



PRIMARY MENU

Serving Our Community, Advancing Our Profession

AABANY Fall Conference

September 22, 2018

Fordham University School of Law

REGISTER TODAY

AABANY proudly presents its 2018 Fall Conference, "Serving Our Community, Advancing Our Profession" which is taking place on September 22, 2018 at Fordham University School of Law. This year's Fall Conference will feature a full day of CLE and non-CLE programs on cutting edge topics presented by AABANY's committees and partners. Read more here.

ONLINE REGISTRATION HAS CLOSED BUT WALK-INS WILL BE ACCEPTED WITH A \$20 SURCHARGE AT THE DOOR. Questions? Contact fall.conference@aabany.org.

Edit

AABANY 9TH ANNUAL FALL CONFERENCE Advancement Within The In-House Legal Profession

Presented by the In-House Counsel Committee September 22, 2018 – 9:00 a.m. to 10:30 a.m.

Panelists

Stacey Alton

Managing Director

Major, Lindsey & Africa

Jae-Min Han

Vice President, Chief Counsel

<u>Spectrum Networks – Charter</u>

Communications, Inc.

Ginny Kim

Vice President-Managing Counsel and Litigation Counsel

<u>United Technologies Corporation</u>

LaTanya Langley

Vice President & General Counsel, Group Stationery, Latin America Middle East, Africa & Anti-Corruption Compliance Officer

BIC

Moderated by:

Duane Morikawa

Senior Vice President, Senior Counsel

Mitsubishi UFJ Trust & Banking Corporation

Outline

The panel will address the skills necessary for an in-house counsel to advance in the in-house legal profession and discuss the challenges of obtaining the necessary training or knowledge, finding a sponsor or mentor from internal or external sources and the importance of developing a career plan, taking on leadership roles and roles to provide greater visibility. The panel will also address market trends and areas of current and future demand.

- I. Introduction of the Panelists (5 minutes)
- II. Advancement in the Legal Profession (45 minutes)
 - ☐ What are the skills necessary for advancement?
 - o What are the qualifications for attorneys when determining advancement?

- O How do you identify and develop top performers within your legal group?
- o How are individuals selected for succession planning purposes?
- O How do you or your organization help attorneys develop the skills necessary for advancement?
 - Discuss possible internal resources:
 - Coaching and training
 - Mentorship programs
 - Leadership opportunities
 - New assignments or roles
 - Discuss the benefits of seeking external resources or becoming involved with outside organizations:
 - Executive coaching
 - Volunteer: Industry groups, bar associations, etc.
 - External mentors and sponsors
- O Have you bumped into a "glass ceiling"? If so, what is your advice for breaking through it.
- ☐ Advancement within your Organization:
 - O How to communicate your interest in advancement within your organization or expanding your role?
 - What advice do you have on developing leadership skills and gaining visibility within the legal group or organization?
 - o How do you effectively seek opportunities?
- Advancement Outside of your Organization and Other Topics:
 - When is it time to leave?
 - o For external opportunities, discuss the pros and cons of seeking lateral positions versus promotions.
 - o Personal challenges: examples lessons learned?
 - O Advice on how to develop professional relationships, mentors, and sponsors.
 - o Importance of self-assessment:
 - Career planning
 - Self-evaluation:
 - Satisfaction with work or what is of interest
 - Does company have a viable future
 - Adequate compensation
 - Work-life balance
 - o Importance of being visible:
 - Known in the industry
 - Know by recruiters
 - Networking

III. Market Update/Trends in the Legal Profession (25 minutes)

Discuss the current market and any noted trends (present or future).
What are the growth areas?
How does diversity play into the hiring process?

IV. Questions and Answers (15 minutes) RESOURCES

Periodicals

Wall Street Journal (<u>www.wsj.com</u>)

New York Law Journal (<u>www.law.com</u>)

NYTimes Dealbook (<u>www.nytimes.com</u>)

Trade association publications

Association of Corporate Counsel (<u>www.acc.com</u>)

Minority Corporate counsel (<u>www.mcca.com</u>)

<u>Other</u>

Law Firm Newsletters/Client Advisories

Bar association panels

Findlaw (www.findlaw.com)

GoInhouse (www.goinhouse.com)

Indeed (www.indeed.com)

Law Crossing (www.lawcrossing.com)

Basic Wage and Hour Laws in NYS

By Karen Kithan Yau, Esq.

Applicable Laws:

- ✓ Fair Labor
 Standards Act
- ✓ New York Labor Law
- Wage Orders
- Hospitality Industry
- Miscellaneous Industries

Statute of Limitations

- ✓ Fair Labor Standards Act ("FLSA") – 2 years
- √ Willful 3 years
- ✓ New York Labor Law ("NYLL) – 6 years

Minimum Wage

- As of 12/31/2018, generally, \$13/hr for employers with 11 or more employees
 - Employers with 10 or more employees, \$12/hr
- Should be paid on time

Hospitality Industry

e.g. Restaurant Servers

- As of 12/31/2018, minimum wage is \$13/hour for employers with 11 or more employees
- Employers with 10 or more employees, \$12/hour
- Tip credit: \$2.15/hour if worker earns more than \$2.80/hour
- Notice of tip credit is required
- Be paid extra for maintaining uniforms

Hospitality Industry

e.g. Fast Food Workers

 As of 12/31/2018, minimum wage is \$13.50/hour

Miscellaneous Industries

e.g. Construction Industry

- As of
 12/31/2018,
 \$13/hour for
 employers with
 11 or more
 employees
- Employers with 10 or more employees, \$12/hour

Overtime

The overtime requirement is based on hours worked in a given payroll week. In general, if you have worked more than 40 hours in a pay week, and are not "exempt", you must be paid an overtime rate for all hours over 40.

Overtime Exemptions:

- Executives and administrators earning more than 75 times the minimum wage rate
- Professionals
- Outside salespersons
- Government employees (However, certain non-teaching employees are covered)
- Part-time babysitters
- Ministers and members of religious orders
- Volunteers, learners, apprentices and students working in non-profit institutions
- Students obtaining vocational experience
- Taxicab drivers
- Independent Contractors

Is the complainant an employee under the law?

Other Rights

- Spread-of Hours
- Split Shift
- Day of Rest
- Meal Breaks
- Other Breaks

Notice and Information

Postings

- Wage Theft Prevention Act
 - ➤ Wage Statements
 - > Payroll records

Proof

, "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner [of Labor] is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer " Matter of Mid Hudson Pam Corp. v. Hartnett, 156 A.D.2d 818, 820-21 (3d Dep't 1989) (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946), among other authorities).

Damages

√ Liquidated Damages

√ Actual Damages

√ Attorneys' Fees and Costs

No Requirement to Give

Fringe benefits, which may include:

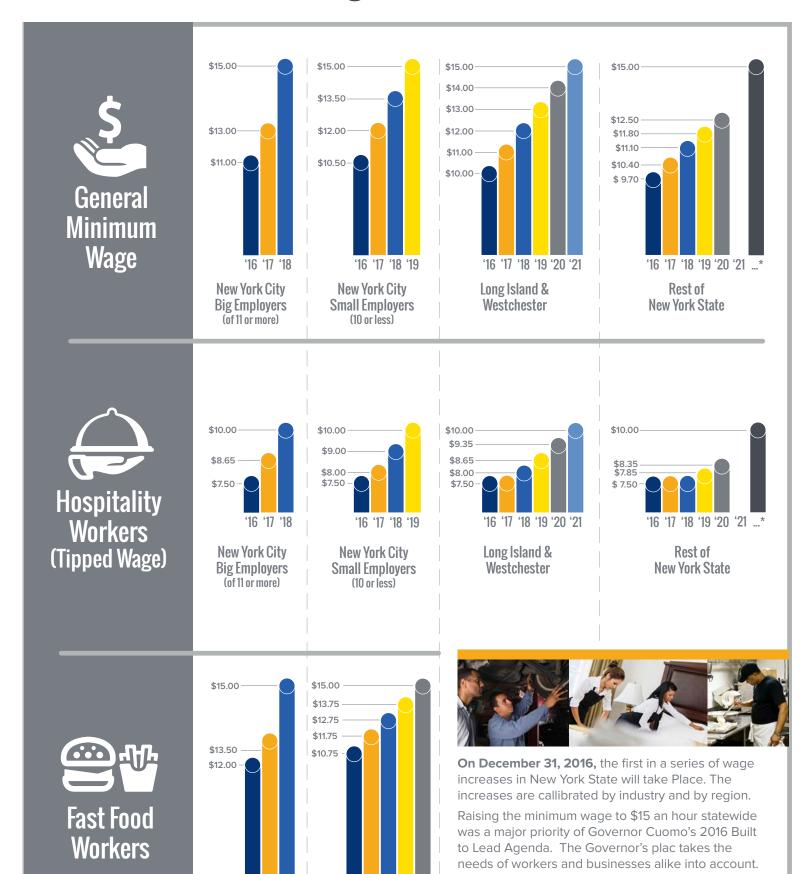
- Reimbursement of expenses or tuition
- Health coverage
- Vacation
- Holidays
- Personal leave

NYC's Paid Safe and Sick Leave Law

Remedies

- No retaliation
- If you need additional assistance or want to file a complaint, please call: 1-888-4-NYSDOL (1-888-469-7365).
- Or USDOL
- Or NYSDCA
- Bring a lawsuit
- Organize! Organize! Organize!

Minimum Wage Annual Increases



16 17 18 19 20

Rest of

New York State

16 17 18

New York City



Note: New York City businesses must comply with all relevant federal, state, and City laws and rules. All laws and rules of the City of New York, including the Consumer Protection Law and Rules, are available through the Public Access Portal, which businesses can access by visiting www.nyc.gov/dca. The Law and Rules are current as of May 2018.

Please note that businesses are responsible for knowing and complying with the most current laws, including any City Council amendments. The Department of Consumer Affairs (DCA) is not responsible for errors or omissions in this packet. The information is not legal advice. You can only obtain legal advice from a lawyer.

NEW YORK CITY ADMINISTRATIVE CODE TITLE 20: CONSUMER AFFAIRS CHAPTER 8: EARNED SAFE AND SICK TIME ACT

§ 20-911. Short title.

This chapter shall be known and may be cited as the "Earned Safe and Sick Time Act."

§ 20-912. Definitions.

When used in this chapter, the following terms shall be defined as follows:

"Calendar year" shall mean a regular and consecutive twelve month period, as determined by an employer.

"Chain business" shall mean any employer that is part of a group of establishments that share a common owner or principal who owns at least thirty percent of each establishment where such establishments (i) engage in the same business or (ii) operate pursuant to franchise agreements with the same franchisor as defined in general business law section 681; provided that the total number of employees of all such establishments in such group is at least five.

"Child" shall mean a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

"Commissioner" shall mean the head of such office or agency as the mayor shall designate pursuant to section 20-a of the charter.

"Department" shall mean such office or agency as the mayor shall designate pursuant to section 20-a of the charter.

"Domestic partner" shall mean any person who has a registered domestic partnership pursuant to section 3-240 of the code, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993.

"Domestic worker" shall mean any "domestic worker" as defined in section 2(16) of the labor law who is employed for hire within the city of New York for more than eighty hours in a calendar year who performs work on a full-time or part-time basis.

"Employee" shall mean any "employee" as defined in subdivision 2 of section 190 of the labor law who is employed for hire within the city of New York for more than eighty hours in a calendar year who performs work on a full-time or part-time basis, including work performed in a transitional jobs program pursuant to section 336-f of the social services law, but not including work performed as a participant in a work experience program pursuant to section 336-c of the social services law, and not including those who are employed by (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by section 92 of the general municipal law or section 207 of the county law.

"Employer" shall mean any "employer" as defined in subdivision (3) of section 190 of the labor law, but not including (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by general municipal law section 92 or county law section 207. In determining the number of employees performing work for an employer for compensation during a given week, all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted, provided that where the number of employees who work for an employer for compensation per week fluctuates, business size may be determined for the current calendar year based upon the average number of employees who worked for compensation per week during the preceding calendar year, and provided further that in determining the number of employees performing work for an employer that is a chain business, the total number of employees in that group of establishments shall be counted.

"Family member" shall mean an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; the child or parent of an employee's spouse or domestic partner; and any other individual related by blood to the employee; and any other individual whose close association with the employee is the equivalent of a family relationship.

"Family offense matter" shall mean an act or threat of an act that may constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision 1 of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, strangulation in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree or coercion in the second degree as set forth in subdivisions 1, 2 and 3 of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household.

"Grandchild" shall mean a child of an employee's child.

"Grandparent" shall mean a parent of an employee's parent. "Health care provider" shall mean any person licensed under federal or New York state law to provide medical or emergency services, including, but not limited to, doctors, nurses and emergency room personnel.

"Hourly professional employee" shall mean any individual (i) who is professionally licensed by the New York state education department, office of professions, under the direction of the New York state board of regents under education law sections 6732, 7902 or 8202, (ii) who calls in for work assignments at will determining his or her own work schedule with the ability to reject or accept any assignment referred to them and (iii) who is paid an average hourly wage which is at least four times the federal minimum wage for hours worked during the calendar year.

"Human trafficking" shall mean an act or threat of an act that may constitute sex trafficking, as defined in section 230.34 of the penal law, or labor trafficking, as defined in section 135.35 and 135.36 of the penal law.

"Member of the same family or household" shall mean (i) persons related by consanguinity or affinity; (ii) persons legally married to or in a domestic partnership with one another; (iii) persons formerly married to or in a domestic partnership with one another regardless of whether they still reside in the same household; (iv) persons who have a child in common, regardless of whether such persons have been married or domestic partners or have lived together at any time; and (v) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

"Paid safe/sick time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in section 20-914 of this chapter and is compensated at the same rate as the employee earns from his or her employment at the time the employee uses such time, except that an employee who volunteers or agrees to work hours in addition to his or her normal schedule will not receive more in paid safe/sick time compensation than his or her regular hourly wage if such employee is not able to work the hours for which he or she has volunteered or agreed even if the reason for such inability to work is one of the reasons in section 20-914 of this chapter. In no case shall an employer be required to pay more to an employee for paid safe/sick time than the employee's regular rate of pay at the time the employee uses such paid safe/sick time, except that in no case shall the paid safe/sick time hourly rate be less than the hourly rate provided in subdivision 1 of section 652 of the labor law.

"Parent" shall mean a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child.

"Public disaster" shall mean an event such as fire, explosion, terrorist attack, severe weather conditions or other catastrophe that is declared a public emergency or disaster by the president of the United States, the governor of the state of New York or the mayor of the city of New York.

"Public health emergency" shall mean a declaration made by the commissioner of health and mental hygiene pursuant to subdivision d of section 3.01 of the New York city health code or by the mayor pursuant to section 24 of the executive law.

"Public service commission" shall mean the public service commission established by section 4 of the public service law.

"Retaliation" shall mean any threat, discipline, discharge, demotion, suspension, reduction in employee hours, or any other adverse employment action against any employee for exercising or attempting to exercise any right guaranteed under this chapter.

"Safe time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in subdivision b of section 20-914 of this chapter, whether or not compensation for that time is required pursuant to this chapter.

"Sexual offense" shall mean an act or threat of an act that may constitute a violation of article 130 of the penal law.

"Sibling" shall mean an employee's brother or sister, including half-siblings, step-siblings and siblings related through adoption.

"Sick time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in subdivision a of section 20-914 of this chapter, whether or not compensation for that time is required pursuant to this chapter.

"Spouse" shall mean a person to whom an employee is legally married under the laws of the state of New York.

"Stalking" shall mean an act or threat of an act that may constitute a violation of section 120.45, 120.50, 120.55, or 120.60 of the penal law.

§ 20-913. Right to safe/sick time; accrual.

- a. All employees have the right to safe/sick time pursuant to this chapter.
 - 1. All employers that employ five or more employees and all employers of one or more domestic workers shall provide paid safe/sick time to their employees in accordance with the provisions of this chapter.
 - 2. All employees not entitled to paid safe/sick time pursuant to this chapter shall be entitled to unpaid sick time in accordance with the provisions of this chapter.
- b. All employers shall provide a minimum of one hour of safe/sick time for every thirty hours worked by an employee, other than a domestic worker who shall accrue safe/sick time pursuant to paragraph 2 of subdivision d of this section. Employers shall not be required under this chapter to provide more than forty hours of safe/sick time for an employee in a calendar year. For purposes of this subdivision, any paid days of rest to which a domestic worker is

- entitled pursuant to subdivision 1 of section 161of the labor law shall count toward such forty hours. Nothing in this chapter shall be construed to discourage or prohibit an employer from allowing the accrual of safe/sick time at a faster rate or use of safe/sick time at an earlier date than this chapter requires.
- c. An employer required to provide paid safe/sick time pursuant to this chapter who provides an employee with an amount of paid leave, including paid time off, paid vacation, paid personal days or paid days of rest required to be compensated pursuant to subdivision 1 of section 161 of the labor law, sufficient to meet the requirements of this section and who allows such paid leave to be used for the same purposes and under the same conditions as safe/sick time required pursuant to this chapter, is not required to provide additional paid safe/sick time for such employee whether or not such employee chooses to use such leave for the purposes included in subdivision a of section 20-914 of this chapter. An employer required to provide unpaid safe/sick time pursuant to this chapter who provides an employee with an amount of unpaid or paid leave, including unpaid or paid time off, unpaid or paid vacation, or unpaid or paid personal days, sufficient to meet the requirements of this section and who allows such leave to be used for the same purposes and under the same conditions as safe/sick time required pursuant to this chapter, is not required to provide additional unpaid safe/sick time for such employee whether or not such employee chooses to use such leave for the purposes set forth in subdivision a of section 20-914 of this chapter.
- d. 1. For an employee other than a domestic worker, safe/sick time as provided pursuant to this chapter shall begin to accrue at the commencement of employment or on the effective date of this local law, whichever is later, and an employee shall be entitled to begin using safe/sick time on the one hundred twentieth calendar day following commencement of his or her employment or on the one hundred twentieth calendar day following the effective date of this local law, whichever is later. After the one hundred twentieth calendar day of employment or after the one hundred twentieth calendar day following the effective date of this local law, whichever is later, such employee may use safe/sick time as it is accrued.
 - 2. In addition to the paid day or days of rest to which a domestic worker is entitled pursuant to section 161(1) of the labor law, such domestic worker shall also be entitled to two days of paid safe/sick time as of the date that such domestic worker is entitled to such paid day or days of rest and annually thereafter, provided that notwithstanding any provision of this chapter to the contrary, such two days of paid safe/sick time shall be calculated in the same manner as the paid day or days of rest are calculated pursuant to the provisions of section 161(1) of the labor law.
- e. Employees who are not covered by the overtime requirements of New York state law or regulations, including the wage orders promulgated by the New York commissioner of labor pursuant to article 19 or 19-A of the labor law, shall be assumed to work forty hours in each work week for purposes of safe/sick time accrual unless their regular work week is less than forty hours, in which case safe/sick time accrues based upon that regular work week.
- f. The provisions of this chapter do not apply to (i) work study programs under 42 U.S.C. section 2753, (ii) employees for the hours worked and compensated by or through qualified scholarships as defined in 26 U.S.C. section 117, (iii) independent contractors who do not meet the definition of employee under section 190(2) of the labor law, and (iv) hourly professional employees.
- g. Employees shall determine how much earned safe/sick time they need to use, provided that employers may set a reasonable minimum increment for the use of safe/sick time not to exceed four hours per day.
- h. Except for domestic workers, up to forty hours of unused safe/sick time as provided pursuant to this chapter shall be carried over to the following calendar year; provided that no employer shall be required to (i) allow the use of more than forty hours of safe/sick time in a calendar year or (ii) carry over unused paid safe/sick time if the employee is paid for any unused

- safe/sick time at the end of the calendar year in which such time is accrued and the employer provides the employee with an amount of paid safe/sick time that meets or exceeds the requirements of this chapter for such employee for the immediately subsequent calendar year on the first day of such year.
- i. Nothing in this chapter shall be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued sick time that has not been used.
- j. If an employee is transferred to a separate division, entity or location in the city of New York, but remains employed by the same employer, such employee is entitled to all safe/sick time accrued at the prior division, entity or location and is entitled to retain or use all safe/sick time as provided pursuant to the provisions of this chapter. When there is a separation from employment and the employee is rehired within six months of separation by the same employer, previously accrued safe/sick time that was not used shall be reinstated and such employee shall be entitled to use such accrued safe/sick time at any time after such employee is rehired, provided that no employer shall be required to reinstate such safe/sick time to the extent the employee was paid for unused accrued safe/sick time prior to separation and the employee agreed to accept such pay for such unused safe/sick time.

§ 20-914. Use of safe/sick time.

- a. Sick time.
- 1. An employee shall be entitled to use sick time for absence from work due to:
 - (a) such employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care; or
 - (b) care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or
 - (c) closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.
- 2. For an absence of more than three consecutive work days for sick time, an employer may require reasonable documentation that the use of sick time was authorized by this subdivision. For sick time used pursuant to this subdivision, documentation signed by a licensed health care provider indicating the need for the amount of sick time taken shall be considered reasonable documentation and an employer shall not require that such documentation specify the nature of the employee's or the employee's family member's injury, illness or condition, except as required by law.
- b. Safe time.
- 1. An employee shall be entitled to use safe time for absence from work due to any of the following reasons when the employee or a family member has been the victim of a family offense matter, sexual offense, stalking, or human trafficking:
 - (a) to obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human trafficking;
 - (b) to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking, or human trafficking;
 - (c) to meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding, including but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, housing or consumer credit;
 - (d) to file a complaint or domestic incident report with law enforcement;

- (e) to meet with a district attorney's office;
- (f) to enroll children in a new school; or
- (g) to take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.
- 2. For an absence of more than three consecutive work days for safe time, an employer may require reasonable documentation that the use of safe time was authorized by this subdivision. For safe time used pursuant to this subdivision, documentation signed by an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider from whom the employee or that employee's family member has sought assistance in addressing family offense matters, sex offenses, stalking, or human trafficking and their effects; a police or court record; or a notarized letter from the employee explaining the need for such time shall be considered reasonable documentation and an employer shall not require that such documentation specify the details of the family offense matter, sexual offense, stalking, or human trafficking.
- c. An employer may require reasonable notice of the need to use safe/sick time. Where such need is foreseeable, an employer may require reasonable advance notice of the intention to use such safe/sick time, not to exceed seven days prior to the date such safe/sick time is to begin. Where such need is not foreseeable, an employer may require an employee to provide notice of the need for the use of safe/sick time as soon as practicable.
- d. Nothing herein shall prevent an employer from requiring an employee to provide written confirmation that an employee used safe/sick time pursuant to this section.
- e. An employer shall not require an employee, as a condition of taking safe/sick time, to search for or find a replacement worker to cover the hours during which such employee is utilizing time.
- f. Nothing in this chapter shall be construed to prohibit an employer from taking disciplinary action, up to and including termination, against a worker who uses safe/sick time provided pursuant to this chapter for purposes other than those described in this section.

§ 20-915. Changing schedule.

Upon mutual consent of the employee and the employer, an employee who is absent for a reason listed in subdivision a of section 20-914 of this chapter may work additional hours during the immediately preceding seven days if the absence was foreseeable or within the immediately subsequent seven days from that absence without using safe/sick time to make up for the original hours for which such employee was absent, provided that an adjunct professor who is an employee at an institute of higher education may work such additional hours at any time during the academic term. An employer shall not require such employee to work additional hours to make up for the original hours for which such employee was absent or to search for or find a replacement employee to cover the hours during which the employee is absent pursuant to this section. If such employee works additional hours, and such hours are fewer than the number of hours such employee was originally scheduled to work, then such employee shall be able to use safe/sick time provided pursuant to this chapter for the difference. Should the employee work additional hours, the employer shall comply with any applicable federal, state or local labor laws.

§ 20-916. Collective bargaining agreements.

- a. The provisions of this chapter shall not apply to any employee covered by a valid collective bargaining agreement if (i) such provisions are expressly waived in such collective bargaining agreement and (ii) such agreement provides for a comparable benefit for the employees covered by such agreement in the form of paid days off; such paid days off shall be in the form of leave, compensation, other employee benefits, or some combination thereof. Comparable benefits shall include, but are not limited to, vacation time, personal time, safe/sick time, and holiday and Sunday time pay at premium rates.
- b. Notwithstanding subdivision a of this section, the provisions of this chapter shall not apply to any employee in the construction or grocery industry covered by a valid collective bargaining agreement if such provisions are expressly waived in such collective bargaining agreement.

§ 20-917. Public disasters.

In the event of a public disaster, the mayor may, for the length of such disaster, suspend the provisions of this chapter for businesses, corporations or other entities regulated by the public service commission.

§ 20-918. Retaliation and interference prohibited.

No employer shall engage in retaliation or threaten retaliation against an employee for exercising or attempting to exercise any right provided pursuant to this chapter, or interfere with any investigation, proceeding or hearing pursuant to this chapter. The protections of this chapter shall apply to any person who mistakenly but in good faith alleges a violation of this chapter. Rights under this chapter shall include, but not be limited to, the right to request and use sick time, file a complaint for alleged violations of this chapter with the department, communicate with any person about any violation of this chapter, participate in any administrative or judicial action regarding an alleged violation of this chapter, or inform any person of his or her potential rights under this chapter.

§ 20-919. Notice of rights.

- a. 1. An employer shall provide an employee either at the commencement of employment or within thirty days of the effective date of this section, whichever is later, with written notice of such employee's right to safe/sick time pursuant to this chapter, including the accrual and use of safe/sick time, the calendar year of the employer, and the right to be free from retaliation and to bring a complaint to the department. Such notice shall be in English and the primary language spoken by that employee, provided that the department has made available a translation of such notice in such language pursuant to subdivision b of this section. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees.
 - 2. Notices provided to employees pursuant to this section on and after the effective date of this paragraph shall in addition inform employees of their right to safe time under this chapter. Employers shall give employees who have already received notice of their right to sick time pursuant to this section notice of their right to safe time within thirty days of the effective date of this paragraph.
- b. The department shall create and make available notices that contain the information required pursuant to subdivision a of this section concerning sick time and safe time and such notices shall allow for the employer to fill in applicable dates for such employer's calendar year. Such notices shall be posted in a downloadable format on the department's website in Chinese, English, French-Creole, Italian, Korean, Russian, Spanish and any other language deemed appropriate by the department.
- c. Any person or entity that willfully violates the notice requirements of this section shall be subject to a civil penalty in an amount not to exceed fifty dollars for each employee who was not given appropriate notice pursuant to this section.

§ 20-920. Employer records.

Employers shall retain records documenting such employer's compliance with the requirements of this chapter for a period of three years unless otherwise required pursuant to any other law, rule or regulation, and shall allow the department to access such records, with appropriate notice and at a mutually agreeable time of day, in furtherance of an investigation conducted pursuant to this chapter.

§ 20-921. Confidentiality and nondisclosure.

An employer may not require the disclosure of details relating to an employee's or his or her family member's medical condition or require the disclosure of details relating to an employee's or his or her family member's status as a victim of family offenses, sexual offenses, stalking, or human trafficking as a condition of providing safe/sick time under this chapter. Health information about an employee or an employee's family member, and information concerning an employee's or his or her family member's status or perceived status as a victim of family offenses, sexual offenses, stalking or human trafficking obtained solely for the purposes of utilizing safe/sick time pursuant to this chapter, shall be treated as confidential and shall not be disclosed except by the affected employee, with the written permission of the affected employee or as required by law. Provided, however, that nothing in this section shall preclude an employer from considering information provided in connection with a request for safe time in connection with a request for reasonable accommodation pursuant to section 8-107.1 of the administrative code.

§ 20-922. Encouragement of more generous policies; no effect on more generous policies.

- a. Nothing in this chapter shall be construed to discourage or prohibit the adoption or retention of a safe time or sick time policy more generous than that which is required herein.
- b. Nothing in this chapter shall be construed as diminishing the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous safe time or sick time to an employee than required herein.
- c. Nothing in this chapter shall be construed as diminishing the rights of public employees regarding safe time or sick time as provided pursuant to federal, state or city law.

§ 20-923. Other legal requirements.

- a. This chapter provides minimum requirements pertaining to safe time and sick time and shall not be construed to preempt, limit or otherwise affect the applicability of any other law, regulation, rule, requirement, policy or standard that provides for greater accrual or use by employees of safe leave or time or sick leave or time, whether paid or unpaid, or that extends other protections to employees.
- b. Nothing in this chapter shall be construed as creating or imposing any requirement in conflict with any federal or state law, rule or regulation, nor shall anything in this chapter be construed to diminish or impair the rights of an employee or employer under any valid collective bargaining agreement.

§ 20-924. Enforcement and penalties.

- a. The department shall enforce the provisions of this chapter. In effectuating such enforcement, the department shall establish a system utilizing multiple means of communication to receive complaints regarding non-compliance with this chapter and investigate complaints received by the department in a timely manner.
- b. Any person alleging a violation of this chapter shall have the right to file a complaint with the department within two years of the date the person knew or should have known of the alleged violation. The department shall maintain confidential the identity of any complainant unless disclosure of such complainant's identity is necessary for resolution of the investigation or

- otherwise required by law. The department shall, to the extent practicable, notify such complainant that the department will be disclosing his or her identity prior to such disclosure.
- c. Upon receiving a complaint alleging a violation of this chapter, the department shall investigate such complaint and attempt to resolve it through mediation. Within thirty days of written notification of a complaint by the department, the person or entity identified in the complaint shall provide the department with a written response and such other information as the department may request. The department shall keep complainants reasonably notified regarding the status of their complaint and any resultant investigation. If, as a result of an investigation of a complaint or an investigation conducted upon its own initiative, the department believes that a violation has occurred, it shall issue to the offending person or entity a notice of violation. The commissioner shall prescribe the form and wording of such notices of violation. The notice of violation shall be returnable to the administrative tribunal authorized to adjudicate violations of this chapter.
- d. The department shall have the power to impose penalties provided for in this chapter and to grant an employee or former employee all appropriate relief. Such relief shall include: (i) for each instance of sick time taken by an employee but unlawfully not compensated by the employer: three times the wages that should have been paid under this chapter or two hundred fifty dollars, whichever is greater; (ii) for each instance of sick time requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, or for each instance an employer requires an employee to work additional hours without the mutual consent of such employer and employee in violation of section 20-915 of this chapter to make up for the original hours during which such employee is absent pursuant to this chapter: five hundred dollars; (iii) for each instance of unlawful retaliation not including discharge from employment: full compensation including wages and benefits lost, five hundred dollars and equitable relief as appropriate; and (iv) for each instance of unlawful discharge from employment: full compensation including wages and benefits lost, two thousand five hundred dollars and equitable relief, including reinstatement, as appropriate.
- e. Any entity or person found to be in violation of the provisions of sections 20-913, 20-914, 20-915 or 20-918 of this chapter shall be liable for a civil penalty payable to the city not to exceed five hundred dollars for the first violation and, for subsequent violations that occur within two years of any previous violation, not to exceed seven hundred and fifty dollars for the second violation and not to exceed one thousand dollars for each succeeding violation.
- f. The department shall annually report on its website the number and nature of the complaints received pursuant to this chapter, the results of investigations undertaken pursuant to this chapter, including the number of complaints not substantiated and the number of notices of violations issued, the number and nature of adjudications pursuant to this chapter, and the average time for a complaint to be resolved pursuant to this chapter.

§ 20-925. Designation of agency.

[Repealed]

Note: New York City businesses must comply with all relevant federal, state, and City laws and rules. All laws and rules of the City of New York, including the Consumer Protection Law and Rules, are available through the Public Access Portal, which businesses can access by visiting www.nyc.gov/dca. The Law and Rules are current as of May 2018.

Please note that businesses are responsible for knowing and complying with the most current laws, including any City Council amendments. The Department of Consumer Affairs (DCA) is not responsible for errors or omissions in this packet. The information is not legal advice. You can only obtain legal advice from a lawyer.

RULES OF THE CITY OF NEW YORK TITLE 6: DEPARTMENT OF CONSUMER AFFAIRS CHAPTER 7: EARNED SICK TIME

§ 7-01. Definitions.

- (a) As used in this chapter, the terms "calendar year," "domestic worker," "employee," "employer," "health care provider," "paid sick time," and "sick time" shall have the same meanings as set forth in section 20-912 of the Administrative Code.
- (b) As used in this chapter, the term "temporary help firm" means an organization that recruits and hires its own employees and assigns those employees to perform work or services for another organization to: (i) support or supplement the other organization's workforce; (ii) provide assistance in special work situations including, but not limited to, employee absences, skill shortages or seasonal workloads; or (iii) perform special assignments or projects.

§ 7-02. Business Size.

- (a) Business size for an employer that has operated for less than one year shall be determined by counting the number of employees performing work for an employer for compensation per week, provided that if the number of employees fluctuates between less than five employees and five or more employees per week, business size may be determined for the current calendar year based on the average number of employees per week who worked for compensation for each week during the 80 days immediately preceding the date the employee used sick time.
- (b) Business size for an employer that has operated for one year or more is determined by counting the number of employees working for the employer per week at the time the employee uses sick time, unless the number of employees fluctuates, in which case business size may be determined for the current calendar year based on the average number of employees per week during the previous calendar year. For purposes of this subdivision, "fluctuates" means that at least three times in the most recent calendar quarter the number of employees working for an employer fluctuated between less than five employees and five or more employees.

§ 7-03. Joint Employers and Temporary Help Firms.

- (a) Where two or more employers have some control over the work or working conditions of an employee, the employers may be treated as a "joint employer" of the employee for purposes of complying with chapter 8 of title 20 of the Administrative Code ("the Earned Sick Time Act"). Joint employers may be separate and distinct entities with separate owners, managers and facilities.
- (b) Every employer deemed to be a joint employer must count each employee jointly employed in

- determining the number of employees performing work for compensation for the employer under the Earned Sick Time Act. For example, an employer who jointly employs three workers and also has three employees under its sole control has six employees for purposes of the Earned Sick Time Act and must provide paid sick time.
- (c) In discharging their joint obligations under the Earned Sick Time Act, joint employers may allocate responsibility for the requirements of such Act among themselves.
- (d) Except as limited by subdivision (f) of this section, all covered joint employers are responsible, individually and jointly, for compliance with all applicable provisions of the Earned Sick Time Act and satisfaction of any penalties imposed for any violation thereof, regardless of any agreement among joint employers.
- (e) If an employee is employed jointly by two or more joint employers, all of the employee's work for each of the joint employers will be considered as a single employment for purposes of accrual and use of sick time under the Earned Sick Time Act.
- (f) Notwithstanding any other provision of this section, where a temporary help firm places a temporary employee in an organization, the temporary help firm shall be solely responsible for compliance with all of the provisions of the Earned Sick Time Act for that temporary employee. For example, a temporary help firm that has 100 employees placed in several different organizations must provide paid sick time to each of its employees placed at the other organizations, regardless of the size of the organization where the temporary help firm places the employee.

§ 7-04. Employees.

- (a) An employee is entitled to the protections of the Earned Sick Time Act regardless of immigration status.
- (b) An individual is "employed for hire within the city of New York for more than eighty hours in a calendar year" for purposes of section 20-912(f) of the Administrative Code if the individual performs work, including work performed by telecommuting, for more than eighty hours while the individual is physically located in New York City, regardless of where the employer is located.
 - (i) Example: An individual who only performs work while physically located outside of New York City, even if the employer is based in New York City, is not "employed for hire within the city of New York" for purposes of section 20-912(f) for hours worked outside New York City.
 - (ii) Example: An individual performs twenty hours of work in New Jersey and sixty hours of work in New York City in a calendar year. The twenty hours of work performed by the employee in New Jersey do not count towards the employee's eighty hours of work for purposes of section 20-912(f).

§ 7-05. Minimum Increments and Fixed Intervals for the Use of Sick Time.

- (a) Unless otherwise in conflict with state or federal law or regulations, an employee may decide how much earned sick time to use, provided however, that an employer may set a minimum increment for the use of sick time, not to exceed four hours per day, provided such minimum increment is reasonable under the circumstances.
 - (i) *Example:* An employee has worked eighty hours and more than one hundred twenty calendar days have passed since the employee's first day of work for the employer. The employer has set a minimum increment of four hours per day for use of sick time. The employee has not yet accrued four hours of time, but is entitled to use the time he or she has already accrued. Under these circumstances, it would not be "reasonable under the circumstances" for the employer to require the employee to use a minimum of four hours of sick time as the minimum increment.
 - (ii) Example: An employee is scheduled to work from 8:00 am to 4:00 pm Mondays. She

schedules a doctor's appointment for 9:00 am on a Monday and notifies her employer of her intent to use sick time and return to work the same day. The employer's written sick time policies require a four hour minimum increment of sick time used per day. If she does not go to work before her appointment, she should appear for work by 12:00 pm.

(b) An employer may set fixed periods of thirty minutes or any smaller amount of time for the use of accrued sick time beyond the minimum increment described in subdivision (a) of this section and may require fixed start times for such intervals.

Example: The employee in Example (ii) of subdivision (a) of this section arrives to work at 12:17pm. Under her employer's written sick time policies, employees must use sick time in half-hour intervals that start on the hour or half-hour. The employer can require the employee to use four-and-a-half hours of her accrued sick time and require her to begin work at 12:30 pm. Similarly, if the employee wanted to leave work at 8:40 am to go to her 9:00 am doctor's appointment, the employer could require the employee to stop work at 8:30 am.

§ 7-06. Employee Notification of Use of Sick Time.

- (a) An employer may require an employee to provide reasonable notice of the need to use sick time.
- (b) An employer that requires notice of the need to use sick time where the need is not foreseeable shall provide a written policy that contains procedures for the employee to provide notice as soon as practicable. Examples of such procedures may include, but are not limited to, instructing the employee to: (1) call a designated phone number at which an employee can leave a message; (2) follow a uniform call-in procedure; or (3) use another reasonable and accessible means of communication identified by the employer. Such procedures for employees to give notice of the need to use sick time when the need is not foreseeable may not include any requirement that an employee appear in person at a worksite or deliver any document to the employer prior to using sick time.
- (c) In determining when notice is practicable in a given situation, an employer must consider the individual facts and circumstances of the situation.
- (d) An employer that requires notice of the need to use sick time where the need is foreseeable shall have a written policy for the employee to provide reasonable notice. Such policy shall not require more than seven days notice prior to the date such sick time is to begin. The employer may require that such notice be in writing.

§ 7-07. Documentation from Licensed Health Care Provider.

- (a) When an employee's use of sick time results in an absence of more than three consecutive work days, an employer may require reasonable written documentation that the use of sick time was for a purpose authorized under section 20-914(a) of the Administrative Code. Written documentation signed by a licensed health care provider indicating the need for the amount of sick time taken shall be considered reasonable documentation. "Work days" means the days or parts of days the employee would have worked had the employee not used sick time.
- (b) If an employer requires an employee to provide written documentation from a licensed health care provider when the employee's use of sick time resulted in an absence of more than three consecutive work days, the employee shall be allowed a minimum of seven days from the date he or she returns to work to obtain such documentation. The employee is responsible for the cost of such documentation not covered by insurance or any other benefit plan.
- (c) If an employee provides written documentation from a licensed health care provider in accordance with subdivision (a) of this section, an employer may not require an employee to obtain documentation from a second licensed health care provider indicating the need for sick

time in the amount used by the employee.

§ 7-08. Domestic Workers.

- (a) Domestic workers who have worked for the same employer for at least one year and who work more than 80 hours in a calendar year will be entitled to two days of paid sick time per year, as provided in this section.
- (b) The two days of paid sick time must be calculated in the manner that paid days of rest for domestic workers are calculated pursuant to New York State Labor Law section 161(1).
- (c) A domestic worker described in subdivision (a) of this section is entitled to two days of paid sick time on the next date that such domestic worker is entitled to a paid day or days of rest under New York State Labor Law section 161(1), and annually thereafter.
- (d) Sick time accrued by a domestic worker will carry over to the next calendar year.

§ 7-09. Rate of Pay.

- (a) Except as provided in subdivision (b) of this section, when using paid sick time, an employee shall be compensated at the same hourly rate that the employee would have earned at the time the paid sick time is taken.
- (b) If the employee uses sick time during hours that would have been designated as overtime, the employer is not required to pay the overtime rate of pay.
- (c) An employee is not entitled to compensation for lost tips or gratuities, provided, however, that an employer must pay an employee whose salary is based in whole or in part on tips or gratuities at least the full minimum wage.
- (d) For employees who are paid on a commission (whether base wage plus commission or commission only), the hourly rate of pay shall be the base wage or minimum wage, whichever is greater.
- (e) For employees who are paid on a piecework basis (whether base wage plus piecework or piecework only), the employer shall calculate the employee's rate of pay by adding together the employee's total earnings from all sources for the most recent workweek in which no sick time was taken and dividing that sum by the number of hours spent performing the work during such workweek. For purposes of this subdivision, "workweek" means a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods.
- (f) If an employee performs more than one job for the same employer or the employee's rate of pay fluctuates for a single job, the rate of pay shall be the rate of pay that the employee would have been paid during the time the employee used the sick time.
- (g) An employer is not required to pay cash in lieu of supplements for sick time used if remuneration for employment includes supplements. The fact that an employer pays cash in lieu of supplements to an employee does not relieve the employer of the requirements of the Earned Sick Time Act. For the purposes of this subdivision, "supplements" has the same meaning as provided in section 220(5)(b) of New York State Labor Law.
- (h) Under no circumstance can the employer pay the employee less than the minimum wage for paid sick time.

§ 7-10. Payment of Sick Time.

- (a) Sick time must be paid no later than the payday for the next regular payroll period beginning after the sick time was used by the employee.
- (b) If the employer has asked for written documentation or verification of use of sick time pursuant to section 20-914(c) or 20-914(d) of the Administrative Code, the employer is not required to pay sick time until the employee has provided such documentation or verification.

§ 7-11. Employer's sale of business.

(a) If an employer sells its business or the business is otherwise acquired by another business, an

- employee will retain and may use all accrued sick time if the employee continues to perform work within the City of New York for the successor employer.
- (b) If the successor employer has fewer than five employees, and the former employer had more than five employees, the employee is entitled to use and be compensated for unused sick time accrued while working for the former employer, until such sick time is exhausted.
- (c) A successor employer must provide employees with its written sick time policies at the time of sale or acquisition, or as soon as practicable thereafter, which shall include a policy that complies with this section.

§ 7-12. Written Sick Time Policies.

- (a) Every employer must distribute or post written policies on sick time and follow such written sick time policies. An employer's written sick time policies must meet or exceed all of the requirements of the Earned Sick Time Act and this Title and state at a minimum:
 - (1) The employer's method of calculating sick time as follows:
 - (i) If an employer provides employees with an amount of sick time that meets or exceeds the requirements of the Earned Sick Time Act on or before the employee's 120th day of employment and on the first day of each new calendar year, which for the purposes of this section is defined as "frontloaded sick time," then the employer's written sick time policy must specify the amount of frontloaded sick time to be provided;
 - (ii) If the employer does not apply frontloaded sick time, then the employer's written sick time policy must specify when accrual of sick time starts, the rate at which an employee accrues sick time and the maximum number of hours an employee may accrue in a calendar year;
 - (2) The employer's policies regarding the use of sick time, including any limitations or conditions the employer places on the use of sick time, such as:
 - (i) Any requirement that an employee provide notice of a need to use sick time;
 - (ii) Any requirement for written documentation or verification of the use of sick time in accordance with Sections 20-914(c) or 20-914(d) of the Administrative Code, and the employer's policy regarding any consequences of an employee's failure or delay in providing such documentation or verification;
 - (iii)Any reasonable minimum increment or fixed period for the use of accrued sick time; and
 - (iv) Any policy on discipline for employee misuse of sick time under Section 7-16 of this Title; and
 - (3) The employer's policy regarding carry-over of unused sick time at the end of an employer's calendar year in accordance with Section 20-913(h) of the Administrative Code;
- (b) Employers must provide written notice of sick time policies using a delivery method that reasonably ensures that employees receive the policies. For example, an employer may comply with this subdivision by:
 - (1) distributing the policies to each employee personally, by regular mail or by email;
 - (2) distributing through company newspapers or newsletters, inclusion with paychecks, inclusion in employee handbooks or manuals, or posting on the company intranet;
 - (3) posting the policies in a conspicuous place where notices to employees are customarily posted; or
 - (4) using any means of distribution or posting that the employer uses in order to comply with section 195(5) of the New York State Labor Law.
- (c) Nothing in this chapter shall prevent an employer from making exceptions to its written sick time policy for individual employees that are more generous to the employee than the terms of the employer's written policy.

- (d) Requirements relating to an employer's additional and separate obligation to provide employees with a Notice of Rights under the Earned Sick Time Act are set forth in section 20-919 of the Administrative Code. An employer may not distribute the Notice of Rights required by Section 20-919 of the Administrative Code instead of distributing or posting its own written sick time policies as required by this section.
- (e) An employer that has not provided to the employee a copy of its written policy along with any forms or procedures required by the employer related to the use of sick time shall not deny sick time or payment of sick time to the employee based on non-compliance with such a policy.

§ 7-13. Employer Records.

- (a) Employers must retain records demonstrating compliance with the requirements of the Earned Sick Time Act, including records of any policies required pursuant to this Chapter, for a period of three years unless otherwise required by any other law, rule or regulation.
- (b) An employer must maintain, in an accessible format, contemporaneous, true, and accurate records that show, for each employee:
 - (1) The employee's name, address, phone number, date(s) of start of employment, date(s) of end of employment (if any), rate of pay, and whether the employee is exempt from the overtime requirements of New York State labor laws and regulations;
 - (2) The hours worked each week by the employee, unless the employee is exempt from the overtime requirements of New York State labor laws and regulations and has a regular work week of forty hours or more;
 - (3) The date and time of each instance of sick time used by the employee and the amount paid for each instance:
 - (4) Any change in the material terms of employment specific to the employee; and
 - (5) The date that the Notice of Rights as set forth in section 20-919 of the Administrative Code was provided to the employee and proof that the Notice of Rights was received by the employee.
- (c) If the department issues a subpoena or document demand, an employer shall provide the department with access to records documenting its compliance with the requirements of the Earned Sick Time Act and the provisions of this chapter, upon appropriate notice, at the department's office.
- (d) Alternately, in the absence of a subpoena or document demand, an employer shall provide the department with access to records upon appropriate notice and at a mutually agreeable time of day at the employer's place of business.
- (e) "Appropriate notice" shall mean 30 days' written notice, unless the employer agrees to a lesser amount of time or the department has reason to believe that:
 - (1) the employer will destroy or falsify records;
 - (2) the employer is closing, selling or transferring its business, disposing of assets or is about to declare bankruptcy;
 - (3) the employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers' compensation or discrimination; or
 - (4) more immediate access to records is necessary to prevent retaliation against employees.
- (f) The department will make two attempts by letter, email or telephone to arrange a mutually agreeable time of day for the employer to provide access to its records in accordance with subdivision (d) of this section. If these attempts are not successful, the department may set a time to access records at the employer's place of business during regular business hours, upon two days' notice.
- (g) An employer's failure to maintain, retain or produce a record otherwise required to be maintained under these rules that is relevant to a material fact alleged by the department in a

notice of hearing issued pursuant to the Earned Sick Time Act or these rules creates a reasonable inference that such fact is true.

§ 7-14. Enforcement and Penalties.

- (a) The department may issue a notice of violation after conducting an investigation pursuant to section 20-924(c) of the Administrative Code.
- (b) Additionally, the department may issue a notice of violation to an employer who fails to respond to a complaint or provide information requested by the Department in connection with a complaint, as required by section 20-924(c) of the Administrative Code, or who fails to provide records or access to records as required by section 20-920 of the Administrative Code provided that:
 - (1) the department makes two written attempts to obtain the response to the complaint, requested information or records, or access to records; and
 - (2) the department notifies the employer that failure to respond to the complaint, or provide requested information, records or access to records will result in a notice of violation charging the employer with failure to maintain, retain, or produce records and failure to comply with the requirements of the Earned Sick Time Act.
- (c) An employer who fails to respond to the notice of violation issued under subdivision (b) of this section on or before the hearing date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the department's investigation of the complaint.
- (d) The employer may cure a notice of violation issued in accordance with subdivision (b) of this section without the penalty imposed in connection with subdivision (c) by:
 - (1) producing the requested information or records on or before the first scheduled hearing date; or
 - (2) resolving to the satisfaction of the department on or before the first scheduled hearing date the employee complaint that is the basis for the request for a response to the complaint.
- (e) The department may conduct an investigation on its own initiative where the department has reason to believe that the facts and circumstances of an employer's practices related to the Earned Sick Time Act warrant investigation, including where:
 - (1) the employer has a history of non-compliance with the Earned Sick Time Act, including failure to comply with settlements or orders of the department, or the department has reason to believe that the employer engages in a pattern of violations of the Earned Sick Time Act:
 - (2) the department has reason to believe that the employer fails to pay minimum wage, prevailing wage, engages in discriminatory practices or retaliation, misclassifies employees as independent contractors or denies undocumented employees sick time required under the Earned Sick Time Act; or
 - (3) the investigation is part of a coordinated enforcement effort with other state, local or federal agencies to protect employee rights.
- (f) A finding that an employer has an official or unofficial policy or practice of not providing or refusing to allow the use of sick time as required under the Earned Sick Time Act constitutes a violation of Section 20-913 of the Administrative Code for each and every employee affected by the policy and will be subject to penalties as provided in Section 20-924(e) of the Code.
- (g) For purposes of Section 20-924(e) of the Administrative Code, penalties shall be imposed on a per employee basis.
- (h) If an employer, as a matter of policy or practice, does not allow accrual of sick time as required under the Earned Sick Time Act, the relief granted to each and every employee affected by the policy or practice must include either application of 40 hours of sick time to the employee's sick time balance or, where such information is known, application of the

number of hours of sick time the employee should have accrued to the employee's sick time balance, provided that such balance does not exceed 80 hours.

§ 7-15. Accrual, Hours Worked and Carry Over.

- (a) If an employee is scheduled and available to work for an on-call shift and is compensated for the scheduled time regardless of whether the employee works, the scheduled time constitutes hours worked for the purposes of accrual under the Earned Sick Time Act.
- (b) For employees who are paid on a piecework basis, accrual of sick time is measured by the actual length of time spent performing work.
- (c) For employees who are paid on a commission basis, accrual of sick time is measured by the actual length of time spent performing work.
- (d) For employees with indeterminate shift lengths (e.g. a shift defined by business needs), an employer shall base the hours of sick time used upon the hours worked by the replacement employee for the same shift. If this method is not possible, the hours of sick time must be based on the hours worked by the employee when the employee most recently worked the same shift in the past.
- (e) If an employee is rehired within six months of separation from employment and had not reached the required 120 days to begin using accrued sick time under section 20-913(d)(1) of the Administrative Code at the time the employee separated from employment, upon resumption of employment, the employee shall be credited at least his or her previous calendar days towards the 120 day waiting period. For the purposes of this subdivision, "waiting period" shall mean the time period described in section 20-913(d)(1) of the Administrative Code between the start of employment or the effective date of the Earned Sick Time Act, whichever is later, and the 120th calendar day following the start of employment or the effective date of the Earned Sick Time Act, whichever is later.
- (f) An employee may carry over up to 40 hours of unused sick time from one calendar year to the next, unless the employer has a policy of paying employees for unused sick time at the end of the calendar year in which such time is accrued and providing the employee with an amount of paid sick time that meets or exceeds the requirements of the Earned Sick Time Act for such employee for the immediately subsequent calendar year on the first day of such year in accordance with Section 20-913(h) of the Administrative Code. Regardless of the number of hours an employee carried over from the previous calendar year, an employer is only required to allow employees to accrue up to 40 hours of sick time in a calendar year. If an employee's sick time balance exceeds 40 hours in a single calendar year, an employer is only required to allow the employee to use up to 40 hours in such calendar year.

Example: An employee accrues 40 hours of sick time in calendar year one and uses 20 hours of sick time in calendar year one. She carries over 20 hours from calendar year one to calendar year two, accrues 40 hours in calendar year two, and does not use any hours in calendar year two. Her sick leave balance at the end of calendar year two is 60 hours (20 hours from calendar year two plus 40 hours from calendar year two). She may carry over 40 of those 60 hours into calendar year three and accrue another 40 hours in calendar year three.

§ 7-16. Employee Abuse of Sick Time.

An employer may take disciplinary action, up to and including termination, against an employee who uses sick time provided under the Earned Sick Time Act for purposes other than those described in section 20-914(a) of the Administrative Code. Indications of abuse of sick leave may include, but are not limited to a pattern of: (1) use of unscheduled sick time on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day, (2) taking scheduled sick time on days when other leave has been denied, and (3) taking sick time on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.

§ 7-17. Retaliation.

- (a) For the purposes of Section 20-912(p) of the Earned Sick Time Act, "an adverse employment action" means any act that is reasonably likely to deter an employee from exercising rights guaranteed under the Earned Sick Time Act.
- (b) The department may establish a causal connection between an employee's exercise of rights guaranteed under the Earned Sick Time Act and an employer's adverse employment action indirectly, such as with evidence that the protected activity was followed closely by the adverse employment action, or directly, with evidence of retaliatory animus directed towards an employee by an employer. Retaliation is established when the department shows that a protected activity was a motivating factor for an adverse employment action, even when other factors also motivated the adverse employment action.

NYC'S PAID SICK LEAVE LAW







"The benefits of paid sick leave extend far beyond the positive impact on individual families. It's also about making our businesses run better, and protecting the health and welfare of their customers."

- Mayor Bill de Blasio





WHAT WE WILL COVER

- Overview of the law
- Which employers must comply with the law
- Which employees are covered/not covered by the law
- Notice of Employee Rights
- Accrual and rate of pay for sick leave
- Use of sick leave
- Compliance
- Q & A





OVERVIEW OF THE LAW





NYC'S PAID SICK LEAVE LAW

- NYC was the 7th jurisdiction to guarantee access to sick leave for employees under the Earned Sick Time Act (Paid Sick Leave Law). To date, more than 30 jurisdictions have adopted paid sick leave laws.
- More than 1 million NYC employees now have the right to sick leave.





NYC'S PAID SICK LEAVE LAW

 Under the law, covered employees have the right to use sick leave for the care and treatment of themselves or a family member.





WHICH EMPLOYERS MUST COMPLY WITH THE LAW





WHICH EMPLOYERS MUST PROVIDE SICK LEAVE?

- All employers must provide some type of sick leave.
- Employers with 5 or more employees or 1 or more domestic workers must provide paid sick leave.
- Employers with fewer than 5 employees must provide unpaid sick leave.





HOW SHOULD EMPLOYERS CALCULATE NUMBER OF EMPLOYEES?

- Employers should count full-time, part-time, and temporary employees who work more than 80 hours in a calendar year in NYC.
- If the number of employees changes every week, count the average number of employees paid per week during the 80 days immediately preceding the date the employee used sick leave.





WHICH EMPLOYEES ARE COVERED/NOT COVERED BY THE LAW





WHICH EMPLOYEES ARE COVERED?

 Employees who work more than 80 hours in NYC in a calendar year are covered.

Includes:

- Full-time employees
- Part-time employees
- Temporary employees
- Per diem and "on call" employees
- Transitional jobs program employees

- Undocumented employees
- Employees who are family members but not owners
- Employees who live outside of NYC but work in NYC





- Employees who work 80 hours or less a calendar year in NYC.
- Students in federal work study programs.
- Employees whose work is compensated by qualified scholarship programs.
- Employees of government agencies.
- Participants in Work Experience Programs (WEP).





- Certain employees subject to a collective bargaining agreement.
- The law does not apply to employees subject to a collective bargaining agreement that has been in effect since April 1, 2014. For all other agreements, the agreement must expressly waive the law's provisions and, unless the employee is in the grocery or construction industry, the agreement must provide comparable benefit.





- Physical Therapists, Occupational Therapists, Speech Language Pathologists, Audiologists licensed by NYS Department of Education.
 - Not covered if:
 - Call in for work at will.
 - Determine own schedule and assignments.
 - Paid average hourly wage 4x the federal minimum wage.





- Independent contractors.
 - Not covered if they do not meet definition of an employee under NYS Labor Law.
 - Factors include how much supervision, direction, and control employer has over services being provided.





WHAT IS A CALENDAR YEAR?

- Means any consecutive 12-month period of time determined by employer.
- Employers must provide employees up to 40 hours of sick leave every calendar year.
- Employers must include their calendar year in the required written Notice of Employee Rights.





NOTICE OF EMPLOYEE RIGHTS





NOTICE OF EMPLOYEE RIGHTS

- Employers must give covered employees the Notice of Employee Rights created by DCA on the first day of their employment.
- The Notice is available in English and 25 additional languages at nyc.gov/PaidSickLeave.





NOTICE OF EMPLOYEE RIGHTS

- Employers are required to keep records that show the date the Notice was provided to each employee and proof that the Notice was received by each employee.
- Employers can give employees the Notice in person, by regular mail, or by email. Save email receipts.





WHAT IS IN NOTICE OF EMPLOYEE **RIGHTS?**

- Accrual rate and information on how to use sick leave.
- Employer's calendar year.
- Right to be free from retaliation.
- Right to file a complaint.

NOTICE OF EMPLOYEE RIGHTS

Under New York City's Earned Sick Time Act (Paid Sick Leave Law), certain employers must give their employees sick leave. Go to nyc.gov/PaidSickLeave to lears which employees are covered by the law.

Employers with five or more employees who are hired to work more than 80 hours a calendar year in New York. City must provide paid sick leave. Empli

Employers who have one or more dome more than 80 hours a calendar year mus

By law, employers who must provide begin employment and to existing em

YOU HAVE A RIGHT TO SIC TREATMENT OF YOURSELF

AMOUNT OF SICK LEAVE.

· Your employer must provide up-

Start of Calendar Year:

Domestic workers: Your employ paid rest to which you are entitle "Domestic Workers' Bill of Right

- You accrue sick leave at the rate sick leave per calendar year.
- . Domestic workers: You must he poid sick leave under City law, D

DATE ACCRUAL BEGINS.

You begin to accrue sick leave on April

Expendion: If you are covered by a colleacone sick leave under City law begins

DATE SICK LEAVE IS AVAILABLE FOR

- You can begin using sick leave o
- Domestic workers: DCA will pro mys.gov/PadSickLeave.

ACCEPTABLE REASONS TO USE SICK

You can use sick leave when:

- . You have a mental or physical ill or treatment of your mental or pl You must care for a family memi
- physical illness, injury, or health
- Your employer's business closer school or child care provider old

FAMILY MEMBERS

- The law recognizes the following as family members: . Child (biological, adopted, or foster child;
- legal ward; child of an employee standing in loco payerfail
- Grandchild
- · Spouse

Domestic partner

If the need is foreseeable, your employer can require up to seven days advance notice of your intention to use sick leave. If the need is unforeseeable, your employer may require you to give notice as soon as practicable.

· Parent

Grandparent

step abling-

or domestic partner

Child or parent of an employee's spouse

Sibling (including a half, adopted, or

Your employer can require documentation from a licensed health care provider if you use more than three consecutive workdays as sick leave. The Paid Sick Leave Law prohibits employers from requiring the health care provider to specify the medical reason for sick leave. Disclosure may be required by other laws.

Up to 40 hours of unused sick leave can be carried over to the next catericar year. However, your employer is unity required to let you use up to 40 hours of sick leave per calendar year.

YOU HAVE A RIGHT TO BE FREE FROM RETALIATION FROM YOUR EMPLOYER FOR USING SICK LEAVE.

Your employer cannot retailate against you for

- Requesting and using sick leave. Filing a complaint for elleged violations of the law with DCA
- . Communicating with any person, including coworkers, about any violation of the law.
- Participating in a court proceeding regarding an alleged violation of the law.
- . Informing another person of that person's potential rights.

Retallation includes any threat, discipline, discharge, demotion, suspension, or reduction in your hours, or any other adverse employment action against you for exercising or attempting to exercise any right guaranteed under

YOU HAVE A RIGHT TO FILE A COMPLAINT.

You can tile a complaint with DCA. To get the complaint form, go online to myc.gov/PaidSickLeave or contact 311 Q12-NEW-YORK autoide NYCL

DCA will conduct an investigation and try to mediate your complaint. DCA will keep your identity confidential unless declosure is necessary to conduct the investigation, mediate the complaint, or is required by law.

Keep a copy of this notice and all documents that show your amount of sick leave and your sick leave accrus and use.

Note: The Earned Sick Time Act sets the minimum requirements for sick leave. Your employer's leave policie may already meet or exceed the requirements of the law.

You have a right to be given this notice in English and. If available on the DCA website, your primary language

For more information, including Frequently Asked Questions, go to eyo,gov/PaktSickLeave or call \$11 and task







ACCRUAL AND RATE OF PAY FOR SICK LEAVE





HOW DOES ACCRUAL WORK FOR EMPLOYEES?

- An employee earns 1 hour of sick leave for every 30 hours worked.
- An employee can accrue up to 40 hours of sick leave per calendar year.

	Date Accrued Sick Leave Available for Use	
Existing employee	July 30, 2014	
New employee	120 days after first day of employment	





WHAT IS THE RATE OF PAID SICK LEAVE?

- Employers with 5 or more employees pay employees at their regular hourly rate but no less than the minimum wage.
 - This includes employees whose salary is based on tips or gratuity.





RECAP: EMPLOYEES

Number of Employees	Amount of Sick Leave per Calendar Year	Paid or Unpaid Sick Leave	Rate of Pay
5 or more	Up to 40 hours	Paid	Regular hourly rate but no less than the minimum wage
1- 4	Up to 40 hours	Unpaid	Not Applicable





OVERVIEW: DOMESTIC WORKERS

Number of Employees	Amount of Sick Leave per Calendar Year	Paid or Unpaid Sick Leave	Rate of Pay
1 or more domestic workers	2 days after one year working for same employer	Paid	Regular hourly rate but no less than the minimum wage

- City leave is in addition to the 3 days of paid rest under NYS Labor Law.
- Accrual and use of sick leave follow NYS Labor Law.





USE OF SICK LEAVE





WHAT ARE ACCEPTABLE REASONS TO USE SICK LEAVE?

- Employees can use leave for themselves or a family member for:
 - Mental or physical illness, injury, or health condition.
 - Medical diagnosis, care, or treatment of above.
 - Preventive medical care.
- Business closes due to a public health emergency.
- Care of child whose school or child care provider closed due to a public health emergency.





WHO IS A FAMILY MEMBER UNDER THE LAW?

- The law recognizes the following as a family member:
 - Child (biological, adopted, or foster child; legal ward; child of an employee standing in loco parentis)
 - Grandchild
 - Spouse
 - Domestic Partner
 - Parent

- Grandparent
- Child or parent of an employee's spouse or domestic partner
- Sibling (including a half, adopted, or step sibling)





WHAT HAPPENS TO UNUSED SICK LEAVE?

- Employees can carry over up to 40 hours of unused sick leave to the next calendar year.
- Employees continue to accrue up to 40 hours of sick leave in addition to the sick leave carried over from the previous year.
- Employers are only required to allow employees to use up to 40 hours of sick leave per calendar year.





CAN EMPLOYER PAY AN EMPLOYEE FOR UNUSED SICK LEAVE?

- An employer can pay an employee for unused sick leave at the end of the calendar year. This is not required.
- An employer is not required to allow an employee to carry over sick leave if:
 - The employer pays employee for the unused sick leave. AND
 - The employer gives employee 40 hours of sick leave on the first day of the new calendar year.





WHAT HAPPENS TO UNUSED SICK LEAVE FOR REHIRES?

- If an employee is rehired within 6 months, the employer must reinstate previously accrued sick leave.
 - Exception: Employer paid employee for unused sick leave when employee left.





MUST EMPLOYEE GIVE ADVANCE NOTICE TO USE SICK LEAVE?

- If the need is **foreseeable**, employers can require up to 7 days advance notice before employee uses sick leave.
 - Example: scheduled doctor's appointment
- If the need is **unforeseeable**, employer may require employee to give notice as soon as practicable (reasonable).
 - Example: accident
- The employer's requirements for giving notice of the need to use sick leave must be included in a written sick leave policy.





CAN EMPLOYER SET MINIMUM INCREMENTS FOR SICK LEAVE?

- An employer can set reasonable minimum increments for the use of sick leave, but the minimum cannot be more than 4 hours per day unless otherwise permitted by state or federal law. The employer's minimum increment must be included in a written sick leave policy.
- An employer may set fixed periods of 30 minutes or less for the use of leave beyond the minimum daily increment.





DOES EMPLOYEE NEED A DOCTOR'S NOTE?

- Employers can require documentation from a licensed health care provider if employee uses more than 3 consecutive workdays as sick leave.
 - Employers cannot require provider to specify the medical reason for sick leave.
 - Note: A workday does not need to be a full day if the employee works part time.
- Employers may require employee to provide written verification that employee used sick leave for sick leave purposes.
 - Form located at nyc.gov/PaidSickLeave
- Employers must include these requirements in their written policy.





WHAT ABOUT AN EMPLOYER'S EXISTING LEAVE POLICIES?

- The Paid Sick Leave Law sets the minimum requirements for sick leave.
- An employer's existing leave policies may already meet or exceed the requirements of the law.





COMPLIANCE





WHAT DOES RIGHT TO BE FREE FROM RETALIATION MEAN?

- An employer cannot retaliate against employees for requesting or using sick leave.
- Retaliation is any act that is reasonably likely to deter an employee from exercising their rights under the paid sick leave law.
- Retaliation includes any threat, discipline, discharge, demotion, suspension, or reduction in hours, or any other adverse employment action against employee.





WHAT RECORDS ABOUT SICK LEAVE MUST EMPLOYER KEEP?

- Employers must keep and maintain records documenting compliance with the law for at least 3 years.
- Employers must keep any health-related information confidential.





WHAT RECORDS ABOUT SICK LEAVE MUST EMPLOYER KEEP?

- Employers must maintain records that show:
 - Each employee's name, address, phone number, dates of employment, pay rate, whether employee is exempt from overtime.
 - Hours worked by each employee.
 - Date and time of each instance of sick leave used by each employee and the amount paid for each instance.
 - Any change in the material terms of employment of an employee. AND
 - Date the Notice was provided to each employee.





HOW DOES THE COMPLAINT PROCESS WORK?

- Employees have 2 years to file a complaint with DCA.
- DCA will keep the employee's identity confidential unless disclosure is necessary to investigate, settle, proceed to hearing, or is required by law.
- DCA will contact employer by mail for written response.
 Employers must respond to DCA within 30 days, sometimes less based on the nature of the complaint.





HOW DOES THE COMPLAINT PROCESS WORK?

- DCA will conduct a fair investigation of the complaint.
- If there is a violation, DCA will work with the employer and the employee to try to settle the complaint.





WHAT HAPPENS WHEN DCA AND THE EMPLOYER DON'T SETTLE?

- If the employer receives a Notice of Violation, the employer has the opportunity to:
 - Settle the violation without a hearing. OR
 - Appear before an impartial judge at the City's Tribunal.
- The judge will hear testimony from DCA, the employer, and any witnesses.





WHAT RELIEF DO EMPLOYEES HAVE UNDER THE LAW?

- Under the law, a judge may order the following relief:
 - Full compensation, including lost wages and benefits, \$500 and appropriate equitable relief for each time employer punished employee for taking sick leave (not including termination).
 - Full compensation, including lost wages and benefits, \$2,500 and appropriate equitable relief (including reinstatement) for each time employer fires employee for taking sick leave.
 - 3x the wages employee should have been paid for each time employee took sick leave but wasn't paid or \$250, whichever is greater.
 - \$500 for each time employee was denied sick leave or was required to find replacement worker, or each time employee was required to work additional hours without mutual consent.





WHAT ARE MAXIMUM PENALTIES UNDER THE LAW?

- The law outlines the following maximum penalties:
 - \$500 for each affected employee for the first violation.
 - Up to \$750 for each affected employee for a second violation within 2 years of a prior violation.
 - Up to \$1,000 for each affected employee for subsequent violations that occur within 2 years of any previous violation.
 - Up to \$50 for each employee who was not given the required written Notice.





RULES

- DCA has published rules that are available at nyc.gov/PaidSickLeave.
- Rules clarify provisions in the Paid Sick Leave Law, establish requirements to implement the Act and meet its goals, and provide guidance to covered employers and protected employees.





DCA IS HERE TO HELP: PAID SICK LEAVE

- To file a complaint, get information, speak with a DCA representative, schedule a training:
 - Visit nyc.gov/PaidSickLeave.
 - Call 311 (212-NEW-YORK outside NYC) and ask for information about Paid Sick Leave.
 - Email PaidSickLeave@dca.nyc.gov.
 - Use online Live Chat at nyc.gov/BusinessToolbox (Businesses only).
 - Visit 42 Broadway, 11th Floor, New York, NY 10004.
 Office hours are 9 a.m. to 5 p.m. Monday through Friday.





DCA IS HERE TO HELP: GENERAL/FINANCIAL EMPOWERMENT

- Visit nyc.gov/consumers.
 - Search "Financial Empowerment" for free one-on-one professional financial counseling and safe banking products.
- Contact 311 (212-NEW-YORK outside NYC).
 - Ask for "Financial Empowerment Center," "NYC SafeStart Account."
- Use online Live Chat at nyc.gov/BusinessToolbox (Businesses only).





QUESTIONS?





nyc.gov/PaidSickLeave

PaidSickLeave@dca.nyc.gov

CONTACT 311 (212-NEW-YORK)









@NYCDCA #PAIDSICKLEAVE





Pro Bono Primer: Divorce & Family Law

Beatrice Leong, Esq. • 09.22.2018

Domestic Relations Law

Pro bono clinic often attract clients who are going through domestic strife.

Many of the people seeking Divorce/ Family Law advice have simple, uncomplicated issues.

Sometimes, they just want someone to hear their story.

How can you help them? Basic Domestic Relations Law

Overview

Matrimonial Law Actions

Versus

Family Law Related Petitions

What is the Difference?

Matrimonial Law

- Parties must be married
- Divorces are heard in Supreme Court
- Relief sought:
 - Dissolution of Marriage/Annulments
 - Custody of Children
 - Orders of Protection
 - Child/Spousal Support
 - Equitable Distribution
 - Prenupt Enforcement
- One Judge

Family Law

- Parties could be married or unmarried, or just related
- Cases in heard in Family
 Courts
- Relief Sought:
 - Custody/ Visitation of Children
 - Child/Spousal Support
 - Orders of Protection
 - ACS/ Neglect Cases
- Multiple Judges

Basic Divorce Law

Spousal Support and Equitable Distribution

Marriage

1. Are you married?

- a. There are extra legal rights and protections provided to a married person, versus a person having a child out of wedlock, or domestic partners such as boyfriends and girlfriends.*
 - i. Rights of Health Insurance
 - ii. Rights to gain access to Marital assets such as houses
 - iii. Rights to gain access to Premarital assets
 - iv. Rights to Retirement Accounts
 - v. Right to Remain in the Residence
 - vi. Right to Spousal Support
 - vii. Rights of Inheritance
- a. Was it civil or religious? There is an extra step for religious marriages.

Maintenance aka "Alimony" or "Spousal Support"

- 2. How many years have you been married? * It is important to determine the length of marriage. (In NY, there are guildlines for spousal support aka alimony or maintenance.)
- 2. Monied Spouse"- who earns a higher income?
- 2. Temporary Maintenance v. Post Divorce Maintenance (ASK FOR SUPPORT IMMEDIATELY, DON'T WAIT- File a Support Petition in Family Court if Necessary)

LENGTH OF MARRIAGE	PERCENT OF THE LENGTH OF MARRIAGE FOR WHICH MAINTENANCE WILL BE PAYABLE
0-15 years (Short Marriage)	15-30%
More than 15-20 Years	30%-40%
More than 20 Years	35%-50%

Spousal Support Cont'd

- Spousal Support not always guaranteed
- 14 Factors that determine whether someone gets maintenance. Common Factors:
 - Age/ Health of Spouse
 - Do they have education?
 - How many years have they been out of the work force?
 - Separate or Joint financial situation?
 - How many years separated? C
 - Standard of Living?
- In pro bono cases- many of the times both spouses work, and are of lower income, so while there
 may be a maintenance award, many times spouses will waive it

Equitable Distribution

- 5. Do you own any property or businesses?
 - o Real Property- Houses
 - Businesses Together
 - Savings Accounts
 - Retirement Accounts
 - Personal Items- Cars, Jewelry, Boats, Art
- 6. Where the assets marital or premarital?
 - Separate Property (Inheritance, gifts to one spouse, any retirements or property gained before marriage
 - Marital Property (starts at Date of Marriage)
 - Commingled or Transmuted Property (Was separate and became marital)
 - Businesses- Who Contributed To the Business?

New Tax Laws for 2018

- Current administration passed new tax laws in December 2017, which affect future divorces
- In the past, monied spouse could take tax deduction if paying alimony or maintenance. Maintenance recipient would only pay taxes up to the amount that wasn't itemized
- Practitioners, Judges and tax experts are unsure how this will affect real life scenarios
- Provisions expire in 2025 for individuals only

Rush to Divorce?

- No longer tax deductible for agreements entered into after December 31, 2018.
- For modifications they will need to specify if new law is to apply.
- Incentive to finalize agreements in 2018 or not depending on which side you are on.

IMPACT ON AFTER-TAX INCOME: WITH ALIMONY TAX DEDUCTION VS. NO ALIMONY TAX DEDUCTION (2019+)

Description	2018	2018 - Single - No Kids			2019 - Single - No Kids		
	Recipient	Payor	Total	Recipient	Payor	Total	
			1000 car 8600 h Part Sabarah (1000)				
Wages	-	600,000	600,000	-	600,000	600,000	
Alimony	180,000	(180,000)	35			-	
Income	180,000	420,000	600,000	-	600,000	600,000	
Standard Deduction	(12,000)	(12,000)	(24,000)	5	(12,000)	(12,000)	
Taxable Income	168,000	408,000	576,000	~	588,000	588,000	
Less Fed Tax	(35,449)	(118,489)	(153,938)	7	(183,249)	(183,249)	
Non-Taxable Income	V2 AN	30 AB V	SM 984 223	180,000	(180,000)	-	
After-Tax Income	132,551	289,511	422,062	180,000	224,751	404,751	

31% 69% 44% 56%

Results:

Higher Total Taxes Paid: 29,311

Gain for Recipient: 47,449

Loss to Payor: (64,760)

Lee D. Sanderson, CPA, ABV, CFF, CVA, MST

VALUATION FORENSICS, LLC

www.valuationforensics.com

212-400-3923

Miscellaneous

- 7. Does Fault Matter? No- the Courts do not care about why the couple is divorcing. Since 2010, NY is No- Fault State.
 - a. Infidelity- Only matters if you're spending money on the mistress and not the kids/ family
 - b. Abuse- Judges will put some weight on domestic violence for visitation/ safety issues, but does not affect financial issues unless its is "excessive"

8. Who stays at marital home?

- a. Both parties are allowed to remain until the divorce is over.
- b. If there are a physical danger, parties can apply for Order or Protection ("Exclusive Use & Occupancy")

Prenuptial Agreements

- Think of it as a plan for marriage, or insurance against divorce
- Over 50% of marriages end in divorce
- Better to draft and negotiate when couples are happy and fair to each other,
 than risk a contentious divorce
- Protections for assets acquired before marriage
- Protection for people in second marriages for their children
- Must be fair to both parties, or else courts will not enforce!

Custody and Visitation

Parental Rights to Children

How does Custody get Decided?

1. Factors that Determine "Custody"

- a. Courts looks to "Best Interest of Children" Standard, not so much the law.
- Factors include: totality of circumstances, primary caretaker, stability of residence, job, finances, quality of home environment, siblings, other relatives/support. Is one parent Alienating the other? (Ability to foster positive relationship)
- c. <u>Case Law: (Friederwitzer, Eschbach)</u>

How does Custody get Decided?

2. Most times, the parents settle custody

- a. Joint Legal Custody/ Joint Physical (Residential) Custody.
 - Parents will share and consult each other on Decision Making on Healthcare, Education and Religion.
 - ii. Children can live a majority of time with one parents, and visit with the other, or share time 50/50 at two homes.

b. Sole Legal Custody

- One parent makes major decisions if the parties hate each other & can't communicate
- ii. Still have vacation and access to children

How does Custody get Decided?

3. What happens if Parents CANNOT AGREE?

- a. The Judge will Depend on Third Parties
- b. Attorney for the Child(ren) are assigned
- c. Forensics (need for, costs, reliability, who to choose, psych v MSW)
- d. Custody Trial if Necessary
 - Witnesses (Grandparents, Teachers, Doctors)
 - ii. Attorney for Child Will get to question
 - iii. Forensic Professionals will be called as Experts

Basic Child Support Law

CSSA Guildlines

Child Support

- 2. Do you have children together?
 - 1) Basic amount of child support, from joint income of parents
 One Child- 17%, Two Children- 25%, Three Children- 29%, Four Children- 31%, Five Children- 35% or more of combined parental income
- 2) The guidelines for child support fall under CHILD SUPPORT STANDARDS ACT, "CSSA" and "Cassano" caselaw.
 - a) EXAMPLE: Single Income Family, Dad is Doctor, Mom is Stay at Home Mom. Two kids. Dad earns \$150,000 = Adjusted Gross Income \$135,000 x 25% = \$33,750/yr /12 = \$2,800/mo (bi-wkly \$1,300) child support (if he is not paying maintenance to mom.*)
 - a) Add-ons (some are discretionary- extracurricular, luxuries like private school. Others are mandatory- child care, out of pocket medical).

Child Support Cont'd

- c) Child Support Cap- \$143,000. For people earning combined income over \$143k, the child support amount above are discretionary, and will likely be granted.
- c) Shared custody rule "Bast v. Rossoff" Does the amount of time spent with children change your support obligation amount? NO. (Example- dad is monied spouse. Children spend almost half the parenting time with him, spending overnights with him. Does he pay less? NO. He may get credits but his support should still be based on his income.)
- c) No child support until dad moves out!
- c) Credit for mortgage, utilities. (food, clothing, shelter)\
- c) Graby Mom receiving \$1,000/mo SSI, not credited to H's obligation. (resources of the children)

Child Support Cont'd

- 4. How old is/ are your child(ren)?
 - NYS requires child support until 21, 22 if child is enrolled in college
 - Child Support end
 - If Child marries
 - If child joins the military
 - If child does not go to school and gets full time job
 - If child moves away from the Custodial Parent
 - Death

Pro Bono Clinic

Common Pro Bono Topics

Matrimonial Law

- Reviewing a Settlement Agreement
- My spouse is misbehaving.What are my options?
- I've been served with divorce papers
- Where will I live after the divorce?
- My spouse is not following our agreement

Family Law

- Baby's mom won't let me see the kids
- My spouse/ child/ grandchild has threatened me physically
- I'm not getting child support

How to Identity the Issues

Intake issues – Identification of Children & Money

What should client bring to intake interview/ consultation?

- Any petitions, agreements or documents from Court.
- Any financial documents (leases, deeds, taxes, 401k statements, bank statements, order of the Court)
- Take Information upfront (good intake questionnaire, notes for the consult)
- Most issues boil down to: CHILDREN AND MONEY in Family Law.

After the Intake and Identifying Issues

- 1. Determine if this is a Family Law issue (sometimes people will need not need Family Lawyers, but criminal, Wills & Estates, Guardianship, Real Estate) Refer out
- 2. Many times, people want their Settlement Agreements reviewed. There is certain language that is required by Domestic Relations Law or else it is invalidate
- 3. Sometimes people just want someone to hear their sob story

Attorneys & Advocates

- 18B Lawyers:
 - They are assigned to lower income peoples who are litigating custody, or facing jail time for failing to pay child support. Cannot negotiation equitable distribution, child or spousal support

- Non- Profit Organizations*
 - Legal Services NY
 - New York Legal Assistance Group
 - Pro Bono Programs
 - Bar Associations

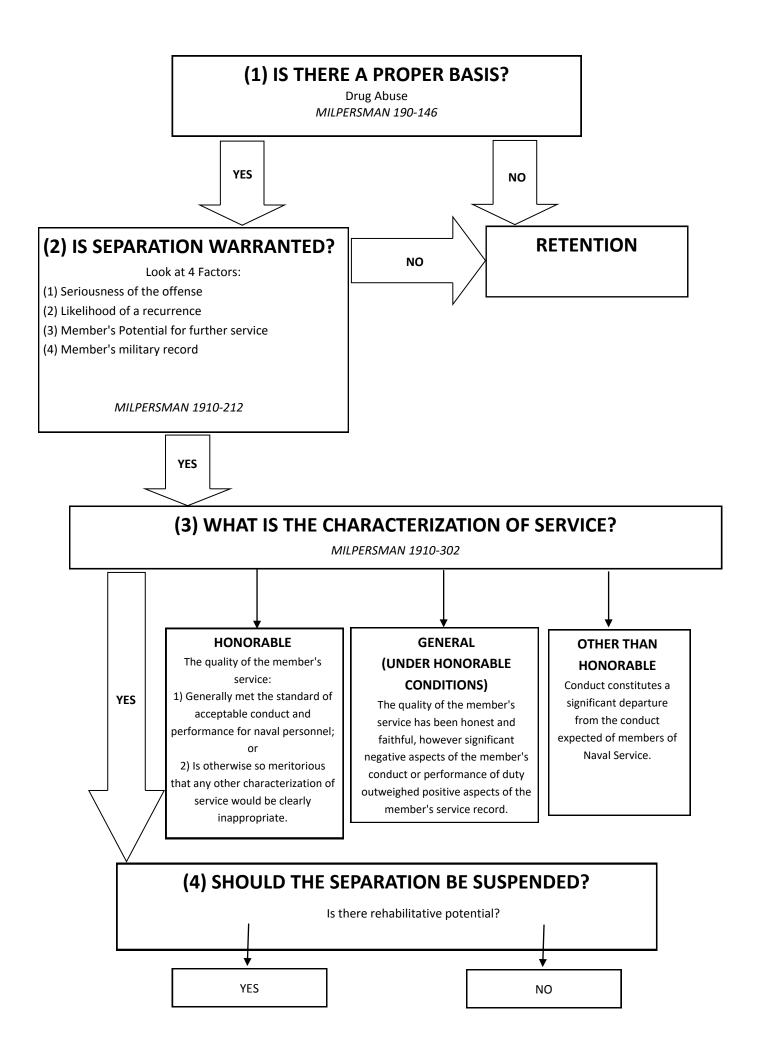
Beatrice Leong, Esq

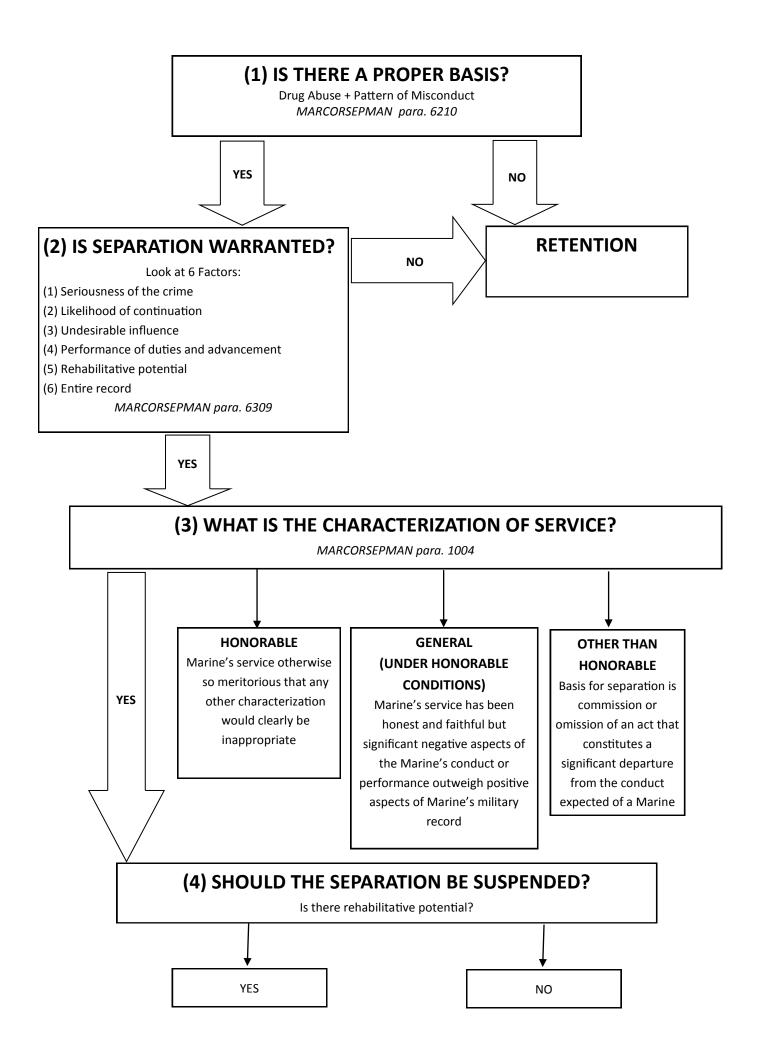
Beatrice Leong received her law degree from the University of Connecticut School of Law, and her bachelors from SUNY Binghamton, where she doubled majored in English Literature & Rhetoric and Asian & Asian American Studies. At UConn Law, she was a volunteer at the local Family Court, helping low income persons obtain pro se divorces, requests for child support and other family matters. She was also elected as President of two student clubs, the UConn Law chapter of Asian Pacific American Law Student Association and the Arts, Entertainment and Sports Law Society. She has practiced exclusively in the field of divorce and family law since her admittance to the New York State bar. She is an associate attorney at Parmet & Zhou LLC, a firm that specializes in Matrimonial and Family Law.

Beatrice is an active member of AABANY and frequently volunteers at pro bono events. She serves as a Co-Chair of the Government Service and Public Interest Committee of AABANY.

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Benefits at Separation

Honorable

ELIGIBLE

Benefits at Separation

1. Payment for Accrued Leave

2. Death Gratuity (6 months pay)

3. Wearing of military uniform

5. Burial in National Cemeteries

28 Hospitalization & Domiciliary Care

29. Medical and Dental Services

31. Guide Dogs and Equipment for

34. Funeral and burial expenses

36. Burial in National Cemeteries

38. Preference for farm loan (Dep of Ag)

39. Preference for farm and other rural

40. Civil Service Preference (Office of

42. Reemployment rights (Dep of Labor)

44. Unemployment compensation (Dep

47. Job preference, public works projects

45. Naturalization beneifts (DOJ, INS)

46. Old age, survivors and disability

41. Civil Service retirement credit

43. Job counseling & employment

30. Prosthetic Appliances (DV)

32. Special Housing (DV)

33. Automobiles (DV)

37. Headstone Marker

housing loans (Dep of Ag)

Personnel Management)

placement (Dep of Labor)

(Dep of commerce, CFR)

of labor)

insurance (SSA)

35. Burial flag

Blindness

4. Admission to Naval Home

(Adapted from MCO P1900.16F Appendix K)

General

ELIGIBLE

ELIGIBLE

ELIGIBLE

ELIGIBLE

ELIGIBLE

OTH

NOT ELIGIBLE

ELIGIBLE

NOT ELIGIBLE

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TBD

6. Burial in Army Post Cemeteries	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
7. Navy Board for Correction of Military Records	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
8. Navy Discharge Review Board	ELIGIBLE	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE
9. Transportation to Home	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
Transportation of Dependents and Household Goods	ELIGIBLE	ELIGIBLE	TBD	TBD
11. Pre-Separation Counseling	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
12. Employment Assistance	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
13. Health Benefits	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
14. Commissary/Exchange	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
15. Military Family Housing	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
16. Overseas Relocation Assistance	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
17. Excess Leave/Perissive TAD	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
18. Preference for USMCR	ELIGIBLE	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
19. Montgomery G.E. Bill	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
20. Dependency and Indemnity Compensation	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
21. Pension for non-service conncected disability or death	ELIGIBLE	ELIGIBLE	TBD	TBD
22. Medal of Honor roll pension	ELIGIBLE	ELIGIBLE	TBD	TBD
23. Insurance	ELIGIBLE	ELIGIBLE	TBD	TBD
24. Vocational Rehabilitation (DV)	ELIGIBLE	ELIGIBLE	TBD	TBD
25. Educational Assistance	ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE	NOT ELIGIBLE
26. Survivors and dependents educational assistance	ELIGIBLE	ELIGIBLE	ELIGIBLE	ELIGIBLE
27 Home and other Loans	ELIGIBLE	ELIGIBLE	TBD	TBD

ELIGIBLE

NOT ELIGIBLE

ELIGIBLE

ELIGIBLE

ELIGIBLE

ELIGIBLE

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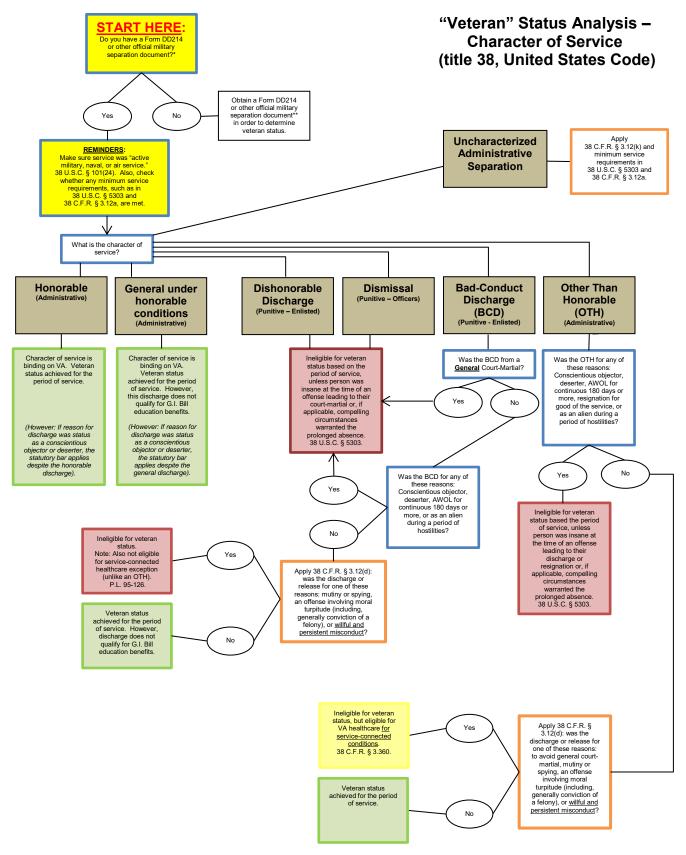
ELIGIBLE



Freshman Application for UNDERGRADUATE ADMISSION

APPLY NOW TO ENJOY THESE BENEFITS:
No essay & a three-week admission decision

 Yes No S. Have you entered a plea of guilty, a plea of no contest, a plea of "nolo contendere," an Alford plea or a plea of delinquency in juvenile court, or have you received a deferred prosecution or prayer for judgment continued to a criminal charge? Yes No 6. Have you otherwise accepted responsibility for the commission of a crime or entered a pretrial/diversion program? Yes No 7. Do you have any criminal charges pending against you? Yes No 8. Have you ever been assigned out-of-school suspension (OSS) or been expelled from high school or been placed on disciplinary probation or suspension by any college or university? This may include, but is not limited to, academic cheating, conduct violations or alcohol policy infractions. If you answer "yes" you are required to submit a statement from an appropriate school official to corroborate your explanation of the incident(s). If not supplied upon submission, a request for additional information may be required to complete your application. Yes No 9. Have you received any type of discharge, other than an honorable discharge, from military service? If you have not served in the military, respond "No." Yes No 	4. Have yo	ou been convicted of a crime as an adult or juvenile?
of delinquency in juvenile court, or have you received a deferred prosecution or prayer for judgment continued to a criminal charge? Yes No No 6. Have you otherwise accepted responsibility for the commission of a crime or entered a pretrial/diversion program? Yes No 7. Do you have any criminal charges pending against you? Yes No 8. Have you ever been assigned out-of-school suspension (OSS) or been expelled from high school or been placed on disciplinary probation or suspension by any college or university? This may include, but is not limited to, academic cheating, conduct violations or alcohol policy infractions. If you answer "yes" you are required to submit a statement from an appropriate school official to corroborate your explanation of the incident(s). If not supplied upon submission, a request for additional information may be required to complete your application. Yes No 9. Have you received any type of discharge, other than an honorable discharge, from military service? If you have not served in the military, respond "No." Yes		
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Program? Yes No		
No 7. Do you have any criminal charges pending against you? Yes No 8. Have you ever been assigned out-of-school suspension (OSS) or been expelled from high school or been placed on disciplinary probation or suspension by any college or university? This may include, but is not limited to, academic cheating, conduct violations or alcohol policy infractions. If you answer "yes" you are required to submit a statement from an appropriate school official to corroborate your explanation of the incident(s). If not supplied upon submission, a request for additional information may be required to complete your application. Yes No 9. Have you received any type of discharge, other than an honorable discharge, from military service? If you have not served in the military, respond "No." Yes		ou otherwise accepted responsibility for the commission of a crime or entered a pretrial/diversion
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placed on disciplinary probation or suspension by any college or university? This may include, but is not limited to, academic cheating, conduct violations or alcohol policy infractions. If you answer "yes" you are required to submit a statement from an appropriate school official to corroborate your explanation of the incident(s). If not supplied upon submission, a request for additional information may be required to complete your application. O Yes No No Have you received any type of discharge, other than an honorable discharge, from military service? If you have not served in the military, respond "No." Yes		
9. Have you received any type of discharge, other than an honorable discharge, from military service? If you have not served in the military, respond "No." Yes	placed on limited to, required to incident(s)	disciplinary probation or suspension by any college or university? This may include, but is not academic cheating, conduct violations or alcohol policy infractions. If you answer "yes" you are a submit a statement from an appropriate school official to corroborate your explanation of the supplied upon submission, a request for additional information may be required to complete
have not served in the military, respond "No." Yes		
○ Yes	-	
	O Yes	
If you have been separated from high school or college for more than six months or one term, please explain how you have been using your time.		



^{*} An individual may be eligible for VA benefits based on a prior period of service even if they do not qualify based on their current period of service. See VAOPGCPREC 61-91. If there is more than one period of service, then analyze each period separately. See 38 C.F.R. § 3.13 for information on what constitutes a period of service.

<u>DISCLAIMER</u>: This document is a tool to facilitate a <u>general</u> understanding of the factors affecting a title 38 "Veteran" status determination and provides no rights or remedies to any individual or group.

^{**} For example, some reservists will only receive a discharge certificate (e.g., DD Form 256A).

[†]Regarding aliens, see the exceptions in 38 U.S.C. § 5303(c) and 38 C.F.R. § 3.12(c)(5).

Stories after Tax Reform: True Winners or Losers

AABANY FALL CONFERENCE 2018 SATURDAY, SEPTEMBER 22, 2018

AGENDA

- Individuals
- Real Estate
- Private Equity
- Capital Markets and Financial Transactions
- International (Multinationals)

Individuals

State and Local Tax Deduction

- Capped in 2018 through 2025
- Extension of previous AMT disallowance of state/local tax deduction
- Some states like NY, NJ, and CT have responded with workarounds and constitutional challenges
- Limited to \$10,000 for a single taxpayer or a married couple filing jointly
 - Two unmarried persons can deduct up to \$20,000 combined

Home Mortgage Interest Deduction

- Capped in 2018 through 2025
- Extension of previous AMT disallowance of home equity interest
- Some grandfathering for old debt
- Limited to \$750,000 (or \$1,000,000 with grandfathering) of debt for a single taxpayer or a married couple filing jointly
 - Two unmarried persons can deduct interest on up to \$1,500,000 (or \$2,000,000) of debt on a co-owned residence. See *Voss v. Commissioner*, 796 F.3d 1051 (9th Cir. 2015).

Standard Deduction

- Increased in 2018 through 2025
- \$12,000 for a single taxpayer or \$24,000 for a married couple filing jointly
 - Two unmarried persons can have one person use standard deduction and other person use itemized deduction (e.g., state and local taxes, home mortgage interest, charitable contributions)
- Itemized deductions scaled back
 - Extension of previous AMT disallowance of miscellaneous itemized deductions (investment expenses, employee expenses, professional dues, some legal fees)
- Extension of previous AMT disallowance of personal exemptions, replaced in part with larger child tax credits

Alimony

- Under prior law, deductible by the payor and income for the recipient
 - Shocking 2014 discovery that \$2.3 billion of alimony was deducted by one person but not reported as income by the other person (47% of returns)
- Not deductible in 2019 and later
 - And not part of the recipient's taxable income in 2019 and later
- Grandfathering for divorces and separation instruments executed in 2018 and earlier
 - Deductible by the payor
 - Income for the recipient

Tax Rate Cuts

- Individual income tax rate cuts
 - Top rate reduced from 39.6% to 37%
 - Higher income brackets
- 20% deduction for pass-through business income
 - Top rate reduced from 37% to 29.6%
 - Complex definitions, including what businesses qualify, with limitations based on W-2 wages and unadjusted tax basis of depreciable property
 - Does not apply to the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees or owners

Real Estate

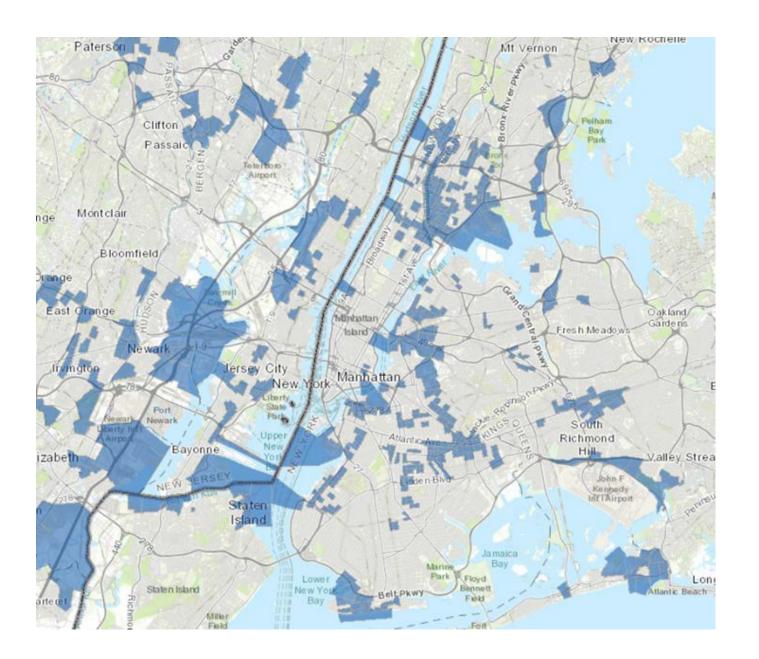
Section 1031 Exchanges

- Tax-free exchange of one investment or business property for another property of like-kind within 180 days
- Still allowed for real property
- Repealed for personal property

- Expanded 100% bonus depreciation in 2018 through 2025
 - Now allowed for used property
 - Leasehold improvements (with typo fix)

Qualified Opportunity Zones

- Gain from the sale of almost any asset can be deferred and excluded, if the gain is reinvested in a qualified opportunity fund.
 - 15% of the initial gain is permanently tax-free after 7 years (10% after 5 years)
 - remaining 85% of the initial gain is tax-deferred until end of 2026
 - In addition, post-investment appreciation in the fund interest is permanently tax-free after 10 years
- Qualified opportunity fund owns various assets in qualified opportunity zones, which are designated low-income census tracts.
- Many unresolved questions about fund qualifications, allowed businesses, and other tax issues.



Private Equity

Changed considerations after the tax reform

Entity choice

- Among other changes, the tax reform reduced the corporate tax rate and eliminated certain deduction items for individuals.
- Corporation is no longer considered tax-inefficient per se and some large sponsors converted their management companies into corporations.
- 3 year holding period requirement for long-term capital gains for PE sponsors
 - For carry recipients, an investment must be held for three years for LTCGs to be available.
 - Exit timing/options of an investment reconsidered additional analysis done to make sure that the carry recipients' interests are not jeopardized.
 - Potential conflict of interest between the investors and a sponsor.

Changed considerations after the tax reform

- GILTI/controlled foreign corporation ("CFC")
 - New attribution rules make it more likely for a fund to have a CFC.
 - A CFC is subject to additional tax-inefficiency i.e., GILTI for certain U.S. investors.
 - The Fund structure for foreign investments is reconsidered to minimize adverse tax consequences of owning CFCs.

BEAT

- Certain deductible payments from a U.S. taxpayer to a non-U.S. person can be subject to BEAT.
- It becomes tax inefficient to use a U.S. company as a clearing house to share income or expenses among affiliates transfer-pricing out to non-U.S. affiliates can cause tax inefficiency.
- As an alternative, PE firms are allocating and charging such income/expense upfront to the applicable entity.

Capital Markets and Financial Transactions

Debt offerings and securitizations

- Limitation on deduction for business interest expense
- Net business interest limited to 30% EBITDA (phasing to smaller base of EBIT)
- For partnership, interest limitation applied first at the partnership level, then at the partner level
- Incentive to reduce business interest expense (e.g., leasing, equity interests, derivatives)
- Issuer or equity holders may recognize phantom income
- Similar rules apply in Europe

New 10% withholding tax on transfer of partnership interests

- 10% withholding tax on transfer partnership interest engaged in a U.S. trade or business
- Applies to transfers of fund interests by non-US partners
- May apply to repos, securities lending, and transactions over partnership interests if not treated as debt secured by collateral
- Tax on amount realized (including debt assumed)
- Transferee, some cases partnership has obligation
- Applies to redemptions, including partial
- No withholding if transferor certifies that it is a US person

Lending transactions

- 956 inclusions from CFC guarantees and share pledges
- Shareholder to corporation (downward) attribution increases CFCs
- "Limitation on guarantees" by CFCs
- New considerations for lenders and borrowers (or sponsor of borrower group)
- Lenders consider effect of GILTI and BEAT tax, and anti-hybrid rules in credit modeling

International (Multinationals)

Favorable Changes

- New 21 percent corporate rate
- 100 percent exemption for dividends from foreign subsidiaries (subject to limitations)
- Deduction for "foreign-derived intangible income"
- Only for "C" corporations: Individuals, S corporations and passthrough entities are not eligible for provisions above

Adverse Changes

- One-time "deemed repatriation" provision applies to all US shareholders in a "specified foreign corporation" for last taxable year beginning before January 1, 2018
- US shareholders in controlled foreign corporations (CFC) are subject to immediate US tax on their global intangible low-taxed income (GILTI)
- Foreign corporations are now more likely to be treated as CFCs and therefore subject to GILTI and Subpart F
- Many transfers of assets to a foreign subsidiary that used to be tax-free are now taxable
- Other adverse "base erosion" provisions were adopted

GILTI Tax

- The global intangible low-taxed income (GILTI) provision represents a departure from a pure territorial system.
- Ensures that American corporations will pay combined US and foreign taxes of at least 10.5% on most of their undistributed foreign profits.
- US individuals who conduct business abroad through foreign subsidiaries are also subject to GILTI tax.
- Applies broadly to US companies across virtually all industries.
- The GILTI tax is estimated to raise \$112 billion in revenue for the US government over the next 10 years.

GILTI Tax (continued)

- 10% US shareholders of CFCs are required to include GILTI in gross income each year.
- GILTI is the shareholder's pro rata share of the excess of (a) the CFC's "tested income," over (b) 10% of the CFC's basis in tangible business property.
- "Tested income" includes most foreign active business income, with exceptions for certain oil and gas extraction income and high-taxed insurance income.
- Domestic "C" corporation shareholders are entitled to
 - 80 percent foreign tax credit, and
 - 50 percent GILTI deduction (37.5 percent after 2025).

GILTI Hypotheticals – US Tax Planning

		Country A (10% Tax Rate	, Treaty	Jurisdiction)			
	No 962 Election	962 Election		CTB Election		US Blocker	
Inclusion Year	\$33.	30	\$13.00		\$27.00		\$2.50
Distribution Year	\$3.	42	\$18.82		\$0.00		\$20.83
Total	\$36.	72	\$31.82		\$27.00		\$23.33
	Nominal deferral (9%) All CFCs No control required Year to year	Significant deferral (60%) All CFCs No control required Year to year		No deferral CFC by CFC Control required Longer-term / tax costs to ur Per se entities not eligible	nwind	Significant deferral (90%) CFC by CFC No control required Longer-term / tax costs to u	nwind

	C	ountry B (30% Tax Rate	, Treaty	Jurisdiction)			
	No 962 Election	962 Election		CTB Election		US Blocker	
Inclusion Year	\$25.90		\$0.00		\$7.00		\$0.00
Distribution Year	\$2.66		\$16.66		\$0.00		\$16.66
Total	\$28.56	3	\$16.66		\$7.00		\$16.66
	Nominal deferral (9%)	Complete deferral		No deferral		Complete deferral	
	All CFCs	All CFCs		CFC by CFC		CFC by CFC	
	No control required	No control required		Control required		No control required	
	Year to year	Year to year		Longer-term / tax costs to un Per se entities not eligible	wind	Longer-term / tax costs to un	nwind

Speaker Bios

Libin Zhang

- Libin Zhang is a partner at Roberts & Holland LLP. He works on a variety of matters relating to corporations, real estate, and international taxation. Recent publications include:
 - Direct Foreign Tax Credit and GILTI: The Curious Incidence of the Credit That Was Not Cut, *Tax Mgmt. Int'l Journal* (April 13, 2018).
 - The End of Eternity: Anomalies in Transition to Territoriality, *Tax Notes* (April 30, 2018).
 - Marginal Income Tax Rates of the Passthrough Business Deduction, Tax Notes (May 21, 2018).
 - To the Frying Pan: New Virtues of Subpart F Income Over GILTI, *Tax Notes* (July 2, 2018).
 - Qualified Opportunity Zones: Hot Tubs and Other Hot Topics, *Tax Notes* (August 6, 2018).



JoonBoom Pae

 JoonBoom Pae is a tax counsel at Weil, Gotshal & Magnes LLP. His practice focuses on the tax aspects of a variety of domestic and cross-border corporate transactions, including fund formation, joint ventures, and mergers and acquisitions. He has substantial experience with advising both sponsors and investors in connection with formation, structuring and operation of various types of onshore and offshore funds, including buyout, infrastructure, real estate and debt funds.



Rich Williams

 Rich Williams is a partner at Dentons. He has experience in a wide range of federal income tax matters, including domestic and international mergers, acquisitions and dispositions; public and private financings; and both cross-border and general strategic tax planning.



Sharon Kim

 Sharon Kim is a partner at Ashurst. She advises leading financial institutions and investment funds and investors on the U.S. tax aspects of financing, capital markets, and investments transactions. She has extensive experience representing issuers of structured products and debt and equity securities, and advising lenders, borrowers, sponsors, managers and investors on U.S. tax matters in connection with credit facilities, private equity and debt funds, structured and derivative products, and securitization transactions.



THE ART OF APPELLATE ADVOCACY

Denny Chin

I. Introduction

- A. Appellate advocacy is an art
 - 1. Opportunity for eloquence
 - 2. Pure lawyering; focus is on lawyers.
 - 3. Stakes are high:
 - -- if you lost in trial court, realistically, this is your last chance
 - -- if you won below, you must preserve your victory
- B. Communication and persuasion

II. Commencing the Appellate Process

- A. Should you appeal?
- B. Do you have the right to appeal?
- C. Rules (time limitations; contents of notice of appeal; format of briefs; page limitations; color of covers; appendix; etc.)
 - 1. Federal Rules of Appellate Procedure
 - 2. Rules of the United States Court of Appeals for the Second Circuit
 - 3. Civil Appeals Management Plan and Guidelines
 - 4. State court rules

III. The Record

- A. Start thinking about the record before you file suit
- B. Making your record in the trial court
- C. Transmitting the record
- D. The Appendix
- E. Read the record carefully; analyze it; understand it

IV. The Briefs

- A. Selecting the issues
 - 1. Be selective
 - 2. You can address, and a court can digest, only a limited number of issues effectively
 - 3. You weaken your appeal by raising too many issues. As Justice Jackson wrote:
 - "The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one." R. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation," in Advocacy and the King's English 216 (1960).
 - 4. In identifying and narrowing the issues, it is useful to develop a "theory of the case" or "theory of the appeal"

- B. The Parts of a Brief (See Fed. R. App. P. 28)
 - 1. Table of contents
 - 2. Statement of subject matter and jurisdictional statement
 - 3. Issues presented
 - 4. Statement of case (nature of case, proceedings and disposition below, facts)
 - 5. Summary of argument
 - 6. Argument (including standard of review)
 - 7. Conclusion (stating "precise relief sought")
 - 8. Appellee's brief may omit certain items if appellee is satisfied with appellant's statements thereof
- C. Your writing should be clear and concise
 - 1. Clarity: You will not be able to persuade the court if the court does not understand your point
 - 2. Conciseness: "Vigorous writing is concise." W. Strunk Jr. & E.B. White, <u>The Elements of Style</u> 23 (4th ed. 2000)
- D. Be scrupulously accurate and don't overstate
 - 1. Citations to the appendix
 - 2. Don't omit relevant unfavorable facts
 - 3. Don't overly slant

- E. Spell out your reasoning
 - 1. There should be a rhythm and flow to your writing and a rhythm and flow to your brief
 - 2. Chains of logic
 - 3. Point and sub-point headings
- F. Be forceful
 - 1. Write with conviction
 - 2. But don't overdo it; remain dignified and don't engage in <u>ad hominem</u> attacks
 - 3. Choose words precisely and carefully; e.g., what do you call the parties?
- G. Your research should be thorough, but string cites generally are unnecessary
- H. Your point headings should be succinct
- I. Your finished product should look professional
- J. The six "C's"
 - 1. Candor
 - 2. Comfort
 - 3. Context
 - 4. Coherence
 - 5. Compression
 - 6. Collision

Stephen V. Armstrong & Timothy P. Terrell, <u>Thinking Like a Writer</u> 10-6 to 10-14 (1992).

K. Reply briefs

- 1. Should be punchy and to the point
- 2. Set up the other side's arguments and then knock them down
- 3. Don't wander or go over old ground or introduce new issues

V. Oral Argument

A. Purpose

- 1. Summary of key arguments
- 2. Opportunity to supplement brief
- 3. Opportunity to answer court's questions
- 4. Scope: big picture; key issues
- 5. Persuasion
- 6. <u>Maryland v. McCullough</u>: six days of argument

B. Substance

1. Introduction

- -- "may it please the court"
- -- introduce yourself (and your partner)
- -- concise summary of issue(s)
- -- outline of argument
- -- open strong

2. Facts

- -- formal recitation of facts usually not given
- -- weave key facts into argument
- -- is court familiar with the facts?
- -- be ready to clarify unclear facts
- -- keep it simple

3. Law

- -- address each issue separately
- -- summarize law
- -- generally better to use principles rather than specific cases; if you mention cases, make sure you know the facts
- -- make your points, weaving facts and law together
- -- strongest arguments
- -- be ready to address weaknesses

4. Conclusion

- -- have one prepared, but do not read it
- -- if you happen to end on a strong note, don't bother with your prepared conclusion
- -- end forcefully, not with a whimper

5. Appellant v. Appellee

- -- by going first, appellant's lawyer has opportunity to shape the argument and perhaps set the tone
- -- appellant's lawyer must remember the goal is to convince the appellate court that trial court was wrong
- -- appellee must listen carefully; opportunity to respond
- -- appellant: opportunity for rebuttal

C. Style

- 1. Be yourself
- 2. But be forceful
- 3. Remember who you are and whom you represent (e.g., the Government, a bereaved widow or widower)
- 4. Don't be wishy-washy or tentative; let the court see you brimming with confidence, seemingly sure that you are right
- 5. But don't overdo it and don't be cocky or arrogant
- 6. Don't overreach
- 7. Be respectful, but firm
- 8. Speak loudly and clearly; do not whisper
- 9. Avoid phrases such as: "It is my client's position that . . ." and "I believe that . . ."
- 10. Maintain eye contact and spread it around; when answering a question, look the judge in the eye
- 11. Don't read your argument

D. Mechanics

- 1. What written device do you use?
 - -- outline
 - looseleaf binder
 - -- index cards
 - -- single sheet
 - -- manilla folder
 - -- avoid legal pad
 - if you write out the entire argument, go back and outline it before the actual argument; key phrases

2. Answering questions

- answer directly; be responsive; do not be evasive even if your answer will hurt you; come back with a strong response
- -- answer right away; do not tell the judge you will get to the question later; do not tell the judge that the question has already been asked
- -- do not argue with a judge
- don't let a question sidetrack you; answer the question and get back to making your points
- -- but be flexible and ready to depart from your outline
- -- anticipate the questions and be ready with answers

- -- pauses
- -- John Davis wrote: Rejoice when the court asks questions
- 3. common questions
 - -- what's this case about?
 - -- what relief do you want?
 - -- where do we draw the line?
 - -- policy considerations?
 - -- what difference does that make?
 - -- isn't that an issue for the finder of fact?
 - -- what's the standard of review?
 - -- shouldn't we defer to the trial court?
- 4. Posture and body language
 - -- don't point or wave your pen
 - -- don't put your hands in your pockets
 - -- don't overdo gesturing or using your hands for emphasis
 - -- relax and don't be stiff
 - -- stand "tall" and confidently
- 5. What do you do if you "freeze" or don't know the answer?
 - -- if need be, as the presiding judge: "May I have a moment, your honor?"

- -- if you don't know the answer, don't be afraid to say you don't know; perhaps offer to brief the question after the argument
- 6. If you run out of things to say, sit down, even though you have time remaining

E. Preparation

- 1. Know the record and the facts
- 2. Know the cases and the law
- 3. Give thought to what you want in terms of relief, particularly if you are the appellant
- 4. Give thought not only to what you will be saying at oral argument, but also how you are going to say it
- 5. Anticipate the questions; what are your weaknesses; what questions are the judges likely to have; put yourself in their shoes; come up with answers; brainstorm with others
- 6. Study the other side's brief; what are their strong points and how can you respond
- 7. Update for last minute developments in the law, particularly with respect to recent cases
- 8. Practice -- do a moot court; time yourself; make adjustments after you practice; then practice again; remember to allow time for questions



CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

Leadership has allocated sufficient *resources* for a harassment prevention effort Leadership has allocated sufficient *staff time* for a harassment prevention effort Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees

A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed

Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred

Accountability for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment

Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system

Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace

The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews

The organization conducts *workplace civility training* and *bystander intervention training* The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort



CHECKLIST FOR EMPLOYERS

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated

An easy-to-understand description of prohibited conduct, including examples

A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees

A statement that the reporting system will provide a prompt, thorough, and impartial investigation

A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation

A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation

An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred

An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors

A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately

Is written in clear, simple words, in all languages commonly used by members of the workforce



CHECKLIST FOR EMPLOYERS

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed

Employer representatives who take reports seriously

A supportive environment where individuals feel safe to report harassing behavior to management

Well-trained, objective, and neutral investigators

Timely responses and investigations

Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility

An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible

Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation

During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred

A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred



CHECKLIST FOR EMPLOYERS

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

• Structural Principles

Supported at the highest levels

Repeated and reinforced on a regular basis

Provided to all employees at every level of the organization

Conducted by qualified, live, and interactive trainers

If live training is not feasible, designed to include active engagement by participants

Routinely evaluated and modified as necessary

• Content of Compliance Training for All Employees

Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment

Includes examples that are tailored to the specific workplace and the specific workforce

Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace

Describes, in simple terms, the process for reporting harassment that is experienced or observed

Explains the consequences of engaging in conduct unacceptable in the workplace

• Content of Compliance Training for Managers and First-line Supervisors

Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods

Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report

Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

REPORT OF CO-CHAIRS
CHAI R. FELDBLUM & VICTORIA A. LIPNIC

JUNE 2016

CONTENTS

PREF	ACE	11
EXEC	CUTIVE SUMMARY	iv
PART	ONE: INTRODUCTION	1
PART	TWO: WHAT WE KNOW ABOUT HARASSMENT IN THE WORKPLACE	3
A.	REAL PEOPLE/REAL LIVES	3
B.	THE PREVALENCE OF HARASSMENT IN THE WORKPLACE	5
C.	EMPLOYEE RESPONSES TO HARASSMENT	15
D.	THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT	17
E.	RISK FACTORS FOR HARASSMENT	25
PART	THREE: PREVENTING HARASSMENT IN THE WORKPLACE	31
A.	IT STARTS AT THE TOP	31
B.	POLICIES AND PROCEDURES	37
C.	ANTI-HARASSMENT COMPLIANCE TRAINING	44
D.	WORKPLACE CIVILITY AND BYSTANDER INTERVENTION TRAINING	
E.	GETTING THE WORD OUT	60
F.	IT'S ON US	64
PART	FOUR: SUMMARY OF RECOMMENDATIONS	66
ACK	NOWLEDGMENTS	72
APPE	NDIX A: ACTIVITIES OF THE SELECT TASK FORCE	74
APPE	NDIX B: CHECKLISTS FOR EMPLOYERS	78
APPE	NDIX C: CHART OF RISK FACTORS AND RESPONSES	83

PREFACE

Thirty years ago, the U.S. Supreme Court recognized claims for sexual harassment as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. In the years that followed, courts have filled in the legal landscape even further.

Six years ago, when we came to EEOC as commissioners, we were struck by how many cases of sexual harassment EEOC continues to deal with every year. What was further striking to us were the number of complaints of harassment on every other basis protected under equal employment opportunity laws the Commission deals with today. We are deeply troubled by what we have seen during our tenure on the Commission.

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years – is there something we've been missing?

As commissioners of an enforcement agency, we could have taken a cynical approach. We could have assumed that some people will always engage in harassment and that we cannot expect to control how people behave in increasingly diverse workplaces. That is especially so in an environment where every manner of rude, crude, or offensive material can be accessed and shared with others with a few strokes on a phone. We could have suggested that the Commission simply continue to do what it has done well for decades – investigate and settle charges, bring litigation, provide legal guidance, hear complaints from federal employees, and provide outreach and education.

We set cynicism to the side. We want to reboot workplace harassment prevention efforts.

Accordingly, we present this "Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace." We offer this report to our fellow commissioners, the EEOC community nationwide, our state partners, employers, employees and labor unions, and academics, foundations, and community leaders across the country. We present this report with a firm, and confirmed, belief that too many people in too many workplaces find themselves in unacceptably harassing situations when they are simply trying to do their jobs.

While we offer suggestions in this report for what EEOC can do to help prevent harassment, we caution that our agency is only one piece of the solution. Everyone in society must feel a stake in this effort. That is the only way we will achieve the goal of reducing the level of harassment in our workplaces to the lowest level possible.

This report, including the recommendations we set forth, could not have been prepared without the work of the Select Task Force on the Study of Harassment in the Workplace that was established by EEOC Chair Jenny Yang over a year ago. The Select Task Force consisted of a select group of outside experts impaneled to examine harassment in our workplaces – its causes, its effects, and what can be better done to prevent it. We served as co-chairs of this task force.

REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Our experts included management and plaintiffs' attorneys, representatives of employee and employer advocacy groups, labor representatives, and academics who have studied this field for years – sociologists, psychologists, and experts in organizational behavior. Because our group was heavy on lawyers, we deliberately fashioned an interdisciplinary approach that considered the social science on harassment in the workplace. Some of what we learned surprised us; everything we learned illuminated our understanding of this complex human issue.

We thank the members of our Select Task Force for volunteering their expertise over this past year – asking the difficult questions, shaping our discussions, and sharpening our inquiry. This is not a consensus report. It is the report of the two of us as co-chairs, based on the testimony, research, expertise, and guidance we received and reviewed along with our task force members over the past year. Nor is it a report focused on the legal issues concerning workplace harassment. It is a report focused on prevention of unwelcome conduct based on characteristics protected under our employment civil rights laws, even before such conduct might rise to the level of illegal harassment

We thank all of our witnesses for the expertise they offered at our eight meetings over the past year. We could not have written this report without the work they put into educating us and the members of the Select Task Force.

We do not pretend to have all the answers for a reboot of workplace harassment prevention. We need the active engagement of every reader of this report to provide ideas and solutions on an ongoing basis.

With great appreciation to all those who strive to make our workplaces productive places where we can all go, do our jobs, and be free from harassment, and,

With confidence that we can do better by our workforce,

Chai Feldblum Commissioner & Co-Chair Victoria A. Lipnic Commissioner & Co-Chair

EXECUTIVE SUMMARY

As co-chairs of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace ("Select Task Force"), we have spent the last 18 months examining the myriad and complex issues associated with harassment in the workplace. Thirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, we conclude that we have come a far way since that day, but sadly and too often still have far to go.

Created in January 2015, the Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. The Select Task Force reflected a broad diversity of experience, expertise, and opinion. From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments.

Throughout this past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the worlds of social science, and practitioners on the ground, on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be "legally actionable," but left unchecked, may set the stage for unlawful harassment.

This report is written by the two of us, in our capacity as Co-Chairs of the Select Task Force. It does not reflect the consensus view of the Select Task Force members, but is informed by the experience and observations of the Select Task Force members' wide range of viewpoints, as well as the testimony and information received and reviewed by the Select Task Force. Our report includes analysis and recommendations for a range of stakeholders: EEOC, the employer community, the civil rights community, other government agencies, academic researchers, and other interested parties. We summarize our key findings below.

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action — either to report the harassment internally or file a formal legal complaint. Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered \$164.5 million for workers alleging harassment – and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects all workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

It Starts at the Top – Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated – effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middlemanagers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

New and Different Approaches to Training Should Be Explored. We heard of several new models of training that may show promise for harassment training. "Bystander intervention training" – increasingly used to combat sexual violence on school campuses – empowers coworkers and gives them the tools to intervene when they witness harassing behavior, and may

REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

show promise for harassment prevention. Workplace "civility training" that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It's On Us. Harassment in the workplace will not stop on its own – it's on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an It's on Us campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the It's on Us campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar It's on Us campaign in workplaces across the nation – large and small, urban and rural – is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

Our final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace "risk factors" for harassment.

PART ONE

INTRODUCTION

"Not everything that is faced can be changed, but nothing can be changed until it is faced."

Robert J. Bies, Professor of Management/Founder, Executive Masters in Leadership Program McDonough School of Business, Georgetown University (quoting James Baldwin)

On January 14, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") held a public meeting titled "Harassment in the Workplace" to examine the issue of workplace harassment – its prevalence, its causes, and strategies for prevention and effective response.¹ At the start of that meeting, EEOC Chair Jenny R. Yang announced the formation of EEOC's Select Task Force on the Study of Harassment in the Workplace ("the Select Task Force"). We were honored to be asked to co-chair the Select Task Force.

In Chair Yang's words, the goal of the Select Task Force was to "convene experts across the employer, employee, human resources, academic, and other communities to identify strategies to prevent and remedy harassment in the workplace. Through this task force, we hope to reach more workers so they understand their rights and also to reach more in the employer community so we can understand the challenge that they face and promote some of the best practices that we've seen working."²

In the weeks that followed that meeting, we assembled the membership of the Select Task Force, drawing from a range of experts and stakeholders, and reflecting a broad diversity of experience, expertise, and opinion. The Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. On March 30, 2016, the members of the Select Task Force were announced:

- Sahar F. Aziz, Associate Professor of Law, Texas A&M University
- Meg A. Bond, Professor of Psychology and Director of the Center for Women and Work, University of Massachusetts Lowell
- Jerry Carbo, Associate Professor of Management and Marketing, Shippensburg University

¹ WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm.

² Opening Statement of Chair Jenny Yang, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/transcript.cfm#yang.

REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

- Manuel Cuevas-Trisán, Vice President, Litigation, Data Protection & Employment Law, Motorola Solutions, Inc.
- Frank Dobbin, Professor of Sociology, Harvard University
- Stephen C. Dwyer, General Counsel, American Staffing Association
- Brenda Feis, Partner, Feis Goldy LLC
- Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center
- Ariane Hegewisch, Program Director, Employment & Earnings, Institute for Women's Policy Research
- Christopher Ho, Senior Staff Attorney and Director, Immigration and National Origin Program, Legal Aid Society Employment Law Center
- Thomas A. Saenz, President & General Counsel, Mexican American Legal Defense and Educational Fund
- Jonathan A. Segal, Partner, Duane Morris and Managing Principal, Duane Morris Institute
- Joseph M. Sellers, Partner, Cohen Milstein LLC
- Angelia Wade Stubbs, Associate General Counsel, AFL-CIO
- Rae T. Vann, General Counsel, Equal Employment Advisory Council
- Patricia A. Wise, Partner, Niehaus, Wise & Kalas; Co-Chair, Society for Human Resource Management Labor Relations Special Expertise Panel

From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public for observation, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments. The activities of the Select Task Force on the Study of Harassment in the Workplace are set out in detail in Appendix A.

The first part of this report considers what we know (and do not know) about workplace harassment. The second part turns to potential solutions for responding to, and preventing, workplace harassment. Several sections of the report include recommendations based on the information presented in that section. The recommendations are offered to EEOC, employers and employer associations, employees and employee associations, other government agencies, academic researchers, and foundations.

PART TWO

LOOKING AROUND US: WHAT WE KNOW ABOUT HARASSMENT IN THE WORKPLACE

Throughout the past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the world of social science and practitioners on the ground on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment. Instead, we looked at unwelcome or offensive conduct in the workplace that: (a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; and (b) is detrimental to an employee's work performance, professional advancement, and/or mental health. This includes, but is not limited to, offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures.

When we use the term "harassment" in this report, therefore, we are referring to the conduct described above. This is not limited to conduct that is legally actionable -i.e., conduct that must be endured as a condition of continued employment or conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Nor, on the other hand, does it include all "rude," "uncivil," or "disrespectful" behavior in the workplace. Rather, the focus of this report is unwelcome or offensive conduct based on a protected characteristic under employment anti-discrimination law.

We start with stories from people who have experienced harassment in the workplace. Our commitment to preventing harassment stems from stories such as these, and the devastating impact harassment has on those who experience it. We then move to what we know about the prevalence of harassment; the ways in which employees who experience harassment respond; the business case for stopping harassment; and finally, factors in a workplace that may put a workplace more at risk for harassment.

A. REAL PEOPLE/REAL LIVES

Laudente Montoya

Laudente Montoya worked as a mechanic at J&R Well Services and Dart Energy. From his first days on the job, Mr. Montoya's supervisor called Mr. Montoya and a co-worker "stupid Mexicans," "dumb Mexicans," and "worthless Mexicans." The supervisor told Mr. Montoya that he didn't like "sp*cs" and that Mexicans were the reason Americans have swine flu.

REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Mr. Montoya fought back. He told his supervisor that "a person in a management position in a large corporation should not talk to their employees like that." In response, the supervisor said something like "welcome to the oil fields. That's how they talk here." According to Mr. Montoya, the supervisor did not limit his offensive comments to Hispanic employees. Mr. Montoya observed the supervisor calling other co-workers names like "n*gger," "lazy Indian," and "wagon burner." When Mr. Montoya and his co-workers complained to the area manager, a friend of the supervisor, the manager did nothing.

As Mr. Montoya explained, "Working that job was one of the worst times in my life. It became so that I could hardly bring myself to go to work in the morning because I hated working with him so much. People were calling me moody. I even saw my doctor about it."

Finally, Mr. Montoya and his co-workers were fed up and filed a charge of discrimination. After filing the charge, Mr. Montoya was laid off.³

Contonius Gill

Contonius Gill worked as a truck driver for A.C. Widenhouse, a North Carolina-based trucking company. On the job, Mr. Gill was repeatedly assaulted with derogatory racial comments and slurs by his supervisor, who was also the facility's general manager; by the company's dispatcher; by several mechanics; and by other truck drivers – all of whom are white.

Mr. Gill was called "n*gger," "monkey" and "boy." On one occasion, a co-worker approached Mr. Gill with a noose and said, "This is for you. Do you want to hang from the family tree?" White employees also asked Mr. Gill if he wanted to be the "coon" in their "coon hunt."

Mr. Gill repeatedly complained about the harassment to the company's dispatcher and general manager but the harassment continued unabated. The end of the story? Mr. Gill was fired for complaining about the harassment.⁴

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³ Testimony of Laudente Montoya, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/montoya.cfm.

⁴ Mr. Gill intervened in the EEOC's lawsuit against A.C. Widenhouse. See Jury Awards \$200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit, https://www.eeoc.gov/eeoc/newsroom/release/2-1-13.cfm.

Jacquelyn Hines

Jacquelyn Hines was a single mother, born and raised in Memphis, Tennessee. She didn't finish high school, but she earned her G.E.D. and worked a series of temporary jobs through various staffing agencies to support herself and her family.

In 2008, she found herself working for New Breed Logistics, a supply-chain logistics company with a warehouse in Memphis. Her supervisor made a habit of directing sexually-explicit comments to Jacquelyn and her female coworkers. Indeed, it wasn't only sexually-explicit comments – there were lewd and vulgar gestures, and some days physical harassment as well, like the day he pressed his stomach and private parts into one woman's back. When these women asked him to "stop talking dirty to me" or "leave me alone," his response was that he "wasn't going to get into trouble, he ran the place" and if anyone complained to HR, *they* would be fired.

And sure enough, that's what happened. One of Jacquelyn's coworkers was fired when she complained about the harassment by way of the company's anonymous hotline. When Jacquelyn herself stood up to her supervisor and asked him to stop, suddenly she was contacted by the temporary agency concerning alleged attendance issues (which had never been mentioned before). Her hours were cut, she lost pay, and within a week she was fired. The male coworker who had stood up to the supervisor on behalf of his colleagues, and told him to stop making comments because the women didn't like it? He was fired, too.

And it didn't stop there. Some time later, Jacquelyn applied for and was hired at a different branch of the company, in Mississippi. She worked there for a few weeks and the job was going well, until one day she was abruptly escorted off the premises. The HR manager would later explain that she had recognized Jacquelyn's name from the Memphis plant and had her fired from her job in Mississippi.⁵

* * *

We could continue to chronicle stories of harassment we heard, including harassment based on disability, religion, age, sexual orientation, and gender identity. EEOC's website is replete with such stories. But in this report, we focus on the social science describing the scope of the problem of workplace harassment and our proposed solutions.

B. THE PREVALENCE OF HARASSMENT IN THE WORKPLACE

Real people, like Mr. Montoya, Mr. Gill, and Ms. Hines, are the reason that all of us must do everything we can to prevent workplace harassment. No one in this country – no one – should

⁵ Testimony of Anica Jones, Trial Attorney, Memphis District Office, EEOC, and Jacquelyn Hines, Claimant, *EEOC v. New Breed Logistics*, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION (June 15, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/jones.cfm and https://www.eeoc.gov/eeoc/meetings/6-17-15/hines.cfm; see also EEOC v. New Breed Logistics, No. 13-6250, 2015 U.S. App. LEXIS 6650 (6th Cir. Apr. 22, 2015) (detailing allegations).

have to experience what they did. But for purposes of crafting a strategic approach to preventing harassment, we obviously need to move beyond the anecdotal evidence so that we know the scope of the problem with which we are dealing.

We started our study with the assumption that harassment is a persistent problem, at least based on the continuing number of harassment-based charges EEOC receives from employees who work for private employers or state and local government employers (162,872 charges since FY2010), and the continuing number of harassment complaints filed by federal employees (39,473 complaints since FY2010).⁶ We therefore started by learning what we could from the private sector charges and the federal sector complaints filed each year.⁷

During the course of fiscal year 2015, EEOC received approximately 28,000 charges alleging harassment from employees working for private employers or state and local government employers. This is almost a full *third* of the approximately 90,000 charges of employment discrimination that EEOC received that year. Many of the charges alleged other forms of discrimination as well, but harassment constituted either all of, or part of, the alleged discrimination in these charges. During that same year, federal employees filed 6,741 complaints alleging harassment as all of, or part of, alleged discrimination. These complaints made up 43% of all complaints filed by federal employees that year.

⁶ U.S. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010-FY 2015)*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm; U.S. Equal Employment Opportunity Commission, *Annual Reports on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Years 2010-2015*, https://www.eeoc.gov/federal/reports/.

⁷ Before an applicant or employee can file a claim of discrimination against such an entity, the individual must file a charge with EEOC. EEOC investigates the charge to determine whether there is reasonable cause to believe that discrimination has occurred. If such cause is found, EEOC attempts to end the alleged unlawful practice through a process of conciliation with the entity that has been charged (called a "respondent" in this system). EEOC does not have legal authority to require a respondent to undertake any actions; it has authority only to negotiate with the respondent to effectuate voluntary resolutions during this administrative process. If a respondent does not agree to a voluntary resolution during this process, EEOC (or the charging party) may sue the respondent in court and a court may order relief if the respondent is found to have violated the law. All allegations of discrimination brought under this administrative system are called "charges." As a matter of terminology, these are often called "private sector charges," even though they encompass charges brought against state and local employers as well as private employers and labor unions. See 42 U.S.C. §2000e (covered entities); §2000e-2 (prohibitions); 2000e-5 (enforcement provisions); 29 C.F.R. §1601 (procedural regulations). The federal government is also covered under federal employment anti-discrimination laws. Before an applicant or employee can file a claim of discrimination against a federal agency, the individual must file a complaint with the agency alleged to have engaged in the discriminatory practice. The agency is responsible for investigating such complaints and determining whether discrimination has occurred. A federal applicant or employee who disagrees with the agency's conclusion can appeal to EEOC. EEOC issues administrative conclusions in such appeals. If EEOC determines that an agency has engaged in discrimination and orders relief, the agency is required to comply with EEOC's decision and does not have the right to appeal EEOC's decision in court. All allegations of discrimination brought under this administrative system are called "complaints." As a matter of terminology, they are called "federal sector complaints." See 42 U.S.C. §2000e-16 (prohibitions and enforcement); 29 C.F.R. §1614 (procedural regulations). ⁸ EEOC, All Charges Alleging Harassment, supra n. 6.

⁹ U.S. Equal Employment Opportunity Commission, Annual Report on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Year 2015 (forthcoming).

¹⁰ Id.

Of the total number of charges received in FY2015 that alleged harassment from employees working for private employers or for state and local government employers, approximately:

- 45% alleged harassment on the basis of sex,
- 34% alleged harassment on the basis of race,
- 19% alleged harassment on the basis of disability,
- 15% alleged harassment on the basis of age,
- 13% alleged harassment on the basis of national origin, and
- 5% alleged harassment on the basis of religion. 11

Of the total number of complaints filed in FY2015 by federal employees alleging harassment approximately:

- 36% alleged harassment on the basis of race,
- 34% alleged harassment on the basis of disability,
- 26% alleged harassment on the basis of age,
- 12% alleged harassment on the basis of national origin,
- 44% alleged harassment on the basis of sex, and
- 5% alleged harassment on the basis of religion. 12

The numbers of charges (in the private sector) and complaints (in the federal sector) that were filed in FY2015 provide a snapshot of the number of people who sought a formal process to complain about harassment that year. This number is both an over-inclusive and under-inclusive data source for determining the prevalence of harassment in our workplaces. It is presumably over-inclusive because not all charges and complaints of harassment include the type of behavior

¹¹ Information provided by the EEOC's Office of Field Programs.

¹² EEOC, Annual Report on the Federal Work Force (Part I), supra n. 6. The percentages do not total 100%, as individuals sometimes file charges or complaints of harassment on the basis of more than one protected characteristic.

we consider harassment for purposes of this report.¹³ Conversely, the number is presumably under-inclusive because approximately 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint.¹⁴

Given the limitations of EEOC charge data, we sought out empirical data on the prevalence of harassment in workplaces in the United States. An important fact caught our attention in this review. There are significantly fewer academic articles on harassment on protected bases other than sex as compared to those about sex-based harassment. There is an extensive literature on discrimination on the basis of various protected characteristics (such as race and ethnicity), but those studies do not disaggregate harassment from other forms of discrimination. In this section, therefore, we explain what we have found with regard to the prevalence of sex-based harassment, and then what little we found on the prevalence of other types of harassment.

Sex-Based Harassment

Based on testimony to the Select Task Force and various academic articles, we learned that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace. Given these widely divergent percentages, we dug deeper to understand what these numbers could tell us about the scope of harassment based on sex.

We found that when employees were asked, in surveys using a randomly representative sample (called a "probability sample"), if they had experienced "sexual harassment," without that term being defined in the survey, approximately one in four women (25%) reported experiencing "sexual harassment" in the workplace. This percentage was remarkably consistent across probability surveys. When employees were asked the same question in surveys using convenience samples (in lay terms, a convenience sample is not randomly representative because it uses respondents that are convenient to the researcher (*e.g.*, student volunteers or respondents from one organization)), with sexual harassment not being defined, the rate rose to 50% of women reporting they had been sexually harassed. ¹⁵

We then found that when employees were asked, in surveys using probability samples, whether they have experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, the rate of reported harassment rose to approximately 40% of

¹³ For example, some charges may allege objectionable behavior, but not behavior based on a protected characteristic under employment non-discrimination laws. Similarly, not all charges and complaints of harassment based on a protected characteristic ultimately prove to have legal merit. That is, harassing behavior on the basis of a protected characteristic may have occurred, but the behavior alleged may not meet the legal standards for severity or pervasiveness to constitute actionable, unlawful harassment.

pervasiveness to constitute actionable, unlawful harassment.

14 Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C. L. Cooper eds., 2008).

¹⁵ Remus Ilies *et al.*, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607 (2003). In this article, the researchers reviewed 96 estimates of sexual harassment incidence from 84 independent samples reported in 71 studies. The researchers considered a survey sample to be in the *probability* category if it was based on "(a) a national probability sample (random or stratified random) or (b) a probability sample across multiple organizations or in a multiple-site organization (*e.g.*, government or state employees), or (c) a sample that resulted from the sampling of the entire sampling frame (as defined by the study) in a single-site organization."

women.¹⁶ When respondents were asked in surveys using convenience samples about such behaviors, the incidence rate rose to 75%.¹⁷ Based on this consistent result, researchers have concluded that many individuals do not label certain forms of unwelcome sexually based behaviors – even if they view them as problematic or offensive – as "sexual harassment."¹⁸

The most widely used survey of harassment of women at work, the Sexual Experiences Questionnaire (SEQ), not only asks respondents whether they have experienced unwanted sexual attention or sexual coercion, but also asks whether they have experienced sexist or crude/offensive behavior. Termed "gender harassment" in the SEQ, these are hostile behaviors that are devoid of sexual interest. Gender harassment can include sexually crude terminology or displays (for example, calling a female colleague a "c*nt" or posting pornography) and sexist comments (such as telling anti-female jokes or making comments that women do not belong in management.) These behaviors differ from unwanted sexual attention in that they aim to insult and reject women, rather than pull them into a sexual relationship. As one researcher described it, the difference between these behaviors is analogous to the difference between a "come on" and a "put down."

When sex-based harassment at work is measured by asking about this form of gender harassment, almost 60% of women report having experienced harassment in surveys using

¹⁶ *Id.* Three of the studies included in the review by Ilies and her colleagues were probability surveys conducted by the Merit Systems Protection Board (MSPB) of federal employees in 1980, 1987 and 1994. U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* (1994) available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government Update* (1988) available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=252435&version=252720&application=ACROBAT; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is it a Problem?* (1981)

http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=240744&version=241014&application=ACROBAT. Instead of asking respondents whether they had experienced "sexual harassment," the MSPB surveys asked respondents if they had experienced one or more of the following six behaviors: letters, phone calls or materials of a sexual nature; pressure for sexual favors; touching, leaning over, cornering orpinching (these were denoted as severe behaviors); pressure for dates; sexually suggestive looks or gestures; and sexual teasing, jokes, remarks or questions (these were denoted as less severe behaviors). While the MSPB studies were conducted nearly 20 years ago, they remain the only set of surveys using probability samples taken over a period of 14 years of largely the same type of workforce.

¹⁷ Ilies et al., supra n. 15. In the case of one convenience sample, the incidence rate rose to 90%. Id.

¹⁸ Vicki J. Magley et al., Outcomes of Self-Labeling Sexual Harassment, 84 J. APPLIED PSYCHOLOGY, 390 (1999). ¹⁹ Emily A. Leskinen et al., Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work, 35 LAW AND HUMAN BEHAVIOR 25 (2011) (stating that the Sexual Experiences Questionnaire (SEQ), developed by Professor Louise Fitzgerald and her colleagues in 1988, is the most validated and widely used measure of sexual harassment experiences). See also Louise F. Fitzgerald et al., Measuring Sexual Harassment in the Military: The Sexual Experiences Questionnaire (SEQ-DoD), 11 MIL. PSYCHOL. 243 (1998).

²⁰ Professor Fitzgerald and her colleagues developed this description to explain the different forms of sex-based harassment. Louise F. Fitzgerald *et al.*, *Why Didn't She Just Report Him? The Psychological and Legal implications of Women's Responses to Sexual Harassment*, 51 JOURNAL OF SOCIAL ISSUES 1, 117-138 (1995). *See also* Louise F. Fitzgerald *et al.*, *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 JOURNAL OF VOCATIONAL BEHAVIOR 152–175 (1988) (describing gender-based harassment). In 2007, Professor Berdhal recommended use of the term "sex-based harassment" in lieu of "sexual harassment," a recommendation adopted by most researchers in the field. Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCH, 425 (2007) [hereinafter Berdahl (2007)]. Berdahl's study provided evidence that sexual harassment is primarily targeted at women who violated gender ideals.

probability samples.²¹ Indeed, when researchers disaggregate harassment into the various subtypes (unwanted sexual attention, sexual coercion, and gender harassment), they find that gender harassment is the most common form of harassment.²²

Whether or not women label their unwanted experiences as sexual harassment appears to have little influence on the negative consequences of these experiences. ²³ As one group of researchers pointed out, data from three organizations "demonstrate that whether or not a woman considers her experience to constitute sexual harassment, she experiences similar negative psychological, work, and health consequences."²⁴

Most of the surveys of sex-based harassment at work have focused on harassment experienced by women. One exception has been the surveys conducted by the Merit Systems Protection Board of federal employees in 1980, 1987, and 1994. When respondents were asked whether they had experienced unwanted sexual attention or sexual coercion, 42% of women and 15% of men responded in the affirmative in 1981; as did 42% of women and 14% of men in 1988; and 44% of women and 19% of men in 1994.²⁵

Gender Identity-Based and Sexual Orientation-Based Harassment

There are few nationally representative surveys of harassment experienced by transgender and lesbian, gay or bisexual (LGB) employees. 26 Such harassment may include sexually-based behaviors (such as unwanted sexual touching or demands for sexual favors) as well as genderbased harassment (such as calling a lesbian a "d*ke" or a gay man a "f*g").

In one survey using a probability sample and studying social and demographic trends, 35% of LGB-identified respondents who reported being "open" at work reported having been harassed in the workplace.²⁷ In another survey using a probability sample, LGBT respondents were asked specifically whether they heard derogatory comments about sexual orientation and gender identity in their workplaces. In that survey, 58% of LGBT respondents said they had heard such

²² Leskinen et al, supra n. 19. In a study of approximately 10,000 women in the military, of those who reported harassment, 89.4% reported gender-based harassment. Id.

²¹ Ilies, supra n. 15. When responding to the SEO, across a variety of work environments and based on 86,578 respondents from 55 independent probability samples, 58% of women report having experienced sex-based harassment.

²³ Magley et al., supra n. 18; Liberty J. Munson et al., Labeling Sexual Harassment in the Military: An Extension and Replication, 86 J. APPLIED PSYCHOL. 293 (2011).

²⁴ Magley et al., supra n. 18.

²⁵ MSPB surveys, *supra* n. 16.

²⁶ It is EEOC's position that harassment based on sexual orientation or gender identity is a form of sex-based harassment. See Equal Employment Opportunity Commission, What You Should Know About EEOC and Enforcement Protections for LGBT Workers, available at:

https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement protections lgbt workers.cfm.

²⁷ Christie Mallory & Brad Sears, Documented Evidence of Employment Discrimination and Its Effects on LGBT People, The Williams Institute (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (citing finding from the 2008 General Social Survey, a national probability survey representative of the U.S. population.).

comments.²⁸ A review of nine other surveys using convenience samples of LGBT individuals found that between 7% and 41% of respondents were verbally and/or physically abused at work or had their work spaces vandalized, with transgender individuals generally experiencing higher rates of harassment than LGB people.²⁹

In a large-scale survey of transgender individuals (albeit not a probability sample), 50% of respondents reported being harassed at work.³⁰ In addition, 7% reported being physically assaulted at work because of their gender identity, and 6% reported being sexually assaulted.³¹ 41% reported having been asked unwelcome questions about their transgender or surgical status, and 45% reported having been referred to by the wrong pronouns "repeatedly and on purpose" at work.32

Race-Based and Ethnicity-Based Harassment

Race-based and ethnicity-based harassment are significantly understudied.³³ Most studies of race- and ethnicity-based discrimination fail to distinguish between harassment and other forms of discrimination, and hence we did not find any nationally representative surveys on such harassment per se.

Researchers have combined the concepts of race-based harassment and ethnicity-based harassment into one construct called "racial and ethnic harassment." In one of the first studies of racial and ethnic harassment based on a convenience sample, between 40% and 60% of respondents (some of whom were working undergraduate or graduate students, others who worked for a school district) reported experiencing some form of racial or ethnic harassment. In this study, harassment was defined to include threatening verbal conduct, such as comments, jokes, and slurs related to one's ethnicity or race, as well as exclusionary behaviors, such as being excluded from a social event, not being given necessary information because of one's ethnicity or race, or being pressured to "give up" one's ethnic/racial identity in order to "fit in."³⁴

³⁰ Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (2011), available at http://endtransdiscrimination.org/report.html. The survey was based on 6,000 online surveys and 500 paper surveys. The survey is not based on a probability sample because the surveys did not come from a random sample of transgender individuals, but rather from individuals who were reached through various community venues.

31 *Id*.

32 *Id*.

²⁸ Human Rights Campaign, Degrees of Equality Report: A National Study Examining Workplace Climate for LGBT Employees (2009), available at http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/DegreesOfEquality 2009.pdf.

²⁹ Mallory and Sears, *supra* n. 27.

³³ Tamara A. Bruce, *Racial and Ethnic Harassment in the Workplace in GENDER*, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (Margaret Foegen Karsten, ed., 2006). While Title VII prohibits discrimination on the basis of national origin, the research generally looks at harassment based on ethnicity, rather than national origin.

³⁴ Kimberly T. Schneider et al., An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts, 85 J. APPLIED PSYCHOL. 3 (2000). This was a study based on four convenience samples of predominantly Hispanic men and women.

In another survey based on a convenience sample measuring racial and ethnic harassment, researchers found that 70% of the respondents reported experiencing some form of verbal harassment and 45% reported experiencing exclusionary behaviors. In addition, 69% of respondents reported *witnessing* at least one ethnically-harassing behavior in the last two years at work and 36% of respondents who reported that they had not experienced direct harassment indicated that they had knowledge about the harassment of other co-workers. ³⁶

There has also been some research on the prevalence of racial harassment in particular industries. For example, in a 2011 survey based on a convenience sample of restaurant workers in Los Angeles, 35% of respondents reported having experienced verbal abuse perceived as motivated by race.³⁷ The study found that language and national origin were among the major motivations that workers attributed to their experience of verbal abuse.³⁸

Disability-Based Harassment

Evidence on the prevalence of disability-based harassment in the workplace was even harder to find than studies of racial and ethnic harassment. In a survey based on a convenience sample of one university's faculty and staff, 20% of respondents with disabilities reported experiencing harassment or unfair treatment at work because of their disability. In addition, 6% of all respondents reported having observed harassment or similar unfair treatment of a coworker with a disabilities reported experiencing harassment or similar unfair treatment at work because of their disability, and 5% of all respondents reported having observed harassment or similar unfair treatment of coworkers with disabilities. In a similar unfair treatment of coworkers with disabilities.

The only other research on disability-based harassment in the workplace analyzed EEOC charge data – not to determine the prevalence of disability-based harassment in the workplace, but to discern what disabilities were more likely to show up in such charges. In the most recent analysis, the odds of a person with behavioral disabilities (anxiety disorder, depression, bipolar

³⁵ K.S. Douglas Low et al., The Experience of Bystanders of Workplace Ethnic Harassment, 37 J. APPLIED SOCIAL

PSYCHOL. 2261 (2007).

³⁶ *Id*.

Restaurant Opportunities Center of Los Angeles, Restaurant Opportunities Centers United, and the Los Angeles Restaurant Industry Coalition, *Behind the Kitchen Door: Inequality and Opportunity in Los Angeles, the Nation's Largest Restaurant Industry*, 48-49 (Feb. 14, 2011) *available at* http://rocunited.org/wp-content/uploads/2011/06/ROC-LA-Behind-the-Kitchen-Door.pdf. Although the researchers conducted a convenience sample survey, they used stratification to ensure that the sample was as representative as possible of the

Los Angeles County restaurant industry. ³⁸ *Id*.

University of Missouri Persons with Disabilities Committee, 2009 Faculty/Staff Survey on Disability Prevalence, Awareness and Accessibility at MU: A Report to the Chancellor and Provost on Findings and Recommendations by The Chancellor's Committee for Persons with Disabilities (2010), http://committees.missouri.edu/persons-disabilities/docs/2009%20Faculty_Staff%20Disability%20Survey%20Findings.doc.

