America is not an intractable problem, we are just using the wrong tools to address it.

[1] 161 CONG. REC. S8455 (daily ed. Dec. 8, 2015) (statement of Sen. Blumenthal).

[2] *Id.*

[3] *Id.* at S8454 (statement of Sen. Schumer).

[4] U.S. CONST. amend. V.

[5] *Id.*

[6] *See* U.S. CONST. amend. V; Mathews v. Eldridge, 96 S. Ct. 893, 902 (1976) ("[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES 684 (7th ed. 2011) ("Judges characteristically approach the question of how much process is due in terms of the extent to which an administrative proceeding must adopt the panoply of procedural formalities that are found in court trials.").

[7] 96 S. Ct. 893, 903 (1976).

[8] *Id.* at 909.

[9] *Compare Mathews*, 96 S. Ct. at 903-10 (holding the Social Security Administration's written review of disability benefits cancellation cases was adequate, and an in-person hearing would not have been useful because of the decision's reliance on medical evidence), *with* Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1994) (holding that a school district's deprivation of a teacher's contractual teaching position required a hearing because the deprivation significantly implicated the teacher's liberty and property interests).

[10] The Terrorist Screening Database was created by the George W. Bush Administration following the terrorist attacks of September 11, 2001. The database is maintained by the Terrorist Screening Center and nominations to the list are made by the FBI (for suspected domestic

terrorists) and the National Counterterrorism Center (for suspected international terrorists). *E.g.*, Mohamed v. Holder, 995 F. Supp. 2d 520, 525 (E.D. Va. 2014).

[11] *See, e.g.*, Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1318, 1332-33 (2016) ("[T]he government has argued that disclosing particular security procedures that dictate inclusion on the no-fly list and related watchlists 'could enable terrorists and other violent criminals to identify potential weaknesses in the current security system, and to circumvent or otherwise defeat the security measures mandated by the TSA in the Directives.' . . . . [However,] it is difficult for a court to conduct the analysis when the government asserts a right to secrecy covering the very procedures challenged by the plaintiffs.").

[12] Latif v. Holder, 28 F. Supp. 3d 1134, 1142 (D. Or. 2014).

[13] *E.g.*, *Mohamed*, 995 F. Supp. at 526.

[14] *See* Latif v. Holder, 28 F. Supp. 3d at 1161-62 (D. Or. 2014) (holding that post-deprivation procedures for plaintiffs contesting inclusion on the No Fly List violated procedural due process because the Agency provided no meaningful information to contest the listing). *But see* Latif v. Lynch, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *19 (D. Or. Mar. 28, 2016) (finding that providing unclassified summaries for agency rationale of No Fly List inclusion or classified disclosures to counsel with appropriate security clearances was sufficient process).

[15] Manta & Robertson, *supra* note 11, at 1337.

[16] Mathews v. Eldridge, 96 S. Ct. 893, 903 (1976) ("[D]ue process generally requires consideration of three distinct factors . . . [the] second [is] the risk of an erroneous deprivation of such interest through the procedures used . . . .").

[17] OFFICE OF THE INSPECTOR GEN. AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT 14-16, AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS iii (2014).

[18] *See id.* at ii ("Generally, we found that the improvements implemented by the FBI as a result of our previous audits have helped to ensure that the watchlist is more complete, accurate, and current."). *But see id.* at v (describing twelve recommendations that focus on basic case management procedures).

[19] *E.g.*, Mohamed v. Holder, 995 F. Supp. 2d 520, 525 (E.D. Va. 2014).

[20] Manta & Robertson, *supra* note 11, at 1316.

[21] *See id.* at 1315 ("Indeed, the government openly proclaims its latitude in deciding what information to use in its decisions when it states that 'nominations must not be based *solely* on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment.'").

[22] *See* Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 472-73 (2013) (discussing rent-seeking incentives of agency actors).

[23] Mathews v. Eldridge, 96 S. Ct. 893, 903 (1976) ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action . . . .").

[24] Latif v. Holder, 28 F. Supp. 3d 1134, 1148 (D. Or. 2014) ("[F]or *international* travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive . . . .").

[25] *Id.* at 1149.

[26] Manta & Robertson, *supra* note 11, at 1360.

[27] *Mathews*, 96 S. Ct. at 903.

[28] *See* Manta & Robertson, *supra* note 11.

[29] Latif v. Lynch, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *19 (D. Or. Mar. 28, 2016).

[30] *See* U.S. CONST. amend. II; District of Columbia v. Heller, 554 U.S. 570, 570 (2008) (holding that the Second Amendment protects an individual's right to possess a firearm and to use it for traditionally lawful purposes). *But see* Manta & Robertson, *supra* note 11, at 1347 ("The Supreme Court has held that there is a fundamental right to interstate travel . . . . [B]ut if the right is defined as a right to travel by air, then it loses its 'deeply rooted' place in history, as air travel has existed only in the modern era.").

[31] *Heller*, 554 U.S. at 570.

[32] *Id.* at 592.

[33] *See, e.g.*, Brief of the ABA as Amicus Curiae Supporting Petitioners at 12-13, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (listing history of U.S. laws regulating firearms); LAW LIBRARY OF CONG., LIBRARY OF CONG., FIREARMS-CONTROL LEGISLATION AND POLICY: COMPARATIVE ANALYSIS, https://www.loc.gov/law/help/firearms-control/comparative.php (last updated July 30, 2015) (listing firearm restrictions in eighteen foreign countries).

[34] 18 U.S.C. §§ 922g (2012).

[35] *The Terror Watch List and Due Process of Law*, NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION (August 24, 2016), https://www.nraila.org/articles/20160824/the-terror-watch-list-and-due-process-of-law.

[36] Mathews v. Eldridge, 96 S. Ct. 893, 903 (1976).

[37] *See* Latif v. Lynch, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *19 (D. Or. Mar. 28, 2016).

[38] *See* Eric Lichtblau & Matt Apuzzo, *Orlando Gunman Was on Terror Watchlist, F.B.I. Director Says*, N.Y. TIMES (June 13, 2016), https://www.nytimes.com/2016/06/14/us/omar-mateen-fbi.html (explaining that Mateen had been removed from the terrorist watchlist before purchasing the gun used in the Orlando massacre).

[39] *Id.*

[40] *See* Lichtblau & Apuzzo, *supra* note 38 ("[The FBI's] dealings with Mr. Mateen once again threaten to raise questions about its ability to effectively intercept terrorist threats. . . .").

[41] *Id.* ("[Don Borelli, retired FBI counterterrorism supervisor:] Can we allow people's futures to be affected if there's no proven basis for it? That's the flip side to all this . . . . Imagine if you can't get a job because you're on some watchlist and there's no basis for it.").

[42] *See* Manta & Robertson, *supra* note 11, at 1316 ("Who wants to be the one to let a terrorist slip onto a plane? When the buck stops with no one, no one has a reason to stop.").

[43] *See, e.g.*, Lichtblau & Apuzzo, *supra* note 38 ("[B]ackground checks are so easy to evade at gun shows and on the internet . . . . [O]nce [suspected terrorists] become aware that the government is keeping an eye on them — [they] would have no trouble buying a gun through another method.").

[44] The figure Senator Schumer was referring to is in reference to the number of times that a background check was completed on a person on the terrorist watchlist—it does not indicate whether a purchase was actually completed. Letter from Diana C. Maurer, Dir. of Homeland Sec. & Justice Issues, U.S. Gov't Accountability Office, to Dianne Feinstein, U.S. Senator (Mar. 7, 2016).

[45] 161 CONG. REC. S8454 (daily ed. Dec. 8, 2015) (statement of Sen. Schumer).

[46] *See, e.g.*, Lichtblau & Apuzzo, *supra* note 38 ("[Ted Alcorn, Research Director of Everytown for Gun Safety said] the top priority of Everytown and other pro-gun-control groups is not using the watch list but rather expanding background checks to all gun sales.").

[47] *See, e.g.*, Charles Kurzman & David Schanzer, Opinion, *The Growing Right-Wing Terror Threat*, N.Y. TIMES (June 16, 2015), https://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html ("For every person killed by Muslim extremists, there have been 4,300 homicides from other threats.").