⁴¹ Jennifer Vanderminden & Carol Swiech, *Report on the Status of People with Disabilities: A Survey of Faculty and Staff at the University of New Hampshire*, Fall 2011, https://www.unh.edu/sites/www.unh.edu/files/departments/presidents commission on the status of people with disabilities/PDFs/2011 cspd survey full report with appendix 2012.pdf.

disorder, and other psychiatric impairments) filing a harassment charge were close to 1.5 times greater than the odds of a person with another type of disability filing a harassment charge.⁴² People with speech impairments, learning disabilities, disfigurements, intellectual disabilities, dwarfism, traumatic brain injuries, and hearing impairments also filed more disability harassment charges than people with other disabilities.⁴³

Age-Based and Religion-Based Harassment

We identified two surveys on age-based harassment in the workplace, both of which were conducted by AARP. In a survey based on a convenience sample of workers older than 50, 8% of respondents reported having been exposed to unwelcome comments about their age. 44 When the same question was asked in a survey based on a convenience sample of workers older than 50 in New York City, close to 25% reported that they or a family member had been subjected to unwelcome comments about their age in the workplace. 45

We received anecdotal information chronicling different types of religion-based harassment in the workplace. We also identified numerous articles describing how religious harassment manifests itself in the workplace, but we were not able to identify empirical data based on probability or convenience samples on the prevalence of such harassment. 47

Intersectional Harassment

As people hold multiple identities, they can also experience harassment on the basis of more than one identity group. For instance, an African-American woman may experience harassment because she is a woman, but also because of her racial identity. There is increasing evidence that targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion. 49

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⁴² Linda Shaw et al., Employee and Employer Characteristics Associated with Elevated Risk of Filing Disability Harassment Charges, 36 J. VOCATIONAL REHAB.187 (2012).

⁴⁴ Dawn Nelson, AARP, *AARP Bulletin Poll on Workers 50+: Executive Summary*, AM. ASS'N RETIRED PERSONS (2007), *available at* http://assets.aarp.org/rgcenter/econ/workers poll 1.pdf.

⁴⁵ AARP New York, NYC's Most Powerful Voting Group to Carry Concerns & Worries into Primary (2013), https://states.aarp.org/nycs-most-powerful-voting-group-to-carry-concerns-worries-into-primary/.

⁴⁶ See, e.g., Oral Testimony of Zahra Billoo, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015),

⁴⁷ As with studies on racial and ethnic harassment, studies of workplace discrimination based on religion do not disaggregate harassment from other forms of discrimination. *See* Sonia Ghumman *et al.*, *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. Bus. Psychol. 439 (2013) ("Empirical research on religious harassment in the workplace is surprisingly sparse... Often, harassment is lumped in with general measures of discrimination, making it more difficult to sort out the antecedents and consequences of harassment from differential treatment in personnel actions.").

⁴⁸ Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 42 (2006).

⁴⁹ Jana L. Raver and Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace* Harassment, 95:2 J. of Applied Psychol. 236 (2010).

In a 2010 study, researchers hypothesized and found that members of racial minority groups report higher levels of harassment than whites, and that women experience higher levels of harassment than men. When the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience higher rates of harassment than white women. Moreover, when the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience harassment than men who are members of a racial minority group. One study focusing primarily on gender-based harassment noted that interviews with participants inevitably led to discussions of related race-based harassment, further reinforcing the intersectional nature of harassing behavior. Despite studies on particular aspects of intersectional harassment, a significant amount of research on topics such as sexual harassment is based on the experiences of white women. Similarly, much research on ethnic harassment is based on the experiences of men who are members of racial minority groups. As a result, current research may underestimate the extent and nature of intersectional harassment.

* * *

The bottom line is that there is a great deal we do not know about the prevalence of harassment that occurs because of an employee's race, ethnicity, religion, age, disability, gender identity, or sexual orientation. This is so, despite the fact that there is no shortage of private sector charges and federal sector complaints that are filed claiming harassment on such grounds. We hope that an outcome of this report will be a focus by funders and researchers on collecting better prevalence data on harassment based on these characteristics.

In light of what we have learned in this area, we recommend the following:

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time. 55
- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.⁵⁶

Id.

⁵⁰ *Id.* at 240-49.

⁵¹ Id

⁵² Berdahl, *supra* n. 48, at 432.

⁵³ Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 Harv. J. L. & Gender 185 (2014).

⁵⁴ Berdahl, *supra* n. 48, at 433.

⁵⁵ The 2005 Gallup Organization poll regarding discrimination in the workplace, conducted by Gallup with input from EEOC, would serve as a ready model for a harassment poll. The Gallup Organization, Public Opinion Poll, *Employee Discrimination in the Workplace* (2005),

http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf. Notably, since 2002, Australia has conducted a national poll on sexual harassment every five years. https://www.humanrights.gov.au/our-work/sex-discrimination/projects/sexual-harassment-know-where-line.

⁵⁶ EEOC's Research and Data Plan for 2016-2019 authorized the agency's research division to study EEOC charge data as well as federal sector hearing and appeal statistics, along with EEO survey and Census data, to determine

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.
- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

C. EMPLOYEE RESPONSES TO HARASSMENT

What do employees do when they experience harassment in the workplace? Based on the volume of charges and complaints filed each year, one might presume that many such individuals seek legal relief.

That presumption is incorrect. In fact, based on the empirical data, the extent of non-reporting is striking. As with all the evidence we discuss in this report, almost all of the data on responses to harassment come from studies of sex-based harassment.

Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).⁵⁷ In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.⁵⁸

which private sector and federal, state and local government employers and industries were most frequently subject to allegations of harassment. See https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm. Researchers are often dependent on outside funding from private and public sources to conduct their research. Thus, this recommendation is directed toward such funders as well.

Berdhal. Three of the studies surveyed women only; two of the studies surveyed men and women. The five studies were: (1) Lilia M. Cortina, *Hispanic Perspectives on Sexual Harassment and Social Support*, 30 PERSONALITY & Soc. PSYCHOL. BULL. 570 (2004) (working Latina women from different companies); (2) Caroline C. Cochran *et al.*, *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207 (1997) (male and female university staff and students); (3) Amy L. Culbertson & Paul Rosenfield, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCHOL. 69 (1994) (exploring experiences of women in the Navy); (4) Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. OF APPLIED PSYCHOL. 401 (1997) (working women from different companies); and (5) MSPB 1994, *supra* n. 16 (male and female federal employees). Because these percentages come from a review of five studies, they include surveys in which respondents were asked if they had experienced "sexual harassment" (without the term being defined), had experienced any behavior from a list of sexually-based behaviors ("comeons"), or had experienced any of those sexually-based behaviors and/or any gender-based derogatory comments ("put downs").

The percentages in the four studies for targets of harassment confronting their harasser in some way were wideranging: 25% (Cochran – university staff and students); 33% to 57% (Schneider – working women in different companies); and 41% of women and 23% of men (MSPB – federal employees). The highest percentages were in the Navy study by Culbertson *et al.*: 54% of officers and 72% of enlisted personnel.

The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others. ⁵⁹

The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct. 16

The incidence of reporting appears to be related to the type of harassing behavior. One study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it.⁶²

In terms of filing a formal complaint, the percentages tend to be quite low. Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint.⁶³ That means that, on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint.

Employees who experience harassment fail to report the behavior or to file a complaint because they anticipate and fear a number of reactions – disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation.⁶⁴

The fears that stop most employees from reporting harassment are well-founded. One 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.⁶⁵ Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as

⁶¹ *Id*

⁵⁹ Cortina & Berdhahl, *supra* n. 14.

⁶⁰ *Id*.

⁶² Written Testimony of Lilia M. Cortina, Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm (citing K. A. Lonsway et al., Sexual Harassment in Law Enforcement: Incidence, Impact and Perception, 16 Police Quarterly 117 (Jun. 2013)).

⁶³ Cortina & Berdhahl, *supra* n. 14. In the Navy study by Culbertson *et al.*, 6% to 8% filed a formal complaint; in the survey by Schneider of women in different companies, 6% to 13% had filed a complaint. Two of the studies had very disparate results. Cortina's study of Latina women in different companies showed a 17% to 20% rate for filing a formal complaint, while the study by Cochran *et al.* of university staff and students showed a 2% rate. The MSPB study found that, in 1987, 5% of both female and male employees took some type of formal action. MSPB 1988, *supra* n. 16. In 1994, for the study included in the Cortina and Berdhahl review, the rate had increased to 6%. MSPB 1994, *supra* n.16.

⁶⁴ Cortina testimony, *supra* n. 62.

⁶⁵ Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

hostility and reprisals against the victim.⁶⁶ Such responses understandably harm the victim in terms of adverse job repercussions and psychological distress.⁶⁷ Indeed, as one researcher concluded, such results suggest that, in many work environments, the most "reasonable" course of action for the victim to take is to avoid reporting the harassment.⁶⁸

These findings raise serious concerns. We discuss the need for a comprehensive strategy to remedy this problem in Part Three of this report.

* * *

Our journey into the academic literature on the prevalence of, and responses to, harassment was illuminating. It taught us some things we did not know at all – for example, how radically different prevalence rates of sex-based harassment can be based on whether respondents are a probability sample or a convenience sample, and based on how survey questions are framed. It reinforced some information we already knew, such as the low level of formal reporting, although the high percentage of those who never talk to a supervisor or file a legal complaint was striking. And it laid bare the absence of empirical data regarding the prevalence of harassment based on protected characteristics other than sex.

D. THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT

Let there be no mistake: Employers should care about stopping harassment because *harassment* is wrong – and, in many cases, it is illegal. Workplace harassment can produce a variety of harms – psychological, physical, occupational, and economic harms that can ruin an employee's life. These effects of harassment – on victims – are primarily why harassment must be stopped. So, again: Employers should care about preventing harassment because it is the right thing to do, and because stopping illegal harassment is required of them.

Moral obligation and legal duty are not the complete story, though. Based on what we have learned, employers should also care about stopping harassment because it makes good business sense.

The business case for preventing harassment is sweeping. At the tip of the iceberg are direct financial costs associated with harassment complaints. Time, energy, and resources are diverted from operation of the business to legal representation, settlements, litigation, court awards, and

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⁶⁶ Mindy Bergman et al., The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment, 87(2) J.APPLIED PSYCHOLOGY 230 (2002); MSPB 1994, supra n. 16.

⁶⁷ Bergman et al., supra n. 66; Cortina and Magley, supra n. 65.

⁶⁸ Written Testimony of Mindy E. Bergman, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task force/harassment/testimony bergman.cfm. As Bergman notes: "It is actually unreasonable for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because remediating the situation did not make the person whole – that is, did not overcome the damage caused by harassment – and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being."

damages. These are only the most visible and headline-grabbing expenses. They also only address employees who report harassment, which, as we explained, may account for only a fraction of the harassment that occurs.

The business case extends far deeper. It encompasses employees who endure but never report harassment, as well as coworkers and anyone else with an interest in the business who witness or perceive harassment in the workplace. When accounting for all those affected by it, harassment becomes more insidious and damaging. In addition to the costs of harassment complaints, the true cost of harassment includes detrimental organizational effects such as decreased workplace performance and productivity, increased employee turnover, and reputational harm.

Direct Financial Costs of Harassment

When employers consider the costs of workplace harassment, they often focus on tangible, monetary costs associated with charges filed with EEOC, and with good reason. As previously noted, nearly one in three charges filed with the Commission in fiscal year 2015—27,893 of 89,385 charges – alleged some form of harassment.⁶⁹ That averages to approximately 76 harassment charges filed *daily* – a number that has, unfortunately, remained steady over the years. Indeed, since 2010, employees have filed 162,872 charges alleging harassment.⁷⁰

Charges of harassment come at a steep cost for employers. The Commission resolved 28,642 harassment allegations in 2015. Of those, 5,518 charges involving allegations of harassment were resolved in favor of the charging party through the administrative process, resulting in \$125.5 million in benefits for employees. Since 2010, employers have paid out \$698.7 million to employees alleging harassment through the Commission's administrative enforcement prelitigation process alone. While we do not have strictly comparable cost data with respect to the various agencies of the federal government, we surmise it would likely be similar, given the diverse and varied nature of the federal workforce and its worksites.

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⁶⁹ See U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Statutes (FY 1997 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 - FY 2015) http://www.eeoc.gov/eeoc/statistics/enforcement/all harassment.cfm.

⁷⁰ See U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

⁷¹ Id

⁷² As we heard from one witness at the first public meeting of the Task Force: "The federal government is the most diverse workforce in the world. We have federal grocery stores – over two hundred federal grocery stores, federal butchers, federal cashiers. We have park rangers who spend two months surveying the wilderness and VA hospitals that have the full range of medical professionals, doctors, and nurses. We have police departments, we have fire departments, so when people think of the federal government you think of bureaucracy you don't think of the traditional employment." *Oral Testimony of Dexter Brooks*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 17, 2015).

EEOC 2015 Statistics in the Private Sector

- 27,893 charges received (31%) alleged harassment
- 28,642 charges resolved (31%) alleged harassment
- \$125.5 million secured for employees alleging harassment in EEOC's

pre-litigation process

- 33 lawsuits filed by EEOC (23% of all suits filed) alleged
- 42 lawsuits resolved by EEOC (27% of all suits resolved) alleged harassment
- \$39 million in monetary benefits secured for employees in EEOC lawsuits involving harassment

A recent study by Hiscox, a liability insurance provider, paints the picture of the costs of employment disputes (albeit not only harassment claims) more broadly.⁷³ representative sample of closed employment dispute claims from smaller- and mid-sized companies, they found that 19% of the matters resulted in defense and settlement costs averaging \$125,000 per claim.⁷⁴ And of course, for the 81% of studied charges that did not result in a payment by the insurance company, precious time, energy, and resources were still required to handle them internally – for 275 days, on average. ⁷⁵ Beyond their study of the closed claims, Hiscox estimated, based on 2014 data, that U.S. employers had at least an 11.7% chance of having an EEO charge filed against them.⁷⁶ While this data applies to a broader range of employment disputes, not just harassment claims, the time, energy, and resources devoted to those claims would apply to harassment claims, as well.

Litigation of harassment claims tends to be even more expensive. One estimate of settlement payments and court judgments solely in 2012 for harassment lawsuits clocked in at over \$356 million.⁷⁷ The largest sexual harassment jury award in 2012 totaled \$168 million.⁷⁸

Harassment litigation initiated by EEOC has also cost employers. In fiscal year 2015, the Commission filed 33 lawsuits containing a harassment allegation.⁷⁹ During the same time, it resolved 42 lawsuits involving harassment, recovering over \$39 million in monetary benefits for

⁷³ See Hiscox, The 2015 Hiscox Guide to Employee Lawsuits: Employee Charge Trends Across the United States, available at http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employeecharge-trends-across-the-United-States.pdf. 74 *Id.* at 6.

⁷⁵ *Id*.

⁷⁷ eBossWatch, National Boss Day Report: Employers paid over \$356 million for workplace harassment and discrimination complaints (Oct. 16, 2012), http://blog.ebosswatch.com/2012/10/national-boss-day-reportemployers-paid-over-356-million-for-workplace-harassment-and-discrimination-complaints/.

⁷⁹ Data provided by EEOC Office of General Counsel.

employees.⁸⁰ Simply put, the direct financial costs of workplace harassment are significant. But by no means are financial costs the only repercussions.

Indirect Costs: Decreased Productivity, Increased Turnover, and Reputational Damage

Direct costs tied to harassment complaints are largely visible. An employer consciously moves resources away from its business plan to respond to the complaints. However, there are a host of indirect costs that, while often invisible, can tower over the direct costs.

It begins with the reality that harassment causes personal harm to the victim. Numerous studies have identified the damaging effects of mistreatment in the workplace, mainly focusing on sexual harassment. Employees experiencing sexual harassment are more likely to report symptoms of depression, general stress and anxiety, posttraumatic stress disorder (PTSD), and overall impaired psychological well-being.⁸¹

The Personal Effects of Harassment: Selections from Stories Shared with the Select Task Force

"I have faced sexual discrimination as well as unwanted sexual harassment on my job and retaliation by my employer for addressing the issue. The distress and mental anguish that I have endured has affected my health. I was recently diagnosed with hypertension on July 13, 2015, and I am only 36 years old."

"[The harassment has] caused devastating loss of income, reputation, missed opportunities, mental health and physical health problems."

One study found that the psychological effects of sexual harassment can rise to the level of diagnosable Major Depressive Disorder or PTSD.⁸² Sexual harassment has also been tied to psychological effects such as negative mood, disordered eating, self-blame, reduced self-esteem, emotional exhaustion, anger, disgust, envy, fear, lowered satisfaction with life in general, and abuse of prescription drugs and alcohol.⁸³

Physical harm can also result. Studies have linked sexual harassment to decreased overall health perceptions or satisfaction, as well as headaches, exhaustion, sleep problems, gastric problems,

⁸⁰ *Id.* To be clear, many of these suits involved allegations in addition to harassment. As a result, not all of the \$39 million in monetary benefits may be directly tied to allegations of harassment.

⁸¹ See Cortina testimony, supra n. 62; Cortina & Berdahl, supra n. 14; Lilia M. Cortina & Emily A. Leskinen, Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems, in VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (C. García- Moreno & A. Riecher-Rössler eds., 2013).

⁸² See Cortina & Leskinen, supra n. 81 (citing B. S. Dansky & D. G. Kilpatrick, Effects of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (W. O'Donohue ed., 1997)).

⁸³ Id.

nausea, weight loss or gain, and respiratory, musculoskeletal, and cardiovascular issues.⁸⁴ These potential effects, both mental and physical, become increasingly likely when the harassment occurs over time.⁸⁵

The damaging personal effects of harassment are not limited to victims. There is growing understanding that employees who observe or perceive mistreatment in their workplace can also suffer mental and physical harm. One study found that employees, female and male alike, who observed hostility directed toward female coworkers (both incivility and sexually harassing behavior) were more likely to experience lower psychological well-being. These declines in mental health were, in turn, linked to lower physical well-being. According to the study, the drivers of these effects can stem from empathy and worry for the victim, concern about the lack of fairness in their workplace, or fear of becoming the next target. Whatever the case, if there is harassment in the workplace, more people than just the victim can be harmed.

It follows, then, that when employees are suffering harassment, the work can suffer. It is well-established that workplace harassment and conflict can result in decreased productivity. Studies – again, focusing largely on sexual harassment – have found that harassment is associated with debilitating job dissatisfaction and work withdrawal. This largely takes form as disengagement from work, which is manifested as distraction, neglecting a project, malingering, tardiness, or even excessive absenteeism. Often, work time is spent talking about the harassment with others, seeking personal treatment or assistance, reporting the harassment, and navigating the complaint and investigation processes.

Work withdrawal and disengagement due to harassment can also go beyond the individual to affect team and group relationships. The mere awareness of sexual harassment among a work group can create a tense environment, an negatively influencing the group's day-to-day functioning. At the most basic interactional level, one study found that three-quarters of U.S. workers have avoided a coworker merely because of a "disagreement" — let alone because of harassment. Ultimately, this kind of response to workplace conflict can become a contagion and

⁸⁹ See Cortina & Berdahl, supra n. 14 at 481 (summarizing studies); Berdahl & Raver, supra n. 85, at 649; Laurent LaPierre et al., Sexual Versus Nonsexual Workplace Aggression and Victims' Overall Job Satisfaction, 10 J. Occupational Health Psych. 155 (2005).

⁸⁴ See Cortina & Berdahl, supra n. 14 at 481.

⁸⁵ See Jennifer L. Berdahl & Jana L. Raver, Sexual Harassment, 3 APA HANDBOOK INDUS. & ORGANIZATIONAL PSYCHOL. 641 (2011).

⁸⁶ See Kathi Minder-Rubino & Lilia Cortina, Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work, 92 J. APPLIED PSYCH. 1254, 1264 (2007).

⁸⁸ Id

⁹⁰ See Cortina & Berdahl, supra n. 14 at 481 (summarizing studies); Donald Zauderer, Workplace Incivility and the Management of Human Capital, THE PUBLIC MANAGER 38 (Spring 2002).

⁹¹ See MSPB 1994, supra n. 16.

⁹² See Jana Raver & Michele Gelfand, Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance, 48 Academy of Mgmt. J. 387, 388 (2005).

⁹³ See id. (citing T.M. Glomb et al., Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences, 71 Org. Behavior and Human Decision Processes 309-28 (1997)).
⁹⁴ See id. at 394.

⁹⁵ CPP Global, Workplace Conflict and How Businesses Can Harness It to Thrive 6 (2008), available at https://www.cpp.com/pdfs/CPP Global Human Capital Report Workplace Conflict.pdf.

an "organization stressor." It can pervade and break down a work group, damaging its ability to function. All of this is a drag on performance – and the bottom line.

A Sketch of the Cost of Lost Time Due to Harassment in the Federal Workplace

[I] magine an employee who's being bothered by a coworker who leers at her or makes comments full of innuendo or double entendres, or who tells jokes that are simply inappropriate in a work setting. The time this employee spends worrying about the coworker, the time she spends confiding in her office mate about the latest off-color remark, the time she spends walking the long way to the photocopier to avoid passing his desk, is all time that sexual harassment steals from all of us who pay taxes.

Adding up those minutes and multiplying by weeks and months begins to paint a picture of how costly sexual harassment is. Increase this one individual's lost time by the thousands of cases like this in a year, and the waste begins to look enormous. And this may well be a case that doesn't even come close to being considered illegal discrimination by the courts. Whether or not they're illegal, these situations are expensive.

U.S. Merit Systems Protections Board, Sexual Harassment in the Federal Workplace (1994).

Perhaps most costly of all, workplace harassment can lead to increased employee turnover. Some have hypothesized that turnover costs are the largest single component of the overall cost of sexual harassment. Even conduct that is not harassment can lead to employee turnover. To summarize one commentator: Acts of incivility can incite people to exit the scene. 99

Combining these various factors can add up to a significant sum of money. In 1994, the Merit Systems Protection Board conservatively estimated that over two years, as a result of sexual harassment, job turnover (\$24.7 million), sick leave (\$14.9 million), and decreased individual (\$93.7 million) and workgroup (\$193.8) productivity had cost the government a total of \$327.1 million. 100

An additional cost to consider is the damage workplace harassment can inflict on a firm's reputation. For example, studies have linked sexual harassment to negative effects on a firm's ability to attract employees. A 2008 study of the impact of sexual harassment on a consumer brand found that prospective employees' perceived sexual harassment in a sales workplace was negatively related to their intentions to work for the firm. Indeed, fostering an organization's image through internal brand strategies aimed at alleviating workplace sexual harassment may lead to the attraction and retention of qualified employees.

⁹⁷ Id

⁹⁶ Id.

⁹⁸ See Rebecca Merkin & Muhammad Kamal Shah, The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings from Pakistan Compared to the United States, Springer Plus 4 (2014), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4028468/.

⁹⁹ See Zauderer, supra n. 90, at 41.

¹⁰⁰ See MSPB 1994, supra n. 16, at 26.

¹⁰¹ See, e.g., Jeremy Sierra et al., Brand Response-Effects of Perceived Sexual Harassment in the Workplace, 14 J. OF BUS. & MGMT. 157 (2008).

¹⁰² *Id.* at 185.

¹⁰³ *Id.* at 190 (referencing John Sullivan, *Measuring Employment Brand*, 2 STRATEGIC HUM. RES. REV. 7 (2003)).

Even behavior that doesn't rise to the level of harassment can adversely affect the ability of employers to attract talent. In the 2007 Level Playing Field Institute study, roughly one-fourth (27%) of respondents who experienced "unfairness" at work within the past year, and over 70% who suffered bullying, said their experience strongly discouraged them from recommending their employer to potential employees. And approximately 58% who experienced unfairness said that their experience would "to some degree" cause them to discourage potential employees. ¹⁰⁵

The ability of a firm to retain customers and clients, or attract new ones, could also be affected. Studies demonstrate that perceived sexual harassment in the workplace has a negative effect on attitudes toward the brand and brand image. Conversely, when internal stakeholders understand, embrace, and execute organizational brand values, the company has an opportunity to gain a competitive advantage in the marketplace and the brand has an opportunity to flourish. In this sense, internal brand strategies are critical for overall business success. ¹⁰⁷

Again, even behavior that does not n't rise to the level of harassment can adversely affect a brand. A majority of respondents in the Level Playing Field Institute's study replied that "unfairness" they had suffered in the workplace led them "to some degree" to discourage others from purchasing products or services from their employer. Studies have also shown that "incivility" among employees in a workplace, when merely observed by a consumer, can lead the consumer to feel anger. That anger then "fosters rapid, negative generalizations about the firm and other employees that extend into the future. As a result, consumers observing uncivil forms of behavior among employees become "less likely to repurchase from the firm and express less interest in learning about the firm's new services."

¹⁰⁴ See Corporate Leavers Study, Level Playing Field Institute, *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* (2007) at 7, http://www.lpfi.org/corporate-leavers-survey/.

¹⁰⁵ *Id.* Much of the research in this area examines the negative effects of incivility or rudeness in the workplace, not specifically harassment. However, we believe this research still merits consideration, as, arguably, the negative effects of incivility would similarly emerge were the focus squarely on harassing behavior.

¹⁰⁶ Sierra *et al.*, *supra* n. 102.

¹⁰⁷ Id. at 190 (citing Rodney Peter Gapp & Bill Merrilees, Important Factors to Consider When Using Internal Branding as a Management Strategy: A Healthcare Case Study, 14 J. BRAND MGMT. 162 (2006)).

¹⁰⁸ Christine Porath et al., It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company, J. SERV. RES. 1 (2011); Christine Porath et al., Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies, 37 J. Consumer Res. 292 (2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.

¹⁰⁹ See Christine Porath, Debbie MacInnis, & Valerie Folkes, It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company, Journal of Service Research (Feb. 22, 2011); Christine Porath, Debbie MacInnis, & Valerie Folkes, Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies, Journal of Consumer Research (Vol. 37) 292-303 (Aug. 2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.

¹¹⁰ Porath, et al., 2010, supra n. 110, at 301.

¹¹¹ Porath, et al., 2011, supra n, 110, at 3.

The Case of the "Superstar" Harasser

Finally, an often competing economic consideration bears discussion. Employers may find themselves in a position where the harasser is a workplace "superstar." By superstar, think of the high-earning trader at an investment bank, the law firm partner who brings in lucrative clients, or the renowned professor or surgeon. Some of these individuals, as with any employee, may be as likely to engage in harassment as others. Often, however, superstars are privileged with higher income, better accommodations, and different expectations. That privilege can lead to a self-view that they are above the rules, which can foster mistreatment. Psychologists have detailed how power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors. In short, superstar status can be a breeding ground for harassment.

When the superstar misbehaves, employers may perceive themselves in a quandary. They may be tempted to ignore the misconduct because, the thinking goes, losing the superstar would be too costly. They may wager that the likelihood or cost of a complaint of misbehavior is relatively low and outweighed by the superstar's productivity. Some employers may even use this type of rationale to cover or retaliate for a harasser.

Employers should avoid the trap of binary thinking that weighs the productivity of a harasser *solely* against the costs of his or her being reported. As a recent Harvard Business School study found, the profit consequences of so-called "toxic workers" – *specifically including* those who are "top performers" – is a net negative. Analyzing data on 11 global companies and 58,542 hourly workers, the researchers found that roughly one in 20 workers was fired for egregious company policy violations, such as sexual harassment. Avoiding these toxic workers, they found, can save a company more than twice as much as the increased output generated by a top performer. As a result, the study urged employers to "consider toxic and productivity outcomes together rather than relying on productivity alone as the criterion of a good hire." No matter who the harasser is, the negative effects of harassment can cause serious damage to a business. Indeed, the reputational costs alone can have serious consequences, particularly where

¹¹² Michael Housman & Dylan Minor, *Toxic Workers*, Harvard Business School, Working Paper 16-057, 3 (Nov. 15) (defining "superstar" as "workers in the top 1% of productivity"), *available at*

http://www.hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf.

¹¹³ Written Testimony of Fran Sepler, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm; see also Michael Housman & Dylan Minor, Toxic Workers, HARV. BUS. SCH. (2015), at 22 ("For example, an investment bank with a rogue trader who is making the firm millions in profits might be tempted to look the other way when the trader is found to be overstepping the legal boundaries.")

¹¹⁴ Sepler testimony, *supra* n. 114.

¹¹⁵ Id

¹¹⁶ Dacher Keltner et al., Power, Approach, and Inhibition, 110 PSYCHOL. REV. 265 (2003).

Housman & Minor, *supra* n. 113, at 23. The authors define a "toxic worker" as "a worker that engages in behavior that is harmful to an organization, including either its property *or people*." *Id.* at 2 (emphasis added). Further, the term "toxic" includes "both the basic definition of toxic as being something harmful and also the notion that toxic workers tend to infect others with such behavior." *Id.* at n.1.

¹¹⁸ *Id.* at 10, 12.

¹¹⁹ *Id*. at 20.

¹²⁰ *Id.* at 23.

it is revealed that managers for years "looked the other way" at a so-called "superstar" harasser. 121

E. RISK FACTORS FOR HARASSMENT

Our efforts over the past year with the Select Task Force focused broadly on unwelcome conduct in the workplace based on characteristics protected under anti-discrimination statutes. We wanted to find ways to help employers and employees prevent such conduct before it rose to the level of illegal harassment.

Several members of the Select Task Force suggested that we identify elements in a workplace that might put a workplace more at risk for harassment. The thought was that if we could identify "risk factors," that might give employers a roadmap for taking proactive measures to reduce harassment in their workplaces. Indeed, as we delved into the question, we found that academic research and practical knowledge gained on the ground by investigators, trainers, diversity leaders, and human resources personnel have identified a number of such risk factors.

Some of the findings around risk factors (both from academic work and practical work) look at the characteristics of those who might be more prone to engage in harassment or to be the victims of harassment. We decided to focus instead on a number of environmental risk factors – organizational factors or conditions that may increase the likelihood of harassment. Indeed, numerous studies have shown that organizational conditions are the most powerful predictors of whether harassment will happen. 122

Most if not every workplace will contain at least some of the risk factors we describe below. In that light, to be clear, we note that the existence of risk factors in a workplace does not mean that harassment is occurring in that workplace. Rather, the presence of one or more risk factors suggests that there may be fertile ground for harassment to occur, and that an employer may wish to pay extra attention in these situations, or at the very least be cognizant that certain risk factors may exist. Finally, we stress that the list below is neither exclusive nor exhaustive, but rather a number of factors we felt were readily identifiable.

 $\frac{https://www.buzzfeed.com/katiejmbaker/administrator-at-iconic-comedy-theater-fired-over-sexual-har?utm_term=.rso68Y0zM\#.ij30DLbPe.$

¹²¹ For just a sampling of news stories on such situations, see, e.g., Rick Rojas, Columbia Business Professor Files Sexual Harassment Lawsuit Against University, N.Y. Times, Mar. 24, 2016, at A23; Tamar Lewin, Seven Allege Harassment by Yale Doctor at Clinic, N.Y. Times, April 14, 2015, at A11. See also Katie J.M. Baker, Ethics and the Eye of the Beholder, BuzzFeedNews (May 20, 2016, 2:56 PM), https://www.buzzfeed.com/katiejmbaker/yale-ethics-professor?utm_term=.skpralLvX#.dmlYJWA4K; Katie J.M. Baker & Adam Serwer, Administrator at Iconic Comedy Theater Fired Over Harassment Allegations, BuzzFeedNews (Feb. 19, 2016, 7:30 PM),

The Cortina testimony, supra n. 62; Chelsea R. Willness et al., A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment, 60:1 Personnel Psychol. 127 (2007).

Homogenous Workforces

Perhaps not surprisingly, harassment is more likely to occur where there is a lack of diversity in the workplace. For example, sexual harassment of women is more likely to occur in workplaces that have primarily male employees, and racial/ethnic harassment is more likely to occur where one race or ethnicity is predominant. Workers with different demographic backgrounds than the majority of the workforce can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. They may speak a different language, observe different customs, or simply interact in ways different from the majority. Conversely, workers in the majority might feel threatened by those they perceive as "different" or "other." They might be concerned that their jobs are at risk or that the culture of the workplace might change, or they may simply be uncomfortable around others who are not like them.

Workplaces Where Some Workers Do Not Conform to Workplace Norms

Harassment is more likely to occur where a minority of workers does not conform to workplace norms based on societal stereotypes. Such workers might include, for example, a "feminine" acting man in a predominantly male work environment that includes crude language and sexual banter, or a woman who challenges gender norms by being "tough enough" to do a job in a traditionally male-dominated environment. Similarly, a worker with a manifest disability may engender harassment or ridicule for being perceived as "different," as might a worker in a "rough and tumble" environment who for any number of reasons chooses not to participate in "raunchy" banter.

Cultural and Language Differences in the Workplace

It might seem ironic (given the first risk factor of homogenous workforces) that workplaces that are extremely diverse also pose a risk factor for harassment. This has been found to be the case especially when there has been a recent influx of individuals with different cultures or nationalities into a workplace, or where a workplace contains significant "blocs" of workers from

¹²⁶ See generally Alistair Bell, Americans Worry That Illegal Migrants Threaten Way of Life, Economy, REUTERS (Aug. 7, 2014), http://www.reuters.com/article/us-usa-immigration-worries-idUSKBN0G70BE20140807 (reporting that 70% of Americans believe that undocumented immigrants threatened U.S. beliefs and customs); Cristina Silva, Undocumented Immigrants Taking Jobs From US Citizens? Most Americans Believe Immigration Is Bad For Economy, INT'L Bus. TIMES (Aug. 14, 2015), http://www.ibtimes.com/undocumented-immigrants-taking-jobs-us-citizens-most-americans-believe-immigration-2054509 (citing survey data that 51% of Americans believe they are competing for jobs against immigrants living in the county without work permits).

¹²⁷ Bond. supra n. 124.

¹²³ Cortina testimony, *supra* n. 62; Sepler testimony, *supra* n. 114; Meg A. Bond, *Prevention of Sexism* in ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014). ¹²⁴ Sepler testimony, *supra* n. 114.

¹²⁵ *Id*.

¹²⁸ Cortina & Berdahl, *supra* n. 14.

¹²⁹ Written Testimony of Sindy Warren, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task force/harassment/9-18-15/warren.cfm.

different cultures. Alternately, different cultural backgrounds may cause employees to be less aware of laws and workplace norms, which can affect both their behavior and their ability to recognize prohibited conduct. Workers who do not speak English may not know their rights, and may be more subject to exploitation. The Select Task Force heard testimony from one expert who discussed how language and linguistic characteristics can play a role in cases of harassment or discrimination. 132

Coarsened Social Discourse Outside the Workplace

In both homogenous and diverse workforces, events and coarse social discourse that happen outside the workplace may make harassment inside a workplace more likely or perceived as more acceptable. For example, after the 9/11 attacks, there was a noted increase in workplace harassment based on religion and national origin. Thus, events outside a workplace may pose a risk factor that employers need to consider and proactively address, as appropriate.

Workforces with Many Young Workers

Workplaces with many teenagers and young adults may raise the risk for harassment. Workers in their first or second jobs may be less aware of laws and workplace norms – *i.e.*, what is and is not appropriate behavior in the workplace. Young workers who engage in harassment may lack the maturity to understand or care about consequences. Young workers who are the targets of harassment may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Finally, young workers who are in unskilled or precarious jobs may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions.

Workplaces with "High Value" Employees

As noted in the discussion regarding the business case, there are workforces in which some employees are perceived to be particularly valuable to the employer – the "rainmaking" partner or prized, grant-winning researcher. These workplaces provide opportunities for harassment, since senior management may be reluctant to challenge the behavior of their high value employees, and the high value employees, themselves, may believe that the general rules of the workplace do not apply to them. In addition, the behavior of such individuals may go on outside the view of anyone with the authority to stop it.

¹³⁰ Mary M. Meares et al., Employee Mistreatment and Muted Voices in the Culturally Diverse Workplace, 32 J. OF APPLIED COMM. Res. 4 (2004).

¹³¹ Id

¹³² Testimony of Guadalupe Valdés, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016), https://www.eeoc.gov/eeoc/task force/harassment/3-11-16/valdes.cfm.

¹³³ Written Testimony of Michael A. Robbins, Industry Specific Harassment Issues, Meeting of the Select Task Force on the Study of Harassment in the Workplace (Sept. 18, 2015),

https://www.eeoc.gov/eeoc/task force/harassment/9-18-15/robbins.cfm; Warren testimony, supra n. 130.

Robbins testimony, supra n. 134.

¹³⁵ *Id*.

¹³⁶ *Id*.

¹³⁷ Sepler testimony, *supra* n. 114.

¹³⁸ *Id*

Workplaces with Significant Power Disparities

The reality is that there are significant power disparities between different groups of workers in most workplaces. But such significant power disparities can be a risk factor. For example, workplaces where there are executives and administrative support staff, factories where there are plant managers and assembly line workers, and all branches of the military pose opportunities for harassment. However, are the plant managers and assembly line workers, and all branches of the military pose opportunities for harassment.

Low-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them. Low-status workers may be less likely to understand internal complaint channels, and may also be particularly concerned about the ramifications of reporting harassment (e.g., retaliation or job loss). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation. Finally, research shows that when workplace power disparities are gendered (e.g., most of the support staff are women and most of the executives are men), more harassment may occur.

Workplaces that Rely on Customer Service or Client Satisfaction

Few employers would say that their business does *not* rely on excellent customer service and client satisfaction. As a risk factor, we are specifically speaking about those workplaces where an employee's compensation may be directly tied to customer satisfaction or client service. For example, a tipped worker may feel compelled to tolerate inappropriate and harassing behavior rather than suffer the financial loss of a good tip. A commissioned salesperson may stay silent in the face of harassment so as to ensure he or she makes the sale. Finally, in order to ensure customer happiness, management may, consciously or subconsciously, tolerate harassing behavior rather than intervene on the workers' behalf.

Workplaces Where Work is Monotonous or Consists of Low-Intensity Tasks

We heard that workplaces where workers are engaged in monotonous or low-intensity tasks may be more likely to see workplace harassment. In jobs where workers are not actively engaged or have "time on their hands," harassing or bullying behavior may become a way to vent frustration or avoid boredom. ¹⁴⁶

¹³⁹ Warren testimony, *supra* n.130.

¹⁴⁰ *Id.*; Sepler testimony, *supra* n. 114.

Written Testimony of Daniel Werner, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION, (June 17, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm.

¹⁴² Southern Poverty Law Center, *Injustice on our Plates: Immigrant Women in the U.S. Food Industry* 1, 22-25 (2010); Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment* 1 (2012).

¹⁴³ Meg A. Bond, *Prevention of Sexism, in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014).

Restaurant Opportunities Centers United, *The Glass Floor, Sexual Harassment in the Restaurant Industry*, (October 7, 2014), *available at* http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

¹⁴⁶ Sepler testimony, *supra* n. 114.

Isolated Workspaces

Harassment is also more likely to occur in isolated workspaces, where the workers are physically isolated or have few opportunities to work with others. Harassers have easy access to such individuals, and there generally are no witnesses to the harassment. For example, janitors working alone on the nightshift, housekeepers working in individual hotel rooms, and agricultural workers in the fields are all particularly vulnerable to sexual harassment and assault. Harassment are physically isolated workers are physically isolated workers.

Workplace Cultures that Tolerate or Encourage Alcohol Consumption

Alcohol reduces social inhibitions and impairs judgment. Not surprisingly, then, workplace cultures that tolerate alcohol consumption during and around work hours provide a greater opportunity for harassment. Workplaces where alcohol is consumed by clients or customers are also at higher risk of harassment. In some workplaces, alcohol consumption may become an issue once or twice a year – holiday parties, for example. In other workplaces, particularly those where social interaction or client entertainment is a central component of the job (sales, for example), alcohol use may be more ritualized and thus present more of a potential risk factor.

Decentralized Workplaces

Decentralized workplaces, marked by limited communication between organizational levels, may foster a climate in which harassment may go unchecked. Such workplaces include retail stores, chain restaurants, or distribution centers – those enterprises where corporate offices are far removed physically and/or organizationally from front-line employees or first-line supervisors, or representatives of senior management are not present. In such workplaces, some managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Others may simply be unaware of how to address workplace harassment issues, or for a variety of reasons may choose not to "call headquarters" for direction. 153

* * *

We close this section by observing once more that, obviously, every workplace has some of these risk factors, and some workplaces have many of them. But the instinct of our Select Task Force members that we should devote time and resources to exploring and categorizing possible risk factors is borne out by what we have learned. The objective of identifying risk factors is not

¹⁴⁷ Robbins testimony, *supra* n. 134.

¹⁴⁸ *Id*.

¹⁴⁹ Rape on the Night Shift (PBS Frontline Broadcast June 23, 2015); Rape in the Fields (PBS Frontline Broadcast June 25, 2013).

¹⁵⁰ Samuel B. Bacharach et al., Harassing Under the Influence: The Prevalence of Male Heavy Drinking, the Embeddedness of Permissive Workplace Drinking Norms, and the Gender Harassment of Female Coworkers, 12 J. OCCUP. HEALTH PSYCHOL. 232 (2007).

¹⁵¹ Restaurant Opportunities Center United, *supra* n. 145.

¹⁵² Sepler testimony, *supra* n. 114.

¹⁵³ *Id*.

to suggest that having these risk factors will necessarily result in harassment in the workplace. A single risk factor may make a particular workplace more susceptible to harassment; more broadly, industries with numerous risk factors may be at greater risk of harassment in their workplaces and greater risk of the harassment not being identified and remedied.

The objective of identifying and describing these risk factors is to provide a roadmap for employers that wish to take proactive actions to ensure that harassment will not happen in their workplaces. We stress that employers need to maintain "situational awareness" — an employer noting surprise that women were being sexually assaulted on the night shift when they worked in isolation and their schedules were controlled by men is cold comfort to the victims of these assaults. The next Part of our report describes a number of actions that employers can take to prevent harassment, including an assessment of these risk factors. In addition, Appendix C includes a chart with suggestions for addressing each of these risk factors in a proactive manner.

PART THREE

MOVING FORWARD: PREVENTING HARASSMENT IN THE WORKPLACE

Harassment in the workplace can sometimes feel like an intractable problem. The question is whether there is anything we can do to prevent harassment to a significant degree. We believe the answer to that is "yes."

We also believe that it will not be easy to achieve this goal. If it were easy, it would have happened a long time ago.

The following sections lay out our analysis, based on what we have learned over the past year, for achieving what some may see as a quixotic goal, but which we see as a moral and legal imperative.

A. IT STARTS AT THE TOP

Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. We heard this from academics who testified to the Select Task Force; we heard it from trainers and organizational psychologists on the ground; and we read about it during the course of our literature review.

Two things – perhaps two faces of the same coin – became clear to us. First, across the board, we heard that leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable is paramount. And we heard that this leadership must come from the very top of the organization.

Second, we heard that a commitment (even from the top) for a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have *systems* in place that hold employees *accountable* for this expectation. These accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for doing that job well, or penalized for failing to do so.

These two sides of the coin – leadership and accountability – create an organization's culture.

An organization's culture is set by the values of an organization. To achieve a workplace without harassment, the *values* of the organization must put a premium on diversity and inclusion, must include a belief that all employees in a workplace deserve to be respected, regardless of their race, religion, national origin, sex (including pregnancy, sexual orientation, or gender identity), age, disability, or genetic information, and must make clear that part of respect means not harassing an individual on any of those bases. In short, an organization's commitment to a harassment-free workplace must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy.

Organizational culture manifests itself in the specific behaviors that are expected and formally and informally rewarded in the workplace. As one of our witnesses explained, "[O]rganizational climate is an important driver of harassment because it is the norms of the workplace; it basically guides employees . . . to know what to do when no one is watching." ¹⁵⁴

Organizational cultures that tolerate harassment have more of it, and workplaces that are not tolerant of harassment have less of it. This common-sense assumption has been demonstrated repeatedly in research studies. ¹⁵⁵ If leadership values a workplace free of harassment, then it will ensure that harassing behavior against employees is prohibited as a matter of policy; that swift, effective, and proportionate responses are taken when harassment occurs; and that everyone in the workplace feels safe in reporting harassing behavior. ¹⁵⁶ Conversely, leaders who do not model respectful behavior, who are tolerant of demeaning conduct or remarks by others, or who fail to support anti-harassment policies with necessary resources, may foster a culture conducive to harassment. ¹⁵⁷

Leadership

What steps can an organization's leadership take to ensure that its organizational culture reflects the leadership's values of not tolerating harassment and promoting civility and respect?

First, leadership must establish a *sense of urgency* about preventing harassment. That means taking a visible role in stating the importance of having a diverse and inclusive workplace that is free of harassment, articulating clearly the specific behaviors that will not be acceptable in the workplace, setting the foundation for employees throughout the organization to make change (if change is needed), and, once an organizational culture is achieved that reflects the values of the leadership, commit to ensuring that the culture is maintained.¹⁵⁸

¹⁵⁷ Cortina testimony, *supra* n. 62; Bergman testimony, *supra* n. 68.

¹⁵⁴ Bergman testimony, supra n. 68 (citing work of Charles A. O'Reilly & Jennifer A. Chatman, Culture as Social Control: Corporations, Cults, and Commitment, 18 ORGANIZATIONAL BEHAV. 157 (1996). We note that there is an extensive academic and lay literature detailing the differences between organizational "culture" and "climate." See, e.g., Edgar H. Schein, Sense and Nonsense About Culture and Climate, Commentary for Handbook of Culture and Climate (1999); JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE (1992). See also http://www.cultureuniversity.com/workplace-culture-vs-climate-why-most-focus-on-climate-and-may-suffer-for-it/. An in-depth analysis of the distinction between organizational "culture" and organizational "climate" is beyond the scope of this report. For our purposes, we posit that an organization's values – its "culture" – is demonstrated through the actions and behaviors it encourages and fosters, or conversely, discourages and sanctions – its "climate."

¹⁵⁵ Bergman et al., supra n. 66 (citing numerous studies).

¹⁵⁶ *Id*.

¹⁵⁸ Oral Testimony of Robert J. Bies, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016). Stephen Paskoff, the founder of a group called Employment Learning Innovations, notes that many organizations have a values statement with regard to respect, non-discrimination, and/or anti-harassment. But for purposes of workplace culture, Paskoff explains, leaders must be able to articulate the specific behaviors that are expected of employees to carry out those values. Paskoff, Foundations of a Civil Workplace, Employment Learning Innovations, Inc. (2010), https://cdn2.hubspot.net/hub/139296/file-17758962-pdf/downloads/foundations_of_a_civil_workplace.pdf.

One way to effectuate and convey a sense of urgency and commitment is to assess whether the workplace has one or more of the risk factors we describe above and take proactive steps to address those. For example, if employees tend to work in isolated workspaces, an employer may want to explore whether it is possible for the work to get done as effectively if individuals worked in teams. In a workplace where an employee's compensation is directly tied to customer satisfaction or client service, the employer may wish to emphasize that harassing conduct should be brought immediately to a manager's attention and that the worker will be protected from retaliation. In workplaces with many teenagers and young adults entering the workforce, the employer may wish to have an orientation in which conduct that is not acceptable is clearly described and workers are encouraged to come forward quickly with any concerns.

Another way to communicate a sense of urgency is to conduct a climate survey of employees to determine whether employees feel that harassment exists in the workplace and is tolerated. Several researchers have developed such climate surveys, and the military has adopted them on a widespread scale in recent years. After a holistic approach to prevention has been put into place (as described in the remainder of this section), such climate surveys can be repeated to ensure that change has occurred and is being maintained.

Second, an organization must have *effective policies and procedures* and must conduct *effective trainings* on those policies and procedures. Anti-harassment policies must be communicated and adhered to, and reporting systems must be implemented consistently, safely, and in a timely fashion. Trainings must ensure that employees are aware of, and understand, the employer's policy and reporting systems. Such systems must be periodically tested to ensure that they are effective. Our detailed recommendations concerning these policies and trainings are discussed in the following sections.

Third, leadership must back up its statement of urgency about preventing harassment with two of the most important commodities in a workplace: *money and time*. Employees must believe that their leaders are authentic in demanding a workplace free of harassment. Nothing speaks to that

¹⁵⁹ In the study done by Professor Magley and her colleagues, the researchers used various tools to determine the climate of the employer: the *Sexual Experiences Questionnaire-SE*, an approach to the measurement of sexual harassment experiences which inquires into the behaviors that comprise a single harassment incident (see Suzanne E. Mazzo *et al.*, *Situation-Specific Assessment of Sexual Harassment*, 59 J. VOCATIONAL BEHAV., 120, 121-22 (2001); the *Organizational Tolerance for Sexual Harassment Inventory* (OTSHI) to assess employees' perceptions of the degree to which an organization tolerates sexual harassment of female employees by other organizational members (either a co-worker or supervisor. The measure consists of brief scenarios depicting sexual harassment followed by three questions about (1) the risk to the victim for reporting the incident; (2) the likelihood that a complaint would be taken seriously; and (3) the likelihood that the harasser would receive meaningful sanctions by the organization; and the *Intolerance for Sexual Harassment Inventory* that measures employees' personal attitudes about the seriousness of sexual harassment in organizations. It uses a 7-point scale, with higher scores indicating a stronger belief that harassment *is* a "big deal."). Vicki Magley *et al.*, *Evaluating the Effectiveness of Sexual Harassment Training*, in Burke & Cooper ed. THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH (2013). In the armed services, Air Force active duty, Air Force National Guard, Air Force Reserve and civilian personnel take the Total Force Climate Survey.

 $[\]underline{\text{http://www.af.mil/News/ArticleDisplay/tabid/223/Article/572259/2015-total-force-climate-survey-slated-formarch.aspx.}$

credibility more than what gets paid for in a budget and what gets scheduled on a calendar. For example, complaint procedures must be adequately funded in the organization's budget and sufficient time must be allocated from employee schedules to ensure appropriate investigations. Similarly, sufficient resources must be allotted to procure training, trainings must be provided frequently, and sufficient time must be allocated from employee schedules so that all employees can attend these trainings. Moreover, if an organization has a budget for diversity and inclusion efforts, harassment prevention should be part of that budget.

Finally, in working to create change, the leadership must ensure that any team or coalition leading the effort to create a workplace free of harassment is vested with enough power and authority to make such change happen. ¹⁶⁰

Accountability

Because organizational culture is manifested by what behaviors are formally and informally rewarded, it all comes down to accountability – and accountability must be demonstrated. An employer that has an effective anti-harassment program, including an effective and safe reporting system, a thorough workplace investigation system, and proportionate corrective actions, communicates to employees by those measures that the employer takes harassment seriously. This in turn means that more employees will be likely to complain if they experience harassment or report harassment they observe, such that the employer may deal with such incidents more effectively. This creates a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace.

With regard to *individuals who engage in harassment*, accountability means being held responsible for those actions. We heard from investigators on the ground, and we read in the academic literature, that sanctions are often not proportionate to the inappropriate conduct that had been substantiated.¹⁶² If weak sanctions are imposed for bad behavior, employees learn that harassment is tolerated, regardless of the messages, money, time, and resources spent to the contrary. Similarly, if high-ranking and/or highly-valued employees are not dealt with severely if they engage in harassment, that sends the wrong message loud and clear.¹⁶³

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¹⁶⁰ Bies testimony, *supra* n. 159.

Robbins testimony, *supra* n. 134.

Written Testimony of Heidi-Jane Olguin, Workplace Harassment: Promising Practices to Prevent Workplace Harassment, Meeting of the Select Task Force on the Study of Harassment in the Workplace (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, supra n. 114; Magley, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, supra n. 114; Magley, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, supra n. 114; Magley, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, supra n. 114; Magley, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, supra n. 160.

¹⁶³ Bergman testimony, *supra* n. 68; Bies testimony, *supra* n. 159.

One organization I worked with several years ago asked me if I had new courseware for use with some previously trained managers. When I asked them what they wanted to accomplish, they indicated that several individuals were continuing to tell off-color jokes and make inappropriate comments. While I welcomed the opportunity to be of service, it seemed to me that the issue was not what training to do next but rather why these decision-makers hadn't taken steps to deal with these individuals' behavior and failure to perform to clear standards.

Stephen Paskoff, 8 Fundamentals of a Civil Treatment Workplace

With regard to *mid-level managers and front-line supervisors*, accountability means that such individuals are held responsible for monitoring and stopping harassment by those they supervise and manage.

For example, if a supervisor fails to respond to a report of harassment in a prompt and appropriate fashion, or if a supervisor fails to protect from retaliation the individual who reports harassment, that supervisor must be held accountable for those actions. Similarly, if those responsible for investigations and corrective actions do not commence or conclude an investigation promptly, do not engage in a thorough or fair investigation, or do not take appropriate action when offending conduct is found, that person must be held accountable.

When C-level employees [i.e., senior headquarters executives] take a critical look at, and aggressively deal with, supervisors that are involved in or not reporting harassment, we have seen this translate into higher morale and higher productivity among the rest of the workforce. Everyone notices what the C-Suite notices.

Heidi Olguin CEO and Founder, Progressive Management Resources, Inc.

Accountability also includes reward systems. If leadership incentivizes and rewards responsiveness to anti-harassment efforts by managers, that speaks volumes. He when the right behaviors (e.g., creating civil and respectful workplaces, promptly reporting and investigating harassment claims, aggressively managing employees involved in or not adequately responding to harassment) are rewarded, that sends a message about what an organization's leadership cares about. For example, a number of witnesses noted that companies who were successful in creating a culture of non-harassment were those that acknowledged and "owned" its well-handled complaints, instead of burying the fact that there had been a complaint and that discipline had been taken. He fact that there had been a complaint and that discipline had been taken.

¹⁶⁴ Bies testimony, *supra* n. 159.

¹⁶⁵ See, e.g., Written Testimony of Patti Perez, Workplace Harassment: Promising Practices to Prevent Workplace Harassment, Meeting of the Select Task Force on the Study of Harassment in the Workplace (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task force/harassment/10-22-15/perez.cfm.

Perhaps counter-intuitively, rewards can also be given to managers when – at least initially – there is an increase in complaints in their division. We heard that using the metric of the number of complaints lodged within a particular division, with rewards given to those with the fewest number of complaints, might have the counterproductive effect of managers suppressing the filing of complaints through formal and informal pressure. In contrast, if employees are filing complaints of harassment, that means the employees have faith in the system. Thus, using the metric of the number of complaints must be nuanced. Positive organizational change can be reflected in an initial increase of complaints, followed by a decrease in complaints and information about the lack of harassment derived from climate surveys.

Before moving on to detailed recommendations, we pause to highlight a radically different accountability mechanism that we find intriguing, and solicited testimony regarding at one of our public meetings. A number of large companies, such as McDonald's and Wal-Mart, have begun to hold their tomato growers accountable by buying tomatoes only from those growers who abide by a human rights based Code of Conduct, which, among other elements, prohibits sexual harassment and sexual assault of farmworkers. This effort, called the Fair Food Program, was developed and is led by the Coalition of Imokalee Workers (CIW), a farmworker-based human rights organization in Florida. The companies agreed to the program because of consumer-driven market pressures, and most of the agricultural companies that entered the program did so because of the resulting financial pressures.

As part of the program, the CIW conducts worker-to-worker education programs. There is also a worker-triggered complaint resolution mechanism, which can result in investigations, corrective action plans, and if necessary, suspension of a farm's "participating grower" status, which means the farm could lose its ability to sell to participating buyers. There are currently 14 businesses and 17 growers participating in the program. There are currently 14 businesses are constant.

* * *

The most important lesson we learned from our study is that employers must have a holistic approach for creating an organizational culture that will prevent harassment. If employers put a metric in a manager's performance plan about responding appropriately to harassment complaints, but then do nothing else to create an environment in which employees know the employer cares about stopping harassment and punishing those who engage in it – it is doubtful that the metric on its own will have much effect. If an employer has a policy clearly prohibiting

^{(&}quot;At this company, an increase in complaints is viewed positively – as a testament to the comfort and trust employees put in the system. This is a workforce who believes the process works – they feel they are awarded procedural justice at work.").

¹⁶⁶ Written Testimony of Judge Laura Safer Espinoza, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task force/harassment/10-22-15/espinoza.cfm. Some growers affirmatively embraced the program and have championed it. We heard from one of those forward-thinking growers, Jon Esformes, the Chief Executive Officer of Pacific Tomato Growers of Sunripe Certified Brands, at the public meeting held by the Select Task Force in Los Angeles, CA.

¹⁶⁷ FAIR FOOD STANDARDS COUNCIL, http://www.fairfoodstandards.org/about/.

¹⁶⁸ Id. The 17 growers do not include sub-growers.

harassment that is mentioned consistently at every possible employee gathering, but does not have a system that protects those who complain about harassment from retaliation, the policy itself will do little good. It is not that policies and metrics are not important. To the contrary, they are essential components of a harassment prevention effort. But holistic refers to the whole system. Every activity must come together in an integrated manner to create an organizational culture that will prevent harassment.

In light of what we have learned in this area, we offer the following recommendations:

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

B. POLICIES AND PROCEDURES

Policies, reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment. In this section, we set forth what we have learned about how to make each of these components as successful as possible.

Anti-Harassment Policies

An organization needs a stated policy against harassment that sets forth the behaviors that will not be accepted in the workplace and the procedures to follow in reporting and responding to harassment. Employees in workplaces without policies report the highest levels of harassment.¹⁶⁹

EEOC's position, which after our study we believe remains sound, is that employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy. EEOC recommends that a policy generally include:

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

An employer's policy should be written in clear, simple words, in all the languages used in the workplace. The points we note above describe the content of an effective policy, but the words of the policy itself should be simple and easy to understand. Similarly, an effective policy should make clear that harassment on the basis of *any* protected characteristic will not be tolerated.

It is also not sufficient simply to have a written policy, even one written in the most user-friendly fashion. The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation. ¹⁷¹

Finally, we urge employers who may read this and conclude that their policies are currently effective and in line with EEOC's recommendations to consider this report as an opportunity to take a fresh and critical look at their current processes and consider whether a "reboot" is

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¹⁶⁹ James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301 (1998).

https://www.eeoc.gov/policy/docs/harassment.html

Olguin testimony, *supra* n. 163; Warren testimony, *supra* n. 130.

necessary or valuable. Appendix B includes a checklist for an effective harassment prevention policy.

Social Media

An additional wrinkle for employers to consider, as they write and update anti-harassment policies, is the proliferation of employees' social media use. The Pew Research Center recently found that 65% of all adults - 90% of those 18-29 years olds, 77% of those 30-49 - use social media. 172 Safe to say, employers can expect a time when virtually the *entirety* of their workforce is using social media.

Arguably, the use of social media among employees in a workplace can be a net positive. As noted by a witness at the Commission's 2014 meeting on social media, social media use in the workplace can create a space for "less formal and more frequent communications." Via social media, employees can share information about themselves, learn about and understand better their colleagues, and engage each others' personal experiences through photos, comments, and the like. ¹⁷³ If this leads to improved work relationships and collegiality, social media can benefit a workplace.

Unfortunately, social media can also foster toxic interactions. Nearly daily, news reports reflect that, for whatever reasons, many use social media to attack and harass others. ¹⁷⁴ During the Commission meeting on social media, witnesses talked about social media as a possible means of workplace harassment. 175 For that reason, harassment should be in employers' minds as they draft social media policies and, conversely, social media issues should be in employers' minds as they draft anti-harassment policies.

For example, an anti-harassment policy should make clear that mistreatment on social media carries the weight of any other workplace interaction. Supervisors and others with antiharassment responsibilities should be wary of their social media connections with employees. And, procedures for investigating harassment should carefully delineate how to access an employee's social media content when warranted.

In context, social media – specifically its use in the workplace – is relatively new. Plus, it seemingly changes at an exponential pace. For now, however, the constant for employers is that

Written Testimony of Renee Jackson, Social Media in the Workplace: Examining the Implications for EQUAL EMPLOYMENT OPPORTUNITY LAW (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-

¹⁷² http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/.

^{14/}jackson.cfm.

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175 See, e.g., Juliet Macur, Social Media, Where Sports Fans Congregate and Misogyny Runs Amok, THE NEW YORK TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/29/sports/more-than-mean-women-journalists-juliedicaro-sarah-spain.html? r=0. for workplace point; Petula Dvorak, Was a Virginia Firefighter Humiliated by Co-Workers Online Before She Killed Herself?, THE WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/local/was-a-va-firefighter-humiliated-by-co-workers-online-before-she-killedherself/2016/04/25/c.

 $^{^{175}}$ See Social Media in the Workplace: Examining the Implications for Equal Employment Opportunity LAW, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-14/.

social media platforms are potential vehicles for workplace-related interactions. And wherever that exists, employers must be aware that harassment may occur.

"Zero Tolerance" Policies

Finally, we have a caution to offer with regard to use of the phrase "a 'zero tolerance' anti-harassment policy." We heard from several witnesses that use of the term "zero tolerance" is misleading and potentially counterproductive. Accountability requires that discipline for harassment be proportionate to the offensiveness of the conduct. For example, sexual assault or a demand for sexual favors in return for a promotion should presumably result in termination of an employee; the continued use of derogatory gender-based language after an initial warning might result in a suspension; and the first instance of telling a sexist joke may warrant a warning. Although not intended as such, the use of the term "zero tolerance" may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior – they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term "zero tolerance" to convey that message.

Reporting Systems for Harassment; Investigations; Corrective Actions

Effective reporting systems for allegations of harassment are among the most critical elements of a holistic anti-harassment effort. A reporting system includes a means by which individuals who have *experienced* harassment can report the harassment and file a complaint, as well as a means by which employees who have *observed* harassment can report that to the employer.

Ultimately, how an employee who reports harassment (either directly experienced or observed) fares under the employer's process will depend on how management and its representatives act during the process. If the process does not work well, it can make the overall situation in the workplace worse. If one employee reports harassment and has a bad experience using the system, one can presume that the next employee who experiences harassment will think twice before doing the same. Finally, ensuring that the process that commences following a report is fair to an individual accused of harassment contributes to *all* employees' faith in the system.

For employers that have a unionized workplace, the role of the union in the employer's reporting system is significant. If union representatives take reports of harassment seriously, and support complainants and witnesses during the process, that will make a difference in how employees who are union members view the system. Similarly, because unions have obligations towards all

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¹⁷⁶ Bergman testimony, *supra* n. 68; Cortina & Berdahl, *supra* n. 14 (*citing* Cortina & Magley, *supra* n. 65; Barbara A. Gutek, *Sexual Harassment Policy Initiatives*, *in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 185 (William O'Donohue ed., 1997); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 497 (1991); Paula McDonald *et al.*, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, ASIA PACIFIC J. HUMAN RESOURCES 53 (2015)).

union members, the union must work with the employer to have a system that works in a fair manner for any individual accused of harassment.

There is a significant body of research establishing the many concerns that employees have with current reporting systems in their workplaces. ¹⁷⁷ In response to some of those concerns, we heard broad support for reporting systems that are multifaceted, including a choice of procedures, and choices among multiple "complaint handlers." ¹⁷⁸ Such a robust reporting system might include options to file complaints with managers and human resource departments, via multi-lingual complaint hotlines, and via web-based complaint processing. ¹⁷⁹ In addition, a multi-faceted system might offer an employee who complains about harassment various mechanisms for addressing the situation, depending on the type of conduct and workplace situation. ¹⁸⁰ For example, an employee may simply need someone in authority to talk to the harasser in order to stop the behavior. In other situations, the employer may need to do an immediate intervention and begin a thorough investigation.

Of course, the operational needs and resources of small businesses, start-up ventures, and the like, will differ significantly from large, established employers with dedicated human capital systems or "C Suites" of senior leadership. But the principle of offering an accessible and well-running reporting system remains the same. ¹⁸¹

As noted in the previous section, a safe and timely reporting system that operates well also communicates to employees the leadership's commitment to the words it has set forth in its anti-harassment policy. We heard some innovative ideas for making that commitment clear. One witness described a company that established a small internal group of key "C-Suite" personnel who were informed immediately regarding any harassment complaint (unless a conflict of interest existed). The small group of senior leaders was then regularly updated regarding investigation outcomes and prevention analysis. In a smaller business, this "group of senior

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¹⁷⁷ McDonald et al., supra n. 177 (collecting sources).

¹⁷⁸ Cortina testimony, supra n. 62; Olguin testimony, supra n. 163: Perez testimony, supra n. 166; Cortina and Berdahl, supra n. 14 (citing Gutek, supra n. 177; Riger, supra n. 177; Laura A. Reese & Karen A. Lindenberg, Employee Satisfaction with Harassment Policies: The Training Connection, 33 Pub. Personnel MGMT. 99 (2004); Mary P. Rowe, Dealing with Harassment: A Systems Approach, in Sexual Harassment in the Workplace: Perspective, Frontiers, and Response Strategies, Women and Work 241 (Margaret S. Stockdale ed., 1996); and Pamela P. Stokes et al., The Supreme Court Holds Class on Sexual Harassment: How to Avoid a Failing Grade, 12 EMP. Resps. & Rts. J. 79 (2000)).

¹⁷⁹ Olguin testimony, *supra* n. 163.

One interesting approach brought to our attention in the course of our study was the implementation of "information escrow" systems designed to address a harassment victim's possible reluctance to be the initial individual to allege harassing behavior by a co-worker. Information escrow systems allow claims to be transmitted to a designated, confidential intermediary who subsequently submits the claim to relevant authorities if – and only if – certain pre-specified conditions are met (such as a certain number of claims filed) regarding the same accused harassing party. Given the relative novelty, and the lack of data as to the utility and success of these "information escrow" systems, we do not have sufficient information to endorse them at this time. We do, however, encourage employers and other stakeholders to seek out and explore new and creative methods like these for the prevention of harassment, and encourage researchers to further examine escrow systems and gather evidence of their utility. *See* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 Mich. L. Rev. 145 (2012).

¹⁸¹ We commend EEOC for the work it has done, and continues to do, with respect to the special needs of small employers, specifically, through its Small Business Task Force, discussed in greater detail in this report's discussion of outreach, *infra*.

leaders" may be the business's owner or the highest-ranking members of management.

We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality – specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential – has been limited in some instances by decisions of the National Labor Relations Board ("NLRB") relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act ("NLRA"). In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.

Based on what we have learned over the last year, we believe there are several elements that will make reporting systems work well and will provide employees with faith in the system. These are largely consistent with the recommendations made above regarding the content of an effective anti-harassment policy:

- Employees who receive harassment complaints must take the complaints seriously. 182
- The reporting system must provide timely responses and investigations. 183
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution. 184
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees. 185
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation. 186
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all relevant parties. 187

The bottom line, however, is that we need better empirical evidence on what type of reporting systems are effective. Many witnesses told us it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes

¹⁸² See McDonald et al., supra n. 177; Barry M. Goldman, Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories, 54 PERSONNEL PSYCHOL. 361 (2001); Karen Harlos, When Organizational Voice Systems Fail: More on the Deaf-Ear Syndrome and Frustration Effects, 37 J. APPLIED BEHAV. SCI. 324 (2001). A study of federal management personnel who handle EEO complaints found that managers often recast harassment complaints as personality clashes or interpersonal difficulties. Howard S. Erlanger et al., Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 L. & Soc'y Rev. 497 (1993).

¹⁸³ Goldman, supra n. 183; Harlos, supra n. 183; Amy Oppenheimer, Investigating Workplace Harassment and Discrimination, 29 EMP. REL. L. J. 56 (2004).

¹⁸⁴ Harlos, *supra* n. 183.

¹⁸⁶ Cortina & Berdhal, supra n. 14.

¹⁸⁷ McDonald et al., supra n. 177.

a reporting system effective. We agree with that suggestion, although we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from its workplace will be used, and equally important, not used.

In light of what we have learned in this area, we offer the following recommendations:

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.
- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.
- Employers should periodically "test" their reporting system to determine how well the system is working.
- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.
- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals. 188
- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

C. ANTI-HARASSMENT COMPLIANCE TRAINING

There are many reasons why employers offer anti-harassment trainings. Employers who care deeply about stopping harassment use training as a mechanism to do so. After EEOC's 1980 guidelines suggested methods for preventing sexual harassment, many employers started to offer training as one of those methods. Trainings got a boost after the Supreme Court's decisions in *Ellerth* and *Faragher* provided employers an incentive to demonstrate they had taken appropriate steps to prevent harassment. Finally, requiring employers to put training into place is a staple of the conciliation agreements and consent decrees that EEOC and private plaintiff attorneys negotiate every year. California and Connecticut have mandated such training for employers with 50 or more supervisors, and Maine has mandated such training for employers with 15 or more supervisors. supervisors.

807(3) (2016).

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¹⁸⁸ In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used. ¹⁸⁹ EEOC's 1980 guidelines suggested that to prevent harassment an employer should: (a) express strong disapproval of harassment; (b) develop appropriate sanctions for those who engage in harassment; (c) inform employees how to complain about harassment; and (d) develop means to sensitize employees. 29 C.F.R. §1611(f). ¹⁹⁰ Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). See Susan Bisom-Rapp, Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001); Susan Bisom-Rapp, An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law, 22 BERKELEY J. EMP. & LAB. L. 1 (2001) (raising concerns regarding employers' use of training programs as a means to avoid liability, when empirical evidence supporting the effectiveness of such programs is mixed or non-existent).

¹⁹¹ Cal. Gov't Code § 12950.1(a) (West 2016); Conn. Gen. Stat. § 46a-54-204 (2016); Me. Rev. Stat. tit. 26, §

Given the amount of resources employers devote to training, and the fact that training is one of the primary mechanisms used to prevent harassment, we explored whether training is effective in preventing harassment, and if so, whether there are some forms of training that have better outcomes than others.

We came to two overarching conclusions:

- There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, *empirical* data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.
- The deficiencies notwithstanding, based on the practical and anecdotal evidence we heard from employers and trainers, we conclude that training *is* an essential component of an anti-harassment effort. However, to be effective in stopping harassment, such training *cannot stand alone but rather must be part of a holistic effort* undertaken by the employer to prevent harassment that includes the elements of leadership and accountability described above. In addition, the training must have specific goals and must contain certain components to achieve those goals.

Research on the Effectiveness of Training

Witnesses who provided testimony to the Select Task Force, and our own reading of the literature, exposed the problems of the empirical evidence to date regarding the effectiveness of training programs standing alone.

First, most of the studies use researcher-designed training, and each of those trainings has different content, lengths, and leaders. It is hard to know if something works when the "what" that you are studying is not the same.

Second, our research (which was thorough, if admittedly not an exhaustive review of all literature over the past three decades) discovered only two studies based on large-scale evaluations of anti-harassment training designed by employers (not researchers) that were given to a significant number of employees who were taking the trainings in their actual workplaces. A set of studies, conducted in the late 1990s by Professor Magley and her colleagues, evaluated trainings at two large employers – a large regulated utility with one location and a large agribusiness with several worksites. Another study, published in 2001 by Professors Bingham

Hispanic.

¹⁹² Magley *et al.*, *supra* n. 160. The researchers studied trainings that had been put in place by employers as a result of settlement agreements and included two employers. The first employer was a large regulated utility organization in the Northwest that did a half-day training on sensitizing employees. The overall sample was nearly 90 percent Caucasian. The second employer was an agribusiness organization in the intermountain region that did trainings at several worksites. That employer did a two-day training for managers and supervisors and a three-hour educational and sensitization training for employees. Nearly half of the workforce at this organization was

and Scherer, evaluated an anti-sexual harassment program provided to employees at a mediumsized university. 193

Third, because it is difficult for researchers to gain access to workplaces to study (which is why there are so few research studies of this kind), many researchers design experiments using student-volunteer samples or other small volunteer samples in organizational settings. In many studies, the researchers survey participants pre- and post-training and evaluate the effectiveness of the training based on self-reported answers immediately following the training. These studies are not to be discounted, but their limitations must be acknowledged. 194

Finally, all of the evidence regarding the effectiveness of training is based on studies of sexual harassment training, not general harassment training.

What can we learn from these studies, limited as they are?

First, it appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment and hence unacceptable in the workplace. The most interesting study in this regard was of federal employees. Rather than conducting a large-scale evaluation of a particular training, researchers compared results from the three surveys done by the Merit Systems Protection Board of federal employees over the course of a decade and a half - in 1980, 1987, and 1994. Their analysis found that participation in training was associated with an increased probability, particularly for men, of considering unwanted sexual gestures, remarks, touching, and pressure for dates to be a form of sexual harassment. The training seemed particularly successful in clarifying for men that unwanted sexual behavior from coworkers, and not just from supervisors, can be a form of sexual harassment. 196

Ensuring that employees know what an employer considers to be harassment is obviously an essential element for effective implementation of an employer's anti-harassment policy. In the 2001 study by Professors Bingham and Scherer of a 30-minute training, participants demonstrated more knowledge about sexual harassment than those who had not participated in the training. ¹⁹⁷ In the 1997 study by Professor Magley and her colleagues, some attendees of the trainings (but not all) evidenced increased knowledge of sexual harassment. Given that Hispanic employees in that study did not evidence increased knowledge, the researchers observed that

¹⁹³ Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 J. APPLIED BEHAV. SCI. 125 (2001). The study evaluated a thirty-minute anti-harassment program consisting of three components: a 3-minute videotaped speech by the chancellor; a hand-out and oral presentation by mixed-sex, two person teams of the university staff and faculty; and a 5-minute discussion. Bingham and Scherer pointed out that other studies done in actual workplaces, as of 2001, were not of the same scale as their study.

¹⁹⁴ Cortina & Berdhal, supra n. 14; Magley, et al., supra n. 160.

¹⁹⁵ See *supra* n. 16 for a fuller description of the MSPB surveys.

¹⁹⁶ Heather Antecol & Deborah Cobb-Clark, Does Sexual Harassment Training Change Attitudes? A View from the Federal Level, 84 Soc. Sci. O. 826 (2003). The researchers also found that the proportion of agency staff receiving training was positively related to the propensity that an individual employee had a definition of sexual harassment that includes these forms of unwanted sexual behavior. In addition, widespread training within the agency had an effect over and above that attributable to the individual's receipt of training itself. ¹⁹⁷ Bingham & Scherer, *supra* n. 194.

culturally-appropriate training might have made a difference. Other studies also suggest that trainings have a positive impact on knowledge acquisition. Other studies also suggest that

Second, it is less probable that training programs, on their own, will have a significant impact on changing employees' attitudes, and they may sometimes have the opposite effect. The 2001 study by Professors Bingham and Scherer evaluated a 30-minute training focused on sensitizing attendees to sexual harassment. Men who completed the training were more likely to say that sexual behavior at work was wrong, but they were also more likely to believe that both parties contribute to inappropriate sexual behavior. Other experiments indicate that participants who come into the training with more of a tendency to harass or with gender role conflicts (based on questionnaires completed prior to the training) are more likely to have a negative reaction to the training.

In the 1997 study conducted by Professor Magley and her colleagues, there was no evidence of any backlash to the trainings. However, the personal attitudes of participants toward sexual harassment were minimally changed or completely unchanged. Finally, a few lab-based

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¹⁹⁸ Magley, *et al.*, *supra* n. 160. In the agribusiness employer, which had greater diversity, non-Hispanic employees who took the training answered more of the knowledge questions correctly than did untrained non-Hispanic employees. However, training did not improve Hispanic employees' knowledge about sexual harassment. With regard to this finding, the researchers observed the need for culturally appropriate training programs and evaluation tools. In addition, in this worksite, some participants displayed decreased knowledge of an employer's practices in responding to harassment following the training.

practices in responding to harassment following the training.

199 Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 SIGNS
130 (1986) (increased ability on the part of resident hall staff at a university to recognize sexual harassment); Robert
S. Moyer & Anjan Nath, Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment, 28 J.

APPLIED SOCIAL PSYCH. 333 (1998) (men were less likely than women to recognize sexual harassment before
training, but after training, men and women were equally likely to do so). See also Gerald L. Blakely et al., The
Effects of Training on Perceptions of Sexual Harassment Allegations, 28 J. APPLIED PSYCHOL. 71 (1998);
Kenneth M. York et al., Preventing Sexual Harassment: The Effect of Multiple Training Methods, 10 EMP. RESPS.
& RTS. J. 277 (1997). One study found no effect of training on the capacity of attendees to recognize harassment.
James M. Wilkerson, The Impact of Job Level and Prior Training on Sexual Harassment Labeling and Remedy
Choice, 29 J. APPLIED PSYCHOL. 1605 (1999).

²⁰⁰ Bingham and Scherer, *supra* n. 194. The study revealed that men who participated in the training were also "significantly less likely to view coercion of a subordinate or a student as sexual harassment than were nonparticipating males . . . or females."

²⁰¹ Lisa K. Kearney et al., Male Gender Role Conflict, Sexual Harassment Tolerance, and the Efficacy of a Psychoeducative Training Program, 5.1 Psychol. of Men & Masculinity 72 (defining gender role conflict as "a psychological state in which socialized gender roles have negative consequences on the person or others.") (internal quotations omitted) (citing J. M. O'Neil et al., Fifteen Years of Theory and Research on Men's Gender Role Conflict: New Paradigms for Empirical Research (1995) in A NEW PSYCHOLOGY OF MEN, 164-206 (R.F. Levant & W.S. Pollack eds.) (1996)). This study revealed that for men who scored high on Gender Role Conflict, the training reinforced their tolerant attitudes toward harassment. Id. In another study, researchers first assessed men's likelihood to sexually harass (LSH). After watching a one-hour video, high LSH men showed greater acceptance of harassment, while low LSH men showed lesser acceptance. Lori A. Robb & Dennis Doverspike, Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training, 88 PSYCHOL. REP. 85 (2001)

²⁰² Magley, *et al. supra* n. 160. An in-depth examination of the social science research on attitudes, attitude/behavior consistency, and attitude change generally is beyond the scope of this report. For a summary of available research in this area, *see* Robert B. Cialdini, INFLUENCE: SCIENCE AND PRACTICE (Carolyn Merrill *et al.* eds., 4th ed. 2001), http://www.cfs.purdue.edu/richardfeinberg/csr%20331%20consumer%20behavior%20% 20spring%202011/cialdini/robert_cialdini-influence-science_and_practice.pdf.

experiments have shown some positive effects on attitudes or behaviors following training.²⁰³

Third, in the study by Professor Magley and her colleagues (the only study to test for this result), there was no evidence that the training affected the frequency of sexual harassment experienced by the women in the workplace or the perception by women that certain sexual conduct was sexual harassment. However, on the positive side, complaints to the human resources department did increase after the training. The researchers postulated that the increase was the result of a multi-faceted approach taken by the employer and not the result of the training alone. For example, prior to the training, the employer had provided employees with a number of additional resources to lodge complaints (including hotlines) and had begun improving its procedures for complaint follow-up. 204

As Professor Magley and her colleagues have pointed out, a common theme among the research studies is that effective training does not occur within a vacuum. Researchers have suggested a range of ideas for creating harassment-free and supportive work environments in which non-training factors are included together with training. ²⁰⁵

In sum, the existing empirical evidence is conflicting and sometimes surprising. It leaves us with a few conclusions:

- Many anti-harassment trainings offered today seek to achieve two goals give employees information about the employer's anti-harassment policy (including how to file complaints) and change employees' attitudes about what type of behaviors in the workplace are wrong.
- The limited empirical data we have to date indicates that training can increase knowledge about what conduct the employer considers unacceptable in the workplace. In particular, training may help men understand that certain forms of sexual conduct are unwelcome and offensive to women.

²⁰³ In one study, training heightened participants' sensitivity to the sexual harassment, with men in particular responding positively to the training experience. Beauvais, supra n. 200. Another study found that for attendees who demonstrated increased proclivity for engaging in unwanted sexual behavior (based on a questionnaire completed prior to the training), training reduced that proclivity. It was unclear, however, whether that result held beyond the short-term. Elissa L. Perry et al., Individual Differences in the Effectiveness of Sexual Harassment Awareness Training, 28 J. APPLIED PSYCHOL. 698 (1998). ²⁰⁴ Magley *et al.*, *supra* n. 160.

Magley, et al., supra n. 160, at 243 (citing Bell, Quick and Cycyota (2002); Elissa L. Perry et al., Sexual Harassment Training: Recommendations to Address Gaps Between the Practitioner and Research Literatures, 48 HUM. RESOURCE MGMT. 817 (2009). Professor Magley and her colleagues have also stressed that cynicism and motivation on the part of attendees influence the effectiveness of sexual harassment training. Lisa M. Kath & Vicki J. Magley, Development of a Theoretically Grounded Model of Sexual Harassment Awareness Training Effectiveness, in 3 Wellbeing: A Complete Reference Guide 319 (P. Cohen & C. Cooper eds., 20140) (making case that "cynicism and motivation are critical factors" that can influence effectiveness of sexual harassment awareness training and "identifying possible training design, individual factors, and contextual factors that may influence trainees' cynicism, motivation, and outcomes").

- The limited empirical data we have to date indicates that sensitivity training (as currently done) in some instances might be mildly positive, often is neutral, and in some circumstances actually may be counterproductive.
- It is possible that individuals who receive training may be more likely to file a complaint, if the training does not stand alone and the employer has taken other steps to convince employees that the employer will be intolerant of sexual harassment.

We cautioned above, and we caution again, that the results of these studies implicate only the effectiveness of the specific trainings that were evaluated. The data cannot be extrapolated to support general conclusions about the effectiveness of training.

Indeed, our most important conclusion is that we need better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective. As we noted above, many witnesses told us that it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes training effective. We agree with that suggestion, although as we noted above, we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from their workplaces will be used, and equally important, not used.

Experience on the Ground

Regardless of the empirical data from research studies, we heard from practitioners with decades of experience that training – especially compliance training – is a key component of any harassment prevention effort. We also heard that training must have certain components to be successful. We provide below the insights we learned from these practitioners.

49

²⁰⁶ See Sepler testimony, *supra* n. 114; Warren testimony, *supra* n. 130; Robbins testimony, *supra* n. 134; Olguin testimony, *supra* n. 163; Perez testimony, *supra* n. 166.

"[Compliance training] is not training to change your mind.

It's training to keep your job."

Jonathan A. Segal, Select Task Force Member

Compliance Training for All Employees

Compliance training is training that helps employers comply with the legal requirements of employment non-discrimination laws by educating employees about what forms of conduct are not acceptable in the workplace and about which they have the right to complain. We do not believe that such trainings should be limited to the legal definition of harassment. Rather the trainings should also describe conduct that, *if left unchecked*, might rise to the level of illegal harassment. For example, some instances of gender-based harassment or sexually-motivated harassment will be legally actionable only if they are sufficiently pervasive to create a hostile work environment, as defined by the law. But compliance training should focus on the unacceptable behaviors themselves, rather than trying to teach participants the specific legal standards that will make such conduct "illegal." In addition, compliance training should explain the consequences of engaging in conduct that is unacceptable in the workplace, including that corrective action will be proportionate to the severity of the conduct.

Compliance training that teaches employees what conduct is not acceptable in the workplace should not be a canned, "one-size-fits-all" training. Effective compliance trainings are those that are tailored to the specific realities of different workplaces. Using examples and scenarios that realistically involve situations from the specific worksite, organization, and/or industry makes the compliance training work much better than if the examples are foreign to the workforce. In addition, depending on the makeup of the workforce, employers may wish to consider conducting training in multiple languages, or providing for different learning styles and levels of education.

Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

Compliance training should also educate employees about their rights and responsibilities if they experience conduct that the employer has stated is not acceptable in the workplace. Again, the training need not focus on legal issues regarding notice and liability. Rather, the training should make clear to employees the (hopefully) multiple avenues offered by the employer to report unwelcome conduct based on a protected characteristic, regardless of whether the individual

might or might not describe that conduct as "harassment." Compliance training should also describe, in simple terms, how an employee who witnesses harassment can report that information.

Finally, compliance training should describe, in simple terms, how the formal complaint process will proceed. This includes information on how an investigation will take place and what confidentiality a complainant can expect. The training should make clear that the employer will take all reports seriously, investigate them in a timely fashion, and ensure that complainants or those who report observing harassment will not experience retaliation for using the reporting system. (Of course, for participants to believe this, the employer's reporting system must indeed operate in this fashion).

Compliance Training for Middle-Management and First-Line Supervisors

All employees need the compliance training described above. But managers and supervisors need additional training if the employer wants to address conduct before it rises to the level of illegal harassment and wants to ensure compliance with employment non-discrimination laws.

As noted previously, to create an organizational culture in which employees believe that the organization will not tolerate harassment, managers, and supervisors must receive clear messages of accountability. Compliance training translates those expectations into concrete actions that managers and supervisors are expected to take – either to prevent harassment or to stop and remedy harassment once it occurs.

Compliance training provides managers and supervisors with easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information. This includes practical suggestions on how to respond to different levels and types of offensive behavior, and clear instructions on how to report harassing behavior up the chain of command. It should also stress the affirmative duties of supervisors to respond to harassing behavior, even in the absence of a complaint. Again, this training should be tailored to the specific worksite, organization, and/or industry, so that the examples used are helpful to managers and supervisors.

Managers and supervisors are the heart of an employer's prevention system. As one witness with decades of experience in the practice of workplace training and investigation noted succinctly:

If I had limited assets to improve the climate of any organization, I would invest ninety-five percent of them in middle managers. These are the people who make all of the difference in the day-to-day lives of organizations and people. When we train middle managers, we don't just train them about how to spot and address problem behavior —we teach them empirically sound things to do and say when an employee seeks them out to discuss a problem.²⁰⁷

²⁰⁷ Sepler testimony, *supra* n. 114.

What we set forth above concerns the *content* of effective compliance training. There are also principles for the *structure* of successful compliance trainings. ²⁰⁸

- Training should be supported at the highest levels. As noted previously, employees must believe that the leadership is serious about preventing harassment in the workplace. Training alone is not sufficient to establish the credibility of the leadership in this regard but compliance training provides a moment at which the focus is on achieving this goal and thus, leadership should take advantage of that moment. The strongest expression of support is for a senior leader to open the training session and attend the entire training session. At a minimum, a video of a senior leader might be shown at the beginning of the training and a memo from leadership to all employees sent prior to the training can underscore the importance and purpose of the training. Similarly, if all employees at every level of the organization are trained, that both increases the effectiveness of the training and communicates the employer's commitment of time and resources to the training effort.
- Training should be conducted and reinforced on a regular basis for all employees. Again, as we noted earlier, employees understand that an organization's devotion of time and resources to any effort reflects the organization's commitment to that effort. Training is no different. If anti-harassment trainings are held once a year (or once every other year), employees will not believe that preventing harassment is a high priority for the employer. Conversely, if anti-harassment trainings are regularly scheduled events in which key information is reinforced, that will send the message that the goal of the training is important. While this is one area where, in general, repetition is a good thing, we caution against simply repeating the same training over and over, which risks becoming a rote exercise. Rather, we urge employers to consider training that is varied and dynamic in style, form, and content.
- Training should be conducted by qualified, live, and interactive trainers. Live trainers who are dynamic, engaging, and have full command of the subject matter are the most likely to deliver effective training. Since one of the goals of compliance training is to provide employees information about the type of conduct the employer finds unacceptable in the workplace, it is important for a trainer to provide examples of such conduct, or have individuals portray scenarios of such conduct, and then be able to answer questions. In addition, compliance training teaches supervisors and managers how to respond to a report or observance of harassment. These can be difficult situations and a live trainer is most suited to work through questions with the participants.
 - o For some employers, however, providing live trainers will not be feasible because they are cost prohibitive or because employees are physically dispersed. In such cases, online or video-based trainings should still be tailored to specific workplaces and workforces and should be designed to include active engagement by participants.

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²⁰⁸ Similar principles have been identified in research about prevention programs in other issue areas, such as youth violence and substance abuse. Maury Nation *et al.*, *What Works in Prevention: Principles of Effective Prevention Programs*, 58 AM. PSYCHOLOGIST 449 (2003).

• Training should be routinely evaluated. Employers should obviously not keep doing something that does not work. Trainers should not only do the training, but should evaluate the results of the training, as well. By this, we mean more than handing a questionnaire to participants immediately after the training asking if they found the training to be helpful. Evaluations are most effective if they are done some time after the training and participants are asked questions such as whether the training changed their own behaviors or behaviors they have observed in the workplace. The evaluation should occur on a regular basis so that the training can be modified, if need be. Similarly, training evaluation should incorporate feedback from all levels of an organization, most notably, the rank-and-file employees who are being trained, lest "evaluation" becomes a senior leadership "echo chamber."

Based on our year of examination – and cognizant of the limitations of empirical, academic data – we still conclude that effective compliance training is a necessary tool to prevent harassment in the workplace. Every employer should have in place, at a minimum, compliance training that includes the content and structure described above. However, since compliance training only goes so far, the following section presents additional ideas for training that may help the holistic effort of preventing harassment in a workplace.

In light of what we have learned in this area, we make the following recommendations:

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.
- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information even before such harassment reaches a legally-actionable level.
- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.
- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or

that failure to obtain such an agreement should derail otherwise acceptable settlement proposals. 209

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.
- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.
- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

D. WORKPLACE CIVILITY AND BYSTANDER INTERVENTION TRAINING

Employees need to know what conduct is unacceptable in the workplace (whether or not they might describe such conduct as harassment), and managers and supervisors need effective tools to respond to observation or reports of harassment. But regardless of the level of knowledge in a workplace, we know from the research that organizational *culture* is one of the key drivers of harassment. We therefore explored trainings that might have an impact on shaping organizational cultures in a way that would prevent harassment in a workplace.

Among the trainings we explored, two stood out for us as showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander intervention training.

Workplace civility training is not new to the workplace. Many employers have put such trainings into place, often in response to concerns about bullying or conflict in the workplace. Bystander intervention training, by contrast, is not prevalent in workplaces. Such training has proliferated in recent years in colleges and high schools as a means of stopping sexual assault. We hope the information presented in this report will encourage employers to consider implementing these trainings as a means of preventing workplace harassment.

Workplace Civility Training

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Employers have offered workplace civility training as a means of reducing bullying or conflict in the workplace. Thus, such training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally.

²⁰⁹ In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.

According to researchers, incivility is often an antecedent to workplace harassment, as it creates a climate of "general derision and disrespect" in which harassing behaviors are tolerated. 210 For example, in studies of attorneys and court employees, researchers found significant correlations between incivility and gender harassment.²¹¹ Researchers also have found that uncivil behaviors can often "spiral" into harassing behaviors. 212

Incivility can also sometimes represent covert manifestations of gender and racial bias on the job. 213 In other words, facially neutral, uncivil behaviors may actually be rooted in animus against members of a protected class and may subtly contribute to a hostile work environment.²¹⁴ We fully recognize that Title VII was not meant, and should not be read, to be "a general civility code for the American workplace."²¹⁵ But promoting civility and respect in a workplace may be a means of preventing conduct from rising to the level of unlawful harassment.

Workplace civility trainings focus on establishing expectations of civility and respect in the workplace, and on providing management and employees the tools they need to meet such expectations. The training usually includes an exploration of workplace norms, including a discussion of what constitutes appropriate and inappropriate behaviors in the workplace. The training also includes a heavily skills-based component, including interpersonal skills training, conflict resolution training, and training on effective supervisory techniques.²¹⁶

The beauty of workplace civility training is that it is focused on the positive – what employees and managers should do, rather than on what they should not do. In addition, by appealing to all individuals in the workplace, regardless of social identity or perceived proclivity to harass, civility training might avoid some of the resistance met by interventions exclusively targeting harassment.²¹⁷

²¹⁰ Cortina testimony, supra n. 62; Lilia M. Cortina, Unseen Injustice: Incivility as Modern Discrimination in Organizations, 33 ACADEMY OF MANAGEMENT REVIEW 55 (2008); Lynne M. Andersson & Christine M. Pearson, Tit for Tat? The Spiraling Effect of Incivility in the Workplace, 24 ACAD. OF MGMT. REV. 452 (1999).

Cortina testimony, supra n. 62; S. Lim & Lilia M. Cortina, Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment, 90 J. APPLIED PSYCHOL. 483 (2005).

²¹² Andersson & Pearson, *supra* n. 211.

²¹³ Cortina testimony, *supra* n. 62.

²¹⁵ Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 80 (1998). (Noting that Title VII cannot be interpreted as a general "civility code" because "[a]s we emphasized in Meritor and Harris, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex . . . it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.")

²¹⁶ Christine M. Pearson & Christine L. Porath, On the Nature, Consequences and Remedies of Workplace Incivility: No Time for "Nice"? Think Again, 19 ACAD. OF MGMT. EXEC. 7 (2005); The Academy of Management Symposium on New Directions to Understanding Motivation to Learn, J.S. Shapiro, What Makes Civility Training Effective?

Engagement, Cynicism and Motivation to Learn (Aug. 2012).
²¹⁷ Cortina, *supra* n. 212. We learned in a meeting with directors and staff of federal EEO offices that many agencies have a contract with a training company called ELI to conduct "Civil Treatment Training for the Federal Government." The EEO officials found that the civility training was helping in reducing the incidents of harassment in their agencies.

We heard some concern that a focus on workplace civility might reinforce stereotypes (e.g., that women need to be treated with special care and concern). Empirical data to support this concern appears lacking. In contrast, there is some empirical data (and many anecdotes) to support the effectiveness of civility training in enhancing workplace cultures of respect that are subsequently incompatible with harassment.²¹⁸

Workplace civility training has not been rigorously evaluated as a harassment prevention tool *per se*, ²¹⁹ but we believe that such training could provide an important complement to the compliance training described in the previous section. Moreover, it would be helpful to have additional research on the possible effects of workplace civility training in reducing the level of workplace harassment based on EEO protected characteristics.

Finally, we recognize that broad workplace "civility codes" which may be read to limit or restrict certain forms of speech may raise issues under the NLRA, which is outside of the jurisdiction of EEOC. ²²⁰ In light of that potential tension, we recommend that EEOC and NLRB confer and consult, and attempt to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes.

Case Study: Los Angeles Department of Water and Power

In response to a significant number of workplace harassment allegations, LADPW established a proactive strategy to safeguard the personal dignity of its employees and empower them to contribute to a workplace free of harassment and discrimination.

- LADPW began with an eight-hour, instructor-led, mandatory training for all its employees that focused on mutual respect in the workplace. The training included a discussion regarding individual differences related to diversity and cultural characteristics, focused on identifying and resolving workplace interpersonal conflict, set forth the roles and expectations of employees and leaders, and provided an overview of EEO laws, employment policies, and procedures.
- That training was followed by a mandatory training for all executives, supervisors, and lead personnel that focused on the practical implications of EEO laws and provided tools and techniques to address inappropriate behavior.
- LADPW also established a "boot camp team" to quickly address inappropriate conduct and provide one-on-one coaching and group training.

LADPW continues to provide department-wide training to its employees on a regular basis, including training on topics such as "A Manager's Guide for a Respectful Workplace," "The POWER of Diversity - Workplace Diversity Training for All Employees," as well as targeted trainings for smaller groups on harassment and discrimination awareness.

During the first three years after LADPW initiated its training program, the number of internal EEO complaints rose – perhaps because employees had a greater understanding of their rights and where to go to file complaints. Since that time, however, complaints have decreased by 70%, and the severity of the types of harassment complaints has decreased as well. According to Renette Anderson, Director of LADPW's Equal Employment Opportunity Services, "Much of this is due to our tenacious and steadfast commitment to our training efforts."

²¹⁸ Michael P. Leiter et al., The Impact of Civility Interventions on Employee Social Behavior, Distress, and Attitudes, 96 J. OF APPLIED PSYCHOL. 1258 (2011).

²¹⁹ Cortina testimony, *supra* n. 62.

²²⁰ See Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012); First Transit, Inc., 360 N.L.R.B. No. 72 (2014).

Bystander Intervention Training

Bystander intervention training has long been used as a violence prevention strategy, and it has become increasingly utilized by colleges and high schools to prevent sexual assault.²²¹ The training has been shown to change social norms and empower students to intervene with peers to prevent assaults from occurring.²²² Most bystander intervention trainings employ at least four strategies:

- Create awareness enable bystanders to recognize potentially problematic behaviors.
- Create a sense of collective responsibility motivate bystanders to step in and take action when they observe problematic behaviors.
- Create a sense of empowerment conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate.
- *Provide resources* provide bystanders with resources they can call upon and that support their intervention. ²²³

One organization that provides training on campuses, Green Dot, creates a sense of empowerment by focusing its training on "three D's:" (1) confront the potential perpetrator of sexual assault in a *direct* manner, and ask the person to cease the behavior; (2) *distract* the potential perpetrator of sexual assault, and remove the potential victim; or (3) *delegate* the problem to someone who has the authority to intervene. ²²⁴

We believe that bystander intervention training might be effective in the workplace. Such training could help employees identify unwelcome and offensive behavior that is based on a coworkers' protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

The founder of Green Dot told us that, although the training was originally applied to the reduction of sexual assault, domestic violence, and stalking, she believed the training framework

²²¹ Sexual Violence: Prevention Strategies, Injury Prevention and Control: Division of Violence Prevention, Centers for Disease Control and Prevention, available at

http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html.

²²² *Id.* (summarizing research).

White House Task Force to Protect Students from Sexual Assault, *Bystander-Focused Prevention of Sexual Violence*, The Nat'l Ctr. for Campus Pub. Safety (2014),

https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf. 224 Written Testimony of Dorothy Edwards, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT

Workplace Harassment, Meeting of the Select Task Force on the Study of Harassment in the Workplace (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm.

could be successfully applied to harassment in the workplace.²²⁵ Similarly, a few researchers have explored the potential of using bystander intervention training in the workplace, and they are encouraged by the possibilities.²²⁶ The studies caution, however, that suggested bystander responses must be crafted for use in the typical situations in which workplace harassment takes place. In addition, the organizational culture must encourage and support bystander intervention and reporting, and provide a safe system in which bystanders may do so.²²⁷

As with workplace civility training, more research is needed to determine the effectiveness of bystander intervention training as a workplace harassment prevention measure. But we believe such training has real potential to positively impact organizational culture. We know that most co-workers are not comfortable when harassment occurs around them, even when they are not the direct victims of the harassment. Bystander training could teach co-workers how to recognize potentially problematic behaviors; motivate and empower employees to step in and take action; teach employees skills to intervene appropriately; and give them resources to support their intervention.

Organizational culture starts from the top. But reinforcing that culture can and must come from the bottom, middle, and everywhere else in between. Bystander intervention training provides that reinforcement in a particularly concrete manner.

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²²⁵ See, e.g., Paula McDonald et al., Action or Inaction: Bystander Intervention in Workplace Sexual Harassment, 27 INT'L J. HUM. RES. MGMT. 548 (2016). See also Paula McDonald & Michael Flood, Encourage. Support. Act!: Bystander Approaches to Sexual Harassment in the Workplace, AUSTRALIAN HUM. RTS. COMM'N (2012), available at https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf. ²²⁶ See, e.g., McDonald, supra n. 226 (documenting the types of interventions co-workers use when they observe sexual harassment); Maura Kelly & Sasha Basset, Evaluation of the Potential for Adapting the Green Dot Bystander Intervention Program for the Construction Trades in Oregon, SOCIOLOGY FACULTY PUBLICATIONS AND PRESENTATIONS 1 (2015) (evaluating the potential of bystander intervention training to reduce harassment in the construction trades); McDonald and Flood, supra n. 226; Lynn Bowes-Sperry & Anne M. O'Leary-Kelly, To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers, 30 ACAD. MGMT. REV. 288 (2005); Cortina & Berdhal, supra n. 14.

²²⁷ McDonald & Flood, *supra* n. 226 (outlining some of the elements that should be included in the design of a bystander program to prevent workplace harassment, including information on how to recognize harassment; content on different forms of bystander intervention, including both individual and collective responses; the links between harassment and other forms of inequality; training to demonstrate how bystanders can assist; and training to all employees). The paper suggests principles and strategies for developing and implementing bystander approaches to sexual harassment, but we believe the suggestions are generalizable to harassment based on other protected characteristics, as well.

Case Study: Green Dot in Anchorage, Alaska

"Green Dot" is a violence prevention program focused on providing bystanders with the strategies and techniques they need to: (1) identify situations that can lead to acts of violence (represented on incident maps by a red dot); and (2) intervene safely and effectively. A "green dot" represents "any behavior, choice, word, or attitude that promotes safety . . . and communicates utter intolerance for violence." The goal is to have sufficient positive interventions such that the green dots totally overwhelm the red dots.

The city of Anchorage, Alaska received a grant to implement the Green Dot program at the community level, including at bars and restaurants. When discussing early warning signs of violence, bar and restaurant groups often shared examples where violent or potentially violent behaviors were happening to staff. Examples ranged from intoxicated patrons violating physical boundaries of servers to discussions of bar cultures that accepted or even encouraged some levels of harassment of staff by customers - all in the spirit of keeping the party atmosphere going and the drinks and tips flowing.

As a result of the Green Dot training, bar and restaurant owners in Anchorage began to develop new cultural norms. They hosted trainings, developed policies, included relevant messaging in their signs and bulletins, and engaged in a host of creative ideas such as Green Dot trivia, contests, and competitions. Both staff and patrons acquired new skills to respond to potential harassment or violence.

Based on what we have learned in this area, we offer the following recommendations:

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.
- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."
- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.
- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.
- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest

that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.²²⁸

 Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

E. GETTING THE WORD OUT

We spent a significant amount of time discussing outreach and education with the Select Task Force members and witnesses. Outreach is needed for workers, employers, and the general public. On-the-job, employer-sponsored training is one form of outreach and education for employees. In this section, we highlight a number of other approaches worthy of consideration.

EEOC resources can provide invaluable guidance for employers. Employers should view the Commission as a source for education and assistance in addressing these critical issues.

Patricia A. Wise, Select Task Force Member

Getting the Word Out: Providing Simple and Easy-to-Access Information

There is a significant amount of information regarding workplace harassment available on the web. But information on the web can be overwhelming and is not always correct. This is a problem for both employers (especially small business employers with limited resources) and employees.

As Jess Kutch, the co-founder and co-director of Coworker.org told us: "[Internet search results] either give very basic advice (sometimes even wrong advice) or they give you dozens of links to deep legalese that wouldn't be helpful for most people." She also noted that very few search results lead to mobile friendly websites, which is problematic because many workers – low-wage workers, in particular – rely on their mobile phones to access information on the internet. Of course, some workers cannot get their information from the internet at all – either because they do not have access to the internet, cannot find sufficient information in their own language if they do not read English, or are not literate.

https://www.eeoc.gov/eeoc/task force/harassment/12-7-15/kutch.cfm.

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²²⁸ In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.. ²²⁹ Written Testimony of Jess Kutch, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015),

We also heard a fair amount about the utility of EEOC's resources on the web. Some Select Task Force members felt that EEOC's guidance on harassment was overly legalistic, and with regard to some issues, outdated. In addition, they noted that EEOC's website is neither mobilefriendly nor fully accessible to non-English speakers. One Select Task Force member sought more information on prevention strategies and noted a dearth of user-friendly tools (such as model harassment policies, effective investigation outlines, and promising practices) that could help employers in their efforts to prevent harassment. One witness suggested that EEOC's information on how to file a complaint is difficult to understand, and that the actual process of filing a complaint can be difficult and cumbersome for potential charging parties.

We took all suggestions to heart about what EEOC could do in terms of outreach and education, and a number of our recommendations at the end of this section reflect ideas that we heard. We also recognize the many successful outreach efforts EEOC has done in the past and continues to be engaged in, including the extensive (and highly regarded) outreach training EEOC conducts through its field offices and personnel.²³⁰ EEOC has also made outreach and education for small businesses a priority through its Small Business Task Force, which in 2016 issued a simplified, one-page fact sheet designed to help small business owners better understand their responsibilities under the federal employment anti-discrimination laws.²³¹

But we wanted to expand our ideas beyond what EEOC might do. To reach all the people who need to be reached, we need more than just one (or even several) government agencies involved in the effort.

The good news is that many non-profit organizations are using innovative mechanisms to get the word out. For example, as we described above, the Fair Food Program, run by the Coalition of Imokalee Workers in Florida, has developed educational materials created by farmworkers themselves. With these materials, the Coalition of Imokalee Workers provides in-person workerto-worker education on worker rights at all farms that participate in the Fair Food Program.²³²

Similarly, ROC-LA, a restaurant worker center in Los Angeles, California, provides "know your rights" trainings both individually and to groups. The trainings focus on real-life application of employee rights, including protection from retaliation and the importance of gathering evidence

²³⁰EEOC provides extensive training via its Technical Assistance Program Seminars and EEOC Training Institute. EEOC representatives are available to make presentations and participate in meetings, conferences and seminars with employee advocate and employer organizations, professional associations, students, non-profit entities, community organizations and other members of the general public. Training programs are also available for tailored to federal sector needs. See http://www.eeotraining.eeoc.gov/index.html and https://www.eeoc.gov/field/mobile/training.cfm.

EEOC's Small Business Task Force is led by Commissioner Constance S. Barker. The Task Force was launched in 2011 to address the need to provide small businesses ready access to plainly written, easily understood information, through the use of the internet, social media, and other sources. The Task Force focuses on the needs of startups and companies that are too small to afford human resource professionals or lawyers. The small business fact sheet is the first in a series of products the Task Force is in the process of developing; the Task Force is also working on producing a series of short YouTube videos designed to provide quick, easy answers to questions often asked by small business owners. ²³² Espinoza testimony, *supra* n. 165.

in cases of harassment.²³³ ROC-LA also provides a free, weekly legal clinic for its members and has posted a simple "know your rights" brochure on its website that it is available in English, Spanish, and Chinese.²³⁴

On the employer side, membership organizations like the Society for Human Resource Management maintain libraries of resources on their websites, and provide webinars and conferences for their members that address a number of employment issues, including prevention of harassment. And of course, there are many conferences, webinars, training programs, and written materials on legal issues concerning harassment.

The Commission is in the process of updating its Enforcement Guidance on Harassment, and we believe it will be a useful guide for employers and employees. Similarly, EEOC's Communications and Outreach Plan proposes upgrading the technology and user experience of EEOC's website, including making its website mobile-friendly and accessible in a number of languages.

There is, however, much more to be done to reach various audiences that would benefit from learning about how to prevent harassment, and how to complain about it or report it when necessary.

Based on what we have learned in this area, we offer the following recommendations:

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.
- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.
- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.
- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Written Testimony of Sophia Cheng, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/cheng.cfm.

234 See https://rocunited.org/la/for-workers/.

²³⁵ See https://www.shrm.org/pages/default.aspx.

Getting the Word Out to Youth

We heard from a number of Select Task Force members and witnesses that there needs to be explicit and focused outreach to youth, even before they enter the workforce. As one witness explained:

Students who are about to be in their first-ever work situations need to be informed about (a) their rights to work in an environment free from harassment, intimidation, and /or discrimination, based on race, color, national origin, sex (including sexual orientation and transgender status), disability, and age... (b) what conduct is not permitted in the workplace (which may differ somewhat from what is acceptable at school); and (c) what they should do when they see or are subjected to any conduct they believe may be prohibited discrimination or harassment.²³⁶

Another witness explained that some teenagers and young adults "either are unaware of what constitutes harassment or, given their youth, simply don't care." Select Task Force members and other witnesses stressed the importance of reaching youth *before* they enter the workforce, so that they understand workplace norms and how they differ from classroom or social norms. We also heard that traditional outreach mechanisms (materials posted on a website, worker centers, conferences, etc.) may not be the most effective in reaching youth, and that more creative approaches are necessary.

We commend the work EEOC has already done, and is continuing to do, in outreach to youth through its Youth@Work initiative. Youth@Work is EEOC's national outreach and education campaign targeted to young workers, which was launched in 2004. Since that launch, EEOC has maintained and periodically updated the campaign. Most recently, in 2016, the agency redesigned the Youth@Work website, made it mobile-friendly, expanded the campaign's social media strategy, and expanded its substantive treatment of a number of developing areas of employment non-discrimination law. We encourage EEOC to continue to make this program current, meaningful, and accessible to youth.

In light of what we have learned in this area, we offer the following recommendations:

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.
- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

Robbins testimony, *supra* n. 134.

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²³⁶ Written Testimony of Rita Byrnes Kittle, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/kittle.cfm.

- EEOC should partner with web-based educational websites, such as Khan Academyor YouTube channels that have a large youth following, to develop content around workplace harassment.
- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

F. IT'S ON US

Harassment in the workplace will not stop on its own. The ideas noted above are helpful, but ultimately, may not be sufficient. It is on *all of us* to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change on their own.

For this reason, we suggest exploring an *It's On Us* campaign for the workplace. The *It's On Us* campaign for colleges and high school campuses is an outgrowth of the White House Task Force to Protect Students from Sexual Assault that recognized the need to change the *cultures* of educational institutions. The campaign is housed at Civic Nation, a non-profit organization focused on engaging millennials. The *It's On Us* campaign is premised on the idea that sexual assault is not just about a victim and a perpetrator. It calls upon everyone to do his or her part to be a part of the solution.

As the former leader of the *It's On Us* campaign explained to us, if students, faculty, and campus staff are passive observers when they see the possibility of sexual assault, they reinforce a culture that tolerates such behavior. But if students, faculty, and campus staff are empowered to be part of the solution to preventing sexual assault, and are given the tools and resources to do so, their role as engaged bystanders will make a significant difference in changing the educational culture.²³⁸

It would be an audacious goal to launch a similar *It's On Us* campaign in workplaces across our country – in large and small workplaces, in urban and rural areas. But doing so would transform the problem of workplace harassment from being about targets, harassers, and legal compliance, and make it one in which co-workers, supervisors, clients, and customers all have roles to play in stopping harassment.

The campaign focuses on three core pillars: increasing bystander intervention, defining consent, and creating an environment to support survivors. These pillars can be adjusted to better fit the scope of anti-harassment efforts in the workplace – particularly when it comes to bystander

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²³⁸ Testimony of Anne Johnson, Faces of Workplace Harassment and Innovative Solutions, Meeting of the Select Task Force on the Study of Harassment in the Workplace (Dec. 7, 2015), https://www.eeoc.gov/eeoc/task force/harassment/12-7-15/johnson.cfm. The It's on Us campaign uses a variety of mechanisms to communicate its message, including public service announcements featuring celebrities, large scale digital engagement campaigns, posters at bus stops and in train stations, collaboration with national partners, peer to peer education, engagement with local leaders and not-for-profit organizations, and engagement with policymakers. It is an effort that works in an integrated fashion with the various bystander intervention trainings that take place across educational settings. See http://itsonus.org.

intervention and creating an environment where targets feel comfortable coming forward to report.

We have no illusions that such a campaign would be easy to launch. But witnesses who testified before the Select Task Force believed it was possible to transfer to the workplace the principles of the *It's On Us* campaign, and the skills that bystanders would need.²³⁹ We agree. If successful, such an effort could pay high dividends in the workplace well beyond the impact of any policy, procedure or compliance training.

An *It's On Us* campaign for the workplace would require the active engagement of business partners, employee advocacy partners, and ordinary people across the country. But we have a blueprint from the existing *It's On Us* campaign in the educational setting. The campaign was successful due in large part to its multi-faceted approach of using a wide-scale awareness campaign with a robust local organizing model to engage people both online and offline.

We are not starting from scratch with this idea. But someone has to bring the campaign to the workplace. Why not all of us?

In light of what we have learned in this area, we offer the following one, very big, recommendation:

• EEOC assists in launching an "It's on Us" campaign to end harassment in the workplace.

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²³⁹ See Johnson testimony, supra n. 239; Edwards testimony, supra n. 225.

PART FOUR

SUMMARY OF RECOMMENDATIONS

Our goal over the past year has been to learn everything we could about workplace harassment and the means to prevent it. Based on that work, we now call for a reboot of workplace harassment prevention efforts. We hope the information provided in this report, as well as our concrete recommendations for action, will energize individuals and organizations across the country to join us in that effort.

EEOC has an essential role in rebooting workplace harassment prevention efforts. But we will always only be one piece of the solution. Everyone in society must feel a sense of urgency in preventing harassment: individual employers and employer associations; individual employees and employee associations; labor union leadership and rank-and-file; federal, state, and local government agencies; academics, foundations, and community leaders. That is the only way we will achieve the goal of reducing the level of workplace harassment to the lowest level possible.

To that end, we set forth below a compilation of the recommendations set forth throughout the report.

It's on Us.

* * *

Recommendations Regarding the Prevalence of Harassment in the Workplace

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.
- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.
- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees, and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.
- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

Recommendations Regarding Workplace Leadership and Accountability

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

Recommendations Regarding Harassment Prevention Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.
- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

- Employers should periodically "test" their reporting system to determine how well the system is working.
- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.
- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.
- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.
- Groups of employers should consider coming together to offer researchers access to their
 workplaces to research the effectiveness of their policies, reporting systems, investigative
 procedures, and corrective actions put into place by those employers, in a manner that would
 allow research data to be aggregated in a manner that would not identify individual
 employers.

Recommendations Regarding Anti-Harassment Compliance Training

• Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.

- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information even before such harassment reaches a legally-actionable level.
- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.
- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.
- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.
- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.
- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

Recommendations Regarding Workplace Civility and Bystander Intervention Training

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.
- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."
- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.
- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.
- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

Recommendations Regarding General Outreach

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.
- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.
- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.
- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Recommendations Regarding Targeted Outreach to Youth

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.
- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.
- EEOC should partner with web-based educational websites, such as Khan Academy, or YouTube channels that have a large youth following, to develop content around workplace harassment.

• EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

Recommendation Regarding an It's on Us campaign:

• EEOC assists in launching an "It's on Us" campaign to end harassment in the workplace.

ACKNOWLEDGEMENTS

The work of the Select Task Force on the Study of Harassment in the Workplace, and the report from the two of us as co-chairs of the Select Task Force, could not have happened without the invaluable assistance of many individuals over the past year.

We want to acknowledge and thank the following individuals:

Chair Jenny Yang, for her leadership in convening the Select Task Force;

Sarah Crawford, Special Assistant to Chair Yang, for organizing the Commission meeting on harassment in the workplace in January 2015 and for being our liaison to the Office of the Chair;

Christine Park Gonzalez and her colleagues at the EEOC Los Angeles District Office, for hosting us and helping us produce a full-day meeting of the Select Task Force in Los Angeles, California in October 2015;

Brett Brenner, Adam Guasch, Justine Lisser, and Kimberly Smith-Brown, from our Office of Communications and Legislative Affairs, for press, website, and other communications support;

Tom Schlageter, from our Office of Legal Counsel, for his advice and counsel;

Felicia Maynard, Fran O'Neill, and Holly Wilson, from our library, for tracking down countless social science research articles;

Leslie Annexstein, from our Office of General Counsel, for helping us identify charging parties who have experienced harassment;

Terri Youngblood, from our Office of Information Technology, for formatting the report and ensuring its compliance with Section 508 of the Rehabilitation Act;

Kristen Hartwell and Stephen Williams, for audio-visual support during our Select Task Force meetings;

Patricia Foley, for arranging CART reporters for our Select Task Force public meetings;

Our entire facilities staff, for ensuring that the Training Center was always configured correctly for our Select Task Force meetings; and

James Tillman, Andre Gallmon, and Jill Lewis, for streamlining the security process for our Select Task Force meetings.

We also want to acknowledge and thank all the EEOC staff that engaged us in conversation, provided us with data, and took the time to review and comment on drafts of this report. We appreciate their guidance and counsel.

We want to acknowledge and thank all the witnesses, listed in Appendix A, who took the time to share their expertise with us. Every one of them has helped us in our work during this process.

None of the work required to convene the Select Task Force and write this report could have been done without the assistance of many individuals in our respective offices. We would like to acknowledge and thank:

Sara Fernandez, Confidential Assistant to Commissioner Feldblum, Anupa Iyer, former Confidential Assistant to Commissioner Feldblum, and Pierce Blue and Steven Zanowic, Special Assistants to Commissioner Feldblum, for research, logistical, and general support;

Crystal Malone (spring 2016), Penni Weinberg (spring 2015), and Jason Whittle (winter 2015), Presidential Management Fellows in Commissioner Feldblum's office, for everything from helping us identify potential members of the Select Task Force to summarizing social science research; and

Penelope Scudder (summer 2015), Neelam Salman (spring 2016), Ira Stup (summer 2016), Neda Saghafi (summer 2016), and Chauna Pervis (summer 2016), legal interns in Commissioner Feldblum's office; and Erin Perugini (fall 2015), legal intern in Commissioner Lipnic's office, for drafting legal memos, compiling research, chasing down citations, endless bluebooking, and everything in-between.

Three of our staff members stand apart in terms of making this effort possible: Sharon Masling, Chief of Staff to Commissioner Feldblum, and Jim Paretti, Senior Counsel, and Donald McIntosh, Counsel, to Commissioner Lipnic.

Sharon, Jim, and Donald spent countless hours identifying members of the Select Task Force, planning meeting agendas, finding and working with witnesses, preparing legal and policy materials, dealing with logistics, sitting through endless hours of meetings with each other and with us, communicating with Select Task Force members, and preparing draft sections of the report. It goes without saying (but we will say it anyway) that nothing would have gotten done without the incredible work of these three staff members.

Finally, we would like to thank the members of the Select Task Force on the Study of Harassment in the Workplace, for their time, their thoughtfulness, their insights, and their commitment to this project. While this report is by the two of us, it would not have been possible without them.

APPENDIX A

 $\frac{\text{ACTIVITIES OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN}}{\text{THE WORKPLACE}}$

On April 7, 2015, the Select Task Force on the Study of Harassment in the Workplace held its first meeting, a private working session in Washington, DC. At that meeting, members of the Select Task Force provided their initial thoughts on how the group might proceed in its work. The bulk of the day was devoted to framing the Select Task Force's mission, and building relationships among the members.

The first public meeting of the Select Task Force, entitled "Workplace Harassment: Examining the Scope of the Problem and Potential Solutions," was held on June 15, 2015, at EEOC headquarters in Washington, DC. At that hearing, members of the Select Task Force heard testimony from six invited witnesses:

- Dexter Brooks, Director, Federal Sector Programs, Office of Federal Operations, EEOC
- Ron Edwards, Director, Program Research and Surveys Division, Office of Research, Information and Planning, EEOC
- Lilia Cortina, Professor of Psychology and Women's Studies, University of Michigan
- Mindy Bergman, Associate Professor of Psychology, Texas A&M University
- Eden King, Associate Professor of Psychology, George Mason University
- Louise Fitzgerald, Professor *Emerita* of Gender and Women's Studies and Psychology, University of Illinois.

The witnesses focused their remarks on the prevalence of workplace harassment in both the private and public sector. Their testimony included an examination of existing research, as well as gaps in current literature and data.

Information on the June 2015 meeting is available at: <u>Select Task Force Meeting of June 15</u>, 2015 - Workplace Harassment: Examining the Scope of the Problem and Potential Solutions.

At this meeting, we announced the formation of the Select Task Force's public website, which assembled in one place a range of existing EEOC resources relating to harassment, and provided an online "suggestion box" for public comment.

On August 12, 2015, we gave a presentation concerning the work of the Select Task Force at the annual EXCEL conference, "Examining Conflicts in Employment Law," and heard feedback from the more than 70 attendees regarding their experience in preventing and addressing workplace harassment in federal worksites.

On September 18, 2015, the Select Task Force held a closed working session in Washington, DC. The focus of the session was to explore "risk factors" or problematic issues that might relate to specific workplaces. The Select Task Force heard testimony from three experts in workplace harassment investigations and training who had experience with a range of industries:

- Michael A. Robbins of EXTTI, Inc.
- Fran Sepler of Sepler & Associates
- Sindy Warren of Warren & Associates LLC.

The Select Task Force also heard from Wendi Lazar, a partner at Outten & Golden LLP, on the risk factors faced by women in the legal profession. Finally, the Select Task Force heard from two members of EEOC's legal staff, Los Angeles Regional Attorney Anna Park and Denver Senior Trial Attorney Rita Byrnes Kittle, about lessons learned from large-scale EEOC investigations and litigation.

On October 22, 2015, the Select Task Force held a day-long public meeting in Los Angeles, California, focused on "Promising Practices to Prevent Workplace Harassment."

At this meeting, the Select Task Force heard testimony from:

- Judge Laura Safer Espinoza, Director, Fair Food Standards Council
- Jon Esformes, Chief Executive Officer, Pacific Tomato Growers; Sunripe Certified Brands
- Sophia Cheng, Community Organizer, Restaurant Opportunities Center of Los Angeles
- Dorothy Edwards, Executive Director, Green Dot
- Melissa Emmal, Deputy Director, Abused Women's Aid in Crisis
- Patti Perez, Shareholder, Ogletree Deakins, and Member of the California Fair Employment and Housing Council
- Renette Anderson, Executive Assistant to the General Manager and Director of Equal Employment Opportunity Services, Los Angeles Department of Water and Power
- Heidi Jean Olguin, CEO, Progressive Management Resources.

The witnesses presented testimony on innovative approaches to combatting workplace harassment and new or non-traditional models of training and outreach. The witnesses also testified on the importance of corporate culture and strong leadership in promoting harassment-free workplaces.

Information on the October 2015 meeting can be found at: <u>Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment.</u>

On December 7, 2015, the Select Task Force convened in Washington, DC, "Faces of Workplace Harassment and Innovative Solutions." The public portion of the meeting was devoted to two topics: (1) harassment on the bases of disability, religion, ethnicity, sexual orientation, gender identity, and age; and (2) solutions using general awareness campaigns and social media.

The first panel, "Faces of Workplace Harassment," consisted of:

- Lisa Banks, Partner, Katz, Marshall & Banks, LLP
- Zahra Billoo, Executive Director, Council on American-Islamic Relationa San Francisco Bay Area
- Tara Borelli, Senior Attorney, Lambda Legal
- Dan Kohrman, Senior Attorney, AARP Foundation Litigation

The second panel, "Innovative Solutions," consisted of:

- Anne Johnson, Executive Director, Generation Progress, Center for American Progress ("It's on Us" campaign)
- Jess Kutch, Co-Founder, Coworker.org

Information on the December 2015 meeting can be found at: <u>Select Task Force Meeting of</u> December 7, 2015 - Faces of Workplace Harassment and Innovative Solutions.

In a closed working session in the afternoon, Select Task Force members gathered into five working groups focused on: (1) Outreach; (2) Research; (3) Training; (4) Employer Best Practices; and (5) Harassment "Risk Factors."

On February 11, 2016, we met with representatives from the federal sector, including equal employment opportunity directors and specialists from federal agencies, to discuss how the federal government is working to prevent harassment, and solicit their feedback, experience, and concerns regarding harassment in the federal-sector workplace.

On February 25, 2016, the Select Task Force met in closed session in Washington, DC to discuss the reports of several of the working groups. At that meeting, the Select Task Force also heard from Nathan Galbreath, Senior Executive Advisor, Sexual Assault Prevention and Response Office, Department of Defense, which oversees the military's sexual assault policy and programs.

On March 1, 2016, we met with the senior leadership of EEOC, including district directors and regional attorneys, to discuss the ongoing work of the task force.

On March 11, 2016, the Select Task Force met in closed session to continue its discussion of the working group reports. The Select Task Force also heard testimony about harassment based on race from Coty Montag, Deputy Director Litigation, NAACP Legal Defense and Education Fund, and about harassment based on national origin and language characteristics from Guadalupe Valdés, Bonnie Katz Tenenbaum Professor of Education, Stanford Graduate School of Education. In addition, the Select Task Force received a briefing on organizational behavior from Robert J. Bies, Professor of Management & Founder of Executive Master's in Leadership Program, McDonough School of Business, Georgetown University, and heard a presentation from Jennifer Abruzzo, Deputy General Counsel, U.S. National Labor Relations Board, on issues relating to harassment arising under the National Labor Relations Act.

The Select Task Force held a closed working session on June 6, 2016, in Washington, DC. The session was devoted to a discussion of the Co-Chairs' draft report, and its release later that month.

APPENDIX B CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

	Leadership has allocated sufficient <i>resources</i> for a harassment prevention effort				
	Leadership has allocated sufficient staff time for a harassment prevention effort				
	Leadership has assessed harassment risk factors and has taken steps to minimize those risks				
	Based on the commitment of leadership, check the box if your organization has the following components in place:				
	A harassment prevention <i>policy</i> that is <i>easy-to-understand</i> and that is <i>regularly communicated</i> to all employees				
	A harassment reporting <i>system</i> that employees <i>know about</i> and is <i>fully resourced</i> and which accepts reports of harassment experienced and harassment observed				
	Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred				
	Accountability for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment				
	Regular <i>compliance trainings for all employees</i> so they can recognize prohibited forms of conduct and know how to use the reporting system				
	Regular compliance trainings for mid-level managers and front-line supervisors so they know how to prevent and/or respond to workplace harassment				
Bonus	points if you can check these boxes:				
	The organization conducts <i>climate surveys</i> on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace				
	The organization has implemented <i>metrics</i> for harassment response and prevention in supervisory employees' performance reviews				
	The organization conducts workplace civility training and bystander intervention training				
	The organization has <i>partnered with researchers</i> to evaluate the organization's holistic workplace harassment prevention effort				

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

An unequivocal statement that harassment based on <i>any</i> protected characteristic will not be tolerated
An easy-to-understand description of prohibited conduct, including examples
A description of a reporting system – available to employees who experience harassment as well as those who observe harassment – that provides multiple avenues to report, in a manner easily accessible to employees
A statement that the reporting system will provide a prompt, thorough, and impartial investigation
A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
Is written in clear, simple words, in all languages commonly used by members of the workforce

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
Employer representatives who take reports seriously
A supportive environment where individuals feel safe to report harassing behavior to management
Well-trained, objective, and neutral investigators
Timely responses and investigations
Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

•	Structural Principles			
		Supported at the highest levels		
		Repeated and reinforced on a regular basis		
		Provided to all employees at every level of the organization		
		Conducted by qualified, live, and interactive trainers		
		If live training is not feasible, designed to include active engagement by participants		
		Routinely evaluated and modified as necessary		
•	Co	ntent of Compliance Training for All Employees		
		Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment		
		Includes examples that are tailored to the specific workplace and the specific workforce		
		Educates employees about their rights and responsibilities if they experience conduct that is no acceptable in the workplace		
		Describes, in simple terms, the process for reporting harassment that is experienced or observed		
		Explains the consequences of engaging in conduct unacceptable in the workplace		
•	Co	ntent of Compliance Training for Managers and First-line Supervisors		
		Provides easy-to-understand and realistic methods for dealing with harassment that they observe that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods		
		Provides clear instructions on how to report harassing behavior up the chain of command including description of sanctions for failing to report		
		Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment		

APPENDIX C CHART OF RISK FACTORS AND RESPONSES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (e.g., team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.
Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation. Language and linguistic characteristics can play a role in harassment.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations among and within work groups.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events—national and local—that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces with "high value" employees	Executives or senior managers Employees with high value (actual or perceived) to the employer, e.g., the "rainmaking" partner or the prized, grantwinning researcher	Management is often reluctant to jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	Apply workplace rules uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, e.g., administrative support staff, nurses, janitors, etc. Gendered power disparities (e.g., most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.

REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces where work is monotonous or tasks are low- intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (e.g., in person, on line) to share concerns.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcoholinduced misconduct.
			Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed.
			Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors	Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance
			training for area managers includes their responsibility for sites under their jurisdiction
			Develop systems for employees in geographically diverse locations to connect and communicate.

Rebooting Workplace Harassment Prevention

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



SELECT TASK FORCE
ON THE STUDY OF
HARASSMENT IN THE WORKPLACE

REPORT OF CO-CHAIRS
CHAI R. FELDBLUM & VICTORIA A. LIPNIC

Highlights of the Report by Commissioner Chai Feldblum & Acting Chair Victoria Lipnic

JUNE 2016

Purpose of The Select Task Force



Assess what we know now about the extent of harassment

Explore promising ways to prevent and remedy harassment

Come up with creative new ideas to prevent harassment

Diversity of Views and Expertise

Academic Representation

- -Sahar F. Aziz, Associate Professor of Law, Texas A&M University
- -Meg A. Bond, Professor of Psychology and Director of the Center for Women and Work, University of Massachusetts Lowell
- -Jerry Carbo, Associate Professor of Management and Marketing, Shippensburg University
- -Frank Dobbin, Professor of Sociology, Harvard University
- -Ariane Hegewisch, Study Director, Institute for Women's Policy Research

Employer Representation

- -Stephen C. Dwyer, General Counsel, American Staffing Association
- -Manuel Cuevas-Trisán, Vice President, Litigation, Data Protection & Employment Law, Motorola Solutions, Inc.
- -Jonathan A. Segal, Partner, Duane Morris and Managing Principal, Duane Morris Institute
- -Rae T. Vann, General Counsel, Equal Employment Advisory Council
- -Patricia A. Wise, Partner, Niehaus, Wise & Kalas; Co-Chair, Society for Human Resource Management Labor Relations Special Expertise Panel

Employee Representation

- -Brenda Feis, Partner, Feis Goldy, LLC
- -Fatima Goss Graves, Vice President
- for Education and Employment,
- National Women's Law Center
- -Christopher Ho, Senior Staff Attorney and Director, Immigration and National Origin Program, Legal Aid Society, Employment Law Center
- -Thomas A. Saenz, President & General Counsel, Mexican American Legal Defense and Educational Fund
- -Joseph M. Sellers, Partner, Cohen Milstein
- -Angelia Wade Stubbs, Associate General Counsel, AFL-CIO

Select Task Force on the Study of Workplace Harassment

January 2015

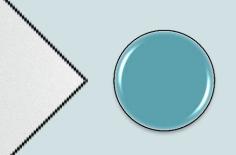
Creation of the Task Force

October 2015

Promising Practices
to Prevent
Workplace
Harassment
Los Angeles, CA

<u>June 2016</u>

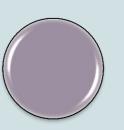
Release of Co-Chairs Report at EEOC Commission Meeting











<u>June 2015</u>

Examining the Scope of the Problem and Potential Solutions

Washington, DC

December 2015

Faces of Workplace Harassment and Innovative Solutions Washington, DC

Harassment' in Report: Not Limited to Illegal Harassment

Harassment, for purposes of the report, is defined as unwelcome or offensive conduct in the workplace that:

- a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; AND
- b) is detrimental to an employee's work performance, professional advancement, and/or mental health.

Range of Possible Unwelcome Harassment

- Offensive jokes, slurs, epithets or name calling
- Offensive objects or pictures.
- Unwelcome touching or contact
- Physical threats or assaults
- Ridicule, mockery, or put-downs
- Constant or unwelcome questions about an individual's identity
- Undue attention



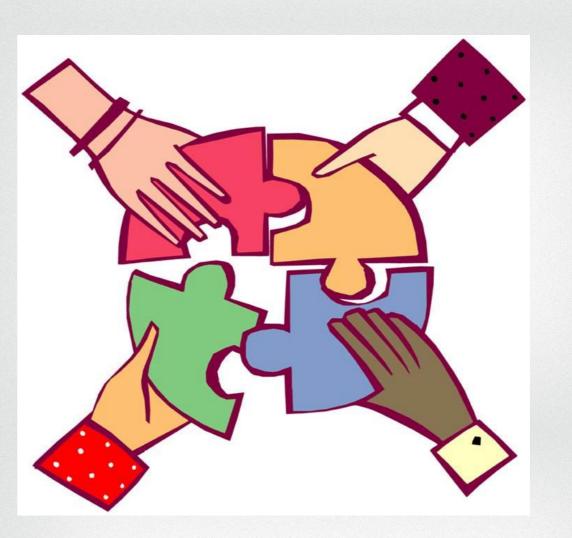
"Not everything that is faced can be changed, but nothing can be changed until it is faced."

-James Baldwin

Our Findings

- Workplace harassment remains a persistent problem.
- Workplace harassment too often goes unreported.
- There is a compelling business case for preventing harassment.
- The good news: We have some creative ideas
- · Leadership and accountability can prevent harassment.



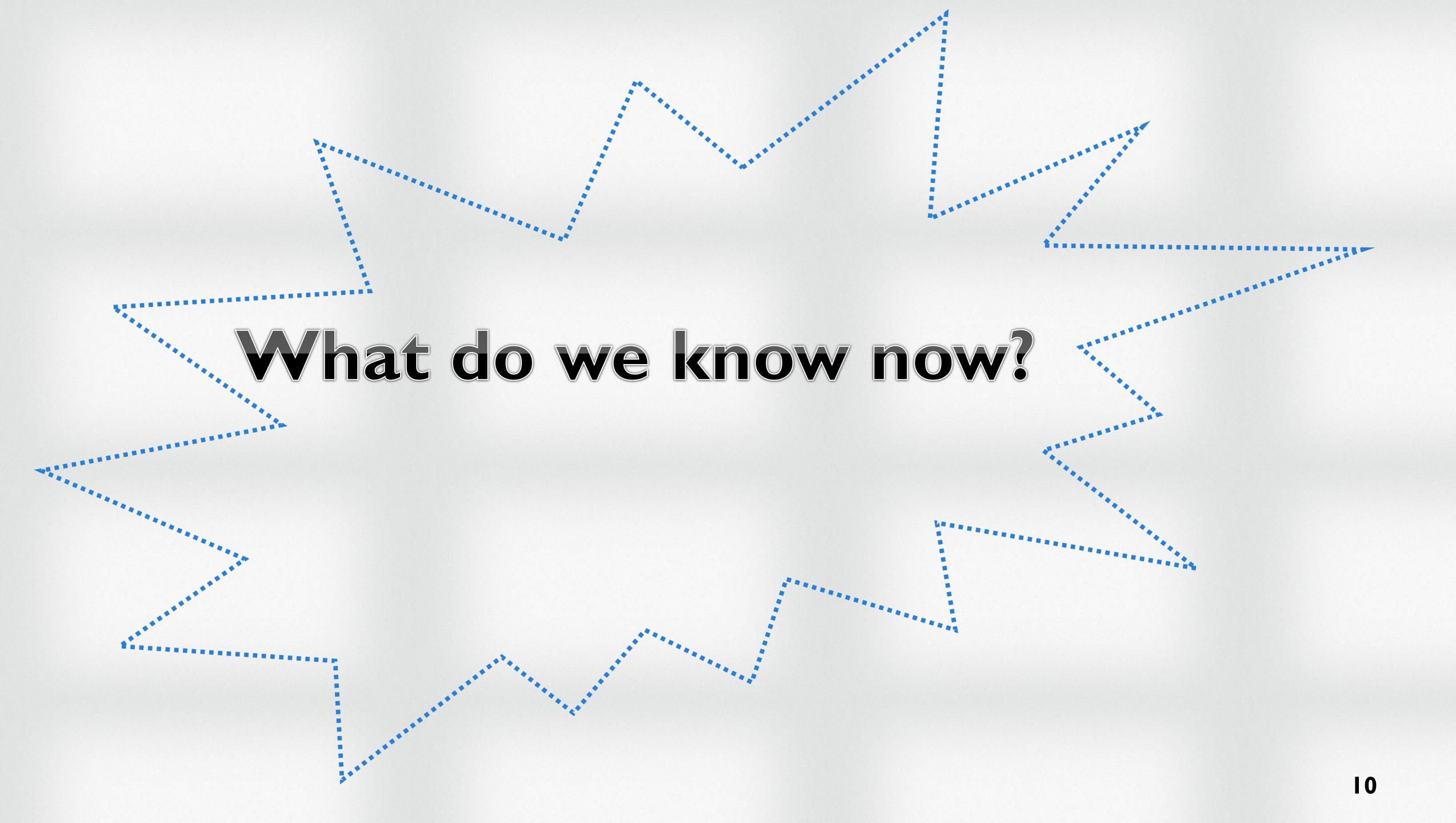


Our Findings Continued..

- Workplace risk factors should be evaluated
- Training is important, but it needs to be the right training.
- Employers need compliance training that is effective.
- Employers should consider workplace civility training and bystander intervention training
- An It's On US campaign in the workplace could be a game changer

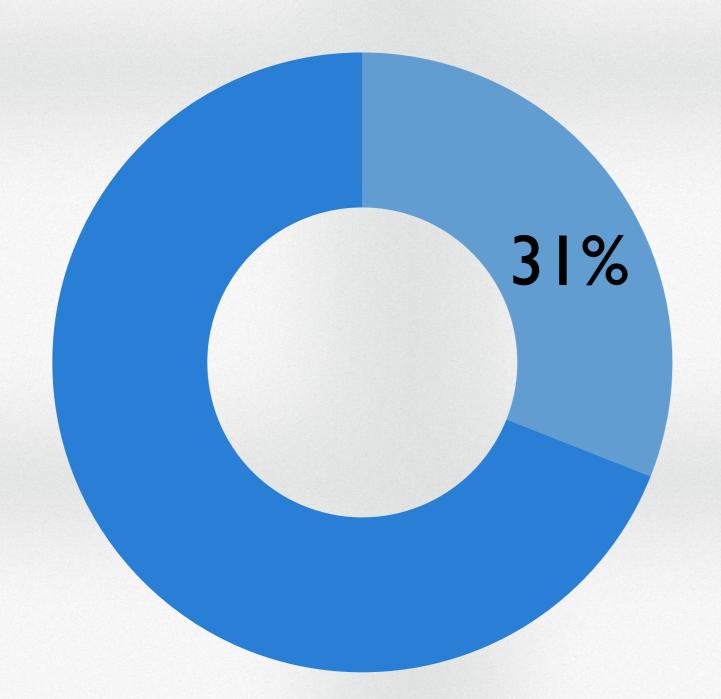






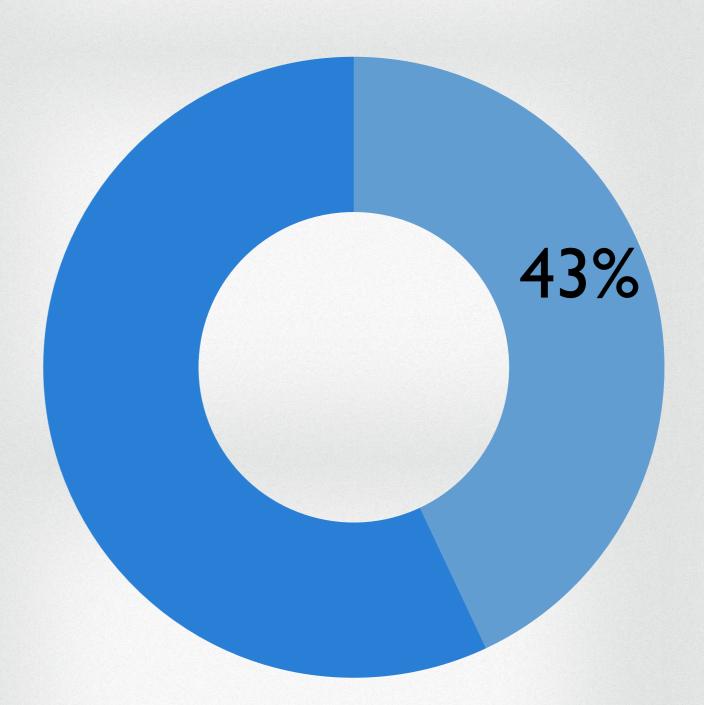
Harassment Charges and Complaints: A Persistent Problem

FY 2015 Private Sector Charges Alleging Harassment



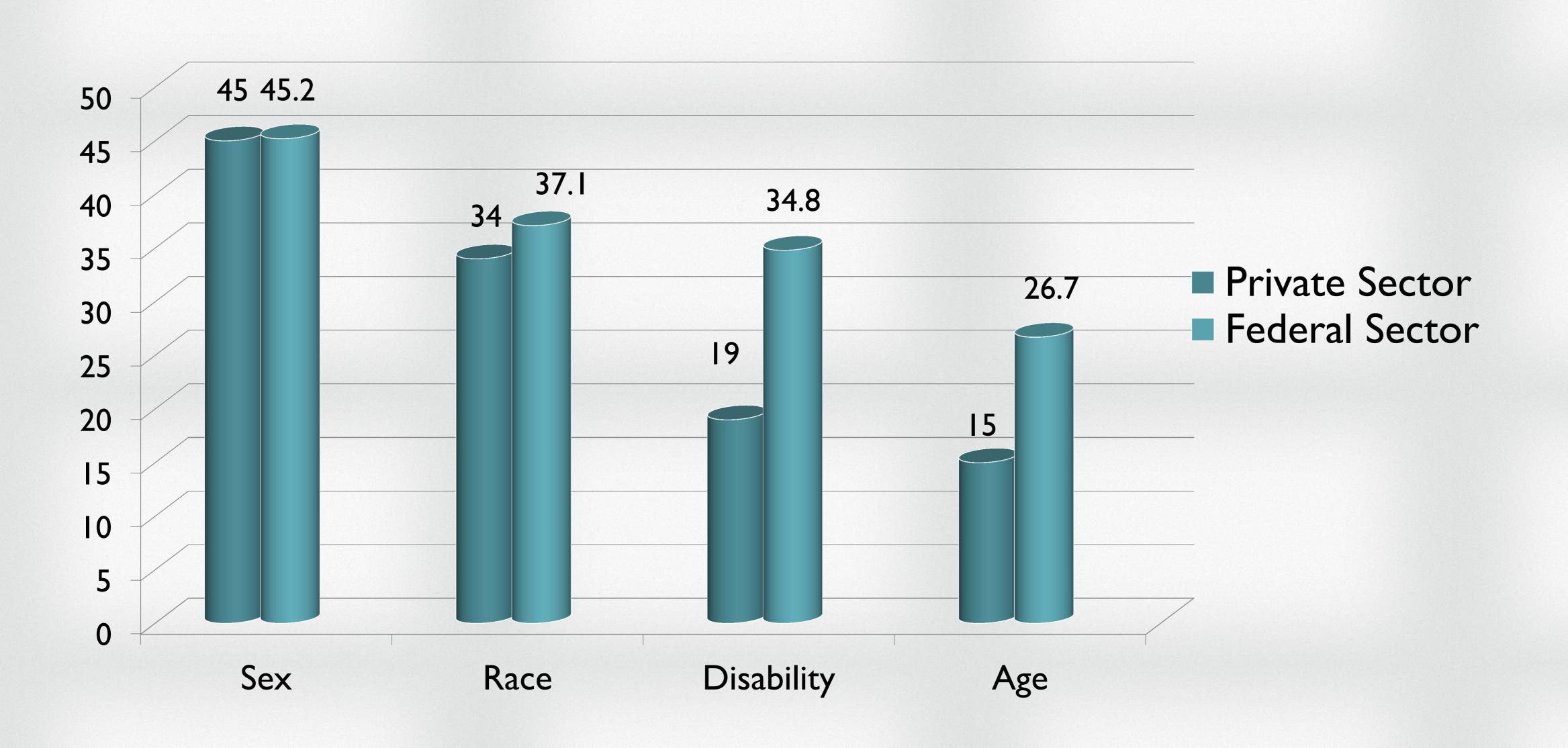
Approximately 31% of private sector charges alleged harassment

FY 2015 Federal Sector Complaints Alleging Harassment



Approximately 43% of federal sector charges alleged harassment

Harassment Charges and Complaints by Category Fiscal Year 2015

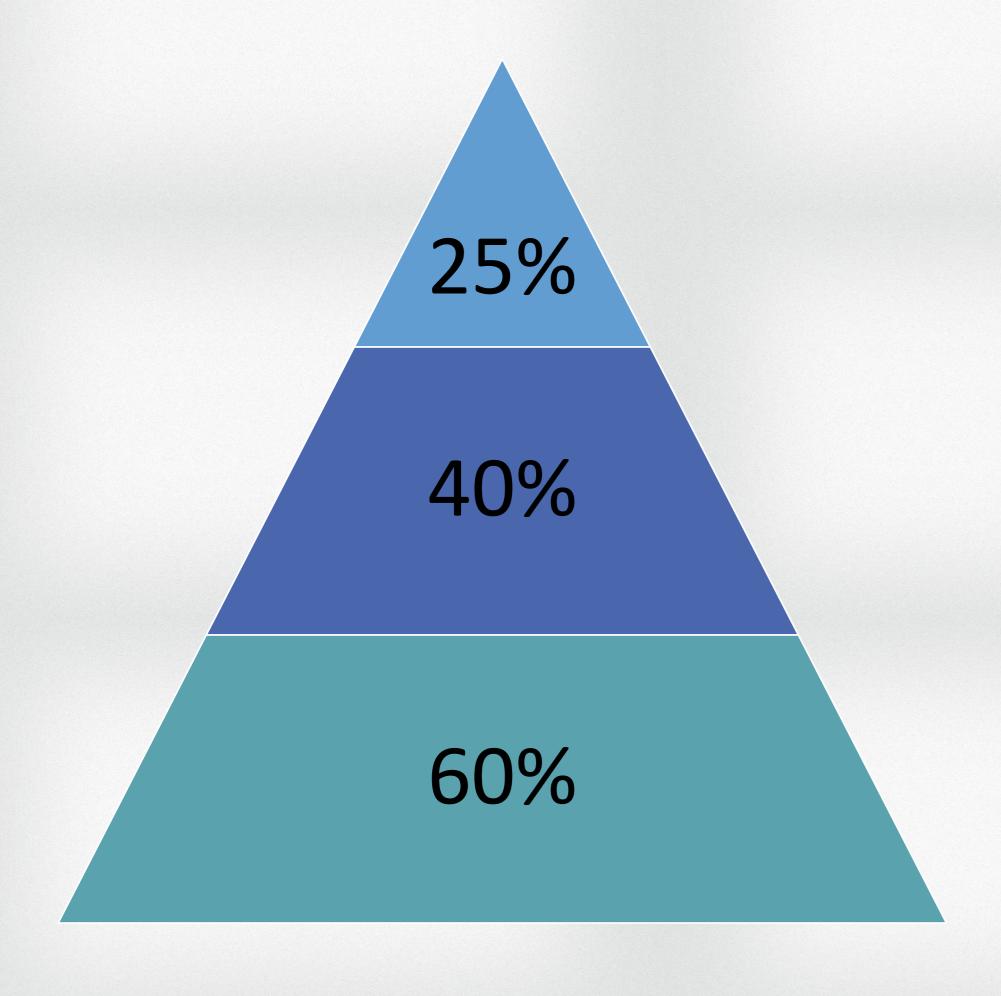


Prevalence of Workplace Harassment What do the Survey Data Say?

- Solid data on sex based harassment: 25-60%
- Some date on sexual orientation and gender identity harassment: 35-58%
- Little data on racial and ethnic harassment: 40-70%
- Next to no data on harassment based on disability, religion, or age

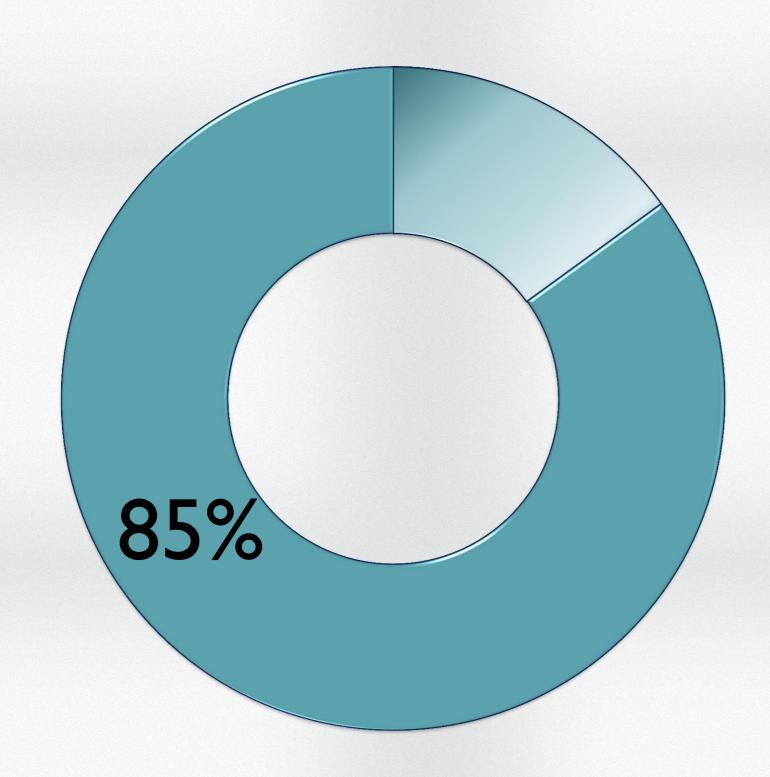


Prevalence of Sex-Based Harassment: Varying Definitions

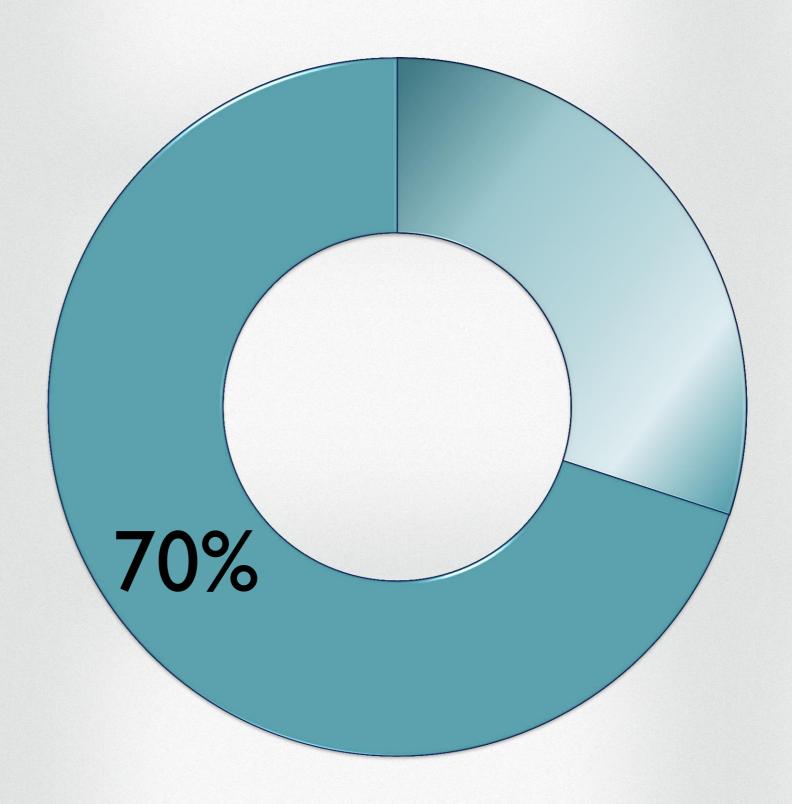


- Most Conservative Estimate: 25% of women experience "sexual harassment," if not defined in the survey.
- More Accurate Estimate: 40% of women experience unwanted sexual attention or sexual coercion, even if they don't label it as "sexual harassment."
- Most Accurate Estimate: 60% of women experience unwanted sexual attention or sexual coercion, OR sexually crude conduct or sexist comments in the workplace.