[48] Robert J. Spitzer, Opinion, *Five Myths About Gun Control*, WASHINGTON POST (Dec. 21, 2012), https://www.washingtonpost.com (search in search bar for "Five Myths About Gun Control"; then select the corresponding hyperlink in the search results) ("In 2009, for example, almost 11,500 Americans were killed by someone else with a gun . . . but more than 18,000 killed themselves with a firearm.").

[49] Ann E. Marimow, *A Warning, a Gun Sale and Tragic Consequences*, WASHINGTON POST, Mar. 7, 2017, at A01 ("The federal background-check system that is used to prevent convicted felons from buying guns is missing scores of state health records that would also flag and disqualify those who are seriously mentally ill.").

[50] 161 CONG. REC. S8455 (daily ed. Dec. 8, 2015) (statement of Sen. Schumer) ("Guess who introduced this idea originally? Not Barack H. Obama but George W. Bush in 2007.").

[51] Manta & Robertson, *supra* note 11, at 1336 n.127.

[52] Bernstein, *supra* note 22, at 473.

[53] Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.").

Applicant Details

First Name	**Andrew**
Last Name	**Stephenson**
Citizenship Status	**U. S. Citizen**
Email Address	**ajs04g@my.fsu.edu**
Address	**Address** Street **6927 Ebony Trail** City **Tallahassee** State/Territory **Florida** Zip **32309** Country **United States**
Contact Phone Number	**3524228106**
Other Phone Number	**3524228106**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**December 2008**
JD/LLB From	**The Florida State University College of Law** **http://www.law.fsu.edu**
Date of JD/LLB	**May 1, 2021**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Florida State University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year student at the Florida State University College of Law with over thirteen years of prior professional experience. I ask for consideration for a one or two-year clerkship starting fall 2021.

In my application materials, I expect you will see that I am not a typical law student applicant. My resume outlines my success in an unintentional career starting with a part-time job during school to positions of leadership and placement in the company's succession plan. However, that was never my goal. When I finally decided to return to school, at arguably the most inconvenient point of my life, I did so with an entirely different perspective on everything from my own strengths and weaknesses to what is truly important in life. I bring that to my future career, which I eagerly hope will include at least one term at a federal court.

I would like to introduce you to my recommenders Mark Spottswood, Jeffrey Kahn, and Adria Quintela. Professor Spottswood taught both Evidence and Civil Procedure and will be my research advisor for my Upper Level Writing Requirement (my topic is a comparison of the federal “apex doctrine” to Florida’s related rules). Professor Kahn taught Torts and Taxation. Accordingly, they have insight into my intellectual ability. Professor Quintela, the Externships Director, oversaw my work at The Florida Bar and taught Externship Perspectives. She received thorough reports on my professional ability. Because I trust that I leave a good wake wherever I go, choosing who to include as references was a challenge. My strategy was to include at least one from my past career and one from my current job, which involves work on federal cases. I can provide more, if desired.

I am singularly focused on attaining a federal judicial clerkship for my next job. Accordingly, my family and I are prepared for the adventure of moving anywhere upon receiving an offer. Richmond, however, is among the few destinations that would be uniquely favorable. I am very grateful for your consideration to this point. I would love the opportunity to discuss even more and show you the value I may bring to this position.

Respectfully,

Andrew J. Stephenson
6927 Ebony Trail
Tallahassee, FL 32309
(352) 422-8106
ajs04g@gmail.com

Andrew J Stephenson

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Education

Florida State University College of Law – Juris Doctor Candidate, May 2021
GPA: 3.842; Rank: 10/197, Upper-Level Rank 6/212; Law Review Staff Editor
Florida State University – Bachelor of Science in Economics, December 2008

Legal Work Experience

Coppins Monroe, P.A. – Law Clerk, April 2020 – *Present* **Tallahassee, FL**
Researching, writing, and more in support of various litigation at the state and federal levels primarily involving defense of employment, civil rights, and tort claims. Contact Gwen Adkins or Holly Dincman at 850-422-2420.

Florida Office of Financial Regulation – Law Clerk, February 2020 - *Present* **Tallahassee, FL**
Assisting general counsel with issues pertaining to the licensing of regulated financial entities in the state.

Florida Bar, Legal Division – Extern, January - April 2020 **Tallahassee, FL**
Assisted division attorneys in the investigation and prosecution of ethics complaints against licensed attorneys.

Blueprint Intergovernmental Agency – Law Clerk, May - July 2019 **Tallahassee, FL**
Researching, writing, and more in support of the administration of tax-funded infrastructure projects. Issues included: spending and procurement, Board meetings, bid protests, eminent domain, and the MWSBE program.

Florida Department of Business and Professional Regulation – Law Clerk, May - August 2019 **Tallahassee, FL**
Assisted division counsel's caseload by drafting forms, negotiating settlements, and conducting informal hearings.

Prior Work Experience

Capital City Bank – Various Positions, 2005 - 2018 **Tallahassee, FL**
Call Me Direct Specialist, October 2017 - August 2018
Supported associates of all levels with answers to a broad range of policy, procedure, and regulatory compliance questions; reviewed legal documents for approval to use with client accounts; advised on procedural changes.
Manager, Client Service Center, January 2015 - September 2017
Managed 13 direct reports including hiring, coaching, performance appraisals, and merit raises; updated and tested business continuity plan; managed incentive plan; and maintained most Team Lead responsibilities below.
Team Lead, May - December 2014
Lead the day-to-day call center floor operations by monitoring workflow, answering questions, resolving escalated client needs, maintaining shift schedules, and coordinating training.
Client Service Specialist, January - April 2014
Direct Banker 1 and 2, February - December 2013
Traveling Associate, January 2009 - November 2012
Teller, May 2005 - December 2008

North Florida Financial – Field Rep., December 2012-January 2013 **Tallahassee, FL**
Sales; Certified in Life, Health, and Variable Annuity products.

Community Involvement

United Way of the Big Bend – Volunteer Income Tax Assistance, 2020 (tax season) **Tallahassee, FL**
CrossWay Church – Ministry Leader and Teacher, 2011-Present **Tallahassee, FL**
Big Brothers Big Sisters of the Big Bend – Big Brother, 2011-2015* **Tallahassee, FL**

Andrew Stephenson
The Florida State University College of Law
Cumulative GPA: 3.842

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Mark Spottswood	A	4	
Legal Writing and Reseach I	Patricia Matthews	A	2	
Property	Courtney Cahill	B+	4	
Torts	Jeffrey Kahn	A	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Nat Stern	A	3	
Contracts	Jake Linford	A	4	
Criminal Law	Sarah Swana	A-	3	
Legal Writing and Research II	Charlee Taylor	B+	3	
Legislation and Regulation	Mark Seidenfeld	A	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Jay Kesten	A-	4	
Evidence	Mark Spottswood	A+	4	
Law Review		s	2	
Taxation I	Jeffrey Kahn	s	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Externship		s	3	at The Florida Bar
Constitutional Law II	Mary Ziegler	s	3	
Externship Perspectives	Adria Quintela	s	1	
Law and Economics	Elissa Philip Gentry	s	3	
Law and Risk Management	Fred Karlinsky	s	2	
Professional Responsibility	Jennifer Lavia	s	3	

Extraordinary circumstances encountered (Covid-19)

Grading System Description

Standard letter grading.
S=Satisfied. It indicates a pass in a pass/fail (S/U) grading option.

Adria E. Quintela, Esq.
Florida State University College of Law
Tallahassee, Florida

July 3, 2020

Dear Sir/Madam:

I am writing to recommend Andrew Stephenson. As the Co-Director of Externship Programs and a Professor at Florida State University College of Law, I had the pleasure of getting to know Andrew during Fall 2019. One of my duties is to interview law students for externship positions. I interviewed Andrew and was immediately impressed by his maturity and his excellent communication skills. I recommended him for an externship at The Florida Bar Lawyer Regulation Division.

During his externship that fall I frequently spoke to his supervisor. His supervisor informed me that he too was impressed with Andrew, that Andrew was doing exemplary work, that he was reliable, and a real asset to the organization.

The skills required to be successful at an externship are many. Andrew succeeded in all areas as was evident by the review written by his supervisor at the end of his externship. Having done an externship Andrew has already proven that he has many of the skills required to be successful at any work place.