Harassment is HUGELY UNDER-REPORTED

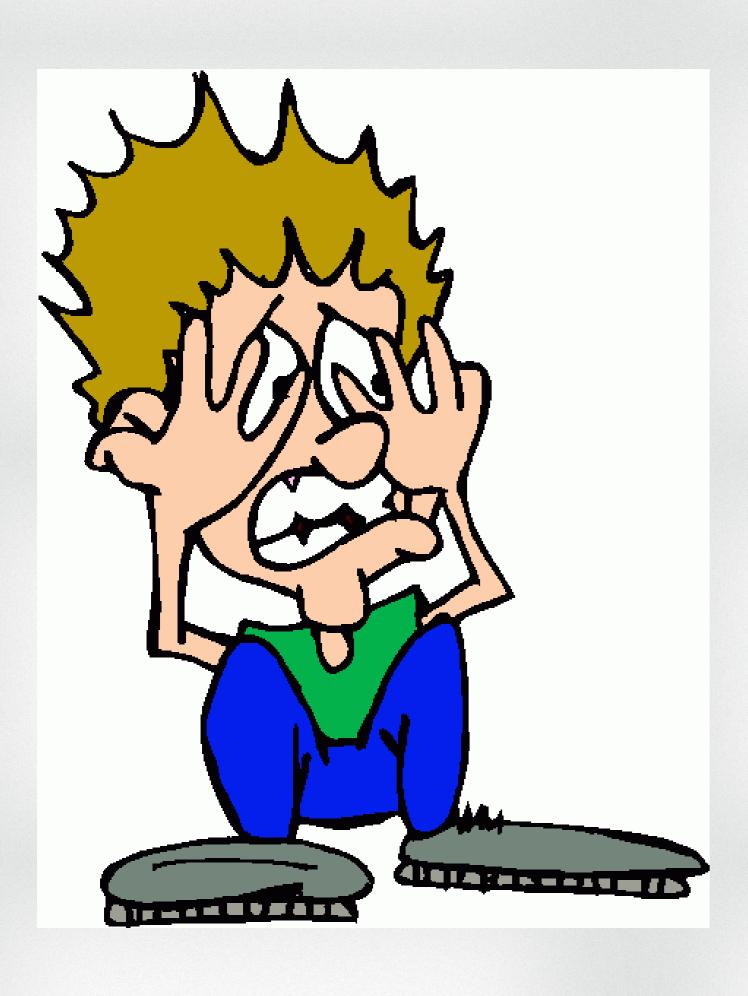


Upwards of 85% of people never file a formal legal charge.



Approximately 70% of employees never even complain internally.

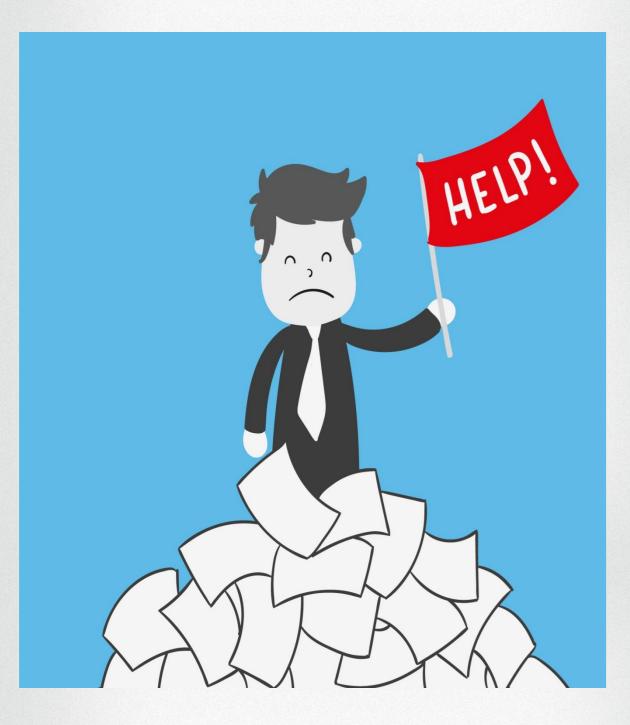
Why the Under-Reporting?



FEAR

- > Humilitation
- > Ostracism
- > Damage to Reputation
- > Damage to Career
- > Retaliation
- > Inaction
- > Blame
- Disbelief

Fears of Retaliation Are Well-Founded



- One study found that **75**% of employees who spoke out against workplace mistreatment faced some form of retaliation.
- Other studies found that sexual harassment reporting is often followed by:
 - organizational indifference
 - trivialization of the harassment complaint
 - hostility and reprisals against the victims



"The most reasonable response to harassment in many organizations is not to report it, not to file a complaint, not even to speak to management about the problem."

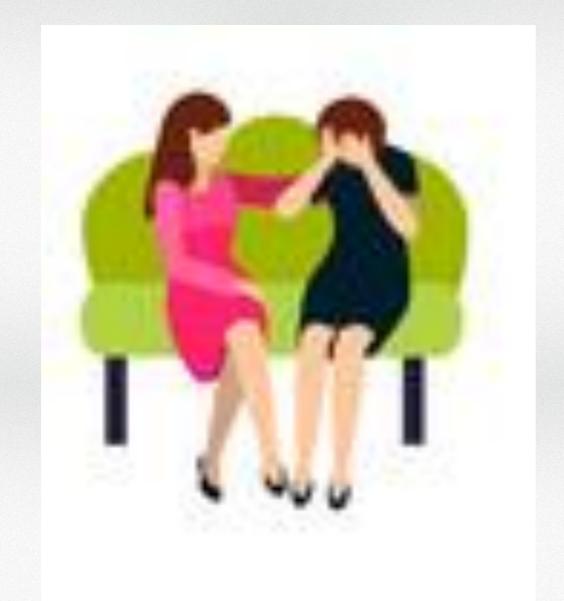
-Professor Lilia Cortina, University of Michigan (Testimony to the Select Task Force)

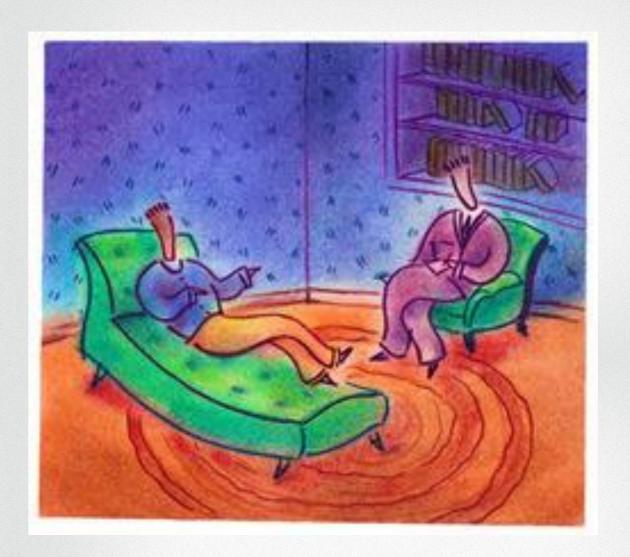
Common Responses to Harassment



- Endure the behavior
- Avoid the harasser
- Downplay the gravity of the situation
- Seek support from family and friends
- Leave the job, if one can







A Compelling Business Case: Employers Should Care about Stopping Harassment



Harassment is Wrong

- Employers should care about stopping harassment because harassment is wrong and, in many cases, illegal.
- Workplace harassment will always cause harm to the target and can actually ruin an employee's life.
- Moral obligation and legal duty are not the complete story, though. Employers should also stop harassment because it makes good business sense.



Direct Financial Costs- EEOC Processes



Between FY2010 to FY2015, employers paid \$698.7 million during EEOC's pre-litigation enforcement process to employees alleging harassment



In just one year, EEOC secured \$125 million in its pre-litigation process AND \$39 million in EEOC's litigation, for employees alleging harassment

Plus...

- Costs also include monetary relief obtained by private plaintiff's attorneys for their clients
- Federal agencies also pay monetary damages for harassment claims

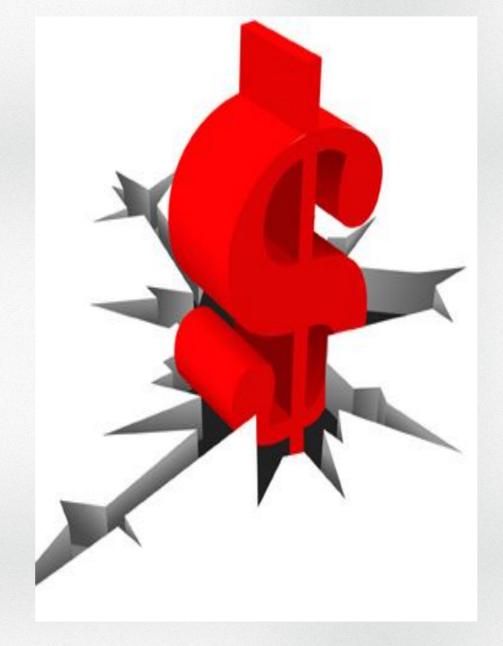


Indirect Financial Costs

 Adverse impact on health & workplace productivity of the target of harassment

Adverse impact on health & workplace productivity of coworkers who witness harassment

- Job Turnover
- Reputational Harm



Health Impact & Workplace Productivity of the <u>Target of Harassment</u>

- Psychological Harm: depression, anxiety, PTSD, negative mood, eating disorders, self-blame, anger, substance abuse
- Physical Harm: headaches, exhaustion, sleep problems, Nausea, weight changes, cardiovascular issues, gastric issues, respiratory issues
- Workplace Productivity: decreased productivity, job dissatisfaction, work withdrawal, disengagement, tardiness, excessive absenteeism, work time spent discussing the harassment

Health Impact and Workplace Productivity of Coworkers

- Workplace tension
- Effect on Workplace functioning
- Effect on physical and psychological health



Job Turnover

Job turnover is potentially the largest single component of the overall cost of harassment.





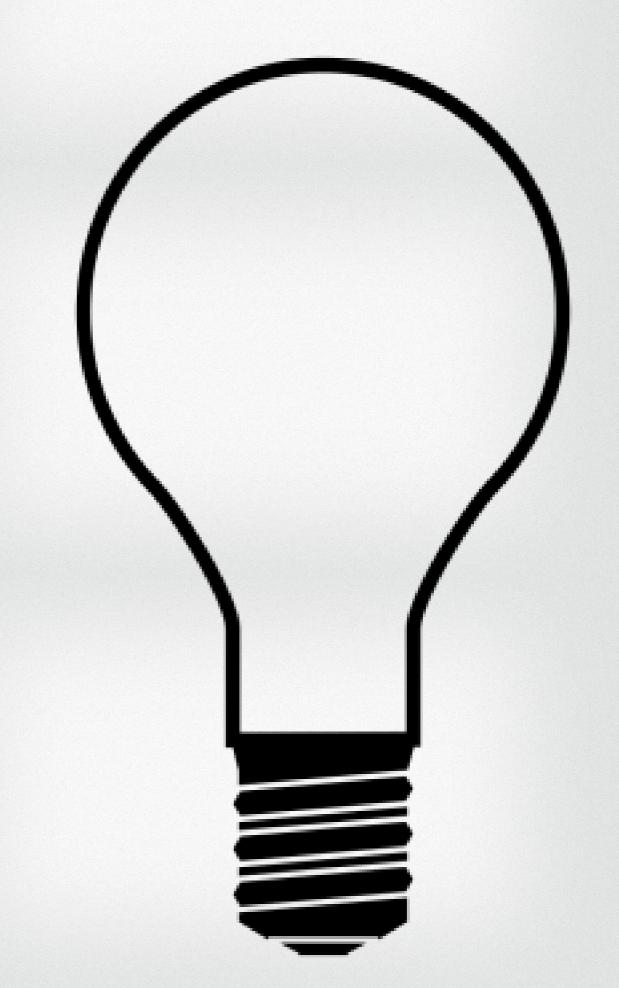
The Perils of the Superstar Harasser

- Employers often make a wrong cost-benefit analysis when faced with allegations of harassment against a highly valued employee.
- Employers are often tempted to ignore misconduct for **fear** of **cost** to the **organization**.
- In reality, the cost of allowing harassment to go unchecked is higher than the cost of losing a highly valued employee.

What Can We All Do?

A Common Sense Research Finding

- Workplaces that tolerate harassment have more of it.
- And workplaces that are not tolerant of harassment have less of it.

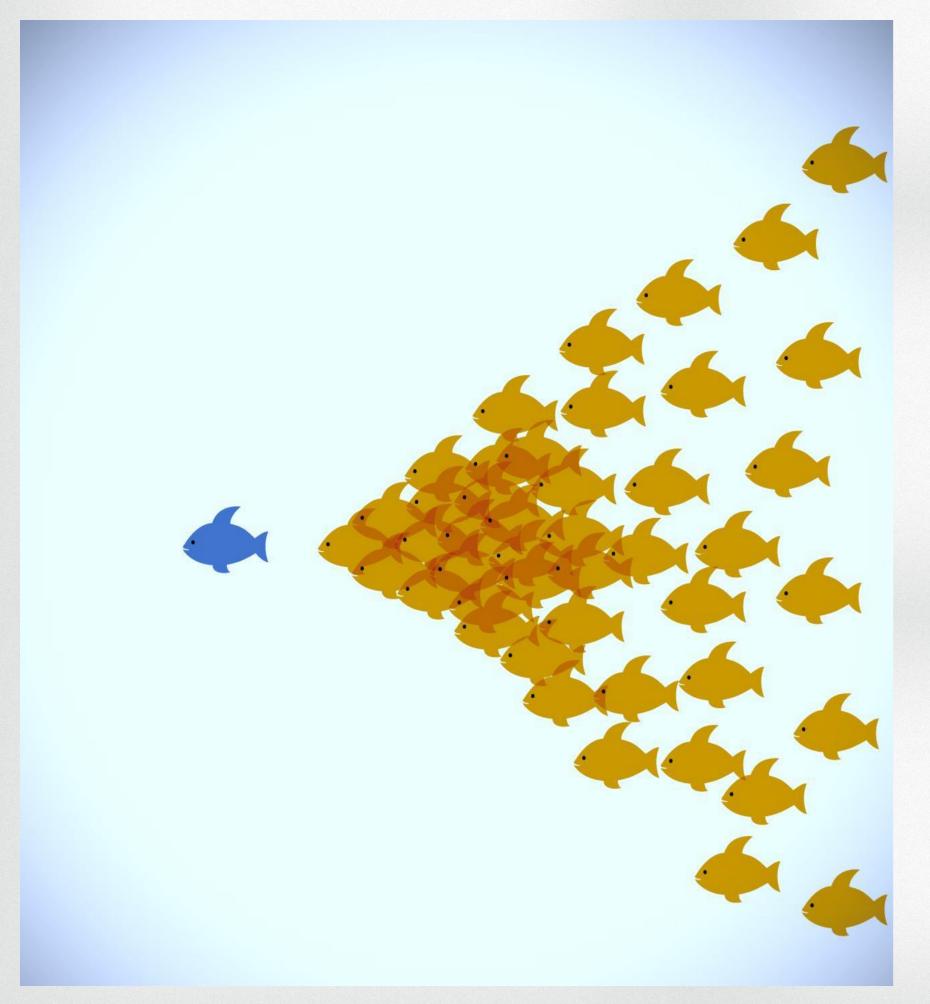


Leadership: It Starts at the Top

- Values: Leaders believe harassment is wrong and should not occur in the workplace. Leaders convey a sense of urgency in stopping and preventing harassment.
- Authenticity: Workers believe that leaders mean what they say.
- Awareness: Leadership knows about the prevalence of workplace harassment: e.g., via climate surveys.
- Accountability: Leaders address harassment in a swift, effective, and proportionate manner. Leadership holds managers accountable for stopping harassment



Front Line Management is Key



- Frontline managers must be trained on how to respond to reports or observations of harassment in a swift and correct manner.
- Frontline managers must be held accountable for their responses to harassment – using discipline or accolades
- The extent of harassment in a manager's division is not necessarily best measured by the number of complaints from that division.

"One organization I worked with several years ago asked me if I had new courseware for use with some previously trained managers. When I asked them what they wanted to accomplish, they indicated that several individuals were continuing to tell off-color jokes and make inappropriate comments. While I welcomed the opportunity to be of service, it seemed to me the issue was not what training to do next but rather why these decision-makers hadn't taken steps to deal with these individuals' behavior and failure to perform to clear standards."

-Stephen Paskoff, founder of Employment Learning Innovations, Inc. 8 Fundamentals of a Civil Treatment Workplace

Checklist on Leadership $\rightarrow \rightarrow \rightarrow$

Checklist One: Leadership and Accountability The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps: Leadership has allocated sufficient resources for a harassment prevention effort Leadership has allocated sufficient staff time for a harassment prevention effort ☐ Leadership has assessed harassment risk factors and has taken steps to minimize those risks Based on the commitment of leadership, check the box if your organization has the following components in place: A harassment prevention policy that is easy-to-understand and that is regularly communicated to all employees ☐ A harassment reporting system that employees know about and is fully resourced and which accepts reports of harassment experienced and harassment observed ☐ Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred ☐ Accountability for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment ☐ Regular compliance trainings for all employees so they can recognize prohibited forms of conduct and know how to use the reporting system ☐ Regular compliance trainings for mid-level managers and front-line supervisors so they know how to prevent and/or respond to workplace harassment Bonus points if you can check these boxes: ☐ The organization conducts climate surveys on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace \Box The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews ☐ The organization conducts workplace civility training and bystander intervention training ☐ The organization has partnered with researchers to evaluate the organization's holistic workplace harassment prevention effort

Workplace Risk Factors: Situational Awareness



- There are factors that may put a work place at risk for harassment.
- While existence of a risk factor does n
 ot mean that harassment will occur, an
 alyzing workplace risk factors is a good
 means of prevention.

Risk Factors for Harassment

- Homogenous workforces
- Workforces with many young workers
- Isolated workspaces
- Cultural and language differences in the workplace
- Workplaces that rely on customer service or client satisfaction
- Decentralized workplaces



Additional Risk Factors for Harassment

- Workplaces where work is monotonous or consists of low-intensity tasks
- Workplace cultures that tolerate or encourage alcohol consumption
- Workplaces with significant power disparities
- Coarsened social discourse outside the workplace



APPENDIX C CHART OF RISK FACTORS AND RESPONSES

Chart on Risk Factors →→→

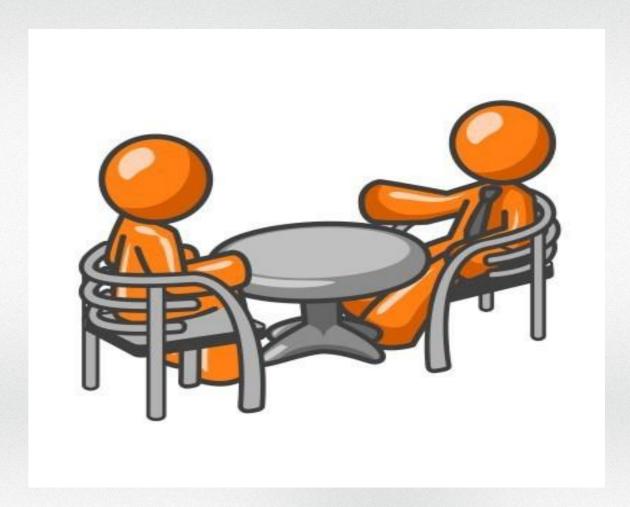
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Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation. Language and linguistic characteristics can play a role in harassment.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations among and within work groups.
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events- national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.

A Holistic Harassment Prevention Effort

- Leadership
- Policy
- Reporting Procedures
- Training
- Creativity







Anti-Harassment Policies

- Drafted in simple and clear language
- Clear explanation of prohibited conduct, including examples
- Protection against retaliation for employees who make complaints or participate in the investigation
- Clearly described complaint process with multiple, accessible avenues of complaint and a prompt, thorough, and impartial investigation
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
- Assurance that the employer will take immediate and proportionate corrective action and respond appropriately to behavior

Checklist on Effective Harassment Prevention Policies $\rightarrow \rightarrow \rightarrow$

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

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A statement that the reporting system will provide a prompt, thorough, and impartial investigation
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An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
Is written in clear, simple words, in all languages commonly used by members of the workforce

Reporting and Investigation Procedures

- Well-resourced with well trained investigators
- Takes complaints seriously and offers a supportive environment
- Protects against retaliation and keeps information confidential to the extent possible
- Provides timely responses and investigations
- Is fair to all parties
 - Consider testing your procedures to see how well they work in practice.



Checklist on Reporting Procedures →→→

- Checklist Three: A Harassment Reporting System and Investigations
- A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.
- Check the box below if your anti-harassment effort contains the following elements:
- A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- Employer representatives who take reports seriously
- \square A supportive environment where individuals feel safe to report harassing behavior to management

- Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

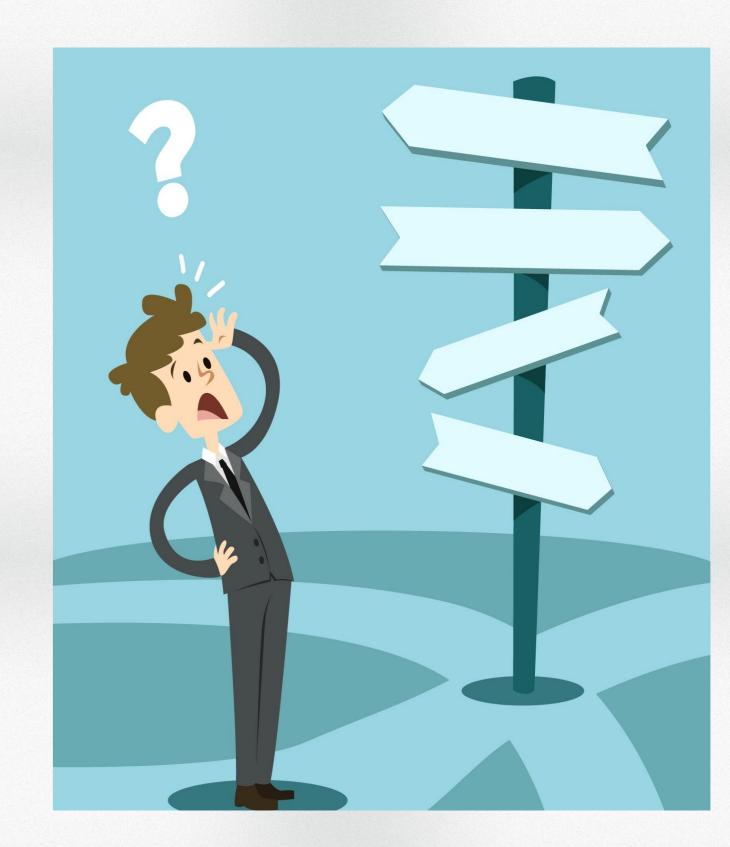




Problems with Traditional Harassment Prevention Training

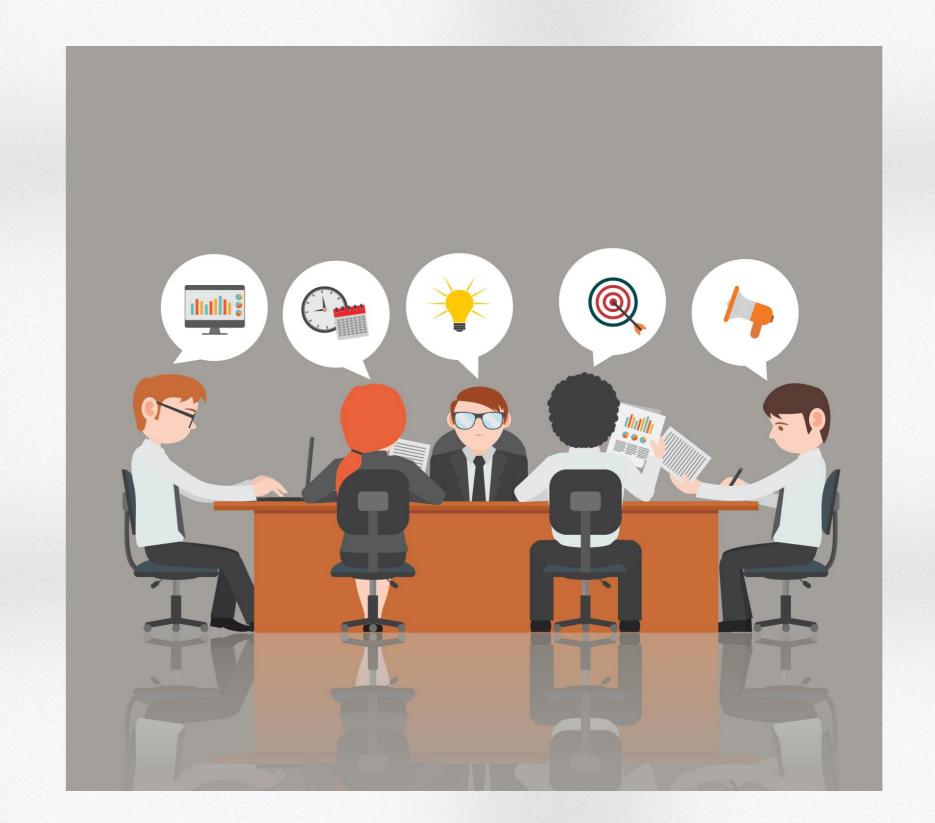


- There is some really bad training out there.
- Training is sometimes done primarily to avoid legal liability
- Training is often done in a vacuum, not as part of a holistic harassment prevention effort.



Effective Training

- Compliance training is critical.
- Effective compliance training has certain essential components.
- There are other types of effective training worth exploring.



Compliance training is not training to change your mind, it's training to keep your job."

-Jonathan Segal, Select Task Force Member

Good Compliance Training

- 1) Uses a live, interactive trainer
- 2) Provides examples tailored to the specific workplace
- 3) Explains unacceptable conduct, not illegal conduct
- 4) Provides information to change behaviors, not attitudes
- 5) Explains easy steps on how to report unwelcome conduct
- 6) Teaches managers how to respond to unacceptable conduct, including in hard situations

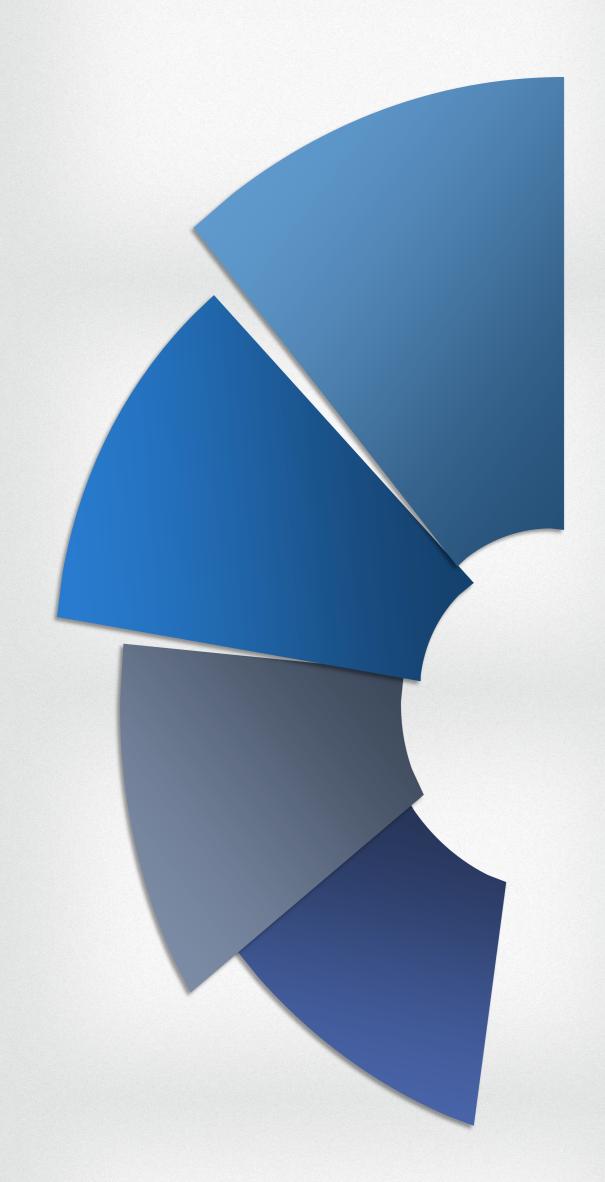
Checklist on Compliance Training

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

Structural Principles \square Supported at the highest levels
☐ Repeated and reinforced on a regular basis
☐ Provided to all employees at every level of the organization
☐ Conducted by qualified, live, and interactive trainers
☐ If live training is not feasible, designed to include active engagement by participants
☐ Routinely evaluated and modified as necessary
Content of Compliance Training for All Employees Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
☐ Includes examples that are tailored to the specific workplace and the specific workforce
☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
☐ Explains the consequences of engaging in conduct unacceptable in the workplace
Content of Compliance Training for Managers and First-line Supervisors Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

Other Trainings that Hold Promise....



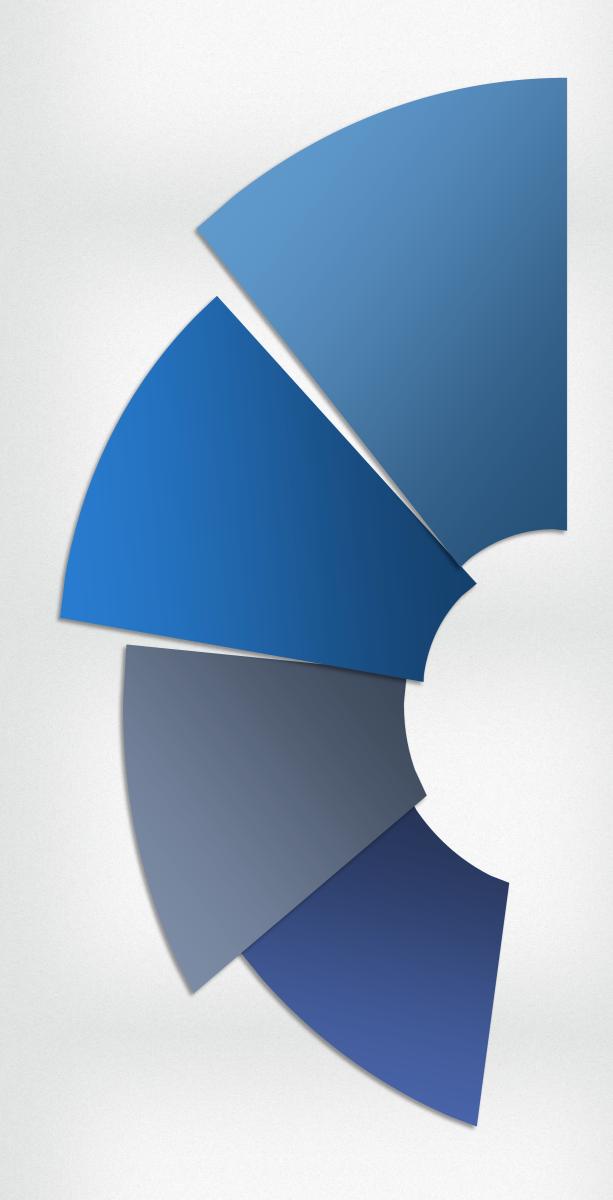
Workplace Civility Training

- Focused on creating a civil and respectful workplace for all.
- Not focused on status-based characteristics.
- Teaches employees to increase their self-awareness of respectful behavior.
- Provides employees with the skills to control their actions and reactions to people and situations.

"Workplace incivility might act as a sort of 'gateway drug' to more egregious forms of abuse, including illegal harassment."

-Professor Lilia Cortina, University of Michigan
Testimony to the Select Task Force on the Study of Workplace
Harassment

Bystander Intervention Training

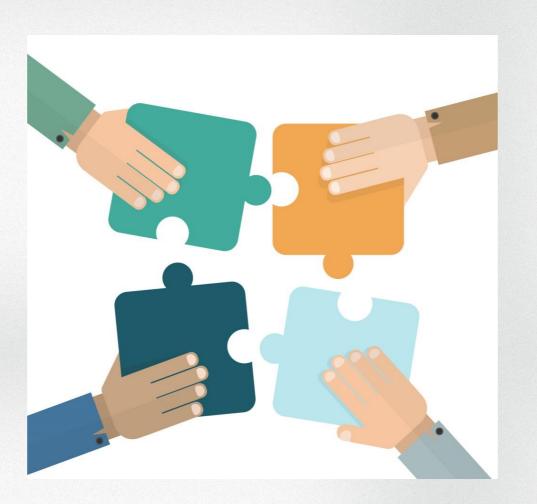


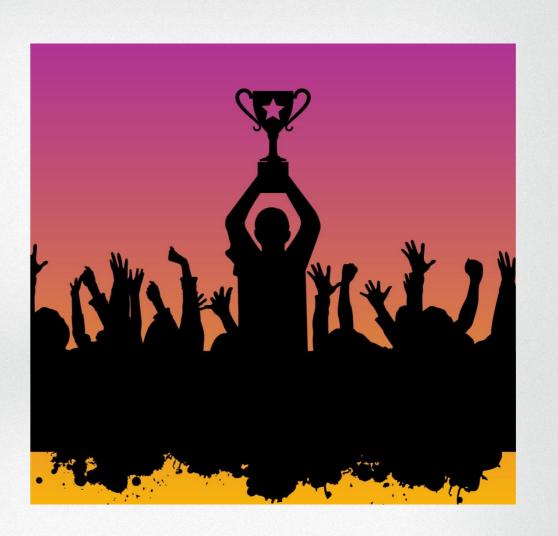
- Deployed frequently on college campuses to reduce sexual assault.
- Teaches students to recognize warning signs of sexual assault.
- Creates a sense of collective responsibility and confidence to intervene.
- Empowers students by giving them the realistic, actionable options for intervention.

What would this look like in the workplace?

- Unacceptable Behavior: Workers would know what behavior is unacceptable.
 (Compliance Training)
- Collective Responsibility: Workers would feel collectively responsible for having a harassment-free workplace
- Tools and Training: Workers would be given tools and training for intervention, specific to that workplace.
- Rewards, not Retaliation: Workers who stop harassment would be rewarded, not retaliated against.







EEOC Can Help Create Holistic Prevention Efforts

- EEOC agreements in the private sector (settlements, conciliations, & consent decrees) and the federal sector can require effective:
 - Policies
 - reporting and investigation procedures
 - compliance training.
- The **three checklists** for those aspects of a prevention effort, as well as the **checklist on leadership**, can be used in guiding agreements. Get them **here**

EEOC's Role in Encouraging New Training



- EEOC's agreements should always require effective compliance training.
- EEOC can also encourage employers to use workplace civility training and bystander intervention training.
- EEOC can also encourage employers to work with **researchers** to study their workplaces pre and post training **to see** what harassment prevention efforts are effective.

One Final Big Idea

An It's on Us campaign in the workplace.



It's On Us Campaign



- It's On US is an awareness campaign aimed at ending sexual assault on college campuses
- About 400,000 people have taken the <u>It's On Us pledge</u> and students have hosted almost 2,000 events on over 500 college campuses.
- The campaign has 95 partners, including businesses, non-profit organizations, and sports organizations.



IT'S ON US - INTHE WORKPLACE



EEOC wants to act as a catalyst to help launch an "It's on Us" campaign in the workplace.

Questions and Comments?





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Washington, D.C. 20507

CHART OF RISK FACTORS FOR HARASSMENT AND RESPONSIVE STRATEGIES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment* Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.	
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (e.g., team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.		
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single- sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.	
Cultural and language differences in the workplace Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities		Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations	

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*	
		Language and linguistic characteristics can play a role in harassment.	among and within work groups.	
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events-national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.	
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.	
Workplaces with	Executives or senior managers	Management is often reluctant to	Apply workplace rules	

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*	
"high value" employees	Employees with high value (actual or perceived) to the employer, <i>e.g.</i> , the "rainmaking" partner or the prized, grant-winning researcher	jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).	
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, <i>e.g.</i> , administrative support staff, nurses, janitors, etc. Gendered power disparities (<i>e.g.</i> , most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.	
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.	
Workplaces where work is monotonous or tasks are low- intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations	

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*	
			among and within work groups with monotonous or low-intensity tasks.	
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (e.g., in person, on line) to share concerns.	
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.	
Decentralized workplaces	Corporate offices far removed physically and/or	Managers may feel (or may actually be) unaccountable for their behavior	Ensure that compliance training reaches all levels of the	

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*	
	organizationally from front-line employees or first-line supervisors	and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.	

Pro Bono Primer: Divorce & Family Law

Beatrice Leong, Esq. • 09.22.2018

Domestic Relations Law

Pro bono clinic often attract clients who are going through domestic strife.

Many of the people seeking Divorce/ Family Law advice have simple, uncomplicated issues.

Sometimes, they just want someone to hear their story.

How can you help them? Basic Domestic Relations Law

Overview

Matrimonial Law Actions

Versus

Family Law Related Petitions

What is the Difference?

Matrimonial Law

- Parties must be married
- Divorces are heard in Supreme Court
- Relief sought:
 - Dissolution of Marriage/Annulments
 - Custody of Children
 - Orders of Protection
 - Child/Spousal Support
 - Equitable Distribution
 - Prenupt Enforcement
- One Judge

Family Law

- Parties could be married or unmarried, or just related
- Cases in heard in Family
 Courts
- Relief Sought:
 - Custody/ Visitation of Children
 - Child/Spousal Support
 - Orders of Protection
 - ACS/ Neglect Cases
- Multiple Judges

Basic Divorce Law

Spousal Support and Equitable Distribution

Marriage

1. Are you married?

- a. There are extra legal rights and protections provided to a married person, versus a person having a child out of wedlock, or domestic partners such as boyfriends and girlfriends.*
 - i. Rights of Health Insurance
 - ii. Rights to gain access to Marital assets such as houses
 - iii. Rights to gain access to Premarital assets
 - iv. Rights to Retirement Accounts
 - v. Right to Remain in the Residence
 - vi. Right to Spousal Support
 - vii. Rights of Inheritance
- a. Was it civil or religious? There is an extra step for religious marriages.

Maintenance aka "Alimony" or "Spousal Support"

- 2. How many years have you been married? * It is important to determine the length of marriage. (In NY, there are guildlines for spousal support aka alimony or maintenance.)
- 2. Monied Spouse"- who earns a higher income?
- 2. Temporary Maintenance v. Post Divorce Maintenance (ASK FOR SUPPORT IMMEDIATELY, DON'T WAIT- File a Support Petition in Family Court if Necessary)

LENGTH OF MARRIAGE	PERCENT OF THE LENGTH OF MARRIAGE FOR WHICH MAINTENANCE WILL BE PAYABLE
0-15 years (Short Marriage)	15-30%
More than 15-20 Years	30%-40%
More than 20 Years	35%-50%

Spousal Support Cont'd

- Spousal Support not always guaranteed
- 14 Factors that determine whether someone gets maintenance. Common Factors:
 - Age/ Health of Spouse
 - Do they have education?
 - How many years have they been out of the work force?
 - Separate or Joint financial situation?
 - How many years separated? C
 - Standard of Living?
- In pro bono cases- many of the times both spouses work, and are of lower income, so while there
 may be a maintenance award, many times spouses will waive it

Equitable Distribution

- 5. Do you own any property or businesses?
 - Real Property- Houses
 - Businesses Together
 - Savings Accounts
 - Retirement Accounts
 - o Personal Items- Cars, Jewelry, Boats, Art
- 6. Where the assets marital or premarital?
 - Separate Property (Inheritance, gifts to one spouse, any retirements or property gained before marriage
 - Marital Property (starts at Date of Marriage)
 - Commingled or Transmuted Property (Was separate and became marital)
 - Businesses- Who Contributed To the Business?

New Tax Laws for 2018

- Current administration passed new tax laws in December 2017, which affect future divorces
- In the past, monied spouse could take tax deduction if paying alimony or maintenance. Maintenance recipient would only pay taxes up to the amount that wasn't itemized
- Practitioners, Judges and tax experts are unsure how this will affect real life scenarios
- Provisions expire in 2025 for individuals only

Rush to Divorce?

- No longer tax deductible for agreements entered into after December 31, 2018.
- For modifications they will need to specify if new law is to apply.
- Incentive to finalize agreements in 2018 or not depending on which side you are on.

IMPACT ON AFTER-TAX INCOME: WITH ALIMONY TAX DEDUCTION VS. NO ALIMONY TAX DEDUCTION (2019+)

	2018 - Single - No Kids			2019 - Single - No Kids		
Description	Recipient	Payor	Total	Recipient	Payor	Total
Magas		600,000	600,000		600 000	600,000
Wages	-	600,000	600,000	-	600,000	600,000
Alimony	180,000	(180,000)	35	5		-
Income	180,000	420,000	600,000	-	600,000	600,000
Standard Deduction	(12,000)	(12,000)	(24,000)	5	(12,000)	(12,000)
Taxable Income	168,000	408,000	576,000	-	588,000	588,000
Less Fed Tax	(35,449)	(118,489)	(153,938)	7	(183,249)	(183,249)
Non-Taxable Income	00: 48 = 20	10 48 10	0x 38 22	180,000	(180,000)	- 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1
After-Tax Income	132,551	289,511	422,062	180,000	224,751	404,751

31% 69% 44% 56%

Results:

Higher Total Taxes Paid: 29,311

Gain for Recipient: 47,449

Loss to Payor: (64,760)

Lee D. Sanderson, CPA, ABV, CFF, CVA, MST

VALUATION FORENSICS, LLC

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212-400-3923

Miscellaneous

- 7. Does Fault Matter? No- the Courts do not care about why the couple is divorcing. Since 2010, NY is No- Fault State.
 - a. Infidelity- Only matters if you're spending money on the mistress and not the kids/ family
 - b. Abuse- Judges will put some weight on domestic violence for visitation/ safety issues, but does not affect financial issues unless its is "excessive"

8. Who stays at marital home?

- a. Both parties are allowed to remain until the divorce is over.
- b. If there are a physical danger, parties can apply for Order or Protection ("Exclusive Use & Occupancy")

Prenuptial Agreements

- Think of it as a plan for marriage, or insurance against divorce
- Over 50% of marriages end in divorce
- Better to draft and negotiate when couples are happy and fair to each other,
 than risk a contentious divorce
- Protections for assets acquired before marriage
- Protection for people in second marriages for their children
- Must be fair to both parties, or else courts will not enforce!

Custody and Visitation

Parental Rights to Children

How does Custody get Decided?

1. Factors that Determine "Custody"

- a. Courts looks to "Best Interest of Children" Standard, not so much the law.
- Factors include: totality of circumstances, primary caretaker, stability of residence, job, finances, quality of home environment, siblings, other relatives/support. Is one parent Alienating the other? (Ability to foster positive relationship)
- c. <u>Case Law: (Friederwitzer, Eschbach)</u>

How does Custody get Decided?

2. Most times, the parents settle custody

- a. Joint Legal Custody/ Joint Physical (Residential) Custody.
 - Parents will share and consult each other on Decision Making on Healthcare, Education and Religion.
 - ii. Children can live a majority of time with one parents, and visit with the other, or share time 50/50 at two homes.

b. Sole Legal Custody

- One parent makes major decisions if the parties hate each other & can't communicate
- ii. Still have vacation and access to children

How does Custody get Decided?

3. What happens if Parents CANNOT AGREE?

- a. The Judge will Depend on Third Parties
- b. Attorney for the Child(ren) are assigned
- c. Forensics (need for, costs, reliability, who to choose, psych v MSW)
- d. Custody Trial if Necessary
 - Witnesses (Grandparents, Teachers, Doctors)
 - ii. Attorney for Child Will get to question
 - iii. Forensic Professionals will be called as Experts

Basic Child Support Law

CSSA Guildlines

Child Support

- 2. Do you have children together?
 - 1) Basic amount of child support, from joint income of parents
 One Child- 17%, Two Children- 25%, Three Children- 29%, Four Children- 31%, Five Children- 35% or more of combined parental income
- 2) The guidelines for child support fall under CHILD SUPPORT STANDARDS ACT, "CSSA" and "Cassano" caselaw.
 - a) EXAMPLE: Single Income Family, Dad is Doctor, Mom is Stay at Home Mom. Two kids. Dad earns \$150,000 = Adjusted Gross Income \$135,000 x 25% = \$33,750/yr /12 = \$2,800/mo (bi-wkly \$1,300) child support (if he is not paying maintenance to mom.*)
 - a) Add-ons (some are discretionary- extracurricular, luxuries like private school. Others are mandatory- child care, out of pocket medical).

Child Support Cont'd

- c) Child Support Cap- \$143,000. For people earning combined income over \$143k, the child support amount above are discretionary, and will likely be granted.
- c) Shared custody rule "Bast v. Rossoff" Does the amount of time spent with children change your support obligation amount? NO. (Example- dad is monied spouse. Children spend almost half the parenting time with him, spending overnights with him. Does he pay less? NO. He may get credits but his support should still be based on his income.)
- c) No child support until dad moves out!
- c) Credit for mortgage, utilities. (food, clothing, shelter)\
- Graby Mom receiving \$1,000/mo SSI, not credited to H's obligation. (resources of the children)

Child Support Cont'd

- 4. How old is/ are your child(ren)?
 - NYS requires child support until 21, 22 if child is enrolled in college
 - Child Support end
 - If Child marries
 - If child joins the military
 - If child does not go to school and gets full time job
 - If child moves away from the Custodial Parent
 - Death

Pro Bono Clinic

Common Pro Bono Topics

Matrimonial Law

- Reviewing a Settlement Agreement
- My spouse is misbehaving.What are my options?
- I've been served with divorce papers
- Where will I live after the divorce?
- My spouse is not following our agreement

Family Law

- Baby's mom won't let me see the kids
- My spouse/ child/ grandchild has threatened me physically
- I'm not getting child support

How to Identity the Issues

Intake issues – Identification of Children & Money

What should client bring to intake interview/ consultation?

- Any petitions, agreements or documents from Court.
- Any financial documents (leases, deeds, taxes, 401k statements, bank statements, order of the Court)
- Take Information upfront (good intake questionnaire, notes for the consult)
- Most issues boil down to: CHILDREN AND MONEY in Family Law.

After the Intake and Identifying Issues

- 1. Determine if this is a Family Law issue (sometimes people will need not need Family Lawyers, but criminal, Wills & Estates, Guardianship, Real Estate) Refer out
- 2. Many times, people want their Settlement Agreements reviewed. There is certain language that is required by Domestic Relations Law or else it is invalidate
- 3. Sometimes people just want someone to hear their sob story

Attorneys & Advocates

- 18B Lawyers:
 - They are assigned to lower income peoples who are litigating custody, or facing jail time for failing to pay child support. Cannot negotiation equitable distribution, child or spousal support

- Non- Profit Organizations*
 - Legal Services NY
 - New York Legal Assistance Group
 - Pro Bono Programs
 - Bar Associations

Beatrice Leong, Esq

Beatrice Leong received her law degree from the University of Connecticut School of Law, and her bachelors from SUNY Binghamton, where she doubled majored in English Literature & Rhetoric and Asian & Asian American Studies. At UConn Law, she was a volunteer at the local Family Court, helping low income persons obtain pro se divorces, requests for child support and other family matters. She was also elected as President of two student clubs, the UConn Law chapter of Asian Pacific American Law Student Association and the Arts, Entertainment and Sports Law Society. She has practiced exclusively in the field of divorce and family law since her admittance to the New York State bar. She is an associate attorney at Parmet & Zhou LLC, a firm that specializes in Matrimonial and Family Law.

Beatrice is an active member of AABANY and frequently volunteers at pro bono events. She serves as a Co-Chair of the Government Service and Public Interest Committee of AABANY.

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FC18 Written Materials Name of the Panel: Rachel Ji-Young Yoo, Esq.

1. Recent notable USCIS new policy memo

- USCIS issues revised final guidance on unlawful presence for students and exchange visitors (8/9/2018)
- USCIS updates policy guidance for certain requests for evidence and notice if intent to deny (7/13/2018)
- 2. How to check the status of my current case from the USCIS website (visa bulletin, priority date and cut-off dates)
- Usage of Progress Time and USCIS website to check my current case status
- Information about visa bulletin, priority date and cut-off dates
- 3. Child Status Protection Act (CSPA)-relating to the "aging-out"
- The purpose of this rule establishment.
- What is the CSPA: CSPA provides a method for calculating a person's age to see if they meet the definition of a child for immigration purposes. The calculated age is the child's "CSPA age." This allows some people to remain classified as children beyond their 21st birthday. However, CSPA does not change the requirement that you must be unmarried in order to remain eligible for classification as a child.
- 4. Asylum related (new policy related or recent courts decisions)
- What is the criteria to be qualified as an Asylum applicant
- Asylum Progress: from STEP one to STEP seven
- 5. Affidavit of Support- what is the HHS Poverty Guidelines for Affidavit of Support , joint sponsor(s)
- What is a Joint Sponsor?
- What is an HHS Poverty Guidelines for Affidavit of Support (PDF provided)
- 6. Investment source of funds/ source of paths
- Source of funds'legal requirement and the standard of evidence
- Source of Path's legal requirement
- 7. Eligibility for citizenship (Citizenship Through Naturalization)
- You have been a permanent resident for at least 5 years and meet all other eligibility requirements;

- You have been a permanent resident for 3 years or more and meet all eligibility requirements to file as a spouse of a U.S. citizen;
- You have qualifying service in the U.S. armed forces and meet all other eligibility requirements;
 or
- Your child may qualify for naturalization if you are a U.S. citizen, the child was born outside the U.S., the child is currently residing outside the U.S., and all other eligibility requirements are met.

8. U visa nonimmigrant- victims of criminal activity

- Qualifying criminal activities
- Applying for a Green Card
- The purpose of this visa establishment

Asian American Bar Association of New York – Diversity and Inclusion and What it Means to be Multicultural



Fall Conference at Fordham Law School Presented by Judy Ng, SVP & Director of Asian Segment September 22, 2018



Diversity and Inclusion

- S Diversity means understanding that each individual is unique, and recognizing our individual differences, including but not limited to race, ethnicity, gender, sexual orientation, age, social status and physical abilities etc.
- § Inclusion, while closely related, is a separate concept from diversity.
- S Diversity and inclusion should be an integral part of an organization's mission, strategies and practices to support a diverse work environment in which all individuals are treated fairly and respectfully, have equal access to opportunities and resources, and can contribute fully to the organization's success



Diversity & Inclusion Importance

- Secruiting from a diverse pool of candidates means a more qualified workforce.
- § A diverse and inclusive workforce helps businesses avoid employee turnover costs.
- **§** Diversity fosters a more creative and innovative workforce.
- Solversity in the workplace is necessary to create a competitive economy in a globalized world
- § Employees are more successful when they feel that they can use their unique strengths and skills everyday. Also, when companies are more inclusive their diverse employees feel a sense of belonging which is extremely important in building trust and productiveness



Diversity @ Flushing Bank

In 1929, Flushing Bank opened its first branch in Flushing New York. Today, we have 18 branches in Queens, Manhattan, Brooklyn and Long Island to serve multicultural markets.

Small enough to know you. Large enough to help you.

This means that we offer the same comprehensive set of products and services that the large commercial banks have, but we take the time to know our customers and provide the personalized attention

Focus on multicultural markets

Surrounding our branch franchise by building internal knowledge and capabilities to serve specialized needs, develop the appropriate product set, and become involved in ethnic communities.

As a community-focused organization that has distinguished itself as a leader in serving multicultural neighborhoods, we are proud to sponsor cultural and charitable events throughout the areas.



Diversity @ Flushing Bank

Strategic Positioning

- § Recognize the importance of our role in the community.
- Sestablish an Asian Advisory Board made up of civic leaders and prominent members of the community to keep us connected and guide our support in Asian Market
- SEmbrace the ethnic and cultural diversity and variety of business that make us so unique
- §Establish a reputation as a community-oriented financial services provider for a diverse set of individual, business, and real estate customers.
- **§**Provide volunteer support to activities celebrating the culture and heritage of our neighborhood
- **§**Contributed millions of dollars to charitable organizations that make a difference in our community



Diversity @ Flushing Bank

Human Resources

- **§**Our employees represent a wide range of cultures, and collectively, speak over 20 different languages.
- §Provide access to leadership and training opportunities for all level of employees
- §Ensure that diverse candidates are eligible and qualified for promotions
- **§**Offer employees a feeling of belonging and a safe place to discuss sensitive issues
- Support employee participation in a variety of cultural and community events.



Professional Background

Early Stage in New York

I started my banking career at HSBC Bank in December 1978 in Hong Kong. In April 1989, I arrived in New York with my family. Due to my language barrier, I handed out my resume in Chinatown and got a job as a head teller at Chase in May 1989. In April 1991, I returned to HSBC Bank of New York as an Operation Assistant. In November 1992, I was promoted to a branch manager of a branch in Flushing.

Next Step in my Career

In January 2004, I was promoted to be a District Sales Leader and Premier Segment Leader of Queens & Bronx District in HSBC Bank.

In October 2007, I transferred to Training Department as the Training Manager of Metro New York. Due to relocation of training department, I left HSBC in January 2009

Worked in a New Field

I worked at a menswear company as a Chief Operating Officer from 2011 to 2013



Role @ Flushing Bank

- In 2014, I joined Flushing Bank as an Area Manager of Asian Market to oversee 4 branches in Flushing.
- § Improved awareness of the Flushing Bank brand in the Asian community by leveraging my relationships with members of the community
 - Sponsorship and participation in various community activities
 - Established a team to participate the Dragon Boat races at Flushing Meadow Park
- §In 2016, I was promoted as the Area Manager of Queens overseeing all 9 branches in Queens.
- Most recently, I was promoted to a new role as Director of Asian Segment to collaborate across the organization to focus on building relationships with the Asian community in the markets we serve.
- §Flushing Bank has demonstrated their commitment to diversity in expanding my role in the organization and their recognition of my contributions.



Management Practices

Identify and Build a Diverse Team

- § Proactively know people of varying backgrounds through social and business activities
- § Engage with diverse talent on an ongoing basis long before the need arises to pull new people into the team

Be Flexible and Lead by Example

- § Flexible work arrangement by offering a part-time job to work with their household or school schedule
- **S** Ensure employees understand that taking advantage of flexible work arrangements will not reflect on them negatively and they will have the opportunity to convert to full-time in the future.

Mentoring and Coaching

Second the support and guidance to my team to achieve their career goals and be successful



Challenges

Challenges

- § Generational Turnover need to address a looming retirement crisis of Baby Boomer Generation by pulling in talent from Millennial Generation
- S Cultural Evolution people with different lifestyles and different backgrounds can impact the corporate culture.
- S Widespread Immigration ability to communicate in English can effect relationships with the colleagues and customers
- § Emerging Markets creates competitive job market to retain talents
- S Advancing Technology employees must be able to adapt to the rapid pace of technology



Conclusion

- Solversity and inclusion will continue to dominate the discussion across the globe as the makeup of the workforce changes significantly.
- § In order for businesses and leaders to maintain talent continuity and broaden their appeal in various market segments, they must develop a clearer understanding of diversity and inclusion and how those concepts fit together.
- § An inclusive workplace that understands the needs of their employees, making them feel valued and respected has a significant and positive impact on employee retention.
- It also has a positive impact on relationships with suppliers and customers.



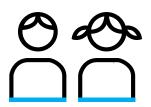
UNDERSTANDING THE MULTICULTURAL CONSUMERS

Mariko S. Carpenter Vice President, Strategic Community Alliances September 2018

Prepared for:
Asian American Bar Association of NY

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THERE ARE OVER 120 MILLION MULTICULTURAL AMERICANS



51%

of children under age 11 are <u>multicultural</u>



42%

of millennials are multicultural

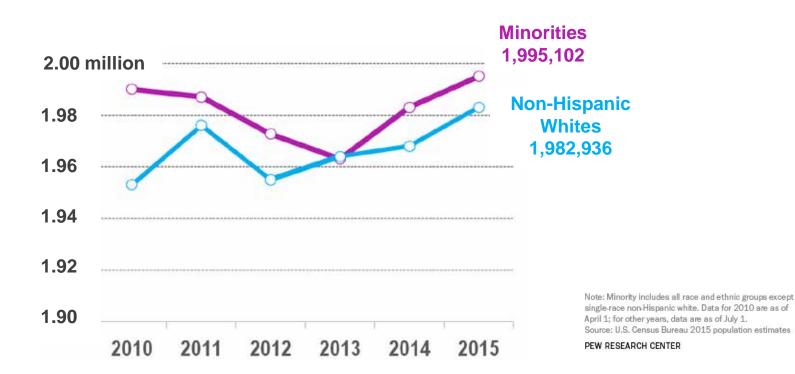


21 of top 25

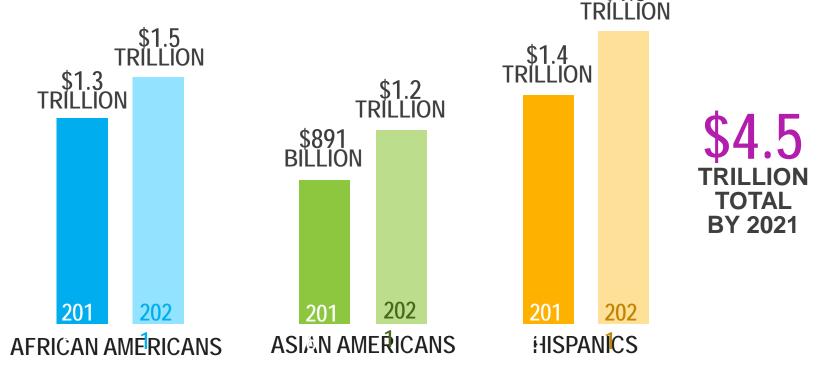
most populated counties in the U.S. are multicultural

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MULTICULTURAL NEWBORNS SURPASS NON-HISPANIC WHITES



MULTICULTURAL CONSUMERS INFLUENCE TREMENDOUS BUYING POWER



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AMERICANS WANT MULTICULTURAL OPTIONS



49%

of Americans say, "I would shop more at a retailer that offers a wider selection of multicultural products"



32%

of Americans would pay more for a brand that understands multicultural needs



Almost 1 in 3

Americans consume foods that contain multicultural flavors at least once a week

THE LARGEST AND FASTEST GROWING HEALTHY PRODUCTS ARE MULTICULTURAL

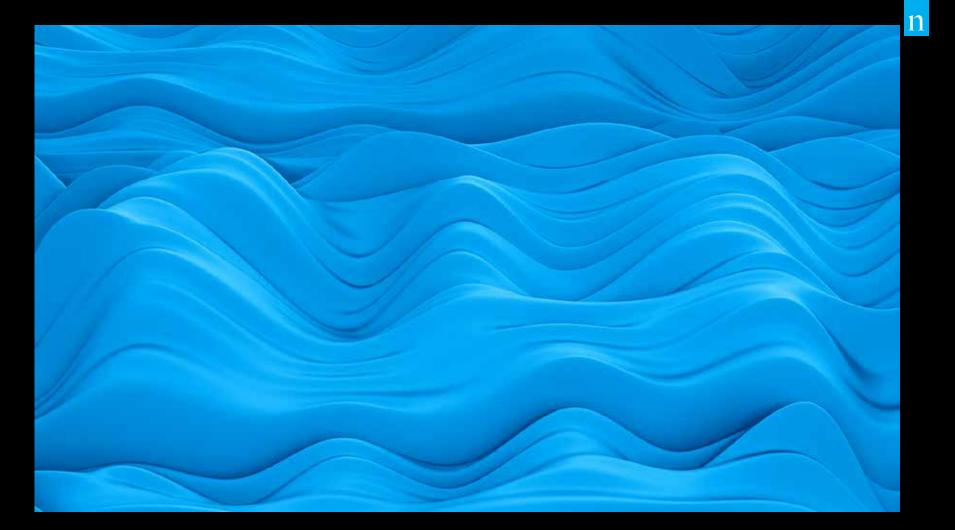
Avocado: +10%

• Tofu: +18%

• Kombucha: +23%

• Hummus: +19%



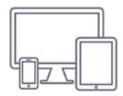


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ASIAN AMERICANS | POWERFUL AND INFLUENTIAL CONSUMERS



ASIAN AMERICANS INFLUENCE
BUYING POWER
THAT IS GROWING
THE FASTEST

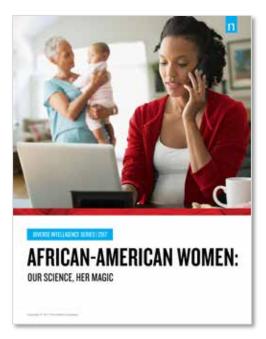


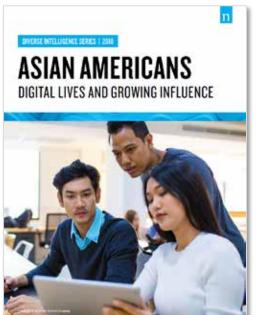
ASIAN AMERICANS ARE LEADERS IN DIGITAL



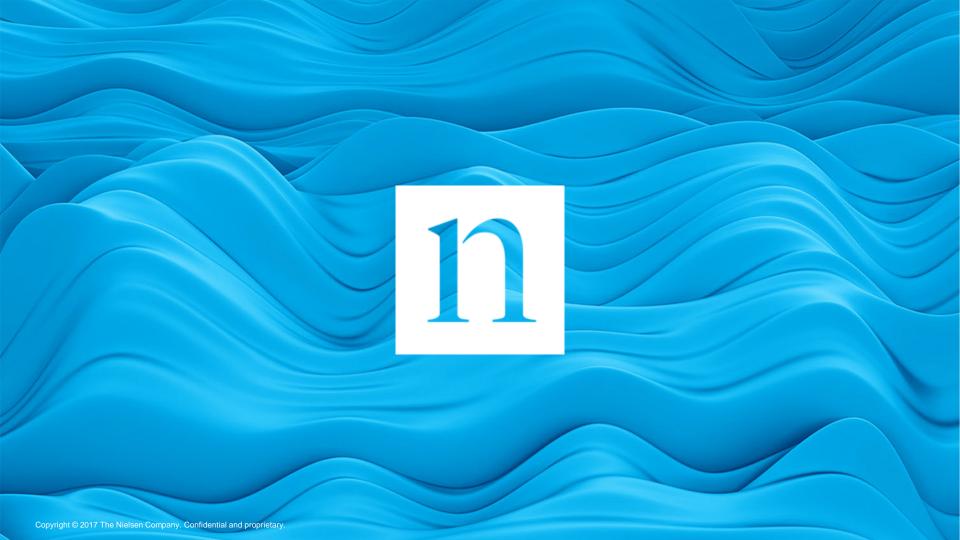
GARNER
MAINSTREAM
APPEAL

NIELSEN DIVERSE INTELLIGENCE SERIES AVAILABLE FOR DOWNLOAD: WWW.NIELSEN.COM











Diversity & Inclusion in BIGLAW: What's Being Done & What You Can do to Help

AABANY Conference 2018

Asker A. Saeed, Director of Diversity & Inclusion, Fried Frank Simone Wilson-Brito, Partner, McCarter & English

September 22, 2018



Agenda

- Current and historical data (in-house and law firms)
- what's being done
- What you can do to help



BIGLAW

Partners	2017		1997
Female	23%		14%
Minority	8%		3%
Female Minority	3%	1.5% (2006)	

Associates	2017	2009	1997
Female	46%	46%	40%
Minority	23%	20%	11%
Female Minority	13%	9% (2006)	

Source: 2017-2018 NALP Directory of Legal Employers



BIGLAW (Minorities broken down)

Partners	2017	1997
Black	1.83%	1.08%
Asian	3.31%	0.94%
Hispanic	2.40%	0.85%

Associates	2017	2009	1997
Black	4.28%	4.66%	3.77%
Asian	11.40%	9.28%	4.57%
Hispanic	4.57%	3.90%	2.57%

Source: 2017-2018 NALP Directory of Legal Employers



Demographics of the American Legal Pipeline

Demographic Markers	US Population 2016	Bachelor's Degrees Conferred 2014-15	ABA Applicants 2016	ABA Matriculants 2016	JD Degreed Conferred 2015-16	Lawyers 2015	Law Firm Associates 2017	Law Firm Partners 2017	First Job in Private Practice Class of 2016
Male	49.2%	42.9%	47.4%	48.4%	51.28%	65.5%	54.5%	77.3%	52.6%
Female	50.8%	57.1%	52.2%	51.1%	48.72%	34.5%	45.5%	22.7%	47.4%
White	61.3%	63.9%	61.5%	68.4%	62.8%	89%	75.2%	90.5%	72.9%
Black	12.4%	10.2%	15.1%	10.2%	8.1%	4.6%	4.3%	1.8%	5.7%
Hispanic	17.8%	11.5%	13.0%	11.5%	10.9%	5.1%	4.6%	2.4%	9.4%
Asian/Pacific Islander	5.7%	7.1%	10.8%	10.3%	6.5%	4.8%	11.4%	3.3%	9.0%
American Indian/Alaskan Native	0.7%	0.5%	2.2%	2.1%	0.7%		0.2%	0.1%	0.3%
Source	1*	2*	3*	4*	5*	6*	7	8	9

^{*}NALP Presentation to CT Legal Conference 06.11.2018 (The first six columns of this table were originally prepared by the Law School Admission Council) Sources:

- US Census Bureau, Population Division, 2016
- National Center for Education Statistics' Digest of Education Statistics: 2016; Table 322.20
- Law School Admission Council, National Decision Profile
- Law School Admission Council, National Decision Profile
- American Bar Association

- - Bureau of Labor Statistics, 2015 Current Population Survey 7. NALP Directory of Legal Employers 2016-2017
 - 8. NALP Directory of Legal Employers 2016-2017
 - 9. NALP Jobs & JDs. Class of 2016

Why do it?



WE WANT TO BE THE BEST

Not "it's the right thing to do"

Not "we have to keep up with the times"

Not "our clients expect us to do it"

What's Being Done

- n Structure → Less "feel good" more Business Operation
 - S Putting someone in Charge
 - Firms are recognizing that "everyone is responsible" doesn't work
 - D&I Professional with a title and track record; not just someone with an interest
 - Dedicated Budget
 - More defined initiative
 - New focus on systems/procedures/operational customs (in addition to winning hearts/minds) designed to make the organization the best organization it can be
 - Much more strategic approach (SMART goals)
- Focus on Inclusion; Inclusion → Diversity

What's Being Done

- In order to achieve diversity, law firms need to focus on being Inclusive. Law firms can be more inclusive by taking a multi-cultural approach to how they conduct business.
- It is not just enough to recruit diverse talent, but you also have to have a firm culture which communicates to all attorneys that they have a place at this firm.
- of the differences. Multiculturalism is the next step in advancing inclusion in the workplace. It forces you to look at the system of advantages a person or group may have because of race, gender, sexual orientation and social class and to realize that those categories come with stereotypes, power and privileges, and you then use that information to level the playing field.
- You cannot have an inclusive environment if you do not understand the power and privileges at play for different people.

8

What's Being Done

- People will stay where there feel that they belong. If a person feels that his/her interests and are acknowledged, valued and represented, that person will most likely stay at the firm for the long term.
- In order to create an inclusive firm culture, buy-in must come from the top, but it also has to be trickle down to everyone. It may start at the top but it cannot stay there. Everyone has a personal responsibility to try and eliminate bias. This is done with training and education. The elimination of bias has to be intentional.
- There are a few things that McCarter is currently doing or is in the process of implementing to try and be a more inclusive firm for attorneys of all different backgrounds.
 - 1. Diversity E-mails. E-mails that we circulate monthly giving a brief description of cultural events happening that month.
 - KWAANZA
 - Juneteenth
 - § LGBTQ+ History Month
 - Spring Festival
 - Loving Day
 - Polish American History Month

FRIED FRANK McCARTER &ENGLISH

What's Being Done

"Xinnian Kuaile" (pronounced "sshin-nyen kwhy-luh") means "Happy New Year."

Chinese New Year is also known as the Spring Festival, which is the literal translation of the modern Chinese name. It is a national holiday in China, where government offices, schools, universities and many companies are closed during the period from Chinese New Year has seventh day of the first hunar month in the Chinese calendar. The dates for Chinese New Year change every year because they are based on the Chinese lunar calendar, which is associated with the movement of the moon, and not the Gregorian calendar. This year, the fentival begins today February 16. It is a time for families to come together and wish each other peace and prosperity. The holiday is celebrated all over the world, with one of the largest celebrations outside Asia occurring in San Francisco, California. The nineteenth Chinatown Lunar New Year Parade and Festival will be held on Sunday. February 25.

Traditionally, the Spring Festival was held to bonor household and heavenly deities as well as ancestors, to celebrate and relax after a year of farm-work (when most of the people were farmens), and to wish for a good harvest in the new year. The holiday has now evolved to celebrating tha start of a new business year and wishing for profits and success in various vocations, and it remains the most important social and economic holiday in China. The Spring Festival is a time to let go of the past and to prepare for the future. Therefore, many people clean their homes and put up red posters with poesic verses and Chinese New Year pictures on their walls, windows and doors in order to sweep away any III fortune and to wish for good incoming luck and prosperity. Popular themes for these decorations include good fortune, happiness, wealth and/or longevity, which are typically shown in the literal Chinese characters.

The first day of the Chinese New Year falls on the new moon between January 21 and February 20 of the modern Western calendar. The festivities usually begin with a reunion dinner with the extended family on Chinese New Year's Eve and conclude with a Lantern Festival, which falls on the fifteenth day of the first lunar month. During this time, business life comes almost to a halt and family is the primary focus, with many people using the time to visit their families and friends. Other activities include lighting firecrackers, lion dancing, enjoying dumplings (nostly in the northern region) and the giving of money in red-paper envelopes (called hong bus') to children by the older or series family members.

Each Chinese New Year is characterized by one of the twelve animals that appear in the Chinese zodiac (every twelve-year period is considered a lunar cycle); this year is the year of the Dog, which occupies the eleventh position in the twelve-year cycle. Recent years of the Dog include 1910 1922, 1934, 1946, 1958, 1970, 1982, 1994 and 2006. The next year of the Dog will be 2030. Each Chinese zodiac signs is associated with an element: gold (metal), wood, water, fire and earth. Accordingly, there are five types of Dogs and 2018 is associated with the element of earth. It is theorized that a person's characteristics are decided by their birth year's rediac sign and element, accordingly, Dogs bom in 2018 are said to be communicative, serious and the work.

Type of Dog	Year of Birth	Characteristics	
Gold	1910, 1970	Conservative, desirable, cautious and always ready to help others	
Water	1922, 1982	Brave and self-centered, even seemingly selfish; well-versed in dealing with financial issues	
Wood	1934, 1994	Sincere, reliable, considerate, understanding and patient	
Fire	1946, 2006	Intelligent, hardworking and sincere	
Earth	1958, 2018	Communicative, serious and responsible in work	

The Diversity & Inclusion Committee wishes each participant a very happy and prosperous Chinese New Year!



What's Being Done

Kwanzaa was created 50 years ago during a very dark period of Los Angeles' History. African-Americans were facing high levels of poverty and unemployment, poor living conditions, segregation and growing racial tension with the police. The idea for the festival was born after the Watts Riots of the 1965 in Los Angeles, which caused many in the African-American community to believe that if there was going to be lasting change, that the help would have to come from within the community by focusing on self-awareness and pride (For more information on the events behind the creation of Kwanzaa please read the following article: http://time.com/4608466/kwanzaa-50-years-history.) As a result, Kwanzaa was born.

Kwanzaa is an African American and Pan-African cultural tradition which was created in 1966. Kwanzaa comes from the Swahili phrase "matunda ya kwanza," which translates as "first fruits of harvest." Kwanzaa reflects African traditions and practices in its reaffirmation of the importance of self-awareness, community and culture. The celebration that has its roots in the Black Nationalist Movement of the 1960s and was created to be the first uniquely African-American holiday. It was established as a means to help African-Americans reconnect with their African cultural and historical heritage. Kwanzaa is a week-long celebration from December 26" through January 1", during which these 7 principles of African culture are recognized: (1) Umoja (unity): To strive for and to maintain unity in the family, community, nation, and race; (2) Kujichagulia (self-determination): To define oneself and find one's unique voice in the world; (3) Ujima (collective work and responsibility): To cooperate in community building and problem solving; (4) Ujamaa (cooperation): To build and sustain businesses from which the community as a whole profits; (5) Nia (purpose): To collectively strive towards cultural unity based on tradition; (6) Kuumba (creativity): To do always as much as we can, in the way we can, in order to leave our community more beautiful and beneficial than we inherited it; and (7) Imani (faith): To believe with all our hearts in our people, our parents, our leaders, and the righteousness and victory of our struggle.

In addition to recognizing the seven principles, the Kwanzaa observance also recognizes cultural linkages to Africa through the use of colors and cultural artifacts. The colors of Kwanzaa are red, green, and black. A mat (called a mkeka) is laid on a table and decorated with 7 candles representing the 7 principles and one is lit on each day of Kwanzaa. Ears of corn are placed on the mkeka, along with a unity cup (called a kikombe cha umoja) for pouring libations in honor of the ancestors. The mkeka is also decorated with beautiful art and other representations of African and African Diaspora cultures. The celebration culminates in a feast and gift-giving.

The Diversity Committee of McCarter & English is proud to recognize this cultural tradition in the African-American community. We wish the participants a Happy Kwanzaa.



What's Being Done

2. Sharing Personal Experiences- You will not change what you don't understand. Helping the majority to understand what it what it means to be a minority in a law firm.

Prove-It-Again Bias. Studies show that women and men of color often need to provide more evidence of competence than majority men in order to be seen as equally competent. Studies have shown that when most people think of a lawyer, a white man comes to mind. Because people of color don't fit that image, they usually have to prove themselves. This usually plays out as in people of color being mistaken for administrative staff, custodial staff or court personnel.

- Panel discussion with current firm employees
- Mandatory implicit bias training for all attorneys
- Annual Diverse Associates Retreat

What's Being Done

- Systems/Procedures/Operational Customs
 - S Does the way you "do business" support your D&I goals?
 - Lawyers tend to look backward; need to look forward
 - § Pay particular attention to hiring, development, retention, promoting, and overall working environment
 - S Rooney Rule, Mansfield Rule
 - S Career development training/opportunities/programs
 - Sponsorship program



What you can do to Help

- First, be a great lawyer (skills, judgment, accountability = bulletproof)
- **§** Get in tune with your own biases
- If you see something, say something! (50/25 rule)
- Attend events (internally and externally); actually show up!
- Solution
 Join an ERG and actively participate
- S Challenge yourself to try something new
- Se mindful of impact on billable hour model

9/22/2018 AABANY FALL CONFERENCE

CLE PANEL: "DIVERSITY AND INCLUSION AND WHAT IT MEANS TO BE MULTICULTURAL"

SPONSORED BY THE AABANY REAL ESTATE COMMITTEE

PROGRAM CHAIR AND MODERATOR: Margaret T. Ling, Esq., Co-Chair of AABANY Real Estate Committee and Senior Counsel, Big Apple Abstract Corp.

PANEL SPEAKERS:

- (A)ASKER A. SAEED, ESQ., Director of Diversity and Inclusion, Fried, Frank, Harris, Shriver & Jacobson, LLP
- (B)SIMONE WILSON-BRITO, ESQ., Partner, McCarter & English, LLP (C)JUDY MEESEUNG NG, Senior Vice President and Director of Asian Segment, Flushing Bank
- (D) MARIKO S. CARPENTER, Vice President, Strategic Community Alliances, The Nielsen Company
- (E)ROCKWELL CHIN, ESQ., Asian American Law Fund of New York

TIME OUTLINE:10:45 AM- 12:15 PM

I.10:45 AM-11:15 AM: 30 MINS:

Asker Saaed and Simone Wilson Brito:

- (A) Defining the Concept and Relevance of Diversity and Inclusion in the Law Firm Workplace
- (B) What is meant by Multicultural within the context of Diversity and Inclusion.
- (C) Why is it important?
- (D) Explain your roles as Attorneys and Diversity and Inclusion Directors at your firms? Both internally and externally in regards to cultivating a client base.
- (E) Is the Corner Office Embracing it?
- (F) Challenges? War Stories? Success Stories?

II.11:15 AM -11:25 AM: 10 MINS:

Judy Ng:

- (A) Diversity and Inclusion within a Bank
- (B) Her role at Flushing Bank in implementing new programs directed at the Asian Segment
- (C) Strategic Positioning and role of Flushing Bank in the Asian Community

- (D) Human Resources and how they support and implement the Diversity and Inclusion Programs at Flushing Bank
- (E) Examples of Asian Community Outreach
- (F) Judy's Story and her experience
- (G) Judy's Management Practice to effectively make Diversity and Inclusion work
- (H) Challenges
- (I) Conclusion

III. 11:25 AM- 11:40 AM: 15 MINS

Rocky Chin:

- (A) Significance of the growth and change of Asian Demographics in our Community
- (B) Why Diversity and Inclusion is important in light of local, national news and current events
- (C) Rocky's experiences and the importance of getting involved and speaking up as Attorneys and being Advocates in our Asian Community
- (D) Diversity and Inclusion must be connected to "equity" and "fairness" and understanding what affirmative action means
- (E) Prioritizing Diversity and Inclusion within Law School Enrollment
- (F) How the Asian Attorneys at all levels can better promote the cause of Diversity and Inclusion

IV. 11:40AM-11:55 AM: 15 MINS

Mariko S. Carpenter:

- (A)Understanding the numbers on Multicultural Consumers in America
- (B) Multicultural Consumer Buying Power
- © Multicultural Consumer Options
- (D) Fastest Growing Healthy Products are Multicultural
- (E) Asian Americans are Powerful and Influential Consumers

V. Moderator Discussion with the Panel: 11:55AM-12:15 PM-20 mins

- (A) Is it conceivable to have the perfect organization/firm which follows the rules of D & I and embraces a multicultural environment?
- (B) Within the realm of the Global Business Environment, it is the priority to get the Multicultural Consumer/Client. EG: Getting the affluent Asian Client. How is this being accomplished?
- (C) Just hiring someone different is just not good enough. There needs to be more. Comments?
- (D) Just giving D & I webinars is not good enough to get everyone on the same page. What else needs to be done? Examples from your experiences.
- (E) Do you think you are succeeding in your D & I Initiatives?
- (F) What is concise definition of what it means to be "Multicultural"?

Access to Justice: Ensuring Language Access in the New York Courts

September 22, 2018 10:45 AM - 12:15 PM

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.



COURT INTERPRETER

Manual and Code of Ethics

Español

普通话

Русский

العربي

Kreyòl Ayisyen

广东话

Français

বাংলা



Polski



Ελληνικά

Shqip

हिन्दी

עברית

Português

Türkçe

Italiano

Tiếng Việt

日本語

Ўзбек

ਪੰਜਾਬੀ • پنجابی

Română

नेपाली

Tagalog

Hrvatski

Magyar

אידיש



NEW YORK STATE UNIFIED COURT SYSTEM

COURT INTERPRETER

Manual and Code of Ethics

2018

Introduction —

We are pleased to introduce the 2018 edition of the New York State Unified Court System's Court Interpreter Manual and Code of Ethics. The Manual provides information on the vital role that court interpreters perform in the administration of justice and the professional standards and ethical responsibilities they are obligated to maintain in carrying out their duties. It also provides information about the selection and employment of court interpreters.

The Unified Court System is committed to ensuring that court interpreting professionals provide fair and impartial assistance to the diverse, multilingual community we serve. It is our hope that this Manual, in setting forth the high standards of performance and ethics to which court interpreters are held, will help to promote that goal.

RONALD YOUNKINS

Executive Director
Office of Court Administration

BARRY CLARKE

Chief of Operations
Office of Court Administration

2018

Table of Contents —

Court Interpreters in the New York State Unified Court System	1
Court Interpreter Employees	1
Per Diem Independent Contractors	2
The Selection Process for Court Interpreters	
in the New York State Unified Court System	3
A. COURT INTERPRETER EMPLOYEES	3
Spanish Court Interpreters	2
Court Interpreter (non-Spanish), Senior Court Interpreter, and Principal Court Interprete	
American Sign Language Court Interpreter	
Promotional Opportunities	
B. PER DIEM COURT INTERPRETERS	5
Per Diem Court Interpreters-Spanish and Registry Languages	5
Per Diem Court Interpreters-Non-Registry Languages	5
Per Diem Court Interpreters-American Sign Language	6
Experience and References	6
Identifying Qualified and Available Court Interpreters	6
Court Interpreter Responsibilities	7
Modes of Court Interpreting	7
Accuracy	7
Impartiality	8
Confidentiality	8
Proficiency	
Professional Demeanor	8
Case Preparation	
Communication with the LEP, Deaf or Hard of Hearing Person	
Addressing the Court	
Language and/or Hearing Difficulties	
Errors	
Quality Control	
Venues	
The Courts.	11
Problem-Solving Courts and Other Settings	11

Remot	ote Interpreting		
	How It Works Who Provides the Service Benefits hallenges		
W			
Ве			
Challe			
	Linguistic		
	Fatigue Factor Dath		
	Interpreting Assignments		
	of Ethics of the Unified Court System		
Office	of Language Access	18	
Co	omplaints	18	
Te	esting	18	
Appen	dices	20	
^	Canons of Professional Responsibility for Court Interpreters	21	
В.	Judicial Bench Card		
C.	Take Away Card - English		
D.	Pattern Jury Instructions 1:87 General Instructions-Interpreters		
Ε.	Remote Interpreting Tip Sheet		
F.	Part 217-Rules of the Chief Adminstrative Judge		
G.	Administrative Order, June 17, 1992		
Н.	Oath	33	
I.	NYS Judicial Districts Map		
J.	Case Types.	35	
K.	Title Standard for Court Interpreter, JG-18	37	
L.	Title Standard for Court Interpreter Sign, JG-18	38	
M.	Title Standard for Senior Court Interpreter, JG-21	40	
N.	Title Standard for Principal Court Interpreter, JG-23	42	
Ο.	Part 50 - Rules of the Chief Judge	44	
P.	Dual Employment/Extra Service Approval Form:		
	Request for approval to serve with another state agency		
Q.	Per Diem Court Interpreter (Freelance) American Sign Language		
R.	Per Diem Court Interpreter (Freelance) Languages Other Than Spanish		
S.	DFM Bulletin 1202: Per Diem Court Interpreter Payments		
Т.	Budget Bulletin #1703, March 16, 2017		
U.	Per Diem Court Interpreter Invoice		
V.	Glossary of Legal Terms		
VV.	Glossary of Forensic Terms for Firearms.		

Court Interpreters in the New York State Unified Court System

The New York State Unified Court System (UCS) is committed to ensuring that legal proceedings conducted in New York's courts and court agencies are equally accessible to all persons regardless of an individual's ability to communicate effectively in the spoken English language. Court interpreters serve a fundamental role in the administration of justice by ensuring access to the courts for Limited English Proficient (LEP) and Deaf or Hard of Hearing persons.

The court system provides spoken language and American Sign Language (ASL) interpreters in proceedings for LEP persons and those who are Deaf or Hard of Hearing, <u>at no cost to the court user</u>. In all legal proceedings parties are provided with interpreters to ensure that they can fully participate. The New York State Courts obtain the services of interpreters in over one hundred languages as diverse as:

Amharic	Gujarati	Mixteco	Tibetan
Czech	Hungarian	Pashto	Twi
Farsi	Ibo	Tagalog	Uzbek
Fuzhou	K'iché	Tamil	Yiddish
Fulani	Mandinka	Thai	Yoruba

Court Interpreter Employees

In New York State court interpreters are employed in the following titles: Principal Court Interpreter, JG-23¹; Senior Court Interpreter, JG-21; Court Interpreter, JG-18; Court Interpreter (non-Spanish), JG-18², and Court Interpreter (ASL), JG-18. Interpreters may work full-time or part-time.

The title of Court Interpreter (Spanish) is a competitive class position that is primarily responsible for interpreting between English and Spanish in the courtroom and other settings. The title of Court Interpreter (non-Spanish), and Court Interpreter (ASL) (See Appendix K and Appendix L: Title Standard for Court Interpreter, and Title Standard Court Interpreter Sign), are non-competitive positions primarily responsible for interpreting between English and a spoken language other than Spanish, and (ASL), respectively. An interpreter employed in the non-competitive position cannot take promotional exams or request transfers to other courts. Court Interpreter employees may also assist LEP persons in filling out forms, and may perform clerical tasks such as filing or answering inquiries, and other related duties per the needs of the court.

The title of Senior Court Interpreter is non-competitive based on skills and experience. Individuals holding this title supervise and coordinate the interpreters in the courts, including coordinating work schedules, evaluating interpreters' performance, and resolving problems in the delivery of interpreting services, as well as providing interpreting services. Senior Court Interpreters may also assist LEP persons in filling out forms and preparing complaints, answer routine inquiries from the

¹⁾ JG signifies the judicial grading of the position.

²⁾ The court system currently employs court interpreters in the following languages: Arabic, ASL, Bengali, BCS (Bosnian/Croatian/Serbian) Cantonese, French, Fuzhou, Greek, Haitian Creole, Hebrew, Italian, Korean, Mandarin, Polish, Punjabi, Romanian, Russian, Spanish, Sylheti, Toisan, Urdu, Wenzhou and Wolof.

public, and perform clerical tasks (See Appendix M: Title Standard for Senior Court Interpreter). In some jurisdictions, Senior Court Interpreters and other supervisory court personnel may administer language proficiency tests and obtain per diem interpreting services.

The title of Principal Court Interpreter is non-competitive, based on skills and experience. Principal Court Interpreter is the highest ranking Court Interpreter in a citywide court or Judicial District. They are responsible for prompt, accurate, and consistent oral, written, and sign interpreting services, and are also responsible for supervising, coordinating activities, and evaluating the performance of Senior Court Interpreters, Court Interpreters, and for oversight of per diem interpreters (See Appendix N: Title Standard for Principal Court Interpreter).

Per Diem Independent Contractors

In addition to employees who have been appointed to UCS court interpreter positions, the UCS contracts with individuals on an as needed basis, to provide interpreting services ("per diem" court interpreters) where a court or judicial district does not have a staff interpreter available.

Those freelance or per diem interpreters *are not* employees of the court system; they are hired for the day and paid a per diem rate. An invoice is submitted with supporting documentation in order for per diem interpreters to receive payment.

The court system maintains a Registry³ of individuals who have successfully completed a written English proficiency examination and an oral assessment in English and the other language. All court interpreters are also required to undergo a fingerprint based criminal background investigation. The languages for which the court system provides an oral assessment are:

Albanian	French	Italian	Russian
Arabic	Greek	Korean	Spanish
Bosnian, Croatian, Serbian (BCS)	Haitian Creole	Mandarin	Urdu
Bengali	Hebrew	Polish	Vietnamese
Cantonese	Hindi	Portuguese	Wolof
	Japanese	Punjabi	

The court system uses this Registry as a primary resource for selecting per diem court interpreters in those languages listed above, as well as languages that do not have a corresponding oral assessment (non-registry languages).

³ The NYS Registry of Per Diem Interpreters is available to court managers at each court and judicial district office, as well as through the Office of Language Access. It is not available to Per Diem Interpreters or the general public.

The Selection Process for Court Interpreters in the New York State Unified Court System

The Unified Court System has given a high priority to the development and implementation of selection procedures to ensure that court interpreters have the necessary language proficiency to perform their duties competently and professionally.

A. COURT INTERPRETER EMPLOYEES

Spanish Court Interpreters

Based upon an analysis of the knowledge, skills and abilities required to perform the duties of a court interpreter, a two-part examination process has been developed to test candidates for permanent positions. The first part requires candidates to be screened on a written, multiple-choice examination that includes reading ability in English and Spanish, grammar, syntax and vocabulary in English and Spanish, and translating written material from Spanish to English and vice versa.

Candidates who pass the written examination then take the oral language assessment; a job-simulated video is used for this test. The candidate must interpret everything said on the video in English into Spanish, and everything said in Spanish into English. Simultaneous and consecutive modes of interpreting are assessed. Each candidate is also given short written passages in English and Spanish which must be translated orally. An audio recording of each candidate's performance is made and evaluated by a group of specially trained bilingual professionals for accuracy, comprehension, fluency, speed, clarity, and pronunciation.

To qualify for appointment to the competitive class court interpreter position⁴, an individual must achieve a passing grade on both the competitive written and oral examinations, be eligible for appointment from a list certified by the Chief Administrator of the Courts, be reachable for appointment by application of the rule of "one in three," undergo a criminal history background investigation, and be appointed by the appropriate authority.

Court Interpreter (non-Spanish), Senior Court Interpreter, and Principal Court Interpreter

The titles of Court Interpreter in languages other than Spanish, Senior Court Interpreter, and Principal Court Interpreter, are in the non-competitive class positions, and are filled on the basis of an applicant's qualifications and experience. In addition, court interpreter applicants in the 22 Registry languages (see page 2) are required to successfully complete a written and oral language skills screening process for inclusion in the Registry.

⁴ Competitive class court interpreter positions currently are available only in Spanish. All other non-Spanish court interpreter positions are non-competitive and thus have a different selection process.

American Sign Language Court Interpreter

Court Interpreter (ASL) is a non-competitive position that has a different selection process from spoken languages (see Appendix L: Title Standard for Court Interpreter, Sign). An individual qualifies for employment by being listed on the Registry of Interpreters for the Deaf, Inc. (RID), a nationally recognized credentialing agency that certifies an individual's competency in (ASL). The minimum RID credential required by the NYS Unified Court System (as of December 2008) is the National Interpreter Certification (NIC). RID's directory of Certified Sign Language interpreters also includes sign interpreters in other languages.

Prior to their appointment, candidates may also be required to participate in an assessment of their language competency skills.

Section 390 of the Judiciary Law authorizes the temporary use of a sign interpreter who is "otherwise qualified" when an RID-certified interpreter is not available. The Administrative Order also establishes compensation rates for such sign interpreting services⁵.

Promotional Opportunities

Full-time Court Interpreter employees (foreign and sign language) are eligible to promote to the non-competitive title of Senior Court Interpreter, a supervisory title found in the larger courts that typically employ multiple interpreter positions (see Appendix M: Title Standard for Senior Court Interpreter). Senior Court Interpreters supervise staff and per diem court interpreters, schedule interpreter services for their court, interpret in the court, and may administer court interpreter exams in some jurisdictions.

Full- time Court Interpreter employees may also promote to the non-competitive title of Principal Court Interpreter. This opportunity is available to Court Interpreter employees with one year of service in the Senior Court Interpreter title or an equivalent combination of education and experience. Under the direction of a District Executive or Chief Clerk, a Principal Court Interpreter is the highest-ranking Court Interpreter in a citywide court or Judicial District (see Appendix N: Title Standard for Principal Court Interpreter), whose responsibilities include oversight and supervision of Senior Court Interpreters, as well as staff and per diem court interpreters. Principal Court Interpreters may also administer court interpreter examinations, investigate complaints, provide training and conduct outreach for their court or jurisdiction.

Court interpreters with a minimum of two years of permanent, competitive class service, and Senior Court Interpreters who once held the competitive title of Court Interpreter on a permanent basis, are also eligible to take the promotional examinations for Court Clerk (JG-18) and Senior Court Clerk (JG-21).

In 1992, the Office of Court Administration issued an Administrative Order which recognizes RID as the credentialing authority for Certified Interpreters of the Deaf and Sign Language in court proceedings. The Administrative Order also establishes compensation rates for such sign interpreting services. A copy of the Administrative Order, dated June 17, 1992, and a copy of Budget Bulletin 1703, dated March 16, 2017, are attached as Appendix G and Appendix T respectively.

B. PER DIEM COURT INTERPRETERS

Per Diem Court Interpreters-Spanish and Registry Languages

In order to be eligible for assignments, per diem court interpreters must be on the NYS Registry of Per Diem Court Interpreters. An individual may be placed on the Registry by passing the Court Interpreter (Spanish) open-competitive examination or successfully passing the per diem language proficiency examination.

With regard to other Registry languages, proficiency examinations are scheduled periodically, as needed, for a particular location and language. Candidates are required to pass a written, multiple choice English proficiency examination. Upon successful completion of the written examination, candidates are assessed on their ability to interpret from English to the foreign language, and from the foreign language to English, in both the simultaneous and consecutive mode. Each candidate also is given short written passages in English and the foreign language, which must be orally translated. Candidates are screened individually using a video format of simulated courtroom material. An audio recording is made of the candidate's interpretation, which is then evaluated by language experts for accuracy, fluency, and clarity.

Unlike the open-competitive examination for Spanish Court Interpreter, which generates a rank-ordered numerical score for an eligible list, this selection process will indicate a score of "pass" or "fail" but not a numerical rank. The score for the written, multiple choice English proficiency examination is provided to candidates for purposes of feedback. Individuals who pass the language exams are required to undergo a criminal background investigation. Candidates who successfully complete this process will be added to the NYS Registry of Per Diem Court Interpreters, which is available to all UCS courts. The courts and judicial districts have discretion with regard to assignments offered to Registry interpreters.

The Office of Language Access has the authority to remove interpreters, permanently or temporarily, with or without cause, from the Registry. Removal from the Registry may be permanent or for a limited timeframe and without prior notice. Registered interpreters may be removed due to failure to qualify on a new oral assessment exam administered in a language for which the interpreter had been registered, and for which there was no exam available.

Failure to provide updated contact information may result in removal from the Registry. Interpreters may also request to be removed from the Registry. Violations of the Canons of Professional Responsibility for Court Interpreters (See Appendix A) and the Code of Ethics (See page 16) may also result in the interpreter being removed from the statewide Registry.

Per Diem Court Interpreters-Non-Registry Languages

Since 2006, the UCS has expanded the required English written proficiency test to include interested candidates of all languages. Court Interpreter examinations are offered yearly for all languages. Examinations in additional languages are developed periodically, as needed. Oral performance tests in Albanian, Bengali and French were added in 2007, followed by Bosnian, Croatian, Serbian (BCS), Hebrew, Hindi, Japanese, Punjabi (Eastern), Urdu and Wolof. Languages that are under consideration for development in the future are Farsi, Fulani, Fuzhou, Mandinka, Romanian, Turkish, and Twi. The competency of per diem court interpreters for Non-Registry languages (where there is no

corresponding oral assessment) is verified by the Office of Language Access through a review of the individual's credentials, including formal language education, prior service as a court interpreter, or interpreting in a legal setting, e.g., such as for private law firms, legal aid societies, administrative tribunals, or in other situations involving the use of legal terminology or the interpreting of sworn testimony; it may also be done by the judge presiding in the courtroom at the outset of a court proceeding (See Appendix B: Judicial Bench card).

Per Diem Court Interpreters-American Sign Language

The UCS requires that all per diem American Sign Language (ASL) Interpreters be certified by the Registry of Interpreters for the Deaf, Inc. (RID), a nationally recognized credentialing organization, in the same manner as full-time American Sign Language Court Interpreters.

Experience and References

All per diem candidates are required to complete an application form which requests information about previous interpreting work, other related bilingual experience, education, and appropriate references. This information is used to help assess interpreting proficiency in languages for which an oral screening examination is not available. Application forms are available in each locality, online http://www.nycourts.gov/COURTINTERPRETER/ExamInformation.shtml or through the Coordinator of the Office of Language Access. Credentials are subject to verification.

Identifying Qualified and Available Court Interpreters

The Office of Court Administration (OCA) has established the Court Interpreter Electronic Scheduling System (E-System) which enables Senior Court Interpreters and other supervisory personnel to identify and access interpreting services in real time. The electronic directory is part of a comprehensive scheduling system that contains the names, languages, geographic locations and availability of all interpreting resources within locations of the UCS. It includes contact information for UCS court interpreters, per diem interpreters both in the UCS Registry and additional languages, as well as other resources.

Court Interpreter Responsibilities

To meet the challenge of ensuring that legal proceedings conducted in New York's courts and court agencies are accessible to all LEP court users, the New York State Unified Court System requires that interpreters become familiar with the following requirements in order to carry out their responsibilities:

Modes of Court Interpreting

The court interpreter shall be familiar with the most commonly used interpreting techniques. The interpreter shall also know when these modes are required.

- SIMULTANEOUS MODE: requires that the interpreter speak contemporaneously with the speaker whose statements are being interpreted, and is most often used in opening and closing statements and any ongoing exchanges.
- **CONSECUTIVE MODE:** requires that the interpreter allow the speaker to complete a thought or statement before giving his/her interpretation. This mode shall be used when LEP or Deaf or Hard of Hearing persons are giving testimony, or are in direct dialogue with the judge, counsel or an officer of the court.
- **SIGHT TRANSLATION:** the real time oral translation of a written document, with minimal preparation.

Accuracy

Court interpreters shall:

- faithfully and accurately interpret what is said without embellishment or omission, while preserving the language level and register of the speaker;
- provide a continuous simultaneous interpretation for litigants and the court of all open-court speeches, questions, answers, instructions, directions, and court rulings;
- provide the most accurate interpretation of a word despite a possible vulgar meaning.
 Colloquial, slang, obscene or crude language, as well as sophisticated and erudite language, shall be conveyed in accordance with the usage of the speaker. An interpreter is not to tone down, improve or edit any words or statements; and
- not simplify or explain statements for a LEP or Deaf or Hard of Hearing person even when the
 interpreter believes that the person for whom he or she is interpreting is unable to understand
 the speaker's language level. If necessary, the LEP or Deaf or Hard of Hearing person may
 request an explanation or simplification from the Court and/or judge.

Impartiality

Court interpreters shall:

- maintain an impartial attitude at all times and avoid unnecessary contact or discussions with counsel, witnesses or interested parties, either inside or outside the courtroom;
- not give legal advice
- avoid even the appearance of impropriety by informing the Court of any prior contact the
 interpreter has had with any of the parties or jurors, as soon as he or she is aware of it. This
 may include any contact as seemingly unimportant as merely recognizing someone in the
 courtroom from the interpreter's neighborhood, who the interpreter does not actually know.

Confidentiality

Court interpreters shall:

- ensure that disclosures made out of court by a LEP or Deaf or Hard of Hearing person through the court interpreter to another person shall be confidential; and
- **not** disclose any information deemed confidential by the court.

Proficiency

Court interpreters shall:

- provide professional services only in matters or areas in which the interpreter can perform accurately and when in doubt, inform the court of any impediment or inability to perform the interpreting duties for any reason; and
- consult appropriate legal and bilingual dictionaries as needed. A glossary of legal terms
 frequently encountered by court interpreters is provided in Appendix V and Appendix W.

Professional Demeanor

Court interpreters shall:

- speak in a clear, firm, and well-modulated voice;
- always be positioned so that the LEP, Deaf or Hard of Hearing person can hear and/or see everything the court interpreter says or signs, and to ensure that the interpreter can hear and see everything that is said or signed during the proceedings, without obstructing the view of the judge, jury or counsel; and
- wear appropriate business attire. Court interpreters should check the dress code section of the
 applicable collective bargaining agreement. Information is also available in the Unified Court
 System's Employee Handbook, http://inside-ucs.org/oca/hr/pdfs/EmpHandBk.pdf on page 33.

Case Preparation

Court interpreters shall, whenever possible, prepare for a proceeding by:

- having a basic understanding of the types of cases handled by the various courts, and thereby preparing for anticipated vocabulary (See Appendix V and Appendix W: Glossary of Legal Terms and Glossary of Forensic Terms).
- reviewing the case material including the charges, police reports, complaints, indictments, transcripts of interviews, motions or any other documents to be used in the case; this information may not be readily available.
- becoming familiar with the communication pattern, cultural background, and native language level of proficiency of the LEP or Deaf or Hard of Hearing person; and
- informing the LEP or Deaf or Hard of Hearing person as to the interpretation mode or signing technique that will be used.

Communication with the LEP, Deaf or Hard of Hearing Person

Prior to the initial court appearance, the court shall:

- advise the LEP or Deaf or Hard of Hearing person that the court interpreter's role is to interpret all statements and comments throughout the proceeding (See Appendix B, Judicial Benchcard and Appendix C, Take Away Card-English);
- when necessary and where available, arrange for wireless interpreting equipment to be used⁶;
- advise the LEP or Deaf or Hard of Hearing person to direct all questions to counsel or to the court; and
- advise the LEP or Deaf or Hard of Hearing person that the interpreter cannot engage in independent dialogue, discussions or conversations with the LEP or Deaf or Hard of Hearing person.

Addressing the Court

To ensure that all parties are properly identified for the record, court interpreters shall:

- utilize the first person singular when interpreting; and
- address the court using the third person singular to protect the record from confusion. For
 example, "Your Honor, the interpreter cannot hear the witness;" "Your Honor, the interpreter
 needs clarification of a word or phrase," etc.

⁶ At the court's discretion, and where available, this equipment may be used during the simultaneous interpreting of the proceeding for LEP defendants.

Language and/or Hearing Difficulties

During the course of a proceeding if:

- an interpreter does not understand a word, phrase or concept, the interpreter shall inform
 the court which may, at its discretion, order an explanation, rephrasing or repetition of the
 statement. The interpreter may request time to look up an unfamiliar word in the dictionary.
- the interpreter has difficulty hearing, he/she shall inform the court. The court may, at its discretion, order the speaker to repeat the statement, to speak louder or change the position of the interpreter in the courtroom.
- the interpreter is aware that an English word or legal term does not have an equivalent translation, or that the word or concept does not exist in the foreign language, the interpreter will immediately inform the Court using the third person, as previously described. The same procedure should be followed if a word or term in the foreign language does not exist in English. In all instances, the interpreter will follow the instructions of the Court.

Errors

• When an interpreter discovers an interpretation error, the interpreter shall immediately inform the judge, even if the error is perceived after the proceeding has been completed.

Quality Control

It is the fundamental obligation of the interpreter to provide clear, accurate and impartial language access to all LEP, Deaf and Hard of Hearing court users. The courts, in collaboration with OLA, will take specific measures to enhance oversight of language access and ensure that the service provided is of the highest quality.

Oversight includes, but is not limited to, review of random samples of audio recorded proceedings, site visits to courthouses by OLA or designated staff, and implementation of an accessible and transparent complaint process for LEP, Deaf and Hard of Hearing court users, attorneys, advocates, court staff and the court interpreter named in a complaint.

This quality control process will allow for efficient and consistent resolution of complaints, whether by way of training, remediation or permanent removal of a per diem interpreter from the Registry.

Venues

The Courts

The Unified Court System includes different types of courts. It is important that interpreters are aware of where the courts are located and the types of cases each handles. Below are some of the courts in which Court Interpreters are most often provided:

City	County	Supreme, Civil
Civil	District	Supreme, Criminal
County	Family	Surrogates

In addition to the courtroom, Court Interpreters may be provided for brief attorney/client interviews, in order to facilitate furtherance in the matter before the court, that may be held in holding cells or other areas of the courthouse, pre-trial conferences with Court Attorneys in judges' chambers, and in court offices where information and instructions are provided to the public.

Problem-Solving Courts and Other Settings

Court interpreters are provided in community courts and problem-solving courts that address specific issues such as:

- Domestic Violence
- Drug Treatment
- Human Trafficking
- Mental Health
- Sex Offenses
- Veterans

Court interpreters may also assist in proceedings for Mediation, Fee Arbitration, and at hospitals.

In all courts and venues, court interpreters are bound by the same Code of Ethics and Canons of Professional Responsibility (See Appendix A).

Remote Interpreting

Providing a court interpreter who is qualified, professional and physically present in the courtroom is always the goal. However, there are times when the need for an interpreter is not known in advance, or no qualified interpreter is available in the specific language requested. In these instances, the Office of Language Access may arrange for Remote Interpreting (See Appendix E: Remote Interpreting Tip Sheet).

How It Works

Remote language access can be facilitated across the state using various technologies, including videoconferencing and telephonic interpreting. The interpreter will appear at the NYC Office of Court Administration (or another court facility), and be linked by telephone or video to the court that needs the interpreter. When the case is called, the interpreter will be heard and/or seen by all in the (offsite) courtroom, often through a speaker or speaker phone. Remote interpretation is generally rendered in the consecutive mode. With additional equipment, simultaneous interpretation may also be provided.

Who Provides the Service

Court interpreters who are employees of the Unified Court System (UCS) are called upon first to provide remote interpreting. If a staff interpreter is unavailable, then per diem court interpreters may be contracted to provide this service.

An interpreter providing remote services should always be interpreting from a UCS court facility, using UCS equipment, and with appropriate oversight. Interpreting services should NOT be provided from a non-court location or via an interpreter's personal telephone, cellphone or computer, via Skype or other connections from a non-UCS facility.

Benefits

Utilization of Remote Interpreting is cost effective and saves time, while also ensuring that:

- the court interpreter has been qualified or successfully screened by the UCS; there is oversight of the interpreter and monitoring of technical issues by OLA staff and/or court staff.
- resolution of the matter is not delayed in order to obtain an available local interpreter.
- costs for travel are reduced or eliminated.

Challenges

As the language facilitator in court proceedings, the interpreter faces a variety of challenging situations. To ensure that the record of interpreted proceedings is clear, the interpreter shall be aware of the following:

Linguistic

- The interpreter shall orally translate the exact response of the witness or speaker, even if the answer to a question is non-responsive.
- When an interpretation is challenged, the interpreter shall seek guidance from the court.
 The court will determine whether the interpreted matter is substantial enough to warrant
 any changes, and will make the final determination as to the acceptable interpretation
 for the record.
- When an interpreter is required for a witness in a jury trial, jurors are advised that they must rely on the translation provided by the interpreter. Jurors are also instructed to inform the court if they disagree with the interpretation rendered (See Appendix D: NY Pattern Jury Instructions, PJI 1:87). If this occurs, the interpreter must seek guidance from the court and not engage in debate with the juror.
- If a witness testifying in a foreign language uses a few words in English, the interpreter shall repeat those words for the record. If the witness utters a full English response, the interpreter shall not repeat the words, sentences or phrases but shall seek direction from the court.
- When an objection is made, the interpreter shall interpret everything that was said up to the objection and instruct the witness by hand gesture not to speak until the court has ruled on the objection.
- When a communication problem arises between the interpreter and the LEP or Deaf or Hard
 of Hearing person, (e.g., an individual is being disruptive or does not allow the interpreter to
 speak), or when there is a need to instruct the witness as to proper usage of the interpreter
 by the LEP or Deaf or Hard of Hearing person, the interpreter shall bring the matter to the
 attention of the court.
- A court interpreter shall **not** characterize or attempt to explain testimony.
- The court interpreter shall **not** mimic any gestures made by the LEP person.
- A court interpreter shall **not** correct erroneous facts or make any inferences from any statements made during a proceeding.

Fatigue Factor

- An interpreter shall inform the court, at an appropriate time during the proceedings, if the quality of interpreting is at risk due to fatigue.
- Depending on the jurisdiction and the resources, interpreters may work in teams to reduce fatigue. ASL interpreters frequently work in teams, because of the physicality involved in sign language interpreting. Court managers may implement Team Interpreting for spoken language interpreters as well where deemed necessary.⁷

⁷ For more information about Team Interpreting, contact the Office of Language Access at (646) 386-5670.

Oath

Section 387 of the Judiciary Law requires that before entering upon his or her duties, an interpreter shall file with the Clerk of the Court the constitutional oath of office.

This oath reads as follows:

"I do hereby pledge and declare that I will support the constitution of the United States and the constitution of the State of New York, and that I will faithfully discharge the duties of the position of Court Interpreter, according to the best of my ability."

This oath shall be executed by all interpreters, including interpreters with whom the court contracts on a per diem basis. The oaths shall be filed with the Clerk of the Court⁸ (See Appendix H: Oath). One signed oath will serve for subsequent engagements. However, According to the Judicial Bench card (see Appendix B: Judicial Benchcard), a best practice for working with interpreters, staff or per diem, includes swearing in the interpreter and placing the interpreter's appearance (full name and language) on the record.

Sample Interpreter Oath:

"Do you solemnly swear or affirm that you will interpret accurately, completely and impartially, follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the duties and obligations of legal interpretation and translation?"

In some cases a judge may also choose to conduct a voir dire to assess a court interpreter's qualifications. If this is an action taken by the judge to create a complete record, the interpreter, whether per diem or staff, should comply.

In certain jurisdictions court interpreters may also be required to swear or affirm an oath in the courtroom, to attest to their qualifications and abilities to discharge their duties.

⁸ The Office of Language Access may also maintain copies of the executed oaths.

Court Interpreting Assignments

- All interpreting assignments, for both employee and per diem court interpreters, should be
 reflected in the mandatory Court Interpreter Electronic Scheduling System (E-System). This
 statewide database, which is in real-time, helps ensure that interpreter services are utilized
 efficiently. The system allows UCS personnel to see which interpreters (and in which languages)
 are providing services in neighboring courts and jurisdictions at all times, and it is used to verify
 payments to per diem interpreters.
- Court interpreter assignments vary from court to court, and from county to county, within the same type of court. The interpreter may request general information about the assignment upon arrival to the court.
- Per diem interpreters may also inquire about the type of case, upon confirmation of the assignment.
- Depending on location, the court interpreter may report to the part clerk or supervisor for assignment, and for any information or administrative support needed to perform professional services.
- Once appointed to a court or jurisdiction, the court interpreter must accept assignment to any case or matter requiring interpreting services within that court or jurisdiction.
- If an interpreter is unable to carry out an assignment, the court, agency head, part clerk or supervisor should be informed immediately.
- Per diem court interpreters may, at their discretion, accept or decline assignments in any of the sixty-two counties within the State of New York (see Appendix I: NYS Judicial Districts Map).
- Court personnel are to schedule interpreting assignments to meet the needs of the courts, and are encouraged to call upon any/all interpreters who are listed as qualified for a particular language.
- Per Diem Court Interpreters will be compensated for the length of time engaged in services actually rendered (See Appendix T: Budget Bulletin # 1703, March 16, 2017).

Code of Ethics of the Unified Court System

A Code of Ethics for Nonjudicial Employees was added to the Rules of the Chief Judge in January 2003. This Code sets forth basic principles of ethical conduct that court employees must observe so that the court system can fulfill its role as a provider of effective and impartial justice. The Code also provides a comprehensive review of the existing laws, rules and ethical obligations that apply to nonjudicial employees and may be found at 22 N.Y.C.R.R., Part 50 of the Rules of the Chief Judge of the State of New York (See Appendix O: Part 50- Rules of the Chief Judge).

In keeping with the Unified Court System's Code of Ethics, Canons of Professional Responsibility for Court Interpreters, including per diem interpreters, were codified in February 2003 (See Appendix A). To ensure that court interpreters do not violate any elements of the Code, they shall:

- immediately report to the Court any solicitation or effort to induce or encourage a violation of any law, professional standard or regulation promulgated by the Chief Administrator of the Courts;
- disclose, on the record, any services previously provided on a private basis to any of the parties involved in a proceeding;
- **not** have any direct or indirect interest in any business or transaction, nor incur any obligations which are in conflict with the proper discharge of the duties of court interpreter or which may affect the outcome of the proceedings. An interpreter shall not derive personal profit or advantage from any confidential information acquired while acting in a professional capacity;
- **not** accept money, consideration or favor for the performance of his or her duties from anyone (other than the compensation received from the court);
- not use the court's time, facilities, equipment or supplies for private gain or advantage;
- not serve in any proceeding which involves an associate, friend or relative of the interpreter;
- not give legal advice of any kind to anyone concerned with the proceeding, whether solicited or not;
- never act as an individual referral service for an attorney; and
- not respond to requests or conduct interviews with the media.

In October 2003, the Unified Court System issued a memorandum to court managers designed to clarify the issue of outside employment of court interpreters who are employees of the court system. The memorandum reads, in part:

It is the court system's policy that outside employment of any kind – paid or unpaid – must not create a conflict of interest or interfere with the employee's performance of his or her duties. Prior to accepting outside employment, court interpreters should seek permission from their supervisor or an appropriate person in the local administrative office. This will help ensure that engaging in the outside employment does not compromise the public trust in interpreting services provided in matters before the court.

No specific prohibition prevents court system interpreters from providing interpreting services to criminal defense attorneys (including 18-B attorneys) and their clients. However, please be reminded that the general rules regarding outside employment apply: Interpreters must receive advance approval, and these services may only be provided outside the interpreter's normal work schedule (see Appendix P). Where the interpreter has previously provided outside interpreting services for a party appearing before the court, the interpreter should disclose the prior relationship to the court and the parties at the onset of the proceedings in which he or she is assigned to interpret (See Appendix A: NYS Unified Court System Canons of Professional Responsibility for Court Interpreters, Canon 7). In no event should an interpreter provide outside interpreting services for a defendant during the course of the interpreter's assignment to interpret a hearing or trial.

Office of Language Access

To ensure uniform administration of court interpreting services, the Office of Court Administration (OCA) in 1994 created the position of Coordinator of the Office of Court Interpreting Services (CIS) as part of the Division of Human Resources. In 2004, the functions of CIS were incorporated into the Division of Court Operations. In 2015 the Office of Court Interpreting Services was renamed the Office of Language Access. The Office of Language Access (OLA) assists in the development and implementation of policies and best practices that support the NYS Unified Court System's (UCS) commitment to ensure that persons with Limited English Proficiency (LEP), or who are Deaf or Hard of Hearing, have equal access to the courts and available court services. OLA is responsible for ensuring that prompt, accurate and consistent foreign language and sign interpretation and translation are provided in a manner that complies with UCS policies and procedures.

Complaints

The Unified Court System has a longstanding internal procedure to address complaints filed against its court interpreters who are employees. Matters of concern revolving around an interpreter's lack of performing his or her duties are reported to that interpreter's immediate supervisors, and may be noted on probationary reviews, performance evaluations, and referred to the Inspector General's office.

All UCS personnel who are responsible for providing or supervising per diem court interpreters have been given access to the Language Services Incident Report. This standardized form was developed by the Office of Language Access and is available online, through the court system's intranet at: http://apps.courtnet.org/webdev/incident_report.jsp

Concerns or complaints about the quality of interpreting services provided may also be emailed to: lnterpreterComplaints@nycourts.gov. Designated staff of OLA review all complaints on a case-by-case basis, and make recommendations as needed.

The Coordinator of Language Access (and staff/designee) monitors and evaluates compliance with OCA's standards, policies and procedures for delivering interpreting services and is responsible for maintaining a high professional standard for the delivery of these services. The Coordinator also recommends the implementation of policies and procedures that will further facilitate accurate and consistent oral, written, and sign language interpreting services.

Testing

In collaboration with the UCS Division of Human Resources, OLA may assist with development of the civil service Court Interpreter (Spanish) examination and screening examinations in languages other than Spanish. To that end, OLA also conducts an ongoing assessment of the language needs of the courts statewide.

Working with other OCA units, representatives of the courts, and interpreting consultants, OLA develops and presents in-service workshops and training programs for interpreters of all languages. These programs cover a wide variety of subjects including interpreting modes, ethics, rules, policies and procedures, enhancement of language skills, and other related subjects.

Through partnership with local government, community groups, the UCS Advisory Committee on Language Access, and members of the Bar, OLA works to assess and address the language needs of court users throughout the state.

FOR MORE INFORMATION OR FOR ADDITIONAL INFO CONTACT:

OFFICE OF LANGUAGE ACCESS

Office of Court Administration • 25 Beaver Street, 8th floor • New York, NY 10004

Email: courtinterpreter@nycourts.gov **Website:** www.nycourts.gov/courtinterpreter

Telephone: (646) 386-5670

Appendices

A. Canons of Professional Responsibility for Court Interpreters21
B. Judicial Bench Card
C. Take Away Card - English
D. Pattern Jury Instructions 1:87 General Instructions-Interpreters 27
E. Remote Interpreting Tip Sheet
F. Part 217-Rules of the Chief Adminstrative Judge 31
G. Administrative Order, June 17, 1992
H. Oath
I. NYS Judicial Districts Map
J. Case Types 35
K. Title Standard for Court Interpreter, JG-18
L. Title Standard for Court Interpreter Sign, JG-18
M. Title Standard for Senior Court Interpreter, JG-21
N. Title Standard for Principal Court Interpreter, JG-23
O. Part 50 - Rules of the Chief Judge
P. Dual Employment/Extra Service Approval Form: Request for approval to serve with another state agency 50
Q. Per Diem Court Interpreter (Freelance) American Sign Language 51
R. Per Diem Court Interpreter (Freelance) Languages Other Than Spanish
S. DFM Bulletin 1202: Per Diem Court Interpreter Payments
T. Budget Bulletin #1703, March 16, 2017
U. Per Diem Court Interpreter Invoice
V. Glossary of Legal Terms 57
W. Glossary of Forensic Terms for Firearms 76

Canons of Professional Responsibility for Court Interpreters



UNIFIED COURT SYSTEM'S CANONS OF PROFESSIONAL RESPONSIBILITY FOR COURT INTERPRETER

As officers of the court, interpreters are obligated to observe high standards of professional conduct to effectively perform their duties and to ensure public confidence in the administration of justice. The New York State Unified Court System has approved "Canons of Professional Responsibility for Court Interpreters." These Canons set forth principles of professional conduct for all court interpreters. To perform their duties, interpreters are obligated to meet these professional guidelines.

- **Canon 1** Court interpreters are obligated to interpret accurately and objectively without indicating any personal bias or beliefs, avoiding even the appearance of partiality.
- Canon 2 Court interpreters shall maintain impartiality by avoiding undue contact with witnesses, attorneys, defendants and their families, and any contact with jurors. This should not limit, however, those appropriate contacts necessary to prepare adequately for their assignments.
- Canon 3 Court interpreters shall reflect proper court decorum and treat with dignity and respect all court officials and personnel and all parties before the court.
- **Canon 4** Court interpreters shall avoid professional or personal conduct that could discredit the court.
- **Canon 5** Court interpreters shall not disclose, except upon court order, any information of a confidential nature about court proceedings and cases, obtained while performing interpreting duties.

Appendix A

Canons of Professional Responsibility for Court Interpreters (cont.)

- Canon 6 Court interpreters shall not engage in, nor have any interest, direct or indirect, in any activity, business or transaction, nor incur any obligation, that is in conflict, or that creates an appearance of conflict, with the proper discharge of their interpreting duties or that affects their independence of judgment in the discharge of those duties.
- **Canon 7** Court interpreters shall disclose to the court and to the parties in a case any prior involvement with that case or private involvement with the parties or others significantly involved in the case.
- **Canon 8** Court interpreters shall work unobtrusively with full awareness of the nature of the proceedings.
- **Canon 9** Court interpreters shall refrain from giving advice of any kind to any party or individual and from expressing personal opinions in a matter before the court.
- **Canon 10** Court interpreters must accurately state their professional qualifications and shall refuse any assignment for which they are not qualified or under conditions that substantially impair their effectiveness.
- Canon 11 Court interpreters shall not accept remuneration, gifts, gratuities or valuable consideration in excess of their authorized compensation in the performance of their official interpreting duties.
- Canon 12 Court interpreters shall not take advantage of knowledge obtained in the performance of official duties, or by their access to court records, facilities, or privileges, for their own or another's personal gain.
- Canon 13 Court interpreters are obligated to inform the court of any impediment in the observance of these Canons or of any effort by another to cause these Canons to be violated.

Judicial Bench Card

THE NEW YORK STATE UNIFIED COURT SYSTEM

UCS Benchcard and Best Practices for Judges

WORKING WITH COURT INTERPRETERS

Persons with limited English proficiency (LEP) and those who are deaf or hard of hearing face special challenges when they use the judicial system, and Court Interpreters serve a fundamental role in providing access to justice for these individuals.

WHO IS ENTITLED TO AN INTERPRETER?

IN NEW YORK STATE, PARTIES AND WITNESSES WHO ARE UNABLE TO UNDERSTAND OR COMMUNICATE IN ENGLISH OR CANNOT HEAR THE COURT PROCEEDINGS are entitled to an interpreter at every stage of a proceeding, in all types of court cases. (Part 217 of the Rules of the Chief Administrator of the Courts, 22 NYCRR Part 217). A judge may presume a need for an interpreter when an attorney or self-represented party advises the Court that a party or a witness has difficulty communicating or understanding English, or that a party is deaf or hard of hearing. If a request for an interpreter has not been made, but it appears that a party or witness has limited ability to communicate or understand court proceedings in English, a judge should ask a few questions (on the record) to determine if an interpreter is necessary:

SAMPLE QUESTIONS TO ASSESS THE ENGLISH PROFICIENCY OF A PARTY OR WITNESS:

- What is your name?
- How comfortable are you in proceeding with this matter in English?
- In what language do you feel most comfortable speaking and communicating?
- Would you like the court to provide an interpreter in that language to help you communicate and to understand what is being said?

HOW DO I GET AN INTERPRETER FOR MY COURT?

Depending on your location, a court administrator, clerk or senior court interpreter is responsible for scheduling and assigning interpreters to the court. If there is no local interpreter available to appear in-person at your court, **REMOTE INTERPRETING**, by phone or video-conference from another UCS location, can be arranged.

HOW DO I KNOW IF THE INTERPRETER IS QUALIFIED?

The UCS uses two types of Court Interpreters:

- (1) Staff Court Interpreter (UCS employee) or
- (2) Per Diem Court Interpreter (freelancer/voucherpaid) from the UCS Registry of Qualified Court Interpreters.

Foreign language interpreters from both groups have satisfied the court system's language-skills screening process and assessment exams, as well as a criminal background check; Sign language interpreters are required to hold certification from the Registry of Interpreters for the Deaf (RID). The clerk or other court staff are responsible for confirming an interpreter's qualifications prior to scheduling the interpreter to appear at your court.

Occasionally, the court may need to call upon an interpreter who is neither a staff court interpreter nor a per diem interpreter on the UCS Registry of Qualified Court Interpreters. Such interpreters should be used *only on an emergency basis*, if a staff or eligible per diem interpreter is not available, and if remote interpreting cannot be arranged. If the court is unsure of an interpreter's qualifications, the judge should review the interpreter's credentials by asking a few questions (on the record) at the outset of the court proceeding:

SAMPLE *VOIR DIRE* QUESTIONS TO ASSESS COURT INTERPRETER QUALIFICATIONS:

- How did you learn English?
- How did you learn the foreign language or sign language that you will be interpreting today?
- What training or credentials do you have to serve as a court interpreter?
- · How long have you been an interpreter?
- How many times have you interpreted in court?

Judicial Bench Card (cont.)

Rev: 5/2015

BEST PRACTICES FOR WORKING WITH COURT INTERPRETERS:

EXPLAIN THE ROLE OF THE COURT INTERPRETER

It is important that the party who needs an interpreter understands the role of the interpreter. The judge should instruct the interpreter to communicate the following information to the party, as it is read aloud by the judge, in the courtroom:

- I have been informed that you are more comfortable communicating in (Foreign language or Sign language) instead of English.
- . The person next to you is the (language) interpreter.
- The interpreter's job is to repeat to you in (language) everything that is said in English during this court proceeding.
- The interpreter will also repeat for us anything you say in (language) back into English.
- Nothing will be changed or left out of this interpretation. The interpreter is not allowed to give you advice or have private conversations with you.
- The interpreter will not talk about your case with anybody outside the court.
- If something is not clear to you or you have a question, raise your hand. I (the Judge) will answer your questions or concerns. Do not ask the interpreter directly for information or advice about the case.
- Do you understand what the interpreter is supposed to do?
- Do you have any difficulty understanding the interpreter?
- . I will now swear-in the interpreter for the record.

SWEAR-IN THE INTERPRETER

All interpreters should be sworn-in. Placing the interpreter's appearance on the record underscores the importance of adhering to the principles of good court interpreting. Also, when the interpreter states his or her name, it is a good opportunity to inquire whether any party knows the interpreter. This question can eliminate potential conflicts or the appearance of impropriety.

SAMPLE INTERPRETER OATH:

"Do you solemnly swear or affirm that you will interpret accurately, completely and impartially, follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the duties and obligations of legal interpretation and translation?"

ADVISE THE JURY (WHERE APPLICABLE)

Explain to jurors that languages other than English may be used during the proceeding. Even if members of the jury understand the non-English language that is being spoken, jurors must base their decision on the evidence presented in the English interpretation. (See PJI 1:87 for a jury instruction on interpreters.)

ASSESS THE PERFORMANCE OF THE COURT INTERPRETER

A judge's observations can aid in the evaluation of an interpreter's performance, even if one does not speak the language that is being interpreted.

Accordingly, consider the following to determine if the interpreter is communicating effectively during the proceeding:

- Are there significant differences in the length of interpretation as compared to the original testimony?
- Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions?
- . Is the interpreter acting in a professional manner?
- Is the interpretation being done in the first-person?
 For example, while verbally translating what is being said in court, the interpreter will relay the words as if he/she is the person speaking.
- If the interpreter has a question, does he or she address the Court in the third-person (e.g. "Your honor, the interpreter could not hear the last question...") to keep a clear record?

If you have any concerns or questions about an interpreter's performance, contact the Chief Clerk of the court.

You may also contact the Office of Language Access at (646) 386-5670 or by e-mail:

InterpreterComplaints@nycourts.gov

THE NEW YORK STATE UNIFIED COURT SYSTEM

UCS Benchcard and Best Practices for Judges

WORKING WITH COURT INTERPRETERS

Take Away Card - English



If you need an interpreter, the court will provide one to you at no cost. This is a free service for people who use the courts.

The reverse side of this card provides information about the court interpreter's role, and what the interpreter can or cannot discuss with you.

If you have a question or concern about court interpreting services, alert the Judge, speak to the Clerk of the Court where the case is being heard, or contact the Office of Language Access:

Office of Language Access

NYS Unified Court System Office of Court Administration 25 Beaver Street, 8th Floor New York, New York 10004

Phone: (646) 386-5670

Email: courtinterpreter@nycourts.gov

nycourts.gov/courtinterpreter

Take Away Card - English (cont.)

English



- To help with communication during the court proceeding, you will be given an interpreter who speaks your language.
- The interpreter's job is to repeat to you in your language, everything that is said in English by the Judge or others in the court.
- The interpreter will also repeat anything that you say in your language, back into English.
- Nothing that is said will be changed or left out of this interpretation.
- The interpreter is not allowed to give you advice or have private conversations with you.
- The interpreter will not talk about your case with anybody outside the court.
- If something is not clear to you or if you have a question, raise your hand.
 The judge will answer your questions or concerns. Do not ask the interpreter directly for information or advice.

nycourts.gov/courtinterpreter

Appendix D

Pattern Jury Instructions 1:87 General Instructions-Interpreters

PJI1:87General Instructions—Interpreters, N.Y. Pattern Jury Instr.--Civil 1:87

N.Y. Pattern Jury Instr.--Civil 1:87

New York Pattern Jury Instructions--Civil Database updated December 2014

Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 1. General Charges
C. General Instructions Not Applicable to All Cases
6 Witnesses

PJI 1:87 General Instructions—Interpreters

You are about to hear testimony in [identify language other than English]. An interpreter will provide a translation. You must rely only on the translation provided by the interpreter, even if you understand the language spoken by the witness and even if you disagree with the interpreter's translation. If you believe that the interpreter translated testimony incorrectly, you must advise the court immediately. Do not offer your own translation of any testimony to the other jurors at any point during the trial or the deliberations.

Comment

Caveat: Absent special circumstances, this charge should be given immediately before the witness testifies.

22 NYCRR § 217 provides that "[i]n all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian in a Family Court proceeding, is unable to understand or communicate to the extent that he or she cannot meaningfully participate in the proceedings, the court shall appoint an interpreter," see People v Lee, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013). Interpreters must file the oath of office that is required by the Constitution with the Clerk of the Court, Judiciary Law § 387; see People v Lee, supra. The Office of Court Administration internal Court Interpreter Manual and Code of Ethics states that an interpreter must faithfully and accurately interpret what the witness has said without embellishments or omissions, see Matter of Yovanny L., 33 Misc3d 894, 931 NYS2d 485 (Fam Ct 2011). The Interpreter Manual also contains additional guidance as to the interpreter's impartiality, confidentiality, proficiency and professional demeanor, see id. Interpreters are enjoined to provide services only in areas where they can perform accurately, and they should inform the court immediately upon learning that an error has been made, see id. The Office of Court Administration has issued a benchcard to aid judges in assessing interpreters' competence and performance. The contents of this benchcard are reproduced in Matter of Yovanny L., supra.

An interpreter should be a person who is not biased and has no interest in the outcome of the case, Matter of James L., 143 AD2d 533, 532 NYS2d 941 (4th Dept 1988); see People v Lee, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013). There may be circumstances where no competent disinterested interpreter is available and the court finds that it is necessary to appoint a person with an interest or other potential source of bias, People v Lee, 89 AD3d 633, 933 NYS2d 272 (1st Dept 2011), aff'd, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013); Matter of James L., supra. In such cases, the court must interrogate the interested interpreter to determine the extent of bias and, further, must admonish the interpreter to translate exactly what the witness has said, Matter of James L. supra; see People v Lee, supra; People v Fisher, 223 NY 459, 119 NE 845 (1918).

In general, the court has discretion to determine whether a witness should be permitted to testify through an interpreter, People v O'Sullivan, 258 AD2d 330, 686 NYS2d 2 (1st Dept 1999). The use of an interpreter may be permitted where a witness has limited command of English and the clarity of his or her testimony would otherwise be hindered, id; see People v Morrison, 244 AD2d 168, 663 NYS2d 841 (1st Dept 1997); People v Wilson, 188 AD2d 405, 591 NYS2d 397 (1st Dept 1992). In Mehmood v Wong, 18 AD3d 518, 795 NYS2d 86 (2d Dept 2005), a personal injury action, it was held that the trial court's failure to appoint

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Appendix D

Pattern Jury Instructions 1:87 General Instructions-Interpreters (cont.)

PJI1:87General Instructions—Interpreters, N.Y. Pattern Jury Instr.--Civil 1:87

an interpreter deprived plaintiffs of a fair trial where the witness's difficulty in understanding questions and answering them in English was obvious and substantial questions were raised as to the jury's ability to understand the testimony. The appellate court in Mehmood held that the trial court's alternative procedure, in which the witness was permitted to request the assistance of an interpreter on a question-by-question basis, was not sufficient to remedy the problem.

The court may, in the exercise of its discretion, determine that an interpreter is competent and that any misunderstandings in the translation process have been rectified, People v Watkins, 12 AD3d 165, 786 NYS2d 133 (1st Dept 2004); People v Nedal, 198 AD2d 42, 603 NYS2d 454 (1st Dept 1993); People v Frazier, 159 AD2d 278, 552 NYS2d 841 (1st Dept 1990); Matter of James L., 143 AD2d 533, 532 NYS2d 941 (4th Dept 1988). Occasional difficulties in translation are not sufficient grounds to challenge a verdict, at least where the difficulties are adequately rectified and the witness's testimony was properly presented to the jury, People v Kowlessar, 82 AD3d 417, 918 NYS2d 41 (1st Dept 2011); see People v Watkins, supra (difficulties in translation did not prevent effective cross-examination of witness). Thus, the court properly exercised its discretion in accepting an interpreter's assurances that there had been adequate communication between herself and the witness, where the juror who originally questioned the precision of the translation assured the court that she detected no real inaccuracies, People v Staley, 262 AD2d 30, 692 NYS2d 314 (1st Dept 1999). Whether any difficulties in the translation led to prejudice is an important consideration, see People v Singleton, 59 AD3d 1131, 873 NYS2d 838 (4th Dept 2009); People v Watkins, supra; People v Pham, 283 AD2d 952, 725 NYS2d 245 (4th Dept 2001). With respect to the interpreter's competence, consideration must be given to the proposed interpreter's grasp of the English language as well as to his or her ability to follow the oath required by Judiciary Law § 387, Matter of James L., supra.

Questions about the reliability of the process may arise when a juror who understands the language being translated into English raises questions about the accuracy of the translation. In such instances, the questions should be resolved and the court should seek assurances from the juror that he or she can accept the translation, People v Staley, 262 AD2d 30, 692 NYS2d 314 (1st Dept 1999). When a juror raises questions about the accuracy of the translation after the verdict has been announced, the rules against impeaching the verdict are applicable and the court should undertake inquiry only in extraordinary circumstances, such as where there is a risk that a juror's knowledge of the witness's language put him or her in the position of an unsworn witness in the jury room, People v Sanchez, 185 AD2d 331, 586 NYS2d 149 (2d Dept 1992).

Individuals who are profoundly hearing-impaired or profoundly speech-impaired are competent to testify and may give evidence through an interpreter, Cowley v People, 83 NY 464 (1881); Matter of Luz P., 189 AD2d 274, 595 NYS2d 541 (2d Dept 1993). Judiciary Law § 390 authorizes the appointment of "a qualified interpreter of the deaf sign-language." For a discussion of the use of sign language interpreters, see Matter of Luz P., supra, and People v Rodriguez, 145 Misc2d 105, 546 NYS2d 769 (Sup 1989).

End of Document

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Remote Interpreting Tip Sheet

THE NEW YORK STATE UNIFIED COURT SYSTEM

Working with Interpreters by Video or Teleconference

TIPS FOR REMOTE INTERPRETING

USE OF REMOTE INTERPRETING:

Remote Interpreting is a useful alternative in providing court interpreting services, when availability or critical need renders on-site interpretation impractical.

Telephone or video interpretation may be used in place of on-site interpreting whenever the quality of interpretation is not compromised and:

- there is no on-site UCS staff or qualified freelance interpreter available, and there is a time-sensitive matter to be heard; or
- 2. there is no available on-site UCS staff or qualified freelance interpreter available for a less-immediate matter; or
- 3. it is more responsible to obtain the service by remote-means than to delay a court proceeding.

Remote interpreting may be considered a suitable option when there is a time-sensitive matter requiring interpretation and no other resources are available. Adhering to the following "tips" will help to ensure that the remote appearances run smoothly and efficiently.

SCHEDULING A REMOTE INTERPRETER:

The Clerk (or appropriate court personnel) should provide as much advance notice as possible when an interpreter is needed. Requests for remote interpreting services may be submitted online, using the **Request for Remote Interpreting Services form** that is available on Courtnet, or by submission of a detailed e-mail to: remoteinterpreting@nycourts.gov

Include as much case information as possible with the request for interpreting services (e.g., case type, procedural phase, which party needs the interpreter), to help the interpreter prepare for vocabulary or legal terminology that may be used during the procedure.

If it is the first time the court is conducting a remote session, a "test run" is strongly recommended. This test will confirm the clarity and proper use of video and/or telephonic connections and equipment to be used during the remote interpretation, and should be conducted at least 30 minutes prior to the remote session.

BEFORE THE PROCEEDING:

 Before the proceeding begins, the court user should be informed (by the Judge) that the interpreter is appearing by video or phone; the judge should also ascertain that they can both hear and understand one another.

- Explain to the court user, through the interpreter, that
 the interpreter's role is to translate what is said in the
 courtroom in English into the foreign language and
 vice versa. The interpreter cannot give any advice, make
 suggestions, or engage in private conversations with the
 court user.
- The court should advise all parties in the courtroom that one person should speak at a time, in a loud and clear voice; it is impossible to interpret multiple or inaudible voices.
- The court user should be advised (by the judge) that if
 they are unable to hear or understand what the interpreter has said, s/he should raise their hand and the
 judge will ask for clarification from the interpreter.
- If there is a jury present, explain that languages other than English may be used during the proceeding. Even if members of the jury understand the non-English language being spoken, jurors must base their decision on the evidence presented in the English interpretation.
- In proceedings where an interpreter for the Deaf or Hard of Hearing is required, the positioning of the parties is particularly important. Facial expressions, lip movements and bodily gestures are interpreted. The person who is deaf or is hard of hearing must be able to see the monitor clearly, and the remote interpreter must also be able to see the court user clearly.

Remote Interpreting Tip Sheet (cont.)

WORKING WITH INTERPRETERS BY VIDEO OR TELECONFERENCE

DURING THE PROCEEDING:

- The Judge should have the interpreter state his/her name, spelling it out, for the record. Inquire whether any party knows the interpreter, to eliminate potential conflicts or the appearance of impropriety.
- Once the case is ready to proceed the interpreter can be sworn in. Administering the oath to the interpreter underscores the importance of adhering to the principles of clear and accurate court interpreting.

SAMPLE OATH FOR THE INTERPRETER:

"Do you solemnly swear or affirm that you will interpret accurately, completely, and impartially, follow all official guidelines for legal interpreting or translating, and discharge all of the duties and obligations of legal interpretation and translation?"

- Remote interpretation should be done in the consecutive mode. All responses and verbal exchanges should include a pause after a sentence or two, in order for the interpreter to fully capture what is being said and to orally translate.
- If the court user and his/her attorney need to confer privately, the handset of the telephone may be used; if one receiver is utilized, it should be shared between the court user and the attorney.
- If needed, the court can utilize the 'mute' button for incourt exchanges that do not involve the court user (similar to an off-the-record bench conference).

Beware of shuffling papers or other activity near the microphones. Turn off cellphones and electronic devices. All sounds near the unit will be transmitted and may interfere with the interpretation.

EVALUATING THE REMOTE INTERPRETING SERVICE:

The court's observation can aid in the evaluation of an interpreter's performance. Accordingly, consider the following to determine if the interpreter is communicating effectively during the proceeding:

- Are there significant differences in the length of interpretation as compared to the original testimony?
- Does the individual needing the interpreter appear to be asking questions of the interpreter?
- Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions?
- Is the interpreter acting in a professional manner?
- Is the interpretation being done in the first-person?
 For example, while verbally translating what is being said in court, the interpreter must relay the statement as if he/she is the person speaking.
- In order to keep a clear record, does he/she address the Court in the third-person? (e.g. "Your Honor, the interpreter could not hear the last question.")

At the conclusion of each Remote Session, please complete the **Remote Interpreting Assessment**, which is available online via Courtnet. The Office of Language Access (OLA) relies on your comments and suggestions in order to make remote interpreting a useful service.

If an interpreter will be needed for a subsequent date, please submit a **Request For Remote Interpreting Services Form** to the Office of Language Access, so that the remote arrangements can be made; scheduling arrangements for future assignments should not be made during the current video or telephonic remote interpreting appearance.

If you have any concerns or questions about an interpreter's performance, contact the Chief Clerk of the court. You may also contact the Office of Language Access at (646) 386-5670 or by e-mail: InterpreterComplaints@nycourts.gov

THE NEW YORK STATE UNIFIED COURT SYSTEM

Working with Interpreters by Video or Teleconference

TIPS FOR REMOTE INTERPRETING

OLA TipSheet.2 Rev. 08.27.15

Appendix F

Part 217-Rules of the Chief Adminstrative Judge

ADMINISTRATIVE RULES OF THE UNIFIED COURT SYSTEM & UNIFORM RULES OF THE TRIAL COURTS

Uniform Rules for N.Y.S. Trial Courts

PART 217. Access to Court Interpreter Services for Persons With Limited English Proficiency

§217.1 Obligation to appoint interpreter in court proceedings in the trial courts.

- (a) In all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense from an approved list maintained by the Office of Court Administration. The court may permit an interpreter to interpret by telephone or live audiovisual means. If no pre-approved interpreter is available, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense as justice requires. This rule shall not alter or diminish the court's authority and duty to assure justness in proceedings before it.
- **(b)** A person with limited English proficiency, other than a person testifying as a witness, may waive a court-appointed interpreter, with the consent of the court, if the person provides his or her own interpreter at his or her own expense.

§217.2 Provision of interpreting services in clerk's offices.

A court clerk shall provide interpreting services at no expense to a person with limited English proficiency seeking assistance at the court clerk's office in accordance with the needs of the person seeking assistance and the availability of court interpreting services. Such services may be provided by telephone or live audiovisual means.

Administrative Order, June 17, 1992

ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATOR OF THE COURTS

Pursuant to the authority vested in me by Section 390 of the Judiciary Law, I hereby:

- (1) approve the Registry of Interpreters for the Deaf, Inc., as a recognized authority for certified interpreters of the deaf sign language in court proceedings; and
- (2) establish compensation rates for services of interpreters of the deaf sign language employed by the courts, as set forth in the attached OCA Budget Bulletin. The conditions for payment of those rates shall be as set forth in that Bulletin.

This order shall take effect August 13, 1992.

CHIEF ADMINISTRATOR OF THE COURTS

Dated: June 17, 1992

AO/128/92

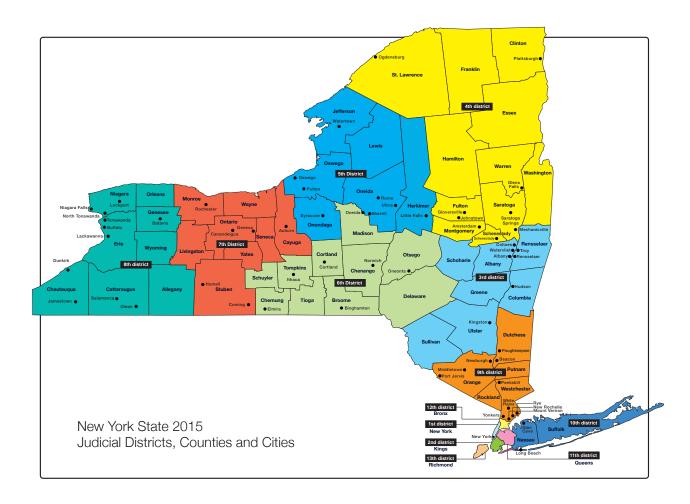
Appendix H

Oath

		H OF OFFICE		
		for n Court Interpreters		
NAME (Print)				
Last	Fi	rst	Middle Initial	
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Appendix I

NYS Judicial Districts Map



Appendix J

Case Types

CITY, CRIMINAL AND DISTRICT COURTS

730 Hearing Mediation
Arraignments Menacing

Assault w/ Intent Misdemeanor Case

Burglary Petit Larceny

Criminal Mischief Possession of Gambling Device

Disorderly Conduct Public Lewdness

Domestic Violence Summons Appearance

Drug Case Theft of Services

DWI Traffic Court Forcible Touching Trespassing

Harassment Unlicensed Vending

Loitering Violations

CIVIL COURTS AND DISTRICT COURTS

Civil Cases (up to \$25K) Infant Compromises

Consumer Credit Dept. Transactions Landlord & Tenant (Rent arrears)

HP Action (Lack or repairs, heat/water)

Name changes

Holdover (possession of apt.) Small Claims Court (suits for up to \$5K)

Housing matters

FAMILY COURTS

Adoptions Mediation

Custody/ Visitation Neglect/ Abuse

Domestic Violence Paternity

Family Treatment Court PINS

Foster Care Support

Guardianship Termination of Parental Rights

Juvenile Delinquency

SUPREME COURT, CIVIL TERM OR NYS SUPREME COURT

(OUTSIDE OF NYC)

Commercial Cases Foreclosures Motor Vehicle Cases

Guardianship Infant Compromise NYC (vs. NYC Board of Ed, NYPD, MTA, etc.)

Mass Torts (ex: asbestos, products liability)

Personal Injury

Matrimonial Special Proceedings (Art. 78)

Mechanic Liens Suits for over \$25K

Medical Malpractice Tax Certiorari & condemnation cases

Mental Hygiene White Collar crimes (ex.: Fraud)

Appendix J

Case Types (cont.)

SUPREME COURT, CRIMINAL TERM OR COUNTY COURT

(OUTSIDE OF NYC)

Arson Rape

Arraignments Robbery

> Assault Sexual assault

Weapons Possession Burglary

Drugs (Possession, Sales) **Estates and Trusts**

> Kidnapping Guardianship

Larceny **Probate**

Murder

SURROGATES COURTS

Guardianship/17 & 17-A Accounting

Administration **Probate**

Adoptions: Infant, family, Small Estate/Voluntary Administration

adult, foreign, and/or step-parent

Estates and Trusts Trusts Fiduciary accounts Wills

Guardianship/17 & 17-A

Appendix K

Title Standard for Court Interpreter, JG-18

TITLE: COURT INTERPRETER

Effective Date: 06/30/1994 Salary Grade: 18

Title Code Number: 9442707 Jurisdictional Classification: C or NC

DISTINGUISHING FEATURES OF WORK:

Court Interpreters are primarily responsible for interpreting between English and another language in the courtroom and other settings. When court activity does not require interpreting services, Court Interpreters also may oversee per diem interpreting services, perform clerical tasks such as filing or answering inquiries, and other related duties.

TYPICAL DUTIES:

Interprets verbatim between English and another language in formal and informal settings.

Translates official, technical, medical and legal documents, certificates, letters and other written material, and audio recordings into English or another language.

Assists non-English speaking persons in filling out forms and preparing complaints.

Performs clerical tasks such as indexing and filing court papers and answering routine inquiries from the public.

May administer per diem interpreter proficiency tests, obtain per diem interpreting services and evaluate language proficiency.

The above statements are intended to describe the general nature and level of work being performed by persons assigned to this title. They do not include all job duties performed by employees in this title, and every position does not necessarily require these duties.

KNOWLEDGE, SKILLS, AND ABILITIES:

Knowledge of English and another language including vocabulary, grammar and pronunciation, as well as street language or slang, equivalent to that of a native speaker of English and the other language.

Ability to accurately interpret oral exchanges from one language into another in both simultaneous and consecutive modes.

Ability to communicate effectively with persons of varying linguistic levels and different cultural backgrounds.

Ability to translate written documents.

Ability to read, write, and communicate verbally at a level equivalent to a twelfth grade education in English and another language.

Ability to understand and follow oral and written instructions.

OUALIFICATIONS:

High school diploma or the equivalent; or An equivalent combination of education and experience.

Note: All candidates will be tested for proficiency in English and another language.

Appendix L

Title Standard for Court Interpreter Sign, JG-18

TITLE: COURT INTERPRETER SIGN

Effective Date: 12/11/2008 Salary Grade: 18

Title Code Number: 9463251 Jurisdictional Classification: NC

DISTINGUISHING FEATURES OF WORK:

Court Interpreters (Sign) are primarily responsible for interpreting between American Sign Language (ASL) and spoken English in the courtroom and other settings. They also translate written documents into sign language. When court activity does not require interpreting services, Court Interpreters (Sign) also may oversee per diem interpreting services, perform clerical tasks such as filing or answering inquiries, and other related duties.

TYPICAL DUTIES:

Interprets verbatim between English and sign language in formal and informal settings.

Translates official, technical, medical and legal documents, certificates, letters and other written material, and audio recordings into sign language.

Assists signers in completing forms and preparing complaints.

Performs clerical tasks such as indexing and filing court papers and answering routine inquiries from the public.

May administer per diem interpreter proficiency tests, obtain per diem interpreting services and evaluate language proficiency.

The above statements are intended to describe the general nature and level of work being performed by persons assigned to this title. They do not include all job duties performed by employees in this title, and every position does not necessarily require these duties.

KNOWLEDGE, SKILLS, AND ABILITIES:

Knowledge of the grammatical rules and syntax of American Sign Language.

Knowledge of English including vocabulary, grammar and pronunciation, including street language or slang.

Knowledge of the policies, procedures and standards regarding provision of sign translation services.

Ability to accurately interpret verbal and sign exchanges in simultaneous, consecutive, and Sight modes.

Ability to read, write, and communicate verbally in a clear and concise manner.

Ability to translate written documents into sign.

Ability to understand and follow verbal and written instructions.

Ability to communicate effectively with persons of varying cultural backgrounds.

Appendix L

Title Standard for Court Interpreter Sign, JG-18 (cont.)

QUALIFICATIONS: High School diploma or the equivalent and professional certification by a recognized credentialing authority as required by Section 390 of the Judiciary Law; or An equivalent combination of education and experience.	
Note: The Chief Administrative Judge has established the Registry of Interpreters for the Deaf, Inc. (RID) as a recognized credentialing authority. The minimum RID credential required by the New York State Unified Court System is the National Interpreter Certification (NIC).	
Prior to appointment, candidates may be required to participate in a language competency skills	

Appendix M

Title Standard for Senior Court Interpreter, JG-21

TITLE: SENIOR COURT INTERPRETER

Effective Date: 06/30/1994 Salary Grade: 21

Title Code Number: 9442706 Jurisdictional Classification: NC

DISTINGUISHING FEATURES OF WORK:

Under supervision, Senior Court Interpreters are responsible for supervising and coordinating the activities of court interpreters and for evaluating their performance. Senior Court Interpreters also interpret between English and another language, perform clerical and administrative tasks, and other related duties.

TYPICAL DUTIES:

Plans and coordinates work schedules; trains subordinate staff and per diem interpreters; develops work performance standards and checks for compliance with instructions and procedures.

Evaluates court interpreters` language proficiency and overall performance based on observation and comments provided by judges and others and prepares appraisals of their performance.

Reviews and resolves problems concerning the fair and efficient delivery of interpreting services and investigates complaints.

Assists in the selection of court interpreters; provides court interpreters with guidance and supervises their work.

Provides information to court administrators to assist in further developing language services in the courts.

Interprets verbatim between English and another language in formal and informal settings.

Translates official, technical, medical and legal documents, certificates, letters and other written material, and audio recordings into English or another language.

Reviews time sheets and maintains related records.

Collects statistics and prepares periodic reports.

Administers per diem interpreter proficiency tests, and obtains per diem interpreting services as necessary.

Assists non-English speaking persons in filling out forms and preparing complaints.

May perform clerical tasks and answer routine inquiries from the public.

The above statements are intended to describe the general nature and level of work being performed by persons assigned to this title. They do not include all job duties performed by employees in this title, and every position does not necessarily require these duties.

Appendix M

Title Standard for Senior Court Interpreter, JG-21 (cont.)

KNOWLEDGE, SKILLS, AND ABILITIES:

Knowledge of English and another language including grammar, usage, and punctuation, as well as street language or slang, equivalent to that of a person using the language on an everyday basis.

Knowledge of court procedures and practices and legal terminology.

Ability to train and lead subordinates and coordinate the activities of a subordinate staff.

Ability to evaluate staff performance against job requirements.

Ability to obtain information and solve problems.

Ability to establish work priorities.

Ability to simultaneously and accurately interpret oral exchanges between English and another language.

Ability to communicate effectively with persons of varying linguistic levels.

Ability to translate written documents.

Ability to read, write, and communicate verbally in a clear and concise manner.

Familiarity with warrants, orders, petitions, calendars and other court documents and forms.

QUALIFICATIONS:

One year of permanent, competitive class service in the Court Interpreter title; or

An equivalent combination of education and experience.

Appendix N

Title Standard for Principal Court Interpreter, JG-23

TITLE: PRINCIPAL COURT INTERPRETER

Effective Date: 12/01/2006 Salary Grade: 23

Title Code Number: 9463250 Jurisdictional Classification: NC

DISTINGUISHING FEATURES OF WORK:

Under the direction of a District Executive, or Chief Clerk, Principal Court Interpreters are the highest ranking Court Interpreter in a citywide court or Judicial District. They are responsible for ensuring prompt, accurate, and consistent, oral, written, and sign interpreting services. Principal Court Interpreters are also responsible for supervising, coordinating activities, and evaluating the performance of Senior Court Interpreters, Court Interpreters, and voucher paid interpreters. Principal Court Interpreters maintain a schedule of interpreters assigned to courts or districts, and make recommendations related to interpreter staffing. Principal Court Interpreters interpret between English and another language, collect and analyze statistics related to interpreter services, perform clerical and administrative tasks, and other related duties.

TYPICAL DUTIES:

Monitors the quality of interpreting services, evaluates problems and recommends solutions related to interpreting services.

Plans and coordinates work schedules for all interpreters.

Trains subordinate staff and voucher paid interpreters.

Investigates and resolves complaints related to interpreter services.

Develops work performance standards and checks for compliance with instructions and procedures.

Evaluates court interpreters` language proficiency and overall performance based on observation and comments provided by judges and others.

Conducts performance evaluations.

Assists in the selection of court interpreters.

Provides court interpreters with guidance and supervises their work.

Provides information to court administrators to assist in further developing language services in the courts.

Interprets verbatim between English and another language in formal and informal settings.

Translates official, technical, medical and legal documents, certificates, letters, other written material and audio recordings into English or another language.

Reviews time and leave requests and maintains related records.

Collects statistics and prepares periodic reports.

Administers per diem interpreter proficiency tests, and obtains per diem interpreting services as necessary.

Appendix N

Title Standard for Principal Court Interpreter, JG-23 (cont.)

Assists non-English speaking persons in completing forms and preparing complaints.

May perform clerical tasks and answers routine inquiries from the public.

The above statements are intended to describe the general nature and level of work being performed by persons assigned to this title. They do not include all job duties performed by employees in this title, and every position does not necessarily require these duties.

KNOWLEDGE, SKILLS, AND ABILITIES:

Knowledge of planning, management and evaluation techniques.

Knowledge of English and another language including grammar, usage, and punctuation, as well as street language or slang, equivalent to that of a person using the language on an everyday basis.

Knowledge of court procedures and practices and legal terminology.

Ability to train and lead subordinates and coordinate the activities of a subordinate staff.

Ability to evaluate staff performance against job requirements.

Ability to obtain information and solve problems.

Ability to establish work priorities.

Ability to simultaneously and accurately interpret oral exchanges between English and another language.

Ability to communicate effectively with persons of varying linguistic levels.

Ability to translate written documents.

Ability to read, write, and communicate verbally in a clear and concise manner.

QUALIFICATIONS:

One year of service in the Senior Court Interpreter title;

An equivalent combination of education and experience.

Part 50 - Rules of the Chief Judge

RULES OF THE CHIEF JUDGE PART 50. RULES GOVERNING CONDUCT OF NONJUDICIAL COURT EMPLOYEES

Section 50.1 Code of ethics for nonjudicial employees of the Unified Court System.

PREAMBLE: A fair and independent court system is essential to the administration of justice. Court employees must observe and maintain high standards of ethical conduct in the performance of their duties in order to inspire public confidence and trust in the fairness and independence of the courts. This code of ethics sets forth basic principles of ethical conduct that court employees must observe, in addition to laws, rules and directives governing specific conducts, so that the court system can fulfill its role as a provider of effective and impartial justice.

- (I.) Court employees shall avoid impropriety and the appearance of impropriety in all their activities.
 - (A.) Court employees shall respect and comply with the law.
 - (B.) Court employees shall not use or attempt to use their positions or the prestige of judicial affiliation to secure privileges or exemptions for themselves or others.
 - (C.) Court employees shall not solicit, accept or agree to accept any gifts or gratuities from attorneys or other persons having or likely to have any official transaction with the court system.
 - (D.) Court employees shall not request or accept any payment in addition to their regular compensation for assistance given as part of their official duties, except as provided by law.
 - (E.) Court employees shall not perform any function in a manner that improperly favors any litigant or attorney.
- (II.) Court employees shall adhere to appropriate standards in performing the duties of their office.
 - (A.) Court employees shall perform their duties properly and with diligence.
 - (B.) Court employees shall be patient and courteous to all persons who come in contact with them.
 - (C.) Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color, sex, sexual orientation, religion, creed, national origin, marital status, age or disability.
 - (D.) Court employees shall not disclose any confidential information received in the course of their official duties, except as required in the performance of such duties, nor use such information for personal gain or advantage.

1

Section 50.1, cont.

- (III.) Court employees shall conduct their outside activities in a manner that does not conflict with their employment duties.
 - (A.) Court employees shall not engage in outside employment or business activities that interfere with the performance of their official duties or that create an actual or appearance of conflict with those duties.
 - (B.) Court employees shall not engage in political activity during scheduled work hours or at the workplace.

Section 50.2 Rules governing conduct for nonjudicial court employees not contained in this Part.

- (a) Appointments by the Court. Court employees may not be appointed as guardians, guardians ad litem, court evaluators, attorneys for alleged incapacitated persons, receivers, referees (to sell real property) or persons designated to perform services for any of these, as provided in section 36.2(c)(3) of the Rules of the Chief Judge (22 NYCRR 36.2[c][3]).
- (b) *Financial disclosure*. Court employees who are required to file financial disclosure statements in accordance with section 40.2 of the Rules of the Chief Judge [22 NYCRR 40.2] must comply with the requirements of that section.
- (c) Political activity of personal appointees of judges. Court employees who are personal appointees of judges on the judges' staffs may not engage in political activities as set forth in section 100.5(C) of the Chief Administrator's Rules Governing Judicial Conduct (22 NYCRR 100.5[C]).

Section 50.3 Dual employment in the court service.

- (a) No employee regularly employed in a position in the classified service in the Unified Court System shall, while continuing to hold such position, accept appointment or employment in any other position or title, or in any capacity whatsoever, on a full-time or part-time basis, either in the classified or unclassified service, in another department or agency of the State or a political subdivision, or in the Legislature or the Judiciary, for which employment compensation or salary is payable, without the previous consent in writing of his or her appointing authority, except that such consent shall be subject to approval by the Chief Administrator of the Courts for employees of courts other than the appellate courts. Such written consent shall be required, in each case, for each such additional appointment or employment accepted or undertaken by such employee.
- (b) A willful violation of the provisions of this section shall be deemed sufficient cause for disciplinary action, including removal.

Section 50.4 Obstruction of court service rights; false representation; impersonation in examination; misuse or misappropriation of examination material.

(a) Any person who shall willfully, by himself or herself, or in cooperation with other persons, defeat, deceive or obstruct any person in respect of his or her right of examination, registration, certification, appointment, promotion or reinstatement, pursuant to the provisions of this Part or who shall willfully and falsely mark, grade, estimate or report upon the examination or proper standing of any person examined, registered or certified pursuant to the provisions of this Part or aid in so doing, or who shall willfully make any false representations concerning the same, or concerning the person examined, or who shall willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, registered or certified, or to be examined, registered or certified, or who shall impersonate any other person, or permit or aid in any manner any other person to impersonate him or her, in connection with any registration or application or request to be registered, shall for each offense be subject to the provisions of section 106 of the Civil Service Law.

(b) A person who shall:

- (1) impersonate, or attempt to or offer to impersonate, another person in taking an examination held pursuant to this Part;
- (2) take, or attempt to take or offer to take, such an examination in the name of any other person;
- (3) procure or attempt to procure any other person to falsely impersonate him or her or to take, or attempt to take or offer to take, any such examination in his or her name;
- (4) have in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities;
- (5) sell or offer to sell questions or answers prepared for use in any such examination;
- (6) use in any such examination any questions or answers secured prior to the administration of the examination or secure the questions or secure or prepare the answers to the examination questions prior to the administration of the examination, unless duly authorized to do so by the appropriate authorities; or
- (7) disclose or transmit to any person the questions or answers to such examination prior to its administration, or destroy, falsify or conceal the records or results of such examination from the appropriate authorities to whom such records are required to be transmitted in accordance with this Part, unless duly authorized to do so by the appropriate authorities;

Section 50.4, cont.

shall be subject to the provisions of section 50(11) of the Civil Service Law. Additionally, a person who is found by the appropriate administrative authority to have violated this section, in addition to any disciplinary penalty that may be imposed, shall be disqualified from appointment to the position for which the examination is being held and may be disqualified from being a candidate for any civil service examination for a period of five years.

Section 50.5 Prohibition against certain political activities; improper influence.

- (a) Recommendations based on political affiliations. No recommendation or question under the authority of this Part shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this Part shall be in any manner affected or influenced by such opinions or affiliations. No person in the Unified Court System is for that reason under any obligation to contribute to any political fund or to render any political service, and no person shall be removed or otherwise prejudiced for refusing so to do. No person in the Unified Court System shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in the Unified Court System, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose. No person in the Unified Court System shall use his or her official authority or influence to coerce the political action of any person or body or to interfere with any election.
- (b) Inquiry concerning political affiliations.
 - (1) No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the Unified Court System or of any person dependent upon or related to such an employee, as a test of fitness for holding office. A violation of this subdivision shall be subject to the provisions of subdivision 2 of section 107 of the Civil Service Law. Nothing herein contained shall be construed to prevent or prohibit inquiry concerning the activities, affiliation or membership of any applicant or employee in any group or organization which advocates that the government of the United States or of any state or of any political subdivision thereof should be overturned by force, violence or any unlawful means.
 - (2) No question in any examination or application or other proceeding pursuant to this Part shall be so framed as to elicit information concerning, nor shall any other attempt be made to ascertain, the political opinions or affiliations of any applicant, competitor or eligible, and all disclosures thereof shall be disregarded. No discrimination shall be exercised, threatened or promised against or in favor of any applicant, competitor or eligible because of his or her political opinions or affiliations.
- (c) *Political assessment*. No employee of the Unified Court System shall, directly or indirectly, use his or her authority or official influence to compel or induce any other employee of the Unified Court System to pay or promise to pay any political assessment, subscription or contribution. Every employee who may have charge or control in any building, office or room occupied for any governmental purpose is hereby authorized to prohibit the entry of any person,

Section 50.5, cont.

and he or she shall not knowingly permit any person to enter the same for the purpose of making, collecting, receiving or giving notice therein, of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment; nor shall any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution. No person shall prepare or take any part in preparing any political assessment, subscription or contribution with the intent that the same shall be sent or presented to or collected from any employee subject to the provisions of this Part, and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any employee. Any person violating any provision of this subdivision shall be subject to the provisions of subdivision 3 of section 107 of the Civil Service Law.

- (d) Prohibition against promise of influence. Any person who, while holding any public office, or in nomination for, or while seeking a nomination or appointment for any public office, shall corruptly use or promise to use, whether directly or indirectly, any official authority or influence, whether then possessed or merely anticipated, in the way of conferring upon any person, or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration that the vote or political influence or action of the last-named person, or any other, shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration, shall be subject to the provisions of subdivision 4 of section 107 of the Civil Service Law. Any public officer, or any person having or claiming to have any authority or influence for or affecting the nomination, public employment, confirmation, promotion, removal or increase or decrease of salary of any public officer, who shall corruptly use, or promise, or threaten to use any such authority or influence, directly or indirectly in order to coerce or persuade the vote or political action of any citizen or the removal, discharge or promotion of any officer or public employee, or upon any other corrupt consideration, shall also be subject to the provisions of subdivision 4 of section 107 of the Civil Service Law.
- (e) *Political organizations*. No employee of the Unified Court System may hold an elective office in a political party, or a club or organization related to a political party, except that an employee may be a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee.

Section 50.6 Practice of law.

- (a) A lawyer who is employed full-time in any court or agency of the Unified Court System shall not maintain an office for the private practice of law alone or with others, hold himself or herself out to be in the private practice of law, or engage in the private practice of law except as provided in this section.
- (b) Subject to prior written application and approval as to each professional engagement, a person referred to in subdivision (a) of this section may engage in the private practice of law as to matters not pending before a court or a governmental agency, in uncontested matters in the Surrogate's

5

Section 50.6, cont.

Court, uncontested accountings in the Supreme Court and other *ex parte* applications not preliminary or incidental to litigated or contested matters. Such approval shall continue only to the completion of the particular engagement for which permission was obtained, except that prior approval for the provision of *pro bono* services, authorized under subdivision (c) of this section, may be granted on an annual basis with respect to an organization or project that provides such services to persons unable to afford counsel. Prior approval must be obtained from:

- (1) the Chief Judge of the Court of Appeals for lawyers employed in that court;
- (2) the Presiding Justice of the appropriate Appellate Division for lawyers employed by an Appellate Division; and
- (3) the Chief Administrator of the Courts for lawyers employed in every other court or court-related agency in the Unified Court System.
- (c)
 (1) Persons referred to in subdivision (a) of this section may provide *pro bono* legal services, which do not interfere with the performance of their jobs, in contested or uncontested matters, except those brought in the courts of their own employment.
 - (2) *Pro bono* services in any contested matter shall be performed under such written terms and conditions as may be specified by the approving authority designated in paragraph (b)(1), (2) or (3) of this section.
 - (3) No provision of legal services or related activities authorized pursuant to this section may take place during usual working hours unless appropriate leave is authorized and charged. No public resources may be used in any such connection. Reasonable precautions must be taken in all cases by approving authorities and authorized employees to avoid actual and perceived conflicts of interest and the actual or perceived lending of the prestige or power of the public offices or positions of the employees and conveying the impression that such employees are in special positions to exert influence.
- (d) An employee of the Unified Court System who is employed on a part-time basis shall not participate directly or indirectly as a lawyer in any contested action or proceeding in the court in which he or she serves, or in any other practice of law which is incompatible with or which would reflect adversely upon his or her position or the performance of his or her duties. Such employee may participate as a lawyer in uncontested actions or proceedings in the court in which he or she serves only with prior written approval of the Chief Administrator of the Courts.
- (e) No partner or associate of a part-time law secretary or law clerk shall practice law before the justice or judge by whom such law secretary or law clerk is employed.
- (f) Each approving authority or designee shall report annually to the Chief Administrator of the Courts the number of requests and approvals. With respect to *pro bono* representation, each

Section 50.6, cont.

authorized employee shall report annually to the Chief Administrator the number of representations and *pro bono* hours performed.

Appendix P

Dual Employment/Extra Service Approval Form: Request for approval to serve with another state agency

AC 1588 (Rev. 5/06)

STATE OF NEW YORK OFFICE OF THE STATE COMPTROLLER BUREAU OF STATE PAYROLL SERVICES

DUAL EMPLOYMENT/EXTRA SERVICE APPROVAL FORM

TO DE COMP	LETED BY EMPLOYEE
	LETED BY EMPLOYEE
PRESENT EMPLOYMENT:	
Name	Agency (where employed)
Title	Dept. ID
	Last 4 Digits of Social Security Number
ADDITIONAL EMPLOYMENT REQUEST:	
I request approval to render additional service to the	(Name of Agency) (Dept. ID)
at, for the period fr	omthrough
	f Description of Work to be Performed)
	·
This requested additional service will not interfere with my r	egular duties.
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Appendix Q

Per Diem Court Interpreter (Freelance) American Sign Language



UCS-23

EMPLOYMENT
OPPORTUNITY
ANNOUNCEMENT
STATE OF NEW YORK
UNIFIED COURT SYSTEM

PLEASE POST

ANNOUNCEMENT NO. 1709

POSITION TITLE: PER DIEM COURT INTERPRETER (FREELANCE)

AMERICAN SIGN LANGUAGE

LOCATION: NEW YORK STATE COURTS

COMPENSATION: FULL-DAY RATE: \$300.00

HALF-DAY RATE: \$170.00 There are no fringe benefits available

QUALIFICATIONS: High School Diploma **or** the equivalent **and** professional certification by a recognized credentialing authority

as required by Section 390 of the judiciary law; or an equivalent combination of education and certification.

NOTE: The Chief Administrative Judge has established the Registry of Interpreters for the Deaf, Inc (RID) as a recognized credentialing authority. The minimum RID credential required by the New York State Unified Court System is the National Interpreter Certificate (NIC). Prior to appointment, candidates may be required to participate in an assessment of their language competency and skills. Currently, RID CI certification is recognized as equivalent to the NIC requirement.

DISTINGUISHING FEATURES OF WORK:

Per diem court interpreters (Sign) are independent contractors who work on a per-diem basis and are primarily responsible for interpreting between American Sign language (ASL) and spoken English in the courtroom and/or other settings. They perform simultaneous and consecutive interpretation, as well as translation of court documents and other written material. For more information see the Court Interpreter Manual and Code of Ethics at: www.nycourts.gov/courtinterpreter/pdfs/Courtinterpreter/Manual.pdf

GENERAL INFORMATION:

Qualified individuals are listed in the Statewide Registry of per diem interpreters eligible for court interpreting assignments in the New York courts based upon the specific counties where they would be willing to work. Interpreters who meet the qualifications listed will be required to attend (at no fee) specific seminars on ethics and the courtroom procedures conducted by the Office of Language Access. Unified Court System employees are not eligible to be placed on this registry.

APPLICATION PROCEDURES: Individuals can file directly by completing the Application For Language Skills Screening which is available online at: http://www.nycourts.gov/careers/applicationforms.shtml or by contacting the Office of Language Access at the address below:

Coordinator, Office of Language Access Office of Court Administration Division of Professional and Court Services 25 Beaver Street - Room 809 New York, NY 10004 Phone Number : 646-386-5670 e-mail: courtinterpreter@nycourts.gov

There are NO APPLICATION FILING FEES OR EXAMINATION FEES for this opportunity at this time. However, individuals who meet all of the qualifications, including passing the screening examinations, will be required to pay a fee for fingerprint processing to conduct a required criminal history background check.

ISSUE DATE: April 2017

APPLICATIONS WILL BE ACCEPTED CONTINUOUSLY

The New York State Unified Court System is an equal opportunity employer, and does not discriminate on the basis of race, color, religion, gender (including pregnancy and gender identity or expression), national origin, political affiliation, sexual orientation, marital status, disability, age, membership in an employee organization, parental status, military service, or other non-merit factor.

Per Diem Court Interpreter (Freelance) Languages Other Than Spanish



UCS-23

EMPLOYMENT
OPPORTUNITY
ANNOUNCEMENT
STATE OF NEW YORK
UNIFIED COURT SYSTEM

PLEASE POST ANNOUNCEMENT NO. 1708

POSITION TITLE: PER DIEM COURT INTERPRETER (FREELANCE)

LANGUAGES OTHER THAN SPANISH*

LOCATION: NEW YORK STATE COURTS

While opportunities exist statewide, there is a special need for these language services in New York City

and for several counties in upstate New York.

COMPENSATION: FULL-DAY RATE: \$300.00

HALF-DAY RATE: \$170.00 There are no fringe benefits available

REQUIREMENTS: High School Diploma or the equivalent **and** a legal right to work in the United States.

The NYS Courts provide interpreters in over 100 languages each year. Candidates for ALL LANGUAGES are encouraged to apply.

*SPANISH court interpreter candidates must apply through the open competitive exam that is offered on a different schedule.

DISTINGUISHING FEATURES OF WORK:

Per diem court interpreters are independent contractors who work on a per-diem basis and are responsible for interpreting between English and another language in the courtroom and/or other settings. They perform simultaneous and consecutive interpretation, as well as translation of court documents and other written material.

ADDITIONAL QUALIFICATIONS:

To qualify as a per diem court interpreter, individuals must first demonstrate sufficient English language competency by passing the New York State Court System's Written Test of English Language Proficiency and Legal Terminology. This 75-question written test is designed to assess English language proficiency involving grammar, vocabulary, word usage, reading comprehension, idiomatic expressions and legal terminology. Individuals are allowed 90 minutes to complete the written test and must obtain a passing score. More information about this written test can be found at:

http://www.nycourts.gov/careers/English%20Language%20Proficiency%20Sample%20Questions.pdf.

Upon successful completion of the written exam, candidates may be assessed on their oral language skills. Oral Assessment

Upon successful completion of the written exam, candidates may be assessed on their oral language skills. Oral Assessment examinations are currently conducted in Albanian, Arabic, Bengali, Bosnian/Croatian/Serbian (BCS), Cantonese, French, Greek, Haitian Creole, Hebrew, Hindi, Italian, Japanese, Korean, Mandarin, Polish, Portuguese, Punjabi (Eastern), Russian, Urdu, Vietnamese, and Wolof. Please see the Candidate Guide for more information on the oral tests at:

Candidates will be required to submit professional references related to their interpreting skills for languages that do not have an oral assessment. Interpreters possessing out-of-state court interpreter certification or other federal certification or professional credentials may apply for state reciprocity for the Registry designated languages or other languages subject to specific conditions (i.e., minimum educational requirements, professional training and experience, and a criminal history check). Additional information on reciprocity provisions may be found at: http://www.nycourts.gov/courtinterpreter/pdfs/Reciprocityprovisions.pdf

GENERAL INFORMATION:

Successful individuals are listed in the Statewide Registry of per diem interpreters eligible for court interpreting assignments in the New York Courts based upon the specific counties where they would be willing to work. Interpreters who meet the qualifications listed will be required to attend (at no fee) specific seminars on ethics and courtroom procedures conducted by the Office of Language Access. Unified Court System employees are not eligible to be placed on this registry. Written and oral examinations are administered in test centers throughout New York State and are held on a periodic basis depending upon the needs of the courts.

APPLICATION PROCEDURES:

Individuals can file directly by completing the Application For Language Skills Screening which is available online at: http://www.nycourts.gov/careers/applicationforms.shtml or by contacting the Office of Language Access at the address below:

Coordinator, Office of Language Access
Office of Court Administration
Division of Professional and Court Services
25 Beaver Street - Room 809
New York, NY 10004
Phone Number: 646-386-5670
e-mail: courtinterpreter@nycourts.gov

There are NO APPLICATION FILING FEES OR EXAMINATION FEES for this opportunity at this time. However, individuals who meet all of the qualifications, including passing the screening examinations, will be required to pay a fee for fingerprint processing to conduct a required criminal history background check.

ISSUE DATE: April 2017

APPLICATIONS WILL BE ACCEPTED CONTINUOUSLY

The New York State Unified Court System is an equal opportunity employer, and does not discriminate on the basis of race, color, religion, gender (including pregnancy and gender identity or expression), national origin, political affiliation, sexual orientation, marital status, disability, age, membership in an employee organization, parental status, military service, or other non-merit factor.

Appendix S

DFM Bulletin 1202: Per Diem Court Interpreter Payments



NEW YORK STATE Unified Court System

HONORABLE LAWRENCE K. MARKS ADMINISTRATIVE DIRECTOR RONALD P. YOUNKINS, ESQ. CHIEF OF OPERATIONS

OFFICE OF COURT ADMINISTRATION

MAUREEN H. McALARY
DIRECTOR, DIVISION OF FINANCIAL MANAGEMENT

Division of Financial Management

DFM Bulletin	Number 1202	March 30, 2012
DFM Bulletin	Number 1202	March 30, 2012

TO: Holders of the Financial Planning and Control Manual

SUBJECT: Per-Diem Court Interpreter Payments

This bulletin promulgates a new form which replaces <u>all</u> previous forms, including vouchers, for the reimbursement of per-diem court interpreter services. It also provides procedural direction for entering interpreter invoices into the Statewide Financial System (SFS).

The newly created form is available both as a fillable PDF or as a two-part hard copy as follows:

Fillable PDF: Available on the DFM Forms page: Per Diem Court Interpreter Invoice

Two-Part Detachable Version (which provides a signed copy for the Interpreter): An initial supply of forms will be sent to those courts currently using a two-part form. Subsequent quantities should be requested from the Office of Court Interpreting Services on a quarterly basis.

The signed invoice form and the E-system check-in report are required before entry is made into SFS. Each invoice corresponds to one instance of service by the court interpreter; multiple assignments or payments will no longer be permitted on the same form.

4 ESP, SUITE 2001, EMPIRE STATE PLAZA, ALBANY, NEW YORK 12223

PHONE: 518-453-8600 • FAX: 518-474-3218 • MMCALARY@COURTS.STATE.NY.US

Appendix S

DFM Bulletin 1202: Per Diem Court Interpreter Payments (cont.)

- 2 -

Information needed for SFS data entry:

"Invoice Number" - The invoice number is unique for each reimbursement request and is created by the fiscal office via data entry of <u>date</u>, <u>type</u> and <u>court assignment</u>. Guidelines are as follows:

Date of Interpreter Assignment: MM/DD/YYYY

Type of Assignment: HD (Half Day: am/ pm), FD (Full Day) or NC (Night Court) **Court Name:** This field is limited to 13 characters. Abbreviations should be consistent.

Example: Cattaraugus Family Court could be entered as: Cattaraug Fam

Invoice remittance display: 04/24/2012 HD AM Cattaraug Fam

Vendors may access payment information through the SFS vendor support site.

Please ensure distribution of this bulletin to all personnel within your court/agency who may be responsible for the processing of, or the monitoring of internal controls related to, court interpreter payments. Thank you for your cooperation.

NYS UNIFIED COURT SYSTEM FOR ADMINISTRATIVE PURPOSES ONLY

Jaurean H. Mcalary
Maureen H. McAlary

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Appendix T

Budget Bulletin #1703, March 16, 2017



NEW YORK STATE Unified Court System

OFFICE OF COURT ADMINISTRATION

RONALD P. YOUNKINS, ESQ.

BARRY R. CLARKE, ESQ. CHIEF OF OPERATIONS

MAUREEN H. McALARY DIRECTOR, DIVISION OF FINANCIAL MANAGEMENT

Division of Financial Management

DFM Bulletin	Number 1703	March 16, 2017

TO: Holders of the Financial Planning and Control Manual

SUBJECT: Per Diem Rates - Interpreter Services

* This supersedes the provisions of Budget Bulletin 362 dated April 24, 2006

Effective April 1, 2017 the rates for per diem interpreter services provided to the courts and agencies of the Unified Court System shall be as follows:

Per Diem Interpreter Rates - Effective April 1, 2017

Full Day Rate	Half Day Rate
\$300.00	\$170.00

The above rates are applicable to all sub-contractors providing per diem <u>language</u> or <u>sign</u> interpreting services. The half-day rate listed above shall be the amounts payable for engagements of four (4) hours or less in duration.

Please ensure distribution of this bulletin to all personnel within your respective jurisdictions who may be responsible for the recruiting or making payments for per diem interpreting services, or for the monitoring of internal controls relating thereto.

NYS UNIFIED COURT SYSTEM FOR ADMINISTRATIVE PURPOSES ONLY

Maureen H. Mc Clary
Maureen H. McAlary

4 ESP, SUITE 2001, EMPIRE STATE PLAZA, ALBANY, NEW YORK 12223 • PHONE: 518-453-8600 • MMCALARY@NYCOURTS.GOV

Per Diem Court Interpreter Invoice

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Glossary of Legal Terms

A & R: Accounts and Records. In New York City Family Court a statement of the Support Collection Unit (SCU) on an order of support.

ABATEMENT: Removal or reduction of rent based on landlord's breach of warranty of habitability. In housing cases, tenants sometimes request abatement.

ABET: To assist, incite or encourage another to commit an offense.

ABUSE: Abuse of a child under 18 years of age. Used in cases where a parent or person legally responsible for the child's care is alleged to have physically or sexually abused the child or permits another person to physically or sexually abuse the child.

ACCESSORY: One who assists, participates in or contributes in a secondary role to the commission of an offense.

ACCOMPLICE: An associate or partner in the commission of a crime.

ACCUSE: To formally initiate criminal proceedings against a person by charging him or her with having committed an offense.

ACD: "Adjournment in Contemplation of Dismissal" - Legal disposition of a case which will be dismissed at the end of six months (or one year, depending on the circumstances of the case) if the defendant does not violate any laws during that period of time.

ACQUIT: To exonerate (by judge or jury) a person of the offense charged.

ACS: Administration for Children's Services. A city agency charged with investigating allegations of child abuse/neglect,

encouraging family stability and, when necessary, the placing of children in foster care and in adoptive homes.

ACTION: A civil judicial proceeding where one party prosecutes another for a wrong done or for protection of a right or prevention of a wrong. An action requires service of process on an adversary party.

ADJOURN: To delay a legal proceeding for a brief period. To suspend until a later stated time or indefinitely

ADJOURNMENT: The postponement of a proceeding for a specific period of time.

ADJUDICATE: To hear or try and determine judicially.

ADMINISTRATOR: Any person to whom letters of administration have been issued. One who administers: executive. Law. One who administers an estate.

ADMINISTRATOR c.t.a: Any person to whom letters of administration, with the will annexed, have been issued.

ADMINISTRATOR d.b.a: Any person to whom ancillary letters of administration have been issued (administer, carry out administration).

ADMISSION: A statement made by a party adverse to his or her interests. The act of admitting or the state of being admitted. A confession of wrongdoing. The right to enter; access. An entrance fee.

ADOPTION: A proceeding where a person or couple is given a legal relationship of parent to a child, thereby acquiring parental rights and responsibilities as if the child was biologically born to that person or couple.

ADVERSARY: An opponent; the defendant is the plaintiff's adversary.

AFFIANT: One who swears to an affidavit; deponent.

AFFIDAVIT: A sworn written statement of facts.

AFFIRMED: Upheld, agreed with. For example, the appellate court affirmed the judgment of the Civil Court.

AGREEMENT: A manifestation of mutual assent between two or more legally competent persons which ordinarily leads to a contract. In common usage, it is a broader term than contract, bargain, or promise, since it includes executed sales, gifts, and other transfers of property, as well as promises without legal obligation.

AID AND ABET: To actively, knowingly, intentionally, or purposefully facilitate or assist another individual in the commission or attempted commission of a crime.

AKA: "Also Known As" - Indicates an alias.

ALIAS: An assumed name. Otherwise named: also known as

ALLEGATION: The assertion, declaration or statement of a party to an action, made in a pleading, setting out what the party expects to prove.

ALLEGE: To assert a fact in a pleading.

ALLEN CHARGE: Further instructions in a criminal case which the judge gives to a jury having difficulty reaching a decision in order to encourage the jury to reach a verdict.

ALLOCUTION: Oral explanation by a judge of procedures, plea or stipulation of settlement for the purpose of ensuring that the parties understand the terms and effect.

AMEND: To revise, modify or alter by addition or deletion.

AMOUNT REALIZED: The amount received by a taxpayer upon the sale or exchange of property. This becomes the starting point for determine whether there is a sufficiently substantial change in the taxpayer's economic situation to warrant the imposition of an income tax.

ANCILLARY ADMINISTRATOR: Any person to whom ancillary letters of administration have been issued.

ANCILLARY EXECUTOROR: Any person to whom ancillary letters testamentary or ancillary

ADMINISTRATOR C.T.A.: Letters of administration c.t.a have been issued.

ANCILLARY GUARDIAN: Any person to whom ancillary letters of guardianship, whether of the person, property, or both, of an infant have been issued.

ANNUL: To make void, to dissolve that which once existed, as to "annul" the bonds of matrimony.

ANSWER: A paper filed in court and sent to the plaintiff by the defendant, admitting or denying the statements in the plaintiff's complaint, briefly stating why the plaintiff's claims are incorrect and why the defendant is not responsible for the plaintiff's injury or loss.

APARTMENT: A part of a house occupied by a person, while the rest is occupied by another, or others.

APARTMENT BUILDING: A building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical

conveniences, such as heat, light, or elevator services, in common to all families occupying the building.

APPEAL: The judicial proceedings or steps in the proceedings resulting from a request to a higher court for a review of the decision of a lower court.

APPEARANCE: The participating in the proceedings by a party summoned in an action, either in person or through an attorney.

APPELLANT: The party who takes an appeal to a higher court.

APPELLEE: The party against whom an appeal is taken.

APPROPRIATE: To set apart for, or to assign to, a particular purpose or use, in exclusion of all others.

APPROVE: To be satisfied with, to confirm, ratify, sanction, or consent to some act or thing done by another.

ARBITER: One appointed by the court to decide a controversy according to law or equity. A decision-maker who is not a judicial officer.

ARBITRATION: A process in which an impartial person decides a dispute instead of the court.

ARBITRATOR: A impartial person chosen by the parties to solve a dispute between them, who is vested with the power to make a final determination concerning issues in controversy.

ARCHIVES: Any place where old records and books are kept.

ARGUMENT: A reason given in proof or rebuttal.

ARMED ROBBERY: The forcible and felonious taking of property from another while armed with a deadly weapon.

ARRAIGNMENT: A hearing before a judicial officer at which the defendant is informed of the charges against him or her and pleads guilty or not guilty. Bail may be set at this time.

ARREARS: That which is unpaid although due to be paid.

ARREST: The apprehension or detention of an individual for the purpose of charging that individual with a specific offense.

ARREST RECORD: A written account listing all the instances in which a person has been arrested.

ARSON: The malicious and intentional burning of property (such as a building).

ASSAULT: A violent attack with the intention of injuring a person.

ASSIGNED COUNSEL: A defense attorney designated by the court to represent a defendant who does not have the funds to retain an attorney.

ASSIGNMENT PART: Part to which all new cases are referred for further proceedings.

ATTACHMENT: The taking of property into legal custody by an enforcement officer.

ATTEMPT: An overt act directed toward the commission of an offense which is performed with the intent and ability to commit the offense.

AUTHENTIC: Genuine; true; real; pure; reliable; trustworthy; having the character and authority of an original; duly vested with all necessary formalities and legally attested; competent, credible, and reliable as evidence.

AWARD: The decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision. The final decision; something awarded.

BAIL: The money or property deposited with the court as insurance that the person will return to court. This permits the person in custody to be released while awaiting disposition of his or her case.

BALANCE: An equality between the sums total of the two sides of an account, or the excess on either side.

BAR: The railing in a courtroom enclosing the area where the lawyers and defendants sit. A system of law courts. The legal profession collectively or the whole body of lawyers.

BENCH CONFERENCE: A meeting between the attorneys and the judge at the judge's bench to discuss an issue in the case or an aspect of the proceedings. It may or may not be part of the official record.

BENEFICIARY: Any person entitled to any part or all of an estate.

BEQUEST OR LEGACY: A transfer of persons property by will.

BEYOND A REASONABLE DOUBT: The degree of certainty required by the trier of fact (judge or jury) to find a criminal defendant guilty.

BGT: Blood Group Test. Order by the court which requires mother, alleged father, and child to submit to blood tests. Also known as Blood Genetic Marker Test.

BILL OF PARTICULARS: Factual detail submitted by a claimant after a request by the adverse party which details, clarifies or explains further the charges and/or facts alleged in a pleading.

BOOK: To enter a person's name, the offense for which he or she was arrested and other pertinent information in the police files.

B PETITION: When an agency responsible for a child in foster care believes that the child's parents have not kept in contact, have not planned for the child's future, have abandoned the child, have severely or repeatedly abused the child, or are mentally ill or retarded in a way that may harm the child, the agency can file a petition to terminate parental rights to the child. If the court grants the petition, the child is freed for adoption.

BREACH OF CONTRACT: A party's failure to perform some contracted-for or agreed- upon act.

BRIEF: A written or printed document prepared by the attorneys on each side of a dispute and submitted to the court in support of their arguments. A brief includes the points of law which the lawyer wishes to establish, the arguments the lawyer uses and the legal authority on which the lawyer rests his or her conclusions.

BURDEN OF PROOF: The duty of a party to substantiate an allegation or issue, in order to prevail in a civil or criminal suit.

BURGLARY: The act of entering a building with an intent to commit a crime.

CABINET: The advisory board or council of a chief executive.

CALENDAR: A schedule of matters to be heard in court.

CALENDAR CALL: The calling of matters requiring parties, or their attorneys, to appear and be heard. There is usually one at the beginning of each court day. Other calendar calls may take place throughout the day.

CAPTION: The heading or introductory clause in a pleading, deposition or other paper connected with a case in court, which shows the names of the parties, name of the court, number of the case on the docket or calendar, etc.

CASA: Court Appointed Special Advocates. Non-attorneys who work in aid of children in foster care.

CAUSE OF ACTION: Grounds on which a legal action may be brought (e.g., property damage, personal injury, goods sold and delivered, labor and services).

CCA: Civil Court Act.

CERTIFICATE OF OCCUPANCY/C OF O: A document by a local government agency signifying that a building or dwelling conforms to local building code regulations.

CERTIFIED COPY: A document that contains a seal that establishes the document as a genuine true copy, so that it may be used as evidence at a trial or hearing. A document may be certified by an official record keeper, a clerk of the court, or any other authorized person.

CERTIFIED STATEMENT: A statement which has been sworn to before a Notary Public or Commissioner of Deeds as a true statement.

CHALLENGE: Objection by a party to the selection of a prospective juror.

CHAMBERS: Private office or room of a judge.

CHANGE OF VENUE: The removal of a case begun in one county or district to another for trial or from one court to another court in the same county or district.

CHARGE: An allegation that a person has committed a specific offense.

CHARGE TO THE JURY: Instructions given by a judge to a jury before deliberations begin.

CHATTEL: Article of personal property.

CHILD ABUSE: Situation where a child's (less than eighteen years of age) parent or person legally responsible for his/her care, inflicts or allows physical injury to be inflicted upon him/her or commits, or allows to be committed, a sex offense against such child as defined in the Penal Law.

CHILD ABUSE OR NEGLECT PROCEEDINGS:

A proceeding brought in court to protect a child from injury or mistreatment by a parent or other person legally responsible for the child.

CHILD NEGLECT: Situation where a child (less than eighteen years of age) lacks proper care, including those where he/she suffers or is in imminent danger of suffering psychological or physical damage for any reason.

CHILD PROTECTIVE AGENCY: Any agency, association, corporation, institution, society or other organization which is incorporated or organized under the laws of this state to care for, to place, or to board out children.

CIC: Change in circumstances. Term often used as a basis for modifying a court order.

CIVIL ACTION: Action maintained to protect a private, civil right, or to compel a civil remedy, as distinguished from a criminal prosecution.

CIVIL CONTEMPT: A willful failure to comply with a court order. Civil contempt is committed when a person violates an order of the court which specifically requires that the person do or refrain from doing an act. Punishment for civil contempt may be a fine or imprisonment; the goal of the punishment is to have the person comply with the original order of the court.

CJJ: Commissioner of Juvenile Justice.

CLAIM: The assertion of a right to money or property.

CLAUSE: A single paragraph or subdivision of a legal document, such as a contract, deed, will or statute.

CLO: Court Liaison Officer. Probation officer assigned to the court.

CLOSING ARGUMENTS: Final statements during trial made by attorneys for each party in which they summarize the evidence they have presented and whatever they assert the opposing party has failed to prove.

COI: Court ordered investigation, usually performed by ACS.

COLLUSION: Agreement with another to engage in illegal activity or commit fraud.

COMMERCIAL NON-PAYMENT PROCEEDING:

Proceeding against a company for failure of payment.

COMMON AREA: In landlord-tenant law, portions of premises used in common by all tenants.

COMPARISON MICROSCOPE: Two microscopes optically bridged to one eye piece to enable the viewing of two items of evidence side by side.

COMPLAINT: A paper filed in court and delivered to the party(s) being sued stating the plaintiff's claims against the defendant.

CONCURRENT SENTENCE: A penalty consisting of two or more prison terms which are to be served simultaneously.

CONDITIONAL DISCHARGE: Sentence without imprisonment or probation but with a condition that must be complied with.

CONFESSION OF JUDGMENT: Entry of a judgment upon written admission of the debtor.

consisting of two or more prison terms which are to be served in sequence one to begin when the other has been completed.

CONSENT: Voluntary agreement.

CONSENT TO MARRY: The marriage of a minor who is at least 14 years of age and less than 16 years of age must have the consent of the court.

CONSPIRACY: The criminal enterprise of two or more persons who have entered into an agreement to commit an unlawful act.

CONTEMPT OF COURT: The finding of the court that an act was committed with the intention of embarrassing the court, disobeying its lawful orders or obstructing the administration of justice in some way.

CONTROLLED SUBSTANCE: Drug which has been categorized by law according to the potential for its abuse and the risk posed.

CONVICT: To prove or find guilty of the crime charged.

CONVICTION: A finding of guilt by a judge, a jury, or a guilty plea.

CORPORATE TRUSTEE: Any trust company or bank authorized to exercise fiduciary powers.

COSTS: The statutory sum awarded to the successful party when a judgment is entered.

COUNTERCLAIM: A legal claim by the defendant against the plaintiff.

COURT: Body of government that is responsible for the resolution of disputes arising under the laws of the government.

COURT ORDER: A command or direction issued by a court.

COURT REPORTER: A person who stenographically takes down testimony during court proceedings.

COVENANT: An agreement or contract

CPL: Criminal Procedure Law.

CPLR: Civil Practice Law and Rules.

CREDITOR: A person to whom a debt is owed by another who is the "debtor."

CRIME: An act of omission or commission in violation of law which carries criminal consequences.

CROSS CLAIM: Claim litigated by codefendants or co-plaintiffs against each other and not against a party on the opposite side of the litigation.

CROSS EXAMINATION: The interrogation of a witness by the opposing party or attorney. Cross examination is limited to those matters about which the witness testified during direct examination.

CSET: Child Support Enforcement Term of the Family Court. A special term with city-wide jurisdiction created in New York

County to handle support enforcement when the person to be supported receives public assistance.

CSS: Commissioner of Social Services

CUSTODY (V PETITION): Petition seeking to establish that a person is legally declared to be responsible for the care of a child.

DECISION: A finding of fact or conclusion of law by the court, usually in writing.

DEED: Written document conveying title of realty to another.

DEFAULT: A default occurs when a party fails to plead or otherwise defend within the time allowed or fails to appear at a court appearance.

DEFAULT JUDGMENT: A judgment entered against a defendant due to his or her failure to appear or submit papers at an appointed time during a legal proceeding.

DEFENDANT: In civil proceedings, the party responding to the complaint. In criminal proceedings, the person charged with the commission of a crime, also called the accused.

DEFENSE: Answer to the accusation offered by the defendant.

DFY: Division for Youth. See NYS Office of Children and Family Services.

DELIBERATION: The process by which a panel of jurors comes to a decision on a verdict.

DE NOVO: From the beginning; a new trial.

DEPOSITION: Sworn testimony of a witness outside of the courtroom.

DESIGNATED FELONY ACTS (E PETITION):

Certain serious violent act crimes committed by a 13, 14, or 15 year old.

DEVISE: When used as a noun, a transfer of real property by will. When used as a verb, to transfer real property by will.

DEVISEE: Any person to whom real property is transferred by will.

DHCR: Division of Housing and Community Renewal.

DHPD: Department of Housing Preservation and Development

DIRECT EXAMINATION: The first questioning of a witness by the party presenting that witness.

DIRECTED VERDICT: An order of the entry of a verdict by the judge without allowing the jury to consider it.

DISCONTINUANCE: The voluntary cessation of a proceeding by the plaintiff.

DISCOVERY: The efforts of a party to a lawsuit to get information about the other party's contentions before trial. During discovery a party may: demand that the other party produce documents or other physical evidence; request written interrogatories which are questions and answers written under oath and; take depositions which involve an in-person session at which one party has the opportunity to ask oral questions of the other party or his or her witnesses.

DISMISS: To terminate a case or charge without a complete trial.

DISMISSAL WITH PREJUDICE: Action dismissed on the merits which prevents renewal of the same claim or cause of action.

DISMISSAL WITHOUT PREJUDICE: Action dismissed, not on the merits, which may be re-instituted.

DISORDERLY CONDUCT: Tumultuous or unruly behavior in public.

DISPOSITION: The termination of proceedings in a case.

DISTRIBUTEE: Any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.

whose official duty is to conduct criminal proceedings on behalf of the People against one accused of committing criminal offenses.

DOCKET: A list of cases pending in a court of law; or a record of the individual transactions in reference to a case.

DOCKET NUMBERS: Numbers sequentially assigned to new cases filed in the court.

DOMICILE: A fixed, permanent, and principal home to which a person, wherever temporarily located, always intends to return.

DOMICILIARY: A person whose domicile is within a designated area.

DSS: Department of Social Services

DUE PROCESS: The guarantee under the Fifth and Fourteenth Amendments that legal proceedings will be carried out pursuant to rules established for the protection of substantive and procedural rights.

DWELLING: A structure or apartment used as a home for a family unit.

DWI: "Driving While Intoxicated" - The unlawful operation of a motor vehicle while under the influence of drugs or alcohol.

18B ATTORNEY: An attorney assigned by the court to represent a party. The assignment is made under County Law, Article18b.

EJECTMENT: A legal action brought by one claiming a right to possess real property against another who possesses the premises adversely or is a holdover tenant who remains beyond the termination of a lease.

EMBEZZLE: To appropriate, fraudulently, to one's use what is entrusted to one's care.

EMERGENCY REMOVAL: The taking of a child from the home because the child is in danger.

ENFORCE: To make effective; as, to enforce a writ, a judgment, or the collection of a debt or fine.

ESCROW: Money or other property delivered to a third person to be held until the happening of a contingency or performance of a condition.

ESCROW ACCOUNT: Money temporarily deposited with a bank to safeguard funds held in escrow.

ESTATE: All of the property of a decedent prior to distribution of that property.

EVICTION: Expulsion of occupants from premises.

EVIDENCE: Any type of probative matter offered at trial in order to convince the trier of fact (judge or jury) of the merit of a party's contention.

EXAMINATION BEFORE TRIAL (EBT): A formal interrogation of parties and witnesses before trial.

EXCLUSIONARY RULE: Doctrine which prohibits the introduction of illegally obtained evidence at trial.

EXECUTION: The process of carrying into effect a court's judgment, decree or order.

EXECUTOR: A person designated in a will to carry out the directions in the will.

EXHIBIT: Physical evidence such as a paper, document or other article produced and presented to a court during a trial or hearing.

EX PARTE: A proceeding or application made by one party only without notice to any other party.

EXTENSION OF PLACEMENT: A proceeding instituted by an authorized agency to which a child has been placed by Family Court to extend the placement with such agency.

EXTRA JUDICIAL SURRENDER: A written surrender of a child by a parent which is not executed and acknowledged before a judge, but executed before witnesses from an authorized agency. The agency must then file an application for approval of the surrender with the court.

EXTRADITE: To surrender by one state or country to another an accused or convicted person.

FACT-FINDING HEARING: The first trial in Family Court where it will be decided if the charges have been proven.

FAMILY OFFENSE (O PETITION): A claim that a person injured or threatened a member of the claimant's family or household.

FAMILY OFFENSE PROCEEDINGS: A proceeding concerning acts between spouses or former spouses or between parent and child, or between members of the same family or household that would constitute disorderly conduct, menacing, reckless endangerment, harassment or assault.

FCA: Family Court Act.

FELONY: A crime punishable by more than a year's imprisonment.

FIDUCIARY: A person or institution that manages money or property for another and must exercise a certain standard of care in that relationship - such as an executor of an estate, a guardian or a trustee.

FINAL JUDGMENT: One which puts an end to a suit or action.

FINDING: Any determination by a judge as to a matter of law or fact, or by a jury as to a matter of fact.

FOREIGN REGISTRATION: If the duty of support for any child, spouse or former spouse is based on a support order of a state other than New York, the petitioner shall have the additional remedy of registering the foreign support order with the clerk of a court of the state. The filing constitutes registration.

FORGERY: The creation, falsification or alteration of a document with intent to commit a fraud.

FORTHWITH: Immediately

FOSTER CARE: Placement of a child by a parent or person legally responsible with an agency authorized to provide care for children.

FOSTER CARE REVIEWS (K PETITION): If a child is in voluntary foster care for 12 continuous months or longer, the court must review the placement and will decide what to do with the child.

FUNERAL EXPENSE: Includes reasonable expense of a funeral, suitable church or other services as an integral part thereof, expense

of interment or other disposition of the body, a burial lot and suitable monumental work thereon and a reasonable expenditure for perpetual care of a burial lot of the decedent.

GAG ORDER: A court ruling limiting the information that the parties and their counsel can reveal about a case.

GARNISHMENT: Process by which a party who controls property belonging to a judgment debtor is forced to turn it over to a judgment creditor.

GHLA/DNA: Human leucocyte blood tissue test. DNA is an alternative to blood generic marker test.

GRAND JURY: A body of people (generally 23 in number) that indicts persons for crimes when it has determined after presentation by the prosecutor, that there is sufficient evidence to warrant holding a person for trial.

GUARDIAN: A person lawfully invested with the power to take care of or manage the property of another person.

GUARDIAN AD LITEM: A person appointed by a court to represent the interests of a minor under 21 years of age or an incompetent.

GUARDIANSHIP PROCEEDING: A proceeding which seeks to confer the guardianship of the person to another.

HARASSMENT: Any exercise of authority in such manner as to be unnecessarily oppressive.

HE: Hearing Examiner.

HEARING: Legal proceeding at which evidence or arguments are presented before a judge.

HEARSAY: A statement, other than one made by the person testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.

HEARSAY RULE: A rule that declares as generally inadmissible as evidence statements made by others than the persons testifying.

HOLDOVER PROCEEDING: Proceeding to remove occupants from premises for reasons other than non-payment of rent.

HOLDOVER TENANCY TENANCY AT SUFFERANCE: A tenancy that comes into existence when one at first lawfully possesses land as under a lease and subsequently remains there after the term of the lease ends.

HOMICIDE: The act of intentionally, recklessly, or negligently causing the death of another person.

HRA: Human Resources Administration

HUNTLEY HEARING: Hearing to determine if statements made by the defendant to the police should be admitted in the criminal proceeding.

IDO: Income or payroll deduction order

IEO: Income execution order.

IMPEACH (A WITNESS): To question the veracity of a witness by showing evidence that the witness is unworthy of belief.

IN CAMERA: Proceedings to which the public is not admitted.

INCAPACITATED PERSON: Any person who, for any cause, is incapable adequately to protect his or her rights, including a person for whom a guardian has been appointed pursuant to article 81 of the Mental Hygiene Law.

INCOME EXECUTION: An order by a court that a portion of the judgment debtor's wages or other property be withheld from the debtor in an amount necessary to satisfy the judgment.

INCOMPETENT: Any person judicially declared unable to manage his or her affairs.

INDEX NUMBER: A number issued by the clerk's office which is used to identify a case.

INDICTMENT: An accusation in writing, made by a grand jury, charging that a person has committed a crime.

INDIGENT: Financially destitute person.

INDIVIDUAL TRUSTEE: Any trustee who is not a corporate trustee.

INFANT: A person under the age of eighteen years.

INFANT'S COMPROMISE: A civil proceeding or motion for obtain court approval of the settlement of an infant's claim.

INQUEST: A non-jury trial for the purpose of determining the amount of damages due on a claim, if a party has not appeared or defended against the claim and after the merits of the claim have been proven.

INSTALLMENTS: Different portions of the same debt payable at different successive periods as agreed.

INTAKE: First court proceeding in Family Court where the petiton is read and charges/demands explained.

INTENT: The state of mind with which a person seeks to accomplish a certain result through a course of action.

INTERPRETER: A person sworn at a judicial proceeding to translate oral or written language.

INTERROGATORIES: Written questions propounded by one party and served on another who must provide written answers under oath.

INTESTATE: One who dies without leaving a will.

I & R: Invesgation and Report by the probation department or ACS.

ISSUE OF FACT: A question concerning a fact maintained by one party that is disputed by the opposing party.

ISSUE OF LAW: A question that concerns an interpretation of law.

JUDGMENT: The final decision of the judge.

JUDGMENT OF POSSESSION: Judgment allowing eviction of occupants from premises.

JUDICIAL HEARING OFFICER (JHO): A person serving as a hearing officer who formerly served as a judge or justice of a court of record of the Unified Court System.

JUDICIAL SURRENDER: A surrender of a child to an authorized agency for the purpose of adoption which is executed and acknowledged before a judge of the Family Court or a Surrogate.

JURISDICTION: The lawful authority of a court over an issue, person or geographic area.

JURY DEMAND: A request for a trial by jury by either party.

JURY INSTRUCTIONS: Directions given by the judge to the jury.

JUVENILE DELINQUENT: A person over seven years of age, and under 16 years of age, who commits an act that would be a crime if it were done by an adult.

JUVENILE DELINQUENCY PROCEEDING: A proceeding to determine whether a minor over the age of seven, but under sixteen, has committed an act which, if committed by an adult, would constitute a crime and whether the minor requires supervision, confinement or treatment.

KINDRED: Refers to related individuals and family members. Generally used in cases where a child is removed from the parents' home and placed with kin.

KINSHIP FOSTER CARE: Foster care placement with a family member.

LACHES: Undue lapse of time in enforcing a right of action.

LARCENY: The unlawful taking of something that belongs to another; a theft.

LAW GUARDIAN: Lawyer assigned by the court to act as a child's attorney.

LEADING QUESTION: A question asked of a witness which suggests the desired answer.

LEASE: Any relationship which gives rise to a relationship of landlord and tenant.

LEASEHOLD: Realty held under a lease.

LEGAL LIFE TENANT: Any person entitled for his or her life or for the life of another to the possession and use of real or personal property.

LEGATEE: Any person designated to receive a transfer by will of personal property.

LETTERS: Authorization from a court to act in a fiduciary capacity, e.g., letters of administration of an estate issued by the Surrogate's Court.

LESSEE: Person who controls property by virtue of a lease.

LESSOR: Owner of property who gives a lease to another.

LICENSEE PROCEEDING: Proceeding against someone allowed to live in premises but whose rights have been revoked.

LIEN: A claim on specific property for payment of a debt.

LITIGANT: Party to a legal action.

LITIGATE: To bring before a court of law for decision.

LOCKOUT: A cessation of the furnishing of work to employees by the employer in an effort to get for the employer more desirable terms in the course of a contract dispute.

MBR: Minimum Basic Rent.

MCI: "Major Capital Improvements" - Rent increases issued by the DHCR based on the upgrading of a building.

MDR: Multiple Dwelling Registration

MHS: Mental Health Study/Mental Health Services

MANAGING AGENT: A person authorized by another to act for the other with regard to management of a building or business.

MANDATORY MINIMUM SENTENCE: A statutory requirement that prescribes a fixed minimum penalty for persons convicted of a crime.

MANSLAUGHTER: The unlawful killing of another without malice or deliberation; may be either voluntary upon a sudden impulse, or involuntary in the commission in an unlawful manner of an act that might produce death.

MARRIAGE APPLICATION PROCEEDING: A proceeding seeking the approval and consent to marry when either party is over fourteen and under sixteen years of age.

MARSHAL: An officer of the court whose duty is to execute the process of the courts. A marshal's duties are very similar to those of a sheriff.

MEDIATION: A discussion led by an impartial third party to facilitate a settlement of a lawsuit. The results of mediation are not binding unless the parties have signed a settlement agreement.

MINOR: Any child under the age of 18 years in the State of New York.

MIRANDA RIGHTS: The rights of a person suspected of having committed an offense and of which he or she must be informed prior to interrogation.

MISDEMEANOR: A crime punishable by imprisonment of no more than one year.

MISTRIAL: A trial terminated and declared void prior to conclusion.

MITIGATING CIRCUMSTANCES: Factors related to the commission of an offense which do not excuse the act but which may reduce the responsibility of the defendant.

MONEY JUDGMENT: Order allowing creditor to collect money from debtor.

MONTGOMERY WARNING: Advice that must be given to a convicted defendant of his or her right to appeal a sentence within thirty days.

MORTGAGE: An interest in land provided to a creditor as security for the payment of a debt.

MOTION: A request to the court, usually in writing, for a ruling or order made before, after or during trial.

MOTION TO DISMISS: An application to the court for an order dismissing a complaint or petition.

MURDER: The unlawful killing of a person committed intentionally, knowingly, or under circumstances manifesting extreme indifference to the value of human life, or during the commission of specific felonies.

NEGLIGENCE: Failure to do what a reasonable and prudent person would have done under similar circumstances, or doing something that a reasonable and prudent person would not have done.

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES: A New York State agency which administers the institutional placement of minors after juvenile delinquency findings.

NON-PAYMENT PROCEEDING: A summary proceeding in Housing Court for the collection of rent or, in the alternative, the recovery of a premises.

NOTICE OF APPEAL: Written notice of intent to appeal a decision/order of a court.

NOTICE OF CLAIM: A paper required to be sent to the city or a public authority, prior to filing a lawsuit, when a person claims an official or employee of that city or a public authority caused the person damage.

NOTICE OF ENTRY: A notice stating that the attached copy of an order or judgment has been filed in the clerk's office of the court.

NOTICE OF PETITION: A petitioner's written notice delivered to the respondents of when the court will hear the petition.

NOTICE TO CURE: Written notice giving opportunity to correct a breach of the terms of a lease.

NOTICE TO QUIT: Written notice to remove from a premises.

NUISANCE HOLDOVER: Proceeding seeking removal of occupants from a premises on the basis that they are causing annoyance, discomfort, inconvenience or damage to others.

NUNC PRO TUNC: "Now for then" - Allows an act to be considered as having been done in a timely manner even though the time for doing so has expired.

OATH: A solemn promise of truthfulness invoking accountability.

OBJECTION: An assertion by a party that a certain witness, question, item of evidence or other matter is inappropriate or illegal and a request that the judge rule to that effect.

OFFENSE: A wrongful act punishable under criminal laws.

ORDER: An oral or written command or a direction from a judge.

ORDER OF FILIATION: A finding by the court that a male party to a parternity case is the father of the child in question.

ORDER OF PROTECTION: Order prohibiting a person from harming or threatening another.

ORDER OF SUPPORT: An order directing payments of support to a child or spouse.

ORDER OF VISITATION: Order which provides that the person who has custody of a child must allow another person to visit the child on specific days and times.

ORDER TO PRODUCE: An order directing a state or city Commissioner of Corrections to produce an inmate for a court appearance.

ORDER TO SHOW CAUSE: A written direction by the court, usually prepared and presented to the court by a party, that the court is shortening the required advance notice of a action to the other parties. Sometimes the order to show cause contains a direction to the parties that they stop some specific activity until the court hears the motion.

OVERRULE: To rule against or reject.

PANEL: A list of jurors to serve in a particular court or for the trial of a particular action.

PAROLE: Conditional release of an offender at the discretion of the paroling authority prior to the completion of the prison sentence imposed. The offender is required to observe certain conditions under the supervision of a parole agency.

PARTY: A person having a direct interest in a legal matter, transaction or proceeding.

PATERNITY PETITION: Petition to determine if a man is the father of a child.

PATERNITY SUIT: A proceeding to establish paternity of a child born out of wedlock.

PENALTY: The punishment required by law for a person convicted of an offense.

PERMANENT NEGLECT: Allegation by an agency responsible for a child in foster care that the child's parents have not kept

in contact or have not planned for the child's future, even though physically and financially able to do so, for a period of more than one year.

PERSON IN NEED OF SUPERVISION (PINS)
PROCEEDING: A proceeding to determine whether a child under the age of 18, who is found to be incorrigible, ungovernable, habitually disobedient, or fails to attend school as legally required or is beyond the lawful control of a parent or lawful authority, requires supervision or treatment.

PERSON INTERESTED: Any person entitled or allegedly entitled to share as beneficiary in the estate of a person, or the trustee in bankruptcy or receiver of the assets of such person.

PERSON UNDER DISABILITY: Any person who is an infant, an incompetent, an incapacitated person, or whose whereabouts are unknown, or who is confined as a prisoner and fails to appear under circumstances which the court finds are due to confinement in a penal institution.

PETITION: Document that commences a special proceeding and informs respondent of the substance of the claim being made.

PETITIONER: Person who files a petition that starts a special proceeding.

PLACEMENT: The commitment or assignment of a person to any facility or to any supervisory, care or treatment program.

PLAINTIFF: A person who brings an action.

PLEA BARGAINING: The process whereby the defendant and the prosecutor reach a resolution of a criminal case prior to the commencement or completion of a trial.

PLEADINGS: A complaint or petition, answer, and reply.

POLLING THE JURY: A practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict.

POOR PERSON'S RELIEF: When a party to a lawsuit cannot afford the costs of a lawsuit, the court may permit that party to proceed without being required to pay for court costs.

PRELIMINARY EXECUTOR: Any person to whom preliminary letters testamentary have been issued.

PREMISES: A distinct and definite locality, such as a room, an apartment, a shop, a building, or other definite area.

PREPONDERANCE OF THE EVIDENCE: A standard used to evaluate and accept probative matter which requires that the probative matter be more convincing than that which is offered by the opposing party.

PRESUMPTIVE DISTRIBUTEE: Any person who would be a distributee, if the person alleged to be deceased or absent were dead.

PRIMA FACIE CASE: A case sufficient on its face and supported by the requisite minimum of evidence.

PROBABLE CAUSE: A reasonable ground to believe that certain alleged facts are true; same as reasonable cause.

PROBATE: The act or process of showing a will to be valid.

PROBATION: Conditional freedom granted by a judge as long as the person meets certain conditions of behavior.

PROPERTY: Anything that may be the subject of ownership.

PROSE: Appearance on one's own behalf without a lawyer in an action before the court.

PSA: Protective Services for Adults.

PUBLIC ASSISTANCE: Welfare.

RAP SHEET: Term for the official document listing all prior arrests, dispositions, aliases and identifying information of a defendant in a criminal case.

REASONABLE CAUSE: A reasonable ground to believe that certain alleged facts are true; same as probable cause.

REBUTTAL: Argument made to refute or oppose a claim made by another party.

RECEIVER: Person appointed to manage someone's property while a proceeding is pending.

RECORD: A permanent written account of some act, court proceeding or transaction that is prepared by a proper officer and designated to remain as permanent evidence of what has been done in a lawsuit.

REFEREE: Most often, a person to whom the court refers a pending case to take testimony, hear the parties, and report back to the court. A referee is an officer with judicial powers who serves as an arm of the court.

REGISTRY: NYS Child Abuse Central Registry.

REMAND: To return to a prison or other designated facility, pending trial or further detention.

REPLEVIN: An action brought by the owner of items to recover possession of those items when those items were wrongfully taken or are being wrongfully kept.

REPLY: A plaintiff's response to a defendant's answer when the answer contains a counterclaim.

RESPONDENT: The person who is sued in a special proceeding.

REST A CASE: To advise the court that the attorney has presented all the evidence he or she intends to offer in the proceeding.

REVERSE: To set aside or revoke judicial action.

RPAPL: Real Property Actions and Proceedings Law.

SAFE DEPOSIT COMPANY: Any corporation authorized, under the banking law, to let out receptacles for safe deposit of personal property.

SCRIE: Senior Citizens Rent Increase Exemption.

SCU: Support Collection Unit. Collects, accounts for, and disburses funds paid pursuant to an order of support.

SEAL A COURTROOM: To prohibit the public from observing the proceeding.

SEAL THE RECORDS: To prohibit public access to records relating to a case.

SEARCH AND SEIZURE: A police practice whereby a person or a place is searched and evidence considered useful in the investigation and prosecution of the offense is obtained.

SEIZURE: The process by which a person authorized under the law to do so takes into custody the property, real or personal, of a person against whom a judgment has been issued or might be issued.

SENTENCE: The formal court judgment specifying the penalty to be imposed upon a person convicted of an offense.

SERVICE: Delivery of legal documents such as a summons or subpoena to an individual.

SET ASIDE: To cancel or declare void a judgment.

SETTLEMENT: A voluntary agreement by the parties that resolves a lawsuit.

SEVER: To separate, for purposes of trial, one or more of the defendants or causes of action named in a charging document.

72 HOUR NOTICE: Notice by a city marshal that occupants will be evicted from premises no earlier than 72 hours from the time of the service of the notice.

SHERIFF: The executive officer of the local court in some areas. In other jurisdictions the sheriff is the chief law enforcement officer of a county.

SQUATTER PROCEEDING: Proceeding seeking to evict persons who occupy a premises without permission.

SRO: Single Room Occupancy.

SRSD: Self Represented Service Division.

STAY OF EVICTION: Order precluding judgment of eviction from being enforced for a specific period of time.

STIPULATION: An agreement by the parties entered into the record.

STIPULATION OF SETTLEMENT: A formal agreement between litigants and/or their attorneys resolving their dispute.

SUBPOENA: A written court order requiring a person to appear in court at a designated time to testify in a case or to produce documents or items to be used as evidence.

SUBPOENA DUCES TECUM: Subpoena to appear and to produce documents.

SUM CERTAIN: Liquidated damages pursuant to contract, promissory note, law, etc.

SUMMARY PROCEEDING: A special proceeding permitted by the RPAPL for the purpose of recovering real property.

SUMMONS: An order requesting one to appear to answer a charge.

SUPPORT PETITION (F): A petition filed to determine who is legally responsible for the support of a child, spouse, or relative and how much support should be paid.

SUPPORT PROCEEDING: A proceeding to compel the support of a spouse, ex-spouse and/or children by the person chargeable with such support.

SUPPRESS EVIDENCE: To preclude certain evidence from being introduced because it was seized illegally.

SUSPECT: A person considered by the authorities as one who may have committed an offense, but who has not yet been charged or arrested.

TEMPORARY ADMINISTRATOR: Any person to whom letters of temporary administration have been issued.

TEMPORARY ORDER OF PROTECTION: A short term order usually issued in domestic violence cases on an emergency basis to protect the petitioner until the matter is heard by the court.

TEMPORARY ORDER OF SUPPORT: An interim order issued during the pendency of a court case concerning the payment of support.

TEMPORARY RESTRAINING ORDER (TRO):

An emergency order issued by the court under special circumstances, prohibiting specific conduct until the arguments or evidence concerning the circumstances can be heard by a judge.

TERMINATION OF PARENTAL RIGHTS PROCEEDING: A proceeding to determine whether a natural parent's custody and quardianship of a child should be terminated.

TESTAMENTARY TRUST: A trust created by a will.

TESTAMENTARY TRUSTEE: A person to whom letters of trusteeship have been issued in a trust created by a will.

TESTIMONY: An oral declaration made by a witness or party under oath.

TORRES HEARING: Hearing to support vacating of a default judgment in a non-payment proceeding.

TORT: Any wrong or injury to a person or property.

TRANSCRIPT: The written, word-for-word record of a legal proceeding, including testimony at trial, hearings or depositions.

TRAVERSE HEARING: Hearing to determine if service was done properly in a proceeding

TRIAL: The formal examination of a legal controversy in court so as to determine the issue.

TRIAL DE NOVO: A new trial.

TRUST: An arrangement through which property is held by one person for the benefit of another.

TURNOVER PROCEEDING: A hearing after a judgment has been issued in which a creditor seeks to establish through evidence that the debtor (or a third party who is in possession of the debtor's property) is in possession of money or property that would satisfy, or partially satisfy, the judgment.

U AND O: "Use and Occupancy" - Term used to indicate the amount to be paid for the use of a premises after the tenancy has been terminated.

UCCJA: Uniform Child Custody Jurisdiction Act.

UIFSA: Uniform Interstate Family Support Act. A nationwide law that encompasses registration, enforcement, and modification provisions regarding child support and spousal support.

UNDERTAKING: A deposit of a sum of money or filing of a bond in court.

VACATE: To annul or rescind.

VENUE: The geographic area wherein a court has the power or authority to hear a case.

VERDICT: The decision of the judge or jury that the defendant is guilty or not guilty of the offense for which he or she has been tried.

VERIFICATION: Confirmation of the truth or authenticity of a pleading or other paper by an affidavit or oath.

VISITATION (V PETITION): Proceeding which requests the right to visit with children.

VOIR DIRE: The preliminary examination of a witness or a potential juror concerning the person's qualifications to testify or to serve.

VOLUNTARY FOSTER CARE PLACEMENT

(L PETITION): A court review of the voluntary placement of a child by a parent who is unable to care for a child.

VSA: Victim Services Agency

WAIVE: To give up or relinquish voluntarily.

WAIVER: An intentional and voluntary relinquishment of some known right.

WARRANT: An order issued by the court which directs a law enforcement officer to arrest a person or to seize property specified in a warrant.

WARRANT OF EVICTION: Order by the court allowing eviction of occupants from a premises.

WARRANTY OF HABITABILITY: Warranty that premises are reasonably fit for occupation.

WILL: A legal document indicating the distribution of a person's possessions after his or her death.

WILLFULNESS HEARING: Used in spousal or child support proceedings to determine if the respondent intentionally failed to obey any lawful order of support.

WRIT: A document issued by a judge ordering or forbidding the performance of a specific act.

WRIT OF HABEAS CORPUS: An order issued by the court directing that a person be produced in court immediately.

YOUTHFUL OFFENDER: A person under the age of 19 appearing in criminal court for whom special correctional commitments and special record sealing procedures are made available by statute.

Appendix W

Glossary of Forensic Terms for Firearms

AUTOMATIC: A firearm that discharges a bullet, ejects the case, and feeds a new cartridge continuously until the trigger is released or all ammunition is exhausted.

BREECH FACE: Metal of the firearm slide, bolt, or frame around the firing pin hole.

BULLET: The projectile that travels through and out of the barrel of a firearm.

CARTRIDGE: A single, complete round of ammunition.

CASE: The container of a cartridge. For rifles and handguns it is usually of brass or other metal; for shotguns it is usually of paper or plastic with a metal head and is more often called a "shell".

CHAMBER: Area at the beginning of the barrel or in a cylinder that holds the cartridge before it is fired.

EJECTOR: A metal rod that knocks the fired case out of the firearm.

EXTRACTOR: Metal hook that pulls the fired case out of the chamber.

HANDGUN: A pistol (i.e., Glock) or revolver (i.e., S&W Chief). A firearm intended to be fired by the use of one hand.

PRIMER: The component in the base of the case containing an explosive compound that, when struck, ignites the gunpowder.

RIFLE: A long-barreled rifled firearm usually meant to be fired with two hands, from the shoulder; A shoulder gun with rifled bore.

RIFLING: A series of high and low areas or polygonal shape twisting left or right that has been either cut or formed in the barrel of a firearm by the manufacturer.

SEMI-AUTOMATIC: A firearm designed to fire a single cartridge, eject the empty case and reload the chamber each time the trigger is pulled.

SHOTGUN: A shoulder gun with smooth-bored barrel(s) primarily intended for firing multiple small, round projectiles, (shot, birdshot, pellets), larger shot (buck shot), single round balls (pumpkin balls) and cylindrical slugs.

Part 217 of the Rules of the Chief Administrative Judge

 Part 217 requires the provision of a court interpreter, free of charge, for all case types.

Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts

Uniform Rules for N.Y.S. Trial Courts

PART 217. Access to Court Interpreter Services for Persons with Limited English Proficiency

§217.1 Obligation to appoint interpreter in court proceedings in the trial courts.

- (a) In all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense from an approved list maintained by the Office of Court Administration. The court may permit an interpreter to interpret by telephone or live audiovisual means. If no pre-approved interpreter is available, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense as justice requires. This rule shall not alter or diminish the court's authority and duty to assure justness in proceedings before it.
- (b) A person with limited English proficiency, other than a person testifying as a witness, may waive a court-appointed interpreter, with the consent of the court, if the person provides his or her own interpreter at his or her own expense.

§217.2 Provision of interpreting services in clerk's offices.

A court clerk shall provide interpreting services at no expense to a person with limited English proficiency seeking assistance at the court clerk's office in accordance with the needs of the person seeking assistance and the availability of court interpreting services. Such services may be provided by telephone or live audiovisual means.

People v. Lee

Court of Appeals of New York

May 1, 2013, Argued; May 30, 2013, Decided

No. 111

Reporter

21 N.Y.3d 176 * 991 N.E.2d 692 **) 969 N.Y.S.2d 834 ***; 2013 N.Y. LEXIS 1335 ****; 2013 NY Slip Op 3865; 2013 WL 2338418

[1] The People of the State of New York, Respondent, v Thomas Lee, Appellant.

Prior History: Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 29, 2011. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), which had convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the third degree.

People v Lee, 89 AD3d 633, 933 NYS2d 272, 2011 N.Y. App. Div. LEXIS 8450 (N.Y. App. Div. 1st Dep't, 2011), affirmed.

Disposition: [****1] Order affirmed.

Counsel: Cleary Gottlieb Steen & Hamilton LLP, New York City (Arminda B. Bepko and David E. Brodsky of counsel), and Office of the Appellate Defender (Richard M. Greenberg and Margaret E. Knight of counsel) for appellant. I. The appointment of a biased interpreter was improper, where the court refused to inquire into the availability of disinterested interpreters and failed to set up a proper mechanism to monitor the accuracy of the translation. (Matter of James L., 143 AD2d 533, 532 NYS2d 941; Matter of Yovanny L., 33 Misc 3d 894, 931 NYS2d 485; People v Constantino, 153 NY 24, 47 NE 37, 12 NY Cr 339; Advanced Tech. Incubator, Inc. v Sharp Corp., 701 F Supp 2d 861; People v Ranieri, 149. Misc 2d 948, 574 NYS2d 437; People v Branch, 46 NY2d 645, 389 NE2d 467, 415 NYS2d 985; People v Furey, 18 NY3d 284, 961 NE2d 668, 938 NYS2d 277; Matter of Beer Garden v New York State Lig. Auth., 79 NY2d 266, 590 NE2d 1193, 582 NYS2d 65; Scott v Brooklyn Hosp., 93 AD2d 577, 462 NYS2d 272; People v Meyer, 78 AD2d 662, 432 NYS2d 219.) II. The evidence permitted by the trial court under People v

Sandoval (34 NY2d 371, 314 NE2d 413, 357 NYS2d 849 [1974]) was excessive and overwhelmingly prejudicial. (People v Williams, 56 NY2d 236, 436 NE2d 1292, 451 NYS2d 690; People v Mayrant, 43 NY2d 236, 372 NE2d 1, 401 NYS2d 165; People v Cooke, 101 AD2d 983, 477 NYS2d 730; People v Rahman, 62 AD2d 968, 404 NYS2d 110, 46 NY2d 882, 387 NE2d 614, 414 NYS2d 683; People v Clark, 42 AD3d 957, 838 NYS2d 760; People v Gonzalez, 221 AD2d 203, 633 NYS2d 482; People v Smith, 18 NY3d 588, 965 NE2d 232, 942 NYS2d 5; People v Ellis, 94 AD2d 652, 462 NYS2d 212; People v Gamble, 182 AD2d 703, 582 NYS2d 470; People v Mitchell, 161 AD2d 247, 554 NYS2d 895.) III. The trial court erred by refusing to instruct the jury not to decide the case solely on the basis of which side it believed. (People v Russell, 266 NY 147, 194 NE 65, People v Warren, 76 NY2d 773, 559 NE2d 648, 559 NYS2d 954; People v Brown, 30 AD3d 609, 817 NYS2d 139; People v Victor, 62 NY2d 374, 465 NE2d 817, 477 NYS2d 97; People v Fish, 234 AD2d 890, 652 NYS2d 179; People v Vera, 94 AD2d 728, 462 NYS2d 467; People v Knowell, 94 AD2d 255. 464 NYS2d 525; People v Khan, 68 NY2d 921, 502 NE2d 987, 510 NYS2d 72.)

Cyrus R. Vance, Jr., District Attorney, New York City (John B.F. Martin and Sheryl Feldman of counsel), for respondent. I. Defendant's complaints about the official court interpreter are largely unpreserved and entirely meritless. (Matter of James L., 143 AD2d 533, 532 NYS2d 941; People v Melendez, 8 NY3d 886, 865 NE2d 1, 832 NYS2d 893; People v Robles, 86 NY2d 763, 655 NE2d 172, 631 NYS2d 131; People v Odum. 67 AD3d 1465, 890 NYS2d 241; People v Wilson, 188 AD2d 405, 591 NYS2d 397; People v Ko. 133 AD2d 850, 520 NYS2d 412; People v McLean, 15 NY3d 117, 931 NE2d 520, 905 NYS2d 536; People v Kinchen, 60 NY2d 772, 457 NE2d 786, 469 NYS2d 680; People v Olivo, 52 NY2d 309, 420 NE2d 40, 438 NYS2d 242; People v Abar, 99 NY2d 406, 786 NE2d 1255, 757 NYS2d 219.) II. The Appellate Division correctly

21 N.Y.3d 176, *176, 991 N.E.2d 692, **692, 969 N.Y.S.2d 834, ***834, 2013 N.Y. LEXIS 1335, ****1; 2013 NY Slip Op 3865, *****3865

concluded that the trial court's Sandoval ruling was a proper exercise of its discretion. (People v Hayes, 97 NY2d 203, 764 NE2d 963, 738 NYS2d 663; People v Walker, 83 NY2d 455, 633 NE2d 472, 611 NYS2d 118; People v Rahman, 62 AD2d 968, 404 NYS2d 110, 46 NY2d 882, 387 NE2d 614, 414 NYS2d 683; People v Hawkins, 11 NY3d 484, 900 NE2d 946, 872 NYS2d 395; People v Grant, 7 NY3d 421, 857 NE2d 52, 823 NYS2d 757; People v Kello, 96 NY2d 740, 746 NE2d 166, 723 NYS2d 111; People v Claudio, 64 NY2d 858, 476 NE2d 644, 487 NYS2d 318; People v Mattiace, 77 NY2d 269, 568 NE2d 1189, 567 NYS2d 384; People v Williams, 12 NY3d 726, 905 NE2d 605, 877 NYS2d 731; People v Williams, 56 NY2d 236, 436 NE2d 1292, 451 NYS2d 690.) III. The court properly instructed the jury on the burden of proof. (People v Allen, 69 NY2d 915, 508 NE2d 934, 516 NYS2d 199; People v Nuccie, 57 NY2d 818, 441 NE2d 1111, 455 NYS2d 593; People v Dory, 59 NY2d 121, 450 NE2d 673, 463 NYS2d 753; People v Umali, 10 NY3d 417, 888 NE2d 1046, 859 NYS2d 104; People v Drake, 7 NY3d 28, 850 NE2d 630, 817 NYS2d 583; People v Feerick, 93 NY2d 433, 714 NE2d 851, 692 NYS2d 638.)

Judges: Opinion by Judge Pigott, Judges Graffeo, Read and Smith concur. Judge Rivera dissents in an opinion in which Chief Judge Lippman concurs. Judge Abdus-Salaam took no part.

Opinion by: Pigott

Opinion

[*178] [**693] [***835] Pigott, J.

At issue on this appeal is whether the trial court abused its discretion in refusing defense counsel's request to replace a state-employed court interpreter because he was acquainted with the complainants. Under the circumstances of this case, we conclude that it did not

Defendant Thomas Lee and a codefendant, Victoria Chin, were charged with [2] burglary in the second degree and grand larceny in the third degree for stealing several thousand dollars' worth of property from the Manhattan apartment of complainants, a husband and wife. At trial, the People called complainant wife, who spoke Cantonese, Prior to her testimony, the court had arranged for a court interpreter to translate her testimony into English. On the day of testimony, the interpreter apprised the court that he was a "friend" of complainant husband, who had introduced the

interpreter's father to construction loan officials. The interpreter had also met complainant [****2] wife, when she had on occasion stopped in on business meetings he had with her husband. He did not meet with either of them socially. The interpreter also stated that he knew the husband had "served federal time," but denied feeling uncomfortable translating for the wife and stated he had no knowledge of the facts of the case.

The court permitted defense counsel to voir dire the interpreter, who denied that [***836] he personally had any business relationship with the husband. Defense counsel nevertheless sought to remove the interpreter because of the relationship and the interpreter's knowledge of complainant husband's "intimidating violent nature," which, in counsel's view, could affect the interpreter's ability to translate objectively. The court denied the request, observing that the interpreter was a state employee [*179] who had taken an oath to fairly discharge his duties as a court interpreter.

Defendant was found quilty of the burglary and grand larceny counts. The Appellate Division affirmed and rejected defendant's request for a new trial based on the trial court's failure to appoint a new interpreter, observing that "the court and defense counsel thoroughly questioned the court interpreter [****3] about any possibility of bias, and there is no reason to believe that defendant was prejudiced by the use of this interpreter" (89 AD3d 633, 633-634, 933 NYS2d 272 [1st Dept 2011]). The court noted that the interpreter was a "career court employee who was presumably well aware of his duty to translate testimony verbatim and accurately," that he did not know the facts of the case, and that there was "substantial corroborating evidence through the testimony of another witness and video surveillance films" to sustain defendant's conviction (id.) at 634). A Judge of this Court granted leave to appeal (19 NY3d 975, 973 NE2d 767, 950 NYS2d 357 [2012]), and we affirm.

A trial court is obligated to appoint a court interpreter in all criminal cases when it "determines that a party or witness... is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings" (Uniform Rules for Trial Cts [22 NYGRR] § 217.1 [a]). Prior to engaging in their duties, court interpreters must execute and file a constitutional oath of office to faithfully discharge the duties of the position of court interpreter. Just as the trial court has the discretion to determine whether an interpreter is necessary in the [****4] first instance (see

21 N.Y.3d 176, *179, 991 N.E.2d 692, **694; 969 N.Y.S.2d 834, ***836; 2013 N.Y. LEXIS 1335, ****4; 2013 NY Slip Op 3865, *****3865

Uniform Rules for Trial Cts [22 NYCRR] § 217.1), or is qualified to serve in that capacity (see People v Catron, 143 AD2d 468, 468, 532 NYS2d 589 [3d Dept 1988], Iv denied 73 NY2d 853, 534 NE2d 338, 537 NYS2d 500 [1988]), the trial court is also in the best position to determine whether an interpreter, once appointed, is biased in favor of a party or witness, thereby necessitating removal and replacement (see People v Rivera, 268 AD2d 538, 539, 703 NYS2d 195 [2d Dept 2000], Iv denied 95 NY2d 802, 733 NE2d 242, 711 NYS2d 170 [2000]). [3]

Here, the trial court did not abuse its discretion in denying defendant's request that the court interpreter be removed. The interpreter complied with his ethical obligation by notifying the court that he was a friend of complainant husband. Upon receiving that information, the court questioned the interpreter as to whether he (1) knew the facts of the case, and (2) would be uncomfortable translating for complainant wife. Having received a negative answer to both questions, the trial court allowed defense counsel to questioning and that of defense counsel uncovered no bias on the part of the interpreter, the court properly exercised its discretion in not removing him.

Defendant's [****5] reliance on Malter of James L. (143 AD2d 533, 532 NYS2d 941 [4th Dept 1988]) is misplaced. In that case, the trial court appointed the complainant's son to serve as an ad hoc interpreter pursuant [**696] [***837] to <u>Judiciary Law § 387</u> to translate for the complainant. In doing so, however, the trial court failed to inquire "into the extent of his bias," ascertain his "qualification to translate," or caution the son "to translate exactly what the primary witness had said" (id. at 533-534).

Here, the court questioned the interpreter concerning his relationship with complainants, and there was no need to ascertain his qualifications or warn him to translate exactly what complainant wife said. As a state employee who had taken an oath to interpret, it can be presumed that the interpreter knew his ethical/professional obligations to translate the

testimony [****6] verbatim. On the facts of this case, the court could have reasonably found that the danger the interpreter would distort complainant wife's testimony was remote, particularly because he possessed no knowledge concerning the facts of the case.

We have considered defendant's remaining arguments and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Dissent by: RIVERA

Dissent

Rivera, J. (dissenting). Where, as here, a court interpreter is revealed to have prior personal or pecuniary relationships with the complainants in a criminal matter, there exists, at a minimum, a substantial claim of an appearance of bias, if not actual bias. In my view, the trial court's failure to disqualify the court interpreter and substitute an alternate interpreter, coupled with the judge's refusal to provide for an adequate mechanism to confirm the accuracy of the challenged [4] interpretation, amounted to an abuse of discretion. Therefore, I respectfully dissent.

[*181] A trial court must appoint an interpreter in cases where a party or witness "is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings" (Uniform [****7] Rules for Trial Cts [22 NYCRRI § 217.1 [at]). The court interpreter's role in a trial is thus significant, and an interpreter potentially has enormous impact on the proceedings. Indeed, it is the interpreter's words which are heard by the jury and judge and become part of the evidentiary record.

It is the duty of an interpreter to faithfully communicate verbatim the testimony of a non-English speaking witness (see Unified Court System Court Interpreter Manual and Code of Ethics Appendix J, Canons of Professional Responsibility for Court Interpreters Canon 1 [Dec. 2008], available at http://www.nycourts.gov/COURTINTERPRETER/pdfs/CourtInterpreterManual.pdf [accessed May 24, 2013]). In fulfilling this duty, a court interpreter must avoid serving where he or she may be compromised due to conflict or bias. Canon 6 of the Unified Court System's Canons of Professional Responsibility for Court Interpreters provides that

^{*}This section provides, in relevant part, that

[&]quot;[i]f the services of an interpreter be required in any court and there be no unemployed official interpreter to act therein, the court may appoint an interpreter to act temporarily in such court. Such interpreter shall before entering upon his duties file with the clerk of the court the constitutional oath of office."

"[c]ourt interpreters shall not engage in, nor have any interest, direct or indirect, in any activity, business or transaction, nor incur any obligation, that is in conflict, or that creates an appearance of conflict, with the proper discharge of their interpreting duties or that affects independence ÓΓ judgment .in [****8] the [**696] [***838] discharge of those duties" (see Unified Court System Court Interpreter Manual and Code of Ethics Appendix J. Canons of Professional Responsibility for Court Interpreters Canon 6 [Dec. 2008], available: https://www.nycourts.gov/COURTINTERPRETER/p dfs/CourtinterpreterManual.pdf [accessed May 24, 2013]).

Ensuring that an interpreter is qualified and unbiased is critical to safeguarding the fairness of the proceedings and the integrity of the legal system.

Here, the interpreter demonstrated a commendable level of professionalism and sensitivity to his ethical obligations when he apprised the court of his prior personal relationship and dealings with complainant husband. Specifically, he stated that he was complainant's acquaintance, knew of complainant's prior criminal background, had held business meetings with complainant, and that the interpreter's father had secured financial [*182] assistance for his business from complainant. The interpreter also noted his familiarity with complainant wife-a witness herselfwhose trial testimony he was called upon to interpret from Cantonese to English. The interpreter thus informed the court of both a personal and pecuniary connection to complainants, [****9] and knowledge of complainant husband's criminal history.

Informed of this relationship, the trial court was presented with a facial violation of Canon 6 and was required to inquire and determine the best way to address this bias, actual or perceived. The majority acknowledges that it is the trial court's responsibility to determine whether bias exists necessitating removal and replacement (see majority op at 179). They, however, [5] conclude that Supreme Court did not abuse its discretion by denying the request to remove this interpreter. I disagree because I believe that the trial court failed to take adequate steps to ensure the accuracy of the interpretation, and to provide a mechanism to preserve the interpretation for review on any subsequent appellate challenge.

For all intents and purposes, the majority's decision

establishes an irrebuttable presumption in favor of official court interpreters under oath, regardless of the potentially compromising circumstances. If all that is necessary to overcome a reasonable claim of bias based, as is the case here, on both personal and pecuniary relationships, is reference to the interpreter's oath and the interpreter's lack of familiarity with the specifics [****10] of a case, parties with a reasonable suspicion for perceiving some bias would be without recourse, regardless of the strength of the claim of bias. If the fact that the interpreter has taken an oath to faithfully discharge his or her duties is sufficient to overcome a challenge of bias or conflict, then there would never be grounds to remove even the most obviously conflicted interpreter.

That an interpreter is unfamiliar with a case, relied on by the trial court and the majority in support of the failure to substitute the interpreter in this case, is similarly insufficient. The need for Canon 6 illustrates the real possibility that a court interpreter can be biased or burdened by a conflict of interest, regardless of the interpreter's lack of knowledge of the facts of a case¹. Certainly a court interpreter with years of experience in [*183] the courtroom, familiar with legal terminology, the order [**697] [***839] of proceedings and testimonial evidence, would be able to ascertain the import of the witness' testimony.

In this case, substitution of the interpreter would have resolved concerns of any actual or potential bias. However, the trial court not only refused to secure a substitute, he failed to even inquire as to the availability of such a substitute, constituting an abuse of discretion.

Of course, it is not always possible to have an interpreter available without causing undue delay to the proceedings, and potentially adversely impacting the rights of the parties. Where a court makes reasonable effort to identify a substitute interpreter, and determines that such substitute is unavailable or cannot be made available without disrupting the proceedings, circumstances may require that the court proceed with the challenged interpreter. In such case, it is essential that the court ensure that reasonable steps are taken to mitigate bias, and that the original testimony is

Even those who genuinely believe they can discharge their duties without bias may, albeit unconsciously, phrase testimony in a way to sound more reasonable or less harsh to a juror's ear. The [****11] most well-intentioned interpreter may be susceptible to the affect of bias, thus, the exhortation in Canon 6 to avoid even the appearance of conflict.

preserved in such a manner as to permit a defendant to confirm the accuracy of the interpretation should the defendant so desire. It must also be possible for [6] meaningful judicial [****12] review should defendant discover inaccuracies or otherwise posit a colorable argument as to the fairness of the proceedings.

Here, the trial court failed to implement a mechanism to confirm the accuracy of the interpretation, thus eliminating the possibility of appellate review of the testimony. In response to defense counsel's concerns about the accuracy of the interpretation, the trial judge informed defense counsel that the defendant's family and friends were parties "obviously interested in the correctness of [the] translations" and that there "was no issue whatsoever about the translation and its appropriateness," or else the family members would have "hurdl[ed] the well" to alert counsel or the court of any inaccuracies. This reliance upon interested parties, and persons in the courtroom, cannot seriously be considered a realistic and sound method to confirm the accuracy of the witness' testimony as interpreted. Certainly the court could not have meant to invite disruption in the courtroom. Nor could the trial judge realistically rely upon individual observers, without any apparent training in the highly [*184] skilled profession of interpreters, to serve as a "check" on the interpretation. [****13] It is unacceptable and unrealistic for a court to intend to supplant a qualified court interpreter, who the trial court had already indicated was a trusted member of the court personnel, with a person of unknown skill, and potential bias, and allegiance to a party. As the majority notes, reliance on ad hoc interpreters creates additional challenges for the courts and the parties (see Matter of James L., 143 AD2d 533. 532 NYS2d 941 [4th Dept 1988]), Moreover, the responsibility for providing interpretive services in a criminal case lies with the court, not the defendant (Uniform Rules for Trial Cts [22 NYCRR] § 217.1).

Given the numerous languages and dialects of the parties, witnesses and others who pass through our nation's courts daily, 2 the courts and our society face.

tremendous challenges in ensuring that the courts are accessible, and that our legal system [**698] [***840] treats individuals fairly, regardless of their language abilities. The American Bar Association's recent passage of Standards for Language Access in Courts, supported by the Conference of Chief Justices and the Conference of State Court Administrators, notes that "[a]ccess to justice is unattainable for those who are not proficient in English [****14] unless they also have access to language services that will enable them to understand and be understood" (see American Bar Association, Standards for [7] Language Access in VIII Courts at [Feb. 2012], available http://www.americanbar.org/content/dam/aba/administra tive/legal aid indigent defendants/ls sclaid standards for language access proposal.authcheckdam.pdf [accessed May 24, 2013]). It is to the credit of New York, and the many individuals who serve as court interpreters, that the Unified Court System provides a mechanism for interpretive services in numerous languages.3 However, in this case, the trial judge's failure to [*185] properly address defendant's claims of bias in a manner that would obviate the risk of bias, or which would allow for meaningful appellate review on a subsequent challenge, was error.

Judges Graffeo, Read and Smith concur with Judge Pigott; Judge Rivera dissents in an opinion in which Chief Judge Lippman concurs; Judge Abdus-Salaam taking no part.

Order affirmed.

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http://www.nycourts.gov/courtinterprefer/pdfs/candidateguide.pdf [accessed May 24, 2013]).

³ "New Yorkers speak more than 150 different languages and dialects. More than 30 percent of New Yorkers—almost five million people—speak a language other than English at home. Last year, utilizing the services of more than 1,000 interpreters (approximately 300 staff and more than 700 per diem interpreters) the New York courts provided interpreting services in 105 different languages" (see Court Interpreting in New York, A Plan of Action: Moving Forward at 2 [June 2011], available

at http://www.nycourts.gov/publications/pdfs/ActionPlanCourtInterpretingUpdate-2011.pdf [accessed May 24, 2013]).

² Court interpreters are required to undergo testing to assess their verbal and written proficiency in English, foreign languages and basic legal terminology. Court interpreters in New York are proficient in Albanian, Arabic, Bengali, Cantonese, Croatian, Dutch, French, Greek, Haltian Creole, Hebrew, Hindi, Italian, Japanese, Korean, Mandarin, Polish, Punjabi, Romanian, Russian, Serbian, [****15] Spanish, Urdu and Woloff (see Candidate Guide to the Language Assessment Testing Program for Court Interpreting, available

Matter of Yovanny L.

Family Court of New York, Bronx County
October 11, 2011, Decided
D-00695/11

Reporter

33 Misc. 3d 894 *; 931 N.Y.S.2d 485 **; 2011 N.Y. Misc. LEXIS 4757 ***; 2011 NY Slip Op 21354 ****

[****1] In the Matter of Yovanny L., a Person Alleged to be a Juvenile Delinquent, Respondent.

Counsel: [***1] Michael A. Cardozo, Corporation Counsel (Tracy Sabbah and Jessica Latour of counsel), for presentment agency, Legal Aid Society (Tamara Steckler and Rebecca lyry of counsel), for respondent:

Judges: Sidney Gribetz, J.

Opinion by: Sidney Gribetz

Opinion

[**486] [*895] Sidney Gribetz, J.

This case presents the issue of the accuracy of translations by court interpreters and its impact on the integrity and orderly progress of judicial proceedings. It is an issue that jurists are frequently sensitive to as many hearings and trials in our multicultural society involve parties or witnesses who do not speak English, and these hearings proceed with the assistance of court-appointed interpreters. While interpreters are used on an almost daily basis in our courts, this issue rarely comes to the forefront to be subject to assessment and review.

In this juvenile delinquency case the respondent was charged with committing various acts which would be crimes if committed by an adult, in connection with the robbery of a Chinese restaurant delivery worker. At the fact-finding hearing, the complainant, who spoke limited English, testified with the aid of a court-appointed Mandarin language interpreter. In the midst of the trial, the Assistant Corporation Counsel [***2] alerted the court to alleged errors in translation by the interpreter, and made an oral motion to strike the testimony of the complaining witness because of those alleged errors.

In response, I interrupted the testimony and conducted

a hearing on the factual issues raised by the presentment agency's motion, and then adjourned the matter to enable the presentment agency and the attorney for the respondent to submit written briefs. After due consideration of the testimony at the hearing and the briefs submitted, I denied the motion in an [****2] oral ruling issued from the bench. I now write this written decision to clarify and elaborate the reasons for my decision.

At the hearing, the court took the testimony of Assistant Corporation Counsel Brittany Shrader, Esq., and the interpreter, Carol Eng.

[**487] Ms. Shrader was not trying this case, but she was sitting in the audience of the courtroom listening to the proceedings. Ms. Shrader testified that she is conversationally fluent in Mandarin Chinese. She majored in East Asian Studies in college and spent a semester of her undergraduate studies in Shanghai where she spoke only Mandarin. Since her college years, she speaks Mandarin with Chinese friends, [***3] and in her work in the Corporation Counsel's office, she has interviewed victims and potential witnesses while speaking in Mandarin.

Ms. Shrader testified that while listening to this fact-finding, she noticed that the court-appointed interpreter was not [*896] translating word for word what the witness was saying. She cited one example where in response to a question about being hit from behind, the witness gave a long answer regarding where the perpetrators were situated, and that one in front of him hit him two times in the face, the interpreter stated that the witness did not know who hit him from behind. On another occasion the witness answered "three or four times" and the interpreter stated "two or three times." Without any specific examples, Ms. Shrader testified that the interpreter paraphrased the witness's statement rather than reciting the exact words.

While not testified to by Ms. Shrader, the court, with the acknowledgment of both attorneys trying the case, took judicial notice of one occasion earlier in the trial where

the interpreter engaged in a long conversation with the witness, rather than simply translating the brief question and reply. And there was another occasion where [***4] the interpreter used the word "motorcycle" in her translation of an answer, and the witness himself jumped in and told her he said "bicycle."

The court-appointed interpreter Carol Eng then testified. She has worked for over 20 years as a freelance per diem court interpreter for the New York State Office of Court Administration and has worked in "thousands" of trials and other court proceedings, in supreme, criminal, and family courts in New York, Bronx, and Queens counties, and her qualifications have never been called to account.

Ms. Eng spoke Cantonese and Taiwanese Chinese since birth, as her native languages, and English since kindergarten. She became conversational in Mandarin because her husband speaks Mandarin. Ms. Eng has no formal training as an interpreter. She stated that many years ago, after she already started working for the courts, she took and passed a civil service test for Cantonese and Mandarin interpreting. "I passed them both, but they lost my Cantonese test." She did not remember if she took the oath of office as an interpreter pursuant to <u>Judiciary Law § 387.</u> [****3]

Under questioning from both attorneys, she claimed that she interpreted the witness's answers word [***5] for word, although admitted that at some points, she had brief difficulties, but eventually translated both the lawyer's inquiries and the witness responses word for word.

I credit the testimony of both witnesses, Ms. Shrader and Ms. Eng, and I find that there were errors made by the interpreter when interpreting the complainant's testimony. For example, [*897] the interpreter stated motorcycle before being corrected to say bicycle. In another instance the witness answered a question by saying he saw someone three to four times per week, while the interpreter interpreted two to three times. Additionally, at times it appeared that there was a conversation occurring between the interpreter and the complainant, and some statements may [**488] have been paraphrased rather than word for word.

Although court interpreters play an important role in our proceedings, there are few statutory requirements, and little case law to give guidance as to the standards to be applied. <u>Judiciary Law § 387</u> simply requires the interpreter to file an oath of office with the Clerk of the Court. Uniform Rules for Trial Courts (22 NYCRR) §

217.1 (a) provides that

"[i]n all civil and criminal cases, when a court determines that a party or witness, or an [***6] interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand or communicate in English to the extent that he or she cannot meaningfully participate in the proceedings, the court shall appoint an interpreter."

General standards expressed in the limited case law in this area set forth that since the interpreter is the conduit from the witness to the trier of fact, interpretation should be word for word rather than summarized, and there should be no conversation between the witness and the interpreter, no significant differences in the length of dialogue of the witness and the interpreter, and no bias or interest in the proceedings. (See e.g. Matter of James L., 143 AD2d 533, 532 NYS2d 941; see alsoDat Pham v Beaver, 445 F Supp 2d 252; United States v Joshi, 896 F2d 1303 (1990))

In the OCA internal Court Interpreter Manual and Code of Ethics, the following "responsibilities" are indicated. Under "Accuracy," interpreters must faithfully and accurately interpret what is said without embellishment or omission, and there is additional advice for impartiality, confidentiality, proficiency, and professional demeanor. Under "Proficiency" and "Errors," interpreters must provide professional services only in areas where they can [***7] perform accurately, and when in doubt inform the court; and the interpreter must immediately inform the judge of an error, even if perceived after the proceeding has concluded.

OCA has also issued a "benchcard" for judges working with interpreters in the courtroom, alerting judges to assess:

- [*898] "1. Are there significant differences in the length of interpretation as compared to the original testimony?
- "2. Does the individual needing the interpreter appear to be asking questions of the interpreter?
- "3. Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions? [****4]
- "4. Is the interpreter acting in a professional manner?
- "5. Is the interpretation being done in the first

person?

"6. If the interpreter has a question, does he or she address the court in the third-person?"

The benchcard also suggests that judges individually swear in court interpreters, a procedure which I admittedly did not follow here.

Accordingly, because Ms. Eng did not interpret word for word on one or two occasions, engaged in conversations with the witness, and erred in her translation of one or two words, I find that Ms. Eng violated the standards for court interpreters in these [***8] regards. However, the bulk of her work, in the 30 to 40 minutes of testimony, did meet proper standards, and the individual errors were isolated instances.

In assessing the remedy, if any, necessary to be imposed, while this court concedes that there have been some errors on the part of the interpreter, at issue is the extent of the errors, and what impact, if any, the errors have.

The case law in this area usually arises in the context of a defendant challenging a [**489] conviction on appeal, in distinction to the instant case, where the prosecutor has made a motion in the midst of trial to strike the testimony, and the court has interrupted the trial to rule on the motion. Nevertheless, that law is instructive. In People v Singleton (59 AD3d 1181, 873 NYS2d 838 [2009]), the court held that while there were some errors in interpretation, the defendant failed to establish that he "was prejudiced by those errors," and the conviction was affirmed. In People v Dat Pham (283 AD2d 952. 725 NYS2d 245 [2001]), also, while there were some errors in the translation, the jury was informed of the errors, and the conviction was affirmed because the defendant did not show that he was seriously prejudiced. Other cases have held that the failure of [***9] the defendant to object as to the adequacy of the translation during trial or otherwise preserve proof of any serious [*899] error does not provide the basis for a reversal (e.g. People v Ko, 133 AD2d 850, 520 NYS2d 412 [1987]; People v Roiston, 109 AD2d 854, 486 NYS2d 768 [1985]).

Also important to note, all of the cases cited by both parties as well as the court, including those referenced above, involve a defendant who claimed prejudice by the errors of the interpreter. The main concern for the court in assessing the fairness of a trial is the due process rights of the defendant. Here, the respondent is in support of keeping the testimony of the complainant,

notwithstanding the errors of the interpreter, so to the extent that his due process rights are implicated, he has waived them.

To be sure, both the prosecutor, and the court system itself, are entitled to an integrity of the orderly process and procedures of our system, and the fact that the respondent has not objected, standing alone, does not require that no remedy be made to ensure the orderly progress of the trial. To the extent possible, trial courts should monitor the professionalism and accuracy of court interpreters. In cases where serious or pervasive errors are made, [****10] remedial action should be taken. [****5]

However, here the errors made were relatively minor and few, and did not affect the main aspects of the witness's testimony, and this court, as the trier of fact in this family court juvenile delinquency case, is able to discern the testimony notwithstanding these errors. Therefore, there has been no major prejudice to any party, and the drastic remedy requested by the presentment agency, that of striking the testimony and starting anew, is denied, as not warranted under the circumstances of this case.

The trial will resume with the continued testimony of the witness, with a different Mandarin interpreter to be supplied by the Clerk of the Court and our interpreter service unit.

End of Document

People v. Smolyanski

Supreme Court of New York, Appellate Division, Second Department September 10, 1992, Submitted; October 5, 1992, Decided 90-08396

Reporter

186 A.D.2d 601 *; 588 N.Y.S.2d 583 **; 1992 N.Y. App. Div. LEXIS 11127 ***

The People, etc., respondent, v Yakov Smolyanski, appellant. (Ind. No. 11841/89)

Counsel: [***1] Philip L. Weinstein, New York, N.Y. (Diane Pazar of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Jay M. Cohen, Seth M. Lieberman, and Angela Prudenti Miller of counsel), for respondent.

Judges: LAWRENCE J. BRACKEN, J.P., ALBERT M. ROSENBLATT, DAVID S. RITTER; VINCENT PIZZUTO, JJ.

Opinion

[*601] [**584] DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Cirigliano, J.), rendered November 7, 1990, convicting him of attempted murder in the second degree, burglary in the first degree (two counts), assault in the second degree (two counts), criminal possession of a weapon in the fourth degree (three counts), attempted assault in the second degree, and menacing, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

At his trial, the defendant, who had emigrated from Russia in 1979; requested that he be allowed to testify in English and thereafter was, for the most part, allowed to do so on his direct examination. Before the onset of cross-examination, the court stated that the defendant would be required to testify through an interpreter on cross-examination because "some of the [***2] record" had not come out as clearly as the court would [*602] have hoped. The defendant thereafter testified entirely through an official interpreter on cross-examination.

The defendant now contends that the court's decision requiring him to testify through an interpreter on cross-

examination without first correcting the direct examination by repeating it with the aid of an interpreter deprived him of his right to a fair trial.

The defense counsel neither objected to the court's decision nor requested that the defendant be required to testify through an interpreter on direct examination. The claim is therefore unpreserved for appellate review (see, CPL 470.05[2]; People v Udzinski, 146 AD2d 245). In any event, the defendant has failed to demonstrate that he was prejudiced by the ruling. Indeed, although the defendant maintains that the court's ruling assured that the jury would understand only that version of his facts which was elicited on cross-examination, the account provided by the defendant (through the interpreter) on cross-examination was entirely exculpatory. Moreover, although the testimony elicited from the defendant on direct examination was occasionally nonresponsive defendant and [***3] ramblina. the succeeded in conveying an exculpatory version of the facts that was consistent [**585] with his testimony on cross-examination.

Although the prosecutor's conduct in arguing with the defendant on cross-examination was improper (see, e.g., <u>People v Sandy, 115 AD2d 27</u>), we conclude that any error was harmless in view of the isolated nature of these occurrences and the overwhelming evidence of the defendant's guilt (see, <u>People v Crimmins, 36 NY2d 230</u>).

The sentence imposed by the court was not excessive (see, <u>People v Suitte</u>, 90 AD2d 80).

BRACKEN, J.P., ROSENBLATT, RITTER and PIZZUTO, J.J., concur.

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People v. Calizaire

Supreme Court of New York, Appellate Division, Second Department
January 21, 1993, Submitted; February 22, 1993, Decided
91-03238

Reporter

190 A.D.2d 857 *, 593 N.Y.S.2d 879 **; 1993 N.Y. App. Div. LEXIS 1583 ***

The People of the State of New York, Respondent, v. Eminiel Calizaire, Appellant.

Counsel: [***1] Leon H. Tracy, Brooklyn, N.Y., for appellant, and appellant pro se.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie and Amy Appelbaum of counsel; Bruce D. Austern on the brief), for respondent.

Judges: Bracken, J. P., Eiber, Ritter and Santucci, JJ., concur.

Ramos, 26 NY2d 272, 274; People v Ononkpevwe, 151 AD2d 511). In any event, a presumption of regularity attaches to official court proceedings and the defendant has offered nothing more than mere conclusory statements to rebut the presumption (see, People v Richetti, 302 NY 290; People v Pichardo, 168 AD2d 577).

We have considered the defendant's remaining contentions, including those raised in his supplemental pro-se brief, and find them to be without merit.

Opinion

[*857] [**879] Appeal by the defendant from a judgment of the Supreme Court, Kings County (Firetog, J.), rendered March 14, 1990, convicting him of rape in the first degree (four counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant failed to preserve the issue of the legal sufficiency of the evidence for appellate review (see, CPL 470.05 [2]; People v Udzinski, 146 AD2d 245, 248-252). In any event, viewing the evidence in the light most favorable to the prosecution (see, People v Contes, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of [**880] guilt was not against the weight of the evidence (see, CPL 470.15 [5]).

We reject the defendant's [***2] contention that he was denied a fair trial because a Haitlan Creole interpreter was not present during the entire trial. The defendant waived his right to an [*858] interpreter since he failed to inform the court that he did not have a sufficient understanding of the English language to enable him to understand the court proceedings (see People v

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People v. Rodriguez

Supreme Court of New York, Queens County
September 8, 1989
No Number in Original

Reporter

145 Misc. 2d 105 *; 546 N.Y.S.2d 769 **; 1989 N.Y. Misc. LEXIS 597 ***

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. RAMON RODRIGUEZ, Defendant

Counsel: [***1] Deborah Borenstein for defendant.

John J. Santucci, District Attorney (James Liander of counsel), for plaintiff;

Judges: WILLIAM D. FRIEDMANN, J.

Opinion by: FRIEDMANN

Opinion

[*105] [**770] BOPINION OF THE COURTR

This proceeding places in focus the cometence of a sign language interpreter used to assist two Grand Jury witnesses who are profoundly deaf and speech impaired.

[*106] Archaically these persons would be termed "deaf-mutes", and will be so referred to where necessary with regret. From a modern day professional standpoint, the more correct disability classification would be persons with profound hearing and speech impairments. Such persons may have some hearing and some facility of speech. There are more than 200,000 such disabled persons 1 [***2] in the United

States. Most, as do other handicapped individuals, need special training programs, in this case, in order to assist them in communicating in a hearing-speech oriented world. ²

Specifically in this prosecution for attempted robbery in the first degree (two counts), and attempted robbery in the second degree (two counts), dismissal of an indictment is sought (CPL 210.20[1][o]; 210.35[5]), for alleged failure of the prosecution to provide, during a Grand Jury presentation, a competent qualified sign language interpreter to assist the two hearing and speech deficient witnesses while testifying before that Grand Jury (Judiciary Law §§ 387, 390; CPL 190.25[3][o]).

BLAWR

Profoundly deaf and speech impaired as a witness

Modern legal authorities and statutes reject the ancient presumption of law that deaf-mutes were idiots and therefore incompetent to testify in legal proceedings (King v Steel, 1 Leach [***3] CL 451 [1787], approving 1 Hale PC 34). Currently, the accepted principle is that "deaf and mute" persons are competent witnesses in legal proceedings when they exhibit sufficient understanding as to the nature of an oath, as well as an [*107] understanding of the facts which they wish to communicate, and are capable of communicating in

For general information about "speech intelligibility", see Bareroot, Deafness and Communication, ch. 14 (Speech Improvement by the Deaf Adult Meeting Communicative Needs), at 209, 211 (Williams & Williams, Baltimore, Md

¹ According to a study of Schein and Delk, The Deaf Population of the United States (Natl Assn of the Deaf, Silver Spring, Md [1974]), and based upon the 1970 U.S. Census, there are 21.2 million persons in the U.S.A. Who are hearing impaired, with approximately 346,000 to 2 million classified as being severely or profoundly deaf. Of that number, at least 200,000 or more require specialized schooling or instruction.

^{[1982]),} and as to a specific study correlating "speech intelligibility with degree of deafness and other factors," see Wolk and Schildreth, Deaf Children in America, ch 7 (Deaf Children and Speech Intelligibility -- A National Study), at 139-159 (College-Hill Press, San Diego, Cal [1986]).

²\$2 For basic information about deaf culture, see Higgins, Outsiders in a Hearing World (a Sociology of Deafness) (Sage Publs [1984]); Quigley and Kretschmer, The Education of Deaf Children (Issues, Theory and Practice) (University Park Press -- Baltimore, Md [1982]); Holm, Deafness: Common Misunderstandings, at 1910-1912 (Am J of Nursing [Nov. 1978]).

some approved manner, their ideas with respect thereto (81 Am Jur 2d. Witnesses, § 69; Cowley v People, 83 NY 464 [1881]; People v McGee, 1 Denio 19 [1845]). See generally, the limited reported authorities related to a "deaf-mute" as a witness in judicial proceedings which have been gathered at Annotation, Deaf-Mute as Witness, 50 ALR4th 1188, which updates an earlier Annotation at 9 ALR 482.

Summarily stated, the relevant law, as it relates to the Grand Jury presentation here under consideration, and with respect to (1) the communication ability of the two profoundly deaf-speech impaired witnesses, both former students at the Lexington School for the Deaf (the defendant, profoundly deaf and speech impaired, presently attends that same institution) and (2) the qualification and background of the interpreter involved [***4] is as follows: A court has the inherent power to elicit testimony from a competent "deaf and mute" person by whatever means or [**771] method is deemed necessary (<u>Cowley v People, supra; and see</u>, Annotation, Accused — Right to Interpreter, 36 ALR3d 276, 293-294).

Such determination should follow an appropriate inquiry into the necessity for interpretive services. (Annotation, Accused – Right to Interpreter, op. cit., at 294-296.)

Reported authorities indicate that competent deaf and mute persons may give evidence by signs or through an interpreter or by writing if that person can read and write (<u>Cowley v People, supra;</u> Annotation, Deaf-Mute as Witness, op. cit., § 4, at 1196-1197).

Currently, the mode of communication most generally used by deaf and/or speech limited persons in legal proceedings and in other aspects of communication in the hearing world is through the involvement of a competent qualified sign language interpreter (Annotation, Deaf-Multe as Witness, op. cit., § 5, at 1197-1198).

In the past, the "go-between" these disabled persons and the hearing world was afforded by a wise hearing person, often a family member or friend. This [***5] technique often worked reasonably well, but also created many problems (see, Annotation, Disqualification for Bias of Interpreter, 6 ALR4th 158; Annotation, Use of Interpreter in Court Proceedings, 172 ALR 924, 941).

During the past 20 years, the profession of trained experienced [*108] sign language interpreters has developed with standards of education, screening,

training, certification and ethics (see, 1987 Annual National Registry of RID Certified Interpreters [Registry of Interpreters For The Deaf; RID Publications, Silver Spring, Md] (including RID Objectives, Activities, Code of Ethics, and Explanation of Listings of Certifications]).

Basic to the selection of a sign language interpreter is the matching of need with translation ability. That is the level of communication skill of the person needing assistance must be matched with the level of communication skill or competency of the interpreter or "go-between" (People v McGee, 1 Denio 19 [1845], supra). Such a pairing is not always easy as sign language techniques and/or methods are more varied and complex than the average uniformed person with the ability of hearing and speech has [***6] been led to believe.

American Sign Language (ASL), which is used by most deaf persons, is a visual-gestural language. It is a distinctly separate language from English. It has its own grammar, inflections and idloms (Becker and Padden, American Sign Language, A Look at Its History, Structure and Communication [T. J. Publishers]).

There are various manual communication systems in use which involve reductions, mixtures and new structures when compared to both ASL and English. (Caccamise and Drury, A Review of Current Terminology in Education of The Deaf, The Deaf American, vol 29, No. 1, Sept. 1976 [with appendix including brief explanation of various sign systems].) Such systems are labeled as Manually Coded English or Manually Signed English designed to represent English grammar.

- (A) Pidgin Sign English involves the use of ASL signs in English word order with the proportions of ASL and English varying according to practitioners.
- (8) Manual English supplements the signs of Pidgin English with invented signs to manually represent every English word and inflection system.
- (C) Finger Spelling involves the use of handshapes, movements and orientations to represent [***7] letters of the alphabet and ampersand.
- (D) Visible English and the Rochester Method -- use of fingerspelling and speech together without signs.

The above sign systems should be compared with some manual communication systems which refer to signs and signing understood by relatively small groups of

people.

[*109] (E) Home Signs -- signs developed and used by individual families such as used by the interpreter Ms. Mazzeo herein.

[**772] (F) School Signs -- developed and used by different schools and

- (G) Local Signs which are somewhat like regional dialects.
- (H) A combination of in-group signs and ASL or Manually Coded English.

As can be seen, when the need for interpretation services is demonstrated, it is necessary to match up the need with interpretative ability. A preliminary inquiry should be held into the nature of a person (witness or party's) physical and/or mental disability and that person's method and level of communication skills, and into the respective skills of the interpreter. (<u>People v. McGee, supra.</u>)

While there seems to be no specific Federal or State constitutional right to be furnished interpretive services in court proceedings, [***8] the failure of a trial court to appoint a qualified interpreter for an accused or a witness once that need has been demonstrated would seem to this court to be a clear denial of due process of law (US Const 5th Amend; NY Const. art 1, § 6; and generally see, Annotation, Accused — Right to Interpreter, op. cit., at 276, 287).

Recognizing this due process obligation, our Legislature has made provision to empower our courts to appoint temporary interpreters in court proceedings (Judiciary Law § 387). Such appointment power has been held to encompass interpretation for witnesses or parties with physical and mental disabilities (People v Miller, 140 Misc 2d 247; People v Johnny P., 112 Misc 2d 647; and see, People v Thompson, 28 NY2d 616, affg 34 AD2d 561 [where the Appellate Division, Second Department, and the Court of Appeals had the opportunity to address a similar issue but did not as the defendant there was acquitted]). In Thompson, the victim/witness was deaf and illiterate but was able to read lips. He did not know sign language and communicated by making verbal sounds which could be understood only by those with special training. The trial [***9] court there allowed a speech therapist to interpret. Whether that trial court had such authority was not addressed upon appeal.

Our Legislature has, in addition, made special provision

with respect to a court's providing an interpreter for deaf persons involved in court proceedings. <u>Section 390 of the Judiciary Law</u> states: "Whenever any deaf person is a party to [*110] a legal proceeding of any nature, or a witness therein, the court in all instances shall appoint a qualified interpreter of the deaf sign-language to interpret the proceedings to, and the testimony of, such deaf person."

However, with respect to a Grand Jury proceeding, the Criminal Procedure Law has carved out an exception to the court's appointment obligation by placing the responsibility for the appointment of an interpreter in Grand Jury proceedings on the shoulders of the prosecutor. *CPL* 190.25(3)(d) states: "An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, [***10] first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge".

Even though <u>CPL 190.25(3)(d)</u> does not expressly contain the word "qualified" with respect to the appointment of an interpreter, it would be ludicrous to believe that our Legislature, in its drafting of that section, did not contemplate that the prosecutor would secure the services of an interpreter who is "qualified".

Moreover, it would seem that our courts, by reason of sections 387 and 390 of the Judiciary Law, cannot abdicate their responsibility to see that hearing impaired persons are provided with the services of a "qualified interpreter of the deaf sign language". Lest we forget, as the Appellate [**773] Division, Second Department, reminded us recently in People v Cade (140 AD2d 99, 101) of the fundamental "principle that Grand Juries exist by virtue of our State Constitution and the superior court which impanels them. They are not arms or instruments of the District Attorney (NY Const. art 1. § 6; CPL 190.05; Matter of Additional Jan. 1979 Grand Jury of Albany Supreme Ct. I***11] v Doe 50 NY2d 14). The manner in which the Grand Jury functions and its procedures and its duties are carefully defined by statutory provisions which are to be strictly construed (see, Matter of June 1982 Grand Jury of Supreme Ct. of Rensselaer County, 98 AD2d 284)."

Accordingly, it would seem to this court that <u>Judiciary</u> <u>Law §§ 387</u> and <u>390</u> and <u>CPL 190.25(3)(d)</u> must be

construed together as necessitating the appointment of a "qualified" [*111] interpreter here, competent after inquiry into the specific sign language methods and level of communications skills understood by the two profoundly hearing and speech impaired witnesses who testified before the Grand Jury proceeding under examination here.

The CPL 210.20 (1)(c); 210.35 (5) hearing

At the hearing inquiring into match-up interpreter Anna Mazzeo and the two Grand Jury witnesses, the testimony in summary revealed Dr. Thomas Whalen had been the supervisor of the Lexington School for the Deaf, since September 1975. He supervised both Grand Jury witnesses while they were students at that school. Concerning their level of communication, he indicated that witness David Mendez's reading and writing ability in English [***12] was equal to that of a second grader. That he functions primarily with a combination of American Sign Language, gestural language and English. In order to be understood, Mendez would need a sign language interpreter who understands how to interpret in a combination of Sign English and American Sign Language, and who is sensitive enough to check throughout the proceeding to make sure that David understands what is going on.

Dwayne Banks, the other witness, functions at slightly below the communication level of David Mendez. His ability in both English reading and writing would be that of a second grader. His communication skills would be primarily through American Sign Language with more gestural language and less reliance on English than David Mendez. Any interpreter for Banks would have to know American Sign language combined with a gestural system which may be unique to Banks.

Carl Chopinsky, for 15 years a highly qualified professional sign language interpreter in the court system, had worked with and observed Anna Mazzeo on approximately 50 to 60 occasions. He indicated that Ms. Mazzeo relies almost exclusively on "Home Signs".

Because of her inadequacies as a court sign [***13] language interpreter, he has been called upon to replace her on a number of occasions at the request of the court system. In his opinion, Ms. Mazzeo cannot use average normal American Sign Language. Ninety per cent of her interpretation is through finger spelling or using the manual alphabet. Her skill is one level or dimensional and does not vary according to the communication level of the client. She is not certified or registered for [*112] sign language interpreting work,

nor to his knowledge, is any longer employed in the court system. He concluded that she is not qualified to interpret for someone with minimal language skill ability.

Anna Mazzeo, the interpreter whose sign language skill was in question, learned sign language in her home. She has used this sign system for approximately 55 She has no training or certification as an in interpreter any mode of sign language communication. Although employed as an Italian interpreter in the courts, she has not been used in the court system for the past 2 1/2 years as a sign language interpreter. She recalls doing finger spelling without problem during the Grand Jury session in question, although she has been, [***14] in the past, told that she cannot interpret sign [**774] language before a Grand Jury. She seems unfamiliar with the various forms of modern sign communication or the basic classifications of persons requiring sign language assistance. She has not been screened nor certified as a sign language interpreter by any organization and has been barred from sign language interpreting in almost all the courts in the New York City metropolitan area. As to the communication levels of the two Grand Jury witnesses here, Ms. Mazzeo indicated she was not qualified to determine what level of competence in sign language either witness possessed.

REEXAMINATION OF GRAND JURY MINUTES

Consideration of relevant law and the hearing testimony required a reexamination of the Grand Jury minutes. Such examination indicated that no advance effort was made to asxertain the method and/or level of sign language communication skills possessed by the witnesses or that they comprehended the oath that was administered to them. Further, many of the answers to simple narrative questions seem unclear, jumbled and unresponsive. In addition, the Grand Jury minutes do not reveal any rechecking of facts understanding [***15] of concepts as indicated by Dr. Whalen as being essential to a full understanding by persons who are functioning at a second grade level or with minimal language skill ability.

STANDARDS OF "COMPETENCE" OR "QUALIFICATIONS" FOR

COURT USE

This court's research indicates that no formal rule or regulation [*113] by the New York State Unified Court System in determining the "qualification" of a sign language interpreter (or for that matter, any kind of

interpreter) as required by <u>Judiciary Law §§ 387</u> and <u>390</u> exists. In place of such regulation, at least in most New York City courts, is the informal reliance upon securing sign language interpreters for court assignments through the placement service of the New York Society for the Deaf. ³

[***16] It would seem that a fair and equitable procedure for Unified Court System adoption would be that all sign language interpreters, regardless of where they are secured, for court proceeding, be either RID certified (The Registry of Interpreters/For The Deaf - a National Membership Association of 814 Thayer Avenue, Silver Spring, Md 20910-4589) or have passed the minimum competency screeding required by the New York State Office of Vocational Rehabilitation. Such as minimum procedure would have eliminated the problem herein as Ms. Mazzeo has continually refused to seek such certification or undertake such competency screening.

CONCLUSION

This court therefore, based upon its inquiry, concludes that although Ms. Mazzeo may be a highly skilled interpreter in the Italian language and its varied dialects, and is used as such in our court system, she is not qualified to render sign language interpreting services in legal proceedings as contemplated by <u>sections 387</u> and <u>390 of the Judiciary Law</u> and <u>CPL 190.25(3)(d)</u>.

Accordingly, defendant's motion to dismiss is granted to the extent of dismissing the indictment on the grounds that the use of an imcompetent interpreter may have been prejudicial [***17] to the defendant and in violation of defendant's right to due process of law. The dismissal is granted with [**775] leave to the [*114], People to re-present to another Grandy Jüry, if they deem such action advisable (CPL 190.75/3), 190.80).

Postcript: This court, since this decision was orally issued, has been advised that the District Attorney's Office, upon evaluation of all aspects of this case, has decided not to appeal or re-present this matter to another Grand Jury. This court believes that the interests of justice have been served by this action.

End of Document

³ New York Society for the Deaf provides interpreter referral services to Family, Civil and Small Claims, Criminal, Criminal Supreme and Federal Courts in all of the five boroughs of New York City. In 1988, that society provided over 3,000 hours of court interpreting with a total of 645 requests from the various courts. State-wide, that agency provided approximately 48,000 total hours of interpreting services to the courts, government offices, and the private sector. All of the interpreters that work through that society's Interpreter Referral Office are free-lance. In order for an interpreter to be registered with that office, the interpreter must either have received the RID certification or have passed the minimum competency. State screening required by the Office of Vocational Rehabilitation.

People v. Ceni

Supreme Court of New York, Bronx County

January 31, 2014, Decided

0287-1998

Reporter

42 Misc. 3d 1219(A) *; 986 N.Y.S.2d 866 **; 2014 N.Y. Misc. LEXIS 404 ***; 2014 NY Slip Op 50097(U) ****; 2014 WL 361154 Background

[****1] The People of the State of New York, Plaintiff, against Astrit Ceni, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Post-conviction relief denied at People v. Ceni, Astrit. 2014 N.Y. App. Div. LEXIS 9189 (N.Y. App. Div. 1st Dep't, June 3, 2014)

Affirmed by People v. Ceni, 123 A.D.3d 506, 999 N.Y.S.2d 385, 2014 N.Y. App. Div. LEXIS 8660 (N.Y. App. Div. 1st Dep't, 2014)

Counsel: [***1] Robert T. Johnson, Esq., District Attorney, Bronx County: By: Orrie A. Levy, Esq., Assistant District Attorney.

For Defendant: Labe M. Richman, Esq., New York, NY.

Judges: Dominic R. Massaro, JSC.

Opinion by: Dominic R. Massaro

Opinion

Dominic R. Massaro, J.

Defendant moves pursuant to <u>CPL_\$440.10(1)(a)</u> and (h) to vacate his judgment of conviction on the grounds that (1) the court affirmatively misadvised him of the deportation consequences of pleading guilty; that (2) the accusatory instrument was jurisdictionally defective; and that (3) he was not informed by the court or defense counsel that he was pleading guilty to a crime with a deprayed indifference element. The People oppose.

On May 4, 1997, Defendant was admitted to the United States as a lawful permanent resident. On January 13, 1998, he was charged, under Bronx County docket number 98X003012, with Attempted Arson in the Second Degree (PL §110/150.15) and Attempted Criminal Mischief in the Fourth Degree (PL § 110/145.00[1]). The felony complaint alleged that Defendant was observed pouring a liquid onto and under an apartment door and attempting to ignite it by using burning pieces of paper. On January 22, 1998, in Bronx Supreme Court, Defendant, [***2] through an Albanian interpreter, pled guilty under Superior Court Information (hereinafter SCI) number 0287-1998, to Reckless Endangerment in the First Degree (PL §120.25), a class D felony, in [****2] exchange for a sentence of five years probation with a condition of treatment in a residential psychiatric facility. The SCI charged that on or about January 12, 1998, Defendant, "under circumstances evincing a deprayed indifference to human life, did recklessly engage in conduct which created a grave risk of death to another person by pour[ing] a liquid under [the] apartment door of Roberto Rolon while seven (7) people were inside and did attempt to light said liquid on fire." The SCI is signed by the Defendant and states that he read it.

On January 22, 1998, before Defendant pled guilty, the following colloquy took place before the Court between ADA Andrew Kampel, Esq. and defense counsel, David Feige, Esq.:

ADA Kampel: Your Honor, the original nature of this case is very serious charges. The People have agreed to plead to the D felony, reckless endangerment, for various reasons: One, there is a strong improbability claim in this case, as the liquid in question was, in fact, antiflame, which [***3] was at the time an inflammable liquid.

Mr. Feige: It doesn't burn.

ADA Kampel: Additionally, based on the

42 Misc. 3d 1219(A), *1219(A); 986 N.Y.S.2d 866, **866; 2014 N.Y. Misc. LEXIS 404, ***3; 2014 NY Slip Op 50097(U); ****2

defendant's age, lack of record whatsoever, and the fact the he works two jobs; and the fact that, talking to witnesses and evaluation of the case, we believe the best thing for the defendant in this case would be a residential long-term in house psychiatric program. I conferenced this case with my chief and we agreed to that.

Mr. Feige: I'd also like to add to the record and explain what we've agreed to. Mr. Ceni will be coming to my office this evening after reporting to Probation, and he already has an appointment next Tuesday at 6:00 pm, to which he'll be working with Christina Katz of my office, a social worker. We have arranged, if necessary, to secure an interpreter, to the extent it's necessary, and we will attempt, if it turns out to be necessary, to secure an Albanian psychiatrist. So guite an undertaking.... Then Judge Safer-Espinosa allocuted Defendant as follows:

The Court: Mr. Ceni, have you discussed the taking of this plea with your attorney?

The Defendant: Yes.

The Court: And do you understand that you have the right to have this case presented to a grand jury and [***4] to have the grand jury vote as to whether there is enough evidence to hold you for trial in this matter; and that you, yourself, would have the right to testify before the grand jury?

The Defendant: Yes

The Court: By consenting to be prosecuted on this Superior Court Information, you're giving up those rights: Is that what you wish to do? [****3]

The Defendant: Yes.

The Court: You also understand that pleading guilty to the charge of reckless endangerment in the first degree is the same as if you were convicted of that charge after trial. So you're giving up your right to go to trial, your right to confront any witnesses against you, and the right against self-incrimination. Do you understand that and is [that] what you wish to do?

The Defendant: Yes.

The Court: This information alleges that on January 12, 1998, at about 10:00, at 2383

Washington Avenue, that you did pour a liquid under the apartment door of Roberto Rolon while seven people were inside that apartment, and you did try to light that liquid on fire. Is that true?

The Defendant: Yes

The Court: And finally, if there's any question regarding your legal status in this country, this conviction could serve as the legal basis for an order [***5] of deportation or for the denial of lawful permanent residence or citizenship. Do you understand?

The Defendant: Yes, I do.

On February 11, 1998, Defendant was sentenced as promised. Fourteen years having flown, on June 26, 2012, Defendant was issued a Notice to Appear from the Department of Homeland Security. The notice informed Defendant that he was being deported on the basis of his 1998 conviction for Reckless Endangerment in the First Degree.

Defendant's Position

First, Defendant asserts that at the time of his plea, the court misadvised him when stating: "if there's any question regarding your legal status in this country, this conviction could serve as the legal basis for an order of deportation or from the denial of lawful permanent residence or citizenship," In his affirmation, Defendant states that after receiving this admonition, he asked the Albanian language court interpreter for clarification and "the interpreter indicated that the judge was saying that immigration problems might happen if I did not have a green card." He maintains the warning led him to believe that, as a lawful permanent resident, he would not be deported. Defendant states that he would not have taken the [***6] plea if he had known it would lead to his deportation with no remedy and therefore his pleawas not knowing, intelligent and voluntary.

Defendant submits that the immigration warning in this case is very similar to the judicial warning in *People v. Diaz*, one of the three cases consolidated for decision by the Court [****4] of Appeals in *People v. Peque. 22 NY3d 168, 980 N.Y.S. 2d 280, 3 N.E. 3d 617 (2013)*¹. In

In Peque, the Court of Appeals held that "due process compels a trial court to apprise a defendant that, if the

42 Misc. 3d 1219(A), *1219(A); 986 N.Y.S.2d 866, **866; 2014 N.Y. Misc. LEXIS 404, ***6; 2014 NY Slip Op 50097(U), ****4

2006, Diaz, who had a green card, pled guilty to third degree drug possession. After conducting a plea allocution, the court said "[a]nd if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you." (*Peque, supra at 178-179*). The Court of Appeals found that the judge's warning was inaccurate immigration advice. The Court remitted the case to the trial court to allow defendant Diaz to move to vacate his plea and develop a record relevant to the issue of prejudice.

In this case, Defendant has submitted affidavits from his counsel at plea, David Feige, Esq., and his counsel at sentencing, Daniel Ferreira, Esq. As relevant to the court's admonition on immigration, Mr. Feige affirms that he reviewed the file kept by the Bronx Defenders on this matter and it reflects that he was aware of Defendant's alien status but it does not indicate that he advised Defendant of immigration consequences, Counsel also states that now he realizes that the Court's admonition concerning immigration was misleading.

Secondly, Defendant asserts that the SCI was jurisdictionally defective because it alleged, that he attempted to light a liquid on fire but the SCI did not specify whether that liquid was flammable and in fact the record reflects that the liquid was non-flammable. Defendant argues this negates the reckless element of the crime [***8] charged.

Thirdly, Defendant claims ineffective assistance of counsel in that neither his counsel nor the court informed him that he was pleading guilty to committing a reckless act under circumstances evincing a depraved indifference to human life and that this act would certainly lead to a finding that the offense was a crime of moral turpitude and a deportable offense.

In his affirmation, Mr. Feige affirms that he does not believe that he discussed the concept of depraved indifference to human life with Defendant and further submits that Defendant was not depraved because he only wanted to scare his neighbors and his judgment was impaired by mental difficulties. Mr. Feige states that

defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony "and further held "that a trial court's failure to provide such advice does not entitle [***7] the defendant to automatic withdrawal or vacatur of the plea. Rather, to overturn his or her conviction, the defendant must establish the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" (Peque supra at 17%)

he himself did not understand the effect of the reckless conviction on immigration and that this led to his failure to negotiate a plea to a lesser charge.

Finally, Defendant submits that <u>CPL \$440.10</u> is the proper vehicle for his claims. Defendant maintains that he could only have raised the jurisdictional issue on appeal, but his other claims required an objection or motion to withdraw the plea. Furthermore, he maintains that he was justified in not raising the jurisdictional issue on appeal because he [***9] was never advised of the right to appeal by counsel or the court.

In his affirmation, Mr. Ferriera states that while working for the Bronx Defenders, he handled the sentencing part of this case. He affirms that he does not remember "whether I did or [****5] would have given the defendant notice of his right to appeal this plea of guilty. I believe that he waived the right to appeal."² (Defendant's motion, Exhibit F).

In his reply affirmation, without elaborating, Defendant notes that he has not since been in trouble and that this crime is his only arrest.

People's Position

The People maintain that Defendant's claims must be denied on procedural grounds since they are all record based, including the jurisdictional claim, and should have been raised on direct appeal [CPL §440.10(2)(c); People v. Cuadrado, 9 NY3d 362, 880 N.E.2d 861, 850 N.Y.S.2d 375 (2007)]. The People dispute Defendant's claim that his failure to raise the jurisdictional issues on appeal was justified because he was not given notice of his right to appeal. The People point out that a notation on the court status sheet signed by Justice Safer-Espinosa indicates that Defendant was given [***10] written notice of his right to appeal and, moreover, Mr. Ferreira's affirmation does not negate the court record on this matter. The People maintain that the proper procedural vehicle for a defendant's claim that he was not advised of the right to appeal is an application for a writ of error coram nobis in the Appellate Division (see People v. Schafer, 94 AD3d 778, 941 N.Y.S.2d 510 [2d Dept 2012]).

The People point out that in <u>Peque</u>, <u>supra</u>, defendant Diaz raised his claim of inaccurate immigration advice

^{.2} There is no other claim or record that Defendant waived his right to appeal.

42 Misc. 3d 1219(A), *1219(A); 986 N.Y.S.2d 866, **866; 2014 N.Y. Misc. LEXIS 404, ***10; 2014 NY Slip Op 50097(U), ****5

by the court on direct appeal. Here, Defendant failed to raise his claim on direct appeal and therefore his motion must be denied pursuant to CPL \$440.10(2)(c).

Furthermore, the People claim that Defendant's claims are without merit. They maintain that the court's immigration advice was accurate and should be interpreted as meaning that depending on Defendant's immigration status in this country, his conviction could have immigration consequences. The People also urge rejection of Defendant's assertion concerning his off the record conversation with the interpreter as unsubstantiated and far fetched.

The People argue that the SCI was jurisdictionally sufficient. The SCI charged Defendant with Reckless [***11] Endangerment in the First Degree in that Defendant "under circumstances evincing a depraved indifference to human life, did recklessly engage in conduct which created a risk of death to another person by pour[ing] liquid under [the] apartment door of Roberto Rolon while seven (7) people were inside and did attempt to light said liquid on fire." The People contend that because the SCI does not specify that the liquid is flammable does not render the SCI jurisdictionally defective. Rather, the issue of whether the liquid was flammable or not is an evidentiary issue that could have been litigated at trial.

The People also argue that Defendant's claims that his attorney was ineffective and that the court erred because he was not informed that he was pleading guilty to a crime with a depraved indifference element should be rejected. Evidenced by the SCI itself, Defendant acknowledged with his signature that he read the SCI which stated that he was being charged with having committed a reckless act under circumstances evincing depraved indifference to human life. Thus, Defendant's assertion that he was unaware of the depraved indifference element of the charge against him is contradicted [***12] by the record. Moreover, Mr. Feige's [****6] affirmation that he does not believe that he discussed the concept of depraved indifference with Defendant is far from an unequivocal statement.

Legal Discussion

CPL \$440.10(1) requires the Court to deny a motion to vacate a conviction, if, although sufficient facts appear on the record to have permitted appellate review, "no such appellate review or determination occurred owing to defendant's unjustifiable failure ... to take or perfect an appeal during the prescribed period

...." Absent any explanation for Defendant's failure to raise these issues on direct appeal, the court is obliged to deny his motion (People v. Cuadrado, supra), A CPL §440.10 motion may not be used to take a belated appeal on issues that appear on the face of the record (People v. Jackson, 266 AD2d 163, 699 N.Y.S.2d 40 [1st Dept 1999]). Although a defendant may raise jurisdictional grounds pursuant to CPL §440.10(1)(a), "[a] motion on this ground, as on all other grounds in the statute, must be denied when the circumstances described in GPL §440.10(2)(c) exist." (Cuadrado, supra at 365). Since Defendant did not appeal from his conviction and since the alleged defect in the pleaappeared on [***13] the record, collateral review of the sufficiency of the allocution is barred by CPL §440.10(2)(c) (People v. Acevedo, 104 AD3d 610, 961 N.Y.S.2d 771 [1st Dept 2013]).

Although Defendant claims that his failure to appeal was justified because he was not advised of the right to appeal by counsel, the court's status sheet signed by Justice Safer-Espinosa, indicates that Defendant was given written notice of his right to appeal. Mr. Ferreira's affirmation that he does not recall whether he informed Defendant of the right to appeal does not refute the record. Thus, the Court finds Defendant's claim unavailing, given the presumption of regularity that attaches to judicial proceedings that may be overcome only by substantial evidence (see People v. Fishon, 47 AD3d 591, 851 N.Y.S.2d 139 [1st Dept 2008]]. "The presumption of regularity is particularly significant in guilty plea cases because plea situations are ordinarily marked by the absence of controverted issues, and in the plea situation the defendant tacitly indicates that no further judicial inquiry is required." (People v. Quinones, 112 A.D.3d 411, 976 N.Y.S.2d 62, 2013 NY Slip Op 08011 [1st Dept 2013]; People v. Hofler, 2 AD3d 176, 767 N.Y.S.2d 774 [1st Dept 2003]).

Defendant's alternative argument, that only his jurisdictional [***14] argument could have been raised on direct appeal but his other plea related claims could not have been because he failed to preserve them or move to vacate the plea, is unpersuasive. Since the basis of Defendant's challenge to the sufficiency of the allocution is his belief that it negated an essential element of the charged crime casts doubt on his guilt and calls into question the voluntariness of his plea, such grounds would not necessarily require preservation (see People v. Lopez, 71 NY2d 662, 666-667, 525 N.E. 2d 5, 529 N.Y.S. 2d 465 [1998]).

Were the Court not to find Defendant's claims barred on

42 Misc. 3d 1219(A), *1219(A); 986 N.Y.S.2d 866; **866; 2014 N.Y. Misc. LEXIS 404, ***14; 2014 NY Slip Op 50097(U), ****6

procedural grounds, they would be denied on the merits. Although Defendant relies on the similarities between the court's immigration warning in this case ("if there's any question regarding your legal status in this country this conviction could serve as the legal basis for an order of deportation or from the denial of lawful permanent residence or citizenship") and the warnings given to Diaz in Peque, supra at 178-179 ("if you're not here legally or if you have immigration issues these felony pleas could adversely affect you"), in the case at bar the court does warn of deportation and denial of citizenship. Also, in [***15] Peque, suera, defendant Diaz raised the claim on direct appeal and the [****7] Court of Appeals remitted to the trial court to allow him to make a motion to vacate the plea and demonstrate prejudice.

The judicial warning in this case should be viewed in light of the January 1998 time period it was administered.3 The history of United States Immigration Law, including the dramatic rise in recent years in deportation enforcement is chronicled in Peque, supra at 186-189. In this case, fourteen and a half years after defendant was sentenced and nine and a half years after his probation ended, Defendant received notice of his deportation. This appears to be related to the present enforcement policy.

Moreover, Defendant has not demonstrated prejudice. At the time of his plea he had been in the United States for less than a year and there was no record made of familial ties in this country. However, in light of such factors as his age; lack of [***16] criminal history, and that he worked two jobs, the parties agreed that the best disposition for Defendant would be probation and a residential long term psychiatric program. It is hard to imagine that under the circumstances of this case, there is a reasonable probability that Defendant would not have pled guilty and would have gone to trial and risked incarconation had the trial court informed him more specifically of the deportation consequences.

Defendant's argument that the SCI was jurisdictionally defective because it alleged that he attempted to light a liquid under the door of an apartment but did not specify whether the fould was flammable is also without merit. Whether the liquid was flammable or not is an evidentiary issue that could have been litigated at trial. The Court finds Defendant's claim that the judgement

should be vacated on the grounds of ineffective assistance of counsel because his counsel failed to explain the element of depraved indifference baseless. Defendant and his attorney both signed the SCI on two separate pages. By signing the SCI, Defendant stated that he read the SCI, which charged him with Reckless Endangerment in the First Degree "under circumstances [***17] evincing a deprayed indifference to human life, did recklessly engage in conduct which created a grave risk of death to another person by pourling a liquid under [the] apartment door of Roberto Rolon while seven (7) people were inside and did attempt to light liquid on fire," In his affirmation, Mr. Feige's equivocal statement that he "does not believe that I discussed with the defendant the concept of depraved indifference to human life" fails to overcome the presumption of regularity that attaches to judicial proceedings (see Fishen, supra). Based on the favorable plea as outlined above and the record of defense counsel's logistical efforts to coordinate a residential program for Defendant, the motion to vacate on the ground of ineffective assistance of counsel is denied. Accordingly, Defendant's motion is denied in its entirety without a

This constitutes the decision and order of the Court. [****8]

January 31, 2014

Dominic R. Massaro, JSC

and of Document

³ in 1998, at the time of this plea, the duty of a court to advise a defendant of the possibility of deportation before accepting a guilty plea was statutory; pursuant to CPL § 220.50(7), however, fallure to do so did not affect the voluntariness of the plea.

Ensuring Language Access

A Strategic Plan for the New York State Courts



Español

普通话

Русский

العربي

Kreyòl Ayisyen

广东话

Français

বাংলা



Polski

أُردُو

Ελληνικά

Shqip

हिन्दी

עברית

Português

Türkçe

Italiano

Tiếng Việt

日本語

Ўзбек

ਪੰਜਾਬੀ • پنجابی

Română

नेपाली

Tagalog

Hrvatski

Magyar

אידיש

Ensuring Language Access

A Strategic Plan for the New York State Courts



NEW YORK STATE UNIFIED COURT SYSTEM

March 2017

Preface



The New York State Judiciary is committed, above all else, to the dual goals of unfettered access to the courts and equal justice under the law. In a state as diverse as New York, that commitment is continuously tested by the hurdles presented by language differences and hearing loss.

To ensure that we are doing our best to meet this challenge, we have periodically issued reports, assessing where we are in ensuring language access in our courts, and setting forth a strategic plan for moving forward. The first report, *Court Interpreting in New York: A Plan of Action*, was issued in 2006, and laid out an ambitious agenda for improving the quality of language access services in the New York courts. The second report, *Court Interpreting in New York — A Plan of Action: Moving Forward*, issued in 2011, assessed progress at the five-year mark, and articulated concrete initiatives for building upon the 2006 plan.

Much has been much accomplished under the 2006 and 2011 plans. Yet, there is more we can and must do to ensure that our courts are accessible to all, and it is time to take stock of where we are, what remains to be done, and how best to achieve those goals.

I am very grateful for the counsel and assistance of our Advisory Committee on Language Access, ably co-chaired by Fern Schair and Eric Brettschneider. The Committee has made a significant contribution to improving language access in the New York courts and has played a major role in shaping our roadmap forward.

Hon. Lawrence K. Marks

Kous K. spol

Chief Administrative Judge of the State of New York

This report is dedicated to the memory of Beatrice Frank, Esq.

Bea taught at New York University Law School for many years, and served on a multitude of committees for the bar and community organizations. Bea was a tireless advocate for interpreting and language services in the courts, and a longstanding member of the UCS Advisory Committee on Language Access.

We deeply appreciate her contributions to improving access to justice for those whose voices are too often not heard.

Table of Contents

I.	Introduction	1
II.	Background: Interpreting Services in the New York State Courts	5
	Management of the Court Interpreting Program	5
	Recruitment and Assessment of Court Interpreters	6
	English Language Proficiency Examination	
	Oral Examination	
	Credential Assessment in the Absence of an Oral Examination	7
	• Reciprocity	7
	American Sign Language	7
	Assignment of Court Interpreters	7
III.	A Strategic Plan for Ensuring Language Access in the New York Courts	9
1.	Improving the Recruitment, Assessment, and Training of Court Interpreters	9
Α.	Recruitment	9
	Create a court interpreter trainee position	9
	Develop a new court interpreter recruitment campaign	9
	Review per diem interpreter compensation	
	» Review per diem rates annually	
	» Implement a tiered compensation structure for per diem interpreters	
	» Establish a cancellation policy	
	Establish a court interpreting intern program.	
	Strengthen relationships with schools, community, and advocacy groups	11
В.	Assessment	11
	Expand testing	
	Provide additional online test preparation materials.	
	Help candidates improve their English language skills	
	Provide feedback on test performance	
	 Replace the annual in-person written English examination with on-demand testing Issue a court rule that requires judges to establish the provisional qualifications of court interpreters 	12
	not already qualified by the Office of Language Access	12
_		
C.	Training	
	Expand online training programs for court interpreters	
	Explore a continuing education requirement for court interpreters. Ingresses the variety and assess of programs, and provide gross training.	
	 Increase the variety and scope of programs, and provide cross-training Update the Court Interpreter Manual 	
	- Opuate the Court interpreter manual	14
2.	Strengthening the Management of the Language Access Program	14
A.	Management of Interpreting Resources	14
	Encourage and facilitate the early notification of a need for language services	14
	Encourage LEB court users to self identify	15

Track the need for interpreting assistance throughout the life of a case	15
Develop a more robust, real-time capacity to deploy court interpreters	15
Improve the protocols and systems for sharing interpreters between courts	15
Coordinate calendars of cases requiring court interpreters.	16
Review the use of per diem interpreters to determine if additional staff interpreters should be hired	16
Expand the use of remote interpreting in court proceedings	16
» Promote the use of remote interpreting and provide additional guidance on its appropriate use	17
» Ensure that all participants are familiar with the protocols for remote interpreting	17
» Establish technology standards and install conforming equipment at all courthouses	17
» Expand the pool of staff court interpreters available for remote interpreting	17
» Establish protocols for the use of commercial telephonic interpreting service for remote court interpreting.	17
» Evaluate the effectiveness of remote interpreting	18
B. Planning for Success	18
Monitor trends in the need for language access	
Track reasons for delays and adjournments	
Critically evaluate and adjust the language access program on a continuing basis	
Report annually to the Chief Administrative Judge	
Identify funding sources for special projects to enhance language access	
3. Moving Beyond the Courtroom	19
• Identify critical points of contact with the public in each courthouse, and establish protocols for ensuring	
language access at each point	19
Recruit biliterate staff	20
Expand the use of remote interpreting	20
Recruit biliterate volunteers and interns.	20
Expand the use of technology to bridge the language access gap	21
 Evaluate capacity to provide language access as a selection criterion for consultants and 	
contractors to provide services	21
Consider language accessibility of service providers	21
Annually assess progress in ensuring language access beyond the courtroom	21
4. Ensuring Language Access for the Deaf and Hard of Hearing Community	22
Develop assessment tools to assist court personnel in determining the type of assistance needed	
 Issue guidelines for judges and court staff on language access for the deaf and hard of hearing community. 	
Ensure that state-of-the-art assistive listening technology is available in every courthouse	
Recruit both staff and per diem American Sign Language interpreters	
Expand remote American Sign Language interpreting	
Recruit qualified volunteers and interns to work with the deaf and hard of hearing community	
• Recruit qualified volunteers and interns to work with the dear and hard of hearing community	23
5. Training Judges, Court Staff, and the Bar to Work Effectively with Court Interpreters	
and the LEP Community	23
Expand language access training for judges	23
Expand and update benchcards on language access	24
Incorporate language access training into additional employee training programs	24
Expand language access training for Court Officers	
Hold regular live remote training sessions with court-based language access managers	24
Expand language access training available online	24
Expand online language access materials for attorneys	25

6.	Promoting Quality in the Language Access Program	25
	Review recordings of a random sampling of court interpreting sessions	25
	Conduct site visits	25
	• Encourage the prompt notification of problems in providing language access during a court proceeding	26
	Revise the process for submitting complaints about language access	26
	Publicize the complaint process	27
	Revise the process for the review of complaints about language access	27
7.	Working with the Community to Enhance Language Access	27
	Develop a new language access outreach campaign	27
	Use foreign language news outlets and other targeted means to reach the LEP community	28
	Strengthen relationships with groups in the LEP community	28
8.	Expanding Language Access through Improved Signage, Translation, and Online Information	28
	Establish a translation committee	28
	Inspect signage on a regular basis.	28
	Expand use of bilingual orders	28
	Translate form orders	29
	Present translated materials in audio-visual format	29
9.	Partnering with the Town and Village Courts to Ensure Language Access	29
	Create a task force on language access in the Justice Courts.	30
	• Include language access issues in training programs for Town and Village Court justices and staff	31
	Promote the use of remote interpreting services	31
	Translate Justice Court documents and signage	31
Со	nclusion	31
Δn	pendices	32
1	A. Languages for which the New York Courts Provided Interpreting Services in 2016, by Hours of Service	
	B. Part 217 of the Rules of the Chief Administrative Judge ("Access to Court Interpreter Services for Persons	
	with Limited English Proficiency")	34
	C. UCS Advisory Committee on Language Access.	35
	D. UCS Court Interpreter Reciprocity Policy.	
	E. Be a Court Interpreter Recruitment Materials	
	F. Working with Court Interpreters: A Benchcard and Best Practices for Judges	
	G. Letter of the Chief Administrative Judge to Bar Associations, Legal Services Providers and Other Organizations	
	H. We Speak Your Language Poster	
	I. Languages for which Remote Interpreting was Provided in 2016, Descending in Order of Use	
	J. Working with Interpreters by Video or Teleconference Benchcard	
	K. Remote Interpreting Operational Standards	
	L. Information about Language Access in the Courts Takeaway Card (English Version)	
	M. Sample English-Spanish Order of Protection	
	N. Timpling for Implementation of the Strategic Plan for Ensuring Language Access in the New York State Courts	

I. Introduction

New Yorkers speak more than 150 different languages and dialects. More than 30 percent of New Yorkers — over five million people — speak a language other than English at home, and two million New Yorkers are not fluent in English.¹

150

languages spoken in New York State 5,000,000

New Yorkers speak a language other than English

2,000,000

New Yorkers are not fluent in English

Last year, utilizing the services of more than 1,000 interpreters (approximately 300 court-employed and over 700 freelance or "per diem" interpreters), the New York courts provided interpreting services in 115 different languages, primarily in Spanish, Mandarin, Cantonese, Russian, and Haitian Creole, but also in languages such as Khmer, Nepali, Pashtu, Swahili, Toisan, Malayalam, Mixteco, Tagalog, and Urdu.²

Interpreter Top Languages Utilized in 2016				
In-Person	Interpreting	Remote Interpreting		
Spanish	Cantonese	Spanish	Mandarin	
Mandarin	French	American Sign	Haitian Creole	
Russian	Bengali	Burmese	Hindi	
Haitian Creole	Polish	Vietnamese	German	
Arabic	Korean	Albanian	Punjabi	

The vast number of languages spoken by New Yorkers, and the relatively small numbers of people speaking many of them, make the provision of language access services very difficult. The difficulty is compounded by the geographic dispersion of the need. Court interpreting is not just a New York City or urban issue. The need for interpreters arises every year, in every court in the state. While Queens County is often cited as an epicenter of linguistic diversity,³ there is also a significant demand for services in suburban and rural areas, where the availability of services is significantly less and the distances interpreters must travel far greater than in more metropolitan regions. Spanish is by far the language that is most in demand across the entire state, but thereafter language needs vary widely, as shown by the following comparison of the five most interpreted languages in different regions of New York.