Andrew was also a student in my externship class. As a student in class he stood out. He always participated and contributed positively to all of our discussions. He completed every assignment ahead of time and his contributions definitely made for a better class.

I can also comment on Andrew's dedication. I recall how on my way in to work during the early morning I would usually find Andrew studying in the library. This was an indication of his dedication and commitment to hard work. I was always impressed as it seemed no matter how early I got to work I would see Andrew there.

I can unequivocally recommend Andrew. He will contribute positively to any work environment. If you should have any additional questions, please do not hesitate to contact me.

Very truly yours,

Adria E. Quintela

Co-Director of Externship Programs
Professor
Florida State University College of Law
aquintela@law.fsu.edu
(954)931-9041

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to you in support of Andrew Stephenson and his desire to be a clerk in your chambers.

I am a professor at the Florida State University College of Law. Mr. Stephenson was a student in my Torts class in the Fall of 2018 and a student in my Taxation I class during the Fall of 2019. Mr. Stephenson was a pleasure to have in the classroom. In both classes, his comments were on point and furthered the discussion. He is a hard-worker and a conscientious student. As he worked for several years after college, he is also mature and professional. I am not surprised to see that he has had great success at the College of Law. His current overall GPA ranks him in the top ten students of his entire class.

I highly recommend Mr. Stephenson for a clerkship position. He is incredibly bright but also easy to get along with and acts professionally both in and out of the classroom. I am confident he will be an strong asset in any chamber.

Please feel free to contact me at (850) 644-7474 if you have any further questions.

Sincerely,

Jeffrey H. Kahn

Jeffrey Kahn - jkahn@law.fsu.edu - 850.644.7474

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter to give my enthusiastic support to Andrew Stephenson's application for a clerkship in your chambers. Andrew is an excellent student, and I have no doubt that he will make a first-rate law clerk.

I first met Andrew in the Spring of 2018, which was before he started here at FSU College of Law. He took the somewhat unusual step of seeking out a one-on-one meeting with a faculty member during his visit to campus, hoping to get a deeper sense of what study at our school might be like. I was immediately impressed by his thoughtfulness, his enthusiasm for the study of law, and his confident, yet respectful, demeanor. Before even starting law school, he seemed to have a maturity that many of our graduates still lack. I was thrilled when I learned he would be joining us as a student.

Since then, I've had Andrew on board for two classes. He was in my first-year Civil Procedure class, and he signed up for my Evidence class as a 2L. Both times, he continued to impress. He was invariably well-prepared for class, he was happy to participate (but never dominated the discussion), and his after-class questions showed that he wanted to explore the depths and implications of each subject, rather than just master the minimum necessary to do well on my tests. He has a careful, analytical mind, and it served him well in these two tricky classes. Each time he earned an A overall.

Since then, he has asked me to supervise a solo research project, focusing on issues in civil discovery practice. The upcoming Fall will be a busy time for me, but I agreed happily, mainly because I had every expectation that Andrew would be able to do much of the work in a self-guided manner, with only modest direction from me. He has, in the past, suggested to me that he has the aspiration to eventually enter academia and pursue a research career. Given his drive, intellect, and curiosity, I would not be surprised if he makes good on that dream.

If you would like to contact me for more information, please feel free to email me at spottswood@law.fsu.edu or to call me at 850-644-4248.

Sincerely,

/s/

Mark Spottswood

Associate Professor

Florida State University College of Law

(The Cover Page, Table of Contents, and Table of Citations are removed for Brevity. Upon request, I can provide the whole document.)

STATEMENT OF THE CASE

Ms. Ellejay Covey comes before this Court on appeal of a summary judgment in favor of Carabelle College (CC) ordered by the United States District Court for the Northern District of Florida. As a current student athlete, she asks this Court to reconsider her alleged violation of her Title IX rights by CC's decision to reject her proposal of a women's golf team. That decision was made without adequate inquiry or knowledge of the level of student interest and ability in women's golf, and it is consistent with an apparent longstanding attitude of indifference towards women's athletic opportunities by CC as seen in its history to the present day.

In the 1980s, CC began its athletic program by establishing four men's and four women's varsity teams. R. at 2. Since then, CC has expanded its athletic program to include a total of fourteen teams with eight men's teams and six women's teams. R. at 2-3. During that period, CC also increased its women's roster opportunities by seven, resulting in a breakdown of 137 male and 122 female student-athletes. R. at 2-3. The first expansion after the 1980s was the addition of men's and women's tennis in 1995; however, those teams were disbanded in 2000. R. at 2. Next, CC added two new men's teams in 2004, golf and wrestling, while only four roster spots were added to the women's swimming team. R. at 2. Then, CC reinstated both tennis teams in 2006 due to requests by students and coaches. R. at 3. Later, women's volleyball was added in 2009 due to a survey conducted by the NCAA showing an increase in participation in girls' volleyball at the high school level. R. at 3. In 2013, CC added men's hockey due to requests from students, while also adding three roster spots to the women's track team. R. at 3. Some of these facts on expansion for men are also detailed in the affidavit of Athletic Director (AD) Colton Underwood, but curiously his affidavit makes no mention of the women's teams. R. at 8.

On November 23, 2016, Ms. Covey sent a letter to Mr. Underwood on behalf of herself and six other students proposing the addition of a women's golf team. R. at 2. Despite her well-reasoned justification founded on student interest and ability, practical feasibility, and opportunity for intercollegiate competition, Mr. Underwood declined because of a supposed lack of both interest and room in the budget. R. at 2-3. In his affidavit, he stated that there has never been any previously expressed interest in women's golf, that no CC student has ever made a professional golfer's association, and that he was unable to identify the other six interested students. R. at 8-9. However, his office received two phone calls

inquiring about women's golf, and Ms. Covey offered to provide the names of the six other students. R. at 2, 8.

While before the district court, both parties moved for summary judgment. The district court issued an order simultaneously granting summary judgment for CC and denying it for Ms. Covey. R. at 6. Ms. Covey filed an appeal arguing that the district court failed to properly apply the standards for Title IX to the facts of the case, determining that CC has a history and continuing practice of program expansion responsive to the interests of female students. R. at 15. The appeal was granted by this Court. R. at 16.

STANDARD OF REVIEW

The standard of review for summary judgment in this case is de novo. J.F.K. v. Troup Cty. Sch. Dist., 678 F.3d 1254, 1256 (11th Cir. 2012). In deciding a motion for summary judgment, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). With no facts in dispute, Ms. Covey is entitled to judgment in her favor as a matter of law.

ARGUMENT

I. CC is in violation of Title IX because it lacks a history and continuing practice of program expansion responsive to its female students.

Title IX prohibits sex discrimination by any educational program that receives federal funding. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2018). In the context of intercollegiate sports, it requires effective accommodation of the interests and abilities of both sexes. 34 C.F.R. § 106.41(c)(1) (2018). Compliance in this area can be achieved by meeting the standards in one prong of a three-prong test—the one relevant to this case being prong two:

> Where members of one sex have been and are under represented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;

1979 Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Additional guidance on how to apply the three-prong test, which distinguishes and further defines a history and continuing practice of program expansion, was given in the 1996 Clarification. Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996), available at

http://www.ed.gov/ocr/docs/clarific.html. This brief will address CC's failure to meet both the history and the continuing practice requirements in prong two.

A. CC lacks a history of program expansion because of long gaps between additions of new teams and a lack of affirmative responses to student requests for expansion.

Carabelle College does not have a history of program expansion responsive to the interests of its female students. A university does not have a history of expansion if its record demonstrates long gaps between additions of new varsity teams and a lack of affirmative responses to past student requests for expansion. Mayerova v. E. Mich Univ., 346 F. Supp. 3d 983, 995 (E.D. Mich. 2018); Barrett v. W. Chester Univ. of Pa. of State Sys. of Higher Educ., No. CIV.A. 03-CV-4978, 2003 WL 22803477, at *7 (E.D. Pa. Nov. 12, 2003).