Bronx	Monroe	Oneida	Queens	Schenectady
Spanish	Spanish	Spanish	Spanish	Spanish
French	American Sign	Burmese	Mandarin	Arabic
Bengali	Nepali	Karen	Bengali	Pashtu
Arabic	Somali	Somali	Korean	American Sign
Twi	Vietnamese	Bosnian	Cantonese	Cantonese

¹⁾ US Census Bureau, Language Statistics (2013), www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html

²⁾ Appendix A sets forth, in descending order of demand, the languages in which the New York courts provided interpreting services in 2016

³⁾ More than 135 languages are spoken by the residents of Queens County. *An Economic Snapshot of Queens*, Office of the New York State Comptroller (2013). Moreover, two percent of the total U.S. Limited English Speaking population in the United States resides in Queens County, making Queens one of the five counties in the nation with the largest number of LEP residents. Zong and Batalova, *The Limited English Proficiency Population in the United States*, Migration Policy Institute (2015).

The scope of proceedings and circumstances for which the New York courts provides interpreting services further complicates this challenge. The New York courts long ago made the policy decision to maximize participation in the justice system by providing interpreting services at no cost to the widest range of court users possible.

The combination of these factors — the multitude of languages spoken in New York, its geographic diversity, and its policy to maximize access to justice — makes the task of providing effective interpreting services in the courts a daunting one. Yet in the face of these challenges, significant progress has been made. Much of this progress has been the result of the 2006 and 2011 strategic plans on language access.⁴ Among the achievements under these plans are:

- Promulgation in 2007 of Part 217 of the Uniform Rules for NYS Trial Courts, which codified the policy of providing interpreting services in court proceedings of all types, and to all court users, including witnesses and crime victims. Part 217 also addresses the need for interpreting services in clerical offices and other points of contact outside of the courtroom;⁵
- Improved management of the court interpreting program, including the deployment of an automated scheduling system, which ensures that the most qualified interpreter available is assigned;
- Enhanced testing and assessment of prospective interpreters, including development of oral examinations in additional languages;
- Posting of a sample English proficiency examination and a sample foreign language oral assessment online to assist candidates in preparing for the exams;
- Implementation of a plan to provide language services at points of contact outside the courtroom:
- Development of bilingual orders of protection, which promote victim safety by ensuring that all parties to the order fully understand its terms;
- Expansion of remote interpreting, which helps to avoid delay in situations where an in-person
 interpreter is not immediately available, while also making the language access program more
 efficient and effective by increasing the number of cases in which available interpreters can be
 assigned; and
- Expansion of online resources available to judges (e.g., benchcards), court interpreters (e.g., glossaries and checklists), and others.

^{4) 2006} Strategic Plan, www.nycourts.gov/COURTINTERPRETER/pdfs/action_plan_040506.pdf 2011 Strategic Plan, www.nycourts.gov/publications/pdfs/ActionPlanCourtInterpretingUpdate-2011.pdf

⁵⁾ In 2016, Rule 217 was amended to expressly state the long-standing policy that interpreting services are provided at no cost to the user. Rule 217 is set forth in Appendix B.

The current plan builds upon the progress already made. To guide the courts moving forward, this plan sets forth initiatives in the following nine categories:

- Improving the Recruitment, Assessment and Training of Court Interpreters
- 2 Strengthening the Management of the Language Access Program
- Moving
 Beyond the
 Courtroom

- 4 Ensuring Language Access for the Deaf and Hard of Hearing Community
- Training Judges, Court Staff, and the Bar to
 Work Effectively with Court Interpreters and the
 Limited English Proficiency ("LEP") Community
- 6 Promoting Quality in the Language Access Program
- Working with the Community to Enhance Language Access
- 8 Expanding Language Access through Improved Signage,
 Translation, and Online Information
- **9** Partnering with the Town and Village Courts to Ensure Language Access in the Justice Courts

These initiatives will help ensure that New York's courts fulfill the promise of equal justice to all and can meet these obligations in the most effective and efficient manner possible.

II. Background: Interpreting Services in the New York State Courts

The New York State Unified Court System ("UCS") meets the need for language access through a combination of court-employed interpreters and independent contractors ("per diem interpreters") who are retained on an as-needed basis.

The UCS employs more than 300 full- and part-time court interpreters in 20 foreign languages and American Sign Language. Like most other court employees, the staff court interpreters are subject to statutory civil service requirements and collective bargaining agreements. These statutory requirements and agreements govern many aspects of the court system's relationship with interpreters, including recruitment, compensation, and performance evaluation, and thus influence many of the initiatives of this strategic plan.

In addition to staff interpreters, the UCS has developed a network of approximately 700 per diem interpreters who provide services in more than 100 languages. Some interpret one of the more common languages for which court-employed interpreters serve (e.g., Spanish, American Sign Language), but most interpret less prevalent languages for which full-time interpreter services are neither necessary nor cost-effective to provide. Given New York's linguistic diversity and geographic breadth, the court system could not meet its interpreting challenges without per diem interpreters.

Management of the Court Interpreting Program

As is true with most programs in the New York State court system, the language access program is administered by individual courts under the policy oversight and guidance of the Office of Court Administration ("OCA").

In 1994, OCA created the Office of Court Interpreting Services (renamed the Office of Language Access ["OLA"] in 2015) to provide central oversight of the court interpreting program. Among the duties of OLA are to assist in the development and implementation of language access policies and best practices, administer the electronic court interpreter scheduling system, produce statistical reports, maintain the statewide Registry of Per Diem Court Interpreters, coordinate remote interpreting, assist with the screening of new applicants, provide training for interpreters, judges and court staff, and address complaints or concerns regarding court interpreting.

There are three levels of staff court interpreters in the New York State Courts: Court Interpreters, Senior Court Interpreters, and Principal Court Interpreters. Court interpreters are responsible for interpreting between English and a foreign language in the courtroom and other settings. Staff interpreters may also assist LEP persons in filling out forms, and may perform clerical tasks such as filling or answering inquiries, and other related duties. In addition to providing interpreting services themselves, Senior Court Interpreters are responsible for supervising and coordinating the activities of staff and per diem court interpreters. They also evaluate staff performance, develop work performance standards, and check for compliance with instructions, procedures, ethics and protocol. Senior Court Interpreters also provide information to OLA regarding per diem court interpreter performance, professionalism and compliance with ethics and protocol, and assist LEP court users in completing forms and submitting complaints.

Principal Court Interpreters are the highest ranking court interpreters in the UCS. Principal Court Interpreters are responsible for supervising, coordinating activities, and evaluating the performance of Senior Court Interpreters, Court Interpreters, and per diem interpreters. They maintain a schedule of interpreters assigned to courts or judicial districts, and make recommendations related to interpreter staffing. Principal Court Interpreters collect and analyze statistics related to interpreter services, and administer per diem interpreter proficiency exams. They provide guidance to Senior Court Interpreters regarding ethics, professionalism and protocols for both staff and per diem interpreters, and also participate in the selection of staff interpreters.

The Chief Administrative Judge has also appointed an Advisory Committee on Language Access. The Committee is comprised of attorneys, advocates, judges, court managers, and others, who provide recommendations and a broad perspective on interpreting issues.⁶ The Advisory Committee works to enhance the quality and availability of interpreter services offered by the courts, while reviewing policies and procedures, and assisting with efforts in areas such as outreach and recruitment.

Recruitment and Assessment of Court Interpreters

The UCS has developed and administers a rigorous and comprehensive assessment program to evaluate the skills and qualifications of prospective interpreters, which includes:

English Language Proficiency Examination

The first step in qualifying as a court interpreter, either staff or per diem, is to pass a written English examination. This requirement was imposed as part of the 2006 Action Plan, and effective January 1, 2007, interpreters who have not passed the examination are disqualified from providing interpreting services in the courts. The English examination is rigorous; typically 40% of candidates pass the examination.⁷

Oral Examination

Candidates who are successful on the written Test of English Language Proficiency are required to pass an oral examination for the language or languages that they wish to interpret, if an examination is available. The oral interpretations are audio-taped, and the tapes are sent to outside bilingual experts for evaluation. The UCS offers oral assessment examinations in 22 languages: Albanian, Arabic, Bengali, Bosnian/Croatian/Serbian, Cantonese, French, Greek, Haitian Creole, Hebrew, Hindi, Italian, Japanese, Korean, Mandarin, Polish, Portuguese, Punjabi, Russian, Spanish, Urdu, Vietnamese, and Wolof. These languages account for more than 80 percent of the interpreting needs in the courts.

⁶⁾ The Advisory Committee consists of judges, court interpreters, representatives of legal services organizations, and others with expertise in language access issues. The members of the Advisory Committee are set forth in Appendix C.

⁷⁾ There is a different process for testing and hiring of staff Spanish court interpreters. In light of the high demand for Spanish and the number of Spanish staff interpreters hired, the UCS has developed a competitive civil service examination. The two-part examination first requires candidates to pass a three-hour, multiple-choice test of their bilingual skills, probing candidates' grammar, vocabulary, word usage, sentence structure and reading comprehension, in both Spanish and English. The written test also assesses candidates' ability to translate from English to Spanish and Spanish to English. Candidates who pass this written examination qualify to take a one-hour oral examination, which includes viewing a video and interpreting everything spoken in Spanish to English and from English to Spanish, in simultaneous and consecutive modes. Final grades are based on performance on both the written and oral components of the examination, and candidates are ranked and selected for employment from an eligible list in compliance with state civil service law and rules.

Credential Assessment in the Absence of an Oral Examination

For those languages for which the UCS does not have an oral examination to test interpreting competency, a candidate's qualifications are assessed through a combination of interviews, resume reviews, and reference checks. The assessment is conducted jointly by OLA and the UCS Division of Human Resources.

Reciprocity

The New York Courts also permit candidates to qualify as court interpreters if they have been certified by one of the following credentialing authorities: the National Center for State Courts Council on Language Access Coordinators; the Federal Court Interpreter Certification Examination Program; and the National Judiciary Interpreter and Translator Certification Program.⁸

American Sign Language

The qualifications of American Sign Language interpreters employed by the court system are assessed by a different process. By statute, the Chief Administrative Judge must name one or more credentialing authorities to certify interpreters in American Sign Language to serve in the New York courts. See Judiciary Law § 390. The Registry of Interpreters for the Deaf ("RID"), a nationally recognized professional association that offers rigorous examinations and certifications, has been named as the credentialing authority for the New York courts. Section 390 also requires that the state provide interpreter services in all proceedings where a party or a witness is deaf and in all criminal proceedings in state-paid courts where the crime victim or any member of the immediate family is deaf.

In addition to the foregoing means of assessing the professional competence of foreign language and American Sign Language interpreters, prospective interpreters must pass a criminal background check before commencing employment in the courts.

Assignment of Court Interpreters

The management of the court interpreting program has been significantly strengthened over the past ten years. A central feature of the improved administration has been the statewide deployment of the Electronic Court Interpreter Scheduling System ("e-Scheduling System") for the assignment of interpreters. Prior to the introduction of the e-Scheduling System in 2006, courts used a paper list, "the Registry of Court Interpreters," that was provided by OCA, supplemented by informal lists of interpreters that were maintained by local courts. The paper system was inefficient. More importantly, it provided no mechanism for ensuring that only qualified interpreters were used.

The e-Scheduling System changed all of that. When the need for an interpreter in a particular language at a particular place and time is entered, the system immediately identifies an interpreter who is available at that time and place, and, most importantly, who is fully qualified, having passed the required examinations and completed the mandatory training. The e-Scheduling System also

⁸⁾ The UCS Court Interpreter Reciprocity Policy is attached as Appendix D.

ensures that the courts are making the most efficient use of available interpreters. In addition to its role in the individual assignment of interpreters, the e-Scheduling System supports administration of the program by producing statistical reports that help to identify language trends and court needs.

The use of remote interpreting has also improved the delivery of language services and promoted the efficient use of available interpreters. While on-site interpreting is generally preferred, in appropriate situations remote interpreting has proven to be an effective means of ensuring language access. The UCS began a statewide program for remote interpreting in mid-2005. Since that time, the use of remote interpreting services has grown exponentially, and has been helpful in avoiding delays in court proceedings, especially for cases that require interpreting in less commonly used languages and at courthouses in the more remote areas of the state.

The introduction of technology such as the e-Scheduling System and remote interpreting has made the process of locating, scheduling, and paying interpreters more efficient, and reduced redundancy of tasks in those areas. The applications provide courts and OCA with comprehensive information on interpreters where there was none previously, tools to ensure that this information is kept current and consistent, and a streamlined way to supply qualified interpreters to all courts that need them.

Progress has also been made in providing interpreting services beyond the courtroom. The court system's public information line (1-800-COURTNY) ensures language access via a remote commercial interpreting service. In addition, remote interpreting, using both staff interpreters and a commercial interpreting service, is now available in many court locations, including Help Centers, and is playing a critical role in meeting interpreting needs outside of courtroom proceedings. In addition, numerous court documents and forms have been translated into various languages and are available online and in print. While much has been accomplished in this regard, there is much more to be done, and the translation of court documents and availability of interpreting in non-courtroom settings will be areas of particular focus under this new strategic plan.

III. A Strategic Plan for Ensuring Language Access in the New York Courts

Ensuring language access is an issue that goes to the core values of the New York State Courts — fairness, equal justice, unfettered access, and public confidence and trust in the judiciary. The goals are lofty and abstract — achieving them requires continuing and careful attention to many small operational details. This plan sets forth almost 70 concrete actions, in nine broad categories, that the New York State Courts will take to ensure that these details are attended to and that no one is denied access or meaningful participation because of language or hearing loss.

1. Improving the Recruitment, Assessment, and Training of Court Interpreters

A. Recruitment

Skilled and trained interpreters are the foundation of a high quality court interpreting program. To attract and retain interpreters of the highest caliber, the UCS will undertake the following:

Create a court interpreter trainee position

The UCS will establish a court interpreter trainee position. The primary objective of the new position is to assist recruitment efforts by creating an entry-level gateway to a career in court interpreting. Trainees will also help bridge the language access gap, primarily, it is anticipated, in non-courtroom settings.

The Division of Human Resources, in consultation with OLA, will present a report and recommendation to the Chief Administrative Judge with respect to establishing a trainee title in the court interpreter series. Among the issues to be addressed in the report are:

- What assessments/qualifications are required for hiring as a trainee
- What pay grade the trainee position will be assigned
- What training will be required of trainees
- What assignments the trainees may be given
- How the trainees will be supervised and evaluated
- What criteria a trainee must satisfy for promotion to court interpreter title

The report and recommendation is due by January 31, 2018, with an expected implementation in Spring 2018.

Develop a new court interpreter recruitment campaign

In 2007, as part of its first language access action plan, the UCS launched an interpreter recruitment campaign entitled "Be a Court Interpreter," using public service announcements over radio, newspaper advertisements, brochures distributed at job fairs and a variety of other outreach efforts.⁹

⁹⁾ Sample Be a Court Interpreter materials are attached as Appendix E

It is time to rethink recruitment strategies for court interpreters, and to launch an updated, fresh campaign, with new publicity tools, emphasizing outreach to community and advocacy groups, and the use of foreign language news outlets, social media, and online platforms. In light of New York State's diversity, the recruitment campaign will be customized to meet regional and local demographics.

In developing the new recruitment campaign, OLA will work with other UCS offices, including the Office of Workforce Diversity, as well as with community groups and educational institutions. The new recruitment effort will be launched by January 2018.

Review per diem interpreter compensation

Adequate compensation, especially in the competitive New York City metropolitan area, is critical to the courts' ability to attract qualified per diem interpreters. To ensure that the compensation for per diem interpreters remains on par, the UCS will undertake the following:

· Review per diem rates annually

Effective April 1, 2017, the rates for per diem interpreters will be increased to \$300 for a full day and \$170 for a half day (from \$250 and \$140, respectively). In its annual report to the Chief Administrative Judge on the language access program (see page 19 below), OLA will address the adequacy of per diem compensation rates and recommend adjustments if warranted.

Implement a tiered compensation structure for per diem interpreters

To attract the most qualified interpreters, the UCS will implement a tiered compensation structure for per diem court interpreters, based on experience, completion of continuing education, and other factors. The UCS Division of Financial Management in consultation with OLA, will present a proposal for a tiered structure to the Chief Administrative Judge by January 31, 2018, with an expected implementation in Spring 2018.

Establish a cancellation policy

Currently the UCS does not pay a per diem interpreter if the assignment is cancelled, a practice that has discouraged some interpreters from accepting assignments with the New York courts. Other state court system have cancellation policies that provide for pro-rated compensation depending on the amount of notice of the cancelled assignment. OLA will examine this issue and propose a cancellation policy to the Chief Administrative Judge by January 31, 2018, with an expected implementation in Spring 2018.

Establish a court interpreting intern program

The UCS will establish an internship program to offer college students an opportunity to learn about the court system and careers in court interpreting. The internship will be geared to students majoring in a foreign language or enrolled in an interpreting or translating program. The internship program will be developed and administered in partnership with selected colleges and universities, which will grant course credit for students who successfully complete the program. Interns will observe interpreters in courtroom settings, learn about the administration of the court interpreting program, and provide interpreting services, under the supervision of a staff interpreter, in non-courtroom settings.

The UCS is working with several colleges and universities to develop the standards and protocols for the selection, training, assignment, supervision and evaluation of interns. The program will be initiated for the Fall 2017 semester.¹⁰

Strengthen relationships with schools, community, and advocacy groups

The UCS will seek to strengthen relationships and cooperation with schools, community groups, and advocacy and interpreter organizations (such as the National Association of Judiciary Interpreters and Translators), in an effort to promote greater awareness of and interest in career opportunities in the court system for biliterate individuals. In particular, the courts will seek to strengthen partnerships with schools that offer interpreting programs. In light of the diversity in language access needs across New York, these efforts must occur both at the central and the regional level. OLA will coordinate these efforts with UCS's district administrative offices.

B. Assessment

Assessing qualifications to serve as a court interpreter is critical to achieving a successful language access program. For that reason, the UCS has developed a rigorous screening process, including a written English examination required of all candidates, oral examinations in the most commonly used languages, as well as thorough background and credential checks. While it is key to ensuring a high quality program, this screening creates a barrier to entry into the interpreter ranks. To further strengthen the assessment process, while also assisting candidates to successfully meet the courts' high standards, the UCS will do the following:

Expand testing

As described above, the UCS requires that all staff and per diem court interpreters pass a written English proficiency examination. In addition, the UCS has developed oral examinations in 22 languages, which account for more than 80 percent of the requested language needs. Over the next three years, the UCS will develop oral examinations for seven additional languages, to be selected based on usage and demand.

Provide additional online test preparation materials

Familiarity with test format and content is key to success.¹¹ To assist candidates in that regard, the UCS recently expanded the information that is available about both the written English proficiency examination and the Oral Language Examinations, including a sample written English examination (with answer key), and a video demonstrating the format of the oral examination.

In connection with each administration of the written English examination, the Division of Human Resources distributes questionnaires to gather information about test takers, including information regarding test preparation. The UCS will collect similar feedback from candidates regarding the

¹⁰⁾ The UCS is currently partnering with the following schools on this project: Baruch College, Hunter College, John Jay College, Montclair State University, and Pace University. In advance of the formal, for-credit intern program to be initiated in Fall 2017, the UCS and these five colleges are conducting a pilot internship program in the Spring 2017 semester. Students are participating in the pilot internship in conjunction with classes at their respective schools, but will not receive separate course credit for the pilot program.

¹¹⁾ According to responses to questionnaires, 80% of the test takers avail themselves of the sample written materials the UCS provides, and those who viewed the sample written materials had a significantly higher passing rate than those who did not (40% vs. 25%).

effectiveness of the oral examination tools that were recently developed and made available to test takers. Based on this feedback from candidates, the UCS will continuously look for ways to improve test preparation materials.

Help candidates improve their English language skills

The pass rate on the written English examination is typically below 50 percent, a result reflecting not only the rigor and scope of the test but also the fact that many candidates are not native English speakers. Thus, while this examination serves as an important means of promoting quality in the language access program, it is also a challenge to many who wish to become a court interpreter. The expanded information about the examination format and content discussed above should help candidates overcome this barrier. However, since many candidates also need additional training in English skills, the UCS will:

- provide links to online materials designed to strengthen the English language skills of nonnative speakers;
- partner with colleges and other organizations to develop courses and materials to assist candidates in improving English skills and vocabulary;¹² and
- post additional materials on the UCS website to assist candidates in learning legal vocabulary and information about the legal system.

Provide feedback on test performance

The UCS recently began to provide candidates who took the written English examination with detailed information about their performance, including scores on each of the various subparts of the test. This feedback is designed to allow candidates to focus on areas of weakness, improve their skills and increase their chance of success on future tests. The UCS will continue to explore ways to provide feedback to candidates that will help them prepare for re-examination.

Replace the annual in-person written English examination with on-demand testing

The first step in qualifying as either a staff or a per diem court interpreter is to pass a written English examination that was developed by and is administered by the UCS. This in-person examination is currently offered once a year. Administering this examination more frequently would enable candidates to take the English language examination as soon as they are ready, and would increase the pool of candidates qualified for oral examination and further screening.

There are a number of avenues for achieving the objective of pre-qualifying more interpreters for further screening. First, the Division of Human Resources Examination Development Unit will implement testing tools that allow for scrambled versions of the examination so that it can be administered online on an on-demand basis. The goal is to implement on-demand testing by early 2018. In addition, the UCS will increase outreach to candidates to encourage them to qualify through alternative English screening mechanisms, such as the Test of English as a Foreign Language ("TOEFL") examination administered by the Educational Testing Service, which is offered more than 50 times each year.

¹²⁾ The UCS will begin this effort by attempting to partner with the colleges that are participating in the court interpreting internship program.

Issue a court rule that requires judges to establish the provisional qualifications of court interpreters not already qualified by the Office of Language Access

The established hierarchy built into the e-Scheduling System dictates that a staff interpreter must be assigned if available, and if not, a per diem interpreter on the Registry of Qualified Court Interpreters may be used. Only when court managers have been unable to schedule either a staff or qualified per diem interpreter may an interpreter who has not been qualified by OLA be assigned. In such situations, the court manager should advise the judge that the interpreter has not already been qualified and, it is a recommended best practice for the judge to establish the interpreter's skills and ability to interpret effectively by asking a few *voir dire* questions on the record.¹³ The importance of this practice warrants that it be elevated to and embodied in a rule of the Chief Administrative Judge that is applicable to all trial courts. The proposed rule will be presented to the Administrative Board of the Courts by June 2017.

C. Training

Rigorous screening and assessment can help to advance the objective of providing high quality language access, but thorough and ongoing training for those persons selected to serve as court interpreters is also critical. Among the topics to be covered in a comprehensive program of court interpreter training are the Canons of Professional Responsibility for Court Interpreters, cultural competency, and skill-specific topics such as remote interpreting, and consecutive and simultaneous interpreting.

To further strengthen training programs for both staff and per diem court interpreters, the UCS will undertake the following:

Expand online training programs for court interpreters

Online training is ideally suited to court interpreters, who, unlike such employees as court officers, are hired individually rather than as part of a group, making in-person, group training less feasible. OLA, in collaboration with the Division of Human Resources, will develop additional online, on-demand training modules for both staff and per diem court interpreters. Wherever possible, live training programs will be recorded and added to the website for on-demand use by interpreters.

Explore a continuing education requirement for court interpreters

As is true with attorneys and many other professions, continuing education is essential for maintaining skills and knowledge, and in keeping current with new developments, initiatives, and legal requirements. OLA will work with the Division of Human Resources to evaluate options for a continuing education program and to make recommendations to the Chief Administrative Judge by January 31, 2018, including recommendations with respect to compliance with a continuing education requirement.

¹³⁾ See Benchcard and Best Practices for Working with Court Interpreters, attached as Appendix F. The Benchcard may also be found at: http://www.nycourts.gov/COURTINTERPRETER/pdfs/Judicial_Benchcard.PDF.

Increase the variety and scope of programs, and provide cross-training

Interpreters can be called upon to work in many different court types or proceedings, where the terminology and processes can vary significantly. OLA will work to expand the range of training programs to include court and case-specific offerings, such as those involving domestic violence, human trafficking, drug treatment, family offense, and housing issues. Where feasible, UCS will consult with and include leaders from relevant areas as faculty, to provide context and expertise in specific subject matters.

Update the Court Interpreter Manual

The UCS Court Interpreter Manual¹⁴ provides guidance to court interpreters, both staff and per diem, as well as court managers, on procedures and policy matters, including the Court Interpreting Canons of Ethics. OLA will publish an updated Court Interpreter Manual by June 2017, which will be provided to all current court interpreters (staff and per diem) and court managers, and will be posted on the courts' website. In addition, OLA will conduct an annual review of the Manual, updating the information as needed and disseminating it to interpreters and court managers.

2. Strengthening the Management of the Language Access Program

In theory, the task of ensuring language access is straightforward: when the court identifies the need to provide interpreting services, a qualified interpreter must be identified and assigned. In the real world, the task is much more complex. Each year the UCS provides interpreting services in more than 100 languages, in more than 90,000 cases in hundreds of court locations around the state, often with little advance notice of the need for an interpreter. Under those circumstances, matching the need with the finite available resources, and attending to the numerous other operational details involved in providing language access, is a daunting challenge.

To improve the management of the language access program, the UCS will undertake the following:

A. Management of Interpreting Resources

Encourage and facilitate the early notification of a need for language services

The difficult logistical task of providing language access is made somewhat easier by advance notice of the need. Early notice reduces the likelihood of delay in the particular proceeding, and also promotes efficient management of the program by allowing for a more orderly assignment of interpreters. To encourage and facilitate early notification of language access needs, the UCS will:

continue to reach out to members of the bar, including state, local and specialized bar
associations, and legal services providers, to emphasize the importance of notice of a need for
language access services at the earliest time possible;¹⁵

¹⁴⁾ The Court Interpreter Manual is available at: http://www.nycourts.gov/courtinterpreter/pdfs/CourtInterpreterManual.pdf.

¹⁵⁾ The Chief Administrative Judge of the New York State Courts periodically communicates with bar associations, legal services providers, and other groups involved with the LEP community about language access issues, including the importance of providing early notice of the need for an interpreter, as well information about the complaint process and the importance of raising concerns or complaints about language access at the earliest time possible. See Appendix G. The UCS will continue find ways to communicate effectively with the legal and LEP communities about these issues.

- establish protocols by which attorneys and other justice partners can notify the court, at the
 earliest possible point of contact with the court system, that an individual requires language
 access assistance; and
- develop a simple form, in both online and print format, that litigants or counsel can submit to inform the court of the need for interpreting services.

Encourage LEP court users to self-identify

Prominent multi-language signage and handout flyers such as such as "I Speak" cards are effective means of encouraging and assisting LEP persons to self-identify as needing language access services. The UCS will ensure that such language access materials are available at each critical point of contact with the public.¹⁶

Track the need for interpreting assistance throughout the life of a case

In some cases the need for interpreting services may be a one-time event, while in other cases an interpreter will be needed for each court appearance. In the latter situation, the ongoing need for the interpreter should be documented in the case file and the court's case management system. This tracking functionality will be built into all automated case management systems. The Division of Technology will work with OLA to develop a proposal, including a timeline for implementation, for building a language tracking function into the various UCS case management systems. The proposal will be developed by January 1, 2018.

Develop a more robust, real-time capacity to deploy court interpreters

As part of its 2006 Action Plan on Court Interpreting, the UCS rolled out the e-Scheduling System that helps match available resources with the need, while also ensuring that the most qualified interpreter is assigned. While that system greatly enhanced the efficient deployment of interpreters, it does not have the capacity to assist in the efficient redeployment of interpreters in real time during a busy courthouse day. The UCS will develop a more flexible system that allows interpreters to be quickly deployed and redeployed as needs change because of adjournments, settlements, emergency applications, and other changed circumstances that are typical in a busy court. The Division of Technology will work with OLA to develop a proposal, including a timeline for implementation, for a more robust, real-time system for the assignment and redeployment of court interpreters. The proposal will be developed by January 1, 2018.

Improve the protocols and systems for sharing interpreters between courts

Most UCS staff interpreters are assigned to a particular courthouse. While there is some sharing of interpreters among courts, the UCS will develop protocols to encourage the more efficient utilization of interpreting resources, including increased use of remote interpreting between court locations. In addition, protocols will be developed to expand the sharing of per diem interpreters between courts, within a scheduled half-day or full-day assignment. By December 2017, draft protocols will be issued and pilot projects initiated to assess the protocols.

¹⁶⁾ The UCS utilizes We Speak Your Language posters and flyers to encourage LEP persons to seek language assistance and to assist them in identifying the language they speak. See Appendix H. This mechanism for self-identification will be re-evaluated as part of the development of a new language access outreach campaign. See page 27 below.

Coordinate calendars of cases requiring court interpreters

When possible, cases requiring court interpreting services in a particular language should be coordinated to permit the most efficient use of available interpreters. For example, where possible, cases requiring a Spanish language interpreter should be grouped together on the court calendar.

The Offices of the Deputy Chief Administrative Judges, in conjunction with OLA, will develop pilot programs to evaluate the feasibility and effectiveness of managing court calendars to enhance the efficient use of interpreting resources. The pilot projects will be initiated by December 2017.

These efforts should never be implemented to the detriment of the LEP court users, by unduly delaying a proceeding, or by otherwise denying or impeding access to the courts.

Review the use of per diem interpreters to determine if additional staff interpreters should be hired

Per diem interpreters play a critical role in the New York courts, providing services in many languages of lesser diffusion, and in courthouses where the demand does not warrant a full-time staff interpreter. There are times, however, when the use of per diem interpreters in a particular location justifies the hiring of an additional staff interpreter. In such cases, the hiring of a staff interpreter is not only warranted fiscally, but can enhance service to the public. OLA, in conjunction with the Divisions of Human Resources and Financial Management, will regularly review the use of per diem interpreters in each court to determine if this "tipping point" has been reached. At least annually, these offices will advise the OCA Executive Director whether additional staff court interpreters should be hired.

Expand the use of remote interpreting in court proceedings

For many court proceedings, especially trials, in-person interpreting is preferred. However, in many situations remote interpreting may fully meet the needs of the parties.

Remote interpreting offers many advantages. It helps avoid adjournment or other delay in a proceeding, especially where considerable travel time would be required for an in-person appearance by the interpreter. In addition, remote interpreting promotes the efficient utilization of interpreters, allowing interpreters to meet the needs of many additional LEP court users.

The use of remote interpreting for court proceedings has steadily expanded over the years. In 2005, it was used in 12 cases, for six languages. In 2016, remote interpreting was provided in 55 languages, for more than 600 cases. Remote interpreting has proven to be especially helpful in providing access to interpreters in less common languages.¹⁷

To encourage the expanded use of remote interpreting, and to ensure that it is used only in appropriate circumstances and provides effective language access, the following steps will be taken:

¹⁷⁾ The most common languages in remote interpreting sessions differ significantly from the most common languages for in-person sessions. Of the top ten languages for which remote interpreting was used in 2016, only three of the languages (Spanish, Mandarin and Haitian Creole) are among the top 10 languages used for in-person sessions. The languages in which remote interpreting was provided in 2016 are attached as Appendix I.

- Promote the use of remote interpreting and provide additional guidance on its appropriate use Feedback indicates that participants in remote interpreting sessions find it effective and easy to use. However, there is, sometimes resistance or hesitation to use it for the first time. To help overcome this hesitation, OCA will take steps to ensure that judges are aware of the availability and advantages of remote interpreting. OCA will also provide further guidance on the circumstances in which remote interpreting is particularly suitable. This guidance will stress that remote interpreting only be used if it will permit the LEP court user to fully and meaningfully participate in the proceeding.
- Ensure that all participants are familiar with the protocols for remote interpreting It is critical that all participants, including the court interpreter, court staff, the judge, counsel, and the parties, understand how remote interpreting works, and are familiar with the protocols for remote interpreting. The UCS will take a number of steps toward that end. First, the UCS will update existing resources on remote interpreting. Second, the protocols will be covered in all training on language access. In addition, as remote interpreting is used for the first time in a courthouse or a court part, OLA will reach out to the court and offer assistance and support. Finally, OLA will also produce and post online a video demonstrating how remote interpreting works in a court proceeding.
- Establish technology standards and install conforming equipment at all courthouses State-of-the-art equipment is critical to effective remote interpreting. Remote interpreting over a secure video connection is preferred, but telephonic remote interpreting may be used if necessary. The UCS Division of Technology, in consulting with OLA, will establish equipment standards for remote interpreting, and ensure that conforming equipment is installed in all courthouses statewide. The standards should, in part, ensure that the remote interpreter can view documents that need to be translated on the record and permit confidential attorney-client conferences. The standards will be issued by December 1, 2017, and conforming equipment will be installed in all courthouses on an ongoing, rolling basis, with a priority for those courts with the most frequent use of interpreters.
- Expand the pool of staff court interpreters available for remote interpreting
 The UCS currently has a cadre of specially trained staff court interpreters who are available for remote interpreting assignments. OLA will identify additional staff interpreters available for remote assignment, both to provide broader language coverage and to create greater capacity for assignments.
- Establish protocols for the use of commercial telephonic interpreting service for remote court interpreting
 Staff court interpreters are the first preference for remote interpreting, with qualified per diem interpreters as a second choice. In some circumstances where neither a staff interpreter nor a qualified per diem interpreter is available, the use of a commercial remote interpreting service.

interpreters as a second choice. In some circumstances where neither a staff interpreter nor a qualified per diem interpreter is available, the use of a commercial remote interpreting service may be appropriate. By Spring 2018, OLA will develop protocols and standards for the use of commercial interpreting services for remote court interpreting.

¹⁸⁾ There are currently two resources available on the use of remote interpreting, a benchcard entitled *Working with Interpreters by Video or Teleconference* (attached as Appendix J) and the *Remote Interpreting Operational Standards* (attached as Appendix K).

Evaluate the effectiveness of remote interpreting

To ensure that remote interpreting is meeting the needs of all participants in the proceeding, from the LEP court user, to the judge, and to determine what changes should be made in this program, OLA will survey participants in selected proceedings on an ongoing basis.

B. Planning for Success

Planning is key to a successful language access program, and data is key to successful planning. It is important to understand demographic trends so that courts can anticipate and prepare for changes in the demand for language services. It is also important to understand what programs are working and which are not, and why, in order to make adjustments and ensure that limited resources are used efficiently to meet the expanding need.

The key components of the UCS' long-range planning efforts, and the augmented data collection and analysis that will inform that planning, include the following:

Monitor trends in the need for language access

The pattern of the demand for language services is continuously changing. In 2010, there were two cases in the Rochester area in which Somali interpreters were needed. Five years later, as a result of refugee resettlement in this region, there were 91 cases requiring Somali interpreters. In recent years there have been similar spikes in demand for various languages, including Burmese/Karen in certain regions of New York and Bosnian/Croatian/Serbian in other areas. It is essential that the courts closely track, and whenever possible, anticipate these changing patterns.

The UCS monitors the current demand for language access services, and historic trends in the demand, using reports generated by the e-Scheduling System on what languages are in demand and how often, at the courthouse, county, judicial district, and statewide levels. But information must also be gathered to anticipate future changes in demand. Toward that end, the UCS will work with community-based organizations, social services and other government agencies, refugee organizations, and other groups that may offer insight into social, political, or demographic changes that will shape the emerging pattern of language needs.

Track reasons for delays and adjournments

Anecdotal evidence indicates that delays in assigning interpreters often result in the delay or adjournment of proceedings, perhaps most often in the Family Court. The UCS will undertake a survey to determine how often and for how long proceedings are delayed because of the unavailability of an interpreter. Based on this information, OLA will develop a remedial plan to address the causes of delays due to the absence of an interpreter.

Critically evaluate and adjust the language access program on a continuing basis

It is essential that data be gathered with respect to the language access program and the effectiveness of each component of the plan be continuously assessed. Data on remote interpreting, the bilingual order initiative, translations, the complaint review process and all other components of the language access program will be gathered and analyzed, and there will be an assessment of problems identified and strategies developed, to address problems.

Report annually to the Chief Administrative Judge

OLA will report to the Chief Administrative Judge with respect to these various analyses on an annual basis, so that this information is considered during the Judiciary budget preparation process, allowing for more informed decisions on funding, personnel and programmatic changes.

Identify funding sources for special projects to enhance language access

In Fiscal Year 2016-2017, the UCS will spend more than \$27 million on the language access program, all of which is from the State's General Fund, and the vast majority of which is for staff and per diem interpreters and other expenses related to the direct provision of interpreting services. The UCS will seek to identify grants and other sources of funding to supplement the operating budget of the language access program. These funds would be dedicated to special projects, such as initiatives to expand the availability of bilingual orders or to develop audio resources to meet the needs of illiterate LEP court users.

3. Moving Beyond the Courtroom

The courtroom proceeding is understandably the primary focus of any court interpreting program. However, there are many other significant points of contact between court users and the justice system, at which the absence of language services can effectively deny access to the courts.

The large number of such points of contact makes the provision of interpreting services beyond the courtroom a difficult challenge. Some of these points of contact may be outside of the courthouse. Many are in offices or programs that are court-managed, while others are in programs that are managed by non-profit or other organizations or agencies. In some cases the contact is the result of court-ordered participation in a program and, in others, involves the court appointment of a psychologist, mediator, or other professional.

The sheer number, geographic dispersion, and wide range of purposes and circumstances of these contacts mandate a multi-faceted solution. These same factors also mean that it will take a sustained effort, over time, to meet language needs at multiple points of contact outside the courtroom.

While some progress in meeting this need has been made, there is much more to do, and it will take an expanded and continued effort to provide full language access at every point of contact between the public and the courts. The UCS will undertake the following initiatives (some new and others that have already begun) toward achieving this goal within five years:

Identify critical points of contact with the public in each courthouse, and establish protocols for ensuring language access at each point

The first step to meeting this goal is to understand the nature and scope of the need. The courts must identify what points of contact in each courthouse are most critical for LEP court users. It is also critical to understand which foreign languages are commonly spoken in the community and what type of assistance is generally needed at each point of contact. For example, in some situations translations of key documents may meet the need, while in other situations access to an interpreter (either a staff interpreter or a commercial interpreting service) or the assistance of a biliterate court employee will be required.

By March 2018, each district administrative office will gather this information (in a form to be developed by OLA) for each courthouse in its district. Based on this information, each district office, in collaboration with OLA, will develop a plan and protocols, with timelines for implementation, for each courthouse.

Recruit biliterate staff

Interpreting in a court proceeding should be restricted to a qualified professional court interpreter. However, biliterate staff in other court titles can help to fill a critical need at many other points of contact with the public. In order to encourage the recruitment of biliterate staff, the court system will increase outreach to educational institutions and community groups to promote career opportunities available to biliterate individuals in the courts.

In addition, the UCS will initiate a pilot program in which qualified biliterate staff in specified titles are paid a salary differential in addition to their base salary. By April 1, 2018, the Division of Human Resources, in collaboration with OLA, will make a report and recommendation to the Chief Administrative Judge with respect to the pilot biliterate employee program. Among the issues to be addressed in the report are:

- what titles, assignments, languages, and court locations are to be included in the pilot;
- · how candidates are to be assessed for biliteracy; and
- what salary differential would be paid to qualified staff.

In developing this biliterate staff program, as well as in recruiting candidates to seek employment in the New York courts, the UCS will seek to collaborate with schools that participate in the New York State Seal of Biliteracy Program.¹⁹

Expand the use of remote interpreting

Remote interpreting is particularly well-suited to meet language access needs in non-courtroom settings. Depending on the circumstances, remote interpreting can be provided by a staff interpreter, a per diem interpreter, or a commercial remote interpreting service. At each such point of contact, staff should be trained and familiar with the remote interpreting protocols, and the necessary equipment will be installed.

Recruit biliterate volunteers and interns

Biliterate volunteers and interns offer another potential avenue for providing language access outside of the courtroom. The UCS currently has a number of programs that use volunteers, both attorneys and non-attorneys, to provide assistance to court users. For example, the Navigator Program utilizes specifically selected and trained non-attorney volunteers to provide general information and other assistance to unrepresented litigants.

¹⁹⁾ The New York State Seal of Biliteracy Program was established pursuant to Chapter 217 of the Laws of 2012, which amended section 815 of the New York State Education Law to create a program that recognizes high school students who have achieved a high level of proficiency in listening, speaking, reading and writing in one or more language other than English. The New York State Seal of Biliteracy is awarded by the New York State Commissioner of Education to students who satisfy the standards established by the New York State Board of Regents and who attend a school that participates in the Seal of Biliteracy Program.

The UCS will seek to recruit biliterate individuals to participate in the Navigator and other court-managed volunteer programs. Biliterate volunteers could also be used effectively in non-court-managed programs. The UCS will assist the providers of these programs in taking advantage of the resource offered by biliterate volunteers and interns.

The New York State Courts Access to Justice Program, in collaboration with OLA, will develop a plan for expanding the use of biliterate volunteers and interns at points of contact outside the courtroom. These offices will issue a report and recommendations to the Chief Administrative Judge by September 2017.

Expand the use of technology to bridge the language access gap

Technology offers a promising means for effectively communicating with the LEP community, especially at points of contact outside the courtroom. Information kiosks, videos, and virtual courthouse tours are among the many technologies that could help bridge the language access gap. The UCS Division of Technology and the NYS Courts Access to Justice Program, in collaboration with OLA, will develop a plan for using technology to help ensure access outside the courtroom. The plan will be presented by January 2018.

Evaluate capacity to provide language access as a selection criterion for consultants and contractors to provide services

The UCS contracts with a large number of organizations to provide a range of services to the public, including civil legal services to the indigent and "Attorney for the Child" representation in certain Family Court proceedings. In the most recent procurement for civil legal services, the Request for Proposals issued by the UCS included as a weighted criterion the organization's ability to provide language access and asked each organization to provide a copy of its language access plan.²⁰ Going forward, capacity to ensure language access will be a criterion in all UCS procurements for services to the public.

Consider language accessibility of service providers

A court should not order an LEP individual to participate in a program that does not provide appropriate language accessible services. If participation in services is not ordered due to the program's lack of language capacity, the court should order the litigant to participate in an appropriate alternative program that provides language access services for the LEP court user. In making its findings and orders, the court should inquire if the program provides language access services to ensure the LEP court user's ability to meet the requirements of the court. Similarly, in proceedings with LEP parties, courts should determine that court-appointed professionals, such as psychologists, mediators, and guardians, can provide linguistically accessible services.

Annually assess progress in ensuring language access beyond the courtroom

The complexity of meeting the demand for language assistance beyond the courtroom will require continuing oversight. Therefore, the annual report by OLA to the Chief Administrative Judge (see page 19) will assess progress and recommend changes in the courts' approach to ensure that the language access program is on track toward meeting the critical need over the next five years.

²⁰⁾ Pursuant to that RFP, the UCS awarded \$85 million to 83 organizations to provide civil legal services to persons at or below 200 percent of the federal poverty guidelines, effective January 1, 2017.

4. Ensuring Language Access for the Deaf and Hard of Hearing Community

The deaf and hard of hearing community is very diverse. Factors that contribute to the variations in need are how and when a person became deaf or hard of hearing, the level of hearing, and how the person communicates. Different members of the community prefer or require different types of assistance. Court personnel must be able to work with each deaf or hard of hearing court user to learn what specific assistance is needed, and then be prepared to provide that assistance.

To ensure that the courts are prepared to provide whatever assistance is needed by each deaf or hard of hearing court user, the UCS will undertake the following:

Develop assessment tools to assist court personnel in determining the type of assistance needed

The means of ensuring access to members of the deaf and hard of hearing community vary widely. The UCS Statewide Coordinator of the Americans with Disabilities Act Program ("ADA") will develop protocols and training to ensure that court employees are equipped to quickly and properly assess the type of assistance that is needed. The protocols will be issued by October 2017.

Issue guidelines for judges and court staff on language access for the deaf and hard of hearing community

The UCS has issued two benchcards, one addressing language access issues generally and one addressing remote interpreting. Given the special needs of the deaf and hard of hearing community, a benchcard on meeting the language access needs of this community will be developed by the UCS Statewide Coordinator of the ADA Program, in consultation with OLA. The guidelines will be issued by October 2017.

Ensure that state-of-the-art assistive listening technology is available in every courthouse

Installation of assistive listening devices ("ALDs") is a standard requirement in courthouse design in New York State. The OCA Office of Court Facilities Management will undertake a survey to ensure that state-of-the-art ALDs are installed and operable in every courthouse in the state, and that court staff are familiar with use of the equipment through regularly scheduled training. The survey will be completed by October 2017.

Recruit both staff and per diem American Sign Language interpreters

The recruitment of both staff and per diem American Sign Language Interpreters has been a challenge. Currently, the UCS employs six staff American Sign Language Interpreters, none of whom is assigned outside of New York City. OLA, in conjunction with the Division of Human Resources and UCS Statewide Coordinator of the ADA Program, will develop a recruitment program directed at both staff and per diem interpreters for American Sign Language and other forms of communication (e.g., certified deaf interpreters). As part of this program, the court system will reach out to schools and organizations serving the deaf and hard of hearing community. The new recruitment effort will be launched by January 2018.

Expand remote American Sign Language interpreting

Over the past ten years, the UCS has increased its use of remote American Sign Language interpreting, using both staff interpreters assigned in the New York City courts and per diem interpreters in appropriate cases, especially in the courts outside of New York City.²¹ As part of the more general effort to encourage the use of remote interpreting in appropriate proceedings (see page 16-18 above), the UCS will specifically promote remote American Sign Language interpreting. The UCS will also undertake a pilot project to assess the feasibility of remote American Sign Language interpreting using a commercial interpreting service.

Recruit qualified volunteers and interns to work with the deaf and hard of hearing community

Just as biliterate volunteers and interns will be recruited to participate in various programs, both in and outside the courthouse, volunteers and interns fluent in American Sign Language should be used to help ensure access at key points of contact outside of courtrooms. OLA will work with the NYS Courts Access to Justice Program to develop a plan for recruiting qualified volunteers and interns to work with the deaf and hard of hearing at points of contact outside the courtroom. A proposal will be submitted to the Chief Administrative Judge by September 2017.

5. Training Judges, Court Staff, and the Bar to Work Effectively with Court Interpreters and the LEP Community

Court interpreters do not work in a vacuum. They are part of a team that includes the judge, court clerks, court officers, court reporters, and counsel. It is important that each member of the courtroom team understands the role of the interpreter and how to work effectively with the interpreter and the LEP court user. As discussed in Section III(3) above, there are also many points of contact with the LEP court user outside of the courtroom, where there are no court interpreters assigned. Appropriate training must be provided so that regardless of the location or context, court personnel are prepared to meet the need for language access. Cultural competence is also an important element of working with the LEP community, and should be incorporated throughout training programs.

Key steps that will be taken to strengthen training for judges, court staff, and the bar include:

Expand language access training for judges

Judges will receive training regarding language access policies and procedures. These trainings will include:

- Optimal methods for managing court proceedings involving interpreters, including an
 understanding of the mental exertion and concentration required for interpreting, the
 challenges of interpreter fatigue, the need to control rapid rates of speech and dialogue, and
 consideration of team interpreting where appropriate;
- The ethical rules that apply to court interpreters;

²¹⁾ American Sign Language is, after Spanish, the second most used language in remote interpreting sessions, see Appendix I.

- Required procedures for the appointment and use of a provisionally qualified interpreter and for an LEP court user's waiver, if requested, of interpreter services;
- The importance of explaining, on the record, the role of the interpreter;
- The importance of establishing, on the record, an interpreter's credentials;
- Available technologies and the technical and operational standards for providing remote interpreting; and
- Working with LEP court users in a culturally competent manner.

Expand and update benchcards on language access

The UCS has issued two benchcards, one addressing language access issues generally and one addressing remote interpreting. Both have proven effective. These cards will be reviewed regularly and updated as needed, and additional cards addressing other specific aspects of language access will be developed, including a benchcard addressing the needs of the deaf and hard of hearing community (see page 22).

Incorporate language access training into additional employee training programs

A language access component will, beginning immediately, be added to appropriate training programs, including mandatory programs such as new employee orientation and training for newly appointed supervisors and newly appointed court clerks.

Expand language access training for Court Officers

For many court visitors, court officers are the first point of contact. Officers therefore must be prepared to assist court users with a broad range of issues, including those related to language access. The Court Officer Academy curriculum currently covers language access issues. This program will be periodically reviewed, updated, and expanded. In addition, beginning immediately, language access issues will be addressed during in-service training programs for court officers.

Hold regular live remote training sessions with court-based language access managers

Each courthouse in the state has a designated employee who is responsible for managing the provision of language services on a day-to-day basis and who serves as a liaison to the public. OLA will immediately initiate a program of regular remote training programs for these managers.

Expand language access training available online

On-demand online training can be particularly helpful as a judge or staff is preparing for a new situation, such as their first remote sign language court session. On an ongoing basis, OLA will review the online programs to determine what programs should be updated or otherwise revised, and what additional topics should be covered by the online training program.

Expand online language access materials for attorneys

The UCS will expand online resources on language access that are geared to attorneys, including best practices for working with court interpreters, and guidance regarding the process for making a complaint about the provision of language access services.

6. Promoting Quality in the Language Access Program

Effective oversight of the language access program is not easy. A fundamental obstacle is inherent in the very nature of the program — often only the interpreter and the LEP user understand the language being interpreted, making it very difficult for judges, attorneys and other participants to assess the accuracy and effectiveness of the language services being provided. Effective oversight is further complicated by the large number of cases in which interpreting is needed, at hundreds of court locations across the state.

In addition, a failure to provide high quality language access can occur for many different reasons, including the inability to assign an interpreter on a timely basis, the performance of an interpreter, an inaccurate translation in a written document, or, in the case of remote interpreting, an equipment malfunction.

Much of this plan is directed to the twin goals of expanding language access and ensuring that access is of the highest quality. There are a number of additional steps that the courts will take to specifically enhance oversight of the language access program, and to ensure that the program operates effectively and efficiently, while providing a consistently high level of service:

Review recordings of a random sampling of court interpreting sessions

OLA will establish protocols under which recordings of interpreting sessions are reviewed for the accuracy of the interpretation, and compliance with procedures for court interpreting and the Court Interpreting Canons of Ethics. These reviews will help identify issues that must be addressed with respect to a particular interpreter as well as issues that should be addressed systemically through training or oversight. The reviews will initially focus on remote interpreting sessions and in court proceedings in which the record is currently taken by electronic recording rather than a court reporter, and will be assessed for expansion to other proceedings.

Conduct site visits

Beginning in Fall 2017, OCA will initiate on-site visits to courthouses to evaluate the implementation of the language access program at the local level. Key features of the site visit program are:

- In New York City, the site visits will be conducted by a member of the OLA staff, and each judicial district outside of New York City will designate a court manager to conduct the visits. OLA will train the managers designated to conduct site visits.
- To help focus the site visits, OLA will create a checklist, which will cover such issues as signage, equipment (e.g., video equipment for remote sessions, assistive listening devices), and translated written materials.

- Where possible, the site visit will include observation of the actual provision of language access services (e.g., interpreters in courtrooms, use of remote interpreting in non-courtroom settings).
- District administrative offices will submit copies of the site visit reports to OLA and inform OLA of
 any issues or problems that were identified during the visit, as well as any procedures that should
 be promoted as best practices.

Encourage the prompt notification of problems in providing language access during a court proceeding

While it is not always possible, problems with language access during a court proceeding should be brought to the attention of the court immediately, rather than dealt with after the fact. It is understandable that an LEP litigant or witness might be hesitant to interrupt a court proceeding to raise an issue about language access. To help overcome this reluctance, LEP court users should be encouraged to immediately bring any problems with language access to the attention of the judge. For that reason, the UCS has recommended that at the start of a proceeding in which a court interpreter is used, the judge clearly state that any issue or problem with language access should be immediately brought to the attention of the court.²² This best practice will be reinforced at judicial trainings and in periodic communications with judges about language access issues. In addition, the UCS will periodically send notices to bar associations, including local and minority bar associations, as well as other organizations with ties to the LEP community, emphasizing the importance of raising issues and problems with language access as soon and as directly as possible.²³

Revise the process for submitting complaints about language access

It is critical that there be a clear, user-friendly process for raising concerns and complaints about language access, and that all participants in a proceeding are aware of the process. To address the former issue, the UCS will develop a new form for the filing of complaints about the provision of language access services. Key features of the complaint form and process are:

- The form will clearly state that the complaint may address any aspect of language access, both in and outside of the courtroom, including failure to assign or delay in assigning an interpreter, the quality of the services provided, inaccurate translation of written materials, and violations of the Court Interpreting Canons of Ethics.
- The form will state that the complaint will not affect the rights of the complaining party, and that the complaint can be signed or submitted anonymously.
- The form will be user-friendly, written in plain language, and translated into the most commonly used languages.
- The form will be available both in hard copy and online on the UCS website.

The new complaint form will be made public by September 2017.

²²⁾ In part, the recommended script includes these instructions about issues and problems with language access:

[•] If something is not clear to you or you have a question, raise your hand. I (the judge) will answer your questions or concerns. Do not ask the interpreter directly for information or advice about the case.

[•] Do you understand what the interpreter is supposed to do?

[•] Do you have any difficulty understanding the interpreter?

Working with Court Interpreters: A Benchcard and Best Practices for Judges, attached as Appendix F.

²³⁾ See, e.g., Appendix G.

Publicize the complaint process

It is also critical that LEP court users, their attorneys, and groups that work with the LEP community know how to make a complaint about language access. There are a variety of ways of educating the public about the complaint process. As noted above, judges are advised to encourage participants in a court proceeding to immediately bring problems and issues about court interpreting to the court's attention. In addition, LEP individuals are given a card, currently available in seven languages, explaining the process for submitting a complaint.²⁴ The courts will also expand the number of languages in which information about the complaint process is available online. Finally, written reminders about the complaint process will be periodically sent to bar associations, including local and minority bar associations, as well as other organizations with ties to the LEP community.²⁵

Revise the process for the review of complaints about language access

Each complaint will be reviewed by an internal committee consisting of staff from both the local court and OLA, so that appropriate corrective action can be taken in the particular situation and to ensure that the court system is aware of systemic issues that must be addressed more broadly. Following a review, OLA will respond to each signed complaint.²⁶

7. Working with the Community to Enhance Language Access

Outreach to and partnership with the LEP community and the organizations that serve them are critical to a successful language access program. Outreach serves a number of purposes. It helps ensure that members of the LEP community are aware of the right to language access services and how to obtain these services. It also helps to foster a sense of trust and confidence in the courts and the legal system. In addition, it provides an opportunity for feedback on the language access program, to learn what is being done well and what needs to be improved. Outreach also helps to support recruitment efforts and provides an opportunity to encourage interest in a career as a court interpreter, a biliterate court employee in a non-court interpreter position, or as a biliterate volunteer.

To enhance partnership with and outreach to the community, the UCS will do the following:

Develop a new language access outreach campaign

In 2007, the UCS launched a "We Speak Your Language" public awareness campaign. Posters with translated text in 30 languages, along with contact information for the court's language access liaison in each court location, were placed in each courthouse in the state.²⁷ Brochures and other related materials were also distributed. It is time to rethink the public awareness efforts and develop a new campaign, including fresh signage, to inform the LEP community about their right to language access in the courts. In developing the new public awareness campaign, OLA will work with other UCS offices, including the NYS Courts Access to Justice Program, as well as with community and language advocacy groups. This new public awareness effort will be launched by January 2018.

²⁴⁾ The English Language version of this card, entitled Information about Language Access in the Courts, is attached as Appendix L.

²⁵⁾ See, e.g., Appendix G.

²⁶⁾ Like most other court employees, staff interpreters are subject to statutory civil service requirements and collective bargaining agreements with their public employee unions. For that reason, the process for the review and evaluation of complaints concerning performance and ethical issues with respect to staff interpreters is subject to applicable statutory and contractual provisions.

²⁷⁾ Appendix H.

Use foreign language news outlets and other targeted means to reach the LEP community

In reaching the LEP community, the medium can be as important as the message. To maximize the effectiveness of outreach, the UCS will develop a plan that emphasizes foreign language news outlets, public service announcements, and social media platforms.

Strengthen relationships with groups in the LEP community

Community-based organizations, specialized bar associations, advocacy groups, clergy, and others offer an effective means to communicate and forge relationships with various LEP populations. The UCS will seek to strengthen existing relationships and build new ones with these groups.

8. Expanding Language Access through Improved Signage, Translation, and Online Information

Multi-language signage and translated materials are necessary to provide meaningful access. To more effectively use signage and translated materials to bridge the language access gap, the UCS will do the following:

Establish a translation committee

The Chief Administrative Judge will appoint a committee on translation by April 2017. The Translation Committee will establish standards for written translation, addressing such issues as plain language and the use of universal symbols rather than text. On an ongoing basis, the committee will recommend priorities for translating court documents, instructions, and signage.

Inspect signage on a regular basis

Each courthouse in New York is inspected on a quarterly basis for compliance with cleaning and maintenance standards. Beginning immediately, the scope of these inspections will be broadened to cover signage. The inspections will ensure that signage is in place and in good condition, and that contact information on language access signage is current.

Expand use of bilingual orders

In 2015, the UCS initiated a pilot project in which orders of protection were issued in bilingual format, with the specific terms and conditions of the order presented in two languages. Initially, bilingual English-Spanish orders of protection were issued in selected Family Courts. ²⁸ Over time, Russian and Chinese bilingual orders were added, and the program was expanded to Family Courts throughout the state, as well as to all Integrated Domestic Violence Courts. In January 2017, UCS began issuing Criminal Court Orders of Protection in bilingual format (Spanish); the availability of the bilingual order will be expanded to criminal courts statewide by the end of 2017. As of the publication of this plan (March 2017), almost 12,500 bilingual orders of protection have been issued.

²⁸⁾ A sample English-Spanish order of protection from the Family Court is attached as Appendix M.

The bilingual order has been integrated into automated case management systems in a manner that facilitates the addition of languages in which bilingual orders may be issued.²⁹ By the end of 2017, bilingual orders of protection will be available in all courts in New York, in the three most-requested languages. During 2018, three additional languages will be added to the bilingual order modules, with more languages to be added annually, based on use and needs as determined by OLA and the Translation Committee. In addition to providing written translated orders, UCS will seek grant funding to explore and develop the ability to provide LEP parties with an audio transcript of the interpreted proceeding, when an order is issued.

Translate form orders

True bilingual orders, with the terms and conditions in a particular case set forth in two languages, are preferred, but achieving this goal is a long-term project. As the courts work toward that goal, the translation of form orders will enhance language access by allowing the LEP court user to read the official English order side-by-side with the informational translated form order. Priority will be given to the translation of form orders in case types such as child support, where a high percentage of litigants are not represented by counsel. The Translation Committee will propose priorities for the translation of form orders and propose a schedule for implementation.

Present translated materials in audio-visual format

While translation of written documents is a key component of meaningful language access, the fact is that many court users, both English and non-English speaking, are illiterate. For that reason, the UCS will seek to present information in audio or audiovisual formats, online, at courthouse kiosks, and by other means. The Translation Committee will recommend priorities for the production of translated materials in non-print format, and propose a schedule for implementation.

9. Partnering with the Town and Village Courts to Ensure Language Access

The Town and Village Courts (collectively "the Justice Courts") are an important part of New York's system of justice. They hear more than two million cases each year. They have jurisdiction over a broad range of civil matters, including small claims and landlord and tenant matters. They try misdemeanors and other lesser offenses, and can arraign felonies, including homicides and other serious crimes, which are then transferred to a superior court for further proceedings. They also issue orders of protection, and collectively take in more than \$250 million in fines and surcharges each year.

Despite their import ant role in our state, these courts are, in many cases, not well funded or adequately resourced. They are constitutionally part of the Unified Court System. NY Const, art VI, §§ 1(a), 17. However, when the financial responsibility for the operation of the trial courts was transferred, in 1976, from local governments to the state, the Justice Courts were expressly exempted. L.1976, ch. 966 (Unified Court Budget Act).

²⁹⁾ Thus far, bilingual orders of protection have only been issued in the so-called "state-paid" courts, all of which have automated case management systems operated by the UCS Division of Technology. Issuing bilingual orders in the Justice Court world is a more complicated matter because the Justice Courts use a proprietary case management system, and it is not clear that privately owned system currently has the capacity to produce orders of protection in a bilingual format. The UCS Division of Technology and the UCS Town and Village Court Resource Center will examine this issue and, as soon as possible, issue recommendations as to how best to implement bilingual orders of protection in the Justice Courts.

See Section III(9) below for a general discussion of language access in the Justice Courts.

As a result, each of the more than 1,200 Justice Courts in New York is operated, financed, and administered by its sponsoring town or village, with very limited financial and technical assistance from the state. None of the Justice Courts has a staff court interpreter, and many lack the funds to hire a per diem interpreter.

The difficulty of ensuring language access in the Justice Courts is further compounded by the nature of Justice Court operations. These courts are located in more than 1,200 different locations across the state, in every county outside of New York City. Many of these courts are located in communities where a significant portion of the local population needs language assistance, often in less common languages. In addition, many appearances before the Justice Courts are relatively short, often with little, if any, advance notice of the need for interpreting services. Of particular concern are criminal arraignments conducted late at night or on weekends. Given the due process and access to justice implications, anecdotal reports that relatives or arresting officers serve as interpreters for arraigned defendants are especially troubling.

The UCS currently provides some assistance to the Justice Courts in relation to language access issues, primarily through the UCS Town and Village Courts Resource Center ("Resource Center"). For example, the Resource Center, in collaboration with OLA, has worked with the Justice Courts to identify their interpreting needs, provide guidance, and share resources. To facilitate speedy and efficient Justice Court access to qualified interpreters, the Registry of per diem interpreters has been made available to Justice Courts both online and in hard copy. OCA also provides Justice Courts with a Court Interpreter Resource Package that includes:

- the list of dictionaries and other interpreting materials OCA identifies for standard use in the state-paid courts;
- the interpreter voir dire questions; and
- the Court Interpreter Manual and Code of Ethics.

To further assist the Justice Courts ensure language access, the UCS will do the following:

Create a task force on language access in the Justice Courts

There are unique challenges to providing language access in the Justice Courts, and what works in the so-called "state-paid courts" might not in these courts. For that reason, the UCS, through its Resource Center, will convene a task force to develop a plan for improving language access in the Justice Courts. The task force will be asked to assess the status of language access in the Justice Courts and to propose options — whether operational changes, court rules, or legislative initiatives — to ensure proper access to interpreter services and to assist local governments in meeting this critically important need. The Task Force will be asked to complete this assessment and to report to the Chief Administrative Judge by the end of 2017. To assist the task force in its work, the Chief Administrative Judge may establish one or more pilot programs in selected Justice Court(s) across the state to test the efficacy of different modalities for the provision of broader language access services in various classes of proceedings in the Justice Courts.

Include language access issues in training programs for Town and Village Court justices and staff

Both justices and staff of the Justice Courts are required, by rule of the Chief Judge of the State of New York, to complete annual training offered by the Resource Center.³⁰ Beginning immediately, issues relating to language access will be integrated, as appropriate, into Justice Court training programs. Among the issues to be covered are the right to an interpreter, the logistics of providing interpreting services, and cultural competence.

Promote the use of remote interpreting services

Remote interpreting holds particular promise for the Justice Courts, where the appearances are often brief, the languages needed are myriad, and many of the courts are located in isolated towns and villages far from an available interpreter. However, there are significant obstacles to implementing remote interpreting in more than 1,200 separate locations, including the need for suitable technology, training in remote interpreting protocols, and, very importantly, funding to pay for the remote interpreter. The UCS will work with the State Magistrates' Association (the association of the Town and Village Justices) to address these issues and to find ways to promote remote interpreting in the Justice Courts.

Translate Justice Court documents and signage

A number of Justice Court guides and forms have been translated into various languages and are available on the UCS website. Additional Justice Court documents should be translated. In addition, multi-language signage and flyers would also promote language access in the Justice Courts. The Resource Center, in consultation with the Task Force on Language Access in the Justice Courts and the Translation Committee, will develop a plan for multi-lingual signage and for the translation of additional Justice Court materials. Among the priorities for translations are documents relating to domestic violence, small claims and landlord-tenant issues.

Conclusion

The New York State Judiciary is committed to fulfilling the promise of equal justice despite language, financial, or other barriers. The initiatives detailed in this report build upon the progress made under the 2006 and 2011 Action Plans and will help ensure that New York continues as a leader in providing unfettered access to the courts.³¹

³⁰⁾ See 22 NYCRR §17.2(a)-(e) (mandatory training for Justices); 22 NYCRR § 17.2(f) (mandatory training for Justice Court clerks).

³¹⁾ A timeline for implementation of the initiatives set forth in this strategic plan is attached as Appendix N.

Appendices

A. Languages for which the New York Courts Provided Interpreting Services in 2016, by Hours of Service	33
B. Part 217 of the Rules of the Chief Administrative Judge ("Access to Court Interpreter Services for Persons with Limited English Proficiency"	") 34
C. UCS Advisory Committee on Language Access	35
D. UCS Court Interpreter Reciprocity Policy	36
E. Be a Court Interpreter Recruitment Materials	39
F. Working with Court Interpreters: A Benchcard and Best Practices for Judges	40
G. Letter of the Chief Administrative Judge to Bar Associations, Legal Services Providers and Other Organizations	42
H. We Speak Your Language Poster	43
I. Languages for which Remote Interpreting was Provided in 2016, Descending in Order of Use	44
J. Working with Interpreters by Video or Teleconference Benchcard	45
K. Remote Interpreting Operational Standards	47
L. Information about Language Access in the Courts Takeaway Card (English Version)	51
M. Sample English-Spanish Order of Protection	52
N. Timeline for Implementation of the Strategic Plan for Ensuring Language Access in the New York State Courts	55

Appendix A

Languages for which the New York Courts Provided Interpreting Services in 2016, by Hours of Service

Spanish	362487:45	Yiddish	381:15	Guyanese Creole	31:15
Mandarin	25660:45	Certified Deaf - CDI	356:30	Mam	31:00
Russian	14771:30	Georgian	333:15	Macedonian	28:30
Haitian Creole	13802:45	Serbian	305:00	Czech	27:00
Arabic	11244:00	Thai	272:45	Jula	25:00
Cantonese	11087:45	Wenzhou	233:30	Oromo	24:45
French	8954:15	Soninke	221:45	Garifuna	20:30
Bengali	8440:45	Mixteco	220:30	Lithuanian	20:00
Polish	8131:15	Malayalam	217:30	Nahuatl	19:30
Korean	7315:45	Tibetan	205:45	Krio	18:45
American Sign	3557:45	Swahili	198:00	Laotian	14:00
Punjabi	2740:15	Ukrainian	188:45	Kiziguwa	12:15
Urdu	2730:45	Pashtu	174:45	Susu	12:00
Fuzhou	2490:30	Sinhala	167:00	Ga	11:00
Fulani	2420:30	Indonesian	148:45	Dari	10:45
Woloff	2221:30	Yoruba	145:15	Idoma	9:15
Greek	1764:00	German	133:00	Oral Transliteration	9:00
Albanian	1452:45	Amharic	132:30	Masalit	7:45
Hindi	1232:30	Hausa	132:30	Lingala	7:45
Hebrew	1207:00	Toisan	132:00	Telugu	7:43
	1183:45		127:45	Tlapaneco	7:00
Portuguese Turkish	1059:15	Bulgarian Gujarati	104:45	Bissa	7:00
Italian		K'iche'		Bandi	
	993:00 761:00	Tamil	94:00		6:15
Vietnamese			92:30 Finnish		
Japanese	711:15	Kirundi	84:30	Dutch	6:00
Twi	706:15	Tigrinya	71:00	Triqui	5:45
Uzbek	691:15	Armenian	68:45	Ewe	5:30
Burmese	673:15	Fukinese	60:15 Sylheti		4:15
Mandinka	663:45	Shanghai	58:45	Cued Speech	3:45
Nepali	607:45	Khmer	58:30	Kurdish	3:45
Romanian	602:00	Quechua	55:00	Bassa	3:30
Somali	510:30	Malinke	52:45	Kyrgyz	3:00
Karen	494:15	Moore	49:30	Rwanda	2:30
Tagalog	491:00	Ibo	47:30	Tem	2:15
Croatian	487:15	Slovak	42:00	Hakka	1:45
Bambara	468:00	Sicilian	41:15	Mende	1:15
Bosnian	463:45	Maay	39:45	Dinka	1:00
Hungarian	419:45	Tajik	39:00		
Farsi	415:45	Jamaican Patois	38:00	115 Languages	512060:30

Part 217 of the Rules of the Chief Administrative Judge ("Access to Court Interpreter Services for Persons with Limited English Proficiency")



§217.1 Obligation to appoint interpreter in court proceedings in the trial courts.

- (a) In all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense from an approved list maintained by the Office of Court Administration. The court may permit an interpreter to interpret by telephone or live audiovisual means. If no pre-approved interpreter is available, the clerk of the court or another designated administrative officer shall schedule an interpreter at no expense as justice requires. This rule shall not alter or diminish the court's authority and duty to assure justness in proceedings before it.
- (b) A person with limited English proficiency, other than a person testifying as a witness, may waive a court-appointed interpreter, with the consent of the court, if the person provides his or her own interpreter at his or her own expense.

§217.2 Provision of interpreting services in clerk's offices.

A court clerk shall provide interpreting services at no expense to a person with limited English proficiency seeking assistance at the court clerk's office in accordance with the needs of the person seeking assistance and the availability of court interpreting services. Such services may be provided by telephone or live audiovisual means.

Appendix C

UCS Advisory Committee on Language Access

Eric Brettschneider, Esq., Co-Chair Fern Schair, Esq., Co-Chair

Hon. Juanita Bing Newton

Maureen D'Aquila

Beth Diebel, Esq.

Colleen A. Duffy, Esq.

Hon. Susan Eagan

Beatrice Frank, Esq.

member thru 2016

Barbara Graves-Poller, Esq.

Shawn Renee Guzman

Yasmeen Hamza, Esq.

Michael Klein, Esq.

Robyn Mazur, Esq.

Rena Micklewright

Staff to Committee

Hon. Raja Rajeswari

Sandy Rand

Ann Ryan

Amy Schwartz-Wallace, Esq.

Trinh Tran, Esq.

Hon. Lillian Wan

Cynthia Weaver, Esq.

Dan Weitz, Esq.

Jeffrey Winn, Esq.

Member thru 2016

Carrey Wong, Esq.

Member thru 2016

UCS Court Interpreter Reciprocity Policy



New York State Unified Court System Office of Court Administration Reciprocity Provisions for the NYS Registry of Per Diem Court Interpreters

The New York State Office of Court Administration (OCA) has developed and administers examinations for interpreters seeking to be listed in its Registry of Per Diem Court Interpreters. Presently, the Language Assessment Program offers examinations consisting of a written English proficiency test and an oral exam in 22 designated languages--Albanian, Arabic, BCS (Bosnian/Croatian/Serbian), Bengali, Cantonese, French, Greek, Haitian Creole, Hebrew, Hindi, Italian, Japanese, Korean, Mandarin, Polish, Portuguese, Punjabi (Eastern), Russian, Spanish, Urdu, Vietnamese and Wolof.

These tests are used by court administrators to identify competent interpreters for per diem assignments in the New York State Courts. Oral exams are currently being developed in additional languages. Candidates for per diem assignments in languages for which no oral exam is presently available must pass the written English proficiency test and provide verifiable evidence of competency in the indicated language. OCA also conducts a separate competitive civil service examination every four years for the employment of full-time permanent Spanish Court Interpreters.

Interpreters possessing out-of-state court interpreter certification may apply for state reciprocity for the Registry designated languages or other languages subject to specific conditions (i.e., minimum educational requirements, professional training and experience, and a criminal history check). Unless otherwise indicated, examinations that will be considered comparable to tests currently conducted by the NYS Office of Court Administration must evaluate an applicant's proficiency in English and in their preferred foreign language through standardized testing. The oral examination components of these certification tests must include testing in all three modes of interpreting - consecutive interpreting, simultaneous interpreting and sight translation.

Reciprocity

Candidates may apply for reciprocity in any language, without having to take the New York State Court System's examinations (written English test and oral test) if they have been certified by at least one of the following credentialing authorities:

1) Federal Court Interpreter Certification Examination Program (FCICE) Federal Court Certification is awarded by the Administrative Office of the U.S. Courts. Certification is presently available only for Spanish, although certification exams were previously available in Haitian Creole and Navajo. For more information about this program please refer to the program's website at: http://www.ncsc.org/fcice.

UCS Court Interpreter Reciprocity Policy cont.

- 2) Consortium for State Court Interpreter Certification (Consortium) State certification examinations are conducted by member states through the National Center for State Courts. New York State became a member of the Consortium for State Court Interpreter Certification in 2005. OCA will accept the results of a consortium developed examination administered by a member state. Specifically, applicants must have obtained a minimum score of 80% on the Written Test and a minimum score of 70% on each section of the Oral Performance Test. While the Consortium has developed examinations in 20 languages (Arabic, BCS (Bosnian/Serbian/Croatian), Cantonese, French, Haitian Creole, Hmong, Ilocano, Khmer, Korean, Laotian, Mandarin, Marshallese, Polish, Portuguese, Russian, Somali, Spanish, Tagalog, Turkish and Vietnamese), not all participating states administer the full range of language tests available. Information about the Consortium testing program and related links can be found on the National Center for State Courts website at: http://www.ncsc.org/education-and-careers/state-interpreter-certification.
- 3) National Judiciary Interpreter and Translator Certification (NJITC) The NJITC program is offered by the National Association of Judicial Interpreters and Translators (NAJIT). Candidates can earn NAJIT certification by passing both the written and oral components of the examination. The certification examination is currently offered only in Spanish. Information about the NAJIT-sponsored testing program, including testing dates, is on the NAJIT website at: http://www.najit.org.
- 4) The Judicial Council of California-Master List of Certified Interpreters. The Judicial Council of California conducts a court interpreter program that requires candidates to pass both a written English examination and an oral proficiency examination currently offered in 15 certified languages [i.e., Spanish, Arabic, American Sign Language, Eastern Armenian, Western Armenian, Cantonese, Japanese, Khmer (Cambodian), Korean, Mandarin, Portuguese, Punjabi, Russian, Tagalog and Vietnamese]. Candidates who pass both examinations and register with the Judicial Council are placed on the "Master List of Certified and Registered Court Interpreters." Additionally, California began scheduling registered interpreter candidates to take Oral Proficiency Exams in English and each interpreter's non-English language. These exams are developed by the American Council on the Teaching of Foreign Languages and administered by Prometric. Information about California's Court Interpreter program can be found on their website at www.courts.ca.gov/programs-interpreters.htm.

Request for Waiver of the Written English Proficiency Examination Requirement in New York State

As outlined above, Court Interpreters who speak a language other than one of the 22 designated Registry languages must also pass a written English proficiency exam before they can be considered for per diem assignments. As of January 1, 2007, failure to demonstrate English proficiency by an approved examination will restrict an individual from providing interpreter services in the New York State Courts.

Appendix D

UCS Court Interpreter Reciprocity Policy cont.

Candidates seeking a waiver of New York's written English proficiency examination may submit proof that they have passed an English proficiency test through at least one of the four credentialing authorities identified above (i.e., FCICE, Consortium, NAJIT, and the Judicial Council of California).

OCA will also accept test scores from one of the following as evidence of sufficient English language proficiency:

Test of English as a Foreign Language (TOEFL) iBT (Internet version) introduced in 2005 and administered by the Educational Testing Service. Candidates must obtain a minimum score of 90 (scores range from 0 to120) on the TOEFL iBT. Visit the TOEFL Web site at www.ets.org/toefl for more information about this examination.

International English Language Testing System (IELTS), jointly owned by British Council, IDP: IELTS Australia and Cambridge English Language Assessment and administered in over 130 countries. Candidates must obtain overall minimum score of 7 (score ranges from 0-9) on the IELTS. Visit the IELTS, www.ielts.org, for more information about this examination.

Applying for Examination Reciprocity or Waiver

Each request for reciprocity or waiver will be reviewed on a case-by-case basis. Out-of-state certifications must be current in the issuing state or federal program at the time of the request. Abridged examinations and conditional/alternative or temporary certifications will not be accepted. In instances where a request for reciprocity or waiver is not granted, applicants will be required to pass the written English proficiency test and either pass the foreign language oral exam, or provide verifiable evidence of competency in the indicated language, as necessary.

Applicants seeking a request for reciprocity and/or waiver of examination should complete the Examination Waiver/Reciprocity Form and submit certified copies of examination results, certifications and/or credentials that can be verified along with the Application for Language Skills Screening (ALSS). No fee is charged for this examination waiver review. However, if your credentials are accepted, you will be required to pay a fee for fingerprint processing for a criminal history background check.

Please mail all completed forms to:

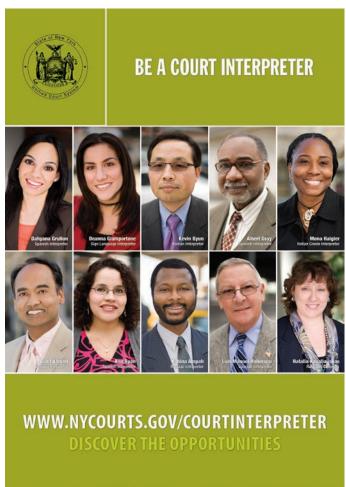
Office of Language Access
Office of Court Administration
Division of Professional and Court Services
25 Beaver Street - 8th floor
New York, NY 10004

If you have a question about New York's Court Interpreter Program please call: (646) 386-5670 or visit our website: www.nycourts.gov/courtinterpreter.

Appendix E

Be a Court Interpreter Recruitment Materials





Working with Court Interpreters: A Benchcard and Best Practices for Judges

THE NEW YORK STATE UNIFIED COURT SYSTEM

UCS Benchcard and Best Practices for Judges

WORKING WITH COURT INTERPRETERS

Persons with limited English proficiency (LEP) and those who are deaf or hard of hearing face special challenges when they use the judicial system, and Court Interpreters serve a fundamental role in providing access to justice for these individuals.

WHO IS ENTITLED TO AN INTERPRETER?

IN NEW YORK STATE, PARTIES AND WITNESSES WHO ARE UNABLE TO UNDERSTAND OR COMMUNICATE IN ENGLISH OR CANNOT HEAR THE COURT PROCEEDINGS are entitled to an interpreter at every stage of a proceeding, in all types of court cases. (Part 217 of the Rules of the Chief Administrator of the Courts, 22 NYCRR Part 217). A judge may presume a need for an interpreter when an attorney or self-represented party advises the Court that a party or a witness has difficulty communicating or understanding English, or that a party is deaf or hard of hearing. If a request for an interpreter has not been made, but it appears that a party or witness has limited ability to communicate or understand court proceedings in English, a judge should ask a few questions (on the record) to determine if an interpreter is necessary:

SAMPLE QUESTIONS TO ASSESS THE ENGLISH PROFICIENCY OF A PARTY OR WITNESS:

- . What is your name?
- How comfortable are you in proceeding with this matter in English?
- In what language do you feel most comfortable speaking and communicating?
- Would you like the court to provide an interpreter in that language to help you communicate and to understand what is being said?

HOW DO I GET AN INTERPRETER FOR MY COURT?

Depending on your location, a court administrator, clerk or senior court interpreter is responsible for scheduling and assigning interpreters to the court. If there is no local interpreter available to appear in-person at your court, **REMOTE INTERPRETING**, by phone or video-conference from another UCS location, can be arranged.

HOW DO I KNOW IF THE INTERPRETER IS QUALIFIED?

The UCS uses two types of Court Interpreters:

- (1) Staff Court Interpreter (UCS employee) or
- (2) Per Diem Court Interpreter (freelancer/voucherpaid) from the UCS Registry of Qualified Court Interpreters.

Foreign language interpreters from both groups have satisfied the court system's language-skills screening process and assessment exams, as well as a criminal background check; Sign language interpreters are required to hold certification from the Registry of Interpreters for the Deaf (RID). The clerk or other court staff are responsible for confirming an interpreter's qualifications prior to scheduling the interpreter to appear at your court.

Occasionally, the court may need to call upon an interpreter who is neither a staff court interpreter nor a per diem interpreter on the UCS Registry of Qualified Court Interpreters. Such interpreters should be used *only on an emergency basis*, if a staff or eligible per diem interpreter is not available, and if remote interpreting cannot be arranged. If the court is unsure of an interpreter's qualifications, the judge should review the interpreter's credentials by asking a few questions (on the record) at the outset of the court proceeding:

SAMPLE VOIR DIRE QUESTIONS TO ASSESS COURT INTERPRETER QUALIFICATIONS:

- How did you learn English?
- How did you learn the foreign language or sign language that you will be interpreting today?
- What training or credentials do you have to serve as a court interpreter?
- · How long have you been an interpreter?
- How many times have you interpreted in court?

Working with Court Interpreters: A Benchcard and Best Practices for Judges *cont*.

Rev: 5/2015

BEST PRACTICES FOR WORKING WITH COURT INTERPRETERS:

EXPLAIN THE ROLE OF THE COURT INTERPRETER

It is important that the party who needs an interpreter understands the role of the interpreter. The judge should instruct the interpreter to communicate the following information to the party, as it is read aloud by the judge, in the courtroom:

- I have been informed that you are more comfortable communicating in (Foreign language or Sign language) instead of English.
- . The person next to you is the (language) interpreter.
- The interpreter's job is to repeat to you in (language) everything that is said in English during this court proceeding.
- The interpreter will also repeat for us anything you say in (language) back into English.
- Nothing will be changed or left out of this interpretation. The interpreter is not allowed to give you advice or have private conversations with you.
- The interpreter will not talk about your case with anybody outside the court.
- If something is not clear to you or you have a question, raise your hand. I (the Judge) will answer your questions or concerns. Do not ask the interpreter directly for information or advice about the case.
- Do you understand what the interpreter is supposed to do?
- Do you have any difficulty understanding the interpreter?
- I will now swear-in the interpreter for the record.

SWEAR-IN THE INTERPRETER

All interpreters should be sworn-in. Placing the interpreter's appearance on the record underscores the importance of adhering to the principles of good court interpreting. Also, when the interpreter states his or her name, it is a good opportunity to inquire whether any party knows the interpreter. This question can eliminate potential conflicts or the appearance of impropriety.

SAMPLE INTERPRETER OATH:

"Do you solemnly swear or affirm that you will interpret accurately, completely and impartially, follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the duties and obligations of legal interpretation and translation?"

ADVISE THE JURY (WHERE APPLICABLE)

Explain to jurors that languages other than English may be used during the proceeding. Even if members of the jury understand the non-English language that is being spoken, jurors must base their decision on the evidence presented in the English interpretation. (See PJI 1:87 for a jury instruction on interpreters.)

ASSESS THE PERFORMANCE OF THE COURT INTERPRETER

A judge's observations can aid in the evaluation of an interpreter's performance, even if one does not speak the language that is being interpreted.

Accordingly, consider the following to determine if the interpreter is communicating effectively during the proceeding:

- Are there significant differences in the length of interpretation as compared to the original testimony?
- Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions?
- Is the interpreter acting in a professional manner?
- Is the interpretation being done in the first-person?
 For example, while verbally translating what is being said in court, the interpreter will relay the words as if he/she is the person speaking.
- If the interpreter has a question, does he or she address the Court in the third-person (e.g. "Your honor, the interpreter could not hear the last question...") to keep a clear record?

If you have any concerns or questions about an interpreter's performance, contact the Chief Clerk of the court.

You may also contact the Office of Language Access at (646) 386-5670 or by e-mail:

InterpreterComplaints@nycourts.gov

THE NEW YORK STATE UNIFIED COURT SYSTEM

UCS Benchcard and Best Practices for Judges

WORKING WITH COURT INTERPRETERS

Appendix G

Letter of the Chief Administrative Judge to Bar Associations, Legal Services Providers and Other Organizations

State of New York Unified Court System



Lawrence K, Marks Chief Administrative Judge 25 Beaver Street New York , N.Y. 10004 (212) 428-2100

November 19, 2015

Dear Colleague:

In a state as diverse as New York, ensuring the ability of persons with limited English proficiency (LEP) to fully participate in court proceedings is a daunting challenge. It is also a matter of access to justice, which the court system takes very seriously.

The NYS Unified Court System's (UCS) policies, including Court Rule NYCRR Part 217, which mandates appointment of a court interpreter at no cost to the user in both criminal and civil cases, are among the most progressive in the country, and a model that the ABA and US Department of Justice have often referred to when drafting guidelines for language access issues.

In order to provide interpreters when and where they are needed, it is important that the request for an interpreter be communicated to the court as early as possible. A litigant or his/her attorney should notify the Part Clerk, Court Officer or Chief Clerk's office of the need for an interpreter, and the specific language or dialect being requested. Advance notice of the need for language services will help to prevent delays.

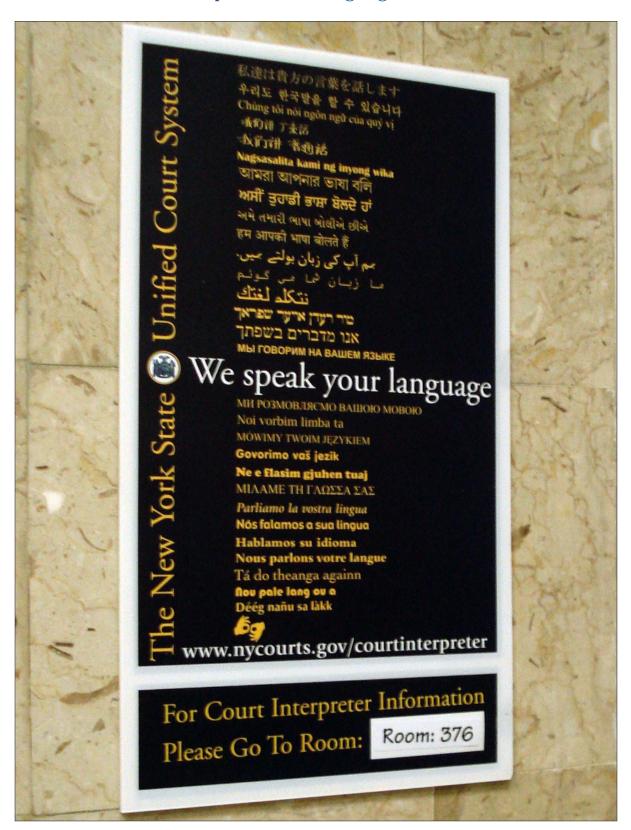
To assist those who use the services of an interpreter while in court, UCS has developed information cards that explain the role of the court interpreter, and what to do if the LEP court user has a question or concern. The cards have been translated into seven of the most-requested languages (Spanish, Chinese, Russian, Arabic, Haitian Creole, Korean, Polish); samples are attached for your review, in English and Spanish.

Concerns about court interpreting services should also be raised as soon as possible. When a problem with interpreting arises during a court proceeding, the issue should be raised with the Judge, so that it can be immediately addressed. When that is not possible, the issue should be brought to the attention of the Chief Clerk of the court. We also suggest that the OCA Office of Language Access be notified of the matter, especially with problems that may indicate the need for training or other systemic response. The Office of Language Access can be contacted by email at interpretercomplaints@nvcourts.gov or by calling 646-386-5670.

Learning of concerns in a timely manner will help us improve the quality of court interpreting services, and we invite you to follow these procedures for bringing issues to our attention. We also welcome your suggestions, as we continue to collaborate on this important service. Additional information may be found online at: www.nycourts.gov/courtinterpreter

Very truly yours,

We Speak Your Language Poster



Appendix I

Languages for which Remote Interpreting was Provided in 2016, Descending in Order of Use

1. Spanish 29. Ukrainian 2. American Sign 30. Korean 3. Burmese 31. Mandinka 32. Tigrinya 4. Vietnamese 5. Albanian 33. Amharic 6. Mandarin 34. Arabic 7. Haitian Creole 35. Gujarati 8. Hindi 36. Kurdish 9. German 37. Turkish 10. Punjabi 38. Dari 11. Russian 39. Romanian 12. Khmer 40. Guyanese Creole 13. Urdu 41. Cantonese 14. Bengali 42. Rwanda 15. Hebrew 43. Hungarian 16. French 44. Croatian 17. Pashtu 45. Jamaican Patois 18. Farsi 46. Laotian 19. Nepali 47. Georgian 20. Portuguese 48. Greek 21. Tagalog 49. Fuzhou 22. Thai 50. Slovak 23. Yoruba 51. Hakka 24. Japanese 52. Uzbek 25. Karen 53. Indonesian 26. Swahili 54. Italian 27. Woloff 55. Tibetan

28. Polish

Working with Interpreters by Video or Teleconference Benchcard

THE NEW YORK STATE UNIFIED COURT SYSTEM

Working with Interpreters by Video or Teleconference

TIPS FOR REMOTE INTERPRETING

USE OF REMOTE INTERPRETING:

Remote Interpreting is a useful alternative in providing court interpreting services, when availability or critical need renders on-site interpretation impractical.

Telephone or video interpretation may be used in place of on-site interpreting whenever the quality of interpretation is not compromised and:

- there is no on-site UCS staff or qualified freelance interpreter available, and there is a time-sensitive matter to be heard; or
- 2. there is no available on-site UCS staff or qualified freelance interpreter available for a less-immediate matter; or
- 3. it is more responsible to obtain the service by remote-means than to delay a court proceeding.

Remote interpreting may be considered a suitable option when there is a time-sensitive matter requiring interpretation and no other resources are available. Adhering to the following "tips" will help to ensure that the remote appearances run smoothly and efficiently.

SCHEDULING A REMOTE INTERPRETER:

The Clerk (or appropriate court personnel) should provide as much advance notice as possible when an interpreter is needed. Requests for remote interpreting services may be submitted online, using the **Request for Remote Interpreting Services form** that is available on Courtnet, or by submission of a detailed e-mail to: remoteinterpreting@nycourts.gov

Include as much case information as possible with the request for interpreting services (e.g., case type, procedural phase, which party needs the interpreter), to help the interpreter prepare for vocabulary or legal terminology that may be used during the procedure.

If it is the first time the court is conducting a remote session, a "test run" is strongly recommended. This test will confirm the clarity and proper use of video and/or telephonic connections and equipment to be used during the remote interpretation, and should be conducted at least 30 minutes prior to the remote session.

BEFORE THE PROCEEDING:

 Before the proceeding begins, the court user should be informed (by the Judge) that the interpreter is appearing by video or phone; the judge should also ascertain that they can both hear and understand one another.

- Explain to the court user, through the interpreter, that
 the interpreter's role is to translate what is said in the
 courtroom in English into the foreign language and
 vice versa. The interpreter cannot give any advice, make
 suggestions, or engage in private conversations with the
- The court should advise all parties in the courtroom that one person should speak at a time, in a loud and clear voice; it is impossible to interpret multiple or inaudible voices.
- The court user should be advised (by the judge) that if
 they are unable to hear or understand what the interpreter has said, s/he should raise their hand and the
 judge will ask for clarification from the interpreter.
- If there is a jury present, explain that languages other than English may be used during the proceeding. Even if members of the jury understand the non-English language being spoken, jurors must base their decision on the evidence presented in the English interpretation.
- In proceedings where an interpreter for the Deaf or Hard of Hearing is required, the positioning of the parties is particularly important. Facial expressions, lip movements and bodily gestures are interpreted. The person who is deaf or is hard of hearing must be able to see the monitor clearly, and the remote interpreter must also be able to see the court user clearly.

Working with Interpreters by Video or Teleconference Benchcard *cont*.

WORKING WITH INTERPRETERS BY VIDEO OR TELECONFERENCE

DURING THE PROCEEDING:

- The Judge should have the interpreter state his/her name, spelling it out, for the record. Inquire whether any party knows the interpreter, to eliminate potential conflicts or the appearance of impropriety.
- Once the case is ready to proceed the interpreter can be sworn in. Administering the oath to the interpreter underscores the importance of adhering to the principles of clear and accurate court interpreting.

SAMPLE OATH FOR THE INTERPRETER:

"Do you solemnly swear or affirm that you will interpret accurately, completely, and impartially, follow all official guidelines for legal interpreting or translating, and discharge all of the duties and obligations of legal interpretation and translation?"

- Remote interpretation should be done in the consecutive mode. All responses and verbal exchanges should include a pause after a sentence or two, in order for the interpreter to fully capture what is being said and to orally translate.
- If the court user and his/her attorney need to confer privately, the handset of the telephone may be used; if one receiver is utilized, it should be shared between the court user and the attorney.
- If needed, the court can utilize the 'mute' button for incourt exchanges that do not involve the court user (similar to an off-the-record bench conference).

Beware of shuffling papers or other activity near the microphones. Turn off cellphones and electronic devices. All sounds near the unit will be transmitted and may interfere with the interpretation.

EVALUATING THE REMOTE INTERPRETING SERVICE:

The court's observation can aid in the evaluation of an interpreter's performance. Accordingly, consider the following to determine if the interpreter is communicating effectively during the proceeding:

- Are there significant differences in the length of interpretation as compared to the original testimony?
- Does the individual needing the interpreter appear to be asking questions of the interpreter?
- Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions?
- Is the interpreter acting in a professional manner?
- Is the interpretation being done in the first-person?
 For example, while verbally translating what is being said in court, the interpreter must relay the statement as if he/she is the person speaking.
- In order to keep a clear record, does he/she address the Court in the third-person? (e.g. "Your Honor, the interpreter could not hear the last question.")

At the conclusion of each Remote Session, please complete the **Remote Interpreting Assessment**, which is available online via Courtnet. The Office of Language Access (OLA) relies on your comments and suggestions in order to make remote interpreting a useful service.

If an interpreter will be needed for a subsequent date, please submit a **Request For Remote Interpreting Services Form** to the Office of Language Access, so that the remote arrangements can be made; scheduling arrangements for future assignments should not be made during the current video or telephonic remote interpreting appearance.

If you have any concerns or questions about an interpreter's performance, contact the Chief Clerk of the court. You may also contact the Office of Language Access at (646) 386-5670 or by e-mail: InterpreterComplaints@nycourts.gov

THE NEW YORK STATE UNIFIED COURT SYSTEM

Working with Interpreters by Video or Teleconference

TIPS FOR REMOTE INTERPRETING

OLA TipSheet.2 Rev. 08.27.15

Remote Interpreting Operational Standards



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

Division of Professional and Court Services Office of Language Access 25 BEAVER STREET, NEW YORK, NY 10004 Tel: (646) 386-5670 Fax: (212) 428-2548 courtinterpreter@nycourts.gov

Remote Interpreting Operational Standards

September 2015

Overview

When availability or critical need renders on-site interpretation impractical, telephone, video-conference or web-based interpreting services (all remote interpreting, or "RI") delivered by UCS-qualified court interpreters, are suitable alternative methods to achieve the same goal.

These guidelines are intended to simplify and encourage the use of remote interpreting within the Unified Court System (UCS), and to establish court system standards for remote interpreting that promote the same quality of interpretation that is expected from on-site or in-person services.

When to Use Remote Interpreting (RI)

Telephone or video interpretation may be used in place of on-site interpreting, and is recommended for use whenever the quality of interpretation is not compromised, and there are no other qualified in-person interpreter resources (whether UCS staff or per diem court interpreters) available. It is more responsible to obtain the services of a UCS-qualified interpreter by remote-means than to delay a court appearance.

Depending on the circumstances, it may be reasonable to wait until a qualified interpreter can be located and brought in to perform the interpreting services on-site at the court. However, when delay in finding an interpreter will result in an individual's being unable to fully participate in the programs and services of the court system, the option to use RI services can provide a more-timely conclusion or resolution of the matter. RI may also be appropriate for non-immediate matters that are scheduled in advance, when the interpretation of these matters cannot be handled in-person by staff or local per diem interpreters in a fiscally-responsible or timely manner.

Some matters, although they may be relatively short in duration, may be of a complex or sensitive nature that deems on-site interpretation the more-appropriate option, regardless of fiscal considerations. Review of the case-type and nature of the proceeding, as well as the determination of suitability of RI for the matter, should be done by local court personnel; if needed or requested, additional guidance may be provided by the UCS Office of Language Access (OLA).

Page 1 of 4

Appendix K

Remote Interpreting Operational Standards cont.

UCS Remote Interpreting Guidelines

Requesting the Remote Interpreting Service

As with requests for in-person court interpreting services, lead time is very important. Court managers should contact OLA <u>as soon as they are aware of the need for RI services</u>, so that an interpreter may be scheduled in a timely manner. Requests for RI should be submitted by court managers, supervising court interpreters or their designees through the UCS intranet site, using the "Request for Remote Interpreting Services" form:

http://inside-ucs.org/oca/professional-ct-services/CourtInterpreting/remoteInterp.shtml

With the exception of emergency or otherwise urgent situations, all requests for RI Services should be submitted in writing. The RI request form or related questions may also be submitted by e-mail to: remoteinterpreting@nycourts.gov

Upon receipt of the RI form by OLA, the RI staff will determine the availability of interpreters for the requested language; if no UCS staff interpreter is available, a qualified per diem interpreter will be called. OLA will provide an update to the court within 48-hours of receipt of the Request Form. Once an interpreter has been confirmed for the remote appearance, OLA will reply to the court with the pertinent details, such as the interpreter's name, IP address or phone number for the day of the appearance.

The RI staff should also be informed in advance if the court is aware of any document(s) that will require the interpreter to provide a verbal (or "sight") translation. When applicable, the document(s) should be forwarded to OLA so that it can be shown to the interpreter prior to the proceeding.

*Note: some courts have coordinated their own RI appearances, from one court location to another, within a respective county or Judicial District (i.e. video conference interpreting between the Central Islip and Riverhead courts in Suffolk County). It is not required that these court-to-court arrangements be submitted to OLA, but the information must always be entered onto the E-Scheduling System, and noted as "Remote" in the Part field.

Equipment

All courts should have RI equipment available in courtrooms, judicial chambers, and/or other rooms where court proceedings may take place and which may require interpreting services (for instance, areas where matters are heard by judicial hearing officers, support magistrates or court attorney referees), or offices in which court personnel deliver direct services to the public. Equipment may include but is not limited to:

- telephones with a speaker-phone function
- telephones with multiple-handsets, line 'splitters' and/or noise-reducing headphones
- video conference equipment (polycom)
- Lync / Skype for Business video conferencing

Page 2 of 4

Appendix K

Remote Interpreting Operational Standards cont.

UCS Remote Interpreting Guidelines

UCS technical staff should be involved in setting-up the RI equipment, whether it is temporarily or permanently installed in the area(s) where it will be used. The decision to install equipment permanently or to have mobile systems available should be at the discretion of local administrators, based on criteria such as efficiency, frequency of use and available resources.

An interpreter providing remote services should always be interpreting from a UCS court facility, using UCS equipment, and with appropriate oversight.

Interpreting services should NOT be provided from a non-court location or via an interpreter's personal telephone or computer, via skype or other connections from a non-UCS facility.

Training and Coordinating the Test-Run

To ensure the integrity, effectiveness and efficiency of the program, training on providing interpretation via remote technology will be provided by OLA staff to participating interpreters and court personnel, including instruction on what to do if the connection is broken during the remote proceeding.

OLA will also work with the court or District Administrative office to coordinate a test-run of the remote connections, as needed; local administrators may offer this information to judges and/or non-judicial court staff who will be using remote interpreting. Court personnel who are responsible for the scheduling of interpreting assignments will be advised of the quality controls, equipment needs and guidelines to ensure effective remote communication, as well as how to identify a "good match" for RI Services, and how to schedule, change or cancel a remote appearance.

Instructional Materials

Prior to a remote appearance, judges and non-judicial personnel will be provided with a link to the following OCA publications:

- 1. Working with Interpreters by Video or Teleconference Tips for Remote Interpreting
- 2. Working with Interpreters in the Court room Benchcard for Judges

The "Remote Interpreting Tip Sheet" and "Benchcard for Judges" outline the various responsibilities of court personnel who will participate in the RI appearance, the mechanics of the program, and important protocols such as:

Page 3 of 4

Appendix K

Remote Interpreting Operational Standards cont.

UCS Remote Interpreting Guidelines

- Role of the interpreter
- Oath
- How to ensure successful communication
- · Facilitating private exchanges between the attorney, client, and interpreter
- Translation of documents
- Assessing the performance of the court interpreter

The **Tip Sheet** and **Benchcard** should be reviewed thoroughly before any remote proceeding, and/or may be referred to as-needed during the interpreter's appearance.

Conclusion and Evaluation of the Remote Interpreting Service

Following the completion of each RI event, the court that received the service should complete an Evaluation Form to provide feedback on the RI appearance, and the court's level of satisfaction with the RI service:

http://apps.courtnet.org/webdev/interpreter assessment.jsp

If a qualified per diem was utilized, at the conclusion of the remote appearance the RI staff will send the requesting court an e-mail indicating that the original invoice signed by the interpreter as well as the print out of the check-in details from the e-system will be sent via regular mail. When court-to-court arrangements are made with a per diem court interpreter, the signed invoice and check-in details from the e-system must be sent to the requesting court for payment.

If the matter was adjourned and a remote interpreter is required for a subsequent date, please submit a new request form:

http://apps.courtnet.org/webdev/remote request 03.jsp

For Assistance

Contact the **Office of Language Access** with any questions, concerns or comments about the remote interpreting services by:

- Tel: 646-386-5670

Page 4 of 4

Information about Language Access in the Courts Takeaway Card (English Version)



If you need an interpreter, the court will provide one to you at no cost. This is a free service for people who use the courts.

The reverse side of this card provides information about the court interpreter's role, and what the interpreter can or cannot discuss with you.

If you have a question or concern about court interpreting services, alert the Judge, speak to the Clerk of the Court where the case is being heard, or contact the Office of Language Access:

OFFICE OF LANGUAGE ACCESS

NYS Unified Court System
Office of Court Administration
25 Beaver Street, 8th Floor,
New York, New York 10004

PHONE: (646) 386-5670

EMAIL: courtinterpreter@nycourts.gov

nycourts.gov/courtinterpreter



- To help with communication during the court proceeding, you will be given an interpreter who speaks your language.
- The interpreter's job is to repeat to you in your language, everything that is said in English by the Judge or others in the court.
- The interpreter will also repeat anything that you say in your language, back into English.
- Nothing that is said will be changed or left out of this interpretation.
- The interpreter is not allowed to give you advice or have private conversations with you.
- The interpreter will not talk about your case with anybody outside the court.
- If something is not clear to you or if you have a question, raise your hand. The judge will answer your questions or concerns. Do not ask the interpreter directly for information or advice.

nycourts.gov/courtinterpreter

Sample English-Spanish Order of Protection

F.C.A §§ 446, 551, 656, 842 & 1056

GF5a 05/2014

NOTICE: The English language text constitutes the legal Order of Protection; the Spanish translation is provided to assist parties with limited English proficiency. (La versión en inglés es la Orden de Protección legal; la traducción al español se ha proporcionado para ayudar a las partes que tengan limitaciones en su dominio del inglés.)

 ORI No (Núm de ORI):
 NY041023J

 Order No (Núm de la Orden):
 2015-000002

NYSID No (Núm de NYSID):

At a term of the (En una Sala del Tribunal de)Family Court of the State of New York, held in and for the County of Rensselaer, at Courthouse 1504 Fifth Avenue, Troy, NY 12180-4107, on January 12, 2015

PRESENT (Presente): Honorable Test Judge

In the Matter of a FAMILY OFFENSE Proceeding (En Materia de un Procedimiento de OFENSA CONTRA LA FAMILIA/OFENSA FAMILIAR)

Jane Test (DOB: 08/08/1985),

Petitioner (Demandante),

- against - (- contra -)

File #(Núm de Unidad de Familia) 33517

Docket #(Núm de Expediente)O-00001-15

Order of Protection

(ORDEN DE PROTECCIÓN)

Both Parties Present in Court (Ambas Partes Presentes ante el Tribunal)

Joe Test (DOB: 09/09/1985),

Respondent (Demandado/a).

NOTICE: YOUR FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION, WHICH MAY RESULT IN YOUR INCARCERATION FOR UP TO SEVEN YEARS FOR CRIMINAL CONTEMPT, AND/OR MAY SUBJECT YOU TO FAMILY COURT PROSECUTION AND INCARCERATION FOR UP TO SIX MONTHS FOR CONTEMPT OF COURT.

THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER.

(AVISO: SI DELIBERADAMENTE NO OBEDECE ESTA ORDEN, USTED PUEDE ESTAR SUJETO A ARRESTO OBLIGATORIO Y ENCAUSAMIENTO PENAL, LO CUAL PUEDE RESULTAR EN SU ENCARCELAMIENTO POR HASTA SIETE AÑOS POR DESACATO PENAL, Y/O PUEDE RESULTAR EN SU ENCAUSAMIENTO EN EL TRIBUNAL DE FAMILIA Y ENCARCELAMIENTO POR HASTA SEIS MESES POR DESACATO JUDICIAL.

ESTA ORDEN DE PROTECCIÓN PERMANECERÁ VIGENTE AÚN SI LA PARTE PROTEGIDA TIENE O CONSIENTE A TENER CONTACTO O COMUNICACIÓN CON LA PARTE EN CONTRA DE QUIEN SE EMITE LA ORDEN. ESTA ORDEN DE PROTECCIÓN SÓLO PUEDE SER MODIFICADA O SUSPENDIDA POR EL TRIBUNAL. LA PARTE PROTEGIDA NO PUEDE SER DECLARADA EN VIOLACIÓN DE ESTA ORDEN NI ARRESTADA POR QUEBRANTAR ESTA ORDEN.)

A petition under Article 8 of the Family Court Act, having been filed on January 01, 2015 (Una petición de conformidad con Article 8 of the Family Court Act, habiendo sido presentada el January 01, 2015) in this Court and On Consent, and Joe Test having been (ante este Tribunal y On Consent, y Joe Test habiendo sido) present in Court and advised of the issuance and contents of this Order, (presente ante el Tribunal e informada de la emisión y el contenido de esta Orden,)

NOW, THEREFORE, IT IS HEREBY ORDERED that (Ahora, por lo tanto, por la presente se ordena que) Joe Test (DOB:09/09/1985) observe the following conditions of behavior(Deberá cumplir con las siguientes condiciones de conducta:)

[01] Stay away from:

Manténgase alejado(a) de:

[A] Jane Test (DOB: 08/08/1985);

Jane Test (DOB: 08/08/1985)

[B] the home of Jane Test (DOB: 08/08/1985);

Sample English-Spanish Order of Protection cont.

GF-5a Page 2 O-00001-15 2015-000002

el hogar de Jane Test (DOB: 08/08/1985)

[C] the school of Jane Test (DOB: 08/08/1985);

la escuela de Jane Test (DOB: 08/08/1985);

[D] the business of Jane Test (DOB: 08/08/1985);

el negocio de Jane Test (DOB: 08/08/1985);

[E] the place of employment of Jane Test (DOB: 08/08/1985);

el lugar de empleo de Jane Test (DOB: 08/08/1985);

[14] Refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with Jane Test (DOB: 08/08/1985);

Absténgase de comunicarse o tener cualquier otro contacto ya sea por correo, por teléfono, correo electrónico, correo de voz u otros medios electrónicos o por cualesquiera otros medios con Jane Test (DOB: 08/08/1985);

[02] Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against Jane Test (DOB: 08/08/1985):

Absténgase de agresión, acecho, acoso, acoso agravado, actos de amenaza, imprudencia temeraria, estrangulación, obstruc-ción criminal de la respiración o circulación, desorden público, daños dolosos contra la propiedad ajena, abuso sexual, conducta sexual ilícita, tocamiento forzoso, intimidación, amenazas, robo de identidad, hurto mayor, coacción o cualquier delito penal contra Jane Test (DOB: 08/08/1985);

It is further ordered that this order of protection shall remain in force until and including (ADEMÁS SE ORDENA que esta orden de protección permanecerá vigente hasta e incluyendo) January 30, 2015.

Dated (Con fecha de): January 12, 2015 ENTER



Honorable Test Judge

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE

CONFORME A LA SECCIÓN 1113 DE LA LEY DEL TRIBUNAL DE FAMILIA, UNA APELACIÓN DE ESTA ORDEN DEBERÁ HACERSE EN UN PLAZO DE 30 DÍAS A PARTIR DE LA FECHA EN QUE EL APELANTE HAYA RECIBIDO LA ORDEN EN EL TRIBUNAL, 35 DÍAS A PARTIR DE LA FECHA DEL ENVÍO POR CORREO DE LA ORDEN POR EL SECRETARIO JUDICIAL DEL TRIBUNAL AL APELANTE, O 30 DÍAS A PARTIR DE LA NOTIFICACIÓN AL APELANTE POR UNA DE LAS PARTES O

Sample English-Spanish Order of Protection cont.

GF-5a Page 3 O-00001-15 2015-000002

APPELLANT, WHICHEVER IS EARLIEST.

POR EL ABOGADO DEL NIÑO, LO QUE OCURRA PRIMERO.

The Family Court Act provides that presentation of a copy of this order of protection to any police officer or peace officer acting pursuant to his or her special duties authorizes, and sometimes requires such officer to arrest a person who is alleged to have violated its terms and to bring him or her before the court to face penalties authorized by law.

Federal law requires that this order is effective outside, as well as inside, New York State. It must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if the person restrained by the order is an intimate partner of the protected party and has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect due process rights (18 U.S.C §§ 2265, 2266).

It is a federal crime to:

- cross state lines to violate this order or to stalk, harass or commit domestic violence against an intimate partner or family member;
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition while this Order remains in effect (Note: there is a limited exception for military or law enforcement officers but only while they are on duty); and
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition after a conviction of a domestic violence-related crime involving the use or attempted use of physical force or a deadly weapon against an intimate partner or family member, even after this Order has expired (18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, 2262).

LA LEY DEL TRIBUNAL DE FAMILIA establece que la presentación de una copia de esta orden de protección a cualquier agente de policía o del orden público en ejercicio de sus deberes especiales, autoriza y a veces requiere, que el agente arreste a la persona que se alega haber quebrantado sus términos, y lo conduzca a él o a ella ante el Tribunal para afrontar penas autorizadas por ley.

LA LEY FEDERAL REQUIERE que esta orden sea vigente fuera y dentro del Estado de Nueva York. Se debe acatar y hacer cumplir por tribunales estatales y tribales, incluyendo tribunales de un estado, el Distrito de Columbia, un estado libre asociado, un territorio o una posesión estadounidense, si la persona restringida por la orden es una pareja íntima de la parte protegida y se le ha dado o se le dará aviso razonable y la oportunidad de ser escuchada conforme a la ley estatal, suficiente para proteger los derechos al debido proceso.) (18 U.S.C. §§ 2265, 2266)

ES UN DELITO FEDERAL

- cruzar fronteras estatales para quebrantar esta orden o acechar, acosar o cometer violencia doméstica contra una pareja íntima o un miembro de la familia:
- comprar, poseer o transferir una pistola o un revólver, rifle, escopeta u otra arma de fuego o munición mientras esta Orden esté vigente. (Atención: existe una excepción limitada para militares o autoridades del orden público pero solamente cuando están desempeñando sus deberes oficiales; y
- comprar, poseer o transferir una pistola o un revólver, rifle, escopeta u otra arma de fuego o munición después de una condena por un delito relacionado con violencia doméstica que implique el uso o la tentativa de uso de fuerza física o de un arma mortífera contra una pareja íntima o un miembro de la familia, aún después de que esta Orden se haya vencido. (18 U.S.C. §§922(g)(8),922(g)(9), 2261, 2261A, 2262).

Check Applicable Box(es) [MARQUE LA(S) CASILLA(S) QUE CORRESPONDA(N)]:

- [x] Party against whom order was issued was advised in Court of issuance and contents of Order (La parte contra quien la orden fue expedida estuvo presente ante el Tribunal y se le informó en el Tribunal de la emisión y el contenido de la Orden)
- [x] Order personally served in Court upon party against whom order was issued (La orden fue entregada personalmente en el Tribunal a la parte contra quien se expidió.)
- [1] Service directed by other means (Notificación autorizada por otros medios)[specify/ESPECIFÍQUE]:
- [] [Modifications or extensions only]: Order mailed on [specify date and to whom mailed](Modificaciones o extensiones solamente: La orden fue enviada por correo [especifíque la fecha y enviada a]):______
- [] Warrant issued for party against whom order was issued[specify date]:(Modificaciones o extensiones solamente: La orden fue enviada por correo [especifíque la fecha y enviada a]) ______
- [] ADDITIONAL SERVICE INFORMATION (Información adicional sobre la notificación)[specify/ESPECIFÍQUE]:

Appendix N

Timeline for Implementation of the Strategic Plan for Ensuring Language Access in the New York State Courts

2017

- Raise per diem court interpreter rates (page 10)
- Establish a court interpreting intern program (10)
- Issue a court rule that requires judges to establish the provisional qualifications of court interpreters not already qualified (13)
- Update the Court Interpreter Manual (14)
- Initiate a pilot project on improving protocols and systems for sharing interpreters between courts (15)
- Initiate a pilot project on coordinating calendars of cases requiring court interpreters (16)
- Establish technology standards for remote interpreting equipment (17)

- Develop a plan for recruiting biliterate volunteers and interns (20)
- Issue assessment tools to assist court personnel in determining the type of assistance needed by deaf and hard of hearing court users (22)
- Issue a benchcard on language access for deaf and hard of hearing community (22)
- Review recordings of a random sampling of court interpreting sessions (25)
- Conduct site visits (25)
- Issue a new form for complaints about language access (26)
- Establish a Translation Committee (28)
- Report of Task Force on Language Access in the Justice Courts (30)

2018

- Establish a court interpreter trainee position (9)
- Launch a new court interpreter recruitment campaign (9)
- Implement a tiered compensation structure for per diem interpreters (10)
- Establish a per diem cancellation policy (10)
- Implement on-demand testing for the English exam (12)
- Proposal on continuing education requirement (13)
- Proposal on tracking the need for interpreting assistance throughout the life of a case (15)

- Proposal on developing real-time capacity to deploy court interpreters (15)
- Establish protocols for the use of commercial telephonic interpreting service for remote interpreting (17)
- Identify critical points of contact with the public in each courthouse (19)
- Proposal on biliterate staff salary differential (20)
- Proposal on use of technology to bridge the language access gap outside the courtroom (21)
- Launch a new language access outreach campaign (27)

Timeline for Implementation of the Strategic Plan for Ensuring Language Access in the New York State Courts *cont*.

Ongoing

- Expand court interpreter testing (page 11)
- Provide additional online test preparation materials (11)
- Provide feedback on test performance (12)
- Assist candidates improve English language skills (12)
- Expand online training for court interpreters (13)
- Increase the variety and scope of training programs for court interpreters (14)
- Encourage and facilitate early notification of the need for an interpreter (14)
- Encourage LEP court users to self-identify (15)
- Expand the use of remote interpreting in court proceedings (16)
- Evaluate the effectiveness of remote interpreting (18)
- Monitor trends in the need for language access (18)
- Track delays in proceedings due to availability of interpreting services (18)

- Annual report to the Chief Administrative Judge (19)
- Identify funding sources (19)
- Evaluate language accessibility in selecting service providers and consultants (21)
- Expand training for judges, court staff and attorneys (23)
- Update and expand number of benchcards (24)
- Publicize complaint process (27)
- Inspect signage (28)
- Expand bilingual orders (28)
- Translate form orders (29)
- Present translated materials in audiovisual format (29)
- Include language access issues in training programs for Town and Village Court justices and staff (31)
- Translate Justice Court documents and signage (31)

Outline for Fall Conference Panel From Silos to Teamwork: Importance of Collaborative Leadership for Lawyers Saturday, Sept. 22, 2018 10:45 am to 12:15 pm

Outline: [95 minutes]

- I. Moderators introduce panelists [5 minutes] [Suzanne]
- II. Interactive Audience Poll: What is the most important factor driving collaboration?[5 minutes] [Marianne]
- III. Moderated Discussion: Encourage audience to ask questions [40 minutes] [Marianne and Suzanne to alternate]
 - A. The past several years have witnessed increased attention on collaboration as a mode of doing work within various sectors, including law, business, and education. Why do you think this attention has developed and what is the focus of this attention within the legal profession? [An Trotter; Susan Sturm]
 - B. How do you define "collaboration" and "collaborative leadership" within your fields and why is it necessary? [Ginny Kim; Lisa Damon; Marianne Chow Newman]
 - C. Is collaboration inherently in conflict with what a lawyer does and what a lawyer is trained to be? And if so, why is that? [Susan Sturm; Lisa Damon]
 - D. What factors drive, and what barriers inhibit, effective collaboration in the legal profession? What is your reaction to the audience's responses to the survey? [Ginny Kim; An Trotter; Marianne Chow Newman]
 - E. Can you talk about what framework or strategies you put in place in your organization to overcome such barriers and to build and support collaboration in your organization? [Ginny Kim; Lisa Damon; An Trotter; Suzanne Kim]
 - F. What benefits do you see in teaching and supporting collaborative problem-solving? Do we need to rethink the framework in which we are teaching and training our attorneys? [Suzanne Kim; Susan Sturm; Ginny Kim]
 - G. What is the role of technology in building/facilitating collaboration? [An Trotter; Lisa Damon]
 - H. Do you think the barriers to collaboration within the legal profession unique? Can we learn from other sectors/disciplines? [Lisa Damon; Susan Sturm]
- IV. Introduce breakout sessions with each panelist leading a discussion (and moderators joining in) [20 minutes] [Marianne] [Requested for table seating, panelists to ask audience from their group what sectors they are from]

Hypothetical (see attached)

Suggested questions that panelists can pose in small discussion during which audience members are active participants in conversation:

- 1. What are the causes of the breakdown in collaboration in Grace's team?
- 2. How can Grace respond in a way that demonstrates she is a collaborative leader?
- 3. What needs to be changed at the firm in order to better support and facilitate collaboration?
- 4. What benefits and challenges have you experienced with collaboration or lack thereof?
- 5. What strategies/framework/best practices can you share to foster and reward collaboration?
- V. Regroup and continuation of moderated conversation [20 minutes] [Suzanne]
 - A. Download what we learned through the small group discussion
 - 1. Common causes of breakdown in collaboration
 - 2. How Grace should respond as a collaborative leader
 - 3. What needs to be changed at a firm like SMW?
 - 4. What are the benefits and challenges to collaboration that the audience has experienced? Strategies/Models/Best Practices
 - B. How do panelists think we can address these questions and concerns based on their own experience with building collaboration through legal education, legal service delivery, from client and legal provider perspective

VI. Q&A [5 minutes]

Attachment: Collaborative Leadership Panel Breakout Hypothetical

A Day at Schuster, Moore & Willis

Grace Lee is a sixth year M&A associate at the preeminent New York law firm, Schuster, Moore & Willis LLP ("SMW"). Grace started at SMW after graduating from law school and is seen by the partners of SMW as one of the highest performing associates. In the face of growing pressure on profits and rising staff costs, SMW announced its goal last year to improve efficiency within the firm, specifically to "improve use of technology" and to "standardize and centralize processes". Since the announcement, however, Grace started to feel a shift in SMW's culture that is becoming ever more revenue-driven, cutthroat and demanding.

The rainmaking M&A partner, **Steve Harris**, recently asked Grace to lead a team of mid-level and junior associates to handle a very high profile M&A transaction for an important client who is looking to buy the target company. Grace was already working on three other active matters that were collectively taking up 75% of her time, but she immediately accepted the new assignment because she did not want to miss this opportunity and, frankly, did not feel she had the option to turn it down.

Today was a particularly bad day for Grace that highlighted her frustration at SMW:

- Grace received a call from the third year associate on her team, Chris Thompson, who Grace assigned to handle the due diligence process (i.e., reviewing and summarizing all of the documents related to the target company in the virtual data room and flagging any issue that could be a problem for the client). Chris told Grace that there has been a mistake in the Due Diligence Memo that was sent to the client the prior week, which failed to point out that the closing of the M&A transaction would trigger the termination of a major contract of the target company. Chris blamed the first year associates for misreading the provision and not catching this mistake, but the first year associates thought it was up to Chris and, ultimately, Grace to double check their work before finalizing the Due Diligence Memo.
- Grace an email from the Tax partner, **Rebecca Kalani**, asking Grace to call her back ASAP. Grace has worked with Rebecca many times over the years and Rebecca has become both a mentor and sponsor of Grace, often vouching for Grace in front other partners. However, it is well-known within SMW that Rebecca does not get along with Steve and she is not the only one. Steve has a habit of not involving partners in the other practice groups until the very last minute, which always results in unnecessary fire drills, and taking all of the credit when a deal closes. Clearly, this time was no exception when Grace returned Rebecca's call: "Grace, what am I reviewing here? I received the Stock Purchase Agreement from your team two days ago and was given no context whatsoever on what this deal is about. I got a voicemail from Steve yesterday saying he wanted to debrief me on this deal and I called him back, but we never connected. This happens every time and I thought it would be different

with you quarterbacking this deal. You just have to tell the client that I can't review this by tomorrow until I have enough information."

From Silos to Teamwork: Importance of Collaborative Leadership for Lawyers Saturday, Sept. 22, 2018 10:45 am to 12:15 pm

Panelists

Lisa J. Damon, Partner, Seyfarth Shaw LLP

Ginny Kim, Vice President – Managing Counsel & Litigation Counsel, United Technologies Corporation Susan Sturm, George M. Jaffin Professor of Law and Social Responsibility, Columbia Law School An Trotter, Senior Director of Operations, The Hearst Corporation, Office of General Counsel

Co-Moderators:

Suzanne Kim, Professor of Law, Rutgers Law School **Marianne Chow Newman**, Counsel, The Hearst Corporation, Office of General Counsel

Outline

- I. 10:45am 10:50am Panelist Introductions
- II. 10:50am 11:30am Moderated Discussion:
 - A. Reason for increasing attention on collaboration within legal profession
 - B. What is "collaboration" and "collaborative leadership" and why is it necessary?
 - C. Barriers to collaboration in the legal profession and how to overcome them
 - D. Benefits in teaching and supporting collaborative problem-solving/work
 - E. Role of technology in building/facilitating collaboration
 - F. Lessons and best practices on collaboration from non-legal sector/disciplines
- III. 11:30am 11:50am Breakout Session with Audience (small group discussion on hypothetical (see attached))
 - A. Cause(s) of the breakdown in collaboration in Grace's team
 - B. How Grace can respond to demonstrate collaborative leadership
 - C. Changes that need to be made at the firm in order to better support/facilitate collaboration/coordination
 - D. Benefits and challenges with collaboration or lack thereof
 - E. Strategies/models/best practices to foster/reward collaboration
- IV. 11:50am -12:10pm Regroup and Share
 - A. Download what we learned through the small group discussion and sharing strategies/models/best practices to collaboration.
 - B. Closing remarks from panelists
- V. 12:10pm 12:15pm Q&A

Attachment: Collaborative Leadership Panel Breakout Hypothetical

Grace Lee is a sixth year M&A associate at the preeminent New York law firm, Schuster, Moore & Willis LLP ("SMW"). Grace started at SMW after graduating from law school and is seen by the partners of SMW as one of the highest performing associates and a rising star. Since her first year, Grace has consistently demonstrated that she is intelligent, diligent and a quick study, as well as a problem solver who can work with colleagues across practice groups. However, the daily grind is starting to wear on her and she has started to feel a shift in SMW's culture that is becoming ever more revenue-driven, cutthroat and demanding.

The rainmaking M&A partner, **Steve Harris**, recently asked Grace to lead a team of mid-level and junior associates to handle a very high profile M&A transaction for an important client who is looking to buy the target company. Grace was already working on three other active matters that were collectively taking up 75% of her time, but she immediately accepted the new assignment because she did not want to miss this opportunity and, frankly, did not feel she had the option to turn it down.

Today was a particularly bad day for Grace that highlighted her frustration at SMW:

- Grace had been toiling away at reviewing the Stock Purchase Agreement ("SPA"). She received the draft SPA from the seller's lawyers two days ago and had asked the second year associate on her team, Megan Fanning, to forward the SPA to the designated associates and partners in the Tax, Labor & Employment and Real Estate practice groups for review. Grace instructed Megan to collect all comments from them by 12:00pm today so that Grace can send a revised draft of the SPA to the client by tomorrow morning per the client's request. However, by the time Grace realized she had not received comments from any of the specialists, it was already 4:00pm and Megan was nowhere to be found. The phone rang -- it was Steve asking for a status update on the SPA.
- After she hung up with Steve, Grace received a call from the third year associate on her team, **Chris Thompson**, who Grace assigned to handle the due diligence process (i.e., reviewing and summarizing all of the documents related to the target company in the virtual data room and flagging any issue that could be a problem for the client). Chris told Grace that there has been a mistake in the Due Diligence Memo that was sent to the client the prior week, which failed to point out that the closing of the M&A transaction would trigger the termination of a major contract of the target company. Chris blamed the first year associates for misreading the provision and not catching this mistake, but the first year associates thought it was up to Chris and, ultimately, Grace to double check their work before finalizing the Due Diligence Memo.
- Grace then received an email from the Tax partner, **Rebecca Kalani**, asking Grace to call her back ASAP. Grace has worked with Rebecca many times over the years and Rebecca has become both a mentor and sponsor of Grace, often vouching for Grace in front other partners. However, it is well-known within SMW that Rebecca does not get along with Steve and she is not the only one. Steve has a habit of not involving partners in the other practice groups until the very last minute, which always results in unnecessary fire drills, and taking all of the credit when a deal closes. Clearly, this time was no exception when Grace returned Rebecca's call: "Grace, what am I reviewing here? I received the SPA from Megan two days ago and was given no context whatsoever on what this deal is about. I got a voicemail from Steve yesterday saying he wanted to debrief me on this deal and I called him back, but we never connected. This happens every time and I thought it would be different with you quarterbacking this deal. You just have to tell the client that I can't review this by tomorrow until I have enough information."

Reading Materials

- 1. Nicole Black, *Collaboration Tools You Should Already Be Using*, GP Solo (July/August 2014), https://www.americanbar.org/publications/gp_solo/2014/july-august-2014/collaboration tools you should already be using.html.
- 2. Michael Blanding, *Collaborating Across Cultures*, Harvard Business School (June 25, 2012), https://hbswk.hbs.edu/item/collaborating-across-cultures.
- 3. Susan Duncan, *Collaboration: The Next Frontier. Are Law Firms Up To It?*, INFOCUS Blog (February 21, 2013), http://www.rainmakingoasis.com/collaboration-the-next-frontier-are-law-firms-up-to-it/.
- 4. Scott Forman, *Q&A with Hearst's Legal Operations Director*, Corporate Counsel, https://www.law.com/corpcounsel/2018/06/11/qa-with-hearsts-legal-operations-director/.
- 5. Heidi K. Gardner, *Collaboration in Law Firms*, The Practice (September 2015), https://thepractice.law.harvard.edu/article/collaboration-in-law-firms/.
- 6. Heidi K. Gardner, *Harness the Power of Smart Collaboration for In-House Lawyers*, Harvard Law School, Center on the Legal Profession, https://clp.law.harvard.edu/assets/Gardner_Smart-Collaboration-for-In-House-Lawyers HLS-white-paper.pdf.
- 7. Kip Kelly & Alan Schaefer, *Creating a Collaborative Organizational Culture*, UNC Kenan-Flagler Business School, Executive Development, https://www.kenan-flagler.unc.edu/~/media/Files/documents/executive-development/unc-white-paper-creating-a-collaborative-organizational-culture.pdf.
- 8. Richard and Daniel Susskind, The Future of The Professions (2015).
- 9. Janet Weinstein et al., *Teaching Teamwork to Law Students*, Journal of Legal Education (2013), http://jle.aals.org/cgi/viewcontent.cgi?article=1092&context=home

From Silos to Teamwork:

Importance of Collaborative Leadership for Lawyers



September 22, 2018

Audience Poll

What is the most important factor driving collaboration?

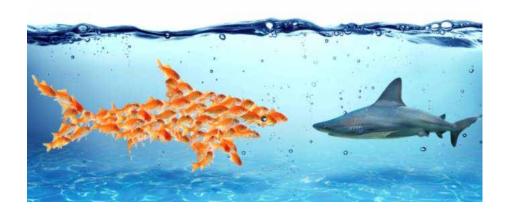
- 1. Go to: pollev.com/mariannechow097
- 2. Click "Skip" on the Introduce Yourself page.
- 3. Enter your response and click " Submit ".

What is the most important factor driving collaboration?

Breakout Session: A Day at Schuster, Moore & Willis

- W hat are the causes of the breakdown in collaboration in Grace's team?
- 2. How can Grace respond in a way that demonstrates she is a collaborative leader?
- 3. What needs to be changed at the firm in order to better support and facilitate collaboration?
- 4. What benefits and challenges have you experienced with collaboration or lack thereof?
- 5. W hat strategies/framework/best practices can you share to foster and reward collaboration?

Q&A



AABANY 9th Annual Fall Conference

GC Roundtable: Dealing with Challenges; Promoting the Legal Profession

Presented by the In-House Counsel Committee September 22, 2018 – 2:15 PM to 3:45 PM

Panelists

Diane Brayton

Executive Vice President and General Counsel

New York Times

Michael Fricklas

Chief Legal Officer
Advanced Publications

Theresa Monahan

Vice President & General Counsel

Excela Technologies

Djenaba Parker

Chief Counsel and Chief Talent Officer

New York Red Bulls

Moderated by:

Ben Hsing

Partner

BakerHostetler

Outline

The panel will discuss the challenges facing the GCs in addressing the legal challenges for their respective companies and industries, such as information security, data privacy, reputational risks, technological developments, etc. The panel will also address efforts to promote the legal profession within their respective legal department, through company-sponsored efforts and through efforts outside of their respective companies. Finally, the panel will discuss the qualities important for advancement and the development of future leaders within their respective departments.

- I. Introduction of the Panelists (5 minutes)
- II. Dealing with Challenges (20 minutes)
 - □ Role within your Company:

- What is your average day like, if there is such a thing as an average day?
- O What is the reporting structure in your organization and what is your role within the organization and interaction with the CEO or Board of Directors?

☐ Discussion of the Challenges:

- O What are some of the challenges facing your organization and what role do you play in addressing these challenges?
- O What are some of the changes in laws, regulations, and political environment affecting your businesses (e.g. information security, data privacy and reputational risk)?
- O What issues and challenges have you faced in advising your organizations? Describe a time when you made a decision that required you to stand alone.
- O Describe how you identified legal risks within your organization or industry (proactively or reactively) and formulate a strategy to address these legal risks?

III. Topics and Key Considerations (50 minutes)

- ☐ Advancement of the Legal Profession(10 minutes)
 - o In what ways do you promote the legal profession within your organization?
 - Does your organization support temporary assignments for crosstraining purposes or provide training on legal issues to non-legal groups?
 - o How do you build an effective team?
 - o How do you successfully partner with the business-side?
 - o In what ways do you promote the legal profession externally (e.g., participation in legal or industry groups, provide pro bono services, etc.)?
 - O How do you select outside counsel? What kind of qualities do you look for in your outside counsel? Does diversity play a role in your hiring of outside counsel?

Advancement within Your Organization (20 minutes)

- O What are the qualities you look for in your staff attorneys when determining advancement? How do you identify and develop top performers within your legal group?
- O Discuss your succession planning and leadership development within your organization.
- O How do you or your organization help attorneys develop the skills necessary for advancement (e.g. coaching, training, mentorship programs, etc.)?
- O General career advice: How to develop leadership skills and gain visibility within the legal group or organization?
- o Personal challenges: examples lessons learned?
- o Advice on developing professional relationships, mentors, sponsors, etc.

- o Explain your organization's policy or efforts to promote diversity?
- ☐ Career Management and How to Become a GC (20 minutes)
 - o What was your career path to becoming a GC?
 - O What skills are necessary to thrive at the executive level, and what skills did you work on to prepare for the GC role?
 - o What do you wish you had known before becoming GC?
 - O Challenges for GCs when communicating with the team, senior management or the Board?
 - o How to fit within the company's culture?
 - O How best to work with the Board and other officers of the company?

IV. Questions and Answers (15 minutes)

RESOURCES

Periodicals

Wall Street Journal (www.wsj.com)

New York Law Journal (<u>www.law.com</u>)

NYTimes Dealbook (<u>www.nytimes.com</u>)

Trade association publications

Association of Corporate Counsel (www.acc.com)

Minority Corporate counsel (<u>www.mcca.com</u>)

<u>Other</u>

Law Firm Newsletters/Client Advisories

Bar association panels

Findlaw (www.findlaw.com)

GoInhouse (www.goinhouse.com)

Indeed (www.indeed.com)

Law Crossing (<u>www.lawcrossing.com</u>)



AALDEF Update: Deferred Action for Childhood Arrivals (DACA)

August 2018

On January 9 and February 13, 2018, federal judges in California and New York, respectively, temporarily blocked the Trump administration's cancellation of the Deferred Action for Childhood Arrivals (DACA) program.¹ On April 24, another federal judge in Washington, D.C. ruled against the Department of Homeland Security (DHS)'s decision to rescind DACA and put his decision on hold in order to give the government time to provide a better explanation. After the DHS submitted a memorandum justifying its termination of DACA to the D.C. court on June 22,² the court re-affirmed its earlier decision and ruled on Aug. 17 that DHS is not required at this time to accept and process initial DACA requests but must continue to process renewals.

Following the California and New York federal court orders, on January 13 and February 14, 2018, U.S. Citizenship and Immigration Services (USCIS) announced that it will comply with these orders and allow DACA recipients to renew their deferred action and employment authorization.³ With the injunctions in place and the D.C. court's recent decision to stay its order on initial DACA applications, the DHS is still processing DACA renewal requests.

On August 8, the U.S. district court in Brownsville, Texas held a hearing in *Texas v. Nielsen*, a lawsuit that was brought by Texas and several other states challenging the lawfulness of the original DACA program. If the judge decides that DACA is unconstitutional and issues an injunction temporarily ordering USCIS to stop processing DACA renewal requests, this would be in conflict with the other federal court decisions and could place the issue on a fast track before the U.S. Supreme Court.

As USCIS is still accepting DACA renewal applications, the Asian American Legal Defense and Education Fund (AALDEF) is providing the following guidance:

- Individuals whose DACA and employment authorization expired before September 5, 2016 (one year before the administration's announcement to end DACA) can file an initial application, not a renewal.
- Individuals whose DACA and employment authorization expired on or after September 5, 2016, or will expire within 180 days from now, can file a renewal application.

¹https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arriv als/234 Order Entering Preliminary Injunction.pdf;

https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arriv als/255 EDNY AMENDED Order Entering Preliminary Injunction.pdf

² On June 22, 2018, the Secretary of DHS issued a memorandum providing a more detailed explanation of DHS's decision to end DACA at:

https://www.dhs.gov/sites/default/files/publications/18 0622 S1 Memorandum DACA.pdf

³https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction

- Individuals who have never applied for DACA cannot apply.
- DACA recipients still cannot file applications to travel outside the U.S. on advance parole (advance permission to travel overseas).
- Because we are uncertain about the window of time available for submitting DACA renewal applications while the lower courts' decisions go through the appeals process, we recommend that you contact an attorney or a Board of Immigration Appeals (BIA)-accredited representative immediately to assess whether you are eligible for renewal.

Documents to prepare for a renewal request*:

- A copy of your prior application
- Current passport
- Two (2) color passport photos
- New address(es) since your previous DACA application
- Employment Authorization Document
- Most recent I-821D approval notice (as well as the I-765 approval notice if you received one)
- Certificates of disposition for any new arrests or criminal/juvenile court proceedings since your previous DACA application
- Order of removal (deportation) since your previous DACA application
- Advance parole document and approval notice if you have traveled outside the country since your previous DACA application
- Check or money order for \$495 payable to "U.S. Department of Homeland Security"

*If you need to submit an initial application, you are required to submit additional evidence, including documents to prove continuous residence beginning from the time period of your last application's approval.

NOTE: This guidance does not constitute legal advice. For specific questions about individual circumstances, please consult with an immigration attorney or a BIA-accredited representative.

BEWARE of any potential scams and fraud! You do not have to pay anyone to help with your applications. Many organizations are offering free legal services.

For additional information or to schedule a legal consultation, contact AALDEF's community organizer at 212.966.5932 x 223 or spark@aaldef.org. You can also contact RAISE (Revolutionizing Asian American Immigrant Stories on the East Coast), the pan-Asian undocumented youth group affiliated with AALDEF, at raise@aaldef.org. RAISE aims to create safe spaces in communities while advocating for humane immigration policies.





August 23, 2018

VIA ELECTRONIC MAIL

Cameron Quinn
Officer for Civil Rights and Civil Liberties
Department of Homeland Security
Washington, DC 20528

John V. Kelly Acting Inspector General Department of Homeland Security Washington, DC 20528

Re: The Use of Coercion by U.S. Department of Homeland Security (DHS)
Officials Against Parents Who Were Forcibly Separated From Their
Children

Dear Ms. Quinn and Mr. Kelly,

As partners in the Immigration Justice Campaign, the American Immigration Council ("Council") and the American Immigration Lawyers Association ("AILA") jointly file this complaint on behalf of numerous parents who were separated from their children while in Department of Homeland Security (DHS) custody pursuant to the Trump administration's "zero tolerance" policy, and then subject to extreme duress and coercion while in DHS custody. Over 2,600 minor children were forcibly separated from their parents; at the time of filing of this complaint, an estimated 366 parents remain outside the United States, having been deported without their children, and 565 children remain in government custody, still separated from their parents.¹

A federal court has determined that the practice of separating children from their parents "shocks the conscience." Medical and psychological experts have repeatedly expressed grave concerns about the deleterious and lasting impact that separation has had—and continues to have—on children and their parents. Republican and Democratic

¹ See Joint Status Report, Dkt 191 at 2, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. Aug. 18, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-joint-status-report-2.

² Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

³ ACP Objects to Separation of Children from their Parents at Border, American College of Physicians, May 31, 2018, *available at*. https://www.acponline.org/acp-newsroom/acp-objects-to-separation-of-children-from-their-parents-at-border (last accessed August 15, 2018).

⁴ Alexander Miller, et al., (2018), *Understanding the mental health consequences of family separation for refugees: Implications for policy and practice*, American Journal of Orthopsychiatry, Vol 88(1) 2018, 26-37, *available at*. http://psycnet.apa.org/doiLanding?doi=10.1037%2Fort0000272.

members of Congress have repeatedly condemned family separation.⁵ Further, there are numerous reports of separated children being subject to physical and verbal abuse.⁶

This complaint contains 13 pseudonymized case examples and original testimony from parents who were separated from their children that show a pervasive, illegal practice by DHS officials of coercing mothers and fathers into signing documents they may not have understood. The cases also demonstrate how the trauma of separation and detention creates an environment that is by its very nature coercive and makes it extremely difficult for parents to participate in legal proceedings affecting their rights. The direct consequence of the coercion is that many parents were forced to waive their legal rights, including their right to be reunified with their children.⁷

The cases present powerful evidence of gross violations of due process committed by government officials that place into question the validity and fairness of legal determinations made by U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) officials, as well as U.S. Citizenship and Immigration Services (USCIS) asylum officers and the Immigration Court. The coercive environment created by family separation was so overpowering as to render many mothers and fathers unable to answer questions or even comprehend the purpose of credible fear interviews or the removal process overall.

Coercion of noncitizens by immigration officials is a direct violation of the U.S. Constitution, federal statute, and regulations.⁸ The Immigration and Nationality Act guarantees every person the right to apply for asylum regardless of the manner of entry.⁹ ICE and CBP officials cannot lawfully force any person to abandon statutory or constitutional rights.¹⁰ The coercive acts committed by U.S. government officials and the

⁵ Peter Baker, Leading Republicans Join Democrats in Pushing Trump to Halt Family Separations, NY Times (June 17, 2018).

⁶ These reports include being deprived of potable water, which compelled some to drink toilet water, and being given expired food. Angelina Chapin, *Drinking Toilet Water, Widespread Abuse: Report Details 'Torture' For Child Detainees*, Huffington Post (July 17, 2018), https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers us 5b4d13ffe4b0de86f485ade8. Many of these children were likely subject to further coercive tactics and duress at the hands of government officials at every stage of their time in government custody. This complaint, however, focuses on the coercion endured by the separated parents, many of whom we continue to advocate for and provide support to in terms of coordinating legal representation.

The ill effects of the "zero tolerance" policy are being exacerbated by the fact that DHS is turning away asylum seekers at the ports of entry, effectively forcing families to cross in between ports of entry to seek asylum in the United States. The Council, AlLA, and other organizations submitted an administrative complaint with the Office for Civil Rights and Civil Liberties (CRCL) and the Office of the Inspector General (OIG) in January 2017 regarding the government's systematic denial of entry to asylum seekers at ports of entry on our Southern border. See https://www.americanimmigrationcouncil.org/content/us-customs-and-border-protections-systemic-denial-entry-asylum-seekers-ports-entry-us. The Council, along with the Center for Constitutional Rights and Latham and Watkins, LLP, subsequently filed a class action lawsuit last year challenging CBP's unlawful practice of turning away asylum seekers who present themselves at ports of entry along the U.S.-Mexico border. See <a href="https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-powders-powders-powders-powders-powders-powders-powders-protections-unlawful-practice-turning-away-powders

asylum-seekers.

8 For example, the accounts below in which speakers of indigenous languages with limited Spanish proficiency were coerced into signing documents while detained in CBP custody likely violates 8 C.F.R. § 235.3(b)(2)(i), which requires that interpretative assistance be provided.

⁹ See generally 8 U.S.C. § 1182. The right to apply for asylum "may be violated by a pattern or practice that forecloses the opportunity to apply." *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994).

¹⁰ See, e.g. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988), aff'd sub nom. Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (finding that the due process rights of Salvadoran asylum seekers was violated by an INS policy and practice of duress and misrepresentation intended to coerce asylum seekers into abandoning their right to apply for asylum and instead agree to voluntary departure).

government's creation of a coercive environment prevented separated parents from meaningfully participating in the asylum process.

Together these practices have resulted in not only the tremendous suffering of children and parents who have been kept apart, detained, and subjected to abusive, inhumane treatment, but also the involuntary, forced return of hundreds of people to grave dangers, including risk of death. As a nation we cannot tolerate such abuses in violation of our laws and we urge you to take immediate action to correct the situation.

KEY FINDINGS

- ICE officers used both physical and verbal threats, deception, and intimidation to coerce multiple separated parents into signing forms relinquishing their rights.
- ICE officers reunified multiple parents with their children, then presented them with pre-completed forms affecting their rights to reunification, and re-separated parents who refused to sign the forms.
- CBP officers subjected separated parents to extreme duress during the separation process, including verbal and physical abuse.
- Detention officers put separated parents in solitary confinement, deprived them of food and water for days, and subjected them to other forms of retaliatory punishment.
- Parents experienced severe physical and emotional distress, depression, and mental health problems from the conditions of detention and separation from their children.
- Government officials and detention facility staff treated parents so cruelly and inhumanely as to compromise their ability to access asylum and other legal relief.
- The trauma of being separated from their children, as well as the coercive environment created by CBP and ICE officers, made it extremely difficult for parents to participate meaningfully during the credible fear interview process, and their proceedings, if any, before the Immigration Judge.
- We surveyed 76 mothers who had been separated from their children and asked by ICE officers to sign a form affecting their rights to be reunified with their children. Over 90% of the mothers reported that they were not allowed to ask about the consequences of signing the form. As a result, less than 25% of mothers expressed that they understood what they were signing. Disturbingly, 67% of mothers reported that ICE intimidated or coerced them prior to having them sign a form affecting their rights to reunification with their children. Worse, 30% reported that ICE officers threatened that if the mother did not sign the form, they would never see their children again.

BACKGROUND

The Council and AILA have long sought to curb the abuse and coercion of vulnerable populations that arrive at the U.S.-Mexico border seeking humanitarian protection. On December 11, 2017, the Council, AILA, and other immigrant rights organizations filed a complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL) and the Office

of the Inspector General (OIG) presenting grave concerns regarding the separation of asylum-seeking families while in CBP and ICE custody at the U.S.-Mexico border. 11 As family separation drastically expanded in Spring and Summer 2018, the concerns of these organizations have been largely borne out.

On April 6, 2018, the Department of Justice (DOJ) and DHS implemented a "zero tolerance" policy for individuals who crossed the southern border without authorization. which resulted in many asylum-seeking families being prosecuted and parents being separated from their children. 12 After the government separated more than 2,600 families, and amid a growing outcry against the impact of these policies on children and their parents, President Trump issued an executive order on June 20, 2018 which purported to limit family separation.¹³

On June 26, in an ACLU lawsuit challenging the family separation policy, Ms. L. v. ICE, U.S. District Court Judge Dana Sabraw held that family separation violated the Due Process Clause of the Fifth Amendment and ordered the administration to reunite all families that the government forcibly separated. ¹⁴ Pursuant to the court's decision, the government was ordered to reunite all "eligible" parents by July 26, 2018. Many parents deemed "ineligible" by DHS for reunification remain detained in adult immigration detention facilities, apart from their children. Many other parents are now detained with their children in family detention centers. Whereas an estimated 2,000 families have been reunified, at least 366 parents were deported without their children. 16

Prior to submitting this complaint, our organizations spoke to dozens of parents who had been separated from their children, most of whom reported having been coerced to various degrees by DHS officials. Their stories, detailed below along with information from publicly available sources, demonstrate the ways in which ICE and CBP officials and detention facility guards coerced separated parents into signing forms relinquishing their rights, and the ways in which treatment by DHS officials, and the conditions in which parents have been detained, created a coercive environment which prevented them from meaningfully exercising their rights.

¹¹ The Separation of Family Members Apprehended by or Found Inadmissible while in U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border (Dec. 11, 2017),

https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/family_separation_complaint.pdf

12 Department of Justice, Office of Public Affairs, "Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry," April 6, 2018, https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry, Under the zero tolerance policy, DHS was directed to refer for criminal prosecution all migrants who crossed the border without authorization, and DOJ was directed to accept as many of these referrals as practicable. Per the new policy, if these migrants arrived with children, the families were separated when the parents were referred for prosecution, and the children were unconventionally designated "unaccompanied alien children" and placed in the custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). The result was a de facto, government-created policy of family separation.

¹³ President Donald J. Trump, Affording Congress an Opportunity to Address Family Separation, The White House, June 20, 2018, https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

¹⁴ Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

¹⁵ *Id.* at 1149.

¹⁶ Whereas the ACLU found that at least 366 parents were deported without their children, other sources suggest that the number was far greater. See Joint Status Report, Dkt 191 at 2, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. Aug. 18, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-joint-status-report-2. Tom Hals & Reade Levinson, U.S. says 463 migrant parents may have been deported without kids, Reuters (July 23, 2018).

<u>DHS Officers Explicitly Coerced Parents into Signing Documentation</u> Relinquishing Their Rights to Reunification.

ICE officers coerced parents into signing forms relinquishing their rights to reunify with their children before the reunification process occurred.

Pursuant to the June 26, 2018 court order in *Ms. L* that halted family separation, ICE was required to reunify all families that were separated, unless ICE determined "that the parent is unfit or presents a danger to the child," or if the parent "affirmatively, knowingly, and voluntarily declines to be reunited with the child."¹⁷ The court further ordered that ICE not deport any parent without their child, unless the parent "affirmatively, knowingly, and voluntarily declines to be reunited."¹⁸

To facilitate the deportation of individuals with administrative final orders of removal while following this preliminary injunction, ICE drafted a form, initially titled "Separated Parent's Removal Form" (hereinafter "Election Form"), to be given to parents with final orders of removal. With the exception of biographical information, the form was written entirely in English—although a later version of the form offered brief summaries of the options in Spanish. The Election Form offered parents two options—to be deported without their children or to be reunified and deported with their children. Only following negotiations with the ACLU was a third option added allowing parents to indicate that they wanted to speak to an attorney first.

According to affidavits filed by the ACLU in the *Ms. L.* case, in addition to dozens of accounts from detained parents shared directly with us, many parents detained at ICE facilities across the country whom the government claimed had "affirmatively, knowingly, and voluntarily" relinquished their rights to reunification, in fact reported that they had been coerced into signing forms they did not understand in a language they did not speak, or were totally unaware that they had relinquished their right to reunification.²³

In addition to being coerced, many parents detained nationwide were forced outright to sign the Election Form. Numerous parents in the El Paso area reported that ICE officers demanded that they sign the Election Form and affirmatively abandon their rights to

Id.
 See Caitlin Dickson, New ICE form to separated parents: Choose deportation with or without kids, Yahoo News (July 3, 2018),

¹⁷ Ms. L. v. ICE, 310 F. Supp. 3d at 1149 (order granting preliminary injunction).

https://www.yahoo.com/news/new-ice-form-separated-parents-choose-deportation-without-kids-232452897.html.

20 Id. Furthermore, authors interviewed dozens of separated parents who described the different forms that they were coerced into

²⁰ *Id.* Furthermore, authors interviewed dozens of separated parents who described the different forms that they were coerced into signing by DHS officials.

 ²¹ Id. Option 1 stated that parents were "requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship." Option 2 stated that parents were "affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief."
 ²² See Order Granting Plaintiffs' Motion for Temporary Restraining Order, *M.M.M. v.* Sessions, No. 18-cv-1835-DMS-MDD, at 10 (S.D. Cal. August 16, 2018) (describing history and purpose of the election forms), available at https://bit.ly/2nTcXOB.
 ²³ See Declaration of Aaron Reichlin-Melnick, Dkt. 153 at Exhibit 44, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-plaintiffs-reply-support-motion-stay-removal (summarizing coercion documented by volunteer attorneys).

reunification.²⁴ Others at the West Texas Detention Facility reported that after ICE gave a presentation to a group of about 60 separated fathers, on July 11, 2018, they were also forced to sign.²⁵ In that case, ICE officers told the fathers that they had three options—be removed without their child, be removed with their child, or continue to fight their case for asylum. ICE did not inform parents that they were entitled both to pursue their asylum claims *and* to be reunified with their child.²⁶

Similar group presentations reportedly occurred at the Otero County Detention Center. Two fathers reported being brought to a room with about 50 other fathers on July 17, 2018, given "no explanation of the form," with the entire process taking less than five minutes. A third father reported that he was brought to a space normally used as a chapel with 25 to 30 other fathers, and that "he was given a form, that it was not explained to him, and that the entire process lasted no more than three minutes. He said he felt sad and intimidated during this process. He expressed that he believed he had no choice but to sign the form."

Indigenous language speakers, many of whom are unable to read or write in any language, speak neither English nor Spanish, or speak Spanish with limited proficiency, also reported being coerced into signing forms by ICE relinquishing their rights to reunification. One mother, T.C., whose story is included below, speaks primarily Q'eqchi' and only limited Spanish. ICE officers demanded she sign the Election Form and threatened to punish her if she refused. She signed the document, but had no idea what she was signing. Similarly, another father, whose case was highlighted in the *Ms. L.* lawsuit, speaks primarily Akatek and limited Spanish, but was made to sign the Election Form without explanation.²⁸

When ICE requires separated parents to sign forms that materially affect their rights without translating those forms into a language that the parents can understand, the rights of the parents are violated.²⁹

 ²⁴ Elise Foley and Roque Planas, *Immigrant Parents Unwittingly Signed Away Right to Reunite with Children, Lawyers Say*, Huffington Post (July 25, 2018), https://www.huffingtonpost.com/entry/immigrant-parents-right-to-reunite_us_5b58f9d0e4b0fd5c73cb6599.
 ²⁵ See *id.*; Declaration of Kathryn E. Shepherd, Dkt. 153 at Exhibit 48, ¶ 8, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July

See id.; Declaration of Kathryn E. Shepherd, Dkt. 153 at Exhibit 48, ¶ 8, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018).

²⁶ Declaration of Kathryn E. Shepherd, Dkt. 153, Exhibit 48 at ¶ 8, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018). ²⁷ *Id.*, Declaration of Luis Cruz, Dkt. 153, Exhibit 44 at ¶¶ 6-9.

²⁸ *Id.*, Declaration of Aaron Reichlin-Melnick, Dkt. 153, Exhibit 43 at ¶ 8. Two other Mam-speaking fathers mentioned in that case also described being told to sign a paper that they believed would allow them to reunite with their children; both fathers had been identified by the Department of Justice as having relinquished their rights to reunification. *Id.*, Declaration of A.R. Reive, Dkt. 153, Exhibit 45 at ¶ 10-12. One of those fathers, "signed a paper that he thought would allow him to be reunited with his son" but which was not explained to him. *Id.* at ¶ 9. Another Mam-speaking father who "speaks extremely limited Spanish … [and] cannot read or write … signed a document that he thought would allow him to be reunited with his son." *Id* at ¶ 10. He "could not …understand the document because he is illiterate and no interpreter was provided to explain its contents to him in Mam." *Id*.

²⁹ See, e.g., *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010) (DHS failure to translate waiver of right to appeal Stipulated Removal determination rendered waiver involuntary); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012) ("A waiver of rights cannot be found to have been considered or intelligent where there is no evidence that the detainee was first advised of those rights in a language he could understand").

Following reunification, ICE officers coerced separated parents into signing prefilled relinquishment consent forms.

Pursuant to a court order in the Ms. L case, ICE was directed to reunify all "eligible" parents with their children by July 26.30 Given the scale of this operation, a substantial number of reunifications occurred within the last week before that deadline.³¹ During this process, multiple reports emerged of coercive behavior by ICE officers against separated parents. These reports are bolstered by a survey of 76 mothers we conducted; 34% of those surveyed reported that they had been asked to sign precompleted forms.

Four parents allege that, on July 25, 2018, ICE officers boarded a bus departing from the El Paso Processing Center that was filled with reunified parents and their children.³² Several parents on that bus-identified in the ACLU's filing as F.G., J.M., C.T., and F.T.—reported that ICE officials handed out the Election Form to each parent on the bus.³³ Each form had been pre-completed by ICE, with the box for Option 1, "I want to be deported with my children," already filled in with a "handwritten check mark." 34

One father, F.G., reported that "officials told him that while there were three options on the form, he had to choose Option 1."35 F.G. refused to sign the form, preferring instead to select Option 2—to be deported without his child.³⁶ Another father, J.M., ignored the pre-written check mark and instead selected Option 2. In response, an ICE officer took the form away and returned with a new copy, "again with Option 1 pre-selected." When J.M. again refused to sign the form, the ICE officers "yelled at him in English" and pressured him in Spanish to sign the form.³⁷ Two other fathers, C.T. and F.T., confirmed that ICE had presented the entire bus with pre-selected forms, and F.T. noted that ICE officers were "visibly and audibly angry when he refused" to select Option 1.38 All four fathers recounted that their children were separated from them a second time upon their refusal to sign the forms pre-marked with Option 1, which would have agreed to them being deported together.

By pre-selecting Option 1 on the Election Form, refusing to permit parents to select any other option, and screaming at any parent who disagreed, ICE agents violated the due process rights of these parents.³⁹ Forcing a parent to sign a pre-selected form does not

³⁰ Ms. L. v. ICE, 310 F. Supp. at 1149.

³¹ On Wednesday, July 19, the government had only reunited 364 separated children with their parents. See Joint Status Report, Dkt 124 at 2, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 19, 2018), available at https://www.aclu.org/legaldocument/july-19-status-conference-report. The following Wednesday, July 26, 2018, the government had reunified or otherwise discharged in appropriate circumstances a total of 1,820 children. See Joint Status Report, Dkt 159 at 2, Ms. L. v. ICE, No. 18cv428-DMS-MDD (S.D. Cal. July 26, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-status-report.
³² See Declaration of Laila Arand, Dkt. 163-1, Ms. L v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 26, 2018).

³³ Id at 2.

³⁴ *Id*.

³⁶ Id; see Note 21, supra, for a description of the options.

³⁷ Declaration of Laila Arand, Dkt. 163-1, Ms. L v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 26, 2018), at 5.

³⁹ See, e.g., Orantes-Hernandez, 685 F. Supp. at 1494 (coercing vulnerable asylum seekers into relinquishing their rights violates due process).

comport with due process as it does not allow for an affirmative, knowing, or voluntary decision by the parent.⁴⁰

<u>DHS Officers Subjected Separated Parents to Extreme Duress and Coercive Environments.</u>

CBP officers subjected separated parents to extreme duress during the separation process, including verbal and physical abuse.

The stories below illustrate how parents were subjected to duress and coercion while in CBP custody. These stories also show the ways in which the coercive environment, established within hours of entry, affected the rights of separated parents throughout their time in DHS custody.⁴¹

Many parents report that they were subject to a coercive environment by officers during their time in CBP short-term detention facilities, colloquially called *hieleras* ("iceboxes") because of the cold temperatures inside the facilities. The unnecessarily harsh conditions in these facilities have been the subject of detailed reporting, CRCL complaints, and multiple federal lawsuits in the past.⁴² Consistent with these previous reports, in the cases cited in this complaint, parents report being given inadequate or spoiled food, being forced to sleep on cold concrete floors and next to toilets, or being unable to sleep as a result of the cramped conditions forcing people to stand, being denied access to feminine hygiene products while menstruating, and suffering because of the cold.⁴³ While in the *hieleras*, parents also indicated suffering terrible emotional distress from seeing their children crying in separate cells but not being able to speak to them, or not knowing where their children were or whether they were being treated humanely.

Parents—sometimes with their children—were also subjected to coercive environments when detained in facilities colloquially called *perreras* ("dog pounds"), typically facilities with chain-link cells. Parents reported being forced to sleep on the concrete floor for over a week with no bedding, a "horrible stench" caused by the failure to provide access to any hygiene such as showers or toothbrushes, being crowded into cells so tightly that

be in edible condition (not frozen, expired or spoiled)").

⁴⁰ See Ms. L., 310 F. Supp. 3d at 1149 (requiring DHS to reunify all parents "unless the parent affirmatively, knowingly, and voluntarily declines to be reunited").

 ⁴¹ In a related context, the Supreme Court has repeatedly ruled that subjecting arrested individuals to coercive environments may violate their constitutional rights to due process. See, e.g., Miller v. Fenton, 474 U.S. 104, 118 (1985) (discussing the ways in which interrogation of an arrested individual in a "coercive environment" may violate due process and render a confession involuntary).
 ⁴² See, e.g., Guillermo Cantor, Hieleras (Iceboxes) in the Rio Grande Valley Sector (2015), available at https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-grande-valley-sector; Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells (2018), available at https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells; National Immigrant Justice Center, et. al., CRCL Complaint, Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection (June 11, 2014) (detailing violations of the rights of children held in CBP holding rooms).
 ⁴³ Multiple parents reported that CBP provided frozen or near-frozen food. This violates section 4.13 of CBP's 2015 National Standards on Transport, Escort, Detention, and Search ("TEDS policy"), available at https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf ("Food provided must

they had to sleep in the bathroom area, continued denial of access to feminine hygiene products, and verbal abuse by CBP officers.⁴⁴

These conditions, combined with the trauma of family separation, created an inordinately coercive and stressful environment which colored the interactions that separated parents had with all immigration officials throughout their time in custody. Parents' first interactions with CBP officials often included officers who used deception to facilitate separating children from their parents. Many parents were falsely told their children would be returned to them after they had gone to federal court to face prosecution for entry-related offenses. Others were given no notice that their child would be taken, returning from interviews with CBP officers only to discover that their child was missing. Some were even forced to witness their wailing child be dragged away by CBP officers.⁴⁵

ICE officers and prison guards subjected separated parents to duress and coercion.

Many separated parents report that ICE officers and prison guards subjected them to duress and coercive environments while in detention that infringed upon their ability to meaningfully avail themselves of their protected right to the asylum process. Many parents reported that ICE officers yelled at and insulted them, used intimidation tactics, such as isolation and denying food, and taunted them with threats that their children already had, or would be, put up for adoption.

The coercive environment of detention after having been separated from a child also created profound psychological trauma to individuals held in ICE detention. One mother, A.R., reported that her mind "went completely blank" while she was detained in the West Texas Detention Facility in Sierra Blanca, Texas. "Even when I tried to pray, the words of the songs I have sung my whole life would not come to me," she stated.⁴⁶

Another mother, C.F., described being held in ICE detention at the Irwin Detention Center in Irwin, Georgia.⁴⁷ Being separated from her daughter was "unbearably difficult" for her. She repeatedly begged guards to help her connect with her daughter, leading to ICE officers repeatedly yelling at her to get her to stop. She became so despondent that she contemplated suicide and told a friend she was going to throw herself off the balcony of the detention center.

⁴⁴ As detailed below, one mother, J.H., was held in CBP "short-term" custody for 12 days without being given the opportunity to bathe; further, despite menstruating so heavily that she frequently bled through her pants, CBP officials denied her access to feminine hygiene products. These conditions directly violate Section 4.11 of CBP's 2015 TEDS policy, *id.*, which requires that detainees be provided "basic personal hygiene items," requires that restrooms must have "access to toiletry items, such as ... sanitary napkins," and notes that "Reasonable efforts will be made to provide showers ... to detainees who are approaching 72 hours in detention." *See also id.* at § 5.6 ("Reasonable efforts will be made to provide showers, soap, and a clean towel to juveniles who are approaching 48 hours in detention"); *Unknown Parties, et. al., v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *11 (D. Ariz. Nov. 18, 2016) (finding that conditions of confinement in the CBP's Tucson Sector short-term detention facilities, including the failure to provide sufficient access to hygiene, violate the due process clause).

⁴⁵ See also Jen Kirby, Migrant in detention says her child was taken away while she breastfed, Vox (June 12, 2018).

⁴⁶ Declaration of A.R., August 6, 2018, on file with authors.

⁴⁷ Declaration of C.F., August 16, 2018, on file with authors.

Other parents reported intimidation by ICE officers while detained. One mother, D.P., described how an ICE officer nicknamed "The Deporter" physically intimidated her while trying to get her to sign a voluntary departure form, standing over her menacingly and shouting at her to sign.⁴⁸

D.P.'s experience is particularly troubling, as she was also placed in solitary confinement and subject to starvation by officials at the Port Isabel Detention Center, after she shouted to draw the attention of a visiting official who was touring the facility. Another mother, A.E., was also threatened with solitary confinement while at the Port Isabel Detention Center, for crying frequently and for refusing to eat due to stress and trauma.⁴⁹ These stories are shared in greater detail below.

Stress from family separation and parents' lack of information about the credible fear process prevented many parents from participating meaningfully in the asylum process.

The Constitution, federal statutes, and regulations guarantee asylum-seekers due process and specific procedures to safeguard their access to humanitarian protection and legal relief.⁵⁰ Over the past decade, numerous organizations have documented how DHS officials frequently fail to follow these rules and regulations, and in doing so violate domestic and international human rights laws.⁵¹ Unfortunately, when asylum-seekers were subjected to family separation, the trauma of having a child forcibly removed from an asylum-seeking parent created an environment so coercive that parents were unable to participate meaningfully in the asylum process.

During credible fear interviews, separated parents were not informed of the role that asylum officers conducting the credible fear interviews played. Many parents reported not even knowing that the credible fear interview had anything to do with their request for asylum. Most of the separated parents were not told in advance what the purpose of the interview was. For many, the credible fear interview was their most substantial interaction with any immigration official after having been separated from their child. As a result, some parents spent large portions of the interview asking questions about their children and begging to see them. This perception was compounded by the failure of government officials to clarify the purpose of the interviews. Separated parents were not

⁴⁸ Declaration of D.P., August 5, 2018, on file with authors.

⁴⁹ Declaration of A.E., August 6, 2018, on file with authors.

⁵⁰ See, e.g., 8 U.S.C. § 1158(a) (providing that any noncitizen "who is physically present in the United States or who arrives in the United States ... may apply for asylum"); 8 U.S.C. § 1225(b)(1)(B)(ii) (providing that a noncitizen who expresses a fear of return must be given a credible fear interview); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country."); U.S. Const. Amend. V (protecting right to due process).

⁵¹ See, e.g. American Immigration Council, et. al, *U.S. Customs and Border Protection's Systematic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border* (Jan. 13, 2017) (CRCL/OIG Complaint); U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 20 (2016) (reporting that despite findings and recommendations in a 2005 study relating to primary inspection, USCIRF observers in 2016 continued to find "examples of noncompliance with required procedures" in CBP inspection interviews); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border*, 12 (2017), https://www.hopeborder.org/discretion-to-deny-1 (reporting that "it is commonplace for asylum seekers to be placed in expedited removal proceedings and summarily deported . . . despite expressing fear").

informed ahead of time that the officers had no knowledge of the whereabouts of their children nor authority to make any decisions about reunification.

One parent, D.P., said that she pled with the officer, saying, "I don't want anything, I just want my daughter. Please give me my daughter," something that she "repeated over and over again" while the officer seemingly grew increasingly angry with her.⁵² Another parent, C.S., reported that she arrived at her credible fear interview in a state where her "mind was totally gone. I was only able to think about my daughters. I had barely eaten or had anything to drink for a long time because of the stress." She repeatedly asked the interviewer where her children were.

Another mother, M.F., described that she omitted key information relating to her asylum case because she had been separated from her child.⁵⁴ She described that she was "scared that if I mentioned anything related to the MS-13 gang threats that my son received, they would take him away from me." She also reported being so preoccupied with her son's welfare during the credible fear interview that her "mind could not focus on anything other than the well-being of my son."

At least some parents, like M.F., also omitted information because they believed that to fully explain their story might prevent them from being reunified with their child. In many cases, parents were misinformed that they were being brought to speak to their child on the phone, only to find themselves—overwhelmed with disappointment—speaking with yet another government official with no knowledge about their children.

Given the psychological and physical duress suffered by parents separated from their children, and their ensuing preoccupation with the whereabouts and well-being of their children, many of the parents were denied any meaningful opportunity to participate in the credible fear process, in violation of the statutory right to apply for asylum.⁵⁵

Results of the Post-Reunification Survey.⁵⁶

In the weeks leading up to the court's reunification deadline of July 26, 2018, hundreds of parents were reunified with their children and released on parole or through an alternatives to detention program. However, many parents, especially those with final orders of removal, were instead reunified with their children and sent to the South Texas Family Residential Center, a family detention center in Dilley, Texas. During the first three weeks of August 2018, while the parents remained in confinement, staff and

 $^{^{\}rm 52}$ Declaration of D.P., August 5, 2018, on file with authors.

⁵³ Declaration of C.S., August 6, 2018, on file with authors.

⁵⁴ Declaration of M.F., August 5, 2018, on file with authors.

⁵⁵ See, e.g., Campos, 43 F.3d at 1288. The ways in which the coercive environment affected asylum-seekers' ability to meaningfully participate in the asylum process is particularly troubling given the more than 366 parents who were deported prior to the *Ms. L.*

court's June 26, 2018 order halting the removal of separated parents.

56 The completed surveys are on file with the authors of this complaint, but to protect the mothers' privacy, the completed surveys have not been included. All quotations included in the "Results of the Post-Reunification Survey" section provided below come from mothers' responses to the question, "Is there anything else that you would like to share?"

volunteers asked 76 mothers to complete a survey regarding their experiences in detention to determine whether they had been subject to coercion.

The responses of the 76 mothers who were interviewed for the purposes of this survey confirmed that widespread coercion took place at the hands of CBP and ICE officials in their respective facilities, preventing parents from making voluntary and/or informed choices about their legal cases or about their custody rights over their children.

Of the 76 mothers surveyed, 58 indicated that they did not understand the governmentissued documents presented to them regarding their choices for reunification with their children.⁵⁷ Furthermore, at least 12 of the mothers are indigenous language speakers.⁵⁸ In 26 cases, mothers were presented with an Election Form that had a pre-selected option to sign regarding their parental rights. While 59 mothers indicated that the option to be reunited with their child prior to deportation was selected on their Election Form, 66 mothers said that if given the choice again, they would choose to stay with their child in the U.S. while fighting their case. All of these mothers indicated that the change in their choice is because they now have a better understanding of their legal rights. Of the 76 mothers, at least 58 did not have an opportunity to speak with their child before being presented with any version of the Election Form that would be used to determine their legal rights over their children, and 23 of the mothers indicated that a version of the Election Form presented to them did not provide an option to consult with an attorney.

Even more troubling, at least 51 of the 76 mothers indicated that they felt pressured or intimidated prior to signing their Election Form. For example, 25 of the mothers indicated they were yelled at; 34 indicated they were not given time to think before signing; and 13 reported that they were threatened with punishment in detention if they did not sign.⁵⁹ Most disturbing of all, 23 mothers reported they were threatened that if they did not sign, their children would be adopted or they would never be able to see their children again. 60 Of the 76 mothers surveyed, 48 were presented with the form two or more times, with four mothers being presented with the form as many as five times. Only seven of the 76 mothers indicated they were allowed to ask questions regarding the form's contents before signing.

It is difficult to cross reference the mothers' accounts with the actual Election Forms presented to them because only 14 of the 76 mothers reported being provided with

⁵⁷ On behalf of an illiterate mother surveyed, a staff member wrote for her, "I don't know how to read and write but it didn't matter to the officials and they took my fingerprints without giving me an explanation about the document."

⁵⁸ For the mothers surveyed who speak rare languages as their primary language, such as Mam or Quiche, where interpreters were not available, fellow survey respondents and their children helped translate.

59 One mother indicated, "They told me that if I didn't sign, they'd leave us detained for two years and that they would punish us.

[[]So] out of fear I signed and I did not understand because I don't speak much Spanish. They treated us like dogs."

60 One mother wrote, "They required us, one-by-one, to sign. They said that they would deport us alone or we would not see our kids and if I did not sign they said that my son would be adopted." Another mother indicated that she was given bad legal advice by an immigration official while detained in Laredo, writing, "The chief deportation officer told me that if I asked for asylum I would be imprisoned for nine months to a year and ultimately they wouldn't give it to me. I asked what would happen to my child and she said he would be detained and then put up for adoption. She told me that what I could do was to ask to be deported in my [asylum] interview so that I would not lose my child, and if my cousin asked for the child, he would lose his residency, job, house, and they would deport him to his country of origin."

some copies of forms they had signed; 62 of the 76 mothers were not provided any copies of the forms they had signed.

INDIVIDUAL COMPLAINTS: EXAMPLES OF EXPLICIT COERCION AND COERCIVE BEHAVIOR TOWARDS PARENTS SEPARATED FROM THEIR CHILDREN

The cases below represent only a sample of the cases in which separated families reported that they were subject to coercion by CBP and ICE officers.⁶¹ This coercion was both explicit, in which parents were forced by government officials to take actions contrary to their best interest, and more subtle, inherent in the behaviors and actions of CBP or ICE officers, or those with whom they have subcontracted duties, such as guards. The pervasive nature of this coercive behavior underscores the many ways in which separated families were—and possibly continue to be—subject to agency action that violates policies, laws, and regulations.⁶²

1. Case of D.P., 63 Honduras, who was separated from her 9-year-old daughter for 47 days, threatened verbally and physically, and placed in retaliatory solitary confinement for ten days without sufficient food or water.

D.P. and her 9-year-old daughter entered the United States and immediately expressed a fear of return to Honduras, their home country, to a Border Patrol officer. She was detained and sent to the *hielera* along with her daughter.

Shortly after her arrival, CBP officers called D.P. into a room to interview her, without her daughter. A male CBP official interviewed her and then told her to sign some paperwork that she believed were deportation papers. She refused to do so because she was afraid to return to her country. The officer then threatened her and told her that if she did not sign the papers, "I would never see my child again because she was going to be adopted." D.P. began crying, but again refused to sign any papers despite the officer's threats.

When D.P. returned from the interview, her daughter was missing. CBP officers had taken her away. Hysterical, D.P. began "crying like crazy and yelling that I wanted my daughter." In response, CBP officers laughed at her and told her that "if I did not quiet down they would put me in a cell by myself."

D.P. was detained in the *hielera* for about three days. During this time, she reported that she cried constantly, did not eat, and could not sleep. Officers repeatedly yelled at her

⁶¹ The authors note that, while this complaint focuses specifically on ways in which ICE and CBP officers subject parents to coercion, there is substantial evidence that children were also the subjects of coercion, abuse, and duress while in ICE and CBP custody, as well as while in the custody of the Office of Refugee Resettlement. While this complaint only details such coercion in passing, the authors recommend that CRCL and OIG conduct an independent review of the ways in which the rights of children were violated during the family separation process.

⁶² In addition, the stories detailed below show the ways in which trauma has affected separated parents. Following the survey taken at Dilley, many mothers were referred for psychological evaluations by trained psychologists; all but one mother was diagnosed with Post-traumatic Stress Disorder.

⁶³ Only initials are used in the public version of this complaint.

to stop crying and to stop asking for her daughter. Her time in the *hielera* was also traumatic because CBP officers refused to provide her with sanitary products even though she was menstruating. "I was also hemorrhaging and bleeding through my pants and was not provided with clothing or feminine hygiene products. I was ashamed and degraded."

D.P. was eventually transferred to the Port Isabel Detention Center, after pleading guilty to improper entry. While detained at Port Isabel, D.P. was repeatedly subject to coercion and abuse. She states that the guards "treated us [mothers] as less than human." D.P. received her credible fear interview more than two weeks after arriving at Port Isabel. The interview was on the phone with an Asylum Officer and an interpreter. She explained how being separated from her child and subjected to the coercive environment at Port Isabel severely compromised her ability to meaningfully participate in the process:

During the interview ... I could not control my emotions, I was only thinking about my daughter. I did not even realize when the officer asked me different questions related to my asylum case. The asylum officer asked me why I left, and I said because I was threatened and beaten, and that is why I left. And when the asylum officer in response required [me] to provide more details, I started to cry. Because I cried a lot, the asylum officer raised his voice again. Instead of providing more details, I started asking where my child was. In response, he said that if I wanted to know where my daughter was, he recommended me to watch the news. I told him I did not have any access to the news. And that is how the interview was ended.

The Asylum Officer found that she did not have a credible fear of persecution. After she was informed of the decision, she was called in to interview with an ICE officer that people called "The Deporter." He demanded that she sign deportation papers and yelled at her when she refused. He became so hostile that she was terrified he would strike her. He physically intimidated her, stood over her, and became red in the face as he demanded she sign the papers.

D.P. had another interaction with this officer in which she refused to sign a voluntary departure form. In response, the officer stated, "Fine, stay in detention for a year waiting for your daughter." He then got very close to her, in a way that made her feel as if he was trying to "physically overwhelm" her, particularly because she was alone with him without any visible cameras in the room.

Even worse, D.P. was subjected to solitary confinement and other retaliation by officials at Port Isabel. When some mothers heard that a "White House representative" was going to visit the detention center, she tried to talk to him. Despite guards telling her she was not supposed to talk to this man, she yelled to the representative "to let him know what was going on." As a result, the man came over and spoke to D.P., and she told him her story. After this person left, officials at the jail punished D.P. by throwing her in

solitary confinement for 10 days and subjecting her to starvation and deprivation of basic human needs.

The detention officers punished me and the other mothers who disobeyed and spoke with the representative. I was handcuffed and put in solitary confinement for ten days. I was put in a dark room, so I did not know when it was day or night. I was not given food or water for about three days. After about three days I was given bread... I was handcuffed for five days and had to eat and go to the bathroom in this way. They did not give me toilet paper. I felt desperate and depressed.

D.P. was eventually reunified with her daughter pursuant to the court-ordered reunification process. She continues to suffer both physically and mentally, and her daughter has repeated nightmares due to their traumatic experiences in detention. Both mother and daughter were eventually transferred to the South Texas Family Residential Center in Dilley, Texas.

In early August, an immigration judge vacated the asylum officer's negative credible fear finding, allowing her to pursue asylum in removal proceedings. D.P was later released from detention along with her daughter.

- 2. Case of C.S., Guatemala, who was separated from her 17-year-old and 15-year-old daughters for 55 days and coerced into signing documents with the threat of having her children taken away from her forever.
- C.S. fled Guatemala along with two daughters after their family was subject to threats, including rape and death threats. The family was apprehended by CBP officers near San Luis, Arizona, after turning themselves in to Border Patrol officers and requesting humanitarian protection. CBP officials then separated her from her daughters and took them to a *hielera*, telling her that she was only going to be separated while she was "punished for coming here." She describes being intimidated by CBP officials during her six-day stay in the *hielera*, during which she was not allowed to speak to her children.
- C.S. was eventually transferred to the San Luis Detention Center, then to the Eloy Detention Center, where she was held for approximately seven weeks. She repeatedly tried to contact her children, but was unsuccessful. The extreme duress of being separated from her children appears to have greatly affected her ability to successfully present her case for humanitarian relief. She describes a phone interview with an unknown individual who asked her about her reasons for coming to the United States.

One day, I was told I had a phone call waiting and that it was from my children. My heart was soaring. I could not wait to hear their voices. However, when I picked up the phone, I was told it was for an interview. I asked if it was an interview with a social worker or to speak with my children. I had no idea that this was an important conversation that affected my immigration case. The man on the phone started asking questions about why I was there, but I kept asking

about my daughters. He told me I would be able to speak with them after. But my mind was totally gone. I was only able to think about my daughters. I had barely eaten or had anything to drink for a long time because of the stress.

Several days later, an ICE official forced C.S. to sign a form without telling her what she was signing and refusing to inform her of the form's purpose despite her repeated requests.

A few days later I was called to speak with ICE. An immigration officer told me to sign a paper if I wanted to see my daughters again. When I asked him what the paper was for he hid it behind his back and said, "It doesn't matter what it says. You are going to sign it anyway." He told me I would never speak to my daughters again if I did not sign it. He told me that because I was not from this country this was not his problem. He just told me over and over that I had to sign it or I would be deported without my daughters and I would never see them again. I bet ICE treats their dogs better than they treated me. Finally, I signed the paper. When I did, the officials let me speak with my daughters.

C.S. was also subject to retaliation after a visit from attorneys. She describes attending a presentation from legal visitors who gave her a "piece of paper telling us that we had rights, and that a lawsuit had been filed to demand that we get our children back." She writes that "[a]fter this, ICE was furious," and that mothers who kept that piece of paper were retaliated against.

The guards turned off our televisions and unplugged the microwave. They didn't let us go outside. But we held on to the fact that the visitors had told us about the national protests. I finally felt like I was not alone.⁶⁴

- C.S. was eventually reunited with her daughters through the court-mandated reunification process. ICE officers initially fit her with an ankle monitor and issued release papers. Soon after, she and her daughters were transferred to a family detention center in Dilley, where they remain.
 - 3. Case of M.H., Honduras, who was separated from her 13-year-old son for 62 days and subject to verbal abuse and coercion.

M.H. fled Honduras along with her 13-year-old son after receiving death threats. After entering the United States, she was apprehended by immigration officers who told her almost immediately that she would be separated from her son. She was kept separate from him for the next nine days.

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⁶⁴ C.S. explains the retaliation she endured after visiting with attorneys: "After this, ICE was furious. They told us that what 'these visitors' had told us was a lie and that they didn't have to do anything to give us our children. They punished us for having the paper explaining our rights. The guards turned off our televisions and unplugged the microwave. They didn't let us go outside. But we held on to the fact that the visitors had told us about the national protests. I finally felt like I was not alone."

When officers came to take M.H. to federal court to face charges of improper entry, they told her that she would never see her child again. An officer told her, "You are going to be deported, and your son is going to be placed for adoption." She became terrified that her son was going to be put up for adoption, especially after an official repeated that threat after she returned from court.

M.H. was eventually taken to a detention center in Laredo for 13 days, and then was transferred to the La Salle Detention Center in Louisiana. While there, she describes being so despondent that she stopped eating. She was not permitted to go outside, was given no information about her son, and reports that she cried constantly. One guard became so angry at her constant tears that she would bang on the cell window and shout "Shut up you *hija de la madre*" (or son of a bitch). M.H. had her credible fear interview during this period. She was unable to concentrate on the interview because of the stress of being separated from her child.

Eventually, M.H. was transferred to the South Texas Detention Center in Pearsall, Texas. At some point while she was there, her son was rushed to the hospital from the shelter he was being held in and was given an emergency appendectomy. No official informed her that her son had undergone emergency surgery. M.H. did not find out until three days after the fact, when a family member in the United States in contact with her son informed her about the surgery. She was afforded absolutely no opportunity to consent to her son's medical care.

M.H. was subject to at least one more instance of coercion by ICE officers. While detained in Pearsall, ICE officers called her in for a meeting. She describes what happened next:

ICE called me and said I was going to be deported. I told them, "My son has been operated on and I am not going anywhere without him." I told them I was not going to leave without my son, even if they killed me. An immigration official told me to sign my deportation paper. When I asked to read it, he said "No, you will sign it regardless," and he covered up the text with his hand so that I could not read it. He told me I had to sign on the line no matter what it said. I refused to sign it, because I had to be with my son again.

M.H. was eventually reunified with her son through the court-ordered reunification process. She reports that he wakes up frequently throughout the night with nightmares.

4. Case of C.F., Guatemala, who was separated for over one month from her six-year-old daughter who had recently had heart surgery, and who contemplated suicide due to extreme duress while in detention.

C.F. fled Guatemala along with her six-year-old daughter. She presented herself and her daughter at the Port of Entry between San Luis Río Colorado, Mexico, and San

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⁶⁵ Literally translates as "daughter of the mother," and colloquially translates as "son of a bitch."

The Use of Coercion by U.S. DHS Officials Against Parents Who Were Forcibly Separated From Their Children American Immigration Council and AILA | August 23, 2018

Luis, Arizona, and expressed a fear of returning to Guatemala. CBP officials then took them to a detention center where there were "many women with children."

Despite having legally presented herself at a Port of Entry and asked for asylum, CBP officials told her that her 6-year-old daughter would be taken from her and she was going to prison. When she asked them why, CBP officers told her that she "didn't have a right to speak" and that she "had stepped into a country that was not mine." None of this was true; she had committed no crime and was not prosecuted. Nevertheless, C.F. was separated from her daughter.⁶⁶

C.F. describes a traumatic and dangerous separation process for her own daughter and for the other mothers and children detained with her. Because her daughter had recently had heart surgery, she was terrified that high levels of stress could prove physically dangerous to her daughter. She begged CBP officers not to take her daughter, but CBP still separated them.

The other children were so terrified of being taken from their mothers that they grabbed onto their shirts in fear and would not let go. The immigration officials had to drag them away, putting the children in headlocks and pulling them away from their mothers. I knew that my daughter would be in danger if she were treated that way, so I tried to keep her calm. These were two days of terror.

After C.F. was separated from her daughter, she was transferred to the Irwin Detention Center in Irwin, Georgia. While there, she describes being "sick with fear and sadness." She begged guards and ICE officers to connect her with her daughter. After repeated requests, ICE officers became so frustrated that they yelled at her and told her, "That's enough. Stop it. We are not going to explain this to you." The situation became so desperate that she contemplated suicide and told a friend that she was going to throw herself from the second floor of the detention center. However, thoughts of her daughter prevented her from going through with it.

After more than a month in detention, C.F. was permitted to talk to her daughter. Her daughter described difficult and painful conditions where she was being held, including an older girl who hit her "all the time," and that people would cover her mouth when she cried to stop her.

C.F. was eventually reunited her daughter through the court ordered reunification process. Following reunification, they were both detained at the South Texas Family Residential Center in Dilley, Texas, along with her daughter. Her daughter now suffers

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records show, L.A. Times (Jul 1, 2018).

⁶⁶ On June 18, 2018, DHS Secretary Nielsen stated at a White House press briefing that "D.H.S. is not separating families legitimately seeking asylum at ports of entry." *Kirtsjen Nielsen Addresses Families Separation at Border: Full Transcript*, NY Times (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html. Despite DHS's repeated claims that families were not separated if they arrived at a port of entry, the *Ms. L.* court found that "the practice of family separation ... has resulted in the casual, if not deliberate, separation of families that lawfully present at the port of entry, not just those who cross into the country illegally." *Ms. L*, 310 F. Supp. at 1144; see also Paloma Esquivel & Brittny Mejia, *The Trump administration says it's a 'myth' that families that ask for asylum at ports of entry are separated. It happens frequently*,

repeated nightmares and often "wakes up crying and tells me that she dreams the men in green uniforms are taking me away from her." While there, an asylum officers found that she had a credible fear of persecution. She was then released from detention along with her daughter, and will seek asylum in non-detained removal proceedings.

5. Case of M.F., Guatemala, who was separated from her 14-year-old son for 60 days and was unable to meaningfully participate in the asylum process due to duress.

M.F. is a Guatemalan woman who fled her home country along with her 14-year-old son, who had been subjected to serious threats. After they were apprehended by CBP, they were taken to the *hielera* and immediately separated from each other and put in different cells. M.F. could see her son from her cell, but could not communicate with him. While she was detained in the *hielera*, CBP officers screamed at her and told her that she would never see her child again. She also observed her son's face turning blue from cold and his lips becoming so dry that they came close to bleeding. On her second day in the *hielera*, M.F. was taken to federal court to face criminal charges of improper entry. Upon her return, her son was gone. She describes what happened next:

When I walked back to the cell, I walked past the cell where my son was being held, and he was no longer there. I became frantic and asked the guard where he went. The guard started screaming and told me that the president was going to take away my child... It felt like an arrow went through my heart.

M.F. was eventually transferred to the Eloy Detention Center. Two days after she arrived, an ICE official presented her with a paper with her son's name on it and told her to sign it. ICE officials did not explain what she was signing. She signed it immediately because she thought it would help her reunite with her son. While in Eloy, M.F. was eventually given a credible fear interview, but could only think about her son.

I asked the Asylum Officer several times about my son, but she explained that was not something she could help with and she could not control what happened. My mind could not focus on anything other than the well-being of my son. As a result of being separated, I could not focus on the questions. I also was concerned that anything I said would end up hurting my son, so I did not explain that it was MS-13 that was after him.

M.F. was found not to have a credible fear of persecution, a decision she is currently seeking to overturn. She was eventually reunited with her son and transferred to the South Texas Family Residential Center in Dilley, Texas. Her son is "extremely traumatized" by the separation, is always nervous now, and appears "completely different" than before they were separated. In early August, an immigration judge vacated the asylum officer's finding and determined that M.F.'s fear of persecution was credible. She was later released from detention along with her daughter and is seeking asylum.

6. Case of J.H., Guatemala, who was separated from her 7-year-old son for 53 days and forced to sleep on a concrete floor for 12 days.

J.H. is a Guatemalan woman who fled her home country with her 7-year-old son to seek asylum in the United States. After crossing the border, they were apprehended and detained. She was sent to a *hielera*, where she was held for three days. When CBP officials separated from her child at the *hielera*, the officials lied to her and told her that her son would only be taken away for a single day. She described the traumatic experience in which officials falsely promised her 7-year-old son would be only removed from her for a short period of time:

The guard said, "Grab your child, don't make this harder than it is, your child needs to go to the bus." My son started to cry and I began to console him and told him this was only for a short period of time and that I loved him very much. In that moment, I felt as if I was going to die. I could not believe that they were taking my child away. ... I said I was scared and didn't want to leave my son, but they promised to give him back the next day, so I tried to be brave and allowed it to happen. They assured me they would return him the next day. My son cried and cried and begged me not to leave him or separate from him. They took me to a bus and told me not to look back at him.

Instead of being reunited with her son, J.H. was taken to a different short-term custody detention, that she called the "dog pound." She was held there for eight days, during which time immigration officials did not permit her to brush her teeth and denied her the ability to shower, despite the fact that she was menstruating. Because of overcrowding, she was forced to sleep on the floor in the area designated as a bathroom. The entire cell had a "horrible stench."

While detained in the "dog pound," J.H. and other mothers were subject to repeated verbal abuse. She frequently broke down in tears as she begged for information about her son, but immigration officials just made fun of her and called her and the other women "crazy women." She notes that "[t]hey would tell us we were annoying old women and that nobody wanted us here, but they were thankful because of us they had a job." She felt treated less than human.

J.H. was eventually transferred to the La Salle detention center, where she was again subject to verbal abuse. When she repeatedly asked guards for information about her son, the guards became frustrated, told her to "stop talking," "don't you talk enough," and eventually called her a "motherfucker."

Like many of the other separated parents, J.H.'s asylum case was negatively affected by the trauma of separation. She had been separated from her son for 30 days at the time of the interview, and she describes being "so upset" that she "could not concentrate, all I could think about was my son." After the asylum officer determined that she did not have a credible fear of persecution, she considered appealing the

decision, but she decided not to because she believed doing so would mean that she would never get her son back.

J.H. was eventually reunited with her son and transferred to the South Texas Family Residential Center in Dilley, Texas. After receiving legal assistance for the first time, she filed an appeal of the negative credible fear determination. In early August, an immigration judge vacated the asylum officer's decision and determined that J.H. had a credible fear of persecution. She was subsequently released from detention.

7. Case of W.L., Honduras, who remains separated from his 17-year-old son after 100 days, and was forced to sign documents without any explanation of what they said.

W.L. fled his home country of Honduras with his 17-year-old son to seek asylum in the United States. They were apprehended after crossing the border and brought to a CBP processing facility near McAllen, Texas, where W.L. expressed a fear of return. The next day, he was separated from his son and transferred to another facility. He said, "The security guard told me to hug my son now, because we will be separated, and we won't know when we will see each other again." W.L. was then transferred to the Rio Grande Detention Center, and then after two weeks to the Stewart Detention Center in Lumpkin, Georgia. While detained at Stewart, he described the coercive environment and the duress that he suffered:

The conditions at Stewart were much worse than in the places I had been before. The guards were very aggressive toward the inmates...One time I saw a detainee on his knees in front of a guard begging for forgiveness. I felt scared and tormented there...

About 15 to 18 days into his detention at Stewart, he was called in by an official to sign documents that were in English, although W.L. only speaks Spanish. He recalls:

The official had a paper with him and shoved a pen in my hand, and indicated for me to sign it. I did not know what this paper was and was not given any explanation. I signed the paper because I felt I had no choice, no control. The man with the paper seemed angry... After I signed the paper, the man took it and walked away.

About eight days later, W.L. was transferred again to a facility in Fulston, Georgia, then to one in South Texas, and then he was transferred again—for the seventh time within about two months—to Port Isabel. Despite expressing fear of return to his home country upon apprehension, W.L. still has not been provided with a credible fear interview or any other interview with any immigration officer. W.L. indicates, "Last week, a visiting attorney told me that the government thinks that I withdrew my fear claim. I did not know about this before last week."

Accordingly, W.L. has since submitted a request for a credible fear interview and remains in detention. He has not been reunited with his son, who has since turned 18 and has been released from ORR custody to live with a sponsor.

8. Case of L.A., Guatemala, who was separated from her 10-year-old daughter for 29 days and subject to duress and coercion.

L.A. is a Guatemalan woman who fled her home country along with her 10-year-old daughter to seek asylum. She was apprehended by the Border Patrol after crossing the border with her daughter. While detained in the *hielera*, L.A. was subject to verbal abuse from officers who frequently yelled at her. One officer told her that immigrants were coming to this country to "take up their resources" and "live off of their tax money."

The day she was detained, officials told her that they were going to take away her daughter. When she protested, they told her it would only be for a brief period of time while she was in court. After two days, officers came to her cell to take her daughter from her. Her daughter "began to weep uncontrollably and began to beg me not to let them take her." The immigration officials then physically dragged L.A.'s 10-year-old daughter away from her as she wept, and was taken to another cell. This caused L.A. "extreme emotional distress."

Despite officials telling her that she would be reunited with her daughter after she returned from court, when L.A. came back from court two days later, her daughter was nowhere to be found. An officer falsely told her that she would be reunited with her daughter after being transferred to a different detention center.

Once L.A. was eventually transferred to a different detention center, she continued to worry about the fate of her daughter. Within six days after having her daughter forcibly taken from her, she had a credible fear interview. She states that she was "not able to fully tell my story because all I could think about was where my daughter was and if she was okay." After L.A. was found not to have a credible fear of persecution, she chose not to appeal the denial. She describes the ways in which family separation affected her decision not to pursue an appeal:

Two days after my interview, I was told that I had failed. I took the opportunity while talking with an immigration officer to ask once again where my daughter was, and the officer said, "I don't have that information, and we can't do anything about it." I told the officer I did not want to appeal my case so that I could see my daughter as soon as possible. I thought this would bring my daughter back to me sooner.

L.A. was eventually reunited with her daughter and is currently detained in the South Texas Family Residential Center in Dilley, Texas. Although she and her daughter are finally reunified, L.A. reports being unable to sleep or eat, suffers from constant headaches, and experiences other residual emotional and physical problems from detention and separation.⁶⁷

L.A. was later released from detention after filing a new appeal of the asylum officer's decision. In early August, an immigration judge vacated the negative credible fear finding. L.A. was released from detention soon after and will pursue her asylum case in removal proceedings.

 Case of Y.R., El Salvador, who was separated from her 15-year-old daughter for about 60 days, subjected to verbal abuse and threats, and was unable to focus on anything other than her daughter during the credible fear interview.

Y.R. is a Salvadoran woman who fled her home country along with her 15-year-old daughter. After she was apprehended crossing the border, they were taken a facility she called a *perrera* (or dog pound), and she was separated from her daughter and placed in a different. The first day she was detained there, during an interview, a CBP official used abusive language and threats and told her that she would be separated from her daughter and that her daughter would be adopted in the United States:

The officer asked me how old my daughter was and when I told them she is 15, he began yelling at me, [asking] why was I lying. He said that she is older than that and that they would investigate it. The officer continued interrogating me. When I told him I was from El Salvador, he yelled at me that that all people from El Salvador are the biggest liars, that we are worse than those from Guatemala or Honduras, and he again threatened that my child will be put up for adoption.

Y.R. was later transferred to the Laredo Detention Center and two weeks after that to the La Salle Detention Center. For the first month of detention, she received no information about her daughter. She became so despondent that she could not sleep at night and mostly stopped eating. She said that she often "felt dead" and "felt like I could not breathe correctly" because of conditions in the detention center and the uncertainty about her daughter.

Like many of the other mothers, when Y.R. was given a credible fear interview, she was given no notice. She was just placed in a room and handed a phone. Prior to the interview she "had not slept for a full night in a month, had not been eating ... felt depressed... [and] could not concentrate at all on what was being asked of me. I could only think of my daughter."

Y.R. was eventually reunited with her daughter more than a month later. She says that her experience "was hell." Following reunification, she was detained, along with her

⁶⁷ L.A. states: "Being separated from my daughter and knowing nothing about her whereabouts has caused extreme trauma for both me and my daughter. My daughter is so desperate to get out, she always asks me when we're going to be able to leave this center. This trauma has begun to impact our physical health, we are unable to sleep or eat and I constantly have a headache."

daughter, in the South Texas Family Residential Center in Dilley, Texas. In early August, an immigration judge vacated the asylum officer's finding and determined that Y.R. had a credible fear of persecution, allowing her asylum claim to move forward. Both Y.R. and her daughter remain detained.

10. Case of H.G.A., Honduras, who has been separated from his 17-year-old son for over 76 days and is subject to coercion.

`H.G.A., a national of Honduras, fled his home country after MS-13 threatened to kill him and his 17-year-old son if his son refused to join the gang. He was apprehended by the Border Patrol and indicated that he wished to seek asylum. CBP officials separated him from his son at the *hielera* and detained him for over a month, during which time he spoke to his son only on three occasions. H.G.A. suffers from what he considers "serious vision problems" that prevent him from being able to read, and he says that, "Because of this the only way that I am confident in what a document says is if someone I trust reads the document to me."

While in detention, H.G.A. was presented twice with forms that immigration officials told him would reunite him with his son. Although the officers read him the form due to his poor vision, he refused to sign because they refused him the opportunity to speak with his son about the form's contents before signing and because he did not trust the officials. "However," both times, he says, "I made sure to tell the officials that I wanted to be reunified."

Nonetheless, despite his refusal to sign any documents, H.G.A. was included in a list of individuals that the government provided during litigation alleging that he relinquished his custody rights and sought to be deported without his son.⁶⁸

At no point in the process was H.G.A. told he could have a lawyer present when considering signing the forms presented to him, and upon learning he was entitled to consult with an attorney, he said, "I do not want to sign anything from the government without a lawyer who can tell me what the form is."

H.G.A. remains detained at the El Paso Processing Center and has not been reunited with his son. In mid-August, an immigration judge overturned a negative credible fear finding and permitted H.G.A.'s claim for asylum to proceed. He is currently in removal proceedings in El Paso.

11. Case of T.C., Guatemala, who was separated from her 17-year-old daughter, who speaks only limited Spanish and was threatened with two years of jail if she refused to sign a form affecting her rights to reunification.

T.C. is a Guatemalan woman who fled her home country to seek asylum in the United States. She primarily speaks Q'eqchi' and only speaks limited Spanish. She speaks no

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⁶⁸ See Declaration of Susanne Gilliam, Dkt. 153 at Exhibit 52, ¶5, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018).

English and can neither read nor write. CBP officials separated her from her 17-year-old daughter after they crossed the border together. Possibly due to her limited Spanish, neither ICE nor CBP officers have ever given her the opportunity to apply for asylum, despite her fear of returning to her home country.

While detained in the El Paso area, an ICE officer called T.C. into a room and presented her with the Election Form, which was written entirely in English. The ICE officer told her in Spanish that she had to sign the form or else they would put her daughter up for adoption. She did not understand what was happening and so was hesitant at first. ICE officers then told her that if she didn't sign, she would be punished, and that she would be locked up in a jail for two years without her daughter. Out of fear, and afraid that she would never see her daughter again, she signed the form. She describes feeling that she was treated like a dog.

Due to language barriers, T.C. was totally unaware of the contents of the form that ICE officers made her sign. However, unlike many parents, she was provided a copy of the form. Volunteers at the Dilley Pro Bono Project confirmed that it a copy of the Election Form. Until the form was explained to her, she had no idea what she had signed.

T.C. was reunited with her daughter and eventually transferred to the South Texas Family Residential Center in Dilley, Texas. Since being transferred to Dilley, she has requested a credible fear interview with ICE officers on seven different occasions. She has yet to receive one. She remains detained, along with her daughter.

12. Case of A.E., Guatemala, who was separated from her 5-year-old son for 32 days and threatened with solitary confinement and other coercion, which impacted how she responded during credible fear interview.

A.E. fled Guatemala along with her 5-year-old son to seek asylum in the United States. They were apprehended near McAllen, Texas, and taken to the *hielera*. A.E. speaks Mam as her first language and is also able to speak Spanish. When she arrived at the facility, a CBP officer told her that her child would be taken from her while she went to court the following Monday. Her 5-year-old son was traumatized by this experience, shouting "Don't leave me *mami*. Don't leave me with immigration. Why are you letting them take me?! Why are you leaving me?" Because she became distraught, officials tried to reassure her, and told her that she would be reunited with her son the day after court. This did not happen.

Following a court proceeding, A.E. was transferred to the Port Isabel Detention Center. Disturbingly, she reports that guards at Port Isabel frequently threatened solitary confinement for mothers who were reacting to the trauma of family separation. A.E. reports that she had lost all appetite due to the stress of her missing son and did not eat. She also cried frequently. In response, guards threatened her and other mothers with solitary confinement.

They said they would take us to *El Pozo* or "the well" as punishment if we kept crying about our children. ... They said I would be punished because I refused to eat in the mornings. ... They would tell me that they were going to also put me in *El Pozo*. I did not know what that was. The women told me it was an ice cold room that was dark with no windows.

Like many other mothers, the coercive environment created by family separation affected her credible fear interview. A.E. describes arriving at the interview after days in which she had not eaten or slept well due to worry. "I could not concentrate on anything else [other than my son] because I was extremely concerned about my son and distraught from being separated from him."

During the family reunification process, ICE officers did not adequately explain her rights and coerced her into choosing an option on the Election Form without explaining it to her.

An officer approached me and said, "Sign here [and] you will get your child back if you return to your country." I was so desperate to know the whereabouts of my son and finally hold him in my arms again that I signed for both of us to be reunited even if it meant going back to Guatemala.

A.E. was eventually reunified with her son and is currently detained at the South Texas Family Residential Center in Dilley, Texas. She has appeared in court five times seeking to overturn the asylum officer's finding that she did not have a credible fear of persecution, but has been unable to present her case yet because of difficulties in obtaining a Mam interpreter.

13. Case of A.R., Honduras, who was separated from her 17-year-old daughter for over 35 days and subject to coercion and duress.

A.R. fled Honduras along with an adult daughter, her 17-year-old daughter, and her 4-year-old blind granddaughter after being subject to threats from gangs. They were apprehended after crossing the border near El Paso, Texas, after which her adult daughter and her granddaughter were separated from her and taken to a different location. She was detained along with her younger daughter for six days in the *hielera*.

A.R. was repeatedly yelled at by CBP officers during her time in the *hielera*, including officers taunting her and shouting, "Why did you come here? What are you doing here? You came to a country that is not yours, and now look at you." She was forced to sleep on the concrete floor of the *hielera* for six days, after which CBP officers separated her from her daughter. When her daughter grabbed onto her out of fear and would not let go, CBP officers yelled at her until she let go.

A.R. was then sent to federal jail and prosecuted for illegal entry. After a week in jail, she was transferred to the West Texas Detention Facility in Sierra Blanca, Texas. The

trauma of being separated from her daughters and subject to abuse and duress left her in an almost catatonic state:

While I was detained in Sierra Blanca my mind went completely blank. Even when I tried to pray, the words of the songs I have sung my whole life would not come to me. I feel like my mind is just beginning to come back.

A.R. was eventually reunited with her 17-year-old daughter through the court-ordered reunification process.

CONCLUSION

The case examples above demonstrate the disturbing ways in which ICE and CBP officers explicitly coerced separated parents, and through abusive tactics and deplorable conditions of confinement created a coercive environment that prevented these parents from meaningfully exercising their rights. Coercive tactics employed against a vulnerable population raises significant legal concerns and threatens the fundamental due process, statutory, and regulatory rights of parents who were separated from their children.

We urge your office to investigate and clarify DHS policy on the use of coercive tactics against parents, and to ensure that ICE and CBP officers are properly trained on the fundamental due process protections to which migrants are entitled. We also urge the following corrective actions:

- 1. DHS should end any policy that results in the separation of parents from their children, absent truly exceptional circumstances, and require that family unity be the determinative factor in charging and detention decisions.
- 2. DHS should establish a clear policy requiring that all parents be reunified with their child before being asked to relinquish any legal rights or claims to legal relief. The policy should also require that parents be given the opportunity to confidentially discuss their options with an attorney, their child, and the child's attorney, if applicable. Upon the parent's request, legal counsel or a representative from a legal assistance organization must be present at the time such waiver or relinquishment of rights is made
- 3. DHS should announce a clear policy forbidding the use of any tactics that have the effect of pressuring an individual to relinquish or make any decisions affecting their legal case.
- 4. DHS should investigate all reports of abuse and coercion against parents and their children and discipline any officer found to have violated parent's rights or any applicable provision of law, regulation, or policy.
- 5. DHS should ensure that all parents who were separated from their children are given a meaningful opportunity to apply for asylum. DHS should immediately release all of these parents from detention (including the use of an alternatives to detention program when necessary) and permit them to present their claim for relief before an Immigration Judge in a non-detained setting following

reunification with their children. DHS should also grant a new credible fear interview to any such parents who were found not to have a credible fear of return. Further, DHS should file a motion to reopen any removal proceedings that resulted in a final order of removal during the period of separation.

- 6. DHS should ensure that rare and indigenous language speakers are provided interpretation in every interaction with a DHS official. DHS should ensure that all immigration forms are presented in a language the individual can understand, and that all individuals be provided with a copy of the signed form.
- 7. DHS should investigate widespread violations of CBP's National Standards on Transportation, Escort, Detention, and Search against parents and children held in short-term detention facilities, including the failure to provide basic necessities such as feminine hygiene products, the failure to provide nutritionally-appropriate meals to juveniles, and the failure to provide edible food.
- 8. DHS should immediately establish a clear policy prohibiting the use of solitary confinement or disciplinary segregation against any detainee. Solitary confinement has been widely condemned by mental health experts and has no place in a civil confinement setting. DHS should investigate each incident of alleged use of solitary confinement against a parent or other individual.
- 9. DHS should investigate and return on a grant of humanitarian parole to the United States any parent who was separated from their child and deported to their home country without being allowed to reunify with their child or meaningfully participate in the asylum process.

Thank you in advance for your time and consideration. If you have any questions or require additional information, please contact Katie Shepherd, National Advocacy Counsel for the Immigration Justice Campaign, at kshepherd@immcouncil.org or (202) 507-7511 or Greg Chen Director of Government Relations at AILA at gchen@aila.org or (202) 507-7615.

American Immigration Council

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Recent Developments in Immigration Law

The Legal Aid Society

Bypassing Congress

- Attorney General opinions
- EOIR policies
- USCIS policies
- ICE policies
- Consular policies
- Family separation

Attorney General opinions

- Certification of decisions
 - 8 C.F.R. § 1003.1(h)(1)(i)
- Asylum and domestic violence
 - Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)
- Administrative closure
 - Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)
 - Congressional letter to DHS and Sessions (9-13-2018)
- Continuances
 - Matter of L-A-B-R, 27 I&N Dec. 405 (A.G. 2018)

EOIR policies

- Immigration judge performance metrics
 - McHenry memo, 04-2018
- Continuances memo
 - **a** OPPM 17-01
- Status docket

USCIS policies

- RFE/NOID memo
 - **PM-602-0163 (07-13-2018)**
- NTA memo
 - **PM-602-0050.1** (06-28-2018)
- Fee waiver denials
- Public charge

ICE policies

- No prosecutorial discretion
- Recalendaring admin closed cases
- Detaining at USCIS interviews
- Detaining at army bases
- Detaining in courthouses
- Videoteleconferencing

Consular policies

- Foreign Affairs Manual changes
 - Public charge
- No rulemaking, public comment period, etc

Family separation

- Zero-tolerance policy
- Family separation
 - Executive order unnecessary
- Flores settlement
 - Policy favoring release of children
 - Detain in least restrictive setting
 - Detain in licensed facility
- n Ms. L v ICE
- Flores regulations



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Practice Alert: Filing DACA Applications in the Wake of Federal Court Rulings

UPDATE FROM AUGUST 17, 2018

On August 17, 2018, the U.S. District Court for the District of Columbia issued an <u>order</u> in <u>NAACP v. Trump</u> that partially stays its original order as to new DACA applications and applications for advance parole, but not as to renewal applications.

This order means that there are no new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below. USCIS will not consider first-time, initial applications or applications for advance parole based on a grant of DACA. It will, however, continue to accept and process renewal DACA applications, as well as initial DACA applications filed by individuals who have previously had DACA.

Previously, the district court held that the government's decision to rescind DACA was unlawful and vacated the termination of the DACA program, requiring the government to accept and process both new and renewal DACA applications, as well as applications for advance parole. The August 17, 2018 order does not change the court's conclusion, but does continue the hold it had placed on its own order, which continued to bar processing advance parole applications and first-time, initial applications, at least temporarily. The Court stated that it "is mindful that continuing the stay in this case will temporarily deprive certain DACA-eligible individuals, and plaintiffs in these cases, of relief to which the Court has concluded they are legally entitled," however that it was "aware of the significant confusion and uncertainty that currently surrounds the status of the DACA program." Additionally, in their August 15, 2018 filing, the plaintiffs had not opposed keeping the stay in place for new applicants. Citing both the potential for additional confusion and the plaintiff's position, the Court agreed to preserve the status quo for the time being.

Additionally, there was a preliminary injunction hearing on August 8, 2018 before U.S. District Court Judge Hanen in a Texas district court. That case, <u>Texas v. Nielsen</u>, is a lawsuit brought by seven states, led by Texas, challenging the legality of the DACA program and requesting a nationwide injunction to block any DACA grants or renewals going forward. A decision on that hearing is still outstanding. We will update this practice alert when there is more information.

UPDATE FROM AUGUST 6, 2018

On August 3, 2018, the U.S. District Court for the District of Columbia issued an <u>order</u> reaffirming its April 24, 2018 ruling that the government's decision to rescind DACA was unlawful and requiring the government to fully restore the DACA program. The court's order is on hold for 20 days, until August 23, 2018, to allow the government time to determine whether it intends to appeal the court's decision and, if so, to seek a stay pending appeal.

Note that there are no new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below. USCIS is still accepting and processing DACA renewal applications for eligible DACA recipients who have previously been approved for DACA, due to two nationwide injunctions issued in California and New York earlier this year. No new or initial applications are being accepted for individuals seeking to apply for DACA for the first time. In light of pending litigation, eligible DACA recipients who would like to renew their DACA, and who should renew given the circumstances in their case, are encouraged to consult with an attorney and submit their DACA renewal applications to USCIS as soon as possible.

Previously, on April 24, 2018, the court held that the government's decision to rescind DACA was unlawful and vacated the termination of the DACA program, requiring the government to accept and process both new and renewal DACA applications. The court stayed its order of vacatur for 90 days to allow the government the opportunity to "better explain its view that DACA is unlawful."

In response to the court's April 24, 2018 order, U.S. Department of Homeland Security (DHS) Secretary Kirstjen Nielsen <u>issued a new memorandum</u> on June 22, 2018, concurring with and declining to disturb the government's September 5, 2017 memorandum that rescinded the DACA program and purporting to offer further explanation for DHS' decision to rescind DACA. Subsequently, in July 2018, the government moved the court to revise its April 24, 2018 order, arguing that Secretary Nielsen's new memorandum demonstrates that DACA's rescission was neither unlawful nor subject to judicial review.

The court's August 3, 2018 order denied the government's motion to reconsider its April 24, 2018 order and upheld the vacatur of DACA's rescission; however, the order does not take effect for 20 days. Thus, the memorandum terminating DACA will be vacated on August 23, 2018, unless the federal government appeals the decision and/or obtains a stay of the court's August 3, 2018, order, pending appeal. If the court's order goes into effect on August 23, the original DACA program will be restored in full and the administration will be required to accept not only DACA renewals, but also new DACA applications as well.

There could be developments in other pending litigation before August 23, 2018, however, that could impact the U.S. District Court for the District of Columbia's August 3, 2018 order, as well as the status of the DACA program. In particular, on August 8, 2018, there will be a preliminary injunction hearing before U.S. District Court Judge Hanen in the U.S. District Court for the Southern District of Texas in the case <u>Texas v. Nielsen</u>, a lawsuit brought by seven states, led by Texas, challenging the legality of the DACA program and requesting a nationwide injunction to block any DACA grants or renewals going forward. Following the August 8th hearing, Judge Hanen will decide whether to issue a preliminary injunction against the DACA program,

potentially ordering USCIS to stop accepting DACA applications, including renewal applications. If Judge Hanen orders USCIS to stop accepting DACA renewal applications and if that order is not "stayed"— or if the courts stay all the orders, including the New York and California injunctions — USCIS could stop accepting DACA renewal applications, potentially as early as mid-August. We will update this practice alert when there is more information.

UPDATE FROM MAY 8, 2018

On May 1, 2018, seven states, led by Texas, <u>filed a lawsuit</u> in a Texas district court challenging the DACA program and requesting a nationwide injunction that would block any DACA grants or renewals moving forward. The case is assigned to Judge Andrew Hanen, who issued the <u>February 16, 2015 injunction</u> blocking the implementation of DAPA and the expansion of DACA. On May 8, 2017, several DACA recipients – represented by MALDEF – filed a motion to intervene as defendants in the lawsuit, which was granted by the court.

There are NO new changes to the DACA program at this time. It is still being implemented on the terms of the prior court rulings discussed below, and we will update this practice alert when there is more information. However, this case opens the possibility of having competing nationwide injunctions: if Judge Hanen were to grant the injunction requested by the plaintiff states, it would contradict the injunctions discussed below that direct the government to temporarily maintain the DACA program. It is unclear what would happen if there were to be competing nationwide injunctions, but it may be more likely that the issue would reach the Supreme Court quickly (though the exact timeline is unclear and would depend on several variables).

Applicants who want to renew their DACA, and who should renew given the circumstances in their case, should submit their renewal applications to USCIS as soon as possible. The case scheduling for this lawsuit is still being determined by the court, but there is a possibility that it will move forward very quickly. The first hearing was initially set for July by the court, but the Plaintiffs requested an accelerated schedule.

UPDATE FROM APRIL 24, 2018

On April 24, 2018, the U.S. District Court for the District of Columbia held that DHS's decision to rescind DACA was "arbitrary and capricious" and vacated the termination of the program. The court held that its decision meant that DHS must accept and process new DACA applications, as well as renewal DACA applications – however, it stayed its order for 90 days to give the government a chance to respond.

The decision of the court differed from previous court rulings because it would affect new applications – i.e. initial applications from individuals who have never applied for DACA previously but who are eligible to apply. However, the court's decision is on hold for 90 days. In

the interim, the government has the chance to better explain its decision to rescind the program. That means that the court may reconsider its decision before the 90 days is over, and before its decision to allow new applications would go into effect.

As a result of the decision being on hold for 90 days, there are NO new changes to the program as of now. It is still being implemented on the terms of the prior court rulings discussed below. We will update this practice alert when there is more information.

UPDATE FROM MARCH 5, 2018

On March 5, 2018, a Maryland district court <u>declined</u> to halt the government's rescission of the DACA program. However, this decision does not affect the other preliminary injunctions currently in effect, which means that USCIS will continue to process renewal applications under the guidelines specified below while those cases go through the regular appellate review process.

The Maryland court did, however, enjoin the government from using information provided through the DACA program for enforcement purposes, stating "[i]n the event that the Government needs to make use of an individual Dreamer's information for national security or some purpose implicating public safety or public interest, the Government may petition the Court for permission to do so on a case-by-case basis with *in camera* review."

UPDATE FROM FEBRUARY 26, 2018

On February 26, 2018, the Supreme Court <u>denied certiorari</u> in <u>DHS v. Regents of the University of California</u>, noting that it "assumed that the Court of Appeals will proceed expeditiously to decide this case." This decision means that, for the time being, USCIS will continue to process renewal applications under the guidelines specified below while the litigation works through the regular appellate review process.

UPDATE FROM FEBRUARY 13, 2018

On February 13, 2018, a New York district court issued a <u>nationwide preliminary injunction</u> ordering the government to maintain the DACA program on the same terms and conditions that existed prior to the September 5, 2017, <u>rescission memo</u>, subject to the same limitations as the January 9, 2018, injunction issued in <u>DHS v. Regents of the University of California</u>. Check AILA's webpages on <u>Batalla Vidal v. Nielsen</u> and <u>New York v. Trump</u> for updates.

UPDATE FROM JANUARY 26, 2018

On January 13, 2018, USCIS <u>updated its website</u> to include guidance on submitting DACA renewal applications in light of the January 9, 2018 <u>district court decision</u>. The guidance includes the following information:

- Clients Who Have Never Had DACA: USCIS will not accept DACA requests from individuals who have not previously been granted DACA. The court decision states that applications from people who have never applied for DACA "need not be processed."
- Clients Who Currently Have DACA: Clients who currently have DACA and are eligible to renew may request renewal by filing Form I-821D, Form I-765, and Form I-765 Worksheet, with the appropriate fee or approved fee exemption request, at the USCIS designated filing location, and in accordance with the form instructions.
- Clients Whose DACA Expired On or After September 5, 2016: Under the policies in effect before the rescission of DACA, applicants whose DACA had expired within the past year were eligible to apply for renewal. USCIS's guidance states that recipients whose previous DACA expired on or after Sept. 5, 2016, may still file a renewal request. USCIS asks applicants to list the date their prior DACA ended in the appropriate box on Part 1 of the Form I-821D.
- Clients Whose DACA Expired Before September 5, 2016: Under the <u>policies</u> in effect before the rescission of DACA, applicants whose DACA had expired more than a year prior to reapplying had to submit initial DACA request applications. USCIS's guidance states that recipients whose previous DACA expired before September 5, 2016 cannot request DACA as a renewal, but may file a new initial DACA request in accordance with the Form I-821D and Form I-765 instructions. These applicants are instructed to list the date their prior DACA expired on Part 1 of the Form I-821D, if available.
- Clients Whose DACA Was Terminated: DACA recipients whose previous DACA was terminated at any point cannot request DACA as a renewal, but may file a new initial DACA request in accordance with the Form I-821D and Form I-765 instructions. These applicants are instructed to list the date their prior DACA was terminated on Part 1 of the Form I-821D, if available.
- Advance Parole: USCIS will not accept or approve advance parole requests from DACA recipients. The court decision had stated that applications for advance parole based on DACA do not have to be processed for the time being.

When Should Clients Submit Their DACA Renewal Applications?

Because the defendants have already appealed the district court's decision to both the Ninth Circuit and the Supreme Court, and given the <u>processing times</u> for DACA applications, practitioners should consider submitting renewal applications for eligible clients as soon as possible.

USCIS has encouraged applicants to apply 150 to 120 days in advance of the expiration of their prior DACA grants. AILA reached out to USCIS for clarification on how it will handle applications that are filed more than 150 days in advance of the expiration date of the underlying DACA grant, and was told that USCIS would accept DACA renewal requests in accordance with the DACA policies in place before DACA was rescinded on September 5, 2017.

Under the <u>instructions for Form I-821D</u> and the <u>DACA FAQs</u> on USCIS's website, DACA applicants were instructed to file for renewal 150 to 120 days in advance of the expiration of their current DACA grant. The form instructions stated that USCIS "may" reject a renewal application that is filed more than 150 days in advance of the expiration. However, the <u>DACA FAQs</u> noted that requests received more than 150 days in advance of expiration would be accepted, but could result in overlap between the applicants' current DACA and their renewal DACA. *See* Questions 49 and 50 of the DACA FAQs.

AILA is not aware of widespread rejection of early-filed DACA renewals prior to the rescission of the DACA program, so USCIS lockboxes may continue to accept early-filed DACA renewals. However, USCIS may not prioritize adjudication of these early-filed applications, given that they are not as time-sensitive as timely-filed DACA renewals. If you file a DACA renewal application for a client more than 150 days in advance of the DACA expiration and it is rejected for being filed too early, please email reports@aila.org, with the subject line "rejected early-filed DACA renewal."

Practitioners and their clients may want to consider several factors when deciding whether to submit a DACA renewal application more than 150 days in advance, including how early they would be applying to renew, the availability of renewal fees, and whether anything has changed since the last time they applied for DACA. It may be good to consider the possible outcomes of filing an early DACA renewal application under the court decision, as well, including (but not limited to): that the renewal could be rejected and take several weeks to be returned; that the application could be accepted but not prioritized for adjudication; that there could be an adverse court decision after the application is submitted but before it is approved and the filing fee is lost; that there could be a court decision that grandfathers cases already filed under the district court decision; or that the case could be accepted and approved before the court makes a decision.

JANUARY 10, 2018

On September 5, 2017, the Trump Administration <u>rescinded</u> the Deferred Action for Childhood Arrivals (DACA) program. For more information on the rescission of DACA, see AILA's <u>Practice Alert: Trump Administration Rescinds DACA</u>. On September 8, 2017, the University of California <u>filed a complaint</u> challenging the rescission of the DACA program and asking the court to enjoin the implementation of the rescission. On January 9, 2018, the district court <u>issued an order</u> directing the government to partially maintain the DACA program. This practice alert summarizes the provisional relief provided by the court.

Scope of Provisional Relief

The court's decision orders DHS to maintain the DACA program on a nationwide basis, under the same terms and conditions that were in effect before the program was rescinded, with the following exceptions:

- *New Applications*: The court stated that applications from people who have never applied for DACA "need not be processed." However, the court also noted that the decision does not prevent DHS from adjudicating new DACA applications.
- Advance Parole: The court stated that applications for advance parole based on DACA do <u>not</u> have to be continued for the time being. However, the court also noted that the decision does not prevent DHS from adjudicating advance parole applications based on DACA.
- *Discretion*: The court stated that the government can take steps to ensure that discretion is exercised fairly and on an individualized basis for each renewal application.

Importantly, the court also stated that the decision does not prohibit DHS from taking enforcement action against anyone, including those with DACA, who it determines may pose a risk to national security or public safety or who – in the judgement of DHS – "deserves … to be removed."

Filing Renewal Applications

The court's decision directs DHS to post "reasonable public notice that it will resume receiving DACA renewal applications" and to specify the process by which it will accept renewal applications. As of January 10, 2018, USCIS had not yet released any public guidance on the court's decision, although it has noted on at least two different USCIS webpages that "more information is forthcoming."

Practitioners may want to consider waiting to file renewal DACA applications on behalf of their clients until USCIS has released public guidance on the process. Given that 1) the court directed USCIS to specify and publicize its renewal process, and 2) the fact that the USCIS lockboxes and service centers will be relying on guidance from USCIS Headquarters to process applications it receives, submitting a renewal application before guidance is released may cause confusion and ultimately lead to a delay in processing.

AILA has reached out to USCIS and will provide updates as soon as they are available.

Effect on Legislative Efforts to Protect Dreams

While the decision is good news in the short term, Dreamers need Congress to pass a permanent legislative solution now more than ever. It seems clear that this Administration will appeal the court's decision quickly, and the litigation itself is likely to be lengthy and drawn out. Moreover, the decision only relates to renewal applications, leaving Dreamers who were unable to apply for DACA without recourse. For more information on the need to pass the Dream Act now, see www.aila.org/dreamers.



September 13, 2018

The Honorable Kirstjen Nielsen Secretary Department of Homeland Security Washington, D.C. 20528

The Honorable Jeff Sessions Attorney General Department of Justice Washington, D.C. 20530

Dear Secretary Nielsen and Attorney General Sessions:

We write today to express our concerns about recent reports that Immigration & Customs Enforcement (ICE) intends to request the recalendaring of thousands of deportation cases that are currently administratively closed. We are troubled by this initiative, following a decision by Attorney General Jeff Sessions that stripped immigration judges and the Board of Immigration Appeals (BIA) of their general authority to administratively close cases², and its potential to further inundate the immigration court backlog.

On May 17th, Attorney General Sessions affirmed the BIA's decision in the *Matter of Castro-Tum* after instructing the BIA to refer the case for his review.³ In the decision, Attorney General Sessions used his authority to unilaterally overrule decades of precedent by determining that immigration judges and the BIA "do not have the general authority to suspend indefinitely immigration proceedings by administrative closure."⁴ Additionally, Attorney General Sessions refused to delegate to judges and the BIA the general authority of administrative closure, and spoke of the "need" for currently administratively closed cases to be returned to an active docket.⁵

In the past, immigration judges and the BIA have used administrative closure for a number of reasons. Administrative closure helped overburdened immigration judges control their caseloads by allowing them to temporarily take a case off of their docket and prioritize cases that were

¹ AILA, *ICE Provides Guidance to OPLA Attorneys on Administrative Closure Following Matter of Castro-Tum* (June 15, 2018), https://www.aila.org/infonet/ice-guidance-admin-closure-matter-of-castro-tum; Hamed Aleaziz, *The Trump Administration is Seeking to Restart Thousands of Closed Deportation* Cases, BUZZFEED NEWS (August 15, 2018), https://www.buzzfeednews.com/article/hamedaleaziz/trump-deportations-immigration-ice-dhs-courts; Dara Lind, *Jeff Sessions just reopened the door to deporting 350,000 immigrants whose cases had been* closed, VOX (May 21, 2018), https://www.vox.com/2018/5/21/17376398/jeff-sessions-immigration-ruling-courts.

² *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

³ *Id*.

⁴ *Id*.

⁵ *Id*.

ready for adjudication.⁶ Many respondents whose cases are administratively closed have pending applications for some type of relief, such as a pending application with USCIS.⁷ These cases include those of unaccompanied children that judges have found to have been abused, abandoned, or neglected; and whose deportation would be against their best interest. These cases also include victims of trafficking in persons who have pending applications for T visas, DACA beneficiaries, and vulnerable populations of immigrants who are too young or mentally incompetent to understand the proceedings against them.

Despite acknowledgement that requiring the entirety of administratively closed cases be reopened would likely overwhelm the immigration court system and undercut the efficient administration of immigration law, the Attorney General left ICE with the exclusive authority to decide when and how to recalendar the cases, stating that he expected the process would move forward in a "measured but deliberate fashion." According to recent reports, internal communications at ICE reveal a plan to restart the deportation cases of thousands of individuals whose cases are currently administratively closed. These cases may include those in which ICE itself sought administrative closure under the 2011 memoranda, which established enforcement priorities and prosecutorial discretion criteria, but have now been superseded. For cases that were administratively closed under these criteria, the individuals who will be placed back into proceedings have no serious criminal history and have demonstrated extensive connections and contributions to the United States.

Any plan to reopen and recalendar all of the currently administratively closed cases will undeniably overwhelm the already flooded immigration court backlog. Currently, there are over 730,000 pending cases in the courts. The addition of all administratively closed cases — currently estimated at over 355,000 — would increase the backlog by nearly fifty percent, to over one million cases, which would presumably create a corresponding increase in the waiting times for immigration court hearings. Given the population of individuals whose cases were subject to administrative closure, this waste of resources cannot be justified.

Accordingly, we urge the administration to take heed of the recommendations made by an independent evaluator that the Department of Justice commissioned to study how to resolve the immense case backlog in the immigration court system. Those recommendations specifically included the continued use of practices like administrative closure, along with other measures that would emphasize fair process, judicial independence, and better access to legal

⁶ Lind, supra note 1.

⁷ American Immigration Council, *Administrative Closure Post- Castro-Tum: Practice Advisory* (June 14, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf.

⁸ Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).

⁹ AILA, supra note 1,

¹⁰ John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011. https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf

¹¹ Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/.

representation programs.¹² To date, the administration has blatantly ignored its own evaluator's recommendation of the continued use of administrative closure by immigration judges and the BIA.¹³

To aid our understanding on how EOIR and ICE will be handling administratively closed cases, we request that you respond to the following questions in writing before September 27th:

- 1. Does ICE plan to seek recalendaring of all currently administratively closed cases? If not, how many cases will ICE seek to recalendar?
- 2. Is ICE planning to prioritize particular cases for recalendaring ahead of others? If so, please describe in detail how ICE will prioritize cases and what criteria will be considered.
- 3. How quickly does ICE plan to seek recalendaring of administratively closed cases? What is ICE's timeline for moving to recalendar administratively closed cases?
- 4. What is the average age of the cases that ICE is seeking to recalendar? Specifically, how long ago, on average, was the most recent administrative closure order in the cases that ICE is seeking to recalendar?
- 5. Please provide all documents regarding ICE and EOIR plans to recalendar administratively closed cases, including but not limited to email communications, draft policy guidance, implementation directives, and instructions.
- 6. Does EOIR plan to recalendar all cases that are administratively closed cases in which ICE files a motion to recalendar? If so, how quickly will those cases be recalendared and scheduled for a hearing? If not, what criteria will EOIR use to decide which motions to recalendar will be granted?
- 7. Has EOIR begun recalendaring administratively closed cases? If so, when and how many?
- 8. How will ICE and EOIR efforts to recalendar administratively closed cases assist in clearing the immigration court backlog?
- 9. What efforts will ICE and EOIR make to ensure that the recalendaring of cases does not increase the wait times for hearings on removability and applications for relief from removal?
- 10. How will individuals be notified that their case has been recalendared? Will attorneys of record be notified of recalendaring?

¹² Emily Creighton, Department of Justice Ignores Its Own Evaluator's Recommendations on Immigration Courts, AMERICAN IMMIGRATION COUNCIL (April 23, 2018), https://intmigrationimpact.com/2018/04/23/department-justice-recommendations-immigration-courts/.

¹³ Booz Allen Hamilton, Legal Case Study: Summary Report (April 6, 2017).

- a. In the case of vulnerable individuals whose cases were closed as an incompetency safeguard under *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), what safeguards will ICE and EOIR put in place to ensure that these individuals understand the nature of the recalendared proceedings, along with any resulting requirements that they appear in immigration court?
- b. Will ICE and EOIR communicate with these individuals regarding recalendaring through the Nationally Qualified Representative Program?
- 11. What safeguards will ICE and EOIR put in place to ensure that unaccompanied children understand the nature of the recalendared proceedings, along with any resulting requirements that they appear in immigration court?
- 12. Does EOIR agree with independent evaluator's recommendation to administratively close cases awaiting adjudication in other agencies or courts?
- 13. What policies is EOIR developing to ensure efficiency and fairness in each recalendared case?
- 14. How does EOIR intend to handle cases in which ICE moves to recalendar where the individual received a grant of immigration relief such as a T or U visa from USCIS after the individual's case was administratively closed?
- 15. How does EOIR intend to ensure that qualified applicants are not deprived of the opportunity to obtain immigration relief before USCIS, given that administrative closure is no longer available for pending benefits applications, and continuances of removal proceedings for such applications have been similarly restricted by *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018)?

Thank you in advance for your cooperation with this request. We look forward to your responses to our questions.

Sincerely,

Catherine Cortez Masto

United States Senator

Patty Muray

United States Senator

Edward J. Markey

United States Senator

Dianne Feinstein

United States Senator

Kirsten Gillibrand United States Senator	Tammy Duckworth United States Senator
Bernard Sanders United States Senator	Kamala D. Harris United States Senator
Richard Blumenthal	Cory A. Booker
United States Senator Palet Merend. Robert Menendez	United States Senator Ron Wyden
United States Senator	United States Senator
Chris Van Hollen United States Senator	Brian Schatz United States Senator
Mazie K. Hirono United States Senator	Tom Udall United States Senator
Elizabeth Warren United States Senator	Michael F. Bennet United States Senator
Unned States Senator	United States Senator



The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions

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SUMMARY

R45297

August 28, 2018

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For a copy of the full report, please call 7-5700 or visit www.crs.gov.

The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions

Reports of alien minors being separated from their parents at the U.S. border have raised questions about the Department of Homeland Security's (DHS's) authority to detain alien families together pending the aliens' removal proceedings, which may include consideration of claims for asylum and other forms of relief from removal.

The Immigration and Nationality Act (INA) authorizes—and in some case requires—DHS to detain aliens pending removal proceedings. However, neither the INA nor other federal laws specifically address when or whether alien family members must be detained together. DHS's

options regarding the detention or release of alien families are significantly restricted by a binding settlement agreement from a case in the U.S. District Court for the Central District of California now called *Flores v. Sessions*. The "*Flores* Settlement" establishes a policy favoring the release of alien minors, including accompanied alien minors, and requires that those alien minors who are not released from government custody be transferred within a brief period to non-secure, state-licensed facilities. DHS indicates that few such facilities exist that can house adults and children together. Accordingly, under the *Flores* Settlement and current circumstances, DHS asserts that it generally cannot detain alien children and their parents together for more than brief periods.

Following an executive order President Trump issued that addressed alien family separation, the Department of Justice filed a motion to modify the *Flores* Settlement to allow for the detention of alien families in unlicensed facilities for longer periods. The district court overseeing the settlement rejected that motion, much as it has rejected similar motions to modify the settlement filed by the government in recent years. (The U.S. Court of Appeals for the Ninth Circuit has affirmed the earlier rulings but has not yet reviewed the most recent ruling.) In its most recent motion, the government has argued, among other things, that a preliminary injunction entered in a separate litigation, *Ms. L v. ICE*, which generally requires the government to reunite separated alien families and refrain from separating families going forward, supports a modification of the *Flores* Settlement to allow indefinite detention of alien minors alongside their parents.

Congress, for its part, could largely override the *Flores* Settlement legislatively, although constitutional considerations relating to the rights of aliens in immigration custody may inform the permissible scope and effect of such legislation.

Contents

Statutory Background	2
General Statutory Framework for Detention of Aliens at the Border Without Valid	
Entry Documents	2
Statutory Framework Governing the Treatment of Unaccompanied Alien Children	4
What was the underlying Flores lawsuit about?	5
What does the Flores Settlement provide?	6
How does the <i>Flores</i> Settlement restrict DHS's power to keep families in civil immigration detention?	7
How does Ms. L. v. ICE relate to the Flores Settlement?	9
What are the executive branch's options concerning family detention while <i>Flores</i> remains in effect?	10
Does the executive branch have the authority to alter the Flores Settlement?	12
Does Congress have the authority to override or alter the <i>Flores</i> Settlement?	14
Contacts	
Author Contact Information	15

eports of alien minors being separated from their parents at the U.S. border—either when they have presented themselves at a port of entry to claim asylum or when they have been apprehended by authorities after unlawfully entering between ports of entry¹—have raised questions about the authority of the Department of Homeland Security (DHS) to detain families together pending removal proceedings. The Immigration and Nationality Act (INA) does not provide a specific framework for the detention of alien families during the removal process. Much of the governing law stems from a binding, 20-year-old settlement agreement (Flores Settlement) between the federal government and parties challenging the detention of alien minors, which the U.S. District Court for the Central District of California entered in a case now called Flores v. Sessions.² The Flores Settlement establishes a policy favoring the release of alien minors, including alien minors accompanied by an alien parent, from immigration detention and requires that those alien minors who are not released from government custody be transferred within a brief period to non-secure, state-licensed facilities.³ According to DHS, few if any such state-licensed facilities capable of holding minors and adults together exist.⁴ For that reason, it is DHS's position that, to comply with the *Flores* Settlement, it must choose between (1) releasing the family together and (2) releasing the alien child while the adult family members remain in detention until removal proceedings have concluded.⁵ Recent federal court decisions cast doubt on the legality of the second option, 6 however, leaving the general release of family units together as the only clearly viable option under current law.

In an executive order issued on June 20, 2018, President Trump directed DHS "to the extent permitted by law and subject to the availability of appropriations, [to] maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." The executive order also directed Attorney General Sessions to ask the district court overseeing the *Flores* Settlement to modify the agreement to allow the government to detain alien families together throughout the duration of the family's immigration proceedings as well as the pendency of any criminal proceedings for unlawful entry into the

¹ See Memorandum in Support of Classwide Preliminary Injunction, Ms. L. v. ICE, No. 18-cv-00428-DMS-MDD (S.D. Cal. Mar. 19, 2018), https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-classwide-preliminary-injunction; Michelle Brané & Margo Schlanger, *This is What's Really Happening to Kids at the Border*, WASH. POST, May 30, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/30/this-is-whats-really-happening-to-kids-at-the-border/?utm_term=.86df956a45f8; Letter from Kate Shepherd, Am. Immigration Council & Katharina Obser, Women's Refugee Comm'n, et al., to Cameron Quinn, DHS Officer for Civil Rights and Liberties, and John V. Kelly, DHS Acting Inspector Gen. (Dec. 11, 2017),

https://www.womensrefugeecommission.org/rights/resources/document/download/1540.

² Flores v. Sessions, 862 F.3d 863, 869, 874 (9th Cir. 2017).

³ Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).

⁴ Flores v. Sessions, No. CV 2:85-4544-DMG-AGR, 2017 WL 6060252, at *18 (C.D. Cal. June 27, 2017). The executive branch has indicated that the lack of such facilities is due in part to "ongoing and unresolved disputes over the ability of States to license these types of facilities that house both adults and children." Defendant's Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the Flores Settlement Agreement, Flores v. Sessions, No. CV 2:85-4544 DMG, at 17-18 (June 21, 2018) [hereinafter, "Government Motion to Modify"]. For instance, Pennsylvania revoked the Berks County family detention center's license in 2016, but the center continues to operate while the merits of the license revocation are litigated. *See* Jacob Parmuk, *A Controversial Detention Center in Pennsylvania Could be a Model as Trump Looks to Detain Migrant Families Together*, CNBC (July 17, 2018, 3:19 PM), https://www.cnbc.com/2018/07/17/berks-county-pennsylvania-detention-center-could-be-model-for-trump.html.

⁵ Defendant's Mem. of Points & Authorities in Supp. of *Ex Parte* Appl. for Relief from the Flores Settlement Agreement at 1, Flores v. Sessions, No. 2:85-CV-85-4544 (C.D. Cal. June 21, 2018).

⁶ See Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1142-49 (S.D. Cal. 2018); see infra "What are the executive branch's options concerning family detention while Flores remains in effect?"

⁷ Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435, 29435 (June 25, 2018).

United States.⁸ While that motion was pending, in a different lawsuit, *Ms. L. v. ICE*, challenging the government's policy of separating alien children from their parents when family units entered the United States at or in between ports of entry, a district judge issued a preliminary injunction mandating alien family reunification.⁹ In response, the government notified the *Flores* court that it would begin detaining alien family units together in DHS facilities until a family's immigration proceedings had been completed.¹⁰ The *Flores* court rejected the government's motion and argument that the preliminary injunction in the *Ms. L.* lawsuit allowed the government to detain family units together in DHS facilities.¹¹ In the aftermath of this ruling, DHS appears to have returned to its prior practice of generally releasing family units apprehended at the border that demonstrate a credible fear of persecution pending removal proceedings.¹²

This report answers frequently asked legal questions pertaining to the *Flores* Settlement and the settlement's impact on the detention of alien families apprehended at or near the U.S. border. In particular, the report addresses (1) the background of the *Flores* litigation, (2) how the *Flores* Settlement restricts DHS's power to keep families in civil immigration detention, (3) the relationship between the *Ms. L.* litigation and the *Flores* Settlement, (4) the executive branch's policy options for detaining or releasing family units apprehended at or near the U.S. border under the *Flores* Settlement, and (5) the extent to which either the executive branch or Congress can override or modify the terms of the *Flores* Settlement.

Statutory Background

Before considering the legal impact of the *Flores* Settlement on DHS's authority to detain family units arriving at the border without valid entry documents, it is useful to review the relevant statutory framework. The INA contains provisions that govern the detention of aliens in general pending the outcome of removal proceedings. Federal statutes also contain specific provisions concerning the detention of unaccompanied alien children (UACs) who are in removal proceedings. However, neither federal law generally, nor the INA, contains provisions that specifically address the detention of family units or accompanied alien minors for immigration enforcement purposes.

General Statutory Framework for Detention of Aliens at the Border Without Valid Entry Documents

Whether they attempt to enter the United States surreptitiously or present themselves at a port of entry, aliens encountered near the border without valid entry documents are generally subject to

⁹ Ms. L., 310 F. Supp. 3d at 1149-50.

⁸ Id. at 29436.

¹⁰ Defendants' Notice of Compliance at 4, Flores v. Sessions, No. 2:85-CV-85-4544 (C.D. Cal. June 29, 2018).

¹¹ See Order Denying Defendant's' Ex Parte Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 5 (C.D. Cal. July 9, 2018).

¹² See Nick Miroff et al., 'Deleted families: What went wrong with Trump's family-separation effort, Wash Post (July 28, 2018) ("Trump's decision to stop separating families . . . has largely brought a return to the status quo at the border, with hundreds of adult migrants released from custody to await immigration hearings while living with their children in the United States."); Oversight of Immigration Enforcement and Family Reunification Efforts: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (July 31, 2018) (statement of Matthew Albence, Immigration and Customs Enforcement) ("It is important to note that the current laws and court rulings effectively mandate the release of family units . . . into communities across the United States."); see also infra "General Statutory Framework for Detention of Aliens at the Border Without Valid Entry Documents."

expedited removal under the INA.¹³ Expedited removal is a streamlined process that contemplates removal without a hearing before an immigration judge.¹⁴ Family units, including children arriving with their families, encountered near the border without valid entry documents are subject to expedited removal,¹⁵ but UACs are not subject to this streamlined removal process.¹⁶

If an alien subject to expedited removal "indicates either an intention to apply for asylum . . . or a fear of persecution," then the immigration officer must refer the alien to an asylum officer for a determination of whether the alien has a credible fear of persecution. ¹⁷ Aliens who demonstrate such a fear are referred to standard removal proceedings in immigration court for further consideration of their claims for asylum or other relief. ¹⁸

The statutory framework that governs the detention of aliens in this situation—that is, where an alien has been referred from expedited to standard removal proceedings after showing a credible fear of persecution—is not straightforward, but its general effect is to permit (without requiring) DHS to detain such aliens pending the outcome of the standard proceedings. ¹⁹

- *First*, for aliens referred from expedited to standard removal proceedings following surreptitious entry (i.e., entry or attempted entry into the United States at a place other than a port of entry), the applicable statute is 8 U.S.C. § 1226(a).²⁰ That statute authorizes DHS to continue detaining the alien, or to release the alien on bond or parole.²¹ If DHS decides to keep the alien in detention, the alien is entitled to challenge that decision in a custody redetermination hearing before an immigration judge.²² Under the standard that governs both the DHS and immigration judge custody determinations, the alien must demonstrate that release on bond or parole "would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."²³
- Second, for aliens referred from expedited to standard removal proceedings after presenting themselves at a port of entry without valid entry documents, the

¹³ 8 U.S.C. § 1225(b); see generally CRS Legal Sidebar LSB10150, An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border, by Hillel R. Smith.

¹⁴ See 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(B)(iii)(iv).

¹⁵ See Flores v. Lynch, 212 F. Supp. 3d 907, 913 (C.D. Cal. 2015) (discussing applicability of expedited removal procedures to family units), rev'd on other grounds and remanded, 828 F.3d 898 (9th Cir. 2016); Ingrid Eagly et al., Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 CAL. L. REV. 785, 811 (2018).

¹⁶ 8 U.S.C. § 1232(a)(5)(D); see generally CRS Legal Sidebar LSB10150, An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border, by Hillel R. Smith.

¹⁷ 8 U.S.C. § 1225(b)(1)(A)(ii).

¹⁸ *Id.* § 1225(b)(1)(B)(ii).

¹⁹ See Jennings v. Rodriguez, 138 S. Ct. 830, 838 (2018) ("U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a)").

²⁰ Matter of X-K-, 23 I. & N. Dec. 731, 735-36 (BIA 2005); R.I.L.-R. v. Johnson, 80 F. Supp. 3d 164, 171-72 (D.D.C. 2015).

²¹ 8 U.S.C. § 1226(a).

²² Matter of X-K-, 23 I. & N. Dec. at 735-36; R.I.L.-R., 80 F. Supp. 3d at 171-72.

²³ 8 C.F.R. § 236.1(c)(8); Matter of Fatahi, 26 I. & N. Dec. 791, 793–94 (BIA 2016) ("After the general bond authority provisions were recodified at section 236(a) of the Act, we applied those provisions and the regulation at 8 C.F.R. § 236.1(c)(8) (1999), to hold that an alien who seeks a change in custody status must establish that he does not pose a danger to persons or property and that he is not a flight risk.").

applicable statute is 8 U.S.C. § 1225(b). That statute provides that such aliens "shall be detained" pending the outcome of the standard removal proceedings in immigration court.²⁴ But the INA grants DHS authority to release even these aliens on parole.²⁵ DHS regulations and internal guidance, in turn, instruct DHS officials to make individualized determinations about whether to release such aliens on parole, taking into account factors such as flight risk, danger to the public, and whether the alien has established his identity sufficiently.²⁶ Recently, in light of evidence that DHS has deviated from this policy in order to detain more aliens for deterrence purposes, two different federal judges in the District of Columbia issued preliminary injunctions ordering DHS to comply with the policy by making individualized parole determinations for aliens detained under § 1225(b).²⁷

Some federal case law suggests that constitutional principles may limit DHS's ability to detain aliens pending removal proceedings for general deterrence purposes (that is, for the purpose of deterring other aliens from committing civil immigration violations), notwithstanding the statutory authorization in the INA for detention during the removal process.²⁸ The Supreme Court has yet to resolve this question, however.²⁹

Statutory Framework Governing the Treatment of Unaccompanied Alien Children

Federal statutes set forth a separate framework for the treatment of UACs. The Homeland Security Act of 2002 tasks the Office of Refugee Resettlement (ORR), within the Department of

²⁴ 8 U.S.C. § 1225(b)(1)(B)(ii).

²⁵ See id. § 1182(d)(5)(A).

²⁶ 8 C.F.R. § 212.5(b); Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* 6-8 (Dec. 8, 2009).

²⁷ Aracely R. v. Nielsen, -- F. Supp. 3d --, 2018 WL 3243977, at *18, *31 (D.D.C. July 3, 2018) ("Plaintiffs have shown that it is likely that they will succeed on the merits of their claims because they have supplied evidence tending to show that Defendants have considered immigration deterrence when making parole determinations, in contravention of binding agency policy."); Damus v. Nielsen, -- F. Supp. 3d --, 2018 WL 3232515, at *17 (D.D.C. July 2, 2018) ("[T]his Court finds that the asylum-seekers are able to demonstrate that individualized parole determinations are likely no longer par for the course. The Court therefore finds that Plaintiffs have demonstrated a likelihood of success on the merits of their . . . claim that [the DHS] Defendants are not abiding by their own policies and procedures.").

²⁸ See R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 187-90 (D. D.C. 2015) (opining that detention of alien families seeking asylum pending the outcome of their standard removal proceedings, for the purpose of deterring other foreign nationals from coming to the United States in pursuit of the same relief, would raise serious due process concerns); see also Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); but cf. Demore v. Kim, 538 U.S. 510, 531 (2003) ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."). For a discussion of the interplay between Zadvydas and Demore, see CRS Legal Sidebar LSB10112, Can Aliens in Immigration Proceedings Be Detained Indefinitely? High Court Rules on Statutory, but not Constitutional Authority, by Hillel R. Smith ("The relationship between the Zadvydas and Demore rulings has been open to debate. Some have construed the rulings to mean that the standards for mandatory, indefinite detention prior to a final order of removal differ from those governing detention after a final order is issued. However, several lower courts have suggested that mandatory detention pending a final order of removal may, if 'prolonged,' raise similar constitutional issues as those raised after a final order.").

²⁹ See Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (not reaching question whether prolonged detention of aliens pending removal proceedings without stringent procedural protections, such as a requirement that the government justify continued detention by clear and convincing evidence in recurring bond hearings, would violate due process).

Health and Human Services, with "coordinating and implementing the case and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status." Minors remain subject to DHS custody unless and until they are deemed "unaccompanied." Under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), if DHS learns that a person in its custody is an "unaccompanied alien child" (UAC), it must transfer the UAC to ORR custody within 72 hours (unless the child is from a contiguous country, in which case the UAC generally may be given the option to voluntarily return to that country in lieu of being held by ORR and DHS authorities). An alien minor is considered a UAC if (1) the minor has no parent or legal guardian in the United States, or (2) no parent or legal guardian "is available to provide care and physical custody" in the United States. Once a UAC is in ORR custody, ORR must "promptly place[] [the child] in the least restrictive setting that is in the best interest of the child." As noted above, UACs are not subject to expedited removal.

What was the underlying *Flores* lawsuit about?

The *Flores* lawsuit began in 1985, reached a settlement in 1997, and remains under the supervision of a U.S. district judge in the Central District of California until the federal government promulgates final regulations implementing the 1997 agreement.³⁶ Initially, the lawsuit involved a class of unaccompanied alien minors who were apprehended at or near the U.S. border and then detained pending removal proceedings.³⁷ At that time, before the enactment of the Homeland Security Act or the TVPRA, there was no national policy addressing the care for unaccompanied alien minors.³⁸ One former Immigration and Naturalization Service (INS) facility in California had adopted a policy of releasing apprehended alien minors only to "a parent or lawful guardian" except in "unusual and extraordinary cases."³⁹ Several detainees filed a lawsuit on behalf of a class of all aliens under the age of 18 who were detained at that facility because a

³⁰ 6 U.S.C. § 279(a), (b).

³¹ See id.; 8 U.S.C. § 1232(b)(1).

³² 8 U.S.C. § 1232(a)(2), (b).

³³ 6 U.S.C. § 279(g)(2)(C). Until recently, the Trump Administration's practice apparently had been that, if an alien minor was separated from the parent who brought the minor to the border (because of a decision to prosecute the parent for illegal entry or for other reasons), the minor was treated as a UAC and transferred to the custody of ORR, which then began seeking a suitable placement for the child. See Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1139-40 (S.D. Cal. 2018); CRS Legal Sidebar LSB10150, An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border, by Hillel R. Smith ("The UAC typically must be transferred to ORR within 72 hours after DHS determines that the child is a UAC. Following transfer to ORR, the agency generally must place the UAC 'in the least restrictive setting that is in the best interest of the child."). This practice, at least in some cases, appears to have caused prolonged periods of separation and child placements that were hundreds of miles away from the detained parent. Ms. L, 310 F. Supp. 3d at 1137. Moreover, "[s]ome parents were deported at separate times and from different locations than their children." Id. On June 26, 2018, however, a federal district court issued a preliminary injunction ordering the federal government to "promptly reunify these family members," in most circumstances, following separations caused by illegal entry prosecution or other executive branch decisions. Id. at 1145.

³⁴ 8 U.S.C. § 1232(c)(2)(A); see generally, Flores v. Sessions, 862 F.3d 863, 870-71 (9th Cir. 2017).

³⁵ See supra note 16.

³⁶ Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017).

³⁷ Reno v. Flores, 507 U.S. 292, 294 (1993).

³⁸ *Id.* at 295 (describing the care of unaccompanied alien juveniles as having been "apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations").

³⁹ *Id.* at 296.

parent or legal guardian did not personally appear to take custody of the child.⁴⁰ The lawsuit challenged the conditions of confinement at the INS facility and also contended that the release policy violated the Due Process Clause of the Fifth Amendment.⁴¹ By 1987, the parties had settled the claims related to the conditions of confinement, but the constitutional challenge to the release policy continued to be litigated.⁴²

Meanwhile, the INS promulgated a rule governing the detention and release of alien minors (accompanied and unaccompanied) at *all* INS facilities. ⁴³ That rule authorized additional adult relatives (other than a parent or lawful guardian) to whom alien minors could be released from custody. ⁴⁴ The *Flores* plaintiffs maintained the lawsuit by challenging the new INS policy under the Due Process Clause, arguing that the government had violated their fundamental right to be released to unrelated adults. ⁴⁵ The litigation ultimately made its way to the Supreme Court. In a 1993 ruling—nearly a decade after the litigation's start—the Supreme Court upheld the constitutional validity of the INS policy on its face. ⁴⁶ In doing so, the Court concluded that the detained alien minors had no constitutional right to be released from government custody into the custody of a "willing-and-able private custodian" when a parent, legal guardian, or close relative is unavailable. ⁴⁷ After the case was remanded to the district court for further proceedings, the parties continued to litigate whether the INS was complying with the earlier settlement agreement, in which the government had agreed to house alien minors in facilities meeting certain minimum standards. ⁴⁸ The parties in the *Flores* litigation eventually reached a settlement agreement in 1997, a modified version of which remains in force today. ⁴⁹

What does the Flores Settlement provide?

The *Flores* Settlement establishes a "nationwide policy for the detention, release, and treatment of minors" in immigration custody.⁵⁰ The settlement agreement announces a "general policy favoring release" and requires the government to place apprehended alien minors in "the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and immigration courts and to protect the minor's well-being and that of others."⁵¹ The settlement agreement further elaborates that when alien minors are first arrested by immigration authorities, those minors may be detained only in "safe and sanitary" facilities.⁵² Within a few days, subject to exception, federal authorities must transfer the detained alien minor to the custody of a

⁴⁰ *Id*.

⁴¹ *Id.* The district court also ruled in favor of the class's claim that the policy, which treated alien minors in deportation proceedings differently from those in exclusion proceedings, violated the class members' rights to equal protection. *Id.*

⁴² Id.; Stipulated Settlement Agreement at 3, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

⁴³ Detention and Release of Juveniles, 53 Fed. Reg. 17449, 17449 to 17450 (May 17, 1988).

⁴⁴ Id.

⁴⁵ Reno, 507 U.S. at 298, 302; Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1006 (9th Cir. 1990).

⁴⁶ Reno, 507 U.S. at 315.

⁴⁷ *Id.* At 302-03. Whether the alien minors had a fundamental right to be released to a parent, legal guardian, or close relative was not before the Court. *Id.* at 302.

⁴⁸ Stipulated Settlement Agreement, *supra* note 42, at 3.

⁴⁹ *Id.* at 1: Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017).

⁵⁰ Stipulated Settlement Agreement, *supra* note 42, at \P 9.

⁵¹ *Id.* at ¶ 11.

⁵² *Id*.

qualifying adult or a non-secure facility that is licensed by the state to provide residential, group, or foster care services for dependent children.⁵³

The *Flores* Settlement binds the parties until the federal government promulgates final regulations implementing the agreement.⁵⁴ However, to date, no implementing regulations have been promulgated.⁵⁵ Additionally, although the litigation initially stemmed from the detention of unaccompanied alien minors, the *Flores* Settlement defines a "minor," subject to certain exceptions, as *any* person under age 18 who is detained by immigration authorities.⁵⁶ Accordingly, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) later held that the *Flores* Settlement applies to both accompanied *and* unaccompanied minors in immigration custody.⁵⁷

How does the *Flores* Settlement restrict DHS's power to keep families in civil immigration detention?

The *Flores* Settlement qualifies the authority that DHS possesses under the INA and other statutes to detain alien minors—whether accompanied or unaccompanied—pending the outcome of removal proceedings. With regard to minors meeting the statutory definition for UACs, Congress has enacted statutes regulating their care and custody and providing protections that to some extent displace the *Flores* Settlement as the operative body of law. Settlement Congress has enacted no such laws with regard to *accompanied* alien minors or alien family units. Accordingly, much of the current impact of the *Flores* Settlement comes in the manner that it restricts DHS's authority to detain accompanied alien minors.

As mentioned earlier, the *Flores* Settlement establishes a "nationwide policy for the detention, release, and treatment of minors" in the custody of the former INS. ⁵⁹ The core of the *Flores* Settlement favors the release of alien minors and requires that those alien minors who are not released from government custody be housed in non-secure, state-licensed facilities. ⁶⁰ Subject to exceptions described below, the government must do so within three days if the minor is apprehended in a district where space is available at a licensed facility or, otherwise, within five

⁵³ *Id.* at 4-5, ¶¶ 12.A, 19.

⁵⁴ See Stipulation Extending the Settlement Agreement and for Other Purposes, and Order Thereon, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. December 7, 2001); Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017) ("The Flores Settlement was intended as a temporary measure, but in 2001 the parties stipulated that it would remain in effect until days following defendants' publication of final regulations" governing the treatment of detained, minors. It has now been twenty years since the Settlement first went into effect, and the government has not published any such rules or regulations. Thus, pursuant to the 2001 agreement, the Settlement continues to govern those agencies that now carry out the functions of the former INS.").

⁵⁵ Flores, 862 F.3d at 869.

⁵⁶ Stipulated Settlement Agreement, *supra* note 42, at ¶ 4.

⁵⁷ Flores v. Lynch, 828 F.3d 898, 905-08 (9th Cir. 2016).

⁵⁸ See Flores, 862 F.3d at 870 (explaining that the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008 are laws "directly addressing the care and custody of unaccompanied minors.").

⁵⁹ Stipulated Settlement Agreement, *supra* note 42, at \P 9.

⁶⁰ Lynch, 828 F.3d 898, 901 (9th Cir. 2016).

days. However, as of the date of this report, there presently do not appear to be any qualifying facilities that can house alien minors *and* their parents.⁶¹

Under the *Flores* Settlement's terms, alien minors' placement in a non-secure, licensed facility may be delayed when there is an "influx of minors into the United States." An influx of minors exists when more than 130 minors are eligible for placement at a licensed facility. When there is an influx, placements must be made "as expeditiously as possible." The effect of these provisions, as interpreted by the district court overseeing the *Flores* Settlement, has allowed DHS to detain some family units for longer than five days during "influxes."

There is no fixed amount of time for what amounts to "expeditious" placement during an influx, but the district court that has continued to oversee the settlement has provided some guidance. For instance, time extensions must be "de minimis" (i.e., minimal) and made based on individualized circumstances. 66 In other words, during an influx the government likely cannot announce a blanket extension of time for placements of particular groups. In 2015, for example, the government advised the Flores court that, for alien families subject to expedited removal but seeking asylum, the government would need to detain those families for an average of 20 days to complete the credible fear interview and processing. ⁶⁷ The court opined that "if 20 days is as fast as [the government], in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear," then a 20-day extension "may" be expeditious under the terms of the settlement, "especially if the brief extension of time will permit the DHS to keep the family unit together."68 But the court did not place its imprimatur on 20 days for all families seeking asylum. Further, when class members attested to being detained for periods ranging from 5 weeks to 13 months, the court concluded that the government was in substantial noncompliance with the Flores Settlement.⁶⁹ The requirement for expeditious release remains the law of the land because the district court rejected the government's motion to amend the Flores Settlement.70

In sum, the reason alien minors and their parents generally cannot remain together for more than brief periods *while in* immigration detention is because the *Flores* Settlement requires minors to be placed in non-secure, state-licensed facilities within days or (in individualized circumstances during an influx) weeks of their apprehension, yet there do not appear to be any facilities that

⁶¹ "ICE currently operates three family residential centers: the Karnes County Residential Center ('Karnes'); the South Texas Family Residential Center ('Dilley'); and the Berks Family Residential Center ('Berks'). Plaintiffs continue to present evidence that these family residential centers are unlicensed. Defendants do not dispute that the family residential centers continue to be unlicensed." Order Re Plaintiffs' Motion to Enforce and Appoint a Special Monitor at 28, Flores v. Sessions, No. 2:85-CV-04544 (C.D. Cal. June 27, 2017) (internal citations, quotation marks, and parentheticals omitted); *see also* Parmuk, *supra* note 4 ("The Pennsylvania family detention center is the only one of the three in the U.S. that ever had a state license. The state revoked its license in 2016, but the detention center continues to operate amid a court fight over the license.").

⁶² Stipulated Settlement Agreement, *supra* note 42, at ¶ 12.

⁶³ *Id*. at ¶ 12.

⁶⁴ *Id*.

⁶⁵ See Order Re Response to Order to Show Cause at 10, Flores v. Lynch, No. 2:85-CV-04544 (C. D. Cal. Aug. 21, 2015).

⁶⁶ *Id.* at 10-11.

⁶⁷ Id. at 9.

⁶⁸ *Id*. at 10.

⁶⁹ Flores v. Sessions, No. 2:85-CV-04544, 2017 WL 6060252, at *20-21 (C. D. Cal. June 27, 2017).

⁷⁰ Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544 (C.D. Cal. July 9, 2018).

both comply with the *Flores*-required conditions *and* authorize adults to be housed in the facility. The Exactly how long DHS may detain alien minors in a temporary, nonqualifying facility during an influx remains unclear. But the overseeing district court has opined that 20 days may be reasonable under certain individualized circumstances. Having said that, an exception exists if an alien parent affirmatively waives a child's right under the *Flores* Settlement to be detained in a non-secure, state-licensed facility. The security of the security of

How does *Ms. L. v. ICE* relate to the *Flores* Settlement?

The government has unsuccessfully argued in the *Flores* litigation that it has been absolved of its obligation to house alien minors in non-secure, state-licensed facilities as a consequence of the preliminary injunction entered in the *Ms. L.* litigation.⁷³ In *Ms. L.*, two asylum seekers brought a class action lawsuit claiming that their substantive due process rights had been violated by the government's practice of separating families entering the United States at the border—both when lawfully seeking admission at a port of entry and when illegally crossing into the United States between ports of entry.⁷⁴ The district court certified a class generally composed of all alien adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody.⁷⁵ Then the court imposed a preliminary injunction against the government, which, as relevant here, orders it to refrain from detaining in DHS custody class members without their minor children and to reunite all class members with their minor children.⁷⁶ The injunction required reunification within 14 days for children under age five, and within 30 days for older children.⁷⁷

In *Flores*, the government alerted the district court to the *Ms. L.* preliminary injunction and explained that, to comply with the injunction, it intended to detain families together during the entirety of immigration proceedings. The government asserted that the *Flores* Settlement permits alien children to remain in DHS detention alongside their parents because the agreement requires the release of minors "without *unnecessary* delay," and the *Ms. L.* injunction, the government said, makes delay *necessary*. The process of the same of

⁷¹ See supra note 61.

⁷² See Order Denying Defendants' Ex Parte Application, supra note 70, at 6.

⁷³ See id. at 5-7. For more information on the Ms. L. litigation, see CRS Legal Sidebar LSB10180, Family Separation at the Border and the Ms. L. Litigation, by Sarah Herman Peck.

⁷⁴ See Amended Complaint for Declaratory & Injunctive Relief with Class Action Allegations, Ms. L. v. ICE, No. 18-cv-00428 (S.D. Cal. Mar. 9, 2018).

⁷⁵ Order Granting in Part Plaintiffs' Motion for Class Certification at 17, Ms. L. v. ICE, No. 18-cv-00428 (S.D. Cal. June 26, 2018). That class does not include, however, an alien parent who has been determined to be unfit or present a danger to the child, who has criminal history or a contagious disease, who is within the interior of the United States, or is detained with the parent's minor child as a result of the executive order. *Id.* at 17 & n.10.

⁷⁶ Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

⁷⁷ Id.

 $^{^{78}}$ Defendants' Notice of Compliance, *supra* note 10, at 1. This policy would apply to aliens apprehended at *and* in between ports of entry. *Id*.

⁷⁹ *Id.* at 5 (quoting *Flores* Settlement) (emphasis in original).

The *Flores* court rejected the government's contention that it could indefinitely detain alien minors in secure, unlicensed facilities and still comply with the terms of the *Flores* Settlement.⁸⁰ The court characterized the government's submission as a "strained construction" of the *Flores* Settlement—one that renders many of its protective requirements meaningless.⁸¹ Nor, the court added, does the injunction make it impossible to comply with both court orders—the *Ms. L.* injunction and the *Flores* Settlement—because, the court explained, "[a]bsolutely nothing prevents [the government] from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion."⁸²

Consequently, as children of class members were reunited with their detained parents in unlicensed facilities, the *Flores* clock, so to speak, began running. Once the clock started, the government faced the requirement to "expeditiously"—generally viewed as a 20-day window—place each family in a *Flores*-qualifying detention facility or release the family.⁸³ In practice, because of a lack of qualifying bed space, the government has been releasing families.⁸⁴

What are the executive branch's options concerning family detention while *Flores* remains in effect?

With the *Flores* Settlement in place, the executive branch maintains that it has two options regarding the detention of arriving family units that demonstrate a credible fear of persecution pending the outcome of their removal proceedings in immigration court: (1) generally release family units; or (2) generally separate family units by keeping the parents in detention and releasing the children only.⁸⁵ The executive branch appears to have resumed implementing the first option after the district court in *Flores* rejected the argument that it could detain family units together in DHS facilities under *Ms. L.*⁸⁶ As for the second option—to separate families by detaining parents only—doubts exist as to whether it is legally viable. The "zero-tolerance"

⁸⁰ Order Denying Defendant's' Ex Parte Application, supra note 70, at 5.

⁸¹ *Id*.

⁸² *Id*.

⁸³ See supra notes 67-72 and accompanying text.

⁸⁴ See Ron Nixon, Erica L. Green, and Michael D. Shear, *Border Officials Suspend Handing over Migrant Families to Prosecutors*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html.

⁸⁵ Government Motion to Modify, *supra* note 4, at 1-2; Defendant's Notice of Compliance, *supra* note 10, at 1 ("[T]he Flores Agreement—as interpreted by this Court and the Ninth Circuit—put the government in the difficult position of having to separate families if it decides it should detain parents for immigration purposes.").

⁸⁶ See Order Denying Defendant's' Ex Parte Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 5 (C.D. Cal. July 9, 2018) ("Defendants . . . have not shown that Ms. L required [them] to violate the Flores Agreement or that compliance with the Ms. L Order would 'directly conflict' with the Flores Agreement's release and state licensure provisions. Absolutely nothing prevents Defendants from reconsidering their current blanket policy of family detention"); Nick Miroff et al., 'Deleted families: What went wrong with Trump's family-separation effort, Wash Post (July 28, 2018) ("Trump's decision to stop separating families . . . has largely brought a return to the status quo at the border, with hundreds of adult migrants released from custody to await immigration hearings while living with their children in the United States. . . . With families once more largely exempted from detention, agents have grudgingly reverted to the 'catch and release' system that Trump promised to end."). Before the "zero tolerance" policy began in May 2018, the executive branch also generally released family units, although for a period in 2014 and 2015 the Obama Administration pursued a policy of detaining most arriving family units in DHS facilities under the unsuccessful argument that the Flores Settlement should be interpreted to permit such detention. Flores v. Lynch, 828 F.3d 898, 904 (9th Cir. 2016); see also R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 174–75 (D.D.C. 2015).

policy" for prosecuting illegal entry offenses, announced by Attorney General Sessions in April 2018,⁸⁷ was one manner of implementing this option, at least for family units that entered the country surreptitiously: when parents were referred for criminal prosecution for illegal entry or other criminal violations, the children were deemed UACs and transferred to ORR custody.⁸⁸ The June 20, 2018, executive order ended this practice,⁸⁹ and the district court in *Ms. L.* concluded that the practice likely violated due process by separating families without a plan for their reunification following the conclusion of criminal proceedings.⁹⁰ Thus, to effect the release of children without their parents through a general policy of criminally prosecuting the parents does not appear to be a legally viable policy for the executive branch because due process may require that the families be reunited following the criminal proceedings.⁹¹ The Department of Justice may decide to prosecute parents who enter the country illegally, but the executive branch as a whole likely cannot use prosecution to separate families for prolonged periods.⁹²

Aside from criminal prosecution, another way for the executive branch to pursue the second option would be to keep parents in DHS civil immigration detention while releasing children to other relatives or guardians. The Ninth Circuit has held that the *Flores* Settlement does not require DHS to release parents along with their children. ⁹³ The executive branch has argued that this holding "specifically envisioned separating parents from their children under the terms of the [*Flores*] Agreement." Nonetheless, it does not appear that DHS has ever pursued a general policy of releasing children without their parents from civil immigration detention. ⁹⁵ Such a policy, in any event, would likely face practical and legal barriers. On the practical front, DHS would need to locate other relatives or licensed programs to accept the children while the parents

⁸⁷ Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download.

⁸⁸ Dep't of Homeland Security, Press Release, *Myth vs. Fact: DHS Zero-Tolerance Policy*, at 3 (June 18, 2018) ("If an adult is referred for criminal prosecution, the adult will be transferred to U.S. Marshals Service custody and any children will be classified as an unaccompanied alien child and transferred to the Department of Health and Human Services custody."), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy) [hereinafter, "DHS *Myth v. Fact* Press Release"].

⁸⁹ Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435, 29435 (June 25, 2018) ("The Secretary of Homeland Security (Secretary), shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members.").

⁹⁰ Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) ("[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. . . . The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.") (emphasis in original).

⁹¹ See id.

⁹² See id. at 1145 ("Th[e] practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim.").

⁹³ Flores v. Lynch, 828 F.3d 898, 908–09 (9th Cir. 2016) ("[P]arents were not plaintiffs in the *Flores* action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights for parents ").

⁹⁴ Government Motion to Modify, *supra* note 4, at 1-2.

⁹⁵ See, e.g., DHS Myth v. Fact Press Release, supra note 88 ("DHS generally releases families within 20 days. This creates a 'get out of jail free' card for illegal alien families and encourages groups of illegal aliens to pose as families hoping to take advantage of that loophole.").

remained in detention. ⁹⁶ On the legal front, the *Ms. L.* court has held that a "government practice of family separation without a determination that the parent was unfit or presented a danger to the child" likely violates due process, except to the extent that the family separation occurs during pending criminal proceedings. ⁹⁷ Under this standard, it is not clear that DHS could constitutionally create family separation by continuing to detain, in civil immigration detention, alien parents whose children were released under the *Flores* Settlement. ⁹⁸

A conceivable third option would be for the executive branch to create licensed family detention centers that comply with the *Flores* Settlement and detain families together in those centers. The executive branch apparently does not count this as a feasible option, however, and has said that "ongoing and unresolved disputes" exist "over the ability of States to license these types of facilities that house both adults and children." Even if such licensed facilities existed, a blanket policy of detaining families together in them arguably might still violate the *Flores* Settlement, which favors release over detention in qualifying facilities. Also, apart from the *Flores* Settlement, at least one federal district court has concluded that the detention of arriving family units pending the outcome of their removal proceedings in immigration court would likely violate due process, if undertaken for the purpose of deterring future arrivals. In undertaken for the purpose of deterring future arrivals.

In summary, the only clearly viable option under current law for the treatment of family units that demonstrate a credible fear of persecution is for the executive branch generally to release the families pending their removal proceedings in immigration court.

Does the executive branch have the authority to alter the *Flores* Settlement?

The executive branch may modify or terminate its obligations under the *Flores* Settlement through three primary avenues: (1) by reaching an agreement with the plaintiffs; 102 (2) by terminating the agreement through promulgation of "final regulations implementing th[e] Agreement," pursuant to the terms of the settlement agreement (as interpreted by the district court); 103 or (3) by filing a motion to modify the settlement in the district court. 104

⁹⁶ See Flores v. Lynch, 828 F.3d at 903 (listing the categories of individuals and programs to which minors may be released under the Flores Settlement).

⁹⁷ Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018).

⁹⁸ See id.

⁹⁹ Government Motion to Modify, *supra* note 4 at 17-18; *see also* Order Denying Defendant's *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 6 (C.D. Cal. July 9, 2018) ("Defendants have known for *years* that there is 'no state licensing readily available for facilities that house both adults and children.") (emphasis in original) (quoting DOJ brief dated Feb. 27, 2015); *but see* Bunikyte, ex rel. Bunikiene v. Chertoff, No. A-07-CA-164-SS, 2007 WL 1074070, at *8 (W.D. Tex. Apr. 9, 2007) ("Plaintiffs point out that Texas does in fact provide licensing for residential child care to emergency shelters and other organizations offering residential care to both adults and children. *See* Tex. Admin. Code § 748.1901 *et seq.* ('The rules in this subchapter apply to operations that provide care for both children and adults.')").

¹⁰⁰ See Flores v. Lynch, 828 F.3d at 901 ("The Settlement creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.").

¹⁰¹ See R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 187-90 (D.D.C. 2015).

¹⁰² See, e.g., Flores v. Lynch, 828 F.3d 898, 903 (9th Cir. 2016) (noting that the parties stipulated an amendment to the consent decree's termination provisions in 2001).

¹⁰³ Flores v. Lynch, 828 F.3d 898, 903 (9th Cir. 2016).

¹⁰⁴ See Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 379 (1992) (holding that consent decrees are subject to

On June 21, 2018, the executive branch began pursuing the third option by asking the *Flores* district court to approve changes to the settlement agreement that would exempt accompanied minors from the general release policy and make the state-licensure requirement inapplicable to ICE family residential facilities. ¹⁰⁵ The effect of these modifications would be to allow DHS to detain accompanied alien minors with their families in ICE family detention centers for more than brief periods without violating the *Flores* Settlement. However, the district court rejected the government's motion on July 9, 2018, ¹⁰⁶ and the government has yet to indicate whether it will appeal the ruling to the Ninth Circuit.

If the government does appeal, it would appear to have limited prospects for success under current circuit case law. A party seeking judicial modification of a settlement agreement must establish that "a significant change in circumstances warrants revision of the decree." The Ninth Circuit has applied this standard to the *Flores* Settlement on two occasions in recent years. In 2016, the Ninth Circuit held that the "surge in family units crossing the Southwest border" during the migrant crisis that began in 2014 did not constitute a significant change in circumstances and thus did not justify modifying the settlement agreement so that it no longer applied to accompanied alien minors. 108 The Ninth Circuit reasoned that the Flores Settlement anticipated that such an influx could occur and provided the government added flexibility in responding under the "as expeditiously as possible" standard. ¹⁰⁹ In 2017, the Ninth Circuit held that developments in the law after the Flores Settlement went into effect in 1997—in particular, the enactment of provisions governing the care and custody of UACs in the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008—did not release the government from its obligations under the decree to provide UACs in removal proceedings with bond hearings. 110 The two statutes, the Ninth Circuit held, did not constitute a "significant change in circumstances" for modification purposes because they did not render compliance with the terms of the consent decree "impermissible." ¹¹¹

The thrust of the government's argument in its most recent motion is that a "worsening influx of families unlawfully entering the United States at the southwest border" constitutes a significant change in circumstances that justifies modifying the *Flores* Settlement to allow accompanied minors to remain detained with their families in unlicensed ICE facilities. ¹¹² This is similar to the argument that the Ninth Circuit rejected in the 2016 ruling—that a "surge in family units crossing the Southwest border" justified modification of the consent decree. ¹¹³ Indeed, the district court concluded that the most recent government motion is but "a thinly veiled motion for

modification under Federal Rule of Civil Procedure 60(b)).

¹⁰⁵ Government Motion to Modify, *supra* note 4, at 4.

¹⁰⁶ Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 6 (C.D. Cal. July 9, 2018).

¹⁰⁷ Flores v. Lynch, 828 F.3d at 909 (quoting Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992)). If the party seeking modification meets this standard, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.*

¹⁰⁸ Id. at 910.

¹⁰⁹ Flores v. Lynch, 828 F.3d at 910.

¹¹⁰ Flores v. Sessions, 862 F.3d 863, 881 (9th Cir. 2017) ("We hold that the statutes have not terminated the *Flores* Settlement's bond-hearing requirement for unaccompanied minors.").

¹¹¹ Id

¹¹² Government Motion to Modify, *supra* note 4, at 11.

¹¹³ Flores v. Lynch, 828 F.3d at 910.

reconsideration" of the argument that the Ninth Circuit rejected in 2016. ¹¹⁴ In the most recent motion, the government argued that "the number of family units crossing the border illegally has increased . . . by 30% since the 2014 influx" and that, notwithstanding the 2016 decision, "nothing suggests that the parties anticipated that this increase would consist largely of children who were accompanied by their parents." ¹¹⁵ Nonetheless, in light of the Ninth Circuit's holding that influxes *do not* justify modification because they were anticipated by, and addressed in, provisions of the *Flores* Settlement, the government's best prospects of success on the motion might be on eventual review at the Supreme Court, which would not be bound by the Ninth Circuit's 2016 opinion. ¹¹⁶

Does Congress have the authority to override or alter the *Flores* Settlement?

If Congress enacts new statutes that directly conflict with provisions of the *Flores* Settlement — such that the provisions of the settlement become "impermissible" under the law—then the executive branch could move the district court to modify the decree in conformity with the new statutes. For example, the *Flores* Settlement establishes a general policy that minors in removal proceedings should be released from custody. It is in contrast, the Protect Kids and Parents Act (S. 3091), as introduced in the Senate on June 19, 2018, would provide that "[a] child shall remain in the custody of and be detained in the same facility as the Asylum Applicant who is the child's parent or legal guardian during the pendency of the Asylum Applicant's asylum or withholding of removal proceedings." If the bill becomes law, it likely would enable the executive branch to obtain modification of the settlement's general release policy on the ground that the policy is "impermissible" under the new law. Seneral release policy on the ground that the policy is "impermissible" under the new law. Coher bills introduced in the 115th Congress may have similar consequences. Constitutional restrictions would remain a potential obstacle to such a government motion, however. For example, if the district court determines that new statutory provisions are unconstitutional as applied to alien minors accompanied by their parents in immigration detention pending formal removal proceedings, the court likely would not grant a

¹¹⁴ Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 1 (C.D. Cal. July 9, 2018).

¹¹⁵ Government Motion to Modify, *supra* note 4, at 13-14.

¹¹⁶ See Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 384 (1992) ("Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous.").

¹¹⁷ Flores v. Sessions, 862 F.3d 863, 874 (9th Cir. 2017).

¹¹⁸ Stipulated Settlement Agreement, *supra* note 42, at 10.

¹¹⁹ Protect Kids and Parents Act, S. 3091, 115th Cong. § 2 (as introduced in the Senate, June 19, 2018) (providing that "[a] child shall remain in the custody of and be detained in the same facility as the Asylum Applicant who is the child's parent or legal guardian during the pendency of the Asylum Applicant's asylum or withholding of removal proceedings"); see also Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. tit. III, § 3102(a) (as introduced in the House, June 19, 2018) ("There exists no presumption that an alien child who is not an unaccompanied alien child should not be detained, and all such determinations shall be in the discretion of the Secretary of Homeland Security.").

¹²⁰ See Flores v. Sessions, 862 F.3d at 874.

¹²¹ E.g., H.R. 6173, 115th Cong. § 1 (as introduced in the House, June 21, 2018) ("There exists no presumption that an alien child who is not an unaccompanied alien child should not be detained, and all such determinations shall be in the discretion of the Secretary of Homeland Security."); Keep Families Together and Enforce the Law Act, H.R. 6181, 115th Cong. § 2 (as introduced in the House on June 21, 2018) (rendering the *Flores* Settlement inapplicable to accompanied minors arriving at or apprehended near the border).

motion to conform the Flores Settlement to the new statute. 122 Any district court holding to this effect—which would implicate unsettled issues noted above about the constitutionality of prolonged immigration detention¹²³—would be subject to de novo review on appeal. ¹²⁴

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¹²³ See supra note 29.

¹²² See Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 391 (1992) ("[A] modification must not create or perpetuate a constitutional violation."); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 187-90 (D.D.C. 2015) (opining that indefinite detention of alien families seeking asylum, for the purpose of deterring other foreign nationals from coming to the United States in pursuit of the same relief, would raise serious due process concerns).

¹²⁴ See Flores v. Lynch, 828 F.3d 905, 910 (9th Cir. 2016).

DACA Litigation Timeline

Last updated AUGUST 28, 2018

since the Trump administration ended the Deferred Action for Childhood Arrivals (DACA) program on September 5, 2017, <u>several lawsuits</u> have been filed against the administration for terminating the program unlawfully. As a result, two nationwide injunctions in California and New York have allowed people who have previously had DACA to renew their status. However, there are still active legal threats to the program, and court dates and rulings in the next few months will determine the program's future.

We have received inquiries asking about possible timelines and future scenarios. The reality is that nobody knows for certain what will happen in the courts or whether a future court ruling, such as another injunction, could affect the current DACA renewal application process. But here we highlight key dates for DACA recipients and other stakeholders to keep in mind.

What are the key recent and upcoming dates?

On August 8, 2018, a hearing was held in *Texas v. Nielsen* (U.S. District Court for the Southern District of Texas – **Judge Hanen**) on the plaintiff states' motion for a preliminary injunction. (NOTE: This case was brought by Texas and other states to *challenge the lawfulness of* the DACA program, *not* to challenge the **Trump administration**'s termination of the program.) Judge Hanen will now decide whether to issue a preliminary injunction against the DACA program, possibly ordering U.S. Citizenship and Immigration Services (USCIS) to stop accepting DACA applications, including applications for renewal. The court may rule on the preliminary injunction at any time.

Two weeks after a potential injunction in *Texas v. Nielsen*: The federal government has asked the court in Texas that any injunction in *Texas v. Nielsen* be delayed by two weeks to allow time for "stay" applications to be filed with all the courts that are hearing DACA-related cases, and potentially the U.S. Supreme Court. A *stay* is a court order that halts further legal proceedings or the enforcement of orders in a case until the stay is either removed or made permanent. The government will want the courts to stay all the orders issued by courts in the DACA-related cases, so that the cases can be reviewed and any conflicts among the California, New York, Texas, and possibly DC court orders can be reconciled.

NOTE: Any stay applications to the Supreme Court would likely be considered this summer (of 2018) while the Supreme Court is not in session. For a stay to be granted, five Supreme Court justices must be in favor of granting it. If a stay is not granted, the order(s) already issued by the U.S. courts of appeals and/or district courts will remain in effect.

If Judge Hanen orders USCIS to stop accepting DACA renewal applications and if that order **is not "stayed"**— or if the courts stay all the orders, including the New York and California injunctions — USCIS could stop accepting renewal applications as early

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¹ See <u>www.nilc.org/issues/daca/litigation-related-to-the-daca-program/</u>.

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as *mid-August 2018*. Therefore, eligible DACA recipients are encouraged to consult with an attorney or Board of Immigration Appeals—accredited representative and decide as soon as possible whether to submit their renewal applications immediately, just in case USCIS does stop accepting applications sometime in August.

On August 17, 2018, the court in *NAACP v. Trump* (U.S. District Court for the District of Columbia – Judge Bates) partially stayed its earlier order that vacated the Trump administration's termination of the DACA program. This stay postpones the effective date of portions of the court's order that would require USCIS to accept DACA applications regardless of whether the applicants previously had DACA.

The week of October 6, 2018, is the first time the Supreme Court may announce whether it will accept an appeal of one of the DACA cases, if the appeal is filed over the summer. If the Court decides to accept an appeal, any oral argument would be scheduled for late 2018 or early 2019. A decision would be unlikely before the spring of 2019.

NOTE: If the Court decides to hear an appeal, an order that is in place and enforceable at that time that either requires USCIS to accept and adjudicate DACA renewal applications or blocks USCIS from accepting and adjudicating applications most likely would not be reaffirmed or altered until spring 2019 or after.

Other potential developments

Appeals are pending in the Courts of Appeals for the Second, Fourth, and Ninth Circuits on lawsuits challenging the end of the DACA program. The Ninth Circuit may issue its opinion/ruling at any time. The parties in the Second and Fourth Circuit cases have begun to submit briefs, but the courts have not yet scheduled argument in those cases. After each court hears argument, it will take some time (how much time can't be known in advance) to consider the arguments and issue a ruling.

Therefore, many different scenarios and timeframes are possible, depending on the different courts' timing and rulings. One way to stay informed on the latest developments is to follow NILC on <u>Facebook</u> and <u>Twitter</u> and to subscribe to our email list (sign up at www.nilc.org). We also encourage you to follow MALDEF's and the NAACP's social media and to visit their websites for information on their cases (the Texas and DC cases, respectively), in which there could be major developments this summer.³

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² NILC Facebook: https://twitter.com/NILC_org.

³ MALDEF's website: <u>www.maldef.org</u>; NAACP's website: <u>www.naacp.org</u>.





August 23, 2018

VIA ELECTRONIC MAIL

Cameron Quinn
Officer for Civil Rights and Civil Liberties
Department of Homeland Security
Washington, DC 20528

John V. Kelly Acting Inspector General Department of Homeland Security Washington, DC 20528

Re: The Use of Coercion by U.S. Department of Homeland Security (DHS)
Officials Against Parents Who Were Forcibly Separated From Their
Children

Dear Ms. Quinn and Mr. Kelly,

As partners in the Immigration Justice Campaign, the American Immigration Council ("Council") and the American Immigration Lawyers Association ("AILA") jointly file this complaint on behalf of numerous parents who were separated from their children while in Department of Homeland Security (DHS) custody pursuant to the Trump administration's "zero tolerance" policy, and then subject to extreme duress and coercion while in DHS custody. Over 2,600 minor children were forcibly separated from their parents; at the time of filing of this complaint, an estimated 366 parents remain outside the United States, having been deported without their children, and 565 children remain in government custody, still separated from their parents.¹

A federal court has determined that the practice of separating children from their parents "shocks the conscience." Medical and psychological experts have repeatedly expressed grave concerns about the deleterious and lasting impact that separation has had—and continues to have—on children and their parents. Republican and Democratic

¹ See Joint Status Report, Dkt 191 at 2, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. Aug. 18, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-joint-status-report-2.

² Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

³ ACP Objects to Separation of Children from their Parents at Border, American College of Physicians, May 31, 2018, *available at*. https://www.acponline.org/acp-newsroom/acp-objects-to-separation-of-children-from-their-parents-at-border (last accessed August 15, 2018).

⁴ Alexander Miller, et al., (2018), *Understanding the mental health consequences of family separation for refugees: Implications for policy and practice*, American Journal of Orthopsychiatry, Vol 88(1) 2018, 26-37, *available at*. http://psycnet.apa.org/doiLanding?doi=10.1037%2Fort0000272.

members of Congress have repeatedly condemned family separation.⁵ Further, there are numerous reports of separated children being subject to physical and verbal abuse.⁶

This complaint contains 13 pseudonymized case examples and original testimony from parents who were separated from their children that show a pervasive, illegal practice by DHS officials of coercing mothers and fathers into signing documents they may not have understood. The cases also demonstrate how the trauma of separation and detention creates an environment that is by its very nature coercive and makes it extremely difficult for parents to participate in legal proceedings affecting their rights. The direct consequence of the coercion is that many parents were forced to waive their legal rights, including their right to be reunified with their children.⁷

The cases present powerful evidence of gross violations of due process committed by government officials that place into question the validity and fairness of legal determinations made by U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) officials, as well as U.S. Citizenship and Immigration Services (USCIS) asylum officers and the Immigration Court. The coercive environment created by family separation was so overpowering as to render many mothers and fathers unable to answer questions or even comprehend the purpose of credible fear interviews or the removal process overall.

Coercion of noncitizens by immigration officials is a direct violation of the U.S. Constitution, federal statute, and regulations.⁸ The Immigration and Nationality Act guarantees every person the right to apply for asylum regardless of the manner of entry.⁹ ICE and CBP officials cannot lawfully force any person to abandon statutory or constitutional rights.¹⁰ The coercive acts committed by U.S. government officials and the

⁵ Peter Baker, Leading Republicans Join Democrats in Pushing Trump to Halt Family Separations, NY Times (June 17, 2018).

⁶ These reports include being deprived of potable water, which compelled some to drink toilet water, and being given expired food. Angelina Chapin, *Drinking Toilet Water, Widespread Abuse: Report Details 'Torture' For Child Detainees*, Huffington Post (July 17, 2018), https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers us 5b4d13ffe4b0de86f485ade8. Many of these children were likely subject to further coercive tactics and duress at the hands of government officials at every stage of their time in government custody. This complaint, however, focuses on the coercion endured by the separated parents, many of whom we continue to advocate for and provide support to in terms of coordinating legal representation.

The ill effects of the "zero tolerance" policy are being exacerbated by the fact that DHS is turning away asylum seekers at the ports of entry, effectively forcing families to cross in between ports of entry to seek asylum in the United States. The Council, AlLA, and other organizations submitted an administrative complaint with the Office for Civil Rights and Civil Liberties (CRCL) and the Office of the Inspector General (OIG) in January 2017 regarding the government's systematic denial of entry to asylum seekers at ports of entry on our Southern border. See https://www.americanimmigrationcouncil.org/content/us-customs-and-border-protections-systemic-denial-entry-asylum-seekers-ports-entry-us. The Council, along with the Center for Constitutional Rights and Latham and Watkins, LLP, subsequently filed a class action lawsuit last year challenging CBP's unlawful practice of turning away asylum seekers who present themselves at ports of entry along the U.S.-Mexico border. See <a href="https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-powders-powders-powders-powders-powders-powders-powders-protections-unlawful-practice-turning-away-powders

asylum-seekers.

8 For example, the accounts below in which speakers of indigenous languages with limited Spanish proficiency were coerced into signing documents while detained in CBP custody likely violates 8 C.F.R. § 235.3(b)(2)(i), which requires that interpretative assistance be provided.

⁹ See generally 8 U.S.C. § 1182. The right to apply for asylum "may be violated by a pattern or practice that forecloses the opportunity to apply." *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994).

¹⁰ See, e.g. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988), aff'd sub nom. Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (finding that the due process rights of Salvadoran asylum seekers was violated by an INS policy and practice of duress and misrepresentation intended to coerce asylum seekers into abandoning their right to apply for asylum and instead agree to voluntary departure).

government's creation of a coercive environment prevented separated parents from meaningfully participating in the asylum process.

Together these practices have resulted in not only the tremendous suffering of children and parents who have been kept apart, detained, and subjected to abusive, inhumane treatment, but also the involuntary, forced return of hundreds of people to grave dangers, including risk of death. As a nation we cannot tolerate such abuses in violation of our laws and we urge you to take immediate action to correct the situation.

KEY FINDINGS

- ICE officers used both physical and verbal threats, deception, and intimidation to coerce multiple separated parents into signing forms relinquishing their rights.
- ICE officers reunified multiple parents with their children, then presented them with pre-completed forms affecting their rights to reunification, and re-separated parents who refused to sign the forms.
- CBP officers subjected separated parents to extreme duress during the separation process, including verbal and physical abuse.
- Detention officers put separated parents in solitary confinement, deprived them of food and water for days, and subjected them to other forms of retaliatory punishment.
- Parents experienced severe physical and emotional distress, depression, and mental health problems from the conditions of detention and separation from their children.
- Government officials and detention facility staff treated parents so cruelly and inhumanely as to compromise their ability to access asylum and other legal relief.
- The trauma of being separated from their children, as well as the coercive environment created by CBP and ICE officers, made it extremely difficult for parents to participate meaningfully during the credible fear interview process, and their proceedings, if any, before the Immigration Judge.
- We surveyed 76 mothers who had been separated from their children and asked by ICE officers to sign a form affecting their rights to be reunified with their children. Over 90% of the mothers reported that they were not allowed to ask about the consequences of signing the form. As a result, less than 25% of mothers expressed that they understood what they were signing. Disturbingly, 67% of mothers reported that ICE intimidated or coerced them prior to having them sign a form affecting their rights to reunification with their children. Worse, 30% reported that ICE officers threatened that if the mother did not sign the form, they would never see their children again.

BACKGROUND

The Council and AILA have long sought to curb the abuse and coercion of vulnerable populations that arrive at the U.S.-Mexico border seeking humanitarian protection. On December 11, 2017, the Council, AILA, and other immigrant rights organizations filed a complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL) and the Office

of the Inspector General (OIG) presenting grave concerns regarding the separation of asylum-seeking families while in CBP and ICE custody at the U.S.-Mexico border. 11 As family separation drastically expanded in Spring and Summer 2018, the concerns of these organizations have been largely borne out.

On April 6, 2018, the Department of Justice (DOJ) and DHS implemented a "zero tolerance" policy for individuals who crossed the southern border without authorization. which resulted in many asylum-seeking families being prosecuted and parents being separated from their children. 12 After the government separated more than 2,600 families, and amid a growing outcry against the impact of these policies on children and their parents, President Trump issued an executive order on June 20, 2018 which purported to limit family separation.¹³

On June 26, in an ACLU lawsuit challenging the family separation policy, Ms. L. v. ICE, U.S. District Court Judge Dana Sabraw held that family separation violated the Due Process Clause of the Fifth Amendment and ordered the administration to reunite all families that the government forcibly separated. ¹⁴ Pursuant to the court's decision, the government was ordered to reunite all "eligible" parents by July 26, 2018. Many parents deemed "ineligible" by DHS for reunification remain detained in adult immigration detention facilities, apart from their children. Many other parents are now detained with their children in family detention centers. Whereas an estimated 2,000 families have been reunified, at least 366 parents were deported without their children. 16

Prior to submitting this complaint, our organizations spoke to dozens of parents who had been separated from their children, most of whom reported having been coerced to various degrees by DHS officials. Their stories, detailed below along with information from publicly available sources, demonstrate the ways in which ICE and CBP officials and detention facility guards coerced separated parents into signing forms relinquishing their rights, and the ways in which treatment by DHS officials, and the conditions in which parents have been detained, created a coercive environment which prevented them from meaningfully exercising their rights.

¹¹ The Separation of Family Members Apprehended by or Found Inadmissible while in U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border (Dec. 11, 2017),

https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/family_separation_complaint.pdf

12 Department of Justice, Office of Public Affairs, "Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry," April 6, 2018, https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry, Under the zero tolerance policy, DHS was directed to refer for criminal prosecution all migrants who crossed the border without authorization, and DOJ was directed to accept as many of these referrals as practicable. Per the new policy, if these migrants arrived with children, the families were separated when the parents were referred for prosecution, and the children were unconventionally designated "unaccompanied alien children" and placed in the custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). The result was a de facto, government-created policy of family separation.

¹³ President Donald J. Trump, Affording Congress an Opportunity to Address Family Separation, The White House, June 20, 2018, https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

¹⁴ Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

¹⁵ *Id.* at 1149.

¹⁶ Whereas the ACLU found that at least 366 parents were deported without their children, other sources suggest that the number was far greater. See Joint Status Report, Dkt 191 at 2, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. Aug. 18, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-joint-status-report-2. Tom Hals & Reade Levinson, U.S. says 463 migrant parents may have been deported without kids, Reuters (July 23, 2018).

<u>DHS Officers Explicitly Coerced Parents into Signing Documentation</u> Relinquishing Their Rights to Reunification.

ICE officers coerced parents into signing forms relinquishing their rights to reunify with their children before the reunification process occurred.

Pursuant to the June 26, 2018 court order in *Ms. L* that halted family separation, ICE was required to reunify all families that were separated, unless ICE determined "that the parent is unfit or presents a danger to the child," or if the parent "affirmatively, knowingly, and voluntarily declines to be reunited with the child."¹⁷ The court further ordered that ICE not deport any parent without their child, unless the parent "affirmatively, knowingly, and voluntarily declines to be reunited."¹⁸

To facilitate the deportation of individuals with administrative final orders of removal while following this preliminary injunction, ICE drafted a form, initially titled "Separated Parent's Removal Form" (hereinafter "Election Form"), to be given to parents with final orders of removal. With the exception of biographical information, the form was written entirely in English—although a later version of the form offered brief summaries of the options in Spanish. The Election Form offered parents two options—to be deported without their children or to be reunified and deported with their children. Only following negotiations with the ACLU was a third option added allowing parents to indicate that they wanted to speak to an attorney first.

According to affidavits filed by the ACLU in the *Ms. L.* case, in addition to dozens of accounts from detained parents shared directly with us, many parents detained at ICE facilities across the country whom the government claimed had "affirmatively, knowingly, and voluntarily" relinquished their rights to reunification, in fact reported that they had been coerced into signing forms they did not understand in a language they did not speak, or were totally unaware that they had relinquished their right to reunification.²³

In addition to being coerced, many parents detained nationwide were forced outright to sign the Election Form. Numerous parents in the El Paso area reported that ICE officers demanded that they sign the Election Form and affirmatively abandon their rights to

Id.
 See Caitlin Dickson, New ICE form to separated parents: Choose deportation with or without kids, Yahoo News (July 3, 2018),

¹⁷ Ms. L. v. ICE, 310 F. Supp. 3d at 1149 (order granting preliminary injunction).

https://www.yahoo.com/news/new-ice-form-separated-parents-choose-deportation-without-kids-232452897.html.

20 Id. Furthermore, authors interviewed dozens of separated parents who described the different forms that they were coerced into

²⁰ *Id.* Furthermore, authors interviewed dozens of separated parents who described the different forms that they were coerced into signing by DHS officials.

 ²¹ Id. Option 1 stated that parents were "requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship." Option 2 stated that parents were "affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief."
 ²² See Order Granting Plaintiffs' Motion for Temporary Restraining Order, *M.M.M. v.* Sessions, No. 18-cv-1835-DMS-MDD, at 10 (S.D. Cal. August 16, 2018) (describing history and purpose of the election forms), available at https://bit.ly/2nTcXOB.
 ²³ See Declaration of Aaron Reichlin-Melnick, Dkt. 153 at Exhibit 44, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-plaintiffs-reply-support-motion-stay-removal (summarizing coercion documented by volunteer attorneys).

reunification.²⁴ Others at the West Texas Detention Facility reported that after ICE gave a presentation to a group of about 60 separated fathers, on July 11, 2018, they were also forced to sign.²⁵ In that case, ICE officers told the fathers that they had three options—be removed without their child, be removed with their child, or continue to fight their case for asylum. ICE did not inform parents that they were entitled both to pursue their asylum claims *and* to be reunified with their child.²⁶

Similar group presentations reportedly occurred at the Otero County Detention Center. Two fathers reported being brought to a room with about 50 other fathers on July 17, 2018, given "no explanation of the form," with the entire process taking less than five minutes. A third father reported that he was brought to a space normally used as a chapel with 25 to 30 other fathers, and that "he was given a form, that it was not explained to him, and that the entire process lasted no more than three minutes. He said he felt sad and intimidated during this process. He expressed that he believed he had no choice but to sign the form."

Indigenous language speakers, many of whom are unable to read or write in any language, speak neither English nor Spanish, or speak Spanish with limited proficiency, also reported being coerced into signing forms by ICE relinquishing their rights to reunification. One mother, T.C., whose story is included below, speaks primarily Q'eqchi' and only limited Spanish. ICE officers demanded she sign the Election Form and threatened to punish her if she refused. She signed the document, but had no idea what she was signing. Similarly, another father, whose case was highlighted in the *Ms. L.* lawsuit, speaks primarily Akatek and limited Spanish, but was made to sign the Election Form without explanation.²⁸

When ICE requires separated parents to sign forms that materially affect their rights without translating those forms into a language that the parents can understand, the rights of the parents are violated.²⁹

 ²⁴ Elise Foley and Roque Planas, *Immigrant Parents Unwittingly Signed Away Right to Reunite with Children, Lawyers Say*, Huffington Post (July 25, 2018), https://www.huffingtonpost.com/entry/immigrant-parents-right-to-reunite_us_5b58f9d0e4b0fd5c73cb6599.
 ²⁵ See *id.*; Declaration of Kathryn E. Shepherd, Dkt. 153 at Exhibit 48, ¶ 8, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July

See id.; Declaration of Kathryn E. Shepherd, Dkt. 153 at Exhibit 48, ¶ 8, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018).

²⁶ Declaration of Kathryn E. Shepherd, Dkt. 153, Exhibit 48 at ¶ 8, *Ms. L. v. ICE*, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018). ²⁷ *Id.*, Declaration of Luis Cruz, Dkt. 153, Exhibit 44 at ¶¶ 6-9.