In a university's record for adding new varsity teams, gaps of more than a decade are too long to support a history of expansion without clear evidence that student interests are being affirmatively met. Barrett, 2003 WL 22803477, at *7. In this case, West Chester University (WCU) eliminated its women's gymnastics team in 2003 which triggered the Title IX claim against it. Id. at *1. Prior to that decision, WCU's expansion of varsity women's sports consisted of a cross-country team added in 1979 and a soccer team added in 1992, gaps of thirteen and eleven years. Id. at *7. Also, WCU conducted a student survey it used to determine that it was meeting student athletic interests in 1999, but it failed to follow NCAA standards in how the survey was conducted making the findings unreliable. Id. at *9. Finally, WCU committed to add a women's golf team to offset the elimination of the gymnastics team without evidence regarding the level of student interest in women's golf. Id. The court granted a preliminary injunction requiring WCU to reinstate its gymnastics team. Id. at *6. In so doing, the court reasoned that decade-long gaps in expansion were too long to affirm a history of expansion. Id. at *7. The court's decision came against WCU's claim that its female students' interests were being met as evidenced by the 1999 survey and the addition of the women's golf team. Id. at *9. The court also stated that the survey was unreliable due to its non-conformity to NCAA standards and it being conducted before the elimination of gymnastics. Id. The court also chose not to credit WCU for its plan to add the golf team because little was known about the level of student interest for women's golf. Id.

A university's addition of athletic opportunities, without evidence of corresponding student interest, does not constitute affirmative responses to requests for expansion. Mayerova, 346 F. Supp. 3d at 995. In this case, Eastern Michigan University (EMU) increased its overall participation numbers in

women's athletics from 2003 to 2016 primarily by adding roster spots in women's track (roster sizes of other women's teams fluctuated without a discernable trend). Id. at 994, 995. Prior to that, it added a women's rowing team in 2000. Id. at 995. There was no factual record of requests for expansion in any sport, nor was there inquiry by EMU into its students' levels of athletic interest. Id. Consequently, the court held that EMU failed to demonstrate a history of expansion and granted a preliminary injunction to reinstate its women's softball and tennis teams. Id. at 996. The court reasoned that prong two of the test in the 1996 Clarification directs the court to consider if a university's expansion is responsive to the interests of the underrepresented sex. Id. at 995. The court noted EMU failed to explain how its increase in track opportunities was responsive to its female student's interests. Id. It also noted EMU did not conduct surveys to ascertain its female students' athletic interests. Id.

A university might demonstrate a history of expansion despite gaps of four to six years between adding new varsity teams. Bryant v. Colgate Univ., No. 93-CV-1029, 1996 WL 328446, at *11 (N.D.N.Y. June 11, 1996). Colgate University created its first varsity women's teams in 1973. Id. at *10-11. After that, it added the following varsity women's teams: softball in 1979 (six years later), soccer in 1982 (three years), cross-country in 1987 (five years), and track and field in 1989 (two years). Id. It added no more teams before the filing of the suit in late 1993 (four years) alleging violation of Title IX for failing to elevate the women's club ice hockey team to varsity status. Id. at *1, *11. The court held that Colgate demonstrated a history of program expansion from 1973 to 1989, but qualified that judgment by emphasizing the need for "continuity and persistence," thus implying that the gaps (particularly the expansion hiatus since 1989) were approaching a point of concern. Id. at *11. However, the court also held that a factual dispute existed as to the university's continuing practice. Id. The parties would eventually settle, and Colgate would be ordered to pay for 70% of the plaintiffs' attorney's fees. Bryant v. Colgate University, 996 F. Supp. 170, 173 (N.D.N.Y. 1998).

In the present case, Carabelle College's long gaps between its additions of women's athletic teams demonstrate a lack of history of expansion in women's sports. CC added only two new women's teams (tennis and volleyball) since establishing its women's athletic program in the late 1980s. There was a sixteen-year gap between the establishment of the first women's teams and the permanent reinstatement of men's and women's tennis in 2006. When the women's volleyball team was added three years later, it was the first new women's varsity team without a corresponding men's team added in the nineteen years following the start of women's varsity sports. No additional women's teams have been added in the more than eight years since (despite a new men's hockey team in 2013), and none are planned at this time.

The gaps of sixteen years and eight years are reminiscent of the thirteen-year and eleven-year gaps in Barrett where the court stated that lack of expansion for over a decade was not adequate history of expansion. Furthermore, the eight years since the university's most recent expansion is twice the length of the hiatus in Bryant, which the court used to cast doubt on Colgate's commitment to "continuity and persistence." Considering CC's budget constraints and the time it can take for a proposed team to start competition, CC will likely reach the decade mark in its ongoing expansion hiatus if it does not add the women's golf team. Ms. Covey's efforts toward establishing the team could have helped CC attain compliance with Title IX at a very fortuitous time, had CC been responsive.

Additionally, Carabelle College's inadequate record of affirmative responses to requests for expansion in women's athletics fails to support a history of expansion. Of the expansions of teams and roster spots detailed in the record, only four indicate a basis of student interest behind them. Two of those "expansions" are merely the reinstatements of the men's and women's tennis teams due to persistent requests from students and coaches, and there is no record of student interest when tennis was added in 1995. A third is the addition of a men's hockey team. Finally, the only new women's team added based on student interest was the volleyball team; however, that was not even based on CC's own students. Volleyball was added based on an NCAA survey of high school girls. Thus, other than the one prompting this Title IX claim, there are no student requests for expansion of women's athletics in the record.

CC's record is like the record in Mayerova in that neither university can point to affirmative responses to students of the underrepresented sex or efforts to discern their interests. Both universities added some women's participation opportunities (EMU by creating a rowing team and increasing its track roster and CC by adding tennis, volleyball, and 7 other roster spots), but those marginal efforts were not presented in the context of responsiveness to the developing interests of its students. Likewise, in Barrett, WCU's plans to add a women's golf team did not satisfy the court because WCU could not point to student interest motivating the expansion. WCU did attempt a survey of its own students, which is more than CC can say.

It is worth noting the motivation behind WCU's proposed women's golf team seemed to be the desire for a low-cost path to compliance with Title IX. This suggests that women's golf brings a small financial burden relative to other sports.

Based on the foregoing, CC does not have a history of program expansion responsive to the interest of its female students. Its record has long gaps between expansions and lacks affirmative responses to its students' interests. In failing prong two of the test, CC is in violation of Title IX for its rejection of the proposed women's golf team.

B. CC lacks a continuing practice because it lacks a procedure to ascertain the interests and abilities of its students and a plan of program expansion.

A university lacks a continuing practice if it lacks a non-discriminatory procedure to ascertain the interest and abilities of its students and has no adequate plan of program expansion responsive to those interests. Pederson v. Louisiana State Univ., 912 F. Supp. 892, 915 (M.D. La. 1996), aff'd in part, rev'd in part, 213 F.3d 858 (5th Cir. 2000); Boucher v. Syracuse Univ., No. 95-CV-620 (FJS), 1998 WL 167296, at *4 (N.D.N.Y. Apr. 3, 1998), vacated in part, appeal dismissed in part, 164 F.3d 113 (2d Cir. 1999); 1996 Clarification.

A university that is ignorant about the athletic interests and abilities of its student body and has no adequate plan for program expansion fails to demonstrate a continuing practice. Pederson, 912 F. Supp. at 920, 922. In this Title IX action against Louisiana State University (LSU), the university demonstrated that it had no method by which it could determine the athletic interests and abilities of its student body and provided no evidence that it ever had a working knowledge of that interest and ability. Id. at 915. LSU did have "plans" to establish two new varsity women's teams, fast-pitched softball and soccer, but the plans for both programs suffered from similar defects in implementation, especially in securing proper facilities and adhering to reasonable timetables. Id. at 922. The court held that LSU did not have a continuing practice and characterized its "plan" as "only verbal commitments, supported by vague intentions, resulting in erratic random action" done only by necessity when "forced to act." Id. at 921, 922. The court also pointed out LSU's apparent assumption that athletics is a male domain and linked that backward mindset to the university's ignorance of the athletic interests and abilities of its female students. Id. at 920. This observation is consistent with the Fifth Circuit's determination on appeal that the discrimination by LSU was intentional. Pederson v. Louisiana State Univ., 213 F.3d 858, 884 (5th Cir. 2000).