²⁸ *Id.*, Declaration of Aaron Reichlin-Melnick, Dkt. 153, Exhibit 43 at ¶ 8. Two other Mam-speaking fathers mentioned in that case also described being told to sign a paper that they believed would allow them to reunite with their children; both fathers had been identified by the Department of Justice as having relinquished their rights to reunification. *Id.*, Declaration of A.R. Reive, Dkt. 153, Exhibit 45 at ¶ 10-12. One of those fathers, "signed a paper that he thought would allow him to be reunited with his son" but which was not explained to him. *Id.* at ¶ 9. Another Mam-speaking father who "speaks extremely limited Spanish … [and] cannot read or write … signed a document that he thought would allow him to be reunited with his son." *Id* at ¶ 10. He "could not …understand the document because he is illiterate and no interpreter was provided to explain its contents to him in Mam." *Id*.

²⁹ See, e.g., United States v. Ramos, 623 F.3d 672 (9th Cir. 2010) (DHS failure to translate waiver of right to appeal Stipulated Removal determination rendered waiver involuntary); United States v. Reyes-Bonilla, 671 F.3d 1036, 1044 (9th Cir. 2012) ("A waiver of rights cannot be found to have been considered or intelligent where there is no evidence that the detainee was first advised of those rights in a language he could understand").

Following reunification, ICE officers coerced separated parents into signing prefilled relinquishment consent forms.

Pursuant to a court order in the Ms. L case, ICE was directed to reunify all "eligible" parents with their children by July 26.30 Given the scale of this operation, a substantial number of reunifications occurred within the last week before that deadline.³¹ During this process, multiple reports emerged of coercive behavior by ICE officers against separated parents. These reports are bolstered by a survey of 76 mothers we conducted; 34% of those surveyed reported that they had been asked to sign precompleted forms.

Four parents allege that, on July 25, 2018, ICE officers boarded a bus departing from the El Paso Processing Center that was filled with reunified parents and their children.³² Several parents on that bus-identified in the ACLU's filing as F.G., J.M., C.T., and F.T.—reported that ICE officials handed out the Election Form to each parent on the bus.³³ Each form had been pre-completed by ICE, with the box for Option 1, "I want to be deported with my children," already filled in with a "handwritten check mark." 34

One father, F.G., reported that "officials told him that while there were three options on the form, he had to choose Option 1."35 F.G. refused to sign the form, preferring instead to select Option 2—to be deported without his child.³⁶ Another father, J.M., ignored the pre-written check mark and instead selected Option 2. In response, an ICE officer took the form away and returned with a new copy, "again with Option 1 pre-selected." When J.M. again refused to sign the form, the ICE officers "yelled at him in English" and pressured him in Spanish to sign the form.³⁷ Two other fathers, C.T. and F.T., confirmed that ICE had presented the entire bus with pre-selected forms, and F.T. noted that ICE officers were "visibly and audibly angry when he refused" to select Option 1.38 All four fathers recounted that their children were separated from them a second time upon their refusal to sign the forms pre-marked with Option 1, which would have agreed to them being deported together.

By pre-selecting Option 1 on the Election Form, refusing to permit parents to select any other option, and screaming at any parent who disagreed, ICE agents violated the due process rights of these parents.³⁹ Forcing a parent to sign a pre-selected form does not

³⁰ Ms. L. v. ICE, 310 F. Supp. at 1149.

³¹ On Wednesday, July 19, the government had only reunited 364 separated children with their parents. See Joint Status Report, Dkt 124 at 2, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 19, 2018), available at https://www.aclu.org/legaldocument/july-19-status-conference-report. The following Wednesday, July 26, 2018, the government had reunified or otherwise discharged in appropriate circumstances a total of 1,820 children. See Joint Status Report, Dkt 159 at 2, Ms. L. v. ICE, No. 18cv428-DMS-MDD (S.D. Cal. July 26, 2018), available at https://www.aclu.org/legal-document/ms-l-v-ice-status-report.
³² See Declaration of Laila Arand, Dkt. 163-1, Ms. L v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 26, 2018).

³³ Id at 2.

³⁴ *Id*.

³⁶ Id; see Note 21, supra, for a description of the options.

³⁷ Declaration of Laila Arand, Dkt. 163-1, Ms. L v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 26, 2018), at 5.

³⁹ See, e.g., Orantes-Hernandez, 685 F. Supp. at 1494 (coercing vulnerable asylum seekers into relinquishing their rights violates due process).

comport with due process as it does not allow for an affirmative, knowing, or voluntary decision by the parent.⁴⁰

<u>DHS Officers Subjected Separated Parents to Extreme Duress and Coercive Environments.</u>

CBP officers subjected separated parents to extreme duress during the separation process, including verbal and physical abuse.

The stories below illustrate how parents were subjected to duress and coercion while in CBP custody. These stories also show the ways in which the coercive environment, established within hours of entry, affected the rights of separated parents throughout their time in DHS custody.⁴¹

Many parents report that they were subject to a coercive environment by officers during their time in CBP short-term detention facilities, colloquially called *hieleras* ("iceboxes") because of the cold temperatures inside the facilities. The unnecessarily harsh conditions in these facilities have been the subject of detailed reporting, CRCL complaints, and multiple federal lawsuits in the past.⁴² Consistent with these previous reports, in the cases cited in this complaint, parents report being given inadequate or spoiled food, being forced to sleep on cold concrete floors and next to toilets, or being unable to sleep as a result of the cramped conditions forcing people to stand, being denied access to feminine hygiene products while menstruating, and suffering because of the cold.⁴³ While in the *hieleras*, parents also indicated suffering terrible emotional distress from seeing their children crying in separate cells but not being able to speak to them, or not knowing where their children were or whether they were being treated humanely.

Parents—sometimes with their children—were also subjected to coercive environments when detained in facilities colloquially called *perreras* ("dog pounds"), typically facilities with chain-link cells. Parents reported being forced to sleep on the concrete floor for over a week with no bedding, a "horrible stench" caused by the failure to provide access to any hygiene such as showers or toothbrushes, being crowded into cells so tightly that

be in edible condition (not frozen, expired or spoiled)").

⁴⁰ See Ms. L., 310 F. Supp. 3d at 1149 (requiring DHS to reunify all parents "unless the parent affirmatively, knowingly, and voluntarily declines to be reunited").

 ⁴¹ In a related context, the Supreme Court has repeatedly ruled that subjecting arrested individuals to coercive environments may violate their constitutional rights to due process. See, e.g., Miller v. Fenton, 474 U.S. 104, 118 (1985) (discussing the ways in which interrogation of an arrested individual in a "coercive environment" may violate due process and render a confession involuntary).
 ⁴² See, e.g., Guillermo Cantor, Hieleras (Iceboxes) in the Rio Grande Valley Sector (2015), available at https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-grande-valley-sector; Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells (2018), available at https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells; National Immigrant Justice Center, et. al., CRCL Complaint, Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection (June 11, 2014) (detailing violations of the rights of children held in CBP holding rooms).
 ⁴³ Multiple parents reported that CBP provided frozen or near-frozen food. This violates section 4.13 of CBP's 2015 National Standards on Transport, Escort, Detention, and Search ("TEDS policy"), available at https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf ("Food provided must

they had to sleep in the bathroom area, continued denial of access to feminine hygiene products, and verbal abuse by CBP officers.⁴⁴

These conditions, combined with the trauma of family separation, created an inordinately coercive and stressful environment which colored the interactions that separated parents had with all immigration officials throughout their time in custody. Parents' first interactions with CBP officials often included officers who used deception to facilitate separating children from their parents. Many parents were falsely told their children would be returned to them after they had gone to federal court to face prosecution for entry-related offenses. Others were given no notice that their child would be taken, returning from interviews with CBP officers only to discover that their child was missing. Some were even forced to witness their wailing child be dragged away by CBP officers.⁴⁵

ICE officers and prison guards subjected separated parents to duress and coercion.

Many separated parents report that ICE officers and prison guards subjected them to duress and coercive environments while in detention that infringed upon their ability to meaningfully avail themselves of their protected right to the asylum process. Many parents reported that ICE officers yelled at and insulted them, used intimidation tactics, such as isolation and denying food, and taunted them with threats that their children already had, or would be, put up for adoption.

The coercive environment of detention after having been separated from a child also created profound psychological trauma to individuals held in ICE detention. One mother, A.R., reported that her mind "went completely blank" while she was detained in the West Texas Detention Facility in Sierra Blanca, Texas. "Even when I tried to pray, the words of the songs I have sung my whole life would not come to me," she stated.⁴⁶

Another mother, C.F., described being held in ICE detention at the Irwin Detention Center in Irwin, Georgia.⁴⁷ Being separated from her daughter was "unbearably difficult" for her. She repeatedly begged guards to help her connect with her daughter, leading to ICE officers repeatedly yelling at her to get her to stop. She became so despondent that she contemplated suicide and told a friend she was going to throw herself off the balcony of the detention center.

⁴⁴ As detailed below, one mother, J.H., was held in CBP "short-term" custody for 12 days without being given the opportunity to bathe; further, despite menstruating so heavily that she frequently bled through her pants, CBP officials denied her access to feminine hygiene products. These conditions directly violate Section 4.11 of CBP's 2015 TEDS policy, *id.*, which requires that detainees be provided "basic personal hygiene items," requires that restrooms must have "access to toiletry items, such as ... sanitary napkins," and notes that "Reasonable efforts will be made to provide showers ... to detainees who are approaching 72 hours in detention." *See also id.* at § 5.6 ("Reasonable efforts will be made to provide showers, soap, and a clean towel to juveniles who are approaching 48 hours in detention"); *Unknown Parties, et. al., v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *11 (D. Ariz. Nov. 18, 2016) (finding that conditions of confinement in the CBP's Tucson Sector short-term detention facilities, including the failure to provide sufficient access to hygiene, violate the due process clause).

⁴⁵ See also Jen Kirby, Migrant in detention says her child was taken away while she breastfed, Vox (June 12, 2018).

⁴⁶ Declaration of A.R., August 6, 2018, on file with authors.

⁴⁷ Declaration of C.F., August 16, 2018, on file with authors.

Other parents reported intimidation by ICE officers while detained. One mother, D.P., described how an ICE officer nicknamed "The Deporter" physically intimidated her while trying to get her to sign a voluntary departure form, standing over her menacingly and shouting at her to sign.⁴⁸

D.P.'s experience is particularly troubling, as she was also placed in solitary confinement and subject to starvation by officials at the Port Isabel Detention Center, after she shouted to draw the attention of a visiting official who was touring the facility. Another mother, A.E., was also threatened with solitary confinement while at the Port Isabel Detention Center, for crying frequently and for refusing to eat due to stress and trauma.⁴⁹ These stories are shared in greater detail below.

Stress from family separation and parents' lack of information about the credible fear process prevented many parents from participating meaningfully in the asylum process.

The Constitution, federal statutes, and regulations guarantee asylum-seekers due process and specific procedures to safeguard their access to humanitarian protection and legal relief.⁵⁰ Over the past decade, numerous organizations have documented how DHS officials frequently fail to follow these rules and regulations, and in doing so violate domestic and international human rights laws.⁵¹ Unfortunately, when asylum-seekers were subjected to family separation, the trauma of having a child forcibly removed from an asylum-seeking parent created an environment so coercive that parents were unable to participate meaningfully in the asylum process.

During credible fear interviews, separated parents were not informed of the role that asylum officers conducting the credible fear interviews played. Many parents reported not even knowing that the credible fear interview had anything to do with their request for asylum. Most of the separated parents were not told in advance what the purpose of the interview was. For many, the credible fear interview was their most substantial interaction with any immigration official after having been separated from their child. As a result, some parents spent large portions of the interview asking questions about their children and begging to see them. This perception was compounded by the failure of government officials to clarify the purpose of the interviews. Separated parents were not

⁴⁸ Declaration of D.P., August 5, 2018, on file with authors.

⁴⁹ Declaration of A.E., August 6, 2018, on file with authors.

⁵⁰ See, e.g., 8 U.S.C. § 1158(a) (providing that any noncitizen "who is physically present in the United States or who arrives in the United States ... may apply for asylum"); 8 U.S.C. § 1225(b)(1)(B)(ii) (providing that a noncitizen who expresses a fear of return must be given a credible fear interview); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country."); U.S. Const. Amend. V (protecting right to due process).

⁵¹ See, e.g. American Immigration Council, et. al, *U.S. Customs and Border Protection's Systematic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border* (Jan. 13, 2017) (CRCL/OIG Complaint); U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 20 (2016) (reporting that despite findings and recommendations in a 2005 study relating to primary inspection, USCIRF observers in 2016 continued to find "examples of noncompliance with required procedures" in CBP inspection interviews); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border*, 12 (2017), https://www.hopeborder.org/discretion-to-deny-1 (reporting that "it is commonplace for asylum seekers to be placed in expedited removal proceedings and summarily deported . . . despite expressing fear").

informed ahead of time that the officers had no knowledge of the whereabouts of their children nor authority to make any decisions about reunification.

One parent, D.P., said that she pled with the officer, saying, "I don't want anything, I just want my daughter. Please give me my daughter," something that she "repeated over and over again" while the officer seemingly grew increasingly angry with her.⁵² Another parent, C.S., reported that she arrived at her credible fear interview in a state where her "mind was totally gone. I was only able to think about my daughters. I had barely eaten or had anything to drink for a long time because of the stress." She repeatedly asked the interviewer where her children were.

Another mother, M.F., described that she omitted key information relating to her asylum case because she had been separated from her child.⁵⁴ She described that she was "scared that if I mentioned anything related to the MS-13 gang threats that my son received, they would take him away from me." She also reported being so preoccupied with her son's welfare during the credible fear interview that her "mind could not focus on anything other than the well-being of my son."

At least some parents, like M.F., also omitted information because they believed that to fully explain their story might prevent them from being reunified with their child. In many cases, parents were misinformed that they were being brought to speak to their child on the phone, only to find themselves—overwhelmed with disappointment—speaking with yet another government official with no knowledge about their children.

Given the psychological and physical duress suffered by parents separated from their children, and their ensuing preoccupation with the whereabouts and well-being of their children, many of the parents were denied any meaningful opportunity to participate in the credible fear process, in violation of the statutory right to apply for asylum.⁵⁵

Results of the Post-Reunification Survey.⁵⁶

In the weeks leading up to the court's reunification deadline of July 26, 2018, hundreds of parents were reunified with their children and released on parole or through an alternatives to detention program. However, many parents, especially those with final orders of removal, were instead reunified with their children and sent to the South Texas Family Residential Center, a family detention center in Dilley, Texas. During the first three weeks of August 2018, while the parents remained in confinement, staff and

 $^{^{\}rm 52}$ Declaration of D.P., August 5, 2018, on file with authors.

⁵³ Declaration of C.S., August 6, 2018, on file with authors.

⁵⁴ Declaration of M.F., August 5, 2018, on file with authors.

⁵⁵ See, e.g., Campos, 43 F.3d at 1288. The ways in which the coercive environment affected asylum-seekers' ability to meaningfully participate in the asylum process is particularly troubling given the more than 366 parents who were deported prior to the *Ms. L.*

court's June 26, 2018 order halting the removal of separated parents.

56 The completed surveys are on file with the authors of this complaint, but to protect the mothers' privacy, the completed surveys have not been included. All quotations included in the "Results of the Post-Reunification Survey" section provided below come from mothers' responses to the question, "Is there anything else that you would like to share?"

volunteers asked 76 mothers to complete a survey regarding their experiences in detention to determine whether they had been subject to coercion.

The responses of the 76 mothers who were interviewed for the purposes of this survey confirmed that widespread coercion took place at the hands of CBP and ICE officials in their respective facilities, preventing parents from making voluntary and/or informed choices about their legal cases or about their custody rights over their children.

Of the 76 mothers surveyed, 58 indicated that they did not understand the governmentissued documents presented to them regarding their choices for reunification with their children.⁵⁷ Furthermore, at least 12 of the mothers are indigenous language speakers.⁵⁸ In 26 cases, mothers were presented with an Election Form that had a pre-selected option to sign regarding their parental rights. While 59 mothers indicated that the option to be reunited with their child prior to deportation was selected on their Election Form, 66 mothers said that if given the choice again, they would choose to stay with their child in the U.S. while fighting their case. All of these mothers indicated that the change in their choice is because they now have a better understanding of their legal rights. Of the 76 mothers, at least 58 did not have an opportunity to speak with their child before being presented with any version of the Election Form that would be used to determine their legal rights over their children, and 23 of the mothers indicated that a version of the Election Form presented to them did not provide an option to consult with an attorney.

Even more troubling, at least 51 of the 76 mothers indicated that they felt pressured or intimidated prior to signing their Election Form. For example, 25 of the mothers indicated they were yelled at; 34 indicated they were not given time to think before signing; and 13 reported that they were threatened with punishment in detention if they did not sign.⁵⁹ Most disturbing of all, 23 mothers reported they were threatened that if they did not sign, their children would be adopted or they would never be able to see their children again. 60 Of the 76 mothers surveyed, 48 were presented with the form two or more times, with four mothers being presented with the form as many as five times. Only seven of the 76 mothers indicated they were allowed to ask questions regarding the form's contents before signing.

It is difficult to cross reference the mothers' accounts with the actual Election Forms presented to them because only 14 of the 76 mothers reported being provided with

⁵⁷ On behalf of an illiterate mother surveyed, a staff member wrote for her, "I don't know how to read and write but it didn't matter to the officials and they took my fingerprints without giving me an explanation about the document."

⁵⁸ For the mothers surveyed who speak rare languages as their primary language, such as Mam or Quiche, where interpreters were not available, fellow survey respondents and their children helped translate.

59 One mother indicated, "They told me that if I didn't sign, they'd leave us detained for two years and that they would punish us.

[[]So] out of fear I signed and I did not understand because I don't speak much Spanish. They treated us like dogs."

60 One mother wrote, "They required us, one-by-one, to sign. They said that they would deport us alone or we would not see our kids and if I did not sign they said that my son would be adopted." Another mother indicated that she was given bad legal advice by an immigration official while detained in Laredo, writing, "The chief deportation officer told me that if I asked for asylum I would be imprisoned for nine months to a year and ultimately they wouldn't give it to me. I asked what would happen to my child and she said he would be detained and then put up for adoption. She told me that what I could do was to ask to be deported in my [asylum] interview so that I would not lose my child, and if my cousin asked for the child, he would lose his residency, job, house, and they would deport him to his country of origin."

some copies of forms they had signed; 62 of the 76 mothers were not provided any copies of the forms they had signed.

INDIVIDUAL COMPLAINTS: EXAMPLES OF EXPLICIT COERCION AND COERCIVE BEHAVIOR TOWARDS PARENTS SEPARATED FROM THEIR CHILDREN

The cases below represent only a sample of the cases in which separated families reported that they were subject to coercion by CBP and ICE officers.⁶¹ This coercion was both explicit, in which parents were forced by government officials to take actions contrary to their best interest, and more subtle, inherent in the behaviors and actions of CBP or ICE officers, or those with whom they have subcontracted duties, such as guards. The pervasive nature of this coercive behavior underscores the many ways in which separated families were—and possibly continue to be—subject to agency action that violates policies, laws, and regulations.⁶²

1. Case of D.P., 63 Honduras, who was separated from her 9-year-old daughter for 47 days, threatened verbally and physically, and placed in retaliatory solitary confinement for ten days without sufficient food or water.

D.P. and her 9-year-old daughter entered the United States and immediately expressed a fear of return to Honduras, their home country, to a Border Patrol officer. She was detained and sent to the *hielera* along with her daughter.

Shortly after her arrival, CBP officers called D.P. into a room to interview her, without her daughter. A male CBP official interviewed her and then told her to sign some paperwork that she believed were deportation papers. She refused to do so because she was afraid to return to her country. The officer then threatened her and told her that if she did not sign the papers, "I would never see my child again because she was going to be adopted." D.P. began crying, but again refused to sign any papers despite the officer's threats.

When D.P. returned from the interview, her daughter was missing. CBP officers had taken her away. Hysterical, D.P. began "crying like crazy and yelling that I wanted my daughter." In response, CBP officers laughed at her and told her that "if I did not quiet down they would put me in a cell by myself."

D.P. was detained in the *hielera* for about three days. During this time, she reported that she cried constantly, did not eat, and could not sleep. Officers repeatedly yelled at her

⁶¹ The authors note that, while this complaint focuses specifically on ways in which ICE and CBP officers subject parents to coercion, there is substantial evidence that children were also the subjects of coercion, abuse, and duress while in ICE and CBP custody, as well as while in the custody of the Office of Refugee Resettlement. While this complaint only details such coercion in passing, the authors recommend that CRCL and OIG conduct an independent review of the ways in which the rights of children were violated during the family separation process.

⁶² In addition, the stories detailed below show the ways in which trauma has affected separated parents. Following the survey taken at Dilley, many mothers were referred for psychological evaluations by trained psychologists; all but one mother was diagnosed with Post-traumatic Stress Disorder.

⁶³ Only initials are used in the public version of this complaint.

to stop crying and to stop asking for her daughter. Her time in the *hielera* was also traumatic because CBP officers refused to provide her with sanitary products even though she was menstruating. "I was also hemorrhaging and bleeding through my pants and was not provided with clothing or feminine hygiene products. I was ashamed and degraded."

D.P. was eventually transferred to the Port Isabel Detention Center, after pleading guilty to improper entry. While detained at Port Isabel, D.P. was repeatedly subject to coercion and abuse. She states that the guards "treated us [mothers] as less than human." D.P. received her credible fear interview more than two weeks after arriving at Port Isabel. The interview was on the phone with an Asylum Officer and an interpreter. She explained how being separated from her child and subjected to the coercive environment at Port Isabel severely compromised her ability to meaningfully participate in the process:

During the interview ... I could not control my emotions, I was only thinking about my daughter. I did not even realize when the officer asked me different questions related to my asylum case. The asylum officer asked me why I left, and I said because I was threatened and beaten, and that is why I left. And when the asylum officer in response required [me] to provide more details, I started to cry. Because I cried a lot, the asylum officer raised his voice again. Instead of providing more details, I started asking where my child was. In response, he said that if I wanted to know where my daughter was, he recommended me to watch the news. I told him I did not have any access to the news. And that is how the interview was ended.

The Asylum Officer found that she did not have a credible fear of persecution. After she was informed of the decision, she was called in to interview with an ICE officer that people called "The Deporter." He demanded that she sign deportation papers and yelled at her when she refused. He became so hostile that she was terrified he would strike her. He physically intimidated her, stood over her, and became red in the face as he demanded she sign the papers.

D.P. had another interaction with this officer in which she refused to sign a voluntary departure form. In response, the officer stated, "Fine, stay in detention for a year waiting for your daughter." He then got very close to her, in a way that made her feel as if he was trying to "physically overwhelm" her, particularly because she was alone with him without any visible cameras in the room.

Even worse, D.P. was subjected to solitary confinement and other retaliation by officials at Port Isabel. When some mothers heard that a "White House representative" was going to visit the detention center, she tried to talk to him. Despite guards telling her she was not supposed to talk to this man, she yelled to the representative "to let him know what was going on." As a result, the man came over and spoke to D.P., and she told him her story. After this person left, officials at the jail punished D.P. by throwing her in

solitary confinement for 10 days and subjecting her to starvation and deprivation of basic human needs.

The detention officers punished me and the other mothers who disobeyed and spoke with the representative. I was handcuffed and put in solitary confinement for ten days. I was put in a dark room, so I did not know when it was day or night. I was not given food or water for about three days. After about three days I was given bread... I was handcuffed for five days and had to eat and go to the bathroom in this way. They did not give me toilet paper. I felt desperate and depressed.

D.P. was eventually reunified with her daughter pursuant to the court-ordered reunification process. She continues to suffer both physically and mentally, and her daughter has repeated nightmares due to their traumatic experiences in detention. Both mother and daughter were eventually transferred to the South Texas Family Residential Center in Dilley, Texas.

In early August, an immigration judge vacated the asylum officer's negative credible fear finding, allowing her to pursue asylum in removal proceedings. D.P was later released from detention along with her daughter.

- 2. Case of C.S., Guatemala, who was separated from her 17-year-old and 15-year-old daughters for 55 days and coerced into signing documents with the threat of having her children taken away from her forever.
- C.S. fled Guatemala along with two daughters after their family was subject to threats, including rape and death threats. The family was apprehended by CBP officers near San Luis, Arizona, after turning themselves in to Border Patrol officers and requesting humanitarian protection. CBP officials then separated her from her daughters and took them to a *hielera*, telling her that she was only going to be separated while she was "punished for coming here." She describes being intimidated by CBP officials during her six-day stay in the *hielera*, during which she was not allowed to speak to her children.
- C.S. was eventually transferred to the San Luis Detention Center, then to the Eloy Detention Center, where she was held for approximately seven weeks. She repeatedly tried to contact her children, but was unsuccessful. The extreme duress of being separated from her children appears to have greatly affected her ability to successfully present her case for humanitarian relief. She describes a phone interview with an unknown individual who asked her about her reasons for coming to the United States.

One day, I was told I had a phone call waiting and that it was from my children. My heart was soaring. I could not wait to hear their voices. However, when I picked up the phone, I was told it was for an interview. I asked if it was an interview with a social worker or to speak with my children. I had no idea that this was an important conversation that affected my immigration case. The man on the phone started asking questions about why I was there, but I kept asking

about my daughters. He told me I would be able to speak with them after. But my mind was totally gone. I was only able to think about my daughters. I had barely eaten or had anything to drink for a long time because of the stress.

Several days later, an ICE official forced C.S. to sign a form without telling her what she was signing and refusing to inform her of the form's purpose despite her repeated requests.

A few days later I was called to speak with ICE. An immigration officer told me to sign a paper if I wanted to see my daughters again. When I asked him what the paper was for he hid it behind his back and said, "It doesn't matter what it says. You are going to sign it anyway." He told me I would never speak to my daughters again if I did not sign it. He told me that because I was not from this country this was not his problem. He just told me over and over that I had to sign it or I would be deported without my daughters and I would never see them again. I bet ICE treats their dogs better than they treated me. Finally, I signed the paper. When I did, the officials let me speak with my daughters.

C.S. was also subject to retaliation after a visit from attorneys. She describes attending a presentation from legal visitors who gave her a "piece of paper telling us that we had rights, and that a lawsuit had been filed to demand that we get our children back." She writes that "[a]fter this, ICE was furious," and that mothers who kept that piece of paper were retaliated against.

The guards turned off our televisions and unplugged the microwave. They didn't let us go outside. But we held on to the fact that the visitors had told us about the national protests. I finally felt like I was not alone.⁶⁴

- C.S. was eventually reunited with her daughters through the court-mandated reunification process. ICE officers initially fit her with an ankle monitor and issued release papers. Soon after, she and her daughters were transferred to a family detention center in Dilley, where they remain.
 - 3. Case of M.H., Honduras, who was separated from her 13-year-old son for 62 days and subject to verbal abuse and coercion.

M.H. fled Honduras along with her 13-year-old son after receiving death threats. After entering the United States, she was apprehended by immigration officers who told her almost immediately that she would be separated from her son. She was kept separate from him for the next nine days.

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⁶⁴ C.S. explains the retaliation she endured after visiting with attorneys: "After this, ICE was furious. They told us that what 'these visitors' had told us was a lie and that they didn't have to do anything to give us our children. They punished us for having the paper explaining our rights. The guards turned off our televisions and unplugged the microwave. They didn't let us go outside. But we held on to the fact that the visitors had told us about the national protests. I finally felt like I was not alone."

When officers came to take M.H. to federal court to face charges of improper entry, they told her that she would never see her child again. An officer told her, "You are going to be deported, and your son is going to be placed for adoption." She became terrified that her son was going to be put up for adoption, especially after an official repeated that threat after she returned from court.

M.H. was eventually taken to a detention center in Laredo for 13 days, and then was transferred to the La Salle Detention Center in Louisiana. While there, she describes being so despondent that she stopped eating. She was not permitted to go outside, was given no information about her son, and reports that she cried constantly. One guard became so angry at her constant tears that she would bang on the cell window and shout "Shut up you *hija de la madre*" (or son of a bitch). M.H. had her credible fear interview during this period. She was unable to concentrate on the interview because of the stress of being separated from her child.

Eventually, M.H. was transferred to the South Texas Detention Center in Pearsall, Texas. At some point while she was there, her son was rushed to the hospital from the shelter he was being held in and was given an emergency appendectomy. No official informed her that her son had undergone emergency surgery. M.H. did not find out until three days after the fact, when a family member in the United States in contact with her son informed her about the surgery. She was afforded absolutely no opportunity to consent to her son's medical care.

M.H. was subject to at least one more instance of coercion by ICE officers. While detained in Pearsall, ICE officers called her in for a meeting. She describes what happened next:

ICE called me and said I was going to be deported. I told them, "My son has been operated on and I am not going anywhere without him." I told them I was not going to leave without my son, even if they killed me. An immigration official told me to sign my deportation paper. When I asked to read it, he said "No, you will sign it regardless," and he covered up the text with his hand so that I could not read it. He told me I had to sign on the line no matter what it said. I refused to sign it, because I had to be with my son again.

M.H. was eventually reunified with her son through the court-ordered reunification process. She reports that he wakes up frequently throughout the night with nightmares.

4. Case of C.F., Guatemala, who was separated for over one month from her six-year-old daughter who had recently had heart surgery, and who contemplated suicide due to extreme duress while in detention.

C.F. fled Guatemala along with her six-year-old daughter. She presented herself and her daughter at the Port of Entry between San Luis Río Colorado, Mexico, and San

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⁶⁵ Literally translates as "daughter of the mother," and colloquially translates as "son of a bitch."

The Use of Coercion by U.S. DHS Officials Against Parents Who Were Forcibly Separated From Their Children American Immigration Council and AILA | August 23, 2018

Luis, Arizona, and expressed a fear of returning to Guatemala. CBP officials then took them to a detention center where there were "many women with children."

Despite having legally presented herself at a Port of Entry and asked for asylum, CBP officials told her that her 6-year-old daughter would be taken from her and she was going to prison. When she asked them why, CBP officers told her that she "didn't have a right to speak" and that she "had stepped into a country that was not mine." None of this was true; she had committed no crime and was not prosecuted. Nevertheless, C.F. was separated from her daughter.⁶⁶

C.F. describes a traumatic and dangerous separation process for her own daughter and for the other mothers and children detained with her. Because her daughter had recently had heart surgery, she was terrified that high levels of stress could prove physically dangerous to her daughter. She begged CBP officers not to take her daughter, but CBP still separated them.

The other children were so terrified of being taken from their mothers that they grabbed onto their shirts in fear and would not let go. The immigration officials had to drag them away, putting the children in headlocks and pulling them away from their mothers. I knew that my daughter would be in danger if she were treated that way, so I tried to keep her calm. These were two days of terror.

After C.F. was separated from her daughter, she was transferred to the Irwin Detention Center in Irwin, Georgia. While there, she describes being "sick with fear and sadness." She begged guards and ICE officers to connect her with her daughter. After repeated requests, ICE officers became so frustrated that they yelled at her and told her, "That's enough. Stop it. We are not going to explain this to you." The situation became so desperate that she contemplated suicide and told a friend that she was going to throw herself from the second floor of the detention center. However, thoughts of her daughter prevented her from going through with it.

After more than a month in detention, C.F. was permitted to talk to her daughter. Her daughter described difficult and painful conditions where she was being held, including an older girl who hit her "all the time," and that people would cover her mouth when she cried to stop her.

C.F. was eventually reunited her daughter through the court ordered reunification process. Following reunification, they were both detained at the South Texas Family Residential Center in Dilley, Texas, along with her daughter. Her daughter now suffers

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records show, L.A. Times (Jul 1, 2018).

⁶⁶ On June 18, 2018, DHS Secretary Nielsen stated at a White House press briefing that "D.H.S. is not separating families legitimately seeking asylum at ports of entry." *Kirtsjen Nielsen Addresses Families Separation at Border: Full Transcript*, NY Times (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html. Despite DHS's repeated claims that families were not separated if they arrived at a port of entry, the *Ms. L.* court found that "the practice of family separation ... has resulted in the casual, if not deliberate, separation of families that lawfully present at the port of entry, not just those who cross into the country illegally." *Ms. L*, 310 F. Supp. at 1144; see also Paloma Esquivel & Brittny Mejia, *The Trump administration says it's a 'myth' that families that ask for asylum at ports of entry are separated. It happens frequently*,

repeated nightmares and often "wakes up crying and tells me that she dreams the men in green uniforms are taking me away from her." While there, an asylum officers found that she had a credible fear of persecution. She was then released from detention along with her daughter, and will seek asylum in non-detained removal proceedings.

5. Case of M.F., Guatemala, who was separated from her 14-year-old son for 60 days and was unable to meaningfully participate in the asylum process due to duress.

M.F. is a Guatemalan woman who fled her home country along with her 14-year-old son, who had been subjected to serious threats. After they were apprehended by CBP, they were taken to the *hielera* and immediately separated from each other and put in different cells. M.F. could see her son from her cell, but could not communicate with him. While she was detained in the *hielera*, CBP officers screamed at her and told her that she would never see her child again. She also observed her son's face turning blue from cold and his lips becoming so dry that they came close to bleeding. On her second day in the *hielera*, M.F. was taken to federal court to face criminal charges of improper entry. Upon her return, her son was gone. She describes what happened next:

When I walked back to the cell, I walked past the cell where my son was being held, and he was no longer there. I became frantic and asked the guard where he went. The guard started screaming and told me that the president was going to take away my child... It felt like an arrow went through my heart.

M.F. was eventually transferred to the Eloy Detention Center. Two days after she arrived, an ICE official presented her with a paper with her son's name on it and told her to sign it. ICE officials did not explain what she was signing. She signed it immediately because she thought it would help her reunite with her son. While in Eloy, M.F. was eventually given a credible fear interview, but could only think about her son.

I asked the Asylum Officer several times about my son, but she explained that was not something she could help with and she could not control what happened. My mind could not focus on anything other than the well-being of my son. As a result of being separated, I could not focus on the questions. I also was concerned that anything I said would end up hurting my son, so I did not explain that it was MS-13 that was after him.

M.F. was found not to have a credible fear of persecution, a decision she is currently seeking to overturn. She was eventually reunited with her son and transferred to the South Texas Family Residential Center in Dilley, Texas. Her son is "extremely traumatized" by the separation, is always nervous now, and appears "completely different" than before they were separated. In early August, an immigration judge vacated the asylum officer's finding and determined that M.F.'s fear of persecution was credible. She was later released from detention along with her daughter and is seeking asylum.

6. Case of J.H., Guatemala, who was separated from her 7-year-old son for 53 days and forced to sleep on a concrete floor for 12 days.

J.H. is a Guatemalan woman who fled her home country with her 7-year-old son to seek asylum in the United States. After crossing the border, they were apprehended and detained. She was sent to a *hielera*, where she was held for three days. When CBP officials separated from her child at the *hielera*, the officials lied to her and told her that her son would only be taken away for a single day. She described the traumatic experience in which officials falsely promised her 7-year-old son would be only removed from her for a short period of time:

The guard said, "Grab your child, don't make this harder than it is, your child needs to go to the bus." My son started to cry and I began to console him and told him this was only for a short period of time and that I loved him very much. In that moment, I felt as if I was going to die. I could not believe that they were taking my child away. ... I said I was scared and didn't want to leave my son, but they promised to give him back the next day, so I tried to be brave and allowed it to happen. They assured me they would return him the next day. My son cried and cried and begged me not to leave him or separate from him. They took me to a bus and told me not to look back at him.

Instead of being reunited with her son, J.H. was taken to a different short-term custody detention, that she called the "dog pound." She was held there for eight days, during which time immigration officials did not permit her to brush her teeth and denied her the ability to shower, despite the fact that she was menstruating. Because of overcrowding, she was forced to sleep on the floor in the area designated as a bathroom. The entire cell had a "horrible stench."

While detained in the "dog pound," J.H. and other mothers were subject to repeated verbal abuse. She frequently broke down in tears as she begged for information about her son, but immigration officials just made fun of her and called her and the other women "crazy women." She notes that "[t]hey would tell us we were annoying old women and that nobody wanted us here, but they were thankful because of us they had a job." She felt treated less than human.

J.H. was eventually transferred to the La Salle detention center, where she was again subject to verbal abuse. When she repeatedly asked guards for information about her son, the guards became frustrated, told her to "stop talking," "don't you talk enough," and eventually called her a "motherfucker."

Like many of the other separated parents, J.H.'s asylum case was negatively affected by the trauma of separation. She had been separated from her son for 30 days at the time of the interview, and she describes being "so upset" that she "could not concentrate, all I could think about was my son." After the asylum officer determined that she did not have a credible fear of persecution, she considered appealing the

decision, but she decided not to because she believed doing so would mean that she would never get her son back.

J.H. was eventually reunited with her son and transferred to the South Texas Family Residential Center in Dilley, Texas. After receiving legal assistance for the first time, she filed an appeal of the negative credible fear determination. In early August, an immigration judge vacated the asylum officer's decision and determined that J.H. had a credible fear of persecution. She was subsequently released from detention.

7. Case of W.L., Honduras, who remains separated from his 17-year-old son after 100 days, and was forced to sign documents without any explanation of what they said.

W.L. fled his home country of Honduras with his 17-year-old son to seek asylum in the United States. They were apprehended after crossing the border and brought to a CBP processing facility near McAllen, Texas, where W.L. expressed a fear of return. The next day, he was separated from his son and transferred to another facility. He said, "The security guard told me to hug my son now, because we will be separated, and we won't know when we will see each other again." W.L. was then transferred to the Rio Grande Detention Center, and then after two weeks to the Stewart Detention Center in Lumpkin, Georgia. While detained at Stewart, he described the coercive environment and the duress that he suffered:

The conditions at Stewart were much worse than in the places I had been before. The guards were very aggressive toward the inmates...One time I saw a detainee on his knees in front of a guard begging for forgiveness. I felt scared and tormented there...

About 15 to 18 days into his detention at Stewart, he was called in by an official to sign documents that were in English, although W.L. only speaks Spanish. He recalls:

The official had a paper with him and shoved a pen in my hand, and indicated for me to sign it. I did not know what this paper was and was not given any explanation. I signed the paper because I felt I had no choice, no control. The man with the paper seemed angry... After I signed the paper, the man took it and walked away.

About eight days later, W.L. was transferred again to a facility in Fulston, Georgia, then to one in South Texas, and then he was transferred again—for the seventh time within about two months—to Port Isabel. Despite expressing fear of return to his home country upon apprehension, W.L. still has not been provided with a credible fear interview or any other interview with any immigration officer. W.L. indicates, "Last week, a visiting attorney told me that the government thinks that I withdrew my fear claim. I did not know about this before last week."

Accordingly, W.L. has since submitted a request for a credible fear interview and remains in detention. He has not been reunited with his son, who has since turned 18 and has been released from ORR custody to live with a sponsor.

8. Case of L.A., Guatemala, who was separated from her 10-year-old daughter for 29 days and subject to duress and coercion.

L.A. is a Guatemalan woman who fled her home country along with her 10-year-old daughter to seek asylum. She was apprehended by the Border Patrol after crossing the border with her daughter. While detained in the *hielera*, L.A. was subject to verbal abuse from officers who frequently yelled at her. One officer told her that immigrants were coming to this country to "take up their resources" and "live off of their tax money."

The day she was detained, officials told her that they were going to take away her daughter. When she protested, they told her it would only be for a brief period of time while she was in court. After two days, officers came to her cell to take her daughter from her. Her daughter "began to weep uncontrollably and began to beg me not to let them take her." The immigration officials then physically dragged L.A.'s 10-year-old daughter away from her as she wept, and was taken to another cell. This caused L.A. "extreme emotional distress."

Despite officials telling her that she would be reunited with her daughter after she returned from court, when L.A. came back from court two days later, her daughter was nowhere to be found. An officer falsely told her that she would be reunited with her daughter after being transferred to a different detention center.

Once L.A. was eventually transferred to a different detention center, she continued to worry about the fate of her daughter. Within six days after having her daughter forcibly taken from her, she had a credible fear interview. She states that she was "not able to fully tell my story because all I could think about was where my daughter was and if she was okay." After L.A. was found not to have a credible fear of persecution, she chose not to appeal the denial. She describes the ways in which family separation affected her decision not to pursue an appeal:

Two days after my interview, I was told that I had failed. I took the opportunity while talking with an immigration officer to ask once again where my daughter was, and the officer said, "I don't have that information, and we can't do anything about it." I told the officer I did not want to appeal my case so that I could see my daughter as soon as possible. I thought this would bring my daughter back to me sooner.

L.A. was eventually reunited with her daughter and is currently detained in the South Texas Family Residential Center in Dilley, Texas. Although she and her daughter are finally reunified, L.A. reports being unable to sleep or eat, suffers from constant headaches, and experiences other residual emotional and physical problems from detention and separation.⁶⁷

L.A. was later released from detention after filing a new appeal of the asylum officer's decision. In early August, an immigration judge vacated the negative credible fear finding. L.A. was released from detention soon after and will pursue her asylum case in removal proceedings.

9. Case of Y.R., El Salvador, who was separated from her 15-year-old daughter for about 60 days, subjected to verbal abuse and threats, and was unable to focus on anything other than her daughter during the credible fear interview.

Y.R. is a Salvadoran woman who fled her home country along with her 15-year-old daughter. After she was apprehended crossing the border, they were taken a facility she called a *perrera* (or dog pound), and she was separated from her daughter and placed in a different. The first day she was detained there, during an interview, a CBP official used abusive language and threats and told her that she would be separated from her daughter and that her daughter would be adopted in the United States:

The officer asked me how old my daughter was and when I told them she is 15, he began yelling at me, [asking] why was I lying. He said that she is older than that and that they would investigate it. The officer continued interrogating me. When I told him I was from El Salvador, he yelled at me that that all people from El Salvador are the biggest liars, that we are worse than those from Guatemala or Honduras, and he again threatened that my child will be put up for adoption.

Y.R. was later transferred to the Laredo Detention Center and two weeks after that to the La Salle Detention Center. For the first month of detention, she received no information about her daughter. She became so despondent that she could not sleep at night and mostly stopped eating. She said that she often "felt dead" and "felt like I could not breathe correctly" because of conditions in the detention center and the uncertainty about her daughter.

Like many of the other mothers, when Y.R. was given a credible fear interview, she was given no notice. She was just placed in a room and handed a phone. Prior to the interview she "had not slept for a full night in a month, had not been eating ... felt depressed... [and] could not concentrate at all on what was being asked of me. I could only think of my daughter."

Y.R. was eventually reunited with her daughter more than a month later. She says that her experience "was hell." Following reunification, she was detained, along with her

⁶⁷ L.A. states: "Being separated from my daughter and knowing nothing about her whereabouts has caused extreme trauma for both me and my daughter. My daughter is so desperate to get out, she always asks me when we're going to be able to leave this center. This trauma has begun to impact our physical health, we are unable to sleep or eat and I constantly have a headache."

daughter, in the South Texas Family Residential Center in Dilley, Texas. In early August, an immigration judge vacated the asylum officer's finding and determined that Y.R. had a credible fear of persecution, allowing her asylum claim to move forward. Both Y.R. and her daughter remain detained.

10. Case of H.G.A., Honduras, who has been separated from his 17-year-old son for over 76 days and is subject to coercion.

`H.G.A., a national of Honduras, fled his home country after MS-13 threatened to kill him and his 17-year-old son if his son refused to join the gang. He was apprehended by the Border Patrol and indicated that he wished to seek asylum. CBP officials separated him from his son at the *hielera* and detained him for over a month, during which time he spoke to his son only on three occasions. H.G.A. suffers from what he considers "serious vision problems" that prevent him from being able to read, and he says that, "Because of this the only way that I am confident in what a document says is if someone I trust reads the document to me."

While in detention, H.G.A. was presented twice with forms that immigration officials told him would reunite him with his son. Although the officers read him the form due to his poor vision, he refused to sign because they refused him the opportunity to speak with his son about the form's contents before signing and because he did not trust the officials. "However," both times, he says, "I made sure to tell the officials that I wanted to be reunified."

Nonetheless, despite his refusal to sign any documents, H.G.A. was included in a list of individuals that the government provided during litigation alleging that he relinquished his custody rights and sought to be deported without his son.⁶⁸

At no point in the process was H.G.A. told he could have a lawyer present when considering signing the forms presented to him, and upon learning he was entitled to consult with an attorney, he said, "I do not want to sign anything from the government without a lawyer who can tell me what the form is."

H.G.A. remains detained at the El Paso Processing Center and has not been reunited with his son. In mid-August, an immigration judge overturned a negative credible fear finding and permitted H.G.A.'s claim for asylum to proceed. He is currently in removal proceedings in El Paso.

11. Case of T.C., Guatemala, who was separated from her 17-year-old daughter, who speaks only limited Spanish and was threatened with two years of jail if she refused to sign a form affecting her rights to reunification.

T.C. is a Guatemalan woman who fled her home country to seek asylum in the United States. She primarily speaks Q'eqchi' and only speaks limited Spanish. She speaks no

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⁶⁸ See Declaration of Susanne Gilliam, Dkt. 153 at Exhibit 52, ¶5, Ms. L. v. ICE, No. 18-cv428-DMS-MDD (S.D. Cal. July 25, 2018).

English and can neither read nor write. CBP officials separated her from her 17-year-old daughter after they crossed the border together. Possibly due to her limited Spanish, neither ICE nor CBP officers have ever given her the opportunity to apply for asylum, despite her fear of returning to her home country.

While detained in the El Paso area, an ICE officer called T.C. into a room and presented her with the Election Form, which was written entirely in English. The ICE officer told her in Spanish that she had to sign the form or else they would put her daughter up for adoption. She did not understand what was happening and so was hesitant at first. ICE officers then told her that if she didn't sign, she would be punished, and that she would be locked up in a jail for two years without her daughter. Out of fear, and afraid that she would never see her daughter again, she signed the form. She describes feeling that she was treated like a dog.

Due to language barriers, T.C. was totally unaware of the contents of the form that ICE officers made her sign. However, unlike many parents, she was provided a copy of the form. Volunteers at the Dilley Pro Bono Project confirmed that it a copy of the Election Form. Until the form was explained to her, she had no idea what she had signed.

T.C. was reunited with her daughter and eventually transferred to the South Texas Family Residential Center in Dilley, Texas. Since being transferred to Dilley, she has requested a credible fear interview with ICE officers on seven different occasions. She has yet to receive one. She remains detained, along with her daughter.

12. Case of A.E., Guatemala, who was separated from her 5-year-old son for 32 days and threatened with solitary confinement and other coercion, which impacted how she responded during credible fear interview.

A.E. fled Guatemala along with her 5-year-old son to seek asylum in the United States. They were apprehended near McAllen, Texas, and taken to the *hielera*. A.E. speaks Mam as her first language and is also able to speak Spanish. When she arrived at the facility, a CBP officer told her that her child would be taken from her while she went to court the following Monday. Her 5-year-old son was traumatized by this experience, shouting "Don't leave me *mami*. Don't leave me with immigration. Why are you letting them take me?! Why are you leaving me?" Because she became distraught, officials tried to reassure her, and told her that she would be reunited with her son the day after court. This did not happen.

Following a court proceeding, A.E. was transferred to the Port Isabel Detention Center. Disturbingly, she reports that guards at Port Isabel frequently threatened solitary confinement for mothers who were reacting to the trauma of family separation. A.E. reports that she had lost all appetite due to the stress of her missing son and did not eat. She also cried frequently. In response, guards threatened her and other mothers with solitary confinement.

They said they would take us to *El Pozo* or "the well" as punishment if we kept crying about our children. ... They said I would be punished because I refused to eat in the mornings. ... They would tell me that they were going to also put me in *El Pozo*. I did not know what that was. The women told me it was an ice cold room that was dark with no windows.

Like many other mothers, the coercive environment created by family separation affected her credible fear interview. A.E. describes arriving at the interview after days in which she had not eaten or slept well due to worry. "I could not concentrate on anything else [other than my son] because I was extremely concerned about my son and distraught from being separated from him."

During the family reunification process, ICE officers did not adequately explain her rights and coerced her into choosing an option on the Election Form without explaining it to her.

An officer approached me and said, "Sign here [and] you will get your child back if you return to your country." I was so desperate to know the whereabouts of my son and finally hold him in my arms again that I signed for both of us to be reunited even if it meant going back to Guatemala.

A.E. was eventually reunified with her son and is currently detained at the South Texas Family Residential Center in Dilley, Texas. She has appeared in court five times seeking to overturn the asylum officer's finding that she did not have a credible fear of persecution, but has been unable to present her case yet because of difficulties in obtaining a Mam interpreter.

13. Case of A.R., Honduras, who was separated from her 17-year-old daughter for over 35 days and subject to coercion and duress.

A.R. fled Honduras along with an adult daughter, her 17-year-old daughter, and her 4-year-old blind granddaughter after being subject to threats from gangs. They were apprehended after crossing the border near El Paso, Texas, after which her adult daughter and her granddaughter were separated from her and taken to a different location. She was detained along with her younger daughter for six days in the *hielera*.

A.R. was repeatedly yelled at by CBP officers during her time in the *hielera*, including officers taunting her and shouting, "Why did you come here? What are you doing here? You came to a country that is not yours, and now look at you." She was forced to sleep on the concrete floor of the *hielera* for six days, after which CBP officers separated her from her daughter. When her daughter grabbed onto her out of fear and would not let go, CBP officers yelled at her until she let go.

A.R. was then sent to federal jail and prosecuted for illegal entry. After a week in jail, she was transferred to the West Texas Detention Facility in Sierra Blanca, Texas. The

trauma of being separated from her daughters and subject to abuse and duress left her in an almost catatonic state:

While I was detained in Sierra Blanca my mind went completely blank. Even when I tried to pray, the words of the songs I have sung my whole life would not come to me. I feel like my mind is just beginning to come back.

A.R. was eventually reunited with her 17-year-old daughter through the court-ordered reunification process.

CONCLUSION

The case examples above demonstrate the disturbing ways in which ICE and CBP officers explicitly coerced separated parents, and through abusive tactics and deplorable conditions of confinement created a coercive environment that prevented these parents from meaningfully exercising their rights. Coercive tactics employed against a vulnerable population raises significant legal concerns and threatens the fundamental due process, statutory, and regulatory rights of parents who were separated from their children.

We urge your office to investigate and clarify DHS policy on the use of coercive tactics against parents, and to ensure that ICE and CBP officers are properly trained on the fundamental due process protections to which migrants are entitled. We also urge the following corrective actions:

- 1. DHS should end any policy that results in the separation of parents from their children, absent truly exceptional circumstances, and require that family unity be the determinative factor in charging and detention decisions.
- 2. DHS should establish a clear policy requiring that all parents be reunified with their child before being asked to relinquish any legal rights or claims to legal relief. The policy should also require that parents be given the opportunity to confidentially discuss their options with an attorney, their child, and the child's attorney, if applicable. Upon the parent's request, legal counsel or a representative from a legal assistance organization must be present at the time such waiver or relinquishment of rights is made
- 3. DHS should announce a clear policy forbidding the use of any tactics that have the effect of pressuring an individual to relinquish or make any decisions affecting their legal case.
- 4. DHS should investigate all reports of abuse and coercion against parents and their children and discipline any officer found to have violated parent's rights or any applicable provision of law, regulation, or policy.
- 5. DHS should ensure that all parents who were separated from their children are given a meaningful opportunity to apply for asylum. DHS should immediately release all of these parents from detention (including the use of an alternatives to detention program when necessary) and permit them to present their claim for relief before an Immigration Judge in a non-detained setting following

reunification with their children. DHS should also grant a new credible fear interview to any such parents who were found not to have a credible fear of return. Further, DHS should file a motion to reopen any removal proceedings that resulted in a final order of removal during the period of separation.

- 6. DHS should ensure that rare and indigenous language speakers are provided interpretation in every interaction with a DHS official. DHS should ensure that all immigration forms are presented in a language the individual can understand, and that all individuals be provided with a copy of the signed form.
- 7. DHS should investigate widespread violations of CBP's National Standards on Transportation, Escort, Detention, and Search against parents and children held in short-term detention facilities, including the failure to provide basic necessities such as feminine hygiene products, the failure to provide nutritionally-appropriate meals to juveniles, and the failure to provide edible food.
- 8. DHS should immediately establish a clear policy prohibiting the use of solitary confinement or disciplinary segregation against any detainee. Solitary confinement has been widely condemned by mental health experts and has no place in a civil confinement setting. DHS should investigate each incident of alleged use of solitary confinement against a parent or other individual.
- 9. DHS should investigate and return on a grant of humanitarian parole to the United States any parent who was separated from their child and deported to their home country without being allowed to reunify with their child or meaningfully participate in the asylum process.

Thank you in advance for your time and consideration. If you have any questions or require additional information, please contact Katie Shepherd, National Advocacy Counsel for the Immigration Justice Campaign, at kshepherd@immcouncil.org or (202) 507-7511 or Greg Chen Director of Government Relations at AILA at gchen@aila.org or (202) 507-7615.

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THERE AND BACK AGAIN: ASIAN PACIFIC AMERICANS AND "EXCLUSION" AS A POLICY IN U.S. IMMIGRATION FRAMEWORK, AABANY FALL CONFERENCE 2018

WEB LINKS TO ADDITIONAL MATERIALS

Amid Legal Uncertainty, DACA Remains More Important Than Ever (<u>Center for American Progress</u>, August 15, 2018)

https://www.americanprogress.org/issues/immigration/news/2018/08/15/454731/amid-legal-political-uncertainty-daca-remains-important-ever/

Chinese immigrant with American family fears Deportation (Fox News, June 16, 2018)

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Denaturalization, explained: How Trump can strip immigrants of their citizenship (<u>Vox</u>, July 18, 2018)

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Denaturalize This (Crooked, July 18, 2018)

https://crooked.com/article/denaturalize-this/

How Trump is cracking down on Legal Immigrants - and how they are fighting back (<u>The Guardian</u>, August 18, 2018)

https://www.theguardian.com/us-news/2018/aug/18/trump-legal-immigration-crackdown-legal-challenge

Immigrants fearing Trump's crackdown, drop out of nutrition programs (<u>Politico</u>, September 3, 2018)

 $\frac{https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292$

Inside Stephen Miller's hostile takeover of immigration policy (<u>Politico</u>, August 29, 2018)

 $\frac{https://www.politico.com/story/2018/08/29/stephen-miller-immigration-policy-white-house-trump-799199}{trump-799199}$

The Four Most Shocking Proposals in the White House Immigration Plan (<u>The Nation</u>, February 26, 2018)

 $\underline{https://www.thenation.com/article/the-four-most-shocking-proposals-in-the-white-house-immigration-plan/}$

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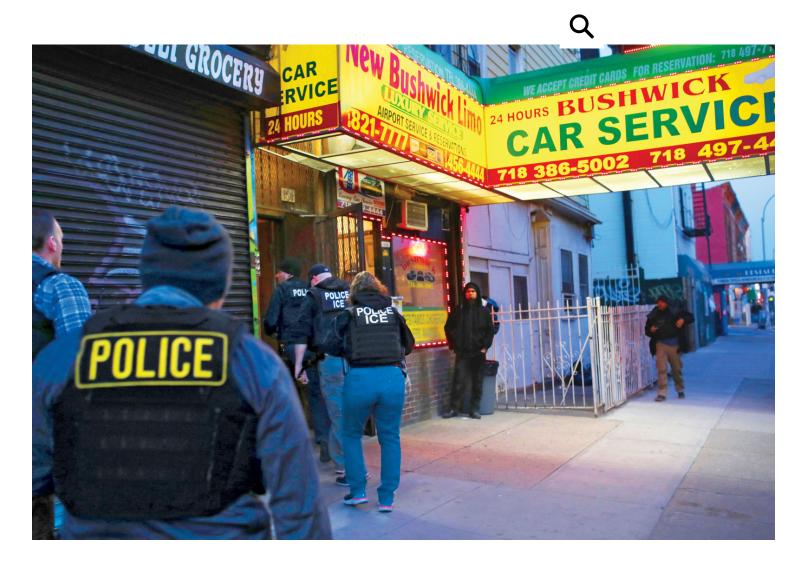
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encer



City of Fear

20,000 of New York's immigrants have been identified for deportation since Trump took office.

The rest worry they'll be next.

Above: An ICE raid in Bushwick. Photo: John Moore/Getty Images

This story is a collaboration with The Marshall Project.

An estimated half a million New Yorkers are undocumented. Whether they've lived here for two months or 20 years, they came to this city of immigrants — a place where more than a third of the population was born in another country — looking for the same things that have brought newcomers here for centuries: work and school opportunities, religious

freedom, family, and a haven from violence, persecution, political upheaval, and natural disaster.

In this "sanctuary city," the local government promises to defend New Yorkers regardless of status, restricting law-enforcement cooperation with federal immigration agents (although not prohibiting it entirely, to the chagrin of many immigrant advocates). But in recent months, amid headlines about terrified toddlers in "baby jails" and a president who refers to migrants as an "infestation," it's become increasingly clear that even New York City doesn't feel safe for the undocumented.

Now these are everyday scenes in the city: A Ecuadoran man gets arrested while delivering pizza in Brooklyn. A Chinese father of two is detained during an interview to become a legal permanent resident. Across the boroughs, Immigration and Customs Enforcement agents have appeared in courthouses, workplaces, neighborhood streets, even a church, according to one advocacy group, sowing panic.

In the eight months following Donald Trump's inauguration, ICE arrests in the region jumped by 67 percent compared to the same period in the previous year, and arrests of immigrants with no criminal convictions increased 225 percent. During that time, ICE arrested 2,031 people in its New York "area of responsibility," which includes the five boroughs and surrounding counties. These aren't unprecedented numbers: ICE arrested almost four times as many people in 2010 in New York as it did last year, and it picks up far fewer people here than in other parts of the country.

Thanks to free legal assistance, in which Mayor de Blasio has invested \$30 million, New York-area immigrants are also more likely than their counterparts elsewhere in the United States to be represented in court. (Eighty percent in Queens versus, say, 39 percent in South Carolina.) Partly as a result, they're also less likely to get deported, according to data from Syracuse University's Transactional Records Access Clearinghouse. Among the five U.S. counties with the most immigration cases, Queens had the highest proportion of immigrants who were granted deportation relief and the lowest proportion ordered removed from the country.

Despite all of that, Trump's immigration crackdown has instilled a new level of fear throughout the city. Before he took office, many undocumented immigrants who were considered low priority for deportation — because they didn't have criminal records, for example —were allowed to stay as long as they regularly reported to immigration

authorities. But Trump has expanded the number of people considered a priority for deportation. Now people whose only offense is staying in the country illegally are being flagged for removal.

Those who are arrested are often subjected to inhumane conditions in overcrowded detention facilities while they await deportation proceedings, which can take months or even years. Although many manage to stave off deportation with the help of a lawyer, scrambling to pay the thousands of dollars in legal fees, others are not so lucky. Flown to countries where they may not have lived in decades, the deported often arrive with no money, no phone, no place to stay. Back in New York, their absences, often dizzyingly sudden, leave children, spouses, friends, churches, and entire communities reeling — and wondering who could disappear next.

It's perhaps no surprise, then, that many immigrant New Yorkers who for years have tried to do the right thing — like paying taxes and checking in with ICE — are retreating into the shadows. "This Trump administration came in, even the permanent residents, even the people who have their status, they have this fear," says Youngmin Lo, 35, an undocumented South Korean pastor at Faith Presbyterian Church in Maspeth, Queens. "And the people who are undocumented, I think they realize it's time to hide."

To understand what life is like for undocumented New Yorkers and their loved ones, the Marshall Project and *New York* contacted more than 100 people around the city — immigrants, lawyers, and advocates. There was the 23-year-old undocumented Dominican woman from the Bronx who was detained on her honeymoon in Niagara Falls. The Manhattan teenager too shaken to tell her best friends that her father had been deported to Gambia. The bright middle-school student in Harlem who suddenly disappeared; an aunt told the school that her family had fled to Canada. "Palpable fear has just become part of their lives at this point," says Constance Bond, principal of St. hope Leadership Academy Charter School in Harlem, about her students from immigrant families — as it has for hundreds of thousands of New Yorkers. —*Geraldine Sealey*

UNDOCUMENTED IMMIGRANTS HAVE ALWAYS LIVED WITH THE FEAR OF DEPORTATION. BUT NOW THE FEAR IS UNMISTAKABLE.

For one woman, a honeymoon turned into a nightmare.

Angelica Herrera De Leon, 23, Dominican Republic

"We married on September 15, 2017. My mom booked a trip for us to Buffalo. Because of my status, we had to go by bus. We went to Niagara Falls on the U.S. side. We had a wonderful weekend.



Her last moment: A snapshot taken by De Leon's husband hours before she was yanked from a bus by border agents. Photo: Courtesy of the subjects On our way back, we fell asleep, but then I realized the bus wasn't moving. I saw the driver inside the bus station with the border agents. I knew that was it: They were getting on the bus. There were four agents. One started asking everybody where they were from. When he came to us, I wasn't going to lie. I'm before God's eyes. First, he asked my husband, and my husband told him he was from the Dominican Republic and he was a resident. He took his residence card. Then he said to me, 'Are you here legally or not?' He took my Hostos [Community College] ID, which was the only ID I had with me, and also my date of birth. I guess he had a little computer or something, and then he said that we had to get off the bus.

Once I got off, he said, 'Okay, this is what's going to happen: You're going to be deported in the next two weeks.' I told him I was married. But he said he didn't have anything on file, so that wasn't going to help me. Literally those words. My husband had already done his fingerprints for

his naturalization. He was only waiting for the exam. My husband was basically freaking out. He didn't know what to do, he didn't know where to go, he didn't know who to call. They say, 'Oh, if you want to go back on the bus, you are free to do so because you are legally here.' But he said, 'I'm not going to leave my wife.' He didn't even speak, he just started crying."

Status: Her deportation case is currently in court.

He fled gay-bashers only to be put in handcuffs at JFK.

Edafe Okporo, 29, Nigeria



Photo: Steven Laxon

"I was working for LGBT people in Nigeria. I was found with a guy I was having a relationship with. They broke into the apartment, dragged me out into the street, and beat me.

I discovered that the United States grants asylum to gay men from countries where being gay is criminalized. I had gotten a travel visa to attend a conference in the U.S. When I arrived at JFK, I walked over to an Immigration officer and said, 'I am fearful for my life.' I was put in handcuffs and thrown in the back of a bus. I was ashamed of myself.

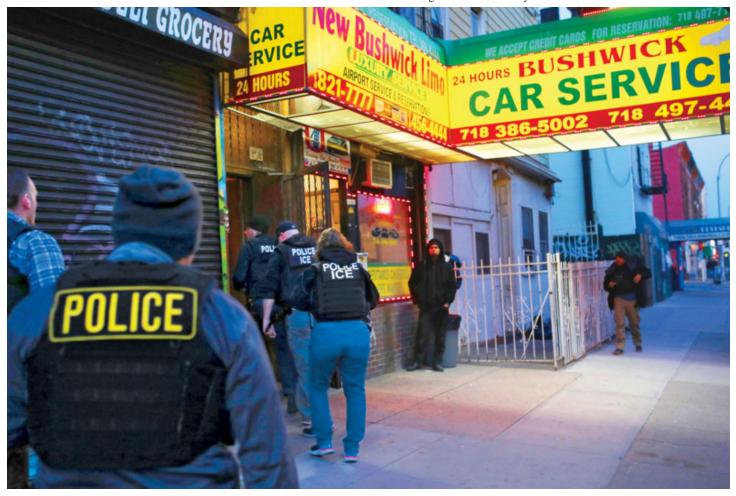
People saw me in chains, even people I took the same flight with. Maybe they thought I was a drug dealer or criminal.

I didn't know where they were taking me. There was a little window at the back of the bus, but I was handcuffed at the waist and legs. The lights on the George Washington Bridge were the only thing I could see."

Status: He was ultimately granted asylum but says he is fearful that any legal slipup could get him deported.

An ICE Raid in Bushwick

In April, ICE swept up 225 immigrants in the New York area during a six-day operation, including this Mexican immigrant in Bushwick. At least 45 of those arrested had no outstanding criminal issue.



6:10 a.m., April 11, 2018, Bushwick, Brooklyn

Photo: John Moore/Getty Images

Nine Ways Trump Has Made It Harder on Immigrants

- **1.** Rescinded DACA, barring those who were illegally brought to the U.S. as children from receiving work permits; judges overturned the ban, at least for now.
- 2. Rescinded the Temporary Protected Status program; immigrants from Haiti, Nicaragua, Honduras, and El Salvador are losing their status and must prepare to leave.
- **3.** Reduced the number of refugees allowed into the U.S. to about one-half of what it was in 2016.
- **4.** Launched a denaturalization initiative aimed at those suspected of having lied on their applications.
- 5. Disqualified victims of domestic violence and gang-related violence for asylum.

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- **6.** Tripled the number of pages in green-card applications.
- 7. Increased red tape for employers hiring H-1B-visa candidates applications dropped 20 percent from 2016 to 2018.
- 8. Proposed a rule barring the spouses of H-1B-visa holders from legally working.
- **9.** Added security screenings for immigrants and those applying for visas that have caused "significant and expensive delays," according to one immigration attorney.

THEY CAN HIDE FROM ICE OR CONFRONT IT.

Some are learning how to film ICE raids.

Hawa Taboure, a U.S. citizen from Mali

Taboure took a training course through the organizations Witness and the Urban Justice Center.

"If ICE knocks on your door, you have to ask them, 'Where's the paper signed by the judge?,' No. 1. No. 2: 'Who are you looking for?' If it's not you, it's not an indication for you to open the door. If they get into your house, you got a right to remain silent. I'll tell them, 'I'm not allowing you to touch anything in my house.'"

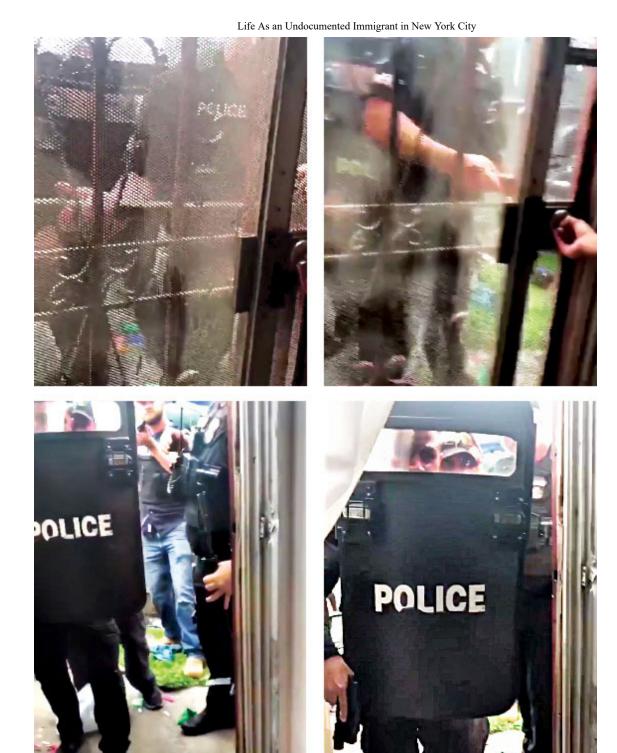
The Right Way to Film a Raid	

WATCH

How to Document an ICE Encounter

As immigration arrests have increased, homemade videos have been used to stay or throw out deportation orders, says Palika Makam, a program coordinator for Witness.

- → Get several angles, both close-ups and wide-angle shots, and capture local landmarks to corroborate details: street signs, clocks that show the current time.
- → Focus your camera on the ICE agent, not the person being arrested or detained. If you can't, you can use the face-blurring tool on YouTube.
- → Don't narrate: anything said or learned about the person being arrested or detained could be used against them in court. If you do feel inclined to narrate, stick to objective facts.
- → Know your rights, but also know when not to use them. When a jumpy ICE agent holding a Taser says to turn off your camera, sometimes it's best to listen. "No footage is ever worth your safety or the safety of the person who you're trying to protect by filming."
- → Use at least a six-digit phone password, and don't use touch ID, because ICE can coerce you to unlock your phone with your fingerprint. And always save at least one unedited copy of your footage in a secure place.
- → Plan when you share and with whom. "Sharing videos after an official ICE report or police report comes out can be huge, because it can help highlight any lies or discrepancies. If you share right away, it could give law enforcement the opportunity to change their story around the video."



Video stills: Taken by an 11-year-old girl whose father was arrested by ICE agents in May.

They're looking over their shoulders.

Joon Young Kim, 32, South Korea

"I stopped visiting a lot of places where a lot of the ICE agents were coming, more predominantly busy areas of Hispanics or even Asians. I stopped going to Flushing Main Street; I stopped going to Corona to have a bite to eat. I saw some ICE agents in Penn Station. I actually stopped going to the city just for the fear of that."

Status: An undocumented Queens man who self-deported in May.

They're afraid to go to work ...

Antonio, 45, Mexico

"If other deliverymen tell me that ICE is grabbing people in an area, I stay away. And I tell my boss not to send me there. I worry. But all I can do is work."

Status: An undocumented deliveryman at a restaurant in Queens.

... And even to report abuse.

Emma Medina, women's-services coordinator at Voces Latinas in Queens

"We have seen a decrease in the amount of calls from women in the community. In some cases, husbands will threaten their wives with deportation to exert power over them. Husbands will say that if they go to the authorities, the family will be broken and it will be all the woman's fault. That keeps the abuse going."

In his wallet



Photo: Bobby Doherty/New York Magazine

"He carries the lawyer's card. I tell him, 'Remember, if something happens, you say nothing and tell them to call my lawyer.' Those are the conversations we're having more

now since this administration," says Emilene Rodriguez, whose Mexican husband is undocumented.

THE FEAR OF LOSING THEIR CHILDREN CAN BE PARALYZING.

Groups are advising parents on what to do if they are separated from their children.

As grimly imperative as a will, this 22-page child-care safety plan lays out the wishes of parents at risk of "administrative separation." Drafted by a coalition of California advocates, this and documents like it have been circulating among immigrants'-rights groups nationwide.

By "Incapacitated," I mean if, while I have any child or children under the age of 18, I am:

- (1) detained by law enforcement;
- (2) incarcerated;
- (3) deported or removed.

Perhaps the main purpose of the document is to keep children out of foster care, wherein parental rights are often severed and kids run a higher risk of eventual homelessness and incarceration. Parents who fail to plan in advance might be cut out of custody proceedings; ICE is supposed to involve them but isn't required to.

If I am Incapacitated, I choose the following person (and alternates) to be the Caregiver for my children ...

Parents are advised to choose at least one person who is "stable," i.e., a documented person not terminally ill or involved in criminal activity or planning to leave the area. This isn't always easy. Once, when attorney Miriam Stombler, who helped draft the document, was presenting the care plan to an ESL class, a mother raised her hand to say

she didn't know anyone at all in the U.S. "Two women in the class said, 'Put me down,' " recalls Stombler. "And they meant it."

For your Designated Caregiver, box 36: Child's Favorite Things.

"If your parent gets picked up by ICE, it lets the person who picks you up from school that day know that chocolate is your favorite ice cream, or your best friend is Amelia, or this is your comfort stuffed animal," says Stombler. "The idea was, *How do we ease the discomfort for kids when their parents are whisked away?*"

Where Immigrants Are Detained in the New York Area

Orange County Jail: Goshen, NY

798* detainees

Average length of stay: 107 days

Bergen County Jail: Hackensack, NJ

1,331 detainees

Average length of stay: 92 days

Hudson County Jail: Kearny, NJ

3,332 detainees

Average length of stay: 88 days

*Figures are totals from November 2016 to November 2017. TRAC, Syracuse University.

Where Immigrants Have Been Picked Up

Just some of the reported arrests since February 1, 2017.



Photo: Immigrant Defense Project

- 1. 3 arrested in Highbridge
- 2. 28 arrested around Bronx County Criminal Court
- 3. 3 arrested in East Elmhurst
- **4.** 13 arrested in Corona
- 5. 33 arrested around Queens County Criminal Court
- 6. 4 arrested in Ridgewood
- 7. 4 arrested in Bushwick
- 8. 43 arrested around Kings County Criminal Court
- 9. 24 arrested around New York County Criminal Court
- 10. 8 arrested around Richmond County Courthouse

Stats are from the Immigrant Defense Project.

Even classrooms don't always feel safe.

Constance Bond, principal of St. Hope Leadership Academy

"We have a student who just disappeared one day, and the aunt called to say that the mother, who was undocumented, went on the run with the child. She was this lovely sixth-grade student whose whole life was upended because ICE was making threats. We lost that girl; we lost that family. She was really excelling academically.

We've had to train staff on what to do should an agent enter the school. We've had parents not want to send their child on a field trip because they're worried ICE might enter the bus. And I have to be honest with you: I'm not 100 percent sure that something couldn't happen. During the election is when I started to see increased stress levels in the kids, particularly in my girls who wear hijabs. They felt like people were saying things to them. For girls that are 11 and 12, that's very scary."

FOR THOSE WHO ARE DETAINED: "THEY TREAT YOU LIKE ANIMALS."

Families are left without their main provider.



Photo: Stephanie Sinclair

Risma Fadersair, 41, Indonesia

"They know Daddy went to work, and they asked, 'Where is Daddy, Mommy?' And I said, 'He is coming back.' I wasn't ready to tell them Daddy got arrested. We don't have a lawyer. My lawyer said, 'I couldn't help your husband because the case is too complicated.' And they gave me a pro bono list. So I called them. And nobody responds. I finally found a private lawyer, but he asked for the money first: \$4,000. So I said to him, 'Even, you can kill me, I don't have that much.' We don't have anybody to defend him. And only my husband works. The income only from him. At home, my husband always takes care of them. Without him, right now, it's just my half missing. But the thing is, if I keep mourning like this, how about my kids?"

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Since ICE Took Dad

Dwight, 9, and Ivor, 8, visit their dad.

Ivor: Sometimes when I see my dad in detention, to be honest, I want to sneak out with him so he can be with us. But then, the Hudson County detention people would be all, like, searching for him. That's why I quit on that idea. I also have this idea to get back on Donald Trump. If he wants to arrest anyone, then I want to arrest his parents. Or him! So that's what he deserves! Also I'm kind of furious.

Dwight: I don't want to move to Indonesia. The rules there are not that good. And here the laws are not that good, too. That's why I want the laws to change, so it could be fair and everyone could be happy in the country.

Ivor: My brother wants to be the president so he can change the laws.

Dwight: Maybe I could first be a lawyer, and then I could try to be president.

Ivor: Yeah, that sometimes happens. I want to be a doctor so I can take care of people, because I don't really like it when people die or stuff. Also, to tell you the truth, I got two honor rolls.

Status: Last September, Fadersair's husband, Indra Sihotang, was detained during a routine check-in and is being held in the Hudson County jail. The couple has four sons under the age of 10, all U.S. citizens, including a 5-year-old with Down syndrome.

Detention is jail, down to the food.

Shemar Pearce, 41, St. Lucia

"Hudson is like hell, hell like I wouldn't want for nobody. It's full of detainees, but they treat you like you are a criminal, like you are a murderer. Like you are the scum. There is one microwave, so there is always an argument for the microwave. It's always an argument for the phone. They give you breakfast at 6:40, then ten o'clock is lunch, and four o'clock is dinner. You have no utensils*, so they give you a tray with not even a complete meal. It's like, you wouldn't even feed your dog that. Everything you have to buy. Like, a plastic spoon is 20 cents with tax. A bottle of water is a dollar with tax. If you want to buy a case of water, that's \$24. I was so depressed. There were times I would be like, I just want to get out of here at any means. I wanted to kill myself. I was telling my husband, 'If I have to get out by a body bag, I will get out.' This is no place for nobody."

Status: Detained by ICE in front of her kids, Pearce spent six weeks this winter in a Hudson County jail.

*Hudson County jail says detainees are given "a utensil."

Asylum seekers have to prove their "credible fear."

Jasdeep Mangat, a physician who volunteers examining detainees

"My evaluation of their trauma is used by their lawyers in court. When I examine them, there is a guard outside the door. I'm not allowed to take pictures. Instead, I carry blank sheets of paper and a ruler to measure the length and dimensions of their scars and wounds. I ask things like, 'How many weapons were used? How many times were you hit? Did you see the weapon? How long was it?'

About a month ago, I evaluated a 30-year-old Honduran man who was attacked with a machete by a gang that killed his brother in front of him. He ended up having a scar on the right side of his scalp. The scar was not clean cut; it was irregular and messy because he hadn't gotten proper suturing afterward. He would not only get beat up by gangs but also by the police. He was also a victim of child abuse and was raped by a family friend. He started trembling when he'd talk about it. He said to me, 'Why can't this life just finish?'"

A high-school senior plans for a fatherless future.



Her reminders: Objects from her father's bedroom left behind after his deportation. Photo: Bobby Doherty/New York Magazine

Anonymous, U.S. citizen whose father was deported to Gambia

"I was at work when my sister called, crying: 'They took Daddy. He went to his meeting with Immigration, and then they took him.' My heart went down to my stomach.

I told myself, *He's coming back*. *Three weeks*, *tops*. We've gotta go back-to-school shopping. I'm gonna be a senior. He needs to help with my college applications. Then the lawyer sat me down: 'This is not something like he just comes home.'

After we went to the lawyers, we drove up to Jersey to see where he was being held. In the car home, everybody was crying. I was like, 'Mom, I'm gonna sleep over at my friend's house,' and I went to a party. Usually I'm not really a party person, but I was just screaming and stuff, dancing, laughing. That was a way of me exerting it out. I was dreading going home. My dad's chair is right here; my chair is right there. At 11 o'clock, we watch *Judge Judy*. That's his favorite show — he loves her, and I hate her. He has this intoxicating scent. I don't know if it's his cologne or his natural scent. Going in the closet, smelling that — I laid on the bed and started crying.

My dad got deported on January 3, 2018. My friends don't really know. I don't want them to see me in a vulnerable way. What hurts the most is to think about the future. He's never gonna see me walk down the aisle and finally meet the guy who was enough for me. He's never gonna see me in a hospital room giving birth to my kid. I know I can always go visit him in Africa. It's not that he's dead, but it's just not the same. Here with my dad, that's where I belong. In the living room, watching *Judge Judy*."

THEIR FAMILIES FIND THEMSELVES AT THE MERCY OF LAWYERS AND POLITICS.

But a good lawyer can save your life.

Nirna Pierre-Paul, 52, Haiti

Pierre-Paul came to Brooklyn from Haiti on a green card when she was 7. She struggled with addiction and did several stints in jail. In 2009, the government began trying to deport her. Sarah Gillman is an attorney with the Legal Aid Society.

Nirna: My country had an earthquake [in 2010], so they decided they were not sending Haitians back. For eight years, I have to report [to ICE], like parole. I didn't miss, not one day. I did everything right. The day before I went this year, I had a nightmare that they

kept me, and they did. They said, "You're being detained." Then they put me in handcuffs. But I had called my sister and told her, "Call Sarah Gillman." She was my lawyer before.

Sarah: We filed a habeas petition arguing that they shouldn't have been permitted to just take her into custody without any prior notice and revoke her order of supervision. In court that night, the judge asked the government attorney, "Why did you detain her?" I was quite shocked listening to this. He said, "Well, I just had to detain her because of operational procedures that have to be followed." So basically they detained a human being who has multiple medical issues, had no support, was living for a long time in New York without any problems, because they had to do something operationally. For lack of a more articulate or sophisticated way of saying it, I think they've been chomping at the bit to do this and now they have the license. That night I called her older sister.

Nirna: Maud.

Sarah: I said, "Could I just ask you again about the family situation?" So their mom has dementia. She started to decline like three years ago, and from what I understand, they started going through the mom's paperwork.

Nirna: She had documents that my mother was a citizen.

Sarah: So, under the law, we were able to argue that Nirna derived citizenship through her mom. We sent an email to the federal attorneys, and then Friday around five, we get an email from the government attorneys agreeing to release Nirna. She was on the phone hysterically crying with me as I was trying to explain to her that it's okay, I'm coming to get you.

Nirna: After I got off the phone, people were just hugging me. People that didn't even talk to me in there, just hugging me.

DACA recipients face the vagaries of perpetually changing laws.

Ivy Teng Lei, 27, China

"My work permit through DACA expires in March 2019. In the last months, DACA was rescinded and no applications were being accepted. Then a federal court struck down the

White House decision to rescind it, and they started accepting existing application renewals. The volatility of it all is just so mentally draining. Even my friends will ask things like, 'So are you still going to be deported?' And I'm like, 'Dude, I don't know!' "

Status: DACA recipient who came to New York at age 7.

Left Behind: From a man deported in April

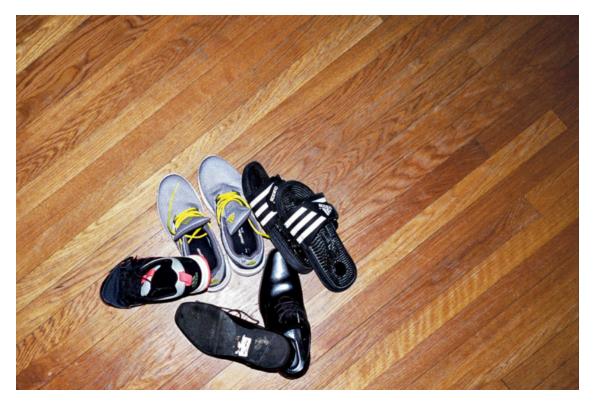


Photo: Brigitte Hamadey



Photo: Brigitte Hamadey



Photo: Brigitte Hamadey

What You Can Bring to Detention

- Small religious items
- Reading material and letters
- Legal documents
- Up to ten photos
- Eyeglasses
- Dentures
- A personal address book
- A wedding ring

A lucky break from activists can also save your life.

Pau, Guatemala

Day 1: Eloy, Arizona

It was just after dawn when Pau discovered her bond had been paid. She'd spent five weeks in immigration detention worrying about her 15-year-old daughter, whom she'd last seen a few days after they'd been picked up by ICE agents at the border in June. Pau had prayed every day. After she passed her "credible fear" interview, her bond had been set at \$15,000. It might as well have been a million. She had no way to raise that kind of money, so she prayed some more.

Her benefactors, she'd eventually learn, were a group of mothers from New York called Immigrant Families Together. A few days before, they'd bailed out her friend Yeni, and now Pau and another woman —all three part of what Pau called her *propia familia* in detention. When they were released after dark, a woman was waiting for them — a stranger. She handed Pau a cell phone, and Yeni was on the line. "These are good people," Yeni said. "You can trust them." The woman dropped Pau and her friend at a hotel in Phoenix. It was the first time in weeks Pau slept through the night.

Day 2: Arizona to Colorado

A man named Kyle arrived at the hotel early the next morning and introduced himself as "el chofer," part of the network of volunteers who'd banded together to help parents like Pau reach their children. For the next six hours, Pau rode in the back of the car with her fellow detainee. Then, in a Starbucks parking lot, they met new drivers, and their paths diverged. The two women hugged and told each other to be brave, to keep going for the sake of their children. Back in the car, Pau cried at everything, even when she ate a banana — her daughter loves bananas.

They drove out of New Mexico and into Colorado, where she switched cars again. That night she slept in Aurora.

Day 3: Colorado to Chicago

They drove into Nebraska, where she met her next driver, Brian, a six-foot-four man with a beard who spoke no Spanish. In some ways, not being able to speak was a relief.

Pau's husband was already in New York, working construction and saving money by living dormitory style with other men. It had been eight years since he'd left home; Pau talked to him every day over WhatsApp. She wanted to reunite her family, but most of all

she wanted her daughter to be safe. Her hometown in Guatemala was too dangerous for a skinny teenage girl.

Day 4: Chicago to Pittsburgh

The closer Pau got to New York, the more anxious she felt to *just get there*. At a midday stop in Ann Arbor, she used the bathroom, then declined the offer to rest. She just wanted to get back in the car.

Pau slept and woke up, and ripped a napkin to shreds as she told her story, again: how the guards had taunted her and told her she was going to be deported the next day, how they yelled "Stop crying!" and "This is all your fault!" But nothing compared, she said, to the pain of watching her daughter sob as she was being taken away. Pau was drying tears from her eyes when the city of Pittsburgh appeared in front of her at sunset, water and bridges gleaming. The family waiting for her had made Mexican-style chicken soup.

Day 5: Pittsburgh to New York City

Pau did not cry all morning. But when she saw the Manhattan skyline, she sobbed and thanked God. She sobbed as her driver negotiated the city streets. She borrowed a phone to call her daughter, who'd been released to her father a week earlier. "Don't worry, Mama," her daughter said. "Everything is going to be okay. You're here."

Status: Living in Queens with her husband and daughter.

One bricklayer was detained in cells he helped build.

Many immigrants being processed for detention are first held at a federal building on Varick Street, where one Trinidadian immigrant who has lived in New York since 1976 found himself in winter 2016.

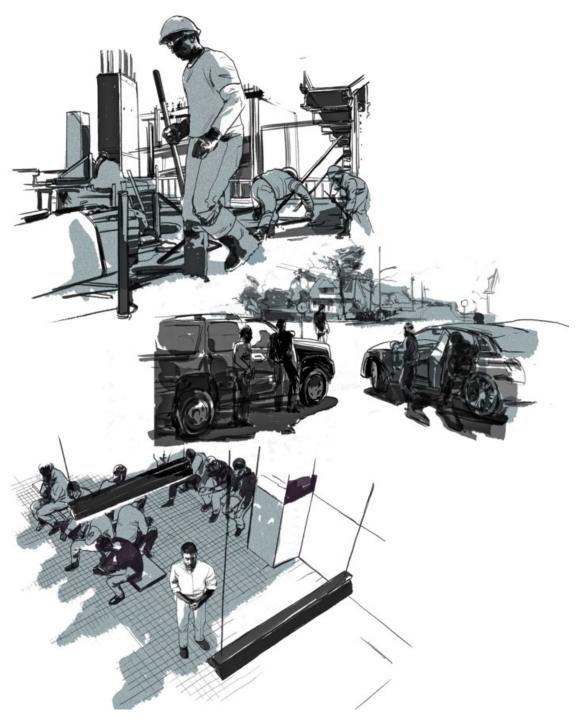


Illustration: Owen Freeman

"I was making \$18 an hour." *c. 1985*

"I'm bringing in all the blocks and the mortar, building the scaffolds. The glaze blocks that they got in the cell, after you strike them up if you don't clean it, the mortar get hardened and it would be very hard to clean it off. You take a wet rag and wipe it down. I did all of that."

"I was going to work." December 7, 2016

"I'm walking up the hill, I'm walking to the train station, and an SUV and three cars just surrounded meI thought it was the police first of all, but I know I didn't commit no crime. I said, 'What did I do?' And he said to me, 'ICE immigration.'"

"They locked me up." Hours later...

"I'm walking past in handcuffs from my hips down to my feet in a place that I worked on, I'm locked up in that place. I see one guy been in there that he won his case but his lawyer made some kind of mistake and he was still sitting in there when I left. And he been in there over a year, you understand what I'm saying?"

Status: He was transferred to Hudson County Correctional Facility and was released ten months later. He has since won a cancellation of removal.

THOSE WHO ARE DEPORTED MAY BE RETURNING TO A COUNTRY THEY DON'T REMEMBER.

He was 17 when he left and almost 50 when he was sent back.

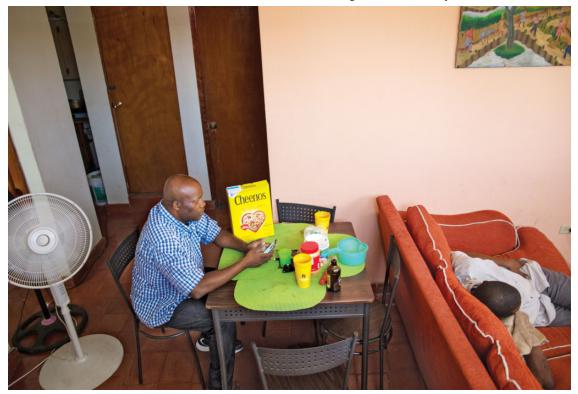


Photo: Edine Célestin

Jean Montrevil, 49, Haiti

"They had a plan to deport me on the 16th of January, even though my case was still pending in court. I thought it was a mistake. They took me to Newark. Two days later, I got transferred to Miami. I stayed there for ten days. They called me to go downstairs; we had to sleep on the floor of the shelter. They gave me the money I have in the account. They gave me two months of medication. And I didn't have no clothes — they had to find some jumpsuits and some pajamas. Then, early in the morning, they woke me up, at maybe four o'clock. We were shackled, put on a bus, and driven to an airfield. The only time they unshackled you was after the plane landed.

Now I have to start my life all over again. If you're going to deport someone, give them a chance to make arrangements. I would have sent my clothes down here. They just deport us like we're freaking animals. Who loses now? Only my kids. My son was doing so well in school; now he's not. He's only 14 years old. My daughter, she's 11 years old. She's getting emotional now. That's what worries me, man."

Status: He was deported in January after having been in the United States since 1986.

How to plan for the worst

- "Years ago, we came up with an emergency plan," says Montrevil, in case he got deported. "That plan saved my life."
- 1. "The lawyer gets the first call when I get in custody."
- 2. "Then the family members."
- 3. "Then the church."
- **4.** "When you get deported to Haiti [and] you don't have any family picking you up, they assume it was because of a crime and you're going straight to jail. That was my biggest fear. I don't think I could last one day in jail here. My friend got deported 20 years ago himself. My family knew to call him in Haiti to pick me up."

Reunited families aren't safe from deportation.



Photo: Courtesy of Catholic Charities

Javier Garrido, 30, and William Garrido, 4, Honduras

In July, after a court order required the Trump administration to reunite families who had been separated at the border, ICE agents drove a few dads to the city from the Hudson County Correctional Facility to reunite them with their children who had been placed in shelters in New York.

Javier Garrido, a Honduran immigrant, was one of them. His only child, 4-year-old William, had been taken from him at the Texas border 55 days earlier. While Garrido shuttled between detention facilities in Texas, Georgia, and New Jersey, with no idea where his son was, William had been flown to New York, placed in a children's shelter, and then with a foster family. At one point, an officer had told Garrido that the boy would likely get adopted. "I was always the one who fed him. I was the one who bathed him," Garrido says. "How were strangers caring for him? Who told him stories and rocked him to sleep?"

When he and William rushed into each other's arms that afternoon, "I fell to my knees," Garrido says. "It was the happiest moment of my life." Hours later, William, no more than 40 pounds and snacking on Doritos, kissed his father's neck a dozen times, paused, then pecked him several times again. "He's missed a lot of naps," Garrido says, gazing through the window of a Morningside Heights social-services office at the distant Empire State Building.

The next day, father and son boarded a flight to Louisiana to stay with an aunt and uncle. But their future is uncertain: Garrido, who was fitted with an ankle monitor, may have been put on a faster track for deportation without his asylum claim being fully vetted, says an advocate at Catholic Charities who reviewed his case. Garrido's priority had been reuniting with William.

THIS IS WHERE THEY'D COME FOR A "BETTER LIFE." BUT IT MAY NOT ALWAYS BE.

Unaccompanied minors can be detained once they turn 18.

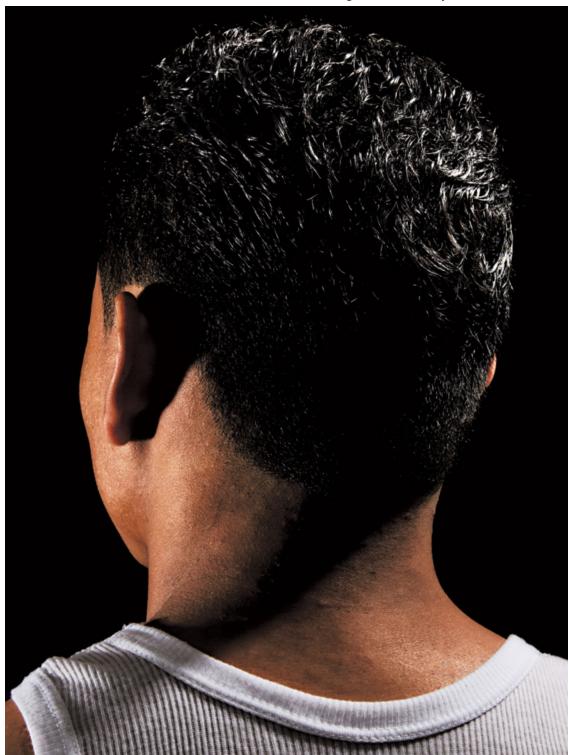


Photo: Bobby Doherty/New York Magazine

José, 19, Honduras

In August 2016, 17-year-old José traveled to the U.S. from Honduras with a friend and a cousin. The journey took two months.

"I went through so much to get here. I saw mutilated bodies. I was robbed by cops in Guatemala and beaten by *sicarios*. I ran through deserts and jumped on trains so big and

loud I thought my heart would jump out of my chest. Many people died on those trains."

After being apprehended by U.S. Immigration officials, José was taken to a children's shelter in New York City.

"In the children's home, I was treated very well. They were caring. They'd take us out to the city to eat doughnuts, to McDonald's, to play. To church. To the pool."

Two months later, on the morning of his 18th birthday, ICE arrested him and took him to a county jail in New Jersey.

"My friends didn't see it happen because it was early in the morning. I was crying; my social worker was crying. I was treated like a criminal. You know the jumpsuits that criminals wear on TV? That's what they put on me."

Brooklyn Defender Services took his case, and he was released in March 2017 after four months.

"My last day in the jail, people cheered. Everyone knows how hard it is to get to this country. They gave me hugs, tears in their eyes. When I got out, I was so nervous. I wasn't used to being outside anymore."

José's immigration case is pending, but his lawyers say new changes to the rules are making it harder for immigrants who arrived as unaccompanied minors, aged out, and are now treated like undocumented adults to stay in the United States. But José is optimistic. These days, he lives in Manhattan with his sponsor.

"Things got dark for me, but then they started getting better. Everything is calm at home; [my sponsor] has a family. She works a lot. In the morning, we eat a traditional breakfast, coffee and rolls. I really like riding my bike around the city. I went to the Statue of Liberty a few months ago, and I try to go to Central Park often. But there are still more places I want to see. I have never been to a zoo, for example. Or on one of those boats that go around the city. I play soccer in Queens from Monday to Saturday. I play midfield. I also take English classes on Tuesdays and Thursdays. And I go to therapy. I started reading a book about the history of Martin Luther King Jr. I am not done, but he seems like a brave person."

Some find it easier to self-deport.

Joon Young Kim, 32, South Korea

"When I realized about my immigration status, I was around 17. There's a mandatory requirement that we have to serve in the South Korean military. There was paperwork to defer it, but my mother, I guess, she didn't apply for it. I got stuck in this weird limbo: I couldn't apply for a green card in the U.S. without an active visa. But if I go back to Korea, I'm going to be jailed. I was a man with no country.

At the end of March, I decided I'm going back to Korea. I hired a lawyer in Korea, and he got me out of the military jail time. I felt this huge relief. I'm going to go serve in the army. I lived in the shadows long enough. [President Trump] did play into my decision-making. It's made it harder for people like me to get status.

In Korea, you come to America for a better life, you come for a dream. I'm going back for a better life, which to me sounds pretty outrageous, but it is the best choice, I think, for my future. I'm taking a small duffel bag filled with a couple of shirts, pants, a toothbrush, \$500 equivalent in Korean currency. And a dream."

Status: After 25 years in the U.S., he returned to South Korea in May.

And yet, for many, being here is still worth the risk.



Drawing Fear: Artwork by Andrew Heo, a parishioner at Youngmin Lo's church in Queens.

Youngmin Lo, 35, South Korea

"As an undocumented person, for a long time I felt guilt and shame about who I was. But when we decided to become [part of a] sanctuary-church network, the church asked if I wanted to share my story with other people. I decided to speak publicly. I do know there are people who may have the same fear that I had, and they want to hide from everything that's going on. But if I don't share my story, it means not only that I lose my opportunity to speak up but we're losing together. If anything happens to me and my family, it will really hurt me and break my heart. But if that's the cost that has to be made, I think I'm willing to do that. We cannot just constantly live in fear. The fear is what keeps us back."

Status: Undocumented pastor in Queens.

This story was published in partnership with The Marshall Project, a nonprofit news organization covering the U.S. criminal justice system. Sign up for their newsletter, or follow The Marshall Project on Facebook or Twitter.

Reporting by Andrew R. Calderon, Maurice Chammah, Eli Hager, Lauren Hilgers, Kathryn Joyce, Jordan Larson, Mustafa Z. Mirza, Julia Preston, Alysia Santo, Nick Tabor, Christie Thompson, Manuel Villa, and Simone Weichselbaum.

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In The Supreme Court of the United States

Donald J. Trump, President of the United States, et al., Petitioners,

HAWAII, ET AL., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF KAREN KOREMATSU, JAY
HIRABAYASHI, HOLLY YASUI, THE FRED T.
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AND NATIONAL BAR ASSOCIATIONS OF
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TABLE OF CONTENTS

INTERES	ΓS OF <i>AMICI C</i>	<i>URIAE</i>	1
		SUMMARY	
ARGUME	NT	•••••	13
I.	CONCEPTION POWER DER	GOVERNME OF PLEN IVES FROM C. VITH RACIST	NARY ASES
II.	XENOPHOBIC	PREJUDICES. HIRABAYA	13
11.	AND YASUI REMINDERS SEARCHING WHEN TH TARGETS	STAND AS STORM OF THE NEED JUDICIAL REVELOCIES OF THE NEW DISFAVORD IN THE NAME	TARK FOR VIEW IENT DRED
	NATIONAL SE	ECURITY	20
III.	LITIGATION CASE DEMAN	GOVERNME STRATEGY IN NDS THIS COU	THIS JRT'S
CONCLUS	SION		40

TABLE OF AUTHORITIES

CASES:

Chae Chan Ping v. United States, 130 U.S. 581 (1889)
Fiallo v. Bell, 430 U.S. 787 (1977)
Fong Yue Ting v. United States, 149 U.S. 698 (1893)
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Korematsu v. United States, 323 U.S. 214 (1944)passim 584 F. Supp. 1406 (N.D. Cal. 1984) 12, 29, 30, 31
Landon v. Plasencia, 459 U.S. 21 (1982)
Reno v. Flores, 507 U.S. 292 (1993)

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)
United States v. Yasui, 48 F. Supp. 40 (D. Or. 1942)24
Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017)
Yasui v. United States, 320 U.S. 115 (1943)
Zadvydas v. Davis, 533 U.S. 678 (2001)18
Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012)
STATUTES:
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BREYER, STEPHEN, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW
GLOBAL REALITIES (2015)12

DeWitt, Lieutenant General John L., Final Report: Japanese Evacuation from the West Coast (1942)	28
Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407 (Feb. 19, 1942)	21
IRONS, PETER, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1984)	22, 27
Memorandum from J. Edgar Hoover, Dir. FBI to Francis Biddle, Att'y Gen. (Feb. 2, 1942)	29
Proclamation 4417, "An American Promise," 41 Fed. Reg. 7714 (Feb. 19, 1976)	32
Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017)	8, 35
REPORT OF CWRIC, PERSONAL JUSTICE DENIED (The Civil Liberties Public	
Education Fund & University of Washington Press, 1997)	32

Saito, Natsu Taylor, The Enduring Effect of the Chinese Exclusion Cases: The	
"Plenary Power" Justification for On- Going Abuses of Human Rights, 10 ASIAN	
L.J. 13 (2003) Testimony of Minoru Yasui, Nat'l Comm. for	14
Redress, Japanese Am. Citizens League, Comm'n on Wartime Relocation and	
Internment of Civilians (1981)U.S. Dep't of Justice, Confession of Error:	22
The Solicitor General's Mistakes During the Japanese-American Internment	
Cases (May 20, 2011)	33

In The Supreme Court of the United States

No. 17-965

Donald J. Trump, President of the United States, et al., Petitioners,

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HAWAII, ET AL., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENTS

INTERESTS OF AMICI CURIAE1

Karen Korematsu, Jay Hirabayashi, and Holly Yasui—the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui—come forward as *amici curiae* because they see the disturbing relevance of this Court's decisions in their fathers'

¹ This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission.

infamous cases challenging the mass removal and incarceration of Japanese Americans during World War II to the serious questions raised by Presidential Proclamation No. 9645.

Minoru Yasui was a 25-year-old attorney in Portland, Oregon, when, on March 28, 1942, he intentionally defied the government's first actionable order imposing a curfew on persons of Japanese ancestry in order to challenge the order's constitutionality. Gordon Hirabayashi was a 24year-old college senior in Seattle, Washington, when, on May 16, 1942, he similarly chose to defy the government's curfew and removal orders. Korematsu was a 22-year-old welder in Oakland, California, when, on May 30, 1942, he was arrested for refusing to report for removal.

All three men brought their constitutional this Court. challenges to Deferring to government's claim that the orders were justified by military necessity. the Court affirmed convictions. Our Nation has since recognized that the mass removal and incarceration of Japanese Americans was wrong; the three cases have been widely condemned; and all three men have been recognized with the Presidential Medal of Freedom for their wartime courage and lifetime work advancing civil and human rights.

Their children have sought to carry forward their fathers' legacy by educating the public and, as appropriate, reminding the courts of the human toll and constitutional harms wrought by governmental actions, carried out in the name of national security, that impact men, women, and children belonging to disfavored minority groups. Guilt, loyalty, and threat are individual attributes. Courts must be vigilant when these attributes are imputed to entire racial, religious, and/or ethnic groups. The *Hirabayashi*, *Yasui*, and *Korematsu* cases stand as important reminders of the need for courts—and especially this Court—to fulfill their essential role in our democracy by checking unfounded exercises of executive power.

The Korematsu, Hirabayashi, and Yasui families are proud to stand with the following public interest organizations:

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, the Korematsu Center works to advance justice for all through research, advocacy, and education. The Korematsu Center has a special interest in addressing government action targeting classes of persons based on race, nationality, or religion and in seeking to ensure that courts understand the historical—and, at times, unjust—underpinnings of arguments asserted to support the exercise of such executive power. The Korematsu Center does not, here or otherwise, represent the official views of Seattle University.

Asian Americans Advancing Justice ("Advancing Justice") is the national affiliation of five nonpartisan civil rights organizations whose offices are located in Washington D.C. (AAJC), San Francisco (Asian Law Caucus), Atlanta, Chicago and Los Angeles. Through direct services, impact litigation, *amicus* briefs, policy advocacy, leadership development, and capacity

building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander, and other underserved communities, including immigrant members of those communities.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities nationwide to secure human rights for all. In 1982, AALDEF supported reparations for Japanese Americans forcibly relocated and imprisoned during World War II. After 9/11, AALDEF represented more than 800 individuals from Muslim-majority countries who were called in to report to immigration authorities under the Special Registration program. AALDEF is currently providing community education and legal counseling to Asian Americans affected by the challenged Presidential Proclamation.

The Hispanic National Bar Association ("HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA is committed to advocacy on issues of importance, including immigration and protection of refugees, to the 53 million people of Hispanic heritage living in the United States.

The Japanese American Citizens League of Hawaii, Honolulu Chapter ("JACL Honolulu") draws upon Hawaii's rich, multiethnic society and strong cultural values, but broadly focuses on addressing discrimination and intolerance towards all people victimized by injustice and prejudice. JACL Honolulu supported redress for Japanese Americans incarcerated during World War II and sponsors annual events to educate the public regarding that unjust incarceration, one of the core reasons for the founding of the JACL Honolulu chapter.

LatinoJustice PRLDEF, Inc. ("LatinoJustice") is a national civil rights legal defense fund that has defended the constitutional rights and egual of protection all Latinos under the law. LatinoJustice's continuing mission is to promote the participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, immigrants' housing, rights, language rights, redistricting, and voting rights. During its 45-year history, LatinoJustice has litigated numerous cases both state and federal courts challenging governmental racial discrimination.

The National Bar Association ("NBA") is the largest and oldest association of predominantly African-American attorneys and judges in the United States. Founded in 1925 when there were only 1,000 African-American attorneys nationwide and when other national bar associations, such as the ABA, did not admit African-American attorneys, the NBA today has a membership of approximately 66,000 lawyers, judges, law professors and law students, and has over 75 affiliate chapters. Throughout its

history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession.

The South Asian Bar Association of North America ("SABA") is the umbrella organization for 26 associations in North bar America regional representing the interests of over 6,000 attorneys of South Asian descent. Providing a vital link for the South Asian community to the law and legal system, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Presidential Proclamation.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Often the question has been raised whether this country could wage a new war without the loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too."

Gordon Hirabayashi made that plea to the Court in 1943, as he appealed his conviction for violating military orders issued three months after the Japanese attack on Pearl Harbor. Authorized by Executive Order No. 9066, those orders led to the forced removal and incarceration of over 120,000 men, women, and children of Japanese descent living on the West Coast.

Mr. Hirabayashi did not stand alone before this Court. Minoru Yasui likewise invoked our Nation's ideals in casting his separate but related appeal as "the case of all whose parents came to our shores for a haven of refuge" and insisting that the country should respond to war and strife "in the American way and not by *** acts of injustice." Appellant Br. 55-56, Yasui v. United States, No. 871 (U.S. Apr. 30, 1943). The Court denied the appeals of both men. See Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

The following year, this Court revisited the mass removal and incarceration of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court again failed to stand as a bulwark against governmental action that

undermines core constitutional principles. By refusing to scrutinize the government's claim that its abhorrent treatment of Japanese Americans was justified by military necessity, the Court enabled the government to cover its racially discriminatory policies in the cloak of national security.

In this case, the Court is once again asked to abdicate its critical role in safeguarding fundamental freedoms. Invoking national security. government seeks near complete deference to the President's decision to denv indefinitely immigrant and most non-immigrant to nationals of six Muslim-majority countries. Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("Presidential Proclamation").

The government claims it is merely asking for the application of established legal principles, but the extreme deference it seeks is not rooted in sound constitutional tradition. Rather, it rests on doctrinal tenets infected with long-repudiated racial and nativist precepts. In support of the sweeping proposition that the President's authority to exclude aliens is unbounded, the government previously invoked the so-called "plenary power" doctrine—that doctrine derives from decisions such as Chae Chan Ping v. United States, 130 U.S. 581 (1889), which relied on pejorative racial stereotypes to eschew judicial scrutiny in upholding a law that prohibited Chinese laborers from returning to the United States after travel abroad. Id. at 595.

Although no longer using the term "plenary power," the government continues to assert that "any policy toward aliens"—including a decision to exclude an entire class of individuals based on religion and national origin—is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Gov't Br. 23 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)). As the Ninth Circuit observed, the numbing judicial passivity the government "runs contrary to the fundamental demands structure of our constitutional democracy" in which "it is the role of the judiciary to interpret the law, a duty that will sometimes require the '[r]esolution of litigation challenging the constitutional authority of one of the three branches." Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (alteration in original) (quoting Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012)).

Even more than the early "plenary power" decisions, the shades of *Korematsu*, *Hirabayashi*, and *Yasui* lurking in the government's argument should give this Court pause. In those cases, the government's policies were ostensibly backed by the controversial "Final Report" issued by Lieutenant General John L. DeWitt, the military commander who ordered the mass removal and incarceration of Japanese Americans on the West Coast. By the time it was finally presented to this Court, the Final Report—which history revealed to be riddled with falsehoods about the national security threat posed by Japanese Americans—had been materially altered to hide the racist motivations of its author.

Here, another report, this time from the Secretary of Homeland Security, purports to justify the President's decision to exclude classes of individuals based on nationality and religion—only this time, the government has resisted allowing even the courts to review the report. See Letter to Patricia S. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit, from Sharon Swingle, Counsel for Defendants-Appellants, re: IRAP v. Trump, No. 17-2231 (Nov. 24, 2017) ("Fourth Circuit Letter"). That fact alone should raise alarms.

Regrettably, however, hidden and suspect government reports are far from the only similarity between this case and *Korematsu*, *Hirabayashi*, and *Yasui*. As here, in those cases, the government denied that its policies were grounded in "invidious *** discrimination" and asked the Court to take it at its word that "the security of the nation" justified blanket action against an "entire group *** at once." Gov't Br. 35, *Hirabayashi v. United States*, No. 870 (U.S. May 8, 1943). In its now infamous decisions, this Court agreed.

In *Hirabayashi*, the Court concluded that even though racial distinctions are "odious to a free people," it could not "reject as unfounded the [government's] judgment" that the measures taken against Japanese Americans were necessary. *Hirabayashi*, 320 U.S. at 99-100. Going further in *Korematsu*, the Court denied that race played any role in the government's decisions: "Cast[ing] this case into outlines of racial prejudice," the Court opined, "without reference to the real military dangers which were presented, merely confuses the

issue." 323 U.S. at 223. Accepting the government's assurance, the Court went on to find that "Korematsu was not excluded from the [West Coast] because of hostility to him or his race[,] [h]e was excluded because *** the properly constituted military authorities *** decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated *** temporarily." *Id*.

Not all members of the Court were convinced, however. Three Justices dissented, including Justice Murphy, who declared that the exclusion of Japanese Americans "falls into the ugly abyss of racism," *Korematsu*, 323 U.S. at 233, and Justice Jackson, who pointed out that the Court "had no real evidence" to support the government's assertions of military necessity. Moreover, Justice Jackson warned, the Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246.

As history has made us acutely aware, the dissenters' doubts as to the veracity of the government's assertion of military necessity were well-founded, and their recognition of the gravity of the Court's decision was prophetic. Four decades after the Court upheld their convictions, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu successfully sought to have them vacated in unprecedented *coram nobis* proceedings. Evidence presented in those cases showed that the "military urgency" on which this Court predicated its decision (and the purported justification asserted in General DeWitt's Final Report) was nothing more than a smokescreen: The real reason for the government's

deplorable treatment of Japanese Americans was not acts of espionage, but rather a baseless perception of disloyalty grounded in racial stereotypes.

With the benefit of hindsight, *Korematsu* (and by inference *Hirabayashi* and *Yasui*) "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees" and "national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Put simply, those cases "illustrate[] that it can be highly destructive of civil liberties to understand the Constitution as giving the President a blank check." Stephen Breyer, The Court and The World: American Law and the New Global Realities 84 (2015).

Korematsu, Hirabayashi, and Yasui are as wrong today as they were on the day they were decided. If it were to accept the government's invitation here to abdicate its judicial responsibility, the Court would repeat its failures in those widely condemned cases. The Court should instead take this opportunity to acknowledge the historic wrong in Korematsu, Hirabayashi, and Yasui, and to repudiate its refusal to scrutinize the government's claim of necessity and its consequent failure to recognize the military orders' racist underpinnings. Heeding the lessons of history, the Court should subject the President's decision to meaningful judicial scrutiny and affirm the Founders' visionary principle that an independent and vigilant judiciary is a foundational element of a healthy democracy.

ARGUMENT

I. THE GOVERNMENT'S CONCEPTION OF PLENARY POWER DERIVES FROM CASES INFECTED WITH RACIST AND XENOPHOBIC PREJUDICES.

In defending the first Executive Order that sought to exclude aliens from Muslim-majority countries, the government argued that "political branches [[have] plenary constitutional authority over foreign affairs, national security, immigration." Gov't Emergency Mot. 15-16, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 4. In light of that "plenary authority," the government asserted, "[i]udicial second-guessing of the President's determination that a temporary suspension of entry of certain classes of aliens was necessary *** to protect national security constitute[s] an impermissible intrusion." *Id.* at 15.

Despite shedding the "plenary power" label, the government's central argument remains unchanged: The political branches' "power to *** exclude aliens" is "largely immune from judicial control." Gov't Br. 18 (ellipsis in original) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)). This Court, however, has never recognized an unbridled "plenary" power in the immigration realm that would preclude judicial review. And to the extent that it has shown excessive deference to the political branches in some cases, those precedents are linked to racist attitudes from a past era that have long since fallen out of favor.

1. In Chae Chan Ping v. United States, known as The Chinese Exclusion Case, the Court upheld a

statute barring the return of Chinese laborers who had departed the United States prior to its passage. 130 U.S. at 581-582. Describing the reasons underlying the law's enactment, the characterized Chinese laborers as "content with the simplest fare, such as would not suffice for our laborers and artisans," and observed that they remained "strangers in the land, residing apart by themselves, *** adhering to the customs and usages of their own country," and unable "to assimilate with our people." Id. at 595. "The differences of race added greatly to the difficulties of the situation." *Id.* Residents of the West Coast, the Court explained, warned of an "Oriental invasion" and "saw or believed they saw *** great danger that at no distant day *** [the West] would be overrun by them, unless prompt action was taken to restrict immigration." Id.

Far from applying a skeptical eye to the law in light of the clear animus motivating its passage, the Court found that "[i]f *** the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security determination is conclusive upon the judiciary." The Chinese Exclusion Case, 130 U.S. at 606; see also Natsu Taylor Saito, The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights, 10 ASIAN L.J. 13, 15 (2003). In reality, the "right of self-preservation" that the Court validated as justification for the government's unbounded power to exclude immigrants was ethnic and racial selfpreservation, not the preservation of borders or national security. 130 U.S. at 608; *see id.* at 606 ("It matters not in what form *** aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.").

Similar racist and xenophobic attitudes are evident in decisions following *The Chinese Exclusion Case. See, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 729-730 (1893) (upholding requirement that Chinese resident aliens offer "at least one credible white witness" in order to remain in the country); *id.* at 730 (noting Congress's belief that testimony from Chinese witnesses could not be credited because of "the loose notions entertained by the witnesses of the obligation of an oath" (quoting *The Chinese Exclusion Case,* 130 U.S. at 598)).

2. Even in its early plenary power decisions, however, the Court recognized that the government's sovereign authority is subject to constitutional limitations. See The Chinese Exclusion Case, 130 U.S. at 604 ("[S]overeign powers *** [are] restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."). Indeed, from the doctrine's inception, the Court divided over the reach of the government's power in light of those limitations.

Fong Yue Ting, which upheld a law requiring Chinese laborers residing in the United States to obtain a special certificate of residence to avoid deportation, generated three dissenting opinions. See 149 U.S. at 738 (Brewer, J., dissenting) ("I deny that

there is any arbitrary and unrestrained power to banish residents, even resident aliens."); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting). Even Justice Field, who authored the Court's opinion in *The Chinese Exclusion Case*, sought to limit the plenary power doctrine's application with regard to alien residents:

As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is *** to ignore the teachings of our history *** and the language of our constitution.

Id. at 754.

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and proliferated. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court, relying on *Korematsu* (see note 2, *infra*), upheld a provision permitting the deportation of resident aliens who were members of the Communist Party. In dissent, Justice Douglas quoted Justice Brewer's words in *Fong Yue Ting*, observing that they "grow[] in power with the passing years":

This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. *** The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History,

before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. at 599-600.

In another McCarthy-era precedent, Justices advocated for limitations on the plenary power doctrine. In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, despite his resulting indefinite detention at Ellis Island. In dissent, Justice Black, joined by Justice Douglas, reasoned that "[n]o society is free where government makes one person's liberty depend upon the arbitrary will of another." *Id.* at 217. "Dictatorships," he observed, "have done this since time immemorial. They do now." Id.Justice Jackson, joined by Justice Frankfurter, added that such aliens must be "accorded procedural due process of law." Id. at 224.

3. Perhaps reflecting the shift away from the xenophobic and race-based characterizations prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limitations on the government's authority over immigration matters.

In Reno v. Flores, 507 U.S. 292 (1993), for example, the Court held that INS regulations must at least "rationally advanc[e] some legitimate

governmental purpose." Id. at 306. In Landon v. Plasencia, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be afforded due process in an exclusion proceeding. Id. at 33. And in Zadvydas v. Davis, 533 U.S. 678 (2001), in response to the government's contention that "Congress has 'plenary power' to create immigration law, and *** the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," the Court observed "power is subject that such to important constitutional limitations." Id. at 695 (citations omitted). "[F]ocus[ing] upon those limitations," id., the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns" and accordingly construed the statute at issue to avoid those problems, id. at See generally Washington, 847 F.3d at 1162-1163 (collecting cases demonstrating reviewability of federal government action in immigration and national security matters).

The Court's most recent decision in this area provides further support for the conclusion that, after more than a century of erosion, the notion of plenary power over immigration is little more than a relic.

In *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court considered a due process claim arising from the denial without adequate explanation of a spouse's visa application. Although it described the power of the political branches over immigration as "plenary," Justice Kennedy's concurring opinion in *Din* made clear that courts may review an exercise of that power. *Id.* at 2139-2140. Justice Kennedy

acknowledged that the Court in Kleindienst v. Mandel, 408 U.S. 753 (1972), had declined to balance the constitutional rights of American citizens injured by a visa denial against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Din, 135 S. Ct. at 2139 (quoting *Mandel*, 408 U.S. at 766). But he explained that the Court did inquire "whether the Government had provided a 'facially legitimate and bona fide' reason for its action." Id. at 2140 (quoting Mandel, 408 U.S. at 770). And while as a general matter courts are not to "look behind" the government's asserted reason, courts should do so if the challenger has made "an affirmative showing of bad faith." Id. at 2141.

To be sure, Justice Kennedy's opinion in Din acknowledged that the political branches are entitled to wide latitude and deference in immigration For that reason, the government relies heavily on *Din* and *Mandel* to argue that its assertion of a national security rationale is sufficient to justify the Presidential Proclamation and to preclude further judicial scrutiny. See Gov't Br. at 58-64. But, as the Ninth Circuit has recognized, Din (and Mandel before it) concerned an *individual* visa denial on the facts of that case. Washington, 847 F.3d at 1163-1164. By contrast, the Proclamation sets nationwide immigration policy of denying immigrant and most non-immigrant visas to aliens of certain nationalities. While it may be sensible for courts ordinarily to defer to the judgment of the political branches when considering the application of immigration law to a particular alien, the President's decision to issue a broadly applicable immigration *policy*—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more searching judicial review. *See id*.

All told, modern judicial precedent supports the notion that courts have both the power and the responsibility to review Presidential Proclamation 9645. Where, as here, the Court is asked to review a far-reaching program—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—precedent and common sense demand more than an assessment of whether the government has offered a "facially legitimate and bona fide" rationale for its policy. Rather, this policy, both on its face and in light of the glaring clues as to its motivations, cries out for careful judicial scrutiny.

II. KOREMATSU, HIRABAYASHI, AND YASUI STAND AS STARK REMINDERS OF THE NEED FOR SEARCHING JUDICIAL REVIEW WHEN THE GOVERNMENT TARGETS DISFAVORED MINORITIES IN THE NAME OF NATIONAL SECURITY.

This Court need not look far for a reminder of the constitutional costs and human suffering that flow from the Judiciary's failure to rein in sweeping governmental action against disfavored minorities. And it need not look far for a reminder of the Executive Branch's use of national security as a pretext to discriminate against such groups. The Court need look only to its own precedents—its all but universally condemned wartime decisions in *Korematsu*, *Hirabayashi*, and *Yasui*.

1. On February 19, 1942, President Roosevelt issued Executive Order No. 9066, authorizing the Secretary of War to designate "military areas" from which "any or all persons" could be excluded and "with respect to which, the right of any person to enter, remain in, or leave" would be subject to "whatever restrictions the Secretary of War or the appropriate Military Commander may impose." Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942). Adding its imprimatur to the Executive Order, Congress made violation of any restrictions issued thereunder a federal offense. An Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Lieutenant General John L. DeWitt, head of the Western Defense Command, used that authority to issue a series of proclamations that led to the removal and incarceration of all individuals of Japanese ancestry living in "Military Area No. 1"—an exclusion area covering the entire Pacific Coast. *Hirabayashi*, 320 U.S. at 89. A curfew order came first. Soon after, Japanese Americans were ordered to abandon their homes and communities on the West Coast for tarpaper barracks (euphemistically called "relocation centers") surrounded by barbed wire and machine gun towers in desolate areas inland. *Id.* at 90.

For different individual reasons, but sharing a deep sense of justice, Minoru Yasui, Gordon Hirabayashi, and Fred Korematsu refused to comply with General DeWitt's orders. Yasui, a young lawyer, regarded the curfew as an affront to American constitutional values. "To make it a crime for me to do the same thing as any non-Japanese person *** solely on the basis of ancestry," he explained, "was, in my opinion, an absolutely abominable concept and wholly unacceptable." Testimony of Minoru Yasui, Nat'l Comm. for Redress, Japanese Am. Citizens League 9, Comm'n on Wartime Relocation and Internment of Civilians (1981). "Our law and our basic concept of justice had always been founded upon the fundamental principle that no person should be punished but for that individual's act, and not because of one's ancestry." Id. at 10. Convinced of the curfew's illegality, Yasui immediately defied it in order to initiate a constitutional challenge.

Hirabayashi, a student at the University of Washington, also defied the orders so that he could challenge their constitutionality, saying that he "considered it [his] duty to maintain the democratic standards for which this nation lives." Peter Irons, Justice at War: The Story of the Japanese American Internment Cases 88 (1984).

Korematsu, a welder living in Oakland, CA, refused to obey the removal orders so that he could remain with his fiancée who was not subject to removal because she was not Japanese American. The last of the three to face arrest and prosecution, Korematsu "shared with Yasui and Hirabayashi an equal devotion to constitutional principle" and believed that the statute under which he was convicted was wrong. *Id.* at 98.

2. The constitutional challenges Yasui, Hirabayashi, and Korematsu made to the military orders soon made their way to this Court. But far from fulfilling its essential role in the constitutional structure that entrusts the Judiciary with the protection of fundamental rights, the Court set upon a path of judicial abdication that today serves as a cautionary tale.

In Hirabayashi's case, the Court elected to consider only his conviction for violating the curfew order, leaving unanswered his challenge to his conviction for failing to report to a Civil Control Station—a precursor to removal from his home in Hirabayashi, 320 U.S. at 85. Harkening Seattle. back to The Chinese Exclusion Case, the Court repeated the government's claim that "social. economic and political conditions" "intensified the solidarity" of Japanese Americans and "prevented their assimilation as an integral part of the white population." Id. at 96. Betraving no skepticism of these premises, the Court found that, in view of these and other attributes of the "isolation" of Japanese Americans and their "relatively little intercourse [with] the white population," "Congress and the Executive could reasonably have concluded that these conditions *** encouraged the continued attachment of members of this group to Japan and Japanese institutions." *Id.* at 98. "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry," the Court continued, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." *Id.* at 99.

Having upheld the curfew in *Hirabayashi*, the Court issued only a short opinion remanding Yasui's case to the Ninth Circuit. *Yasui*, 320 U.S. at 115. Because the district court had imposed a sentence based on its determination that Yasui had renounced his American citizenship, and the government did not defend that finding, the Court remanded the matter for resentencing. *Id.* at 117. The Court thereby avoided addressing the district court's conclusion, supported by extensive analysis, that the military orders were unconstitutional as applied to citizens. *See United States v. Yasui*, 48 F. Supp. 40, 44-54 (D. Or. 1942).

The Court's third opportunity to confront the mass removal and incarceration program came a year-and-a-half later, in Korematsu's case. Court again narrowed the issues before it, rejecting Korematsu's argument that the removal order could not be extricated from the incarceration he would inevitably face if he complied with that order. Then, despite affirming that racial U.S. at 216. distinctions are "immediately suspect" and "must [be] subject *** to the most rigid scrutiny," id., the Court denied, without probing examination, that the military orders were driven by racial hostility. The Court reiterated its conclusion from *Hirabayashi* that it would not substitute its judgment for that of the military authorities. "There was evidence of disloyalty on the part of some," the Court reasoned, and "the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Id.* at 223-224.

When the Court decided Korematsu, however, three members rejected the government's arguments. In vigorous dissents, Justices Murphy and Jackson sharply questioned the validity of the military justification the government advanced. Although acknowledging that the discretion of those entrusted with national security matters "must, as a matter of *** common sense, be wide," Justice Murphy declared that "it is essential that there be definite limits to military discretion" and that individuals not be "left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U.S. at 234. In his view, the exclusion order "clearly d[id] not meet th[is] test" as it relied "for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage." Id. at 234-235 (emphasis added). In fact, as Justice Murphy noted, intelligence investigations found no evidence ofJapanese American sabotage espionage. Id. at 241. And even if "there were some disloyal persons of Japanese descent on the Pacific Coast," Justice Murphy reasoned, "to infer that examples of individual disloyalty prove disloyalty and justify discriminatory action against the entire group" is nothing more than "th[e] legalization of racism." Id. at 240-241, 242.

Justice Jackson was equally dubious of the factual basis for the government's claim that the military orders were justified. The government never submitted General DeWitt's Final Report to the lower Although the report was eventually courts. presented to this Court, by then it was too late for development of record evidence to challenge the report or counter its assertions. Those facts were not lost on Justice Jackson, who viewed the report with "How does the Court know," he asked, "that these orders have a reasonable basis in necessity?" 323 U.S. at 245. Pointing out that "[n]o evidence whatever on that subject ha[d] been taken by this or any other court" and that the Final Report was the subject of "sharp controversy as to [its] credibility," Justice Jackson observed that the Court had "no real evidence before it" and thus "ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any crossexamination, that what he did was reasonable." *Id*.

Justice Jackson saw grave dangers in the Court's opinion. While an unconstitutional military order is short-lived, he observed, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." 323 U.S. at 246. With that, Justice Jackson issued a prophetic warning: By "validat[ing] the principle of racial discrimination in criminal procedure and of transplanting American citizens," the Court had created "a loaded weapon ready for the

hand of any authority that can bring forward a plausible claim of an urgent need." $Id.^2$

3. The dissenters' fears proved to be well-founded. Decades after this Court's decisions in *Hirabayashi*, *Yasui*, and *Korematsu*, newly discovered government records revealed not only that intelligence reports and data contradicted the claim that the mass removal and incarceration program was justified by military necessity, but also that the government knew as much when it convinced the Court to affirm the defendants' convictions.³

In 1983, armed with those newly discovered records, Yasui, Hirabayashi, and Korematsu filed

² Justice Jackson's usage of Korematsu and Hirabayashi as precedent in Harisiades (see p. 16, supra), on which the government relies (Gov't Br. 18), brought this warning to life. In Harisiades, a noncitizen claimed that due process protected his liberties in the same way it does the rights of citizens. But Korematsu and Hirabayashi, Justice Jackson wrote, show that even citizens are unprotected from far-reaching government claims of national security. Harisiades, 342 U.S. at 591 & n.17 ("When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention."). Constrained by stare decisis, Justice Jackson applied Korematsu as standing precedent to reject Harisiades' constitutional claim. That application to the specific facts in *Harisiades* extended Korematsu's principle of extreme deference to "new purposes" precisely the danger Justice Jackson predicted in his "loaded weapon" warning. 323 U.S. at 246.

³ Those records are discussed at length in *Justice at War: The Story of the Japanese American Internment Cases* by Peter Irons, *supra*, who, along with Aiko Herzig-Yoshinaga, unearthed them.

coram nobis petitions seeking to vacate their convictions. As the court found in the *Hirabayashi* case, government records showed that General DeWitt's Final Report had been materially altered in order to fabricate an acceptable factual justification for the mass removal and incarceration program. Hirabayashi v. United States, 627 F. Supp. 1445, 1456-1457 (W.D. Wash. 1986). Although the version of the report presented to this Court stated that it was impossible to identify potentially disloyal Japanese Americans in the time available, a prior printed version—submitted to the War Department while the government's briefs in *Hirabayashi* and Yasui were being finalized—made clear that the decision to issue the challenged orders had nothing to do with urgency. Rather, General Dewitt's decision turned on his view that Japanese Americans were inherently disloyal on account of their "ties of race, intense feeling of filial piety and *** strong bonds of common tradition, culture and customs." Id. at 1449. "It was not that there was insufficient time in which to make such a determination" the original report stated; "a positive determination could not be made [because] an exact separation of the 'sheep and the goats' was unfeasible." Id. (quoting Lieutenant General John L. DeWitt, Final Report: Japanese Evacuation from the West Coast ch. 2 (1942)).

Beyond exposing the racist underpinnings of General DeWitt's orders (as well as the pretextual nature of the claim of urgency), the *coram nobis* cases revealed that the government possessed information rebutting the assertion in the DeWitt Report that Japanese Americans were involved in sabotage and espionage. *Hirabayashi v. United States*, 828 F.2d

591. 601 (9th Cir. 1987). The Office of Naval Intelligence ("ONI"), which the President charged with monitoring West Coast Japanese American communities, had determined in its official report that Japanese Americans were overwhelmingly loyal and posed no security risk. ONI thus recommended handling any potential disloyalty on an individual, not group, basis. ONI found, contrary to the government's representation to this Court, that mass incarceration was unnecessary, as "individual determinations could be made expeditiously." Id. at 602 n.11 (emphasis added); see also IRONS, supra, at 203. In addition, reports from the Federal Bureau of Investigation ("FBI") and Federal Communications Commission ("FCC") directly refuted claims in the Report that Japanese Americans were engaged in shore-to-ship signaling, intimating Japanese American espionage. Korematsu, 584 F. Supp. at 1417. Indeed, FBI Director Hoover wrote to Attorney General Biddle shortly before President Roosevelt issued Executive Order 9066 that the push for mass racial handling was based on politics rather than facts. Memorandum from J. Edgar Hoover, Dir. FBI to Francis Biddle, Att'y Gen. (Feb. 2, 1942).

Department of Justice attorney John Burling, co-author of the government's brief, sought to alert the Court of the FBI and FCC intelligence that directly refuted the DeWitt Report. Burling included in his brief a crucial footnote that read: "The recital [in General DeWitt's report] of the circumstances justifying the evacuation as a matter of military necessity *** is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese

ancestry, in conflict with information in the possession of the Department of Justice." *Korematsu*, 584 F. Supp. at 1417 (emphasis and citation omitted). But high-level Justice Department lawyers stopped the brief's printing. Despite Burling's vociferous protest about the DeWitt Report's "intentional falsehoods," *id.* at 1418, the footnote was diluted to near incoherence, even implying the opposite of Burling's intended message. As revised, the footnote stated:

[The DeWitt Report] is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Gov't Br. 11 n.2, Korematsu v. United States, No. 22 (U.S. Oct. 5, 1944). Notwithstanding an earlier warning from Justice Department lawyer Edward Ennis that failing to alert the Court to the contrary intelligence in DOJ's possession "might approximate the suppression of evidence," Hirabayashi, 828 F.2d at 602 n.11 (citation omitted), the Justice Department concealed from the Court this material evidence on military necessity.

In light of the evidence presented, the courts hearing Fred Korematsu and Gordon Hirabayashi's *coram nobis* cases concluded that the government's misconduct had effected "a manifest injustice" and

that the mass removal and incarceration program had been validated based on unfounded charges of treason. *Korematsu*, 584 F. Supp. at 1417; *Hirabayashi*, 627 F. Supp. at 1447. In granting Korematsu's *coram nobis* petition, Judge Patel articulated the modern significance of the wartime cases:

Korematsu *** stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu, 584 F. Supp. at 1420.

In vacating Korematsu, Yasui, and Hirabayashi's convictions, the *coram nobis* courts joined other governmental institutions in recognizing

⁴ In Minoru Yasui's *coram nobis* case, the court acceded to the government's request to vacate his conviction and dismiss his petition for relief without making any determinations regarding government misconduct—and without acknowledging the injustice he suffered.

the wrongs committed against Japanese Americans during World War II. In 1976, President Ford officially rescinded Executive Order 9066, explaining that "[w]e now know what we should have known then—not only was *** evacuation wrong, but Japanese-Americans were and are loyal Americans." Presidential Proclamation 4417, "An American Promise," 41 Fed. Reg. 7714 (Feb. 19, 1976). The Executive Branch also recognized the contributions of the three men who challenged the military orders. Each one received the Presidential Medal of Freedom, the nation's highest civilian honor: Fred Korematsu in 1998, Gordon Hirabayashi in 2012, and Minoru Yasui in 2015.

In 1983, after extensive hearings and research, congressionally authorized Commission Wartime Relocation and Internment of Civilians (CWRIC) issued a report concluding that it was not "military necessity" that underpinned the mass removal and incarceration program, but rather "race prejudice, war hysteria and a failure of political leadership." REPORT OF CWRIC, PERSONAL JUSTICE Denied 459 (The Civil Liberties Public Education Fund & University of Washington Press, 1997). Five years later, Congress passed (and President Reagan signed) the Civil Liberties Act of 1988, which, on the recommendations, acknowledged CWRIC's injustice of the removal and incarceration program, issued an official apology, and conferred symbolic reparations to the survivors of the incarceration centers.

Most recently, in 2011, the Acting Solicitor General confirmed what the *coram nobis* cases had

established decades earlier: This Court's wartime decisions were predicated on lies. "By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, [DOJ] had learned of a key intelligence report that undermined the rationale behind the internment. *** But the Solicitor General did not inform the Court of the report despite warnings *** that failing to alert the Court 'might approximate the suppression of evidence.' Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones." U.S. Dep't of Justice, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20. https://www.justice.gov/opa/blog/confession-errorsolicitor-generals-mistakes-during-japaneseamerican-internment-cases.

III. THE GOVERNMENT'S LITIGATION STRATEGY IN THIS CASE DEMANDS THIS COURT'S VIGILANCE.

The government's arguments in this case bear a disturbing similarity to the arguments this Court accepted in *Korematsu*, *Hirabayashi*, and *Yasui*. Defending the military orders in *Hirabayashi*, the government told this Court:

The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to

impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once. Certainly, it cannot be said that such a conclusion was beyond the honest judgment, reasonably exercised, of those whose duty it was to protect the Pacific Coast against attack.

Gov't Br. 35, *Hirabayashi v. United States*, *supra* (emphasis added).

Here, the government similarly implores the Court to accept the rationale offered and not to look behind the four corners of the Presidential Proclamation to ascertain whether the policy is by discriminatory animus. "The motivated Proclamation," the government argues, "is explicitly premised on facially legitimate purposes: protecting national security and the national interest by preventing entry of persons about whom the United States lacks sufficient information to assess the risk they pose[.] *** The Proclamation thus amply establishes a 'facially legitimate and bona fide reason' for its restrictions." Gov't Br. 60 (quoting Mandel, 408 U.S. at 770).

Decades after Korematsu, Hirabayashi, and Yasui, however, the national security justification the government offered for its wartime policies was proven false and the real reasons for the military orders—baseless concerns about disloyalty grounded in racial stereotypes—were exposed. The government has offered no basis to believe that similar revelations about the President's decision to

exclude individuals from Muslim-majority countries will not one day come to light. To the contrary, the government's representations and litigation strategy in this case only exacerbate that grave concern.

First, although the government claims that it conducted a "worldwide review" to arrive at the decision to deny all immigrant and most nonimmigrant visas to designated classes. Proclamation's text offers reason to doubt that the actually supports the The Proclamation indicates that its non-immigrant visa "in accordance restrictions are with of the Secretary of Homeland recommendations Security" based on the worldwide review. Presidential Proclamation, § 1(h)(iii). Notably, the Proclamation does not make the same claim with respect to the *immigrant* visa restrictions. See id. at § 1(h)(ii). The government's references to the worldwide review in its brief are similarly delicate. See Gov't Br. 9-10.

Second, despite the purported centrality of the worldwide review and corresponding report by the Secretary of Homeland Security, the government has gone to great lengths to shield that report from view. The government has resisted providing the report to the courts even for in camera inspection and has urged the courts not to "consider [its] contents" should they decide, over the government's objections, to review the report. See Notice of In Camera Ex Parte Lodging of Report Containing Classified Information and Objection to Review or Consideration of Report at 4, State of Hawaii v.

Trump et al., No. 17-cv-0050-DKW-KSC, ECF No. 376 (D. Haw. Oct. 13, 2017); Fourth Circuit Letter, supra. The government has also aggressively fought efforts to release the report publicly, arguing that it is protected from disclosure under the Freedom of Information Act ("FOIA") by the presidential communications privilege. See, e.g., Brennan Center for Justice v. U.S. Dep't of State, No. 17-cv-7520 (S.D.N.Y. filed Oct. 2, 2017).

Third, echoing the findings in the ONI, FBI and FCC reports suppressed in the wartime cases, the limited documents that have come to light pertaining to the President's exclusion decision undermine rather than affirm the purported national security justification for the ban. Following the first Executive Order suspending the entry of aliens from Muslim-majority nations, the Department ("DHS") Homeland Security drafted a report assessing the likelihood that visitors and immigrants from those countries would commit acts of terrorism in the United States. The report concluded that "citizens of countries affected by E.O. 13769 [were]

⁵ In FOIA litigation, the government has released indexes describing the contents of the pages it continues to withhold. Those indexes indicate that the appendices for the reports on the "worldwide" review are only a few pages long. See Letter to Judge Paul Gardephe from AUSA Christopher Connolly, Brennan Center for Justice v. U.S. Dep't of State, No. 17-cv-7520 (S.D.N.Y. Feb. 23, 2018), ECF No. 31. Because the reports' appendices supposedly provide detail as to why the targeted countries' vetting systems are inadequate, the paltry page count offers additional reason for skepticism that the reports provide a sufficient justification for the President's policy.

rarely implicated in US-based terrorism" and "few of the impacted countries have terrorist groups that threaten the West." Acting Secretary for Intelligence and Analysis, DHS, Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States (Feb. 2017) (capitalization removed), https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-

Donald.pdf. In other words, little more than six months before the Secretary of Homeland Security produced a report that purports to justify the visadenial policy, the Department concluded that the very individuals affected were unlikely to pose a threat to the United States if permitted to enter.

Parallels to the government's actions in the wartime cases have not been lost on the lower courts. Before enjoining the President's Proclamation, the District Court of Maryland asked the government: "How is this different than Korematsu where [the United States relied on an executive order by the President and many years after the fact it was determined that there was information within the Justice Department that contradicted representations made to the Court"? Prelim. Inj. Hr'g Tr. at 50, Int'l Refugee Assistance Project, et al. v. Trump, et al., No. 17-cv-00361-TDC (D. Md. Oct. 16, 2017), ECF No. 217. Even when confronted with that direct question, the government refused to assure the court that the DHS report entirely supports the policies contained in the Proclamation. See id. at 51 ("Your Honor, I'm not going to speak to the contents of the report."). Indeed, the government disclaimed any obligation to tell the court whether

advisors to the President disagreed that his exclusion decision was necessary. See id. at 52 ("I do not think we either have the obligation or should be asked about whether there were disagreements among presidential advisors in the report and whether—what one describes as an inconsistency of what one agency thought or what another agency thought.").

The government's refusal to produce the report underlying the Proclamation, or even to assure the courts that its contents do not undermine the President's policy, offers ample reason for skepticism that the decision to exclude certain classes was based on a credible assessment of the national security threat those individuals pose. The dubious nature of the government's asserted justification raises the question whether, like in *Korematsu*, *Hirabayashi*, and *Yasui*, the decision was motivated by more nefarious considerations.

* * *

During World War II, this Court's refusal to probe the government's claim that military necessity justified the mass removal and incarceration of Japanese Americans made it unwittingly complicit in the government's deception. The Court's blank-check treatment of the Executive Branch's wartime policies—underscored by its repeated refusal to confront the most grievous aspects of those policies or to acknowledge their racist underpinnings—allowed the wrongs inflicted on Japanese Americans to continue unabated for years, and allowed the

government to avoid accountability for its egregious misconduct for decades.

Hirabayashi, Korematsu, and Yasui are powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of the courts as a check on abuses of government power, especially during times of national and international stress. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch, even in areas in which decision-makers must wield wide discretion, is incompatible with the protection of fundamental freedoms. Meaningful judicial review is an essential element of a healthy democracy.

Consistent with those principles, this Court should reject the government's invitation to abdicate its critical role in our constitutional system, subject the President's exclusion decision to searching judicial scrutiny, and stand—as Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu did—as a bulwark against governmental action that undermines core constitutional values.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

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March 30, 2018



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Director

5107 Leesburg Pike, Suite 2600 Falls Church, Virginia 22044

Director

January 17, 2018

MEMORANDUM TO: The Office of the Chief Immigration Judge

All Immigration Judges All Court Administrators All Immigration Court Staff

FROM: James R. McHenry III

Director

SUBJECT: Case Priorities and Immigration Court Performance Measures

This memorandum is effective immediately, applies prospectively to all new cases filed and to all immigration court cases reopened, recalendared, or remanded, and serves to rescind the January 31, 2017, memorandum entitled "Case Processing Priorities" and all other prior memoranda establishing case processing or docketing priorities.

I. Background

On December 6, 2017, the Attorney General issued a memorandum to all Executive Office for Immigration Review (EOIR) employees outlining several principles to follow to ensure that the adjudication of immigration court cases serves the national interest. It also provided that the Director of EOIR may issue further guidance to ensure the achievement of those principles. Pursuant to 8 C.F.R. § 1003.0(b)(1)(ii) and (iv), the EOIR Director has the authority to "[d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases and otherwise to manage the docket of matters to be decided by the immigration judges" and to "[e]valuate the performance of the Office of the Chief Immigration Judge (OCIJ) and take corrective action where needed."

Accordingly, pursuant to that authority and in accordance with the Attorney General's principles, this memorandum lays out EOIR's specific priorities and goals in the adjudication of immigration court cases.

Memorandum to OCIJ, IJs, CAs, and IC staff
Subject: Case Priorities and Immigration Court Performance Measures

II. Case Prioritization

EOIR has always designated detained cases as priorities for completion. In 2014, EOIR began designating other types of "priority" cases for docketing and processing purposes, and those priority designations have been subsequently modified three times—most recently on January 31, 2017.

The repeated changes in case prioritization have caused confusion and created difficulty in comparing and tracking case data over time. But, most importantly, the frequent shifting priority designations did not enhance docket efficiency. Not only were cases repeatedly moved to accommodate new priorities without a clear plan for resolving both the new and older cases, but also the designations did not adequately stress the importance of completing all cases in a timely manner.

For example, less than 10% of cases currently pending meet the definition of "priority" outlined in the January 31, 2017, memorandum—a statistic that conveys a potentially mistaken impression regarding the importance of completing the other 600,000-plus pending cases that do not bear a "priority" designation.

Accordingly, to address concerns and confusion, it is appropriate to clarify EOIR's priorities and goals to ensure that the adjudication of cases serves the national interest consistent with the principles outlined by the Attorney General.

All cases involving individuals in detention or custody, regardless of the custodian, are priorities for completion. Likewise, cases subject to a statutory or regulatory deadline, cases subject to a federal court-ordered deadline, and cases otherwise subject to an established benchmark for completion, including those listed in Appendix A, are also priorities. As developments warrant, other priority designations may be established as appropriate, and other categories of cases may be tracked regardless of whether they reflect a priority designation.

The designation of a category of cases as priority is an indication of an expectation that such cases should be completed expeditiously and without undue delay consistent with due process. Because the designations outlined in this memorandum apply prospectively, it is not intended to require the rescheduling of currently-docketed cases. The designation of priority cases is also not intended to diminish or reduce the significance of other cases. Indeed, the timely completion of *all* cases consistent with due process remains a matter of the utmost importance for the agency. Finally, the designation of a case as a priority is not intended to limit the discretion afforded an immigration judge under applicable law, nor is it intended to mandate a specific outcome in any particular case.

¹Cases of aliens in the custody of the Department of Homeland Security and aliens in the care and custody of the Department of Health and Human Services who do not have a sponsor identified were priorities under prior policy and remain so under this new policy.

III. Immigration Court Benchmarks and Performance Metrics

Apart from designated case priorities, EOIR's case processing has also involved other types of evaluative measures over time, such as statutory or regulatory deadlines for the completion of certain types of cases, including under the Immigration and Nationality Act (INA), the Government Performance and Results Act (GPRA) of 1993, and the GPRA Modernization Act of 2010. Although these case completion goals have not previously denoted case priorities *per se*, they do serve as indicators of the importance of completing certain classes of cases in a timely manner.

Historically, EOIR also utilized case completion measures for non-detained cases from FY 2002 to FY 2009, but it eliminated those measures in FY 2010, leading to confusion regarding the extent to which the timely completion of non-detained cases was perceived as a priority for the agency. The abolition of non-detained case completion benchmarks was also subsequently criticized by both the Department of Justice (DOJ) Office of Inspector General and the Government Accountability Office, both of whom recommended that EOIR reinstate goals for the completion of non-detained cases. In 2016 and 2017, the House Committee on Appropriations also directed EOIR to establish a goal that the median length of detained cases be no longer than 60 days and the median length of non-detained cases be no longer than 365 days.

Although EOIR has previously stated that case completion goals are statements of agency priorities and has tracked performance relative to those goals, it has not expressly designated cases subject to such measures as priorities, unless they happened to fall into another category that was a priority (*e.g.* detained cases). This has led to even further confusion regarding the interaction between case priorities and case resolution goals, especially because the overwhelming majority of pending cases in recent years were neither designated as a priority nor subject to a performance goal.

Almost every trial court system utilizes performance measures or case completion metrics to ensure that it is operating efficiently and appropriately. Some of these are established by statute or regulation whereas others are set by policy; nevertheless, trial court performance measures are an essential and widely-recognized tool for ensuring healthy and effective court operations.

In the federal system, for example, the Civil Justice Reform Act of 1990 requires semiannual reporting of the number of certain types of civil cases and motions pending beyond a particular date with the intent of reducing litigation delays in federal district courts. Many administrative adjudicatory systems also feature case processing time standards, either by statute,

Memorandum to OCIJ, IJs, CAs, and IC staff Subject: Case Priorities and Immigration Court Performance Measures

regulation, or policy.² At the state level, most states have adopted court case processing time standards, many of which follow model standards approved by the American Bar Association (ABA).³

In fact, over 25 years ago, the ABA recognized the importance of establishing court performance standards to ensure effective case management and to avoid undue delay; in doing so, it outlined seven essential elements for managing cases, including several that are now being implemented by EOIR such as "[p]romulgation and monitoring of time and clearance standards for the overall disposition of cases," "[a]doption of a trial-setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimizing resettings caused by overscheduling," "[c]ommencement of trials on the original date scheduled with adequate advance notice," and "[a] firm, consistent policy for minimizing continuances." In short, court performance measures and case completion goals are common, well-established, and necessary mechanisms for evaluating how well a court is functioning at performing its core role of adjudicating cases.

EOIR is no exception to the rule that court performance measures are a necessary accountability tool to ensure that a court is operating at peak efficiency, nor is there anything novel or unique about applying performance measures to EOIR's immigration courts.⁵ Rather, a review of such measures is vital to ensure that the immigration court system is performing strongly, that EOIR is adjudicating cases fairly, expeditiously, and uniformly consistent with its mission, and that it is addressing its pending caseload in support of the principles established by the Attorney General.

Accordingly, to ensure that EOIR is meeting these goals, the court-based performance measures outlined in Appendix A to this memorandum will be tracked by EOIR, and court

² See, e.g., 42 U.S.C. § 1395ff (establishing hearing deadlines for cases before administrative law judges at the Department of Health and Human Services); Fed. Energy Regulatory Comm'n, Summary of Procedural Time Standards for Hearing Cases, https://www.ferc.gov/legal/admin-lit/time-sum.asp (last updated Mar. 10, 2017) (outlining time standards for administrative law judges hearing cases at the Federal Energy Regulatory Commission).

³ See Case Processing Time Standards, Nat'l Ctr. for State Courts, http://www.ncsc.org/cpts (last visited January 9, 2018); Model Time Standards for State Trial Courts (Nat'l Ctr. for State Courts 2011), http://www.ncsc.org/Services-and-Experts/Technology-tools/~/media/Files/PDF/CourtMD/Model-Time-Standards-for-State-Trial-Courts.ashx.

⁴ See Judicial Admin. Div., Am. Bar Ass'n, Standards Relating to Trial Courts § 2.51 (vol. II 1992), available at https://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandar ds.authcheckdam.pdf.

⁵ EOIR's other adjudicatory components, the Board of Immigration Appeals and the Office of the Chief Administrative Hearing Office, are also subject to performance measures.

Memorandum to OCIJ, IJs, CAs, and IC staff
Subject: <u>Case Priorities and Immigration Court Performance Measures</u>

performance in meeting them will be regularly audited. These goals are intended to help determine which courts are operating in a healthy and efficient manner, and which courts may be in need of more specialized attention in the form of additional resources, training, court management, creative thinking and planning, and/or other action as appropriate.

As published here in Appendix A, these court-based goals are not intended to apply specifically to any individual employee; rather, these goals apply to the court as a whole, and all court employees accordingly share responsibility for working together to successfully meet them.⁶

OCIJ will provide additional "not-to-exceed" guidelines for each goal, as appropriate. Further, some cases may be subject to more than one goal. EOIR will also track the clearance rate (the ratio of new cases filed to cases completed) and the age of existing cases at each court and may announce future goals for those statistics at a later date.

Many of these measures derive from statutory or regulatory mandates, including the INA; others derive from EOIR's goals developed under GPRA. Still others, such as a goal of ensuring file completion and accuracy, are simply reflections of the standard that a professional administrative court system should endeavor to attain. Although many of these goals have already existed for several years at EOIR, their current designation clarifies that cases subject to a goal should be considered priority cases and reiterates that the goals themselves reflect considered policy judgments regarding optimal court performance and functioning that EOIR's immigration courts should strive to achieve.

EOIR is already meeting, or close to meeting, some of these goals; for instance, the median length of time a detained case is pending at the immigration court level is currently less than 60 days. For other goals, they may appear merely aspirational at first, and the agency is cognizant that it may take time for them to be fully realized. Nevertheless, as a professional administrative court system within the DOJ exercising the Attorney General's delegated authority, EOIR should strive to become the preeminent administrative adjudicatory agency in the federal government and to fulfill its mission at the highest level possible. Further, by making you aware of these goals, you can begin thinking about how, with these goals in mind, EOIR's day-to-day activities can be streamlined to improve efficiency while maintaining due process. Moreover, there is no doubt that as the agency puts into place additional resources, training, and

⁶ In autumn 2017, following collective bargaining, EOIR and the National Association of Immigration Judges jointly agreed to remove language from Article 22 of their labor agreement that had limited EOIR's ability to measure and evaluate immigration judge performance. Although many of the policy considerations relevant for setting court performance goals are also relevant for setting performance metrics for individual immigration judges, especially regarding goals that have existed in some form at EOIR already for several years, the implementation of those metrics specifically for immigration judges is subject to an ongoing process and is beyond the scope of this memorandum.