In contrast, a university demonstrates a continuing practice if it has procedures for ascertaining interests and plans for expansion, even if those procedures are informal. Boucher, 1998 WL 167296, at *4. In this action against Syracuse University (SU), the university did not have a formal procedure for its students to communicate their athletic interests and abilities. Id. However, SU's athletic director proactively sought to ascertain those interests and abilities by monitoring the participation levels of the university's club sports. Id. He also gathered information from other schools at various levels and in various regions, especially at the university's primary feeder schools. Id. Additionally, there was also evidence that informal means existed for interested students to communicate such interests to the university. Id. Finally, at the time of the proceedings, SU had actual plans to establish women's softball in the near future. Id. at *1. The court

held that the university had a continuing practice of expansion as evidenced by the AD's actions and the actual expansion underway. Id. at *4. The court reasoned that the combined informal efforts to ascertain interest and the planned expansion underway provide convincing evidence of a continuing practice, but it added that Title IX is better served by formal procedures. Id.

In the instant case, CC does not have a continuing practice because it has neither procedures for ascertaining its female students' interests nor current plans for expansion of women's sports. At the time of these proceedings, CC has no plans for expanding women's athletics. Also, CC has no procedure, formal or informal, by which CC can ascertain its students' athletic interests and abilities. On November 23, 2016, Ms. Covey put CC on notice that there was some degree of interest and ability in women's golf among her and at least six other students. Two months later, Mr. Underwood declined her request stating among his reasons that there was a lack of interest in the sport. However, the record does not clearly demonstrate how CC reached that conclusion. The only justifications appear to be the fact that no previous request of its kind had ever been made, no CC student has ever become a professional golfer, and that Mr. Underwood was unable to identify the other six interested students—despite two phone calls to his office. Those combined reasons do not amount to a reasonable basis of insight into the actual interests of female students at CC.

Another feature of the record is the odd focus on the history of men's sports at CC that Mr. Underwood gave in his affidavit. Though it is understandable that the AD is proud of those men's teams, his instinct to neglect any mention of women's teams in that statement might reveal his ideas of gender domains in athletics and his primary responsibility as AD.

The ignorance about CC's female students' interest and abilities in this case is like the ignorance LSU demonstrated in Pederson. Like LSU, CC's ignorance is a result of a lack of procedures by which it can ascertain them. Another similarity is the way both universities apparently perceive athletics as a male domain. This can only be inferred at CC by the present inequalities along with the AD's statements, but the inference is consistent with the discriminatory outcome. It sheds light as to why the school gives little attention to the athletic interests and abilities of its female students.

These similarities do not extend to Boucher where SU's informal procedures gave it enough knowledge of its students interests and abilities to prompt further expansion. SU's AD proactively monitored the university's club sports as a source of insight. He also kept tabs on developing interests outside the school. His actions presumably contributed to SU's decision to plan its forthcoming softball team. Those combined efforts, as well as the informal means for students to proactively request expansion of sports, are distinct from those demonstrated by Mr.

Underwood at CC. He has no analogous method of ascertaining his student's athletic interest. Then when Ms. Covey requested women's golf, Mr. Underwood did not take any proactive steps to determine the level of interest for it among the student body. Rather than conduct a survey, interview the interested students, or even propose a trial run at the club level, he rejected the idea without genuine consideration. The proactive effort of Ms. Covey to request the team, standing alone, does not constitute informal procedures.

Also, CC has no adequate plan for current or future expansion of women's sports. However, unlike LSU, CC does not even have verbal commitments or vague intentions to constitute an *in*adequate plan. Naturally, this is even more distinct from SU where, at the time of its proceedings, it was in the process of adding a women's softball team. At CC, no expansions in women's athletics are being contemplated.

As a matter of policy, adequate procedures are essential to compliance with many regulations, and prong two of this Title IX test is no exception. This legislation was designed to effect a significant change to the status quo regarding equal treatment among the sexes. The simple fact that such legislation was needed suggests potential difficulties in attaining its goals (e.g. hostile attitudes and mere inertia among universities). Prong one of the test allows for compliance by achieving objective proportionality. Pure proportionality is a prima facie indication that those obstacles were overcome. Prong two does not provide that same assurance, thus necessitating other evidentiary sources including procedures. The existence of procedures provides many benefits to the goals of Title IX. First, it immediately overcomes the inertia and hostility that stands in the way of change by requiring immediate, proactive steps in establishing the procedures. Next, it provides an evidentiary basis to determine that a university has adequate plans and to measure how well the university is adhering to them. Finally, it prevents a university from claiming compliance with Title IX by marginal efforts, convenient timing, or the fortuitous discovery of evidence after the fact. Accordingly, as a matter of policy, formal procedures should be the default expectation with informal procedures requiring the most prima facie evidence of expansion in response to the interests and abilities of students, as seen in Boucher.

Since CC cannot demonstrate either procedures to track student interest or plans for program expansion, it does not have a continuing practice of program expansion and stands in violation of Title IX.

CONCLUSION

In failing to demonstrate a history and continuing practice of program expansion, CC is in violation of Title IX. Thus, this Court should reverse summary judgment for CC and grant summary judgment for Ms. Covey.

BLUEPRINT
INTERGOVERNMENTAL AGENCY

M E M O R A N D U M

I drafted this memo for the Assistant Attorney. This is used with permission. The date is inaccurate, and the parcel numbers and attachments are removed.

To: Benjamin Harrison Pingree, Director of PLACE
Autumn Calder, AICP, Blueprint Director

From: Kirsten Mood, Assistant Blueprint Attorney

Date: October 15, 2019

Re: Land Bank Acquisition: W1 and Greenways Master Plan

ISSUE: Whether Blueprint may acquire property necessary for the W1 Capital Circle Southwest Project and Greenways Master Plan Project under the Land Bank Program.

RULE: Blueprint Real Estate Policy Section 107.09(A)(1) provides that the Director of PLACE may approve acquisition of any property necessary for implementation of a project within the Capital Improvement Plan (CIP), provided funds are available, budgeted, and within the Director's purchasing authority discussed below. Blueprint Real Estate Policy Section 107.10 establishes a Land Bank Program "to be used to acquire property for Blueprint projects" without eminent domain authority.

To approve an acquisition for a project budgeted and approved in the CIP through the Land Bank Program, the Director of PLACE must consider a written report including the following information: (1) property location; (2) property description; (3) intended use; (4) estimate of value; and (5) proposed purchase price. § 107.10(B), Blueprint Real Estate Policy. Blueprint must also prepare or obtain a value estimate or appraisal report for all real estate transactions, including land bank purchases. §§ 107.08(A), 107.10(F). For property under $25,000, an in-house valuation is sufficient. § 107.08(A)(1). For property up to $750,000, an independent state-certified appraiser must prepare an appraisal report with an estimate of the property's fair market value. § 107.08(A)(2). For property exceeding $750,000, two independent appraisals are necessary. § 107.08(A)(3).

Once in receipt of the written report and appraisal if necessary, the Director of PLACE or his designee may approve land bank acquisitions for sale prices—excluding closing costs, attorney's fees, and business damages—up to $750,000 or 20% of the appraised value, whichever is greater. §§ 107.06(A)(1)(a), 107.10(D)(1). The Intergovernmental Management Committee (IMC) may approve all land bank acquisitions that exceed the authority of the Director of PLACE for projects approved and budgeted within the CIP. §§ 107.06(B)(1)(a), 107.10(E). The Director of PLACE or his designee may negotiate settlement of any voluntary action necessary to acquire the parcel under the Land Bank Program. § 107.10(A)(1). Negotiations for voluntary acquisitions need not follow chapters 73 and 74, Florida Statutes, related to eminent

domain proceedings. Any appraisal, written offer, or written counteroffer made during this process is exempt from public records disclosure under section 125.355, Florida Statutes, until the execution of an option contract, until 30 days before the IA Board considers a sale contract for approval, or until 30 days after termination of negotiations. § 107.10(C).

ANALYSIS: In this case, Blueprint seeks to purchase property that is divided into two parcels for both the W1 Capital Circle Southwest Project and Greenways Master Plan Project. The owner is asking for $1.5 million for the undivided whole. A portion of the property is considered necessary for the W1 Capital Circle Southwest Project and could be acquired under the threat of condemnation. The remainder of the property is useful for the Greenways Master Plan Project. Accordingly, there is value to Blueprint in obtaining the whole, thus avoiding the additional costs associated with dividing the property and with eminent domain actions.

Both Projects are within the Capital Improvement Plan, and funds are available. Blueprint may acquire the parcel through the Land Bank Program with Director of PLACE approval, assuming that the sale price does not exceed 120% of the appraised value. Blueprint must obtain two appraisal reports from separate independent state-certified appraisers containing estimates of the parcel's fair market value. For the Director of PLACE to approve the purchase at the current asking price, the property must appraise for $1.25 million or higher. If the property appraises for less, Blueprint can proceed with one of three strategies

1. Obtain IMC approval: If the asking price of $1.5 million is the most appropriate price considering the nature of the transaction and the goals of each party, then Blueprint must seek and obtain approval from the Intergovernmental Management Committee (IMC).

2. Negotiate a lower price: If the seller is flexible on the price after learning the results of the appraisals and Blueprint's purchasing constraints, Blueprint can attain a savings by negotiating a lower price consistent with the Director of PLACE's approval authority. The following table provides examples of purchase price limits within the approval authority of the Director of PLACE.

Appraised Value	Maximum Price
$0.95 million	$1.14 million
$1.00 million	$1.20 million
$1.05 million	$1.26 million
$1.10 million	$1.32 million
$1.15 million	$1.38 million
$1.20 million	$1.44 million
$1.25 million	$1.50 million

3. Purchase by means of two separate transactions: If the seller is firm and the need is sufficiently justifiable, the property, being divided into two parcels and being intended for two different projects, might be divisible into two distinct transactions. The Director of PLACE can purchase one or both parcels at $750,000 regardless of its

appraisal value. This would also eliminate the need for two independent appraisals, but one appraisal for each parcel would be required. This option may be advantageous if the need for the property is compelling, the seller's price is firm, and there is a risk that an eminent domain action would result in higher overall costs on Blueprint. An unmotivated seller with a firm price is more inclined to resist eminent domain.

Finally, the Director of PLACE must also consider a written report including all identifying information necessary under Real Estate Policy Section 107.10(B). Once these steps are completed, the Director of PLACE or his designee may negotiate the purchase of the parcel. Any written offer, counteroffer, or appraisal generated during this process may be exempt from public records disclosure.

CONCLUSION: Blueprint may negotiate the purchase of the property through the Land Bank Program with two independent appraisals and development of a written report listing property location, property description, intended use, estimate of value; and proposed purchase price. All written negotiations and the appraisal are exempt from public records disclosure under section 125.355, Florida Statutes.

ATTACHMENTS

1. Parcel *redacted*
2. Parcel *redacted*

Applicant Details

First Name	**Adam**
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Contact Phone Number	**425-281-1643**

Applicant Education

BA/BS From	**Ohio State University-Columbus**
Date of BA/BS	**June 2006**
JD/LLB From	**University of Washington School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=94803&yr=2009**
Date of JD/LLB	**June 3, 2018**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington International Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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

Specialized Work Experience

References

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

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April 9, 2022

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Richmond, VA

Dear Judge Hanes,

Please accept my application for the August 2022 law clerk position in your chambers. I work well independently and I am a quick learner with a deep interest in legal research and writing. I graduated from the University of Washington School of Law in the top 5% of my class, and I previously clerked for Justice Craig Stowers on the Alaska Supreme Court. In November 2021 I began clerking again for Judge Gregory Miller on the Anchorage Superior Court.

One aspect of my Alaska Supreme Court clerkship I found particularly rewarding was that, as the highest court in the second-youngest state in the Union, issues of first impression were a frequent occurrence. I cherished every opportunity to delve into legal treatises, legislative history, and even debates from the Alaska Constitutional Convention. I believe the constant feedback from Justice Stowers and fellow law clerks while drafting opinions greatly aided in polishing my legal writing ability. My time in Alaska also helped me discover that I truly enjoy clerking, which led to my current position. I learned much from Justice Stowers, and although I would love nothing more than to provide you with his contact information, sadly he passed away earlier this year. In his stead, Judge Miller and Judge Thomas Matthews of the Anchorage Superior Court have graciously agreed to serve as references. In January and February I assisted Judge Matthews with an expedited redistricting challenge. The case involved five plaintiffs and a 12-day bench trial, requiring many late nights and weekends to meet the publication deadline.

When the pandemic effectively ended my initial plans to return for my LL.M., I decided to take a year off to help my family with moving and childcare, and to finally sit for the D.C. bar exam. My bar application has taken much longer than usual to process due to difficulties with contacting some of my former employers in Japan. My present goal is to clerk for a few more years to gain greater exposure to different legal fields and judicial philosophies. Eventually I hope to put everything I have learned to good use in the public sector as a voting rights attorney, or maybe even on the bench or in elected office. I also enjoy exploring new places and learning new things, and Virginia's rich history offers much to see and experience.

It would be an honor if my eclectic mix of interests and abilities could be of benefit to your chambers. Thank you for taking the time to consider my application and I look forward to hearing from you.

Sincerely,

Adam Sterling

ADAM N. STERLING

P.O. Box 1421 Pullman, WA 99163 | (425) 281-1643 | adam.n.sterling@gmail.com

Bar Admission: D.C. (pending) | UBE Scaled Score: 328

LEGAL EXPERIENCE

Anchorage Superior Court — **Law Clerk I**
825 W 4th Avenue, Anchorage, AK 99501 — November 2021 – Present

- Currently clerking for Judge Gregory Miller until August 2022, conducting legal research and drafting court orders for major substantive and procedural motions.
- Assisted Judge Thomas Matthews with a two-month expedited redistricting challenge involving multiple parties raising novel questions of Alaska constitutional law.

Alaska Supreme Court — **Law Clerk III**
303 K Street, Anchorage, AK 99501 — August 2019 – August 2020

- Clerked in the chambers of Justice Craig Stowers as one of three law clerks until his retirement in June 2020, then clerked for Chief Justice Joel Bolger and Justice Dario Borghesan.
- Conducted legal research, prepared bench memos, and drafted court opinions on a broad range of civil state-law issues, including a number of criminal petitions for hearing.
- Proofread draft opinions from other chambers for factual accuracy, citation formatting, and legal persuasiveness, then returned critiques detailing counterarguments and areas for improvement.

University of Washington School of Law — **Legislative Advocacy Clinic**
4293 Memorial Way NE, Seattle, WA 98195 — September 2016 – June 2017

- Interviewed various criminal justice stakeholders and drafted a bill (SB 5038) to clarify what information prosecutors must disclose when offering incentivized witnesses at trial.
- Made weekly trips to Olympia during the 2017 legislative session to meet with lawmakers, negotiate with prosecutors, and shepherd our bill through the legislative process.

University of Washington School of Law — **Hazelton Fellow**
4293 Memorial Way NE, Seattle, WA 98195 — June 2016 – March 2017

- Assisted my constitutional law instructor, Professor Lisa Manheim, with legal research for an upcoming law review article on the constitutional right to vote.
- Located, summarized, and compiled hundreds of court cases and law review articles pertaining to election laws, redistricting, and voting rights.

OTHER PROFESSIONAL EXPERIENCE

Aerotek (Nintendo of America, NST) — **Associate Translator**
Redmond, WA — November 2013 – September 2015

WillWay Co. (Epion English Conversation Schools) — **English Conversation Teacher**
Osaka, Japan — April 2011 – September 2012

Interac Co., Ltd. — **Assistant Language Teacher**
Miyazaki & Oita, Japan — April 2008 – March 2010

Parker Staffing Services (Nintendo of America) — **Video Game Tester**
Redmond, WA — June 2006 – March 2008

EDUCATION

University of Washington School of Law — **Juris Doctor**
Seattle, WA — September 2015 – June 2018 | GPA 3.86

- Honors: Graduation with High Honors (Top 5%), Order of the Coif, Asian Law Concentration Track, CALI Awards (International Law, Evidence, Admiralty Law)
- Activities: Washington International Law Journal (Senior Managing Editor), Dean's Advisory Committee on Diversity, Student Ambassador Council

Doshisha University — **Master of Arts in Public Policy**
Kyoto, Japan — April 2011 – March 2013 | GPA 4.23

- Thesis: A Comparison of Campaign Finance Reforms in the US and Japan – The Potentiality of Implementing the Donation Booth

The Ohio State University — **B.A. in Japanese, B.S. in Psychology**
Columbus, OH — September 2003 – June 2006 | GPA 3.799

- Honors: *Magna Cum Laude* with Honors in the Arts and Sciences, Phi Beta Kappa, Golden Key Honor Society, College of Arts and Sciences Certificate for Excellence in Scholarship

LANGUAGES & INTERESTS

Japanese: business-level proficiency (JLPT N1) | Sports: 2003 Lacrosse Academic All-American | Volunteering: 2020 Alaska Volunteer Tax & Loan Program, 2016-2019 Greater Maple Valley Unincorporated Area Council (Recording Secretary), 2012 Kyoto Gion Matsuri | Cooking: Asian cuisine | Traveling: Taiwan, Japan from Okinawa to Niigata | Video Games: 12 consoles with over 300 games

Independent Legal Research Projects

- Washington State Diploma Privilege Court Rule Proposal (summer 2018 – spring 2019)
- Washington International Law Journal Style Guide Revision (summer 2017)
- Open-Source 1L Constitutional Law Casebook (summer 2016 – spring 2019)

PUBLICATIONS

Adam N. Sterling, Comment, *Implicit Limits on Amending the Japanese Constitution*, 28 WASH. INT'L L.J. 243 (2019).

Adam N. Sterling, *Campaign Finance Regulations and Reforms in the United States: Reevaluating the Donation Booth*, DŌSHISHA POL'Y & MGMT. REV., Mar. 2014, at 77 (Japan).

Adam N. Sterling, *A Tentative Plan for Overcoming the Inadequacies of Campaign Finance Regulations in Japan: Debating the Potentiality of Implementing the Donation Booth*, DŌSHISHA POL'Y & MGMT. REV., Mar. 2014, at 167 (Japan).

UNIVERSITY OF WASHINGTON
UNOFFICIAL ACADEMIC TRANSCRIPT

Prepared on 2/18/2021

Adam Nicholas Sterling — Law LAW
1529173 — 03/22/XX
3RD YR PROF — NO LONGER ENROLLED (LAST QTR SPRING 2018)

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PLACEMENT TESTS:    TYPE       SCORE        DATE
                    JP100A       60       07/01/03

ACT SCORE  :  33

UNIVERSITY OF WASHINGTON DEGREES EARNED:
 JURIS DOCTOR
 SPRING 2018  (06/08/18)
 WITH HIGH HONORS IN LAW
 UW:135.0 TRANSFER: 16.0 EXTENSION:  0.0  GPA:  3.86

DETAIL OF TRANSFER CREDIT:
 GREEN RIVER COLLEGE, WA (2 YEAR SCHOOL)
 ATTENDED 2001-2002
 CHIN   111 1ST-YR CHIN-H             5.0   4.0
 PE     1XX                           1.0   4.0
 POL S  202 INTRO TO AMER POL         5.0   3.4
 PSYCH  101 INTRO TO PSYCH            5.0   4.0
 TOTAL CREDITS EARNED:               16.0 GPA:3.81

 SUMMARY OF TRANSFER CREDIT:    LD      UD    TOTAL
  TOTAL CREDITS EARNED:        16.0      0.0   16.0
  TOTAL TOWARD DEGREE:         16.0      0.0   16.0

COMMENT:
PASSED THE PROFICIENCY TEST IN JAPANESE ON
6/23/03.
-----------------------------------------------------

GPA CALCULATION BEGAN AUTUMN 2005 FOR LAW STUDENTS.

             AUTUMN 2015              LAW    11
 LAW A  501  CONTRACTS                4.0   A-
 LAW A  502  CIVIL PROCEDURE I        6.0   A-
 LAW A  504  TORTS                    3.0   A
 LAW A  506  LEGAL ANALYSIS           3.0   A-
        QTR  ATTEMPTED: 16.0 EARNED: 16.0 GPA:  3.76
        QTR  GRADED AT: 16.0     GRADE POINTS:  60.1
CUM ATTEMPTED: 16.0 UW EARNED: 16.0 TTL EARNED: 16.0
CUM GRADED AT: 16.0 GRADE PTS:  60.1  CUM GPA:  3.76

             WINTER 2016              LAW    11
 LAW A  501  CONTRACTS                3.0   A-
 LAW A  503  PROPERTY I               6.0   A
 LAW A  504  TORTS                    4.0   A
 LAW A  506  LEGAL ANALYSIS           2.0   A-
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.90
        QTR  GRADED AT: 15.0     GRADE POINTS:  58.5
CUM ATTEMPTED: 31.0 UW EARNED: 31.0 TTL EARNED: 31.0
CUM GRADED AT: 31.0 GRADE PTS: 118.6  CUM GPA:  3.83

             SPRING 2016              LAW    11
 LAW A  505  CRIMINAL LAW             5.0   A-
 LAW A  506  LEGAL ANALYSIS           2.0   A
 LAW A  507  CON LAW I                6.0   A
 LAW A  508  CMP INTL LAW SURVEY      3.0   A-
 LAW B  599  SPECIAL TOPICS           1.0   CR
        QTR  ATTEMPTED: 17.0 EARNED: 17.0 GPA:  3.85
        QTR  GRADED AT: 16.0     GRADE POINTS:  61.6
CUM ATTEMPTED: 48.0 UW EARNED: 48.0 TTL EARNED: 48.0
CUM GRADED AT: 47.0 GRADE PTS: 180.2  CUM GPA:  3.83

             AUTUMN 2016              LAW    12
 LAW A  574  INTERNATIONAL LAW        4.0   A
 LAW B  507  FED COURTS & SYSTEM      4.0   A-
 LAW B  512  LEGIS & PUB POLICY       3.0   A
 LAW B  597  JOURNAL SEMINAR          1.0   A
 LAW E  599  LEG ADVOC CLNC           3.0   CR
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.90
        QTR  GRADED AT: 12.0     GRADE POINTS:  46.8
CUM ATTEMPTED: 63.0 UW EARNED: 63.0 TTL EARNED: 63.0
CUM GRADED AT: 59.0 GRADE PTS: 227.0  CUM GPA:  3.85

             WINTER 2017              LAW    12
 LAW B  503  EVIDENCE                 4.0   A
 LAW B  540  JAPANESE LAW             4.0   A
 LAW B  597  JOURNAL SEMINAR          1.0   A
 LAW E  599  LEG ADVOC CLNC           6.0   CR
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  4.00
        QTR  GRADED AT:  9.0     GRADE POINTS:  36.0
CUM ATTEMPTED: 78.0 UW EARNED: 78.0 TTL EARNED: 78.0
CUM GRADED AT: 68.0 GRADE PTS: 263.0  CUM GPA:  3.87

             SPRING 2017              LAW    12
 LAW B  510  PROBS PROF RESPONS       4.0   A-
 LAW B  513  ADVANCED EVIDENCE        2.0   A-
 LAW B  523  NEGOTIATION              4.0   CR
 LAW B  590  U.S. CONSTITUTION        2.0   A
 LAW E  599  LEG ADVOC CLNC           3.0   CR
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.78
        QTR  GRADED AT:  8.0     GRADE POINTS:  30.2
CUM ATTEMPTED: 93.0 UW EARNED: 93.0 TTL EARNED: 93.0
CUM GRADED AT: 76.0 GRADE PTS: 293.2  CUM GPA:  3.86

             AUTUMN 2017              LAW    13
 LAW A  509  ADMINISTRATIVE LAW       5.0   A
 LAW B  515  CRIM PRO: INVESTGTN      5.0   A
 LAW B  532  ADV CLINIC               1.0   CR
 LAW E  515  POST-CONVCTN REVIEW      4.0   A-
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.91
        QTR  GRADED AT: 14.0     GRADE POINTS:  54.8
CUM ATTEMPTED:108.0 UW EARNED:108.0 TTL EARNED:108.0
CUM GRADED AT: 90.0 GRADE PTS: 348.0  CUM GPA:  3.87

             WINTER 2018              LAW    13
 LAW A  592  CONSTITUTION LAW II      5.0   A
 LAW B  541  CHINESE LAW              4.0   A-
 LAW E  500  INDPT ADV WRITING        2.0   A-
 LAW E  555  LEGISLATION              4.0   A-
        QTR  ATTEMPTED: 15.0 EARNED: 15.0 GPA:  3.80
        QTR  GRADED AT: 15.0     GRADE POINTS:  57.0
CUM ATTEMPTED:123.0 UW EARNED:123.0 TTL EARNED:123.0
CUM GRADED AT:105.0 GRADE PTS: 405.0  CUM GPA:  3.86

             SPRING 2018              LAW    13
 LAW    600  INDEPNDNT STDY/RSCH      4.0   CR
 LAW A  548  CIVIL RIGHTS             4.0   A-
 LAW A  585  ADMIRALTY                4.0   A
        QTR  ATTEMPTED: 12.0 EARNED: 12.0 GPA:  3.85
        QTR  GRADED AT:  8.0     GRADE POINTS:  30.8
CUM ATTEMPTED:135.0 UW EARNED:135.0 TTL EARNED:135.0
CUM GRADED AT:113.0 GRADE PTS: 435.8  CUM GPA:  3.86
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UNIVERSITY OF WASHINGTON
UNOFFICIAL ACADEMIC TRANSCRIPT

Prepared on 2/18/2021

Adam Nicholas Sterling Law LAW
1529173 03/22/XX
3RD YR PROF NO LONGER ENROLLED (LAST QTR SPRING 2018)

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-------------- DEGREE EARNED 06/08/18 --------------
 JURIS DOCTOR
 WITH HIGH HONORS IN LAW
 UW:135.0 TRANSFER: 16.0 EXTENSION:  0.0  GPA:  3.86
----------------------------------------------------

****************************************************
CUMULATIVE CREDIT SUMMARY:
 UW CREDITS ATTEMPTED 135.0  UW CREDITS EARNED 135.0
 UW GRADED ATTEMPTED  113.0  EXTENSION CREDITS   0.0
 UW GRADED EARNED     113.0  TRANSFER CREDITS   16.0
 UW GRADE POINTS      435.8   ---------------------
 UW GRADE POINT AVG.   3.86  CREDITS EARNED    151.0
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****************** END OF RECORD *******************
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ADAM N. STERLING
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WRITING SAMPLE

The following writing sample is from an informal memorandum I drafted in response to a motion for stay pending appeal of a judicially determined property division in a divorce action. In particular, the husband argued that the superior court impermissibly divided his disability benefits from the U.S. Department of Veterans Affairs (VA) when calculating an uneven property division. The standard of review and abuse of discretion discussions have been omitted for brevity, and the facts have been altered or omitted to preserve confidentiality. Omissions are indicated with asterisks, although citations to the record have been removed without indication. Justice Stowers gave me permission to submit this writing sample.

M E M O R A N D U M February 14, 2020

* * *

B. Applying The Correct Test, This Court Should Partially Grant The Husband's Motion To Stay On The Issue Of VA Disability Benefits

Based on the applicable law,[1] the husband has a strong likelihood of succeeding on his argument that the superior court improperly divided his VA disability benefits. "Where the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits."[2] In the instant case, both "parties' financial condition is very strong," so the determining factor for whether to grant a stay is the issue's merits. While it may initially appear that the superior court lacked jurisdiction to award the wife a third of the husband's future VA disability benefits as a matter of federal preemption, the real conflict here lies elsewhere. Some background is provided below to explain what the federal preemption arguments are and why state law is really what is at issue.

1. Background on federal statutes and case law

In 1981 the U.S. Supreme Court held in *McCarty v. McCarty* that federal law preempted state courts from treating military retired pay as marital property in a divorce proceeding.[3] Relying on the statutes' "language, structure, and legislative history," the Court concluded that Congress unmistakably intended retired pay to be a "personal entitlement" and "actually reach the

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1 This is referred to as the "balance of hardships" test, which requires: (1) "irreparable harm" to the moving party; (2) the non-moving party is "adequately protected"; (3) "serious and substantial questions going to the merits of the case"; and (4) "probable success on the merits." *Holmes v. Wolf*, 243 P.3d 584, 591 (Alaska 2010) (internal quotation marks omitted) (quoting *Messerli v. Dep't of Natural Res., State of Alaska*, 768 P.2d 1112, 1122 (Alaska 1989)). [Text relocated from omitted section]

2 *Holmes*, 243 P.3d at 591.

3 *McCarty v. McCarty*, 453 U.S. 210, 232-36 (1981).

beneficiary."[4] The following year Congress overturned that decision by passing the Uniformed Services Former Spouses' Protection Act (Act).[5] The relevant provision allows state courts to "treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[6] The term "disposable retired pay" is then defined as

> the total monthly retired pay to which a member is entitled less amounts which —
>
> . . .
>
> (ii) are deducted from the retired pay of such member as a result of . . . a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired . . . .

When the Court again addressed the question of military retired pay as marital property in *Mansell v. Mansell*, it noted that the Act's purpose was clearly "to change the legal landscape created by the *McCarty* decision."[7] The Court noted that "domestic relations are preeminently matters of state law," so it is presumed that Congress "rarely intends to displace state authority in this area."[8] As such, preemption in the family law context is only proper when "positively required by direct

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[4] *Id.* at 226-30.

[5] Pub. L. No. 97-252, 96 Stat. 730, Title X (1982).

[6] 10 U.S.C. § 1408(c)(1).

[7] 490 U.S. 581, 587 (1989).

[8] *Id.* at 589 (citing *Rose v. Rose*, 481 U.S. 619, 628 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

enactment."[9] The Court nonetheless rejected the wife's argument that Congress intended to "restor[e] to state courts all pre-*McCarty* authority," instead reading the Act as a "precise and limited" grant of authority only in regard to "disposable retired pay."[10] To the contrary, "state courts . . . have not been granted the authority to treat total retired pay as [marital] property."[11] Applying that reasoning, the Court held that because the statutory definition specifically excluded "military retirement pay waived in order to receive veterans' disability payments,"[12] state courts had no "power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[13]

The Court reaffirmed *Mansell* in the 2017 decision of *Howell v. Howell*.[14] That case again involved the waiver of retirement pay in order to receive disability benefits, but that waiver had occurred after the divorce; the state court then ordered "reimbursement" to "indemnify" the wife for her previously allocated portion of the husband's retired pay.[15] The Court reversed, holding that *Mansell* directly controlled and, "[r]egardless of . . . form," state courts could not "displace the federal rule" by ordering the "dollar for dollar" repayment of the portion of retirement pay "that

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9 *Id.* (quoting *Hisquierdo*, 439 U.S. at 581).

10 *Id.* at 588-89.

11 *Id.* at 589.

12 *Id.* (citing 10 U.S.C. § 1408(a)(4)(B) (current version at 10 U.S.C. § 1408(a)(4)(A)(ii))).

13 *Id.* at 595.

14 137 S. Ct. 1400 (2017).

15 *Id.* at 1404.

federal law prohibits state courts from awarding to a divorced veteran's former spouse."[16] However, the Court noted that state courts "remain[] free to take account . . . of reductions in value when it calculates . . . the need for spousal support."[17]

Two other developments in federal law bear directly on the issue presented here. First is the post-*McCarty* but pre-*Mansell* decision of *Rose v. Rose*.[18] There the Court upheld an order to pay child support out of a veteran's disability benefits over a similar preemption challenge.[19] Reiterating the maxim that "domestic relations of husband and wife, parent and child, belong[] to the laws of the States,"[20] the Court declined to identify any preemption where "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support."[21] Second is the 2001 amendment to military personnel law to permit concurrent receipt of both retired pay and disability benefits for certain service members.[22] Concurrent retirement and disability pay (CRDP) is available only for members with "a service-

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[16] *Id.* at 1405-06.

[17] *Id.* at 1406; *see also* 10 U.S.C. § 1408(e)(6) ("Nothing in this section shall be construed to relieve a member of liability for the payment of alimony . . . required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted . . . .").

[18] 481 U.S. 619 (1987).

[19] *Id.* at 625, 636.

[20] *Id.* at 625 (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

[21] *Id.* at 636. Recall that disability benefits themselves were not at issue in *Mansell* or *McCarty*, but instead the question was solely regarding military retirement pay and any portion thereof waived to receive separate disability benefits. *See Mansell v. Mansell*, 490 U.S. 581, 589 (1989) ("disposable retired or retainer pay"); *McCarty v. McCarty*, 453 U.S. 210, 213 (1981) ("nondisability retirement").

[22] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, Div. A, Title VI, § 641(a) (2001) (codified at 10 U.S.C. § 1414).