Memorandum to OCIJ, IJs, CAs, and IC staff Subject: Case Priorities and Immigration Court Performance Measures

more efficient processes, you will continue impress with your dedication to our mission. As the Attorney General indicated, every employee at EOIR can contribute something to improve the system, and your creative suggestions regarding more effective case management are welcome.

IV. Conclusion

Thank you for your dedication and professionalism as we work together as a team to ensure that the adjudication of immigration court cases serves the national interest in accordance with the principles outlined by the Attorney General.

Please contact your Assistant Chief Immigration Judge with any questions you may have concerning this memorandum.

This guidance is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this memorandum should be construed as mandating a particular outcome in any specific case.

Attachment

APPENDIX A

IMMIGRATION COURT PERFORMANCE MEASURES

- 1. Eighty-five percent (85%) of all non-status⁷ detained removal⁸ cases should be completed⁹ within 60 days of filing of the Notice to Appear (NTA), reopening or recalendaring of the case, remand from the Board of Immigration Appeals (BIA), or notification of detention.
- 2. Eighty-five percent (85%) of all non-status non-detained removal cases should be completed within 365 days (1 year) of filing of the NTA, reopening or recalendaring of the case, remand from the BIA, or notification of release from custody.
- 3. Eight-five percent (85%) of all motions should be adjudicated within 40 days of filing.
- 4. Ninety percent (90%) of all custody redeterminations should be completed within 14 days of the request for redetermination.
- 5. Ninety-five percent (95%) of all hearings should be completed on the initial scheduled individual merits hearing date.
- 6. One hundred percent (100%) of all credible fear reviews should be completed within seven (7) days of the initial determination by an asylum officer that an alien does not have a credible fear of persecution. See INA § 235(b)(1)(B)(iii)(III). One hundred percent (100%) of all reasonable fear reviews should be completed within 10 days of the filing of the negative reasonable fear determination as reflected in Form I-863. See 8 C.F.R. § 1208.31(g).
- 7. One hundred percent (100%) of all expedited asylum cases should be completed within the statutory deadline and consistent with established EOIR policy. *See* INA 208(d)(5)(A)(iii); OPPM 13-02.
- 8. Eighty-five percent (85%) of all Institutional Hearing Program (IHP) removal cases should be completed prior to the alien's release from detention by the IHP custodian.
- 9. One hundred percent (100%) of all electronic and paper records should be accurate and complete.

⁷ A status case is (1) one in which an immigration judge is required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition by U.S. Citizenship and Immigration Services, (2) one in which the immigration judge is required to reserve a decision rather than completing the case pursuant to law or policy, or (3) one which is subject to a deadline established by a federal court order.

⁸ A "removal" case includes a case in removal proceedings, in addition to any reopened, recalendared, or remanded cases in exclusion or deportation proceedings.

⁹ A completed removal case is one in which a final decision has been rendered concluding the case at the immigration court level and encompasses an order of removal, an order of voluntary departure, an order terminating proceedings, or an order granting protection or relief from removal. For other types of cases, a completed case is one in which a final decision has been rendered appropriate for the specific type of case proceeding.

Litigation Related to the DACA Program

Last updated AUGUST 28, 2018

n Sep. 5, 2017, the Trump administration announced that it was terminating the Deferred Action for Childhood Arrivals (DACA) program, which was created during President Obama's administration. Under the terms of the DACA termination, everyone who had filed a first-time or a renewal application for DACA as of Sep. 5, 2017, would continue to have their applications processed. And anyone with a grant of DACA expiring between Sep. 5, 2017, and Mar. 5, 2018, could apply for a two-year renewal of their DACA. Originally, the deadline to submit renewal applications to U.S. Citizenship and Immigration Services (USCIS) was October 5, 2017. No other DACA applications were accepted.

However, due to two court orders — in *Regents of the University of California*, et al. v. Dept. of Homeland Security (DHS) and Batalla Vidal v. Nielsen — USCIS is accepting DACA renewal applications. Under these injunctions, anyone who has had DACA in the past may apply, although those whose DACA expired on or before Sep. 4, 2016, must file as if they were applying for the first time. **A person who's had DACA may** now apply to renew it regardless of when their DACA expired and even if their application was previously rejected for not

meeting the Oct. 5, 2017, deadline. For information on the orders and the application process, see **NILC's** <u>Frequently Asked Questions</u>: <u>USCIS Is Accepting DACA Renewal Applications</u>.¹

More than ten cases have been filed challenging the Trump administration's termination of the DACA program. The two tables in this publication provide information only about the cases with the most traction as of its publication date. The tables were created for easy reference and are not intended to be comprehensive.

Table 1 includes cases challenging the termination of DACA on Sep. 5, 2017. The plaintiffs in these cases brought claims primarily under the Administrative Procedure Act and the **U.S. Constitution's** Due Process and Equal Protection clauses; some brought claims of estoppel. NILC is counsel only in the *Batalla Vidal v. Nielsen* case. For further information about the other cases described in Table 1, you may want to contact the entities involved in them (listed in the table) or read the complaints to which the table hyperlinks.

Table 2 includes the single case currently challenging the DACA program itself, which Texas and six other states filed on May 1, 2018.

Table 1: Cases Challenging the Termination of the DACA Program

LAWSUIT NAME	COURT	PLAINTIFF(S)	STATUS OF CASE
Batalla Vidal v. Nielsen Case No. 1:16-cv-04756 (NGG) (JO)	Filed in E.D.N.Y. Currently on appeal to 2d Circuit.	Martin Jonathan Batalla Vidal, Antonio Alarcón, Carolina Fung Feng, Eliana Fernández, Mariano Mondragón, Carlos Vargas, Make the Road New York	 8/25/16: Case <u>filed</u>.² Case assigned to Judge Nicholas G. Garaufis. 9/19/18: <u>Complaint amended</u> to challenge DACA termination.³ 2/13/18: District court granted motion for preliminary injunction requiring USCIS to accept DACA applications from people who have has DACA previously. The government has appealed the preliminary injunction to the U.S. Court of Appeals for the Second Circuit. The parties are currently filing supplemental briefing, and oral argument will be scheduled after early October.

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LAWSUIT NAME	COURT	PLAINTIFF(S)	STATUS OF CASE
			For more information on the case and for the latest developments: www.nilc.org/batalla-vidal-v-baran-et-al/
NY v. Trump, et al. Case No. 17-cv-5228	Filed in E.D.N.Y. Currently on appeal to the 2d Circuit.	New York, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington	 9/6/17: Case filed. 9/7/17: The court reassigned this case to Judge Nicholas G. Garaufis, who has heard this case in tandem with <i>Batalla Vidal v. Nielsen</i>. The appeal in <i>New York v. Trump</i> has been consolidated with the appeal in <i>Batalla Vidal v. Nielsen</i>. See <i>Batalla Vidal</i>, above.
Regents of the Univ. of Calif. v. DHS (lead case) Case No. 17-cv-05211 Consolidated with Calif. v. DHS, Case No. 17-cv-05235; County of Santa Clara v. Trump, Case No. 17-cv-05813; Garcia et al. v. Trump, Case No. 17-cv-05380; and San Jose v. Trump, Case No. 17-cv-05329-SVK.	Filed in N.D.Cal. Currently on appeal to the 9th Circuit.	 The regents of the University of California and Janet Napolitano California, Maine, Maryland, and Minnesota Santa Clara County and Service Employees International Union Local 521 (Local 521) Miriam González Ávila, Dulce Garcia, Jirayut Latthivongskorn, Viridiana Chabolla Mendoza, Norma Ramírez, and Saul Jiménez Suarez City of San Jose 	 9/8/17: Case filed.⁴ 9/20/17: On this date, the court consolidated this case with City of San Jose v. Trump, State of Calif. v. DHS, and Garcia v. United States. All of the cases were then reassigned to Judge William Alsup. 1/9/18: The U.S. district court in California granted the preliminary injunction requiring the federal government to accept applications for renewal of DACA. 1/18/18: DHS filed an unusual request to appeal to the Supreme Court directly, asking that review by the Ninth Circuit be skipped. 2/26/18: U.S. Supreme Court denied DHS's request, so the case was returned to the lower courts 5/15/18: The Ninth Circuit Court of Appeals heard oral argument on the case in Pasadena, California. For more information on the case and for the latest developments, see UC press releases, including https://www.universityofcalifornia.edu/pressroom/uc-statement-federal-court-daca-ruling.
CASA de Maryland v. Trump Case No. 17-cv-02942- RWT	D.Md. Permanent injunction on information- sharing; other claims dismissed.	CASA de Maryland, Arkansas United Community Coalition, CHIRLA, FIRM, Junta for Progressive Action Inc., Make the Road Pennsylvania, Michigan United, OneAmerica, Promise Arizona, Maricruz Abarca, Luis Aguilar, Ángel Aguiluz, José Aguiluz, Josué Aguiluz, María Joseline Cuellar Baldelomar, Missael Garcia, Annabelle Martinez	 10/5/17: Case <u>filed</u>.⁵ 3/5/18: The U.S. district court in Maryland <u>granted summary judgment</u> to the plaintiffs on only their information-sharing/estoppel claim, prohibiting the government from using or sharing information provided through the DACA application process for enforcement or deportation purposes.⁶ To the extent that the government wants to use the information, the government must apply to the court on a case-by-case

LAWSUIT NAME	COURT	PLAINTIFF(S)	STATUS OF CASE
		Herra, Eliseo Mages, Heymi Elvir Maldonado, Brenda Moreno Martinez, Jesús Eusebio Perez, Nathaly Uribe Robledo, Estefany Rodriguez, A.M., a minor child, and Isabel Cristina Aguilar Arce, on behalf of A.M.; J.M.O., a minor child, and Adriana Gonzales Magos, on behalf of J.M.O.	basis. The court granted summary judgment to the government, however, on the other claims challenging the termination of DACA. • 4/27/18: Both the plaintiffs and the government appealed the district court's order to the Fourth Circuit Court of Appeals. Briefing on the appeals is scheduled to be complete in mid-September. For more information on the case and for the latest developments, see CASA's press releases, including https://wearecasa.org/press/casa-weighing-options-to-federal-judges-ruling-in-casa-v-trump/ .
NAACP v. Trump Case No. 17-cv-01907	D.D.C.	NAACP, American Federation of Teachers (AFT), United Food and Commercial Workers International Union (UFCW)	 9/18/17: Case filed.⁷ 1/18/17: The court consolidated this case with <i>Trustees of Princeton University v. USA</i> (see below), and the consolidated case was reassigned to Judge John D. Bates. 3/14/18: The court heard oral argument on the case. 4/24/18: The court issued a decision partially granting summary judgment to the plaintiffs,⁸ holding that the DACA termination was arbitrary and capricious, in violation of the Administrative Procedure Act, because the government did not sufficiently explain why it made the decision. The court ordered that the memo terminating DACA be vacated — which would reinstate the original DACA program, allowing DACA-eligible people to file first-time applications — but the court stayed its order for 90 days to give the government time to issue a new memo or better explain why it ended DACA. The court denied the plaintiffs' request for a preliminary injunction on their informationsharing/estoppel claim, because it found that harm was not imminent given that the CASA de Maryland order (above) currently prevents DHS from sharing that information. The court then dismissed that claim entirely because it found that the claim was not sufficiently pled. 6/22/18: The government submitted a new memorandum from Secretary of Homeland Security Kirstjen Nielsen, which reaffirms the decision to end the DACA program. In response, the court delayed its order to vacate the memo terminating DACA. 8/4/18: The court issued a decision regarding the new Nielsen memo, ruling that it does not change the court's earlier judgment. The court reinstated its earlier order, i.e., that the DACA program be reinstated.

LAWSUIT NAME	COURT	PLAINTIFF(S)	STATUS OF CASE
			 8/17/18: With the consent of the plaintiffs, the court partially stayed its order as it applies to initial applications and advance parole. This means that the order goes into effect on August 23 only with regard to renewal applications — in a manner similar to the orders issued by the U.S. District Courts for the Eastern District of New York and Northern District of California.
			For more information on the case and for the latest developments, see NAACP, AFT, and UFCW press releases, including:
			• www.naacp.org/latest/naacp-files-lawsuit-defense-daca-eligible-people-color/
			• www.aft.org/press-release/aft-joins-naacp-lawsuit-stop-trumps- termination-daca
			• www.ufcw.org/2017/10/23/dacanaacpaft/
Trustees of Princeton University, et al. v. USA, et al. Case No. 17-cv-02325	D.D.C.	Trustees of Princeton University, Maria De La Cruz Perales Sanchez, Microsoft Corporation	 11/3/17: Case <u>filed</u>.⁹ 1/18/17: The court consolidated this case with <i>NAACP v. Trump</i> (above), and the consolidated case was reassigned to Judge John D. Bates. See <i>NAACP v. Trump</i>, above.

Table 2: Case Challenging the Creation of the 2012 DACA Program

LAWSUIT NAME	COURT	PLAINTIFF(S)	STATUS OF CASE
Texas et al. v. Nielsen et al. Case No. 1:18-cv-00068 Filed in S.D. Tex., Brownsville Division	Tex., Brownsville	States of Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia	• 5/1/18: Case <u>filed</u> . ¹⁰ Case first assigned to Judge Olvera, a President Obama appointee, but then later reassigned to Judge Hanen, who presided over the expanded DACA and DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents)—related litigation in <i>Texas v. United States</i> . Counter to case-relation rules, this new case was marked as related to <i>Texas v. U.S.</i> , even though the latter case was closed.
		• 5/2/18: Plaintiff states filed a request for a preliminary injunction that would halt the 2012 DACA program from operating during the pendency of this lawsuit, both for initial and renewal applications. Texas and the other states requested relief from Judge Hanen by July 23, 2018, the date on which the 90-day period set out in the NAACP v. Trump and Princeton et al. v. Trump cases had been scheduled to run out.	
			• 5/15/18: The court granted a request by 22 individual DACA recipients, represented by the Mexican American Legal Defense and Educational Fund (MALDEF) to intervene, formally making them defendants in the case. ¹² The DACA recipients had argued that because the federal government and the plaintiff states both have taken the same position on the legality of DACA, the agencies of the federal government that are the defendants in the case will not adequately represent DACA recipients' interests if the court does not let the latter become part of the case.
			• 6/25/18: The court granted a request by the New Jersey to intervene, formally making it a defendant in the case.
			 8/8/18: A hearing was held on the plaintiff states' motion for a preliminary injunction. (This hearing was originally scheduled for July 17 but was postponed in light of the developments in the DC district court, described above.) The court may rule on the preliminary injunction at any time.

URLs and Notes

- ¹ www.nilc.org/faq-uscis-accepting-daca-renewal-applications/.
- ² www.nilc.org/wp-content/uploads/2017/09/Batalla-Vidal-v-Baran-et-al-complaint-2016-08-25.pdf.
- ³ www.nilc.org/wp-content/uploads/2017/10/Batalla-Vidal-v-Duke-2d-Amended-Complaint-2017-09-19.pdf.
- ⁴ https://universityofcalifornia.edu/sites/default/files/UC-DACA-Complaint.pdf.
- ⁵ www.washlaw.org/pdf/daca complint 10 05 17.PDF.
- ⁶ http://cdn.cnn.com/cnn/2018/images/03/06/maryland-daca-opinion.pdf.
- ⁷ https://www.naacp.org/wp-content/uploads/2017/09/NAACP-DACA-complaint.pdf.
- 8 https://ecf.dcd.uscourts.gov/cgi-bin/show public doc?2017cv2325-70.
- 9 https://www.princeton.edu/sites/default/files/documents/2017/11/DACA%20Complaint%2011%203%2017%20FINAL.pdf.
- ¹⁰ https://www.texasattorneygeneral.gov/files/epress/File-Stamped Complaint.pdf.
- ¹¹ https://www.texasattorneygeneral.gov/files/epress/Mt for Pl.pdf.
- ¹² MALDEF's press release about this development is available at www.maldef.org/news/releases/2018 05 15 Federal Court Grants MALDEF Motion to Intervene on Behalf of Dream ers in Texas-Led Lawsuit Challenging DACA/.

The New Hork Times

Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You're Not.

By Patricia Mazzei

July 23, 2018

MIAMI — Norma Borgoño immigrated to the United States from Peru in 1989. A single mother with two children, she set roots in the Miami suburbs, finding work as a secretary, dedicating herself to her church and, earlier this year, welcoming her first grandchild, a girl named Isabel, after Ms. Borgoño's middle name.

She took the oath of citizenship in 2007, a step she felt would secure her status in her adopted homeland. But hers, it turns out, is not a feel-good immigrant story: The Justice Department has moved to revoke Ms. Borgoño's citizenship, an action that could eventually force her to return to Peru.

Federal prosecutors in May filed a rare denaturalization case against Ms. Borgoño, 64, accusing her of committing fraud when she applied for citizenship and failed to disclose that she had taken part in a crime several years before she applied for citizenship — though she had not at the time been charged with it. It wasn't until four years later, in 2011, that Ms. Borgoño pleaded guilty to helping her boss, to no benefit of her own, defraud the Export-Import Bank of the United States of \$24 million.

Since President Trump took office, the number of denaturalization cases has been growing, part of a campaign of aggressive immigration enforcement that now promises to include even the most protected class of legal immigrants: naturalized citizens.

The government says it is doing what it has always done: Prosecuting cases of fraud among 21.2 million naturalized citizens, from people suspected of war crimes or terrorism to those in phony marriages or with false identities.

But Ms. Borgoño's case comes as the United States Citizenship and Immigration Services, the agency that handles residency and citizenship, is separately opening a new office to investigate thousands of potential denaturalization cases involving identity fraud, even as it approves more new citizenship applications than before. U.S.C.I.S. also intends to refer more cases for possible deportation, and to give citizenship adjudicating officers more discretion to deny applications they consider ineligible or incomplete.

Another agency, Immigration and Customs Enforcement, has requested \$207.6 million to hire an additional 300 agents to investigate more cases, including marriage, visa, residency and citizenship fraud.

Taken together, "it's new terrain for the government," said Victor X. Cerda, one of Ms. Borgoño's defense attorneys. "They're being more aggressive."

The renewed focus on denaturalization, and a recent uptick in the number of cases filed by the Justice Department, have deeply unsettled many immigrants who had long believed that a United States passport warded off a lifetime of anxiety over possible deportation. Citizenship also opens the door to voting, a fact that Democratic Party activists and others used to their advantage in naturalization drives before the 2016 election.

The new push for denaturalization investigations, though, threatens what were once certainties.

"You put a question mark next to every naturalized citizen's name," said David W. Leopold, a former president of the American Immigration Lawyers Association. "And then you instill fear."

Denaturalization remains a rare, lengthy and difficult process, and immigration authorities say that only people who have deliberately lied to the government have any reason to be concerned. U.S.C.I.S. naturalizes 700,000 to 750,000 people a year; in 2017, that number was 715,000, despite a 35 percent surge in applications that began in the run-up to the last presidential election.

The increase required U.S.C.I.S. to hire more staff, open two new offices and expand 10 existing offices to keep up, though processing times have slowed. Still, the agency says it naturalized more people in the first six months of this year than in the same period for each of the previous five years.

The number of denaturalization cases, however, has also gone up: They averaged 11 a year from 1990 to 2017 and rose to approximately 15 in 2016 and about 25 in 2017, according to the Justice Department. About 20 cases have been filed so far this year, the department said.

More cases are expected from the new U.S.C.I.S. office investigating suspected citizenship fraud. Expected to open in Los Angeles next year, the office will review naturalizations that were flagged after old fingerprint records on paper were scanned into a government database a decade ago. The scans allowed immigration authorities to find people who had been granted citizenship despite having prior criminal convictions or deportation orders.

The Obama administration appeared to pursue few cases involving duplicate identities, unless they involved egregious wrongdoing or naturalized citizens who had received government security clearances. But a 2016 report by the inspector general for the Department of Homeland Security found that more than 315,000 fingerprint records for people who had been deported or had criminal convictions had still not been uploaded.



Flags at a naturalization ceremony in Charlottesville, Va. Matt Eich for The New York Times

The report prompted U.S.C.I.S. to dedicate funds and workers to the job, starting in January 2017. So far, about 2,500 cases have required an in-depth review, and about 100 cases have been referred to the Justice Department. Prosecutors have not pursued all of them.

"We are not out there looking for people to denaturalize," said Daniel M. Renaud, associate director for field operations at U.S.C.I.S. "We're not going out and saying, 'Who did we naturalize last year? Let's open up that file and take a look!"

As with any other immigration approval, he said, "If there is fraud, then we think it's in the interest of everyone for us to deal with it."

Last year, the Supreme Court ruled unanimously that citizenship could not be revoked over minor falsehoods in an application.

Among the pending denaturalizations are cases against two men in Michigan and Florida. The Justice Department says it found evidence that the men did not disclose in their applications that they had outstanding deportation orders under other identities. Six people have been denaturalized since the fingerprint reviews began, including a New Jersey man who had immigrated from India and failed to respond to the denaturalization lawsuit filed against him.

Ms. Borgoño's case in Miami, however, is different, because it did not originate with the fingerprint database but with her criminal conviction.

Ms. Borgoño cooperated with investigators to build the case against her boss and never profited from his fraudulent scheme involving bank loan applications. She was sentenced to house arrest and probation, which she completed early after paying a small amount of restitution.

But prosecutors say that because the scheme began before Ms. Borgoño became naturalized, she should have divulged her involvement to immigration authorities, who might have then denied her citizenship. Her attorneys say it is unclear whether Ms. Borgoño knew of her boss's unlawful scheme at the time.

When Ms. Borgoño pleaded guilty, prosecutors did not suggest her citizenship was at risk, said Mr. Cerda, her attorney, who has asked the court to dismiss the denaturalization case.

"There was no indication, no discussion, that this could be used against her," he said, saying Ms. Borgoño's defense might have taken a different tack if it had known her immigration status was at stake. "There has to be a modicum of understanding, frankly, in terms of the government's perspective of which cases to pursue and which ones not to pursue. I just don't think that's being applied right now."

The Justice Department's other recent denaturalization targets include child sex abusers, repeat sex offenders and people accused of supporting or conspiring with terrorists. In 2016, a Pennsylvania man who 18 years earlier had been convicted of a white-collar crime, like Ms. Borgoño, agreed to give up his citizenship but remain a legal permanent resident.

"There's no statute of limitations," noted Matthew Hoppock, an immigration lawyer in Kansas who tracks denaturalization cases. "It makes negotiating these cases with the government really difficult. My client can agree to give up her citizenship if you promise not to deport her. You can make that promise now, but you could always deport her later — 10 years from now, 20 years from now."

Mr. Cerda declined to make Ms. Borgoño available for an interview, citing the pending case. Her daughter, Urpi Ríos, said the lawsuit had shattered the family.

"She did everything that was asked of her," Ms. Ríos said, speaking through tears. "I'm trying to do the best I can to make her smile every day."

Ms. Borgoño has no close family remaining in Peru, according to her daughter, who worries her mother could be deported and wind up alone and sick. Ms. Borgoño has Alport syndrome, a genetic condition, and has been on a kidney transplant list for two years.

She was overjoyed by the birth of her granddaughter, who spent two weeks in the neonatal intensive care unit before coming home.

"And then, not even a week goes by, and this bombshell comes," said Ms. Ríos, recalling the moment her mother was served with the denaturalization complaint. "It's without mercy."

Follow Patricia Mazzei on Twitter: @PatriciaMazzei.

Kitty Bennett and Doris Burke contributed research.

A version of this article appears in print on July 24, 2018, on Page A10 of the New York edition with the headline: You're Now a U.S. Citizen. Until You're Not.



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500 Falls Church, Virginia 22041

July 31, 2017

MEMORANDUM

TO:

All Immigration Judges

All Court Administrators

All Attorney Advisors and Judicial Law Clerks

All Immigration Court Staff

FROM:

MaryBeth Keller

Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 17-01: Continuances

This Operating Policies and Procedures Memorandum (OPPM) supplements and amends OPPM 13-01. It is intended to provide guidance to assist Immigration Judges with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.

This OPPM also reminds Immigration Judges that in all situations in which a continuance is granted at a hearing, they must make the reason(s) for the adjournment clear on the record, by stating the reasons orally or by setting forth in writing the reason(s) in an order. In all cases, the judge should also annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code. The Court Administrators and court staff must ensure that each adjournment code is accurately entered into CASE.

The number of pending cases before immigration courts currently exceeds 600,000. Although multiple factors may have contributed to this case load, Immigration Judges must ensure that lower productivity and adjudicatory inefficiency do not further exacerbate this situation. To that end, it is more important than ever that Immigration Judges ensure that our resources are used efficiently.

In particular, the delays caused by granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets. In 2012, the Office of the Inspector General of the U.S. Department of Justice found that "frequent and lengthy continuances" were a significant contributing factor to increased case processing times and that over half of all cases surveyed had one or more continuances, with an average in those cases of four continuances and 368 days of continuance, per case. U.S. Department of Justice, Office of Inspector General, Management of Immigration Cases and the Office for Appeals bvExecutive *Immigration* Review (Oct. 2012). https://oig.justice.gov/reports/2012/e1301.pdf. A recent report by the U.S. Government Accountability Office showed that the use of continuances in immigration proceedings increased 23% between fiscal years 2006 and 2015, U.S. Government Accountability Office, Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017), https://www.gao.gov/assets/690/685022.pdf. Furthermore, despite an increase in the hiring of Immigration Judges, initial case completion numbers in Fiscal Year 2016 were essentially the same as in Fiscal Year 2012, and recent overall case completion numbers have declined notably compared to the numbers from Fiscal Years 2004 to 2011. U.S. Department of Justice, Executive Office for Immigration Review, Statistics Yearbooks FY 2004-FY 2016, https://www.justice.gov/eoir/statistical-year-book.

In addition to complicating the resolution of individual cases by prolonging the time between hearings, multiple continuances can strain overall court resources, including administrative and interpreter resources, and consume docket time that could otherwise be used to resolve additional cases. Therefore, it is critically important that Immigration Judges use continuances appropriately and only where warranted for good cause or by authority established by case law.

The Immigration and Nationality Act (INA) generally does not establish any specific "right" to a continuance in immigration proceedings. Rather, the availability of continuances is primarily governed by 8 C.F.R. § 1003.29, which provides that an "immigration judge may grant a motion for continuance for good cause shown." In certain circumstances, case law further refines the regulatory definition of good cause and informs consideration of specific types of continuance requests, including requests to obtain additional evidence and requests to continue proceedings to await adjudication by U.S. Citizenship and Immigration Services (USCIS) of a relevant petition. In other situations, because the reasons for requesting a continuance vary widely, an assessment of good cause will depend on the specific factors of each case. Nevertheless, in general, the reason and support for the request as well as any opposition to it, the timing of the request, the respondent's detention status, the complexity of the case, the number and length of any prior continuances, and concerns for administrative efficiency are all appropriate factors to be considered in determining whether to grant a continuance and for how long.

Overall, while administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, Immigration Judges should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.

Further, although the appropriate use of continuances serves to protect due process, which Immigration Judges must safeguard above all, there is also a strong incentive by respondents in immigration proceedings to abuse continuances, and Immigration Judges must be equally vigilant in rooting out continuance requests that serve only as dilatory tactics. As the Supreme Court has recognized, "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Moreover, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323 (1992). Continuance requests that seek only to prolong

OPPM 17-01: Continuances Page 4 of 6

a removable alien's presence in the United States serve neither the public's interest nor the interests of justice, including the related interests of other aliens with meritorious claims whose cases may be delayed collaterally. Thus, as a general matter, continuance requests solely for dilatory purposes should not be countenanced by Immigration Judges.

With these principles in mind, there are several specific recurring categories of continuance requests, all of which may cause significant docketing and administrative efficiency concerns, which warrant additional guidance:

A. Continuances to Obtain Counsel

With regard to granting a continuance to give a respondent the opportunity to obtain legal counsel, it remains general policy that at least one continuance should be granted for that purpose. Such a continuance should be of reasonable length, but it is appropriate for Immigration Judges to consider the overall context of the case in determining that length, particularly when all respondents are initially provided a list of pro bono legal service providers in accordance with 8 C.F.R. § 1240.10(a)(2). For each additional request for a continuance, the Immigration Judge should inquire as to the respondent's diligence in securing representation and other relevant information to determine whether there is good cause for a further continuance and, if so, the length of any such continuance.

B. Continuances for Attorney Preparation

Although continuances to allow recently retained counsel to become familiar with a case prior to the scheduling of an individual merits hearing are common, subsequent requests for preparation time should be reviewed carefully, especially given that the time between a master calendar hearing and an individual merits hearing, which often exceeds one year in a non-detained case, already encompasses substantial time for preparation. It is also appropriate for Immigration Judges to consider the overall complexity of the case in determining the appropriateness and length of any continuance for attorney preparation time, as well as the number and length of prior continuances for preparation time. In addition, frequent or multiple requests for additional preparation time based on a practitioner's workload concerns related to large numbers of other pending cases should be rare and warrant careful review. "A practitioner's workload must be

controlled and managed so that each matter can be handled competently." 8 C.F.R. § 1003.102(q)(1). Thus, for a practitioner who takes on more cases than he or she can responsibly and professionally handle, necessitating the need for multiple continuances across multiple cases, it may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. § 1003.102.

C. Continuances of Merits Hearings

Of particular importance are requests to continue an individual merits hearing that has already been scheduled. Such hearings are typically scheduled far in advance, which provides ample opportunity for preparation time, and often involve interpreters or third-party witnesses whose schedules have been carefully accommodated. Moreover, slots for individual merits hearings cannot be easily filled by other cases, especially if the decision to continue the hearing is made close in time to the scheduled date. Although some continuances of individual merits hearings are unavoidable, especially in situations involving an unexpected illness or death, the continuance of an individual merits hearing necessarily has a significant adverse ripple effect on the ability to schedule other hearings across an Immigration Judge's docket. Thus, such a request should be reviewed very carefully, especially if it is made close in time to the hearing. For a continuance request made well in advance of the scheduled date of the hearing, an Immigration Judge should adjudicate that request expeditiously and, if granted, should endeavor to fill that hearing slot with another individual merits hearing after providing sufficient notice. Further, because an individual merits hearing is typically scheduled far in advance and generally only after considering the availability of a respondent's representative, a request for a continuance based on a scheduling conflict with a respondent's representative that arose after the individual merits hearing has been calendared should be rare and should be considered very carefully. In sum, Immigration Judges generally should not continue individual merits hearings absent a genuine showing of good cause or a clear case law basis.

D. Continuances Requested By DHS

Continuance requests made by a trial attorney of the U.S. Department of Homeland Security (DHS) should also be comparatively rare. For continuance requests made by DHS to allow time to complete background investigations and security checks or to allow time to obtain a

respondent's file, it is appropriate for the Immigration Judge to inquire on the record about the ongoing process for obtaining background and security checks or for obtaining the alien's file.

As OPPM 13-01 notes, the legal maxim that "justice delayed is justice denied" is a common refrain in the context of immigration proceedings. Although fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances, Immigration Judges must also be mindful of the effects of frequent and lengthy continuances, particularly when they are not supported by good cause, on the efficient administration of justice for both respondents and the public.

If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge.

Results from Tom K. Wong¹ et al., 2018 National DACA Study

Survey fielded 7/16/2018 to 8/07/2018 n = 1,050

Methodology	2
Economic Integration	3-5
Education	6-7
Inclusion and Belonging	8
Concerns about Immigration Enforcement	9-11

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- 1 -

Methodology

The questionnaire was administered to an online panel of DACA recipients recruited by the partner organizations. Several steps were taken to account for the known sources of bias that result from such online panels. To prevent ballot stuffing—one person submitting multiple responses—the authors did not offer an incentive to respondents for taking the questionnaire and used a state-of-the-art online survey platform that does not allow one IP address to submit multiple responses. To prevent spoiled ballots—meaning people responding who are not undocumented—the authors used two unique validation tests for undocumented status. Multiple questions were asked about each respondent's migratory history and DACA history. These questions were asked at different parts of the questionnaire. When repeated, the questions were posed using different wording. If there was agreement in the answers such that there was consistency regarding the respondent's migratory history and DACA history, the respondent was kept in the resulting pool of respondents. If not, the respondent was excluded.

Economic Integration

Check all that apply. After my DACA application was approved, I...

(n = 1,050)

			≥ 25
Got my first job		57.1%	36.7%
Got a job with better pay		54.0%	65.5%
Got a job that better fits my education and training		44.8%	52.7%
Got a job that better fits my long-term career goals		45.2%	55.3%
Got a job with health insurance or other benefits		46.6%	59.8%
Got a job with improved work conditions		45.6%	55.0%
Started my own business		5.6%	7.8%
I have been able to earn more money, which has helped me become financially independent		76.5%	80.7%
I have been able to earn more money, which has helped my family financially		74.6%	78.0%
I have been able to earn more money, which has helped me pay for childcare		47.6%	44.4%
I have been able to earn more money, which has helped me pay for medical expenses		43.5%	48.8%
I have been able to earn more money, which has helped me pay for tuition		53.3%	45.0%
Opened a bank account		58.2%	44.5%
Got my first credit card		61.1%	64.7%
Opened a retirement account		27.1%	34.8%
Bought my first car		61.5%	68.7%
Bought a home		13.7%	20.3%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older

Are you currently employed?

(n = 1,050)

		≥ 25
Yes	 89.3%	92.3%
No	 10.7%	7.7%
No response	 0.0%	0.0%

Note: percentages may not sum to 100 due to rounding. n = 600 for respondents 25 years and older

Please indicate your average hourly wage OR annual salary

25
81
50
33
00
5

Note: n = 938 for respondents currently employed. n = 554 for respondents 25 years and older and currently employed. Figures exclude the bottom 1st and top 99th percentiles

On average, how many hours do you work per week?

		≥ 25
Average hours worked per week	 37.3	39.6
Median hours worked per week	 40.0	40.0

Note: n = 554 for respondents 25 years and older and currently employed

••••• Were you employed before DACA?

		≥ 25
Yes	 43.6%	59.6%
No	 56.2%	40.1%
No response	 0.2%	0.4%

Note: percentages may not sum to 100 due to rounding. N = 938 for respondents currently employed. n = 554 for respondents 25 years and older and currently employed

Please indicate your average hourly wage OR annual salary before DACA

		≥ 25
Average hourly wage	 \$10.32	\$10.56
Median hourly wage	 \$10.00	\$10.00
Average annual earnings	 \$19,217.16	\$20,147.20
Median annual earnings	 \$18,771.44	\$19,972.33

Note: n = 409 for respondents currently employed and employed before DACA. n = 330 for respondents 25 years and older and currently employed and employed before DACA. Figures exclude the bottom 1st and top 99th percentiles

On average, how many hours did you work per week before DACA?

		≥ 25	
Average hours worked per v	week	36.5 37.9	
Median hours worked per w	week	40.0 40.0	
Note: $n = 409$ for respondents currently employed and employed before DACA. $n = 330$ for respondents 25 years and older and			
	currently employed and employed	d before DACA	

..... Does your employer know that you have DACA?

(n = 938, which represents the 89.3% of respondents who are currently employed)

Yes		73.7%
No		5.3%
Not sure		20.9%
No response		0.1%
NT .	4 4 100 1	1.

Note: percentages may not sum to 100 due to rounding

Education

Check all that apply. After my DACA application was approved, I...

(n = 1,050)

		≥ 25
Pursued educational opportunities that I previously could not	 62.4%	48.8%
I haven't pursued more education yet, but I plan to	 36.0%	46.5%
I don't plan to pursue more education	 4.6%	7.3%
Paid off some/all of my student loans	 15.3%	15.0%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older

Are you currently in school?

(n = 1,050)

		_ 23
Yes	 40.0%	23.2%
No	 59.9%	76.7%
No response	 0.1%	0.2%

Note: percentages may not sum to 100 due to rounding. n = 600 for respondents 25 years and older

..... What degree are you currently pursuing?

(n = 420, which represents the 40.0% of respondents who are currently employed)

		≥ 25
GED or equivalent	 0.9%	2.2%
High-school diploma	 3.3%	0.0%
Trade/technical/vocational degree or certificate	 3.1%	5.0%
Associate's degree	 18.1%	18.0%
Bachelor's degree	 53.1%	35.9%
Master's degree	 15.0%	27.3%
Professional degree above a master's degree	 3.1%	5.0%
Doctorate degree	 3.3%	6.5%
No response	 0.0%	0.0%
Bachelor's degree or higher	 74.5%	74.8%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 139 for respondents 25 years and older and currently in school

What is the highest degree or level of school you have completed? If you are currently enrolled in school, what is the highest degree you have received thus far?

(n = 1,050)

		≥ 25
GED or equivalent	 1.8%	2.7%
High-school diploma	 25.6%	19.0%
Trade/technical/vocational degree or certificate	 6.9%	7.0%
Associate's degree	 14.9%	15.0%
Some college	 18.7%	16.3%
Bachelor's degree	 24.6%	28.7%
Master's degree	 6.0%	9.7%
Professional degree above a master's degree	 0.6%	0.8%
Doctorate degree	 0.4%	0.7%
No response	 0.5%	0.2%
Bachelor's degree or higher	 31.5%	39.8%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older

Inclusion and Belonging

Check all that apply. After my DACA application was approved, I...

(n = 1,050)

		≥ 25
Have become more politically active	48.5%	44.8%
Have become more involved in my community	52.3%	47.2%
Am no longer afraid because of my immigration status	64.0%	62.8%
Feel more like I belong in the U.S.	63.6%	64.8%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older

Check all that apply. After my DACA application was approved, I...

(n = 1,050)

Got my driver's license for the first time 78.0% 78.8%

Got a state identification card for the first time 61.6% 59.7%

Became an organ donor 45.7% 46.5%

Donated blood for the first time 18.7% 15.2%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older

Do you have an immediate family member, meaning a parent, sibling, spouse, or child, who is a U.S. citizen?

(n = 1,050)

 Yes
 72.1%

 No
 27.6%

 No response
 0.3%

Note: percentages may not sum to 100 due to rounding

Concerns about Immigration Enforcement

How often do you think about the following?

(n = 1,050)

"Being detained in an immigration detention facility"				w/children
A few times an hour				5.2%
About once an hour		2.1%	1.8%	1.3%
		16.9%	16.3%	21.0%
		21.5%	19.7%	20.6%
		37.1%	38.0%	37.3%
		18.2%	20.0%	14.6%
No response 0.3%			0.3%	0.0%
About once a day or more		44.7%	42.0%	48.1%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older. n = 233 for respondents with children

"Being deported from the U.S."		≥ 25	w/children
A few times an hour	 4.9%	4.3%	5.2%
About once an hour	 2.2%	1.7%	2.2%
A few times a day	 22.4%	21.0%	25.8%
About once a day	 25.1%	23.3%	20.2%
Less than once a day	 33.2%	36.0%	34.8%
Never	 11.3%	12.7%	11.6%
No response	 0.9%	1.0%	0.4%
About once a day or more	 55.4%	51.3%	53.7%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older. n = 233 for respondents with children

"A family member being detained in an immigration detention facility"			≥ 25	w/children
A few times an hour	5.8%	8.2%		
About once an hour		4.0%	6.0%	
		24.1%	21.0%	24.5%
		26.0%	25.3%	24.0%
		24.5%	26.8%	26.2%
Never		12.6%	15.8%	11.2%
No response 0.9%			1.2%	0.0%
About once a day or more		62.9%	57.3%	62.7%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older. n = 233 for respondents with children

"A family member being deported from the U.S."			≥ 25	w/children
A few times an hour			5.5%	7.3%
About once an hour	5.3%	3.8%	6.0%	
A few times a day		25.7%	22.5%	26.2%
		25.2%	25.0%	21.0%
		25.1%	27.3%	27.0%
Never		10.9%	14.5%	12.0%
No response		1.1%	1.3%	0.4%
About once a day or more		63.9%	58.2%	60.9%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older. n = 233 for respondents with children

"Congress passing a new law that provides legal status for undocumented youth"				w/children
A few times an hour	10.0%	14.6%		
About once an hour 5.3%				6.9%
About once a day		26.8%	25.3%	29.2%
		29.9%	32.2%	27.9%
		19.3%	20.3%	14.2%
		5.4%	5.7%	6.0%
		1.5%	1.8%	1.3%
About once a day or more		75.2%	74.0%	79.8%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 600 for respondents 25 years and older. n = 233 for respondents with children

..... How often do you think about the following?

(n = 233, which represents the 22.2% of all respondents who have children)

"Being separated from my children because of deportation"

A few times an hour	 20.2%
About once an hour	 3.9%
A few times a day	 27.0%
About once a day	 24.9%
Less than once a day	 18.0%
Never	 5.6%
No response	 0.4%
About once a day or more	 75.9%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 233 for respondents with children

..... How often do you think about the following?

(n = 233, which represents the 22.2% of all respondents who have children)

"Not being able to see my children grow up because of deportation"

A few times an hour	 20.2%
About once an hour	 4.3%
A few times a day	 25.3%
About once a day	 23.6%
Less than once a day	 17.6%
Never	 8.6%
No response	 0.4%
About once a day or more	 73.4%

Note: percentages do not sum to 100 as individuals may select all that apply. n = 233 for respondents with children

In what state do you live?

(n = 1,050)

	%	0/0
	Poll	DACA
California	 30.9%	28.6%
Texas	 14.3%	16.5%
Illinois	 5.6%	5.3%
New York	 5.3%	4.6%
Florida	 4.9%	3.9%
Arizona	 3.6%	3.7%
New Mexico	 3.1%	0.9%
Washington	 2.7%	2.4%
New Jersey	 2.2%	2.6%
Georgia	 2.0%	3.2%
North Carolina	 1.8%	3.6%
Colorado	 1.6%	2.3%
Massachusetts	 1.6%	0.9%
Maryland	 1.5%	1.2%
Utah	 1.5%	1.3%
Virginia	 1.5%	1.5%
Nevada	 1.3%	1.8%
Tennessee	 1.1%	1.2%
Oregon	 1.0%	1.5%
Other	 12.2%	13.1%

Note: percentages may not sum to 100 due to rounding

Data on active DACA population by state as of July 31, 2018 available from USCIS here: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACAPopulationDataJuly31_2018.pdf

How old are you?

(n = 1,050)

Average	 25.7
Median	 25
16	 0.3%
17	 1.1%
18	 3.1%
19	 5.1%
20	 4.5%
21	 6.2%
22	 7.2%
23	 7.2%
24	 8.2%
25	 7.4%
26	 6.7%
27	 5.8%
28	 8.8%
29	 7.1%
30	 5.2%
31	 3.6%
32	 5.1%
33	 2.7%
34	 1.9%
35	 1.5%
36	 1.1%
37	 0.4%

Note: percentages may not sum to 100 due to rounding

How old were you when you first came to the U.S.?

(n = 1,050)

Average	 6.1
Median	 5
0	 5.1%
1	 10.3%
2	 8.0%
3	 8.6%
4	 8.8%
5	 10.7%
6	 7.1%
7	 7.5%
8	 5.3%
9	 6.0%
10	 5.1%
11	 4.3%
12	 4.5%
13	 2.9%
14	 2.8%
15	 3.1%

Note: percentages may not sum to 100 due to rounding

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. v. HAWAII ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–965. Argued April 25, 2018—Decided June 26, 2018

In September 2017, the President issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken pursuant to one of the President's earlier Executive Orders. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and intelligence agencies, developed an information and risk assessment "baseline." DHS then collected and evaluated data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns, as well as other countries "at risk" of failing to meet the baseline. After a 50-day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries-Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen-remained deficient. She recommended entry restrictions for certain nationals from all of those countries but Iraq, which had a close cooperative relationship with the U.S. She also recommended including Somalia, which met the information-sharing component of the baseline standards but had other special risk factors, such as a significant terrorist presence. After consulting with multiple Cabinet members, the President adopted the recommendations and issued the Proclamation.

Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), he determined that certain restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and "elicit improved identity-management and information-sharing protocols and practices from foreign governments." The Proclamation imposes a range of entry restrictions that vary based on the "distinct circumstances" in each of the eight countries. It exempts lawful permanent residents and provides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

Plaintiffs—the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii—argue that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: §1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States," and §1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." The court did not reach the Establishment Clause claim.

- Held:
 - 1. This Court assumes without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155. Pp. 8–9.
 - 2. The President has lawfully exercised the broad discretion granted to him under §1182(f) to suspend the entry of aliens into the United States. Pp. 9–24.
 - (a) By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. Sale, 509 U. S., at 187. The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[]" that the entry of the covered al-

iens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. He then issued a Proclamation with extensive findings about the deficiencies and their impact. Based on that review, he found that restricting entry of aliens who could not be vetted with adequate information was in the national interest.

Even assuming that some form of inquiry into the persuasiveness of the President's findings is appropriate, but see *Webster* v. *Doe*, 486 U. S. 592, 600, plaintiffs' attacks on the sufficiency of the findings cannot be sustained. The 12-page Proclamation is more detailed than any prior order issued under §1182(f). And such a searching inquiry is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. See, *e.g.*, *Sale*, 509 U. S., at 187–188.

The Proclamation comports with the remaining textual limits in §1182(f). While the word "suspend" often connotes a temporary deferral, the President is not required to prescribe in advance a fixed end date for the entry restriction. Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Finally, the Proclamation properly identifies a "class of aliens" whose entry is suspended, and the word "class" comfortably encompasses a group of people linked by nationality. Pp. 10–15.

- (b) Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation's vetting system. The existing grounds of inadmissibility and the narrow Visa Waiver Program do not address the failure of certain high-risk countries to provide a minimum baseline of reliable information. Further, neither the legislative history of §1182(f) nor historical practice justifies departing from the clear text of the statute. Pp. 15–20.
- (c) Plaintiffs' argument that the President's entry suspension violates §1152(a)(1)(A) ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. Had Congress intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country,

it could have chosen language directed to that end. Common sense and historical practice confirm that §1152(a)(1)(A) does not limit the President's delegated authority under §1182(f). Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. And on plaintiffs' reading, the President would not be permitted to suspend entry from particular foreign states in response to an epidemic, or even if the United States were on the brink of war. Pp. 20–24.

- 3. Plaintiffs have not demonstrated a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause. Pp. 24–38.
- (a) The individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause. A person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. Cf., e.g., Kerry v. Din, 576 U. S. ____, ___. Pp. 24–26.
- (b) Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. At the heart of their case is a series of statements by the President and his advisers both during the campaign and since the President assumed office. The issue, however, is not whether to denounce the President's statements, but the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, the Court must consider not only the statements of a particular President, but also the authority of the Presidency itself. Pp. 26–29.
- (c) The admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792. Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. That review is limited to whether the Executive gives a "facially legitimate and bona fide" reason for its action, Kleindienst v. Mandel, 408 U.S. 753, 769. but the Court need not define the precise contours of that narrow inguiry in this case. For today's purposes, the Court assumes that it may look behind the face of the Proclamation to the extent of applying rational basis review, i.e., whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. Plaintiffs' extrinsic evidence may be considered, but the policy will be upheld so long as it can reasonably

be understood to result from a justification independent of unconstitutional grounds. Pp. 30–32.

(d) On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." Romer v. Evans, 517 U.S. 620, 635. The Proclamation does not fit that pattern. It is expressly premised on legitimate purposes and says nothing about religion. The entry restrictions on Muslim-majority nations are limited to countries that were previously designated by Congress or prior administrations as posing national security risks. Moreover, the Proclamation reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs challenge the entry suspension based on their perception of its effectiveness and wisdom, but the Court cannot substitute its own assessment for the Executive's predictive judgments on such matters. See Holder v. Humanitarian Law Project, 561 U.S. 1, 33-34.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list. Second, for those countries still subject to entry restrictions, the Proclamation includes numerous exceptions for various categories of foreign nationals. Finally, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. Pp. 33–38.

878 F. 3d 662, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17-965

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS v. HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States." 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO-1). EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. §3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. §3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order. Washington v. Trump, 847 F. 3d 1151 (2017) (per curiam).

In response, the President revoked EO-1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO-2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO-2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§2(c), 3(a). order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in

court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. International Refugee Assistance Project (IRAP) v. Trump, 857 F. 3d 554 (CA4 2017); Hawaii v. Trump, 859 F. 3d 741 (CA9 2017) (per curiam). This Court granted certiorari and stayed the injunctions allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a "credible claim of a bona fide relationship" with a person or entity in the United States. Trump v. IRAP, 582 U.S. ____, ___ (2017) (per curiam) (slip op., at 12). The temporary restrictions in EO-2 expired before this Court took any action, and we vacated the lower court decisions as moot. Trump v. IRAP, 583 U.S. ___ (2017); Trump v. Hawaii, 583 U.S. (2017).

On September 24, 2017, after completion of the world-wide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public safety threats." §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO-2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies,

developed a "baseline" for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. §1(c). The baseline included three components. The first, "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identityrelated information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U.S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid*.

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as "at risk" of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid*.

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The

Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. §§1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its "identity-management deficiencies" and "significant terrorist presence" presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. §1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. §1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation. Invoking his authority under 8 U.S.C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identitymanagement and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counterterrorism objectives" of the United States. Proclamation The President explained that these restrictions would be the "most likely to encourage cooperation" while "protect[ing] the United States until such time as improvements occur." Ibid.

The Proclamation imposed a range of restrictions that vary based on the "distinct circumstances" in each of the eight countries. *Ibid*. For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii),

(e)(ii). For countries that have information-sharing deficiencies but are nonetheless "valuable counterterrorism partner[s]" (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three

individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The court concluded that the Proclamation violated two provisions of the INA: §1182(f), because the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the national interest, and §1152(a)(1)(A), because the policy discriminates against immigrant visa applicants on the basis of 265 F. Supp. 3d 1140, 1155-1159 (Haw. nationality. 2017). The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government's appeal. 583 U.S. _ (2017).

The Court of Appeals affirmed. The court first held that

the Proclamation exceeds the President's authority under §1182(f). In its view, that provision authorizes only a "temporary" suspension of entry in response to "exigencies" that "Congress would be ill-equipped to address." 878 F. 3d 662, 684, 688 (2017). The court further reasoned that the Proclamation "conflicts with the INA's finely reticulated regulatory scheme" by addressing "matters of immigration already passed upon by Congress." *Id.*, at 685, 690. The Ninth Circuit then turned to §1152(a)(1)(A) and determined that the entry restrictions also contravene the prohibition on nationality-based discrimination in the issuance of immigrant visas. The court did not reach plaintiffs' Establishment Clause claim.

We granted certiorari. 583 U.S. ___ (2018).

П

Before addressing the merits of plaintiffs' statutory claims, we consider whether we have authority to do so. The Government argues that plaintiffs' challenge to the Proclamation under the INA is not justiciable. Relying on the doctrine of consular nonreviewability, the Government contends that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by law." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-543 (1950). According to the Government, that principle barring review is reflected in the INA, which sets forth a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present in the United States. See Brief for Petitioners 19– 20 (citing 8 U. S. C. §1252).

The justiciability of plaintiffs' challenge under the INA presents a difficult question. The Government made similar arguments that no judicial review was available in

Sale v. Haitian Centers Council, Inc., 509 U. S. 155 (1993). The Court in that case, however, went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability. The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, see Tr. of Oral Arg. 13, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims, see Sebelius v. Auburn Regional Medical Center, 568 U. S. 145, 153 (2013) (requiring Congress to "clearly state[]" that a statutory provision is jurisdictional). As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.

TII

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, e.g., 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

¹The President also invoked his power under 8 U. S. C. §1185(a)(1), which grants the President authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe." Because this provision "substantially overlap[s]" with §1182(f), we agree with the Government that we "need not resolve . . . the precise relationship between the two statutes" in evaluating the validity of the Proclama-

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

A

The text of §1182(f) states:

"Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to

tion. Brief for Petitioners 32–33.

the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. Sale, 509 U. S., at 187 (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States); see also Abourezk v. Reagan, 785 F. 2d 1043, 1049, n. 2 (CADC 1986) (describing the "sweeping proclamation power" in §1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[]" that the entry of the covered aliens "would be detrimental to the interests of the United The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to

encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur." *Ibid.*²

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to make a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. See Webster v. Doe, 486 U.S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director "shall deem such termination necessary or advisable in the interests of the United States" forecloses "any meaningful judicial standard of review"). But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under §1182(f). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the

²The Proclamation states that it does not disclose every ground for the country-specific restrictions because "[d]escribing all of those reasons publicly... would cause serious damage to the national security of the United States, and many such descriptions are classified." §1(j).

Sudanese government and armed forces "is in the foreign policy interests of the United States"); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" are "necessary").

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§1182(f)] authority." Sale, 509 U. S., at 187–188. And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." Holder v. Humanitarian Law Project, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," Webster's Third New International Dictionary 2303 But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry "for such period as he shall deem necessary." It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. See, e.g., Presidential Proclamation No. 5829, 3 CFR 88 (1988) (President Reagan) (suspending the entry of certain Panamanian nationals "until such time as . . . democracy has been restored in Panama"); Presidential Proclamation

No. 8693, 3 CFR 86–87 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nations Security Council resolutions "until such time as the Secretary of State determines that [the suspension] is no longer necessary"). In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Proclamation Preamble, and §1(h); see *ibid*. (explaining that the aim is to "relax[] or remove[]" the entry restrictions "as soon as possible"). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identitymanagement protocols, and he accordingly lifted the entry suspension on its nationals. See Proclamation No. 9723, 83 Fed. Reg. 15937.

Finally, the Proclamation properly identifies a "class of aliens"—nationals of select countries—whose entry is suspended. Plaintiffs argue that "class" must refer to a well-defined group of individuals who share a common "characteristic" apart from nationality. Brief for Respondents 42. But the text of §1182(f), of course, does not say that, and the word "class" comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be "overbroad." Brief for Respondents 42. But that simply amounts to an unspoken tailoring requirement found nowhere in Congress's grant of authority to suspend entry of not only "any class of aliens" but "all aliens."

In short, the language of §1182(f) is clear, and the Proc-

lamation does not exceed any textual limit on the President's authority.

В

Confronted with this "facially broad grant of power," 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of §1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

1

Plaintiffs' structural argument starts with the premise that §1182(f) does not give the President authority to countermand Congress's considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See §1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See §1187.

We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation's vetting system.

To the contrary, the Proclamation supports Congress's

individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. Brief for Respondents 48. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not require that systemic problems such as the lack of reliable information be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall. Ibid.

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a "rigorous security partnership" with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), http://www.dhs.gov/visa-waiver-program (as last visited June 25, 2018). Eligibility for that partnership

involves "broad and consequential assessments of [the country's] foreign security standards and operations." *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its "counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities," often including "operational site inspections of airports, seaports, land borders, and passport production and issuance facilities." *Ibid.*

Congress's decision to authorize a benefit for "many of America's closest allies," ibid., did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries. The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer "reciprocal [travel] privileges" to United States citi-8 U.S.C. §1187(a)(2)(A). But in establishing a select partnership covering less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standardparticularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those highrisk countries provide a minimum baseline of information to adequately vet their nationals. Once again, this is not a situation where "Congress has stepped into the space and solved the exact problem." Tr. of Oral Arg. 53.

Although plaintiffs claim that their reading preserves for the President a flexible power to "supplement" the INA, their understanding of the President's authority is remarkably cramped: He may suspend entry by classes of aliens "similar in nature" to the existing categories of inadmissibility—but not too similar—or only in response to "some exigent circumstance" that Congress did not already touch on in the INA. Brief for Respondents 31, 36,

50; see also Tr. of Oral Arg. 57 ("Presidents have wide berth in this area . . . if there's any sort of emergency."). In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in §1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other "interests of the United States."

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under §1182(f).

2

Plaintiffs seek to locate additional limitations on the scope of §1182(f) in the statutory background and legislative history. Given the clarity of the text, we need not consider such extra-textual evidence. See *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. ____, ___ (2016) (slip op., at 9). At any rate, plaintiffs' evidence supports the plain meaning of the provision.

Drawing on legislative debates over §1182(f), plaintiffs suggest that the President's suspension power should be limited to exigencies where it would be difficult for Congress to react promptly. Precursor provisions enacted during the First and Second World Wars confined the President's exclusion authority to times of "war" and "national emergency." See Act of May 22, 1918, §1(a), 40 Stat. 559; Act of June 21, 1941, ch. 210, §1, 55 Stat. 252. When Congress enacted §1182(f) in 1952, plaintiffs note, it borrowed "nearly verbatim" from those predecessor statutes, and one of the bill's sponsors affirmed that the provision would apply only during a time of crisis. According to plaintiffs, it therefore follows that Congress sought to delegate only a similarly tailored suspension power in

§1182(f). Brief for Respondents 39–40.

If anything, the drafting history suggests the opposite. In borrowing "nearly verbatim" from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress's conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. See NLRB v. SW General, Inc., 580 U.S. (2017) (slip op., at 16) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). When Congress wishes to condition an exercise of executive authority on the President's finding of an exigency or crisis, it knows how to say just that. See, e.g., 16 U. S. C. §8240–1(b); 42 U. S. C. §5192; 50 U. S. C. §§1701, 1702. Here, Congress instead chose to condition the President's exercise of the suspension authority on a different finding: that the entry of an alien or class of aliens would be "detrimental to the interests of the United States."

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under §1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct "deemed harmful by the immigration laws." And the remaining entry restrictions that focused on entire nationalities—namely, President Carter's response to the Iran hostage crisis and President Reagan's suspension of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies "that the immigration laws do not address." Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered

nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, e.g., Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation's "annexation of Crimea and its use of force in Ukraine"); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing "foreign policy interests of the United States" based on Sudan's refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked §1182(f) to suspend entry "as immigrants" by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carve-out for emergency action, but the proclamation was based in part on Cuba's decision to breach an immigration agreement some 15 months earlier.

More significantly, plaintiffs' argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

 \mathbf{C}

Plaintiffs' final statutory argument is that the President's entry suspension violates §1152(a)(1)(A), which provides that "no person shall...be discriminated against

in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in §1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that §1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in §1152(a)(1)(A).

As an initial matter, this argument challenges only the validity of the entry restrictions on *immigrant* travel. Section 1152(a)(1)(A) is expressly limited to the issuance of "immigrant visa[s]" while §1182(f) allows the President to suspend entry of "immigrants or nonimmigrants." At a minimum, then, plaintiffs' reading would not affect any of the limitations on nonimmigrant travel in the Proclamation.

In any event, we reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA.³ Section 1182 defines the pool of individuals who

³The Act is rife with examples distinguishing between the two concepts. See, e.g., 8 U.S.C. §1101(a)(4) ("The term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa."); §1182(a) ("ineligible to receive visas and ineligible to be admitted"); §1182(a)(3)(D)(iii) ("establishes to the satisfaction of the consular officer when applying for a visa... or to the satisfaction of the Attorney General when applying for admission"); §1182(h)(1)(A)(i) ("alien's application for a visa, admission, or adjustment of status"); §1187 (permitting entry without a visa); §1361 (establishing burden of proof for when a person "makes application for a visa..., or makes application for admission, or otherwise attempts to enter

are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission)⁴ into the United States. First, any alien who is inadmissible under §1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U. S. C. §1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"—including §1182(f). §1201(h).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility into the United States, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which §1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end. See, e.g., §§1182(a)(3)(C)(ii), (iii) (providing that certain aliens "shall not be excludable or subject to restrictions or conditions on entry . . . because of the alien's

the United States").

⁴The concepts of entry and admission—but not issuance of a visa—are used interchangeably in the INA. See §1101(a)(13)(A) (defining "admission" as the "lawful entry of the alien into the United States").

past, current, or expected beliefs, statements, or associations" (emphasis added)). "The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports" the conclusion that §1152(a)(1)(A) does not limit the President's delegated authority under §1182(f). Knight v. Commissioner, 552 U.S. 181, 188 (2008).

Common sense and historical practice confirm as much. Section 1152(a)(1)(A) has never been treated as a constraint on the criteria for admissibility in §1182. Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. As noted, President Reagan relied on §1182(f) to suspend entry "as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517, 51 Fed. Reg. 30470 (1986). Likewise, President Carter invoked §1185(a)(1) to deny and revoke visas to all Iranian nationals. See Exec. Order No. 12172, 3 CFR 461 (1979), as amended by Exec. Order No. 12206, 3 CFR 249 (1980); Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, Vol. 1, Apr. 7, 1980, pp. 611–612 (1980); see also n. 1, supra.

On plaintiffs' reading, those orders were beyond the President's authority. The entry restrictions in the Proclamation on North Korea (which plaintiffs do not challenge in this litigation) would also be unlawful. Nor would the President be permitted to suspend entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.

In a reprise of their §1182(f) argument, plaintiffs attempt to soften their position by falling back on an implicit exception for Presidential actions that are "closely drawn" to address "specific fast-breaking exigencies." Brief for Respondents 60–61. Yet the absence of any textual basis for such an exception more likely indicates that Congress

did not intend for §1152(a)(1)(A) to limit the President's flexible authority to suspend entry based on foreign policy interests. In addition, plaintiffs' proposed exigency test would require courts, rather than the President, to determine whether a foreign government's conduct rises to the level that would trigger a supposed implicit exception to a federal statute. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 491 (1999) (explaining that even if the Executive "disclose[d] its . . . reasons for deeming nationals of a particular country a special threat," courts would be "unable to assess their adequacy"). The text of §1152(a)(1)(A) offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not.

* * *

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

IV A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge.

Federal courts have authority under the Constitution to decide legal questions only in the course of resolving "Cases" or "Controversies." Art. III, §2. One of the essential elements of a legal case or controversy is that the

plaintiff have standing to sue. Standing requires more than just a "keen interest in the issue." Hollingsworth v. Perry, 570 U. S. 693, 700 (2013). It requires allegations—and, eventually, proof—that the plaintiff "personal[ly]" suffered a concrete and particularized injury in connection with the conduct about which he complains. Spokeo, Inc. v. Robins, 578 U. S. ____, ___ (2016) (slip op., at 7). In a case arising from an alleged violation of the Establishment Clause, a plaintiff must show, as in other cases, that he is "directly affected by the laws and practices against which [his] complaints are directed." School Dist. of Abington Township v. Schempp, 374 U. S. 203, 224, n. 9 (1963). That is an issue here because the entry restrictions apply not to plaintiffs themselves but to others seeking to enter the United States.

Plaintiffs first argue that they have standing on the ground that the Proclamation "establishes a disfavored faith" and violates "their own right to be free from federal [religious] establishments." Brief for Respondents 27–28 (emphasis deleted). They describe such injury as "spiritual and dignitary." Id., at 29.

sion of particular foreign nationals. See *Kerry* v. *Din*, 576 U. S. ____, ___ (2015) (plurality opinion) (slip op., at 15); *id.*, at ____ (KENNEDY, J., concurring in judgment) (slip op., at 1); *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has "a bona fide relationship with a particular person seeking to enter the country . . . can legitimately claim concrete hardship if that person is excluded." *Trump* v. *IRAP*, 582 U. S., at ___ (slip op., at 13).

The Government responds that plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims. We therefore conclude that the individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause.

В

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were

"foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." App. 158. That statement remained on his campaign website until May 2017. Id., at 130–131. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." Id., at 120–121, 159. Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right." *Id.*, at 123.

One week after his inauguration, the President issued EO-1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.' Id., at 125. The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger.... [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country." Id., at 229.

Plaintiffs also note that after issuing EO-2 to replace

EO-1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." Id., at 132-133. More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." IRAP v. Trump, 883 F. 3d 233, 267 (CA4 2018).

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. George Washington reassured the Hebrew Congregation of Newport, Rhode Island that "happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens." 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that "America would fight with her whole strength for your right to have here your own church," declaring that "[t]his concept is indeed a part of America." Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George

W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that "[t]he face of terror is not the true faith of Islam," and that America is "a great country because we share the same values of respect and dignity and human worth." Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.

 \mathbf{C}

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977); see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In Kleindienst v. Mandel, the Attorney General denied admission to a Belgian journalist and selfdescribed "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U.S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. *Id.*, at 764–765. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. Id., at 769. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justifica-

tion" against the asserted constitutional interests of U. S. citizens. *Id.*, at 770.

The principal dissent suggests that Mandel has no bearing on this case, post, at 14, and n. 5 (opinion of SOTOMAYOR, J.) (hereinafter the dissent), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. In Din, JUSTICE KENNEDY reiterated that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that the Government need provide only a statutory citation to explain a visa denial. 576 U.S., at ___ (opinion concurring in judgment) (slip op., at 6). Likewise in Fiallo, we applied Mandel to a "broad congressional policy" giving immigration preferences to mothers of illegitimate children. 430 U. S., at 795. Even though the statute created a "categorical" entry classification that discriminated on the basis of sex and legitimacy, post, at 14, n. 5, the Court concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. 430 U. S., at 799 (citing Mandel, 408 U. S., at 770). Lower courts have similarly applied *Mandel* to broad executive action. See Rajah v. Mukasey, 544 F. 3d 427, 433, 438-439 (CA2 2008) (upholding National Security Entry-Exit Registration System instituted after September 11, 2001).

Mandel's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." Din, 576 U. S., at ___ (Kennedy, J., concurring in judgment) (slip op., at 3). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. Ziglar v. Abbasi, 582 U. S. ___, __ (2017) (slip op., at 19) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the

lack of competence on the part of the courts is marked." *Humanitarian Law Project*, 561 U. S., at 34.

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. Mathews, 426 U.S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing Mandel as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. See Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.⁵

⁵The dissent finds "perplexing" the application of rational basis review in this context. *Post*, at 15. But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the *de novo* "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as "throw[ing] the Establishment Clause out the window." *Post*, at 16, n. 6. But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals. See Part IV–C, *supra*. The dissent can cite no

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448–450 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." Romer v. Evans, 517 U.S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is

authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context.

persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U.S.C. §1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as "countr[ies] or area[s] of concern" for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also Rajah, 544 F. 3d, at 433, n. 3 (describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it "stands apart . . . in the degree to

which [it] lacks command and control of its territory." Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country's key role in combating terrorism in the region. §1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report "was a mere 17 pages." *Post*, at 19. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U. S. C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U. S. 103, 111 (1948); see also Regan v. Wald, 468 U.S. 222, 242-243 (1984) (declining invitation to conduct an "independent foreign policy analysis"). While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." Humanitarian Law Project, 561 U.S., at

33 - 34.6

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks," Proclamation Preamble, and \$1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya's ongoing engagement with the State Department and the steps Libya is taking "to improve its practices." Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, e.g., §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on

⁶The dissent recycles much of plaintiffs' §1182(f) argument to assert that "Congress has already erected a statutory scheme that fulfills" the President's stated concern about deficient vetting. *Post*, at 19–21. But for the reasons set forth earlier, Congress has not in any sense "stepped into the space and solved the exact problem." Tr. of Oral Arg. 53. Neither the existing inadmissibility grounds nor the narrow Visa Waiver Program address the failure of certain high-risk countries to provide a minimum baseline of reliable information. See Part III–B–1, *supra*.

nonimmigrant entry for Somali nationals). These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter's order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.⁷

⁷JUSTICE BREYER focuses on only one aspect of our consideration—the waiver program and other exemptions in the Proclamation. Citing selective statistics, anecdotal evidence, and a declaration from unrelated litigation, JUSTICE BREYER suggests that not enough individuals are receiving waivers or exemptions. *Post*, at 4–8 (dissenting opinion). Yet even if such an inquiry were appropriate under rational basis review, the evidence he cites provides "but a piece of the picture," *post*, at 6, and does not affect our analysis.

Finally, the dissent invokes *Korematsu* v. *United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See *post*, at 26–28. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U. S., at 248 (Jackson, J., dissenting).

* * *

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. Winter v. Natural Resources Defense Council, Inc., 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate.

Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

KENNEDY, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 17-965

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS v. HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2018]

JUSTICE KENNEDY, concurring.

I join the Court's opinion in full.

There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is "inexplicable by anything but animus," Romer v. Evans, 517 U.S. 620, 632 (1996), which in this case would be animosity to a religion. Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even

Kennedy, J., concurring

comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

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[June 26, 2018]

THOMAS, J., concurring.

I join the Court's opinion, which highlights just a few of the many problems with the plaintiffs' claims. There are several more. Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. See Webster v. Doe, 486 U.S. 592, 600 (1988). Nor could it, since the President has inherent authority to exclude aliens from the country. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542–543 (1950); accord, Sessions v. Dimaya, 584 U.S. ___, ____ (2018) (THOMAS, J., dissenting) (slip op., at 13-14). Further, the Establishment Clause does not create an individual right to be free from all laws that a "reasonable observer" views as religious or antireligious. See Town of Greece v. Galloway, 572 U.S. ____, ___ (2014) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 6); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 52–53 (2004) (THOMAS, J., concurring in judgment). The plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). And, even on its own terms, the plaintiffs' proffered evidence of anti-Muslim discrimination is unpersuasive.

Merits aside, I write separately to address the remedy

that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President's Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called "universal" or "nationwide" injunctions—have become increasingly common.¹ District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

T

If district courts have any authority to issue universal injunctions, that authority must come from a statute or the Constitution. See *Missouri* v. *Jenkins*, 515 U. S. 70

^{1&}quot;Nationwide injunctions" is perhaps the more common term. But I use the term "universal injunctions" in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth. An injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide.

124 (1995) (THOMAS, J., concurring). No statute expressly grants district courts the power to issue universal injunctions.² So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is "[in]consistent with our history and traditions." *Ibid*.

Α

This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies. Rather, it has read such statutes as constrained by "the body of law which had been transplanted to this country from the English Court of Chancery" in 1789. Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945). As Justice Story explained, this Court's "settled doctrine" under such statutes is that "the remedies in equity are to be administered . . . according to the practice of courts of equity in [England]." Boyle v. Zacharie & Turner, 6 Pet. 648, 658 (1832). More recently, this Court reiterated that broad statutory grants of equitable authority give federal courts "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc., 527 U. S. 308, 318 (1999) (Scalia, J.) (quoting Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 568 (1939)).

 2 Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts. See infra, at 7–8.

В

The same is true of the courts' inherent constitutional authority to grant equitable relief, assuming any such authority exists. See *Jenkins*, 515 U. S., at 124 (THOMAS, J., concurring). This authority is also limited by the traditional rules of equity that existed at the founding.

The scope of the federal courts' equitable authority under the Constitution was a point of contention at the founding, and the "more limited construction" of that power prevailed. Id., at 126. The founding generation viewed equity "with suspicion." Id., at 128. Several anti-Federalists criticized the Constitution's extension of the federal judicial power to "Case[s] in . . . Equity," Art. III, §2, as "giv[ing] the judge a discretionary power." Letters from The Federal Farmer No. XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 322 (H. Storing ed. 1981). That discretionary power, the anti-Federalists alleged, would allow courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Essays of Brutus No. XI (Jan. 31, 1788), in id., at 417, 419–420. The Federalists responded to this concern by emphasizing the limited nature of equity. Hamilton explained that the judiciary would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 471 (C. Rossiter ed. 1961) (Federalist). Although the purpose of a court of equity was "to give relief in extraordinary cases, which are exceptions to general rules," "the principles by which that relief is governed are now reduced to a regular system." Id. No. 83 at 505 (emphasis deleted).

The Federalists' explanation was consistent with how equity worked in 18th-century England. English courts of equity applied established rules not only when they decided the merits, but also when they fashioned remedies. Like other aspects of equity, "the system of relief adminis-

tered by a court of equity" had been reduced "into a regular science." 3 W. Blackstone, Commentaries on the Laws of England 440–441 (1768) (Blackstone). As early as 1768, Blackstone could state that the "remedy a suitor is entitled to expect" could be determined "as readily and with as much precision, in a court of equity as in a court of law." *Id.*, at 441. Although courts of equity exercised remedial "discretion," that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope. See G. Keeton, An Introduction to Equity 117–118 (1938).

In short, whether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country's founding.

II

Universal injunctions do not seem to comply with those principles. These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role.

Equity originated in England as a means for the Crown to dispense justice by exercising its sovereign authority. See Adams, The Origins of English Equity, 16 Colum. L. Rev. 87, 91 (1916). Petitions for equitable relief were referred to the Chancellor, who oversaw cases in equity. See 1 S. Symon's, Pomeroy's, Equity Jurisprudence §33 (5th ed. 1941) (Pomeroy); G. McDowell, Equity and the Constitution 24 (1982). The Chancellor's equitable jurisdiction was based on the "reserve of justice in the king." F. Maitland, Equity 3 (2d ed. 1936); see also 1 Pomeroy §33, at 38 (describing the Chancellor's equitable authority as an "extraordinary jurisdiction—that of *Grace*—by delega-

tion" from the King). Equity allowed the sovereign to afford discretionary relief to parties where relief would not have been available under the "rigors of the common law." *Jenkins*, *supra*, at 127 (opinion of THOMAS, J.).

The English system of equity did not contemplate universal injunctions. As an agent of the King, the Chancellor had no authority to enjoin him. See Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (2017) (Bray). The Chancellor could not give "any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee." 3 Blackstone 428. The Attorney General could be sued in Chancery, but not in cases that "immediately concerned" the interests of the Crown. Bray 425 (citing 1 E. Daniell, The Practice of the High Court of Chancery 138 (2d ed. 1845)). American courts inherited this tradition. See J. Story, Commentaries on Equity Pleadings §69 (1838) (Story).

Moreover, as a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example. While these injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff. Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 702 (2004) (Woolhandler & Nelson); see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 564 (1852) (explaining that a private "injury makes [a public nuisance] a private nuisance to the injured party").

True, one of the recognized bases for an exercise of equitable power was the avoidance of "multiplicity of suits." Bray 426; accord, 1 Pomeroy §243. Courts would employ "bills of peace" to consider and resolve a number of suits in a single proceeding. *Id.*, §246. And some authori-

ties stated that these suits could be filed by one plaintiff on behalf of a number of others. *Id.*, §251. But the "general rule" was that "all persons materially interested . . . in the subject-matter of a suit, are to be made *parties* to it . . . , however numerous they may be, so that there may be a complete decree, which shall bind them all." Story §72, at 61 (emphasis added). And, in all events, these "protoclass action[s]" were limited to a small group of similarly situated plaintiffs having some right in common. Bray 426–427; see also Story §120, at 100 (explaining that such suits were "always" based on "a common interest or a common right").

American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power. For most of our history, courts understood judicial power as "fundamentall[y] the power to render judgments in individual cases." *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ____, ____ (2018) (THOMAS, J., concurring) (slip op., at 2–3). They did not believe that courts could make federal policy, and they did not view judicial review in terms of "striking down" laws or regulations. See *id.*, at _____ (slip op., at 3–4). Misuses of judicial power, Hamilton reassured the people of New York, could not threaten "the general liberty of the people" because courts, at most, adjudicate the rights of "individual[s]." Federalist No. 78, at 466.

The judiciary's limited role was also reflected in this Court's decisions about who could sue to vindicate certain rights. See *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___ (2016) (THOMAS, J., concurring) (slip op., at 2–4). A plaintiff could not bring a suit vindicating public rights—*i.e.*, rights held by the community at large—without a showing of some specific injury to himself. *Id.*, at ____ (slip op., at 3–4). And a plaintiff could not sue to vindicate the private rights of someone else. See Woolhandler & Nelson 715–716. Such claims were considered to be beyond the

THOMAS, J., concurring

authority of courts. *Id.*, at 711–717.

This Court has long respected these traditional limits on equity and judicial power. See, e.g., Scott v. Donald, 165 U. S. 107, 115 (1897) (rejecting an injunction based on the theory that the plaintiff "so represents [a] class" whose rights were infringed by a statute as "too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction"). Take, for example, this Court's decision in Massachusetts v. Mellon, 262 U. S. 447 (1923). There, a taxpayer sought to enjoin the enforcement of an appropriation statute. The Court noted that this kind of dispute "is essentially a matter of public and not of individual concern." Id., at 487. A general interest in enjoining implementation of an illegal law, this Court explained, provides "no basis ... for an appeal to the preventive powers of a court of equity." Ibid. Courts can review the constitutionality of an act only when "a justiciable issue" requires it to decide whether to "disregard an unconstitutional enactment." Id., at 488. If the statute is unconstitutional, then courts enjoin "not the execution of the statute, but the acts of the official." Ibid. Courts cannot issue an injunction based on a mere allegation "that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." Ibid. "To do so would be not to decide a judicial controversy." Id., at 488–489.

By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies. See Bray 451. That is when what appears to be "the first [universal] injunction in the United States" emerged. Bray 438. In Wirtz v. Baldor Elec. Co., 337 F. 2d 518 (CADC 1963), the Court of Appeals for the District of Columbia Circuit addressed a lawsuit challenging the Secretary of Labor's

THOMAS, J., concurring

determination of the prevailing minimum wage for a particular industry. Id., at 520. The D. C. Circuit concluded that the Secretary's determination was unsupported, but remanded for the District Court to assess whether any of the plaintiffs had standing to challenge it. Id., at 521–535. The D. C. Circuit also addressed the question of remedy, explaining that if a plaintiff had standing to sue then "the District Court should enjoin . . . the Secretary's determination with respect to the entire industry." Id., at 535 (emphasis added). To justify this broad relief, the D. C. Circuit explained that executive officers should honor judicial decisions "in all cases of essentially the same character." Id., at 534. And it noted that, once a court has decided an issue, it "would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action." Ibid. The D. C. Circuit added that the case was "clearly a proceeding in which those who have standing are here to vindicate the public interest in having congressional enactments properly interpreted and applied." *Id.*, at 534–535.

Universal injunctions remained rare in the decades following *Wirtz*. See Bray 440–445. But recently, they have exploded in popularity. See *id.*, at 457–459. Some scholars have criticized the trend. See generally *id.*, at 457–465; Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B. U. L. Rev. 615, 633–653 (2017); Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 Harv. J. L. & Pub. Pol'y 487, 521–538 (2016).

No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the judiciary a powerful tool to check the Executive Branch. See Amdur & Hausman, Nationwide

THOMAS, J., concurring

Injunctions and Nationwide Harm, 131 Harv. L. Rev. Forum 49, 51, 54 (2017); Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum 56, 57, 60–62 (2017). But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best "boi[l] down to a policy judgment" about how powers ought to be allocated among our three branches of government. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. ___, ___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 23). But the people already made that choice when they ratified the Constitution.

* * *

In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.

SUPREME COURT OF THE UNITED STATES

No. 17-965

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS v. HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2018]

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. See 8 U. S. C. §1182(f) (requiring "find[ings]" that persons denied entry "would be detrimental to the interests of the United States"); Church of Lukumi Babalu Aye, *Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (First Amendment); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. ___ (2018) (same); post, at 2-4 (SOTOMAYOR, J., dissenting). If, however, its sole ratio decidendi was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees,

students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation's lawfulness. The Solicitor General asked us to consider the Proclamation "as" it is "written" and "as" it is "applied," waivers and exemptions included. Tr. of Oral Arg. 38. He warned us against considering the Proclamation's lawfulness "on the hypothetical situation that [the Proclamation] is what it isn't," *ibid.*, while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States "if they meet the criteria" for a waiver or exemption. *Id.*, at 33.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-bycase exemptions. Ante, at 36–37; Exec. Order No. 12172, 44 Fed. Reg. 67947 (1979), as amended by Exec. Order No. 12206, 45 Fed. Reg. 24101 (1980); Presidential Proclamation No. 5517, 51 Fed. Reg. 30470 (1986). For another thing, the Proclamation then follows more closely the basic statutory scheme, which provides for strict case-by-case scrutiny of applications. It would deviate from that system, not across the board, but where circumstances may require that deviation.

Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security

threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system's absence?

For another thing, the relevant statute requires that there be "find[ings]" that the grant of visas to excluded persons would be "detrimental to the interests of the United States." §1182(f). Yet there would be no such findings in respect to those for whom the Proclamation itself provides case-by-case examination (followed by the grant of a visa in appropriate cases).

And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban," rather than a "security-based" ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the sec-

ond possibility, i.e., that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security "shall coordinate to adopt guidance" for consular officers to follow when deciding whether to grant a waiver. §3(c)(ii). Yet, to my knowledge, no guidance has issued. The only potentially relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not provide guidance for consular officers as to how they are to exercise their discretion. See Dept. of State, FAQs on the Presidential Proclamation, https:// travel.state.gov/content/travel/en/us-visas/visa-informationresources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html (all Internet materials as last visited June 25, 2018).

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. from M. Waters, Assistant Secretary Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2018). In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. Reply Brief 17. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

Amici have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with "sig-

nificant business or professional obligations" in the United States, §3(c)(iv)(C), and amici identify many scholars who would seem to qualify. Brief for Colleges and Universities as Amici Curiae 25–27; Brief for American Council on Education et al. as *Amici Curiae* 20 (identifying more than 2,100 scholars from covered countries); see also Brief for Massachusetts Technology Leadership Council, Inc., as Amicus Curiae 14–15 (identifying technology and business leaders from covered countries). The Proclamation also anticipates waivers for those with a "close family member (e.g., a spouse, child, or parent)" in the United States, $\S3(c)(iv)(D)$, and amici identify many such individuals affected by the Proclamation. Brief for Labor Organizations as Amici Curiae 15-18 (identifying children and other relatives of U. S. citizens). The Pars Equality Center identified 1,000 individuals—including parents and children of U.S. citizens—who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria. See Brief for Pars Equality Center et al. as Amici Curiae 12–28.

Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. §§3(b)(vi), 6(e). Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Dept. of State, Bureau of Population, Refugees, and Migration, Interactive Reporting, Refugee Processing Center, http://ireports.wrapsnet.org. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122). *Ibid*.

The Proclamation also exempts individuals applying for several types of nonimmigrant visas: lawful permanent residents, parolees, those with certain travel documents, dual nationals of noncovered countries, and representatives of governments or international organizations. §§3(b)(i)–(v). It places no restrictions on the vast majority

of student and exchange visitors, covering only those from Syria, which provided 8 percent of student and exchange visitors from the five countries in 2016. §§2(b)–(h); see Dept. of State, Report of the Visa Office 2016, Table XVII Nonimmigrant Visas Issued Fiscal Year 2016 (Visa Report 2016 Table XVII). Visitors from Somalia are eligible for any type of nonimmigrant visa, subject to "additional scrutiny." §2(h)(ii). If nonimmigrant visa applications under the Proclamation resemble those in 2016, 16 percent of visa applicants would be eligible for exemptions. See Visa Report 2016 Table XVII.

In practice, however, only 258 student visas were issued to applicants from Iran (189), Libya (29), Yemen (40), and Somalia (0) in the first three months of 2018. See Dept. of State, Nonimmigrant Visa Issuances by Nationality, Jan., Feb., and Mar. 2018. This is less than a quarter of the volume needed to be on track for 2016 student visa levels. And only 40 nonimmigrant visas have been issued to Somali nationals, a decrease of 65 percent from 2016. *Ibid.*; see Visa Report 2016 Table XVII. While this is but a piece of the picture, it does not provide grounds for confidence.

Anecdotal evidence further heightens these concerns. For example, one *amicus* identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. Her family received a form with a check mark in the box unambiguously confirming that "'a waiver will not be granted in your case.'" Letter from L. Blatt to S. Harris, Clerk of Court (May 1, 2018). But after the child's case was highlighted in an *amicus* brief before this Court, the family received an update from the consular officer who had initially denied the waiver. It turns out, according to the officer, that she had all along determined that the waiver criteria were met. But, the

officer explained, she could not relay that information at the time because the waiver required review from a supervisor, who had since approved it. The officer said that the family's case was now in administrative processing and that she was attaching a "'revised refusal letter indicating the approval of the waiver." *Ibid*. The new form did not actually approve the waiver (in fact, the form contains no But a different box was now box saying "granted"). checked, reading: "The consular officer is reviewing your eligibility for a waiver under the Proclamation. . . . This can be a lengthy process, and until the consular officer can make an individualized determination of [the relevant] factors, your visa application will remain refused under Section 212(f) [of the Proclamation]." *Ibid*. One is left to wonder why this second box, indicating continuing review, had not been checked at the outset if in fact the child's case had remained under consideration all along. Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

Finally, in a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers. According to the affidavit, consular officers "were not allowed to exercise that discretion" and "the waiver [process] is merely 'window dressing." See Decl. of Christopher Richardson, *Alharbi* v. *Miller*, No. 1:18-cv-2435 (June 1, 2018), pp. 3–4. Another report similarly indicates that the U. S. Embassy in Djibouti, which processes visa applications for citizens of Yemen, received instructions to grant waivers "only in rare cases of imminent danger," with one consular officer reportedly telling an applicant that "'[e]ven for infants, we would need to see some evidence of a congenital heart defect or another medical issue of that degree of difficulty

that...would likely lead to the child's developmental harm or death." Center for Constitutional Rights and the Rule of Law Clinic, Yale Law School, Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials from Yemeni-American Families Stuck in Limbo 18 (2018).

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 17-965

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2018]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

T

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a "prudential rule of avoiding constitutional questions." Zobrest v. Catalina Foothills School *Dist.*, 509 U. S. 1, 8 (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.

Α

The Establishment Clause forbids government policies "respecting an establishment of religion." U.S. Const., Amdt. 1. The "clearest command" of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. Larson v. Valente, 456 U.S. 228, 244 (1982); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion"); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause ... forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma" (internal quotation marks omitted)); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (noting that the Establishment Clause "forbids hostility toward any [religion]," because "such hostility would bring us into 'war with our national tradition as embodied in the First Amendmen[t]"); Epperson v. Arkansas, 393 U.S. 97, 106 (1968) ("[T]he State may not adopt programs or practices ... which aid or oppose any religion. This prohibition is absolute" (citation and internal quotation marks omitted)). Consistent with

that clear command, this Court has long acknowledged that governmental actions that favor one religion "inevitabl[y]" foster "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." Engel v. Vitale, 370 U.S. 421, 431 (1962). That is so, this Court has held, because such acts send messages to members of minority faiths "'that they are outsiders, not full members of the political community." Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 309 (2000). To guard against this serious harm, the Framers mandated a strict "principle of denominational neutrality." Larson, 456 U.S., at 246; Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994) (recognizing the role of courts in "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion").

"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See *id.*, at 862, 866; accord, *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (plurality opinion) (slip op., at 19).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the

decisionmaker. *Lukumi*, 508 U. S., at 540 (opinion of KENNEDY, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate "text, legislative history, and implementation . . . , or comparable official act" (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in "any judicial psychoanalysis of a drafter's heart of hearts." *Id.*, at 862.

В 1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, *ante*, at 27–28, that highly abridged account does not tell even half of the story. See Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump's public statements expressing animus toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." App. 119. That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

"Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data

showing '25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad' and 51% of those polled 'agreed that Muslims in America should have the choice of being governed according to Shariah.' Shariah authorizes such atrocities as murder against nonbelievers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

"Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.'—Donald J. Trump." *Id.*, at 158; see also *id.*, at 130–131.

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. *Id.*, at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." *Ibid.* He answered, "No." *Ibid.* A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. *Id.*, at 163–164. In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people

coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim." *Id.*, at 120–121. That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." *Id.*, at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." *Ibid.*; *id.*, at 164. A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things." *Ibid.*

As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." *Id.*, at 121. He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." *Id.*, at 121–122. Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." *Id.*, at 122–123. He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim." *Id.*, at 123.

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." *Ibid.* Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." *Ibid.* He replied: "You know my plans. All along, I've proven to be right." *Ibid.*

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82

Fed. Reg. 8977 (2017) (EO-1), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." App. 124. That same day, President Trump explained to the media that, under EO-1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." Id., at 125. Considering that past policy "very unfair," President Trump explained that EO-1 was designed "to help" the Christians in Syria. *Ibid*. The following day, one of President Trump's key advisers candidly drew the connection between EO-1 and the "Muslim ban" that the President had pledged to implement if elected. *Ibid*. According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally." *Ibid*.

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO-1. See *Washington* v. *Trump*, 2017 WL 462040, *3. The Ninth Circuit denied the Government's request to stay that injunction. *Washington* v. *Trump*, 847 F. 3d 1151, 1169 (2017) (*per curiam*). Rather than appeal the Ninth Circuit's decision, the Government declined to continue defending EO-1 in court and instead announced that the President intended to issue a new executive order to replace EO-1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO-2). One of the President's senior advisers publicly explained that EO-2 would "have the same basic policy outcome" as EO-1, and that any

changes would address "very technical issues that were brought up by the court." App. 127. After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump "continue[d] to deliver on . . . his most significant campaign promises." *Id.*, at 130. That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result." *Id.*, at 127–128.

Before EO-2 took effect, federal District Courts in Hawaii and Maryland enjoined the order's travel and refugee bans. See *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227, 1239 (Haw. 2017); International Refugee Assistance Project (IRAP) v. Trump, 241 F. Supp. 3d 539, 566 (Md. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. IRAP v. Trump, 857 F. 3d 554, 606 (CA4) 2017) (en banc); *Hawaii* v. *Trump*, 859 F. 3d 741, 789 (CA9 2017) (per curian). In June 2017, this Court granted the Government's petition for certiorari and issued a per curiam opinion partially staying the District Courts' injunctions pending further review. In particular, the Court allowed EO-2's travel ban to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump* v. *IRAP*, 582 U. S. ____, ___ (2017) (slip op., at 12).

While litigation over EO-2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO-2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." App. 131. He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "very hard" for Muslims to assimilate into Western culture. *Id.*, at 131–132. During a rally in April 2017, President Trump recited the lyrics to a song called "The

Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. Id., at 132, 163. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]." Id., at 132. The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" Id., at 132-133. He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" Id., at 133. Then, on August 17, 2017, President Trump issued vet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" IRAP v. Trump, 883 F. 3d 233, 267 (CA4 2018) (IRAP II) (en banc) (alterations in original).

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" App. 133. Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on

¹According to the White House, President Trump's statements on Twitter are "official statements." App. 133.

crutches!" *IRAP II*, 883 F. 3d, at 267. Those videos were initially tweeted by a British political party whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including . . . Islam." *Ibid.* When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Ibid.*

2

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. *Ante*, at 29. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. See *McCreary*, 545 U. S., at 862–863. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the

²The content of these videos is highly inflammatory, and their titles are arguably misleading. For instance, the person depicted in the video entitled "Muslim migrant beats up Dutch boy on crutches!" was reportedly not a "migrant," and his religion is not publicly known. See Brief for Plaintiffs in *International Refugee Assistance Project* v. *Trump* as *Amici Curiae* 12, n. 4; P. Baker & E. Sullivan, Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them, N. Y. Times, Nov. 29, 2017 ("[A]ccording to local officials, both boys are Dutch"), https://www.nytimes.com/2017/11/29/us/politics/trumpanti-muslim-videos-jayda-fransen.html (all Internet materials as last visited June 25, 2018).

Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," App. 399, warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," id., at 121, promised to enact a "total and complete shutdown of Muslims entering the United States," id., at 119, and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban, id., at 125.3 The President continued to make similar statements well after his inauguration, as detailed above, see supra, at 6–10.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam.⁴ Instead, he has continued to make

³The Government urges us to disregard the President's campaign statements. Brief for Petitioners 66–67. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history." Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 540 (1993) (opinion of KENNEDY, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President's campaign statements. For example, just last November, the Deputy White House Press Secretary reminded the media that the Proclamation addresses "issues" the President has been talking about "for years," including on "the campaign trail." IRAP II, 883 F. 3d 233, 267 (CA4 2018). In any case, as the Fourth Circuit correctly recognized, even without relying on any of the President's campaign statements, a reasonable observer would conclude that the Proclamation was enacted for the impermissible purpose of disfavoring Muslims. Id., at 266, 268.

⁴At oral argument, the Solicitor General asserted that President Trump "made crystal-clear on September 25 that he had no intention of imposing the Muslim ban" and "has praised Islam as one of the great countries [sic] of the world." Tr. of Oral Arg. 81. Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump's statement during a

remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. See United States v. Fordice, 505 U.S. 717, 746-747 (1992) ("[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time" (citation omitted)). Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally signifi-Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. ____, ___ (2018) (slip op., at 18) ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—

television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018); Reply Brief 28, n. 8. During that interview, the President was asked whether EO-1 was "the Muslim ban," and answered, "no it's not the Muslim ban." See Transcript: ABC News anchor David Muir interviews President Trump, ABC News, Jan. 25, 2017, http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602. But that lone assertion hardly qualifies as a disavowal of the President's comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump's January 25th statement makes "crystal-clear" that he never intended to impose a Muslim ban given that, until May 2017, the President's website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

were inconsistent with what the Free Exercise Clause requires"). It should find the same here.

Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

П

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." Ante, at 30 (citing Kleindienst v. Mandel, 408 U. S. 753 (1972)). As the majority notes, Mandel held that when the Executive Branch provides "a facially legitimate and bona fide reason" for denying a visa, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification." Id., at 770. In his controlling concurrence in Kerry v. Din, 576 U.S. ___ (2015), JUSTICE KENNEDY applied Mandel's holding and elaborated that courts can "'look behind' the Government's exclusion of" a foreign national if there is "an affirmative showing of bad faith on the part of the consular officer who denied [the] visa." Din, 576 U.S., at ___ (opinion concurring in judgment)

(slip op., at 5). The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not.⁵ Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving "all kinds of denigrating comments about" a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that "dot[s] all the i's and . . . cross[es] all the t's," *Mandel* would not "pu[t] an end to judicial review of that set of facts." Tr. of Oral Arg. 16.

In light of the Government's suggestion "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," the majority rightly declines

⁵Mandel and Din are readily distinguishable from this case for a number of reasons. First, Mandel and Din each involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility. Mandel, 408 U. S., at 767; Din, 576 U. S., at ____ (slip op., at 1). Here, by contrast, President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis. Second, Mandel and Din did not purport to establish the framework for adjudicating cases (like this one) involving claims that the Executive Branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose. Applying Mandel's narrow standard of review to such a claim would run contrary to this Court's repeated admonition that "[f]acial neutrality is not determinative" in the Establishment Clause context. Lukumi, 508 U. S., at 534. Likewise, the majority's passing invocation of Fiallo v. Bell, 430 U.S. 787 (1977), is misplaced. Fiallo, unlike this case, addressed a constitutional challenge to a statute enacted by Congress, not an order of the President. Id., at 791. Fiallo's application of Mandel says little about whether *Mandel's* narrow standard of review applies to the unilateral executive proclamation promulgated under the circumstances of this case. Finally, even assuming that Mandel and Din apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made "an affirmative showing of bad faith," Din, 576 U.S., at ___ (slip op., at 5), by the President who, among other things, instructed his subordinates to find a "lega[l]" way to enact a Muslim ban, App. 125; see *supra*, at 4–10.

to apply *Mandel's* "narrow standard of review" and "assume[s] that we may look behind the face of the Proclamation." Ante, at 31–32. In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, e.g., McCreary, 545 U.S., at 860–863; Larson, 456 U.S., at 246; Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-452 (1969); see also Colorado Christian Univ. v. Weaver, 534 F. 3d 1245, 1266 (CA10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)).⁶ As explained above, the

⁶The majority chides as "problematic" the importation of Establishment Clause jurisprudence "in the national security and foreign affairs context." Ante, at 32-33, n. 5. As the majority sees it, this Court's Establishment Clause precedents do not apply to cases involving "immigration policies, diplomatic sanctions, and military actions." Ante, at 32, n. 5. But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority's complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any "authority for its proposition" that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. Ante, at 33 n. 5; see supra, at 14, and n. 5. In any event, even if there is no prior case directly on point, it is clear from our precedent that "[w]hatever power the United States Constitution envisions for the Executive" in the context of national security and foreign affairs, "it most assuredly envisions a role for all three branches

Proclamation is plainly unconstitutional under that heightened standard. See *supra*, at 10–13.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "inexplicable by anything but animus." Ante, at 33 (quoting Romer v. Evans, 517 U. S. 620, 632, 635 (1996)); see also Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group). The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. IRAP II, 883 F. 3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle "that the government may not act on the basis of

when individual liberties are at stake." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). This Court's Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See *McCreary*, 545 U. S., at 860. That reasonable-observer inquiry includes consideration of the Government's asserted justifications for its actions. The Government's invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is "far more problematic" in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern. *Ante*, at 32, n. 5.

animus toward a disfavored religious minority" (emphasis in original)).

The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Ante*, at 34. But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." *Ibid.*; see also *ante*, at 33–38, and n. 7. Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a "religious gerrymander." *Lukumi*, 508 U. S., at 535.

The majority first emphasizes that the Proclamation "says nothing about religion." Ante, at 34. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President's statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO-1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start "talking territory instead of Muslim," App. 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims. The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705 (2017), and the Proclamation targets only

a handful of Venezuelan government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President's inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

The majority next contends that the Proclamation "reflects the results of a worldwide review process undertaken by multiple Cabinet officials." Ante, at 34. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of amici, the Trump administration appointed Frank Wuco to help enforce the President's travel bans and lead the multiagency review process. See Brief for Plaintiffs in International Refugee Assistance Project v. Trump as Amici Curiae 13-14, and n. 10. According to amici, Wuco has purportedly made several suspect public statements about Islam: He has "publicly declared that it was a 'great idea' to 'stop the visa application process into this country from Muslim nations in a blanket type of policy," "that Muslim populations 'living under other-than-Muslim rule' will 'necessarily' turn to violence, that Islam prescribes 'violence and warfare against unbelievers,' and that Muslims 'by-and-large . . . resist assimilation.'" Id., at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements. For "[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation." Brief for Constitutional Law Scholars as *Amici Curiae* 7 (filed Apr. 2, 2018); see *supra*, at 4–10. The President campaigned on a promise to implement a "total and complete shutdown of Muslims" entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. See IRAP II, 883 F. 3d, at 268 ("[T]he Government chose not to make the review publicly available" even in redacted form); IRAP v. Trump, No. 17–2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit's request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. See Brennan Center for Justice v. United States Dept. of State, No. 17-cv-7520 (SDNY), Doc. No. 31-1, pp. 2-3. That the Government's analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President's proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an "extensive and complex" framework governing "immigration and alien status." *Arizona* v. *United States*, 567 U. S. 387, 395 (2012).⁷ The Immigra-

⁷It is important to note, particularly given the nature of this case, that many consider "using the term 'alien' to refer to other human beings" to be "offensive and demeaning." *Flores* v. *United States Citizenship & Immigration Servs.*, 718 F. 3d 548, 551–552, n. 1 (CA6 2013). I use the term here only where necessary "to be consistent with the statutory language" that Congress has chosen and "to avoid any confusion in replacing a legal term of art with a more appropriate term." *Ibid.*

tion and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. Generally, admission to the United States requires a valid visa or other travel document. 8 U. S. C. §§1181, 1182(a)(7)(A)(i)(I), 1182(a)(7)(B)(i)(II). To obtain a visa, an applicant must produce "certified cop[ies]" of documents proving her identity, background, and criminal history. §§1202(b), 1202(d). An applicant also must undergo an in-person interview with a State Department consular officer. §§1201(a)(1), 1202(h)(1), 22 CFR §§42.62(a)–(b) (2017); see also 8 U.S.C. $\S\S1202(h)(2)(D)$, 1202(h)(2)(F) (requiring in-person interview if the individual "is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism" or is "a member of a group or section that ... poses a security threat to the United States"). "Any alien who ... has engaged in a terrorist activity," "incited terrorist activity," or been a representative, member, or endorser of a terrorist organization, or who "is likely to after entry in anv terrorist §1182(a)(3)(B), or who has committed one or more of the many crimes enumerated in the statute is inadmissible and therefore ineligible to receive a visa. §1182(a)(2)(A) (crime of moral turpitude or drug offense); §1182(a)(2)(C) (drug trafficking or benefiting from a relative who recently trafficked drugs); §1182(a)(2)(D) (prostitution or "unlawful commercialized vice"); §1182(a)(2)(H) (human trafficking); §1182(a)(3) ("Security and related grounds").

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits certain nationals from a select group of countries to skip the ordinary visa-application process. See §1187. To determine which

countries are eligible for the Visa Waiver Program, the Government considers whether they can satisfy numerous criteria—e.g., using electronic, fraud-resistant passports, §1187(a)(3)(B), 24-hour reporting of lost or stolen passports, §1187(c)(2)(D), and not providing a safe haven for terrorists, §1187(a)(12)(D)(iii). The Secretary of Homeland Security, in consultation with the Secretary of State, also must determine that a country's inclusion in the program will not compromise "the law enforcement and security interests of the United States." §1187(c)(2)(C). Eligibility for the program is reassessed on an annual basis. See §1187(a)(12)(D)(iii), 1187(c)(12)(A). As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan. See Brief for Former National Security Officials as Amici Curiae 27.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation's proclaimed objectives of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing practices." Ante, at 34.

For many of these reasons, several former nationalsecurity officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, for-

mer Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders "do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests." Brief for Former National Security Officials as *Amici Curiae* 15 (boldface deleted).

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (e.g., infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. Ante, at 37, and n. 7. As several amici thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. See Brief for Pars Equality Center et al. as Amici Curiae 11, 13–28 (explaining that "waivers under the Proclamation are vanishingly rare" and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See ante, at 3–8 (BREYER, J., dissenting) (outlining evidence

suggesting "that the Government is not applying the Proclamation as written," that "waivers are not being processed in an ordinary way," and that consular and other officials "do not, in fact, have discretion to grant waivers").

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

Ш

As the foregoing analysis makes clear, plaintiffs are likely to succeed on the merits of their Establishment Clause claim. To obtain a preliminary injunction, however, plaintiffs must also show that they are "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the public interest." Winter v. Natural Resources Defense Council, Inc., 555 U. S. 7, 20 (2008). Plaintiffs readily clear those remaining hurdles.

First, plaintiffs have shown a likelihood of irreparable harm in the absence of an injunction. As the District Court found, plaintiffs have adduced substantial evidence showing that the Proclamation will result in "a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the [Muslim] Association." 265 F. Supp. 3d 1140, 1159 (Haw. 2017).

Second, plaintiffs have demonstrated that the balance of

the equities tips in their favor. Against plaintiffs' concrete allegations of serious harm, the Government advances only nebulous national-security concerns. Although national security is unquestionably an issue of paramount public importance, it is not "a talisman" that the Government can use "to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 582 U. S. ____, ___ (2017) (slip op., at 20). That is especially true here, because, as noted, the Government's other statutory tools, including the existing rigorous individualized vetting process, already address the Proclamation's purported national-security concerns. See *supra*, at 19–22.

Finally, plaintiffs and their *amici* have convincingly established that "an injunction is in the public interest." Winter, 555 U. S., at 20. As explained by the scores of *amici* who have filed briefs in support of plaintiffs, the Proclamation has deleterious effects on our higher education system;⁸ national security;⁹ healthcare;¹⁰ artistic culture;¹¹ and the Nation's technology industry and overall economy.¹² Accordingly, the Court of Appeals correctly affirmed, in part, the District Court's preliminary injunction.¹³

⁸See Brief for American Council on Education et al. as *Amici Curiae*; Brief for Colleges and Universities as *Amici Curiae*; Brief for New York University as *Amicus Curiae*.

⁹See Brief for Retired Generals and Admirals of the U.S. Armed Forces as *Amici Curiae*; Brief for Former National Security Officials as *Amici Curiae*.

 $^{^{10}\}mathrm{See}$ Brief for Association of American Medical Colleges as Amicus Curiae.

 $^{^{11}\}mathrm{See}$ Brief for Association of Art Museum Directors et al. as Amici Curiae.

¹²See Brief for U. S. Companies as *Amici Curiae*; Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*.

¹³ Because the majority concludes that plaintiffs have failed to show a likelihood of success on the merits, it takes no position on "the propriety

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, "[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece* v. *Galloway*, 572 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 1). Instead of vindicating those principles, today's decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 584 U.S. ____, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at ____ (slip op., at 17) ("The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures" (quoting *Lukumi*, 508 U.S., at 547)); *Masterpiece*, 584

of the nationwide scope of the injunction issued by the District Court." Ante, at 39. The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was "incressary to provide complete relief to the plaintiffs." Madsen v. Women's Health Center, Inc., 512 U. S. 753, 765 (1994); see Califano v. Yamasaki, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class").

SOTOMAYOR, J., dissenting

U. S., at ___ (KAGAN, J., concurring) (slip op., at 1) ("[S]tate actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration"). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," id., at ___ (slip op., at 17), the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, id., at _____ (slip op., at 12–14), the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "that they are outsiders, not full members of the political community." Santa Fe, 530 U.S., at 309.

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of Korematsu v. United States, 323 U. S. 214 (1944). See Brief for Japanese American Citizens League as Amicus Curiae. In Korematsu, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 275 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as Amicus Curiae 12–14. As here, the exclusion

SOTOMAYOR, J., dissenting

order was rooted in dangerous stereotypes about, inter alia, a particular group's supposed inability to assimilate and desire to harm the United States. See Korematsu, 323 U. S., at 236–240 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. Compare Korematsu v. *United States*, 584 F. Supp. 1406, 1418–1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order); Brief for Japanese American Citizens League as Amicus Curiae 17–19, with IRAP II, 883 F. 3d, at 268; Brief for Karen Korematsu et al. as Amici Curiae 35–36, and n. 5 (noting that the Government "has gone to great lengths to shield [the Secretary of Homeland Security's] report from view"). And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in Korematsu was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U.S., at 234 (Murphy, J., dissenting). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure. Id., at 245-246.

SOTOMAYOR, J., dissenting

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, e.g., Civil Liberties Act of 1988, 50 U.S.C. App. §4211 et seq. (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. §4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling Korematsu, denouncing it as "gravely wrong the day it was decided." Ante, at 38 (citing Korematsu, 323 U.S., at 248 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying Korematsu and merely replaces one "gravely wrong" decision with another. Ante, at 38.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.



June 28, 2018 PM-602-0050.1

Policy Memorandum

SUBJECT: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens

Purpose

On January 25, 2017, the President signed Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*. The Executive Order set forth the President's immigration policies for enhancing public safety, and it articulated the priorities for the removal of aliens from the United States.

This Policy Memorandum (PM) outlines how U.S. Citizenship and Immigration Services' (USCIS) Notice to Appear (NTA) and referral policies implement the Department of Homeland Security's (DHS) removal priorities, including those identified in Executive Order 13768, and it provides updates to USCIS' guidelines for referring cases and issuing NTAs. This PM supersedes Policy Memorandum 602-0050, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, dated November 7, 2011.

Scope

This PM applies to and will be used to guide referrals and the issuance of NTAs by all USCIS employees, unless otherwise specifically provided in this PM or other USCIS policy or guidance documents.

Authority

Immigration and Nationality Act (INA) §§ 101(a)(43), 103(a), 208, 212, 216, 216A, 237, 239, 240, 242, 244, and 318; Homeland Security Act of 2002 § 402(5); Title 8, Code of Federal Regulations (8 CFR) §§ 2.1, 103, 207.9, 208, 216.3(a), 216.6(a)(5), 236.14(c), and pts. 239 and 244.

Background

Executive Order 13768 emphasizes that enforcement of our immigration laws is critically important to the national security and public safety of the United States. The Executive Order also provides that the Federal Government will no longer exempt classes or categories of removable aliens from potential enforcement.

On February 20, 2017, former Secretary of Homeland Security John Kelly issued an implementation memorandum, Enforcement of the Immigration Laws to Serve the National *Interest*, which was related to the President's immigration enforcement priorities. The memorandum sets forth guidance for all DHS personnel regarding the enforcement priorities.

The Executive Order and DHS Implementation Memorandum prioritize the removal of aliens described in INA §§ 212(a)(2), (a)(3), (a)(6)(C), 235, and 237(a)(2) and (a)(4), to include aliens who are removable based on criminal or security grounds, fraud or misrepresentation, and aliens subject to expedited removal. In addition to aliens described in those subsections, the Executive Order and DHS Implementation Memorandum also prioritize removable aliens who, regardless of the basis for removal:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense that has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;²
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but have not departed; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

USCIS has authority, under the immigration laws, ³ to issue Form I-862, Notice to Appear, which is thereafter filed with the Immigration Court to commence removal proceedings under section 240 of the INA. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) also have authority to issue NTAs. Accordingly, USCIS must ensure that its issuance of NTAs fits within and supports DHS's overall removal priorities – promoting national security, public safety, and the integrity of the immigration system. This PM identifies the circumstances under which USCIS issues NTAs or refers cases to ICE.

¹ See https://www.dhs.gov/sites/default/files/publications/17 0220 S1 Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

² Chargeable criminal offenses include those defined by state, federal, international, or appropriate foreign law.

³ See, e.g., INA §§ 103(a), 239; 8 CFR §§ 2.1, 239.1.

⁴ Delegation by the Secretary of Homeland Security to the Bureau of Citizenship and Immigration Services, Delegation Number 0150.1, Paragraph 2(N). However, international District Directors and officers are not authorized to issue NTAs.

This PM will not apply to the use of discretion in adjudicating cases. Guidance on how the enforcement priorities will affect USCIS' use of discretion in adjudicating cases will be addressed in a separate policy memorandum.

Policy

USCIS is updating its NTA policy to better align with enforcement priorities. It is the policy of USCIS to issue NTAs and Referrals to ICE (RTIs), as outlined below:

I. National Security Cases

These cases fall under the priorities outlined in Executive Order 13768, and they include aliens engaged in or suspected of terrorism or espionage, or those who are otherwise described in INA §§ 212(a)(3) or 237(a)(4). In addition, any removable alien who, in the judgment of a USCIS officer, otherwise poses a risk to national security is considered a priority for removal.

This PM does not affect the handling of cases involving national security concerns.⁵ Guidance from the Fraud Detection and National Security Directorate (FDNS)⁶ will continue to govern the definition of these cases and the procedures for resolution and NTA issuance.

II. NTA Issuance Required by Statute or Regulation

USCIS will continue to issue NTAs in the following circumstances:

- A. Termination of Conditional Permanent Resident Status and Denials of Form I-751, Petition to Remove the Conditions of Residence (8 CFR §§ 216.3, 216.4, 216.5).
- B. Termination of Conditional Permanent Resident Status and Denials of Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (8 CFR § 216.6).
- C. Termination of refugee status by the District Director (8 CFR § 207.9).
- D. Denials of Nicaraguan and Central American Relief Act (NACARA) Section 202 and Haitian Refugee Immigration Fairness Act (HRIFA) adjustment of status applications:
 - 1. NACARA 202 adjustment denials (8 CFR § 1245.13(m));
 - 2. HRIFA adjustment denials (8 CFR § 245.15(r)(2)(i)).
- E. Asylum, 8 NACARA Section 203, 9 and Credible Fear cases: 10

⁵ National Security Concerns include cases involving Terrorism-Related Inadmissibility Grounds (TRIG) in sections 212(a)(3)(B) and 212(a)(3)(F) of the INA. *See also* INA § 237(a)(4)(B) (corresponding grounds of deportability).

⁶ See Policy for Vetting and Adjudicating Cases with National Security Concerns (April 11, 2008).

⁷ See USCIS memorandum, Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions (Oct. 9, 2009); see also USCIS memorandum, I-751 Filed Prior to Termination of Marriage (Apr. 3, 2009).

- 1. Asylum referrals (8 CFR § 208.14(c)(1));
- 2. Termination of asylum or termination of withholding of removal or deportation (8 CFR § 208.24(e));¹¹
- 3. Positive credible fear findings (8 CFR § 208.30(f));
- 4. NACARA 203 cases, where suspension of deportation or cancellation of removal is not granted and the applicant does not have asylum status or lawful immigrant or nonimmigrant status (8 CFR § 240.70(d));
- 5. Cases where NACARA 203 was granted to persons who were ineligible to receive suspension of deportation or special rule cancellation of removal at the time that the grant was issued (8 CFR § 246.1).

This PM does not change NTA or notification procedures for Temporary Protected Status (TPS) cases as described in 8 CFR part 244. ¹² In individual TPS cases where USCIS denies an initial TPS application or re-registration or withdraws TPS, *and* the individual has no other lawful immigration status or other authorization to remain in the United States, officers will first follow the procedures in the applicable regulations within 8 CFR part 244, where required.

Once the TPS regulatory provisions have been followed or are found to be non-applicable in the specific case, officers will issue an NTA to such an alien who has no other lawful immigration status or authorization to remain in the United States following the final determination to deny or withdraw TPS, unless there is a sufficient reason to delay issuance of, or to not issue the NTA (e.g., ICE or another appropriate law enforcement agency makes a reasonable request that USCIS not immediately issue the NTA, so as not to disrupt an investigation). Where the alien already has an unexecuted final order of removal, the officer should not issue another NTA without consulting with local USCIS counsel.

Independent of this PM, if the Secretary terminates a country's TPS designation, certain former beneficiaries who have been granted TPS under that country's designation, but who do not have other lawful immigration status or authorization to remain in the United States, may become a DHS enforcement priority. In such circumstances, USCIS officers should defer to ICE and CBP regarding the appropriate timing of any NTA issuances to former TPS beneficiaries after the country's TPS designation ends. However, if USCIS issues an unfavorable decision on a benefit request submitted by, or on behalf of, a former TPS

⁸ USCIS may issue an NTA when an asylum applicant withdraws his or her asylum application. See also Section VI of this memorandum for other NTA issuance by the Asylum Division in special circumstances not required by statute or regulation.

⁹This memorandum does not apply to the Asylum Division's initiation of rescission proceedings for lawful permanent residents (LPRs) granted LPR status under NACARA 203 by the Asylum Division.

¹⁰ This memorandum does not apply to the Asylum Division's issuance of Form I-863, Notice of Referral to Immigration Judge.

¹¹ See INA § 208(c)(3) describing removal when asylum is terminated.

¹² See USCIS memorandum, Service Center Issuance of Notice to Appear (Form I-862) (Sept. 12, 2003).

beneficiary who is not lawfully present in the United States, officers will follow the NTA guidance in Section V below.

III. Fraud, Misrepresentation, and Abuse of Public Benefits Cases

Cases presenting substantiated fraud or misrepresentation are among DHS's enforcement priorities. Aliens falling under INA § 212(a)(6)(C), removable aliens who "have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency," and removable aliens who have abused any program related to receipt of public benefits are all priorities for removal. 14

When fraud, misrepresentation, or evidence of abuse of public benefit programs is part of the record, ¹⁵ and the alien is removable, USCIS will issue an NTA upon denial of the petition or application, or other appropriate negative eligibility determination (e.g., withdrawal, termination, rescission). An NTA will be issued against such a removable alien, even if the petition or application is denied for a ground other than fraud, such as lack of prosecution or abandonment, the application or petition is terminated based on a withdrawal by the petitioner/applicant, or where an approval is revoked, so long as the alien is removable and USCIS has determined there is fraud in the record.

USCIS may consider referring groups of cases with articulated suspicions of fraud to ICE prior to adjudication. USCIS will not refer to ICE individual applications or petitions involving suspected fraud, except as agreed upon by USCIS and ICE. When USCIS refers a case to ICE for investigation, USCIS will suspend adjudication for 60 days, but they may resume the administrative process should ICE not respond within that timeframe or provide a Case Closure Notice or case status report within 120 days of accepting the referral. USCIS will ensure proper de-confliction with ICE throughout its administrative process.

While the NTA is not required to include the charge of fraud or misrepresentation (INA §§ 212(a)(6)(C)(i) and/or (ii), 237(a)(1)(A), 237(a)(1)(G), or similar charge), efforts should be made to include these charges whenever evidence in the record supports such a charge. Please consult with USCIS counsel if there are questions determining whether to include a charge of fraud or misrepresentation.

¹³ See section 5(d) of the Executive Order: Enhancing Public Safety in the Interior of the United States.

¹⁴ See section 5(d) of the Executive Order: Enhancing Public Safety in the Interior of the United States. For purposes of USCIS, enforcement priority 5(d) would necessarily include instances where USCIS has established that the alien is inadmissible under INA § 212(a)(6)(C)(i)), as well as when the fraud or willful misrepresentation was committed in connection with any official matter or application before another government agency.

¹⁵ Adjudicators encountering Statement of Findings should follow current operational guidance regarding their review and resolution.

IV. Criminal Cases

Criminal cases fall under the priorities outlined in Executive Order 13768, as follows:

- Aliens described in INA §§ 212(a)(2) or 237(a)(2), Criminal and Related Grounds;
- Removable aliens convicted of any criminal offense;
- Removable aliens charged with any criminal offense that has not been resolved; and
- Removable aliens who committed acts that constitute a chargeable criminal offense.

A. Egregious Public Safety (EPS) Cases and Non-Egregious Public Safety (Non-EPS) Cases

Executive Order 13768 does not contain language regarding Egregious Public Safety (EPS) or Non-Egregious Public Safety (Non-EPS) cases. However, this PM uses the terminology to assist in triaging cases for investigation and the issuance of NTAs.

An EPS case is defined by USCIS and ICE¹⁶ as a case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of, any of the following:

- Murder, rape, or sexual abuse of a minor, as defined in INA § 101(a)(43)(A);
- Illicit trafficking in firearms or destructive devices, as defined in INA § 101(a)(43)(C);
- Offenses relating to explosive materials or firearms, as defined in INA § 101(a)(43)(E);
- Crimes of violence for which the term of imprisonment imposed, or where the penalty for a pending case, is at least one year, as defined in INA § 101(a)(43)(F);
- An offense relating to the demand for, or receipt of, ransom, as defined in INA § 101(a)(43)(H);
- An offense relating to child pornography, as defined in INA § 101(a)(43)(I);
- An offense relating to peonage, slavery, involuntary servitude, and trafficking in persons, as defined in INA § 101(a)(43)(K)(iii);
- An offense relating to alien smuggling, as described in INA § 101(a)(43)(N);
- Human Rights Violators, known or suspected street gang members, or Interpol hits; or
- Re-entry after an order of exclusion, deportation or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, has not been approved.

¹⁶ See Memorandum of Agreement Between United States Citizenship and Immigration Services and United States Immigration and Customs Enforcement On the Issuance of Notices to Appear to Aliens Encountered During an Adjudication (June 15, 2006).

A Non-EPS criminal case is defined by USCIS as a case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of any crime not listed above.

1. EPS Cases

Executive Order 13768 and the implementing guidance provide that DHS personnel should take enforcement actions in accordance with applicable law, and they support that DHS personnel have full authority to initiate removal proceedings against any alien who is removable. As a result, USCIS will issue an NTA against removable aliens in all cases meeting the EPS definition, regardless of the existence of a conviction, if the application or petition is denied and the alien is removable. USCIS should refer an EPS case to ICE prior to adjudication and before an NTA is issued if there are circumstances that warrant such action. If the case is referred, ICE will have an opportunity to decide if, when, and how to issue an NTA or detain the alien. For Form I-90 applications, and any adjudications involving EPS concerns where USCIS has not issued an NTA, USCIS will refer these cases to ICE after adjudication.

If USCIS does not receive notification of the acceptance or declination of an EPS referral to ICE after 60 days, USCIS will resume adjudication of the case.

2. Non-EPS Criminal Cases

USCIS will issue NTAs in all Non-EPS criminal cases if the application or petition is denied and the alien is removable. Where USCIS does not issue an NTA, USCIS should refer Non-EPS cases to ICE prior to final adjudication if the alien appears inadmissible to or deportable from the United States based upon a criminal offense not included on the EPS list. ¹⁷

3. N-400 Denials

USCIS will issue NTAs on all N-400 cases if the N-400 has been denied on good moral character (GMC) grounds based on the underlying criminal offense, and provided the alien is removable.

V. <u>Aliens Not Lawfully Present in the United States or Subject to Other Grounds of</u> Removability

USCIS will issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.

¹⁷ A Non-EPS case referred to ICE prior to adjudication will be treated in the same manner as an EPS case referral, subject to the suspense period and notification requirements.

For aliens removable under any other grounds not specifically addressed in this PM, USCIS will ensure all grounds for removability supported by the record are addressed and result in the issuance of an NTA, whenever appropriate.

VI. Special Circumstances for NTA Issuance

- A. In limited and extraordinary circumstances, USCIS may issue an NTA if a removable alien requests that an NTA be issued, either before or after the adjudication of an application or petition, in order to seek lawful status or other relief in removal proceedings. The request must be made in writing to the USCIS office that has jurisdiction over the case, and USCIS retains discretion to deny such a request.
- B. An Asylum Office may issue an NTA in the following situations:
 - 1. An asylum applicant who has been issued an NTA may request issuance for family members not included on the asylum application as dependents for family unification purposes. The request must be made in writing, and USCIS retains discretion to deny such a request.
 - 2. An asylum applicant issued a denial while in lawful immigration status may request that the Asylum Office issue an NTA after he or she falls out of lawful immigration status. The request must be made in writing and USCIS retains discretion to deny such a request.
 - 3. The Asylum Office may issue an NTA after rescinding asylum status, based on a determination that USCIS did not have jurisdiction to grant asylum status, if the applicant does not currently have an outstanding order of removal or is not otherwise in removal proceedings.
 - 4. If the Asylum Office dismisses NACARA 203 because the NACARA applicant was not removable and the applicant subsequently falls out of lawful immigration status, the applicant may request the issuance of an NTA. The request must be made in writing, and USCIS retains discretion to deny such a request.
- C. USCIS may issue NTAs in connection with a Form N-400 filing in the following situations, in addition to the situations described above in paragraph IV.A.3:
 - When the applicant may be eligible to naturalize, but is also deportable under INA §
 237. Examples include applicants convicted of aggravated felonies prior to
 November 29, 1990, or applicants convicted of deportable offenses after obtaining
 lawful permanent resident (LPR) status that do not preclude GMC or otherwise
 make an applicant ineligible for naturalization; or
 - 2. When it is determined that the applicant was inadmissible at the time of adjustment or admission to the United States, and thus deportable under INA § 237, and ineligible for naturalization under INA § 318. ¹⁸

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¹⁸ In the Third Circuit *only* (Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands), based on the holding in *Garcia v. Att'y Gen.*, 553 F.3d 724 (3d Cir. 2009), if the alien has been an LPR for at least 5 years, the alien

Unless USCIS exercises prosecutorial discretion in favor of the alien, as described below in Section VIII, an NTA will be issued in these two situations before adjudication. ¹⁹ If an NTA has been issued in any case while the N-400 is pending, the N-400 will be placed on hold until removal proceedings have concluded. Once proceedings have concluded, the adjudication of the N-400 will resume.

D. In cases involving the confidentiality protections at 8 U.S.C. § 1367(a)(2), 20 USCIS must follow the guidelines established in this PM, once the benefit request has been denied. 8 U.S.C. § 1367 does not preclude USCIS from serving an NTA upon the attorney of record or safe mailing address. However, USCIS cannot serve the NTA on the physical address of the applicant or petitioner unless Section 1367 protections have been terminated.

In following the guidelines established in this PM, USCIS must also comply with the provisions at 8 U.S.C. § 1367(a)(1), which, with limited exception, prohibits DHS employees and contractors from making adverse determinations of admissibility or deportability using information furnished solely by prohibited sources. Unlike the confidentiality provisions of 8 U.S.C. § 1367(a)(2), which expire once the benefit request has been denied and all opportunities for appeal have been exhausted, this prohibition on adverse determinations of admissibility or deportability using information furnished solely by prohibited sources does not expire upon denial of the benefit petition or application and applies regardless of whether any application or petition has been filed. ²²

cannot be placed in removal proceedings for fraud or willful misrepresentation of a material fact at time of adjustment, if USCIS could have learned of the fraud or misrepresentation through reasonable diligence before the 5-year rescission period expired. Please consult with USCIS counsel if there are questions regarding the applicability of this precedent.

¹⁹ In the Ninth Circuit *only* (Alaska, Arizona, California, Commonwealth of the Northern Mariana Islands (CNMI), Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), based on the decision in *Yith v. Nielsen*, 881 F.3d 1155 (2018), please consult with counsel before issuing an NTA in these cases.

The confidentiality protections in 8 USC § 1367(a)(2) extend to applicants and petitioners for, and beneficiaries of, benefit requests covered by the following form types: Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, processed under the Violence Against Women Act (VAWA); Form I-485 based on VAWA, T or U nonimmigrant status; Form I-751 under the battered spouse or child waiver; Form I-914, Application for T Nonimmigrant Status; Form I-918, Petition for U Nonimmigrant Status; Form I-765V, Application for Employment Authorization for Abused Nonimmigrant Spouse; Form I-485, Application to Register Permanent Residence or Adjust Status, processed under VAWA amendments to the Cuban Adjustment Act; and all related ancillary forms with a VAWA Form I-360, VAWA Cuban Adjustment Act Form I-485, Form I-914, or Form I-918. These confidentiality protections generally continue indefinitely for individuals granted covered immigration relief or benefits and cover information contained in prior and subsequent applications filed by protected individuals, including petitions for derivative beneficiaries, applications for adjustment of status, and naturalization.

²¹ Officers should look to operational guidance for instructions on the handling of cases for which 1367(a)(2) protections have been terminated.

²² For additional information, see USCIS Policy Memorandum, *Identification and Disclosure of Section 1367 Information*, PM-602-0136 (Aug. 25, 2016), and DHS Instruction No. 002-02-001, *Implementation of Section 1367 Provisions* (Nov. 7, 2013).

VII. Preservation of Administrative Review

Except as specifically provided by law, ²³ the issuance, service, or filing of an NTA to commence removal proceedings does not negate any right to seek administrative review, whether by motion to the USCIS office that issued the unfavorable decision, or by appeal to the USCIS Administrative Appeals Office. USCIS will continue to conduct its administrative review during the course of removal proceedings. If USCIS takes favorable action upon motion or appeal, such that an individual is no longer removable, USCIS should advise ICE counsel so that appropriate action can be taken in removal proceedings.

VIII. Exercise of Prosecutorial Discretion

Executive Order 13768 and the implementing guidance provide that DHS personnel should take enforcement actions in accordance with applicable law, and they support that DHS personnel have full authority to initiate removal proceedings against any alien who is removable. NTAs will be issued in cases where the individual is a priority for removal under this PM, as outlined above, except in very limited circumstances involving the exercise of prosecutorial discretion, as described here. The Executive Order and implementing guidance also provide that prosecutorial discretion may be exercised on a case-by-case basis in consultation with the head of the relevant field office of the component that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, USCIS Field Office Director, Director of the National Benefits Center, International Operations Chief, or Service Center Director. 24 Given the high level of concurrence required, prosecutorial discretion to not issue an NTA should only be exercised on a case-by-case basis after considering all USCIS and DHS guidance, DHS's enforcement priorities, the individual facts presented, and any DHS interest(s) implicated (e.g., federal court litigation-related considerations or deconfliction with law enforcement priorities of other agencies).

To facilitate the exercise of prosecutorial discretion, a Prosecutorial Review Panel must be maintained in each office authorized to issue NTAs. The Prosecutorial Review Panel must include a local supervisory officer²⁵ and a local USCIS Office of Chief Counsel attorney (to serve in an advisory role for legal sufficiency review) to determine whether to recommend

²³ See, e.g., INA 318 (precluding consideration of an application for naturalization if there are pending removal proceedings pursuant to a warrant of arrest (NOTE: this is subject to *Yith* in the Ninth Circuit)); 8 CFR § 244.10(c)(2) (precluding administrative appeal when NTA is issued after certain denials of TPS, but providing for *de novo* determination of TPS eligibility in removal proceedings).

²⁴ See John F. Kelly, Secretary of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

²⁵ In cases involving Form N-400, the NTA Panel must be represented by at least one local supervisory officer who is an expert in naturalization laws, policies, and procedures.

the exercise of prosecutorial discretion not to issue an NTA in the aforementioned cases. The Prosecutorial Review Panel will make a recommendation regarding the positive exercise of prosecutorial discretion, as described above. A Field Office Director, an Associate Service Center Director, the Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations must concur with the recommendation to exercise prosecutorial discretion.

Implementation

Components should refer to their operational guidance for specific processing of cases in accordance with this memorandum. Each office must create processes for referrals of cases, both pre- and post-adjudication, and the completion of RTIs. A document outlining these processes must be sent to the appropriate District Office, Service Center, or International Operations Division Branch within 30 days of the issuance of this memorandum.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate, Service Center Operations Directorate, or the Refugee, Asylum, and International Operations Directorate.

July 13, 2018 PM-602-0163

Policy Memorandum

SUBJECT: Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), Chapter 10.5(b)

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) adjudicators regarding the discretion to deny an application, petition, or request without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) if initial evidence is not submitted or if the evidence in the record does not establish eligibility.

Previous guidance

This PM rescinds in its entirety the June 3, 2013 PM titled "Requests for Evidence and Notices of Intent to Deny" (2013 PM) regarding an adjudicator's discretion to deny an application, petition, or request without issuing an RFE. This PM incorporates those portions of the 2013 PM which are still intended to govern USCIS adjudications.

Scope

This memorandum applies to, and shall be used, to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees.

Effective Date

This updated guidance is effective September 11, 2018 and applies to all applications, petitions, and requests received after the effective date.

Authority

8 CFR 103.2(b)(8).

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 2

Background

The June 3, 2013 PM titled "Requests for Evidence and Notices of Intent to Deny" (2013 PM) addressed policies for the issuance of RFEs and NOIDs when the evidence submitted at the time of filing does not establish eligibility for the benefit sought. While the 2013 PM provided that RFEs should be issued "when the facts and the law warrant," it also stated that an adjudicator should issue an RFE unless there was "no possibility" that the deficiency could be cured by submission of additional evidence. The effect of the "no possibility" policy was that only statutory denials (such as a denial where a nonexistent benefit is requested) would be issued without an RFE or a NOID. This new PM clarifies how those filings, as well as filings lacking required initial evidence, should be treated.

The 2013 PM explained that an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit requested. However, where the record does not establish eligibility or ineligibility, the 2013 PM limited adjudicators' discretion to adjudicate cases based on the record. Yet, 8 CFR 103.2(b)(8) provides that an adjudicator, under the circumstances described in the regulation, may either deny the application, petition, or request, or issue an RFE or a NOID when the record does not establish eligibility. The 2013 PM's "no possibility" policy limited the application of an adjudicator's discretion. The burden of proof, however, is on the applicant, petitioner, or requestor to establish eligibility. The policy implemented in this PM rescinds the 2013 PM's "no possibility" policy and restores to the adjudicator full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID, when appropriate. This policy is intended to discourage frivolous or substantially incomplete filings used as "placeholder" filings and encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required evidence. It is not intended to penalize filers for innocent mistakes or misunderstandings of evidentiary requirements.

Policy

Statutory Denials

Consistent with USCIS practice and regulations, adjudicators will continue issuing statutory denials, when appropriate, without issuing an RFE or a NOID first. This would include any filing in which the applicant, petitioner, or requestor has no legal basis for the benefit/request sought, or submits a request for a benefit or relief under a program that has been terminated. Examples of cases where the issuance of a denial may be appropriate without prior issuance of an RFE or a NOID include, but are not limited to:

¹ Per 8 CFR 208.14(d), applications for asylum are not subject to denial pursuant to the provisions at 8 CFR 103.2(b).

² Section 291 of the Act, 8 USC 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 3

- Waiver applications that require a showing of extreme hardship to a qualifying relative, but the applicant is claiming extreme hardship to someone else and there is no evidence of any qualifying relative;
- Family-based visa petitions filed for family members under categories that are not authorized by statute.

Officers should check current policy and the operating procedures for additional guidance, applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation.³

Denials Based on Lack of Sufficient Initial Evidence

If all required initial evidence is not submitted with the benefit request, USCIS in its discretion may deny the benefit request for failure to establish eligibility based on lack of required initial evidence. Examples of filings that may be denied without sending an RFE or a NOID include, but are not limited to:

- Waiver applications submitted with little to no supporting evidence; or
- Cases where the regulations, the statute, or form instructions require the submission of an official document or other form or evidence establishing eligibility at the time of filing and there is no submission. For example, family-based or employment-based categories where an Affidavit of Support (Form I-864), if required, was not submitted with the Application to Register Permanent Residence or Adjust Status (Form I-485).

Officers should check current policy and the operating procedures for additional guidance, applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation. Furthermore, certain form instructions or regulations may permit applicants, petitioners, or requestors to file a form before all the required initial evidence is available, or may restrict USCIS' authority to deny based solely on the submission of limited evidence.

³ For example, as of July 13, 2018, due to preliminary injunctions issued by the U.S. District Court for the Northern District of California in *Regents of Univ. of California v. DHS et al.*, No. 3:17-cv-05211 (N.D. Cal. Jan. 9, 2018) and by the U.S. District Court for the Eastern District of New York in *Batalla Vidal v. Nielsen*, 1:16-cv-04756 (E.D.N.Y. Feb. 13, 2018), USCIS is adjudicating Deferred Action for Childhood Arrivals (DACA) requests on the same terms and conditions in place prior to September 5, 2017. Therefore, this policy memo does not change the RFE and NOID policies and practices that apply to the adjudication of DACA requests while DHS remains enjoined from making changes to the DACA policy. This policy memorandum will apply to DACA or DACA-related requests, however, if and when DHS is no longer subject to these or any future court orders preventing such changes.

PM-602-0163 Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b) Page 4

Additional Considerations

In some cases, particularly where the response to an RFE opens up new lines of inquiry, a follow-up RFE might be warranted. If possible, however, officers should include in a single RFE all the additional evidence they anticipate having to request. The officer's careful consideration of all the apparent gaps in the evidence will minimize the issuance of multiple RFEs or denials for failure to establish eligibility for the benefit sought. In response to an RFE or a NOID, applicants, petitioners, or requestors must submit all of the requested materials together at one time, along with the original RFE or NOID. If only some of the requested evidence is submitted, USCIS will consider this to be a request for a decision on the record. See 8 CFR 103.2(b)(11). Additionally, failure to submit requested evidence which precludes a material line of inquiry will be grounds for denying the request. See 8 CFR 103.2(b)(14).

Apart from RFEs, officers have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information that is readily accessible. See 8 USC 1357(b). For example, an officer may, in the exercise of discretion, verify information relating to a petitioner's corporate structure by consulting a publicly available state business website. As another example, an officer may attempt to corroborate evidence relating to an individual's history of nonimmigrant stays in the United States by searching a nonpublic, U.S. government database. If relevant, any such additional evidence should be placed in the Record of Proceeding according to the National Background, Identity, and Security Check Operating Procedures Handbook (NaBISCOP) and standard operating procedures (SOPs), unless specifically exempted from inclusion, as is the case for classified materials. For details, please refer to AFM Chapter 10.2, Record of Proceeding, the NaBISCOP, and the applicable SOPs.

Under 8 CFR 103.2(b)(16)(i), if a decision adverse to the applicant, petitioner, or requestor is based on derogatory information, and the applicant, petitioner, or requestor is unaware that the information is being considered, generally the officer must advise the applicant, petitioner, or requestor, as applicable, of this information and offer an opportunity for rebuttal before the decision is rendered. Any explanation, rebuttal, or information presented by or on behalf of the applicant, petitioner, or requestor must be included in the record of proceeding. There is an exception for certain classified materials.⁴

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⁴ Under 8 CFR 103.2(b)(16)(ii) and (iv), a determination of statutory eligibility shall be based only on information that is contained in the record of proceeding and disclosed to the individual, except when the information is classified under Executive Order No. 12356 as requiring protection from unauthorized disclosure in the interest of national security and the classifying authority has not agreed in writing to such disclosure. Whenever the Director of USCIS believes he or she can do so consistently with safeguarding both the information and its source, the Director or his or her designee should direct that the individual be given notice of the general nature of the information and an opportunity to offer opposing evidence. The Director's or his or her designee's authorization to use such classified information shall be made a part of the record. A decision based in whole or in part on such classified information shall state that the information is material to the decision. Under 8 CFR 103.2(b)(16)(iii), where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided the USCIS Director or his or her designee has determined that such

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 5

Implementation

The Adjudicator's Field Manual (AFM) is revised as follows:

- (1) Chapter 10.5(a) is revised as follows:
- (a) General.

* * *

(2) <u>Considerations Prior to Issuing RFEs.</u>

Initial case review should be thorough. Although the burden of proof is on the applicant, petitioner, or requestor, before issuing an RFE or NOID, an officer may assess whether the information needed is available in USCIS databases or systems. Occasionally, certain evidence or information not submitted with the application, petition, or request may be readily accessible in other USCIS records or otherwise available from external sources. If such information is available in USCIS databases or systems, an officer may obtain the information from these sources rather than issuing an RFE or a NOID. Adjudicators have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information. 8 USC 1357(b).

An officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency. In general, officers may, but are not required to, issue RFEs or NOIDs, and they retain the discretion to deny a request for ineligibility without issuing an RFE or NOID.

When an RFE is appropriate, it should:

- (1) identify the eligibility requirement(s) that has not been established and why the evidence submitted was not sufficient;
- (2) identify any missing evidence specifically required by the applicable statute, regulation, or form instruction:
- (3) identify examples of other evidence that may be submitted to establish eligibility; and
- (4) request that evidence.

The RFE should ask for all of the additional evidence the officer anticipates having to request and state the deadline for response. The officer's careful consideration of all the apparent gaps in the evidence will minimize the issuance of multiple RFEs or denials for failure to establish eligibility for the benefit sought. In certain instances the evidence provided in response to an RFE may raise eligibility questions that the adjudicator did not identify during initial case review or open up new lines of inquiry. In such a case, a follow-up RFE or a NOID might be warranted. Failure to submit requested evidence which precludes a material line of inquiry, however, will be grounds for denying the request. 8 CFR 103.2(b)(14).

information is relevant and is classified under Executive Order No. 12356 as requiring protection from unauthorized disclosure in the interest of national security.

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 6

Statutory Denials

Statutory denials should generally be issued without prior issuance of an RFE or a NOID on any application, petition, or request that does not have any basis upon which the applicant, petitioner, or requestor may be approved. This would include any filing in which the applicant, petitioner, or requestor has no legal basis for the benefit/request sought, or a request for a program that has been terminated. Other examples include, but are not limited to:

- Waiver applications that require a showing of extreme hardship to a qualifying relative but the applicant is claiming extreme hardship to someone else and there is no evidence of any qualifying relative;
- Family-based visa petitions filed for family members under categories that are not provided by statute based on the claimed family relationship.

Officers should check the applicable policy and operating procedures for additional guidance, as applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation.⁵ Furthermore, certain form instructions or regulations may permit applicants, petitioners, or requestors to file a form before all required initial evidence is available, or may restrict USCIS' ability to deny based solely on the submission of limited evidence.

Denials Based on Lack of Sufficient Initial Evidence

In the case of a filing that lacks initial evidence, the application, petition, or request may be denied without issuing an RFE or NOID. Examples of filings in which the issuance of a denial may be appropriate without prior issuance of an RFE or a NOID include, but are not limited to:

- Waiver applications submitted with little to no supporting evidence; or
- Cases where the regulations, the statute, or form instructions require the submission of an
 official document or other form or evidence establishing eligibility at the time of filing and there
 is no submission. For example, family-based or employment-based categories where an
 Affidavit of Support (Form I-864), if required, was not submitted with the Application to
 Register Permanent Residence or Adjust Status (Form I-485).

⁵ For example, as of July 13, 2018, due to preliminary injunctions issued by the U.S. District Court for the Northern District of California in *Regents of Univ. of California v. DHS et al.*, No. 3:17-cv-05211 (N.D. Cal. Jan. 9, 2018) and by the U.S. District Court for the Eastern District of New York in *Batalla Vidal v. Nielsen*, 1:16-cv-04756 (E.D.N.Y. Feb. 13, 2018), USCIS is adjudicating Deferred Action for Childhood Arrivals (DACA) requests on the same terms and conditions in place prior to September 5, 2017. Therefore, the RFE and NOID policies and practices that were in effect as of September 5, 2017 continue to apply to the adjudication of DACA requests while DHS remains enjoined from making changes to the DACA policy. This policy memorandum will apply to DACA or DACA-related requests, however, if and when DHS is no longer subject to these or any future court orders preventing such changes.

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 7

* * *

(2) Chapter 10.5(b) is revised as follows:

* * *

(4) Notice of Intent to Deny (NOID).

A NOID may be based on evidence of ineligibility or on derogatory information known to USCIS, but the applicant, petitioner, or requestor is either unaware of the information or may be unaware of its impact on eligiblity. When an adverse decision is based on derogatory information that is unknown to the applicant, petitioner, or requestor, generally, an opportunity to rebut that information shall be provided in accordance with 8 CFR 103.2(b)(16)(i). In that situation, a NOID provides an applicant, petitioner, or requestor with adequate notice and sufficient opportunity to respond and the opportunity to review and rebut derogatory information of which he/she/it is unaware. While not required in other situations, a NOID also provides an applicant, petitioner, or requestor with adequate notice and sufficient opportunity to respond to an intended denial on other substantive grounds.⁶

When a preliminary decision has been made to deny an application or petition and the denial is not based on lack of initial evidence or a statutory denial as discussed in Chapter 10.5(b), and 8 CFR 103.2(b)(16)(i) applies, the adjudicator must issue a written NOID to the applicant, petitioner, or requestor providing up to a maximum of 30 days to respond to the NOID. The NOID must include the required response date.

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(5) The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

\mathbf{P}	M-602-	Chapter 10.5(a); and	Amends standards for issuance of certain requests
01	163	Chapter 10.5(b)	for evidence and notices of intent to deny.
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⁶ Note that this does not apply to filing deficiencies such as signatures, which are subject to the regulations at 8 CFR 103.2(a)(7)(ii) and the policy memorandum, "Signatures on Paper Applications, Petitions, Requests, and Other Documents field with U.S. Citizenship and Immigration Services, PM-602-0134.1, dated February 16, 2018, and effective beginning on March 17, 2018

Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), and 10.5(b)

Page 8

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS adjudicators have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

AIM FOR YOUR NEXT BIG CASE

THREE SIMPLE SECRETS TO HELP YOU WIN

By David Weinberg, Esquire 888.436.2849 weinbergd@jurygroup.com

ou've got a big case coming up. It may be mediation, an arbitration, an administrative proceeding or a trial. Your client's future rests in the balance. Your client is counting on you. How you decide to present the case will make the difference between winning and losing.

There are mountains of discovery, complicated fact patterns, confusing technical issues. Evidence is piled in your conference room - hundreds of pages of emails, correspondence, manuals, training expert videos, videos. video deposition enactments, transcripts, affidavits, photographs, spreadsheets, diagrams, contracts blueprints, amendments – the list goes on. How do you boil all this down into a powerful format that will win the day for your client?

What if I could share three secrets that could make the difference between winning and losing? For nearly twenty years, I've built a special practice called JuryGroup – working behind the scenes with litigators on both sides of the bar. My colleagues and I join their trial teams to help construct case strategies that resonate with many different audiences in many different forums. Our time is frequently included in monthly billings.

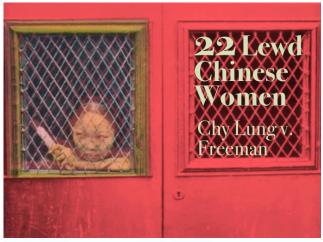
These three winning secrets are drawn from a wide range of relevant disciplines: trial advocacy, behavioral science, journalism, marketing, literature and theater. The three secrets are surprisingly simple and powerful. They are (1) Define your AUDIENCE, (2) Design your IMAGE (3) Deliver your MESSAGE. When JuryGroup joins your litigation team we help you apply them successfully.







Secret One: Define Your AUDIENCE



Litigation is a communications contest. The side that best connects with the audience generally wins. To devise a successful litigation strategy, you must accurately define your audience – determining what they believe, what they value, what they fear – and what impact their attitudes will have upon your case. Your audience extends beyond the finder of fact – jury, judge, mediator and arbitrator – to all the interested parties – clients, colleagues, witnesses, opposing attorneys, the news media and the public.



JuryGroup helps define your audience in a number of ways. First, we apply behavioral science to predict audience reaction and analyze the complex blend of factors that lead to those reactions – status, racial/ethic background and other critical indicators. Next, we help you design graphic images and deliver a message that resonates with the values and concerns of those who will be deciding your case. We clarify your litigation strategy by presenting crucial aspects of your case to mock juries. Then, to determine prevailing local attitudes, we conduct focus groups for ininteraction with individuals representative of the potential jury.



JuryGroup evaluates the potential pool of jurors – profiling the characteristics of jurors most likely to favor or oppose your arguments. During jury selection, we develop questions designed to reveal hidden bias. As you conduct voir dire, we carefully observe potential jurors, helping you identify clues to their real feelings. We continue careful observation of all audience members throughout the proceedings, watching for behavioral clues to how they are responding to your case.

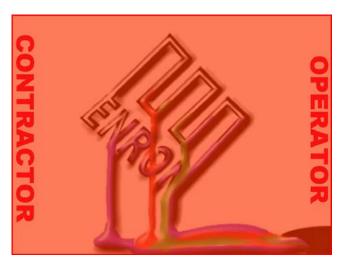
Secret Two: Design Your IMAGE

People today communicate electronic images, exchanging them on computers and mobile phones. Lawyers in popular movies and TV shows use the latest presentation technologies to argue their cases. Viewers now expect the same when they enter real-life courtrooms. JuryGroup helps litigators make the most of presentation technology in negotiation, mediation, arbitration and trial. jurisdictions around the country, these presentations have been admitted to support opening and closing statements and witness examinations.

Compelling graphics enhance the client's story, forming a backdrop so the litigator can make a stronger personal connection with the audience. The best presentations are designed especially for each case, tailored to the litigator, the audience and the case at hand. Exhibits are sequenced seamless, smooth progression, highlighting the most relevant aspects of evidence. Litigators no longer have to fumble with clumsy poster boards and precarious stacks of exhibits. Documents, photos, diagrams, videos, charts, graphs and summaries can easily be displayed, compared and magnified. Colors and design are used to link related evidence, making complex information easier to understand and remember.

Well-designed presentations aren't distracting. The themes lead viewers to focus on content rather than technology. Computer presentations maintain interest and involvement in the evidence, often reducing the time it takes to put forward the best case. JuryGroup will help you choose the three themes that most effectively deliver your message.





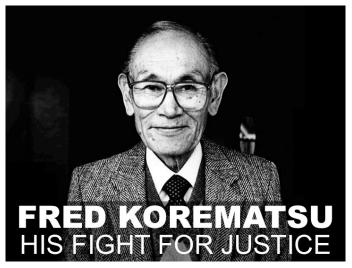




Secret Three: Deliver Your MESSAGE

There is a compelling message at the heart of every case. Most litigation teams spend inordinate amounts of time and effort hoping to get the message out in the open, support it with fact and argument, and communicate it in a way that reaches decision makers. Then they wait, worry and wonder if they got it right. It's our job to minimize the guesswork and guide you through this entire process.

The heart of every successful argument ever made is a successful theme. What are the three most important arguments we have to win in this case? JuryGroup



helps you discover the three most crucial themes of your case. Themes help organize the narrative so that it parallels principles of law. Effective themes capture the essence of each issue in a simple phrase -- maybe only a word or two. These phrases are signposts - reminders which offer a simple framework for understanding the case. It's our role to help litigators use themes to organize every aspect of a proceeding - including opening, closing and witness examination. The narrative of the case should link every piece of evidence to at least one theme. These themes are then reinforced with graphic presentations.

See How These 3 Secrets Can Work for You With Our Free One-Hour Consultation

Do you have a mediation, arbitration, hearing or trial coming up? Are you afraid that you will not pull the case together in time? Are you concerned that you do not know your client's real story? Have you found your strategic message – the story and moral of your case? Is your case organized with compelling themes that quickly capture the key issues? Have you reinforced your message with convincing contemporary graphics? Have you used these secrets of the successful twenty-first century litigator to create a winning case?

There is still time to win your case.

For a limited time, we are offering a free one-hour consultation to attorneys interested in presenting a winning case. Due to the demands of our client schedule, the number of hours for free consultations our limited. Please don't wait until a week before trial, arbitration, or mediation to call. Creating a winning case strategy starts **now**.

Mention this brochure when you call and you will receive a free demo collection of winning presentations from our previous assignments which will provide you with a wealth of information for organizing your own case. Call or write me at 888-436-2849 or weinbergd@jurygroup.com.

SPEAK AND BE HEARD: COMMUNICATING YOUR BEST IDEAS

twitter - @genuineknowhow gktrainingandcommunications.com info@gktandc.com

These are some of the most frequent habits we see that dent communicators' credibility. If you would like a suggestion about a kinesthetic learning tool you can use to address one or more of these, just check the box(es) of the habits you're most interested in changing (or helping someone else change). We'll email you a video link to a kinesthetic tool we've developed specifically for that habit.

	Speaking more articulately			
	SLOWING DOWN			
	Speaking in a monotone			
	Pausing effectively			
	Going on too long (lack of conciseness)			
	Rambling or lack of structure			
	Getting too technical / speaking in jargon			
	Difficulty answering challenging questions			
	Bad articulation / mumbling			
	Lack of eye contact			
	Weak posture			
	Ending sentences weakly (upward inflection or vocal fry)			
	Other:			
Company:				
Date	e:			
Your email address:				
	Don't worry we don't like SPAM either.			
I'm interested in occasional communication from GK Training and Communications with helpful tips and video training resources.				



CORPORATE COUNSEL

Mock Trials in Business Litigation: Choosing When and How to Do It Cost-Effectively

Shain Khoshbin and David Weinberg, 214.941.5100 May 5, 2016

"Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win." — Sun Tzu, The Art of War

Corporate counsel know that mock trials are useful tools in litigation. Nonetheless, they cost money. So the trick is to figure out when it's worth doing one, when it isn't and how to save money when you do.

When Does It Makes Sense?

Besides cases involving substantial monetary damages, other cases that warrant mock trials include:

- Cases that have the potential to create important precedents or "copy-cat" litigation (e.g., an adverse decision will vitiate a key provision in contracts regularly used by the company or encourage additional/other litigation).
- Cases that involve critical intellectual property (e.g., claims to validate/invalidate a key patent or trademark, or to enjoin the use of an essential trade secret).
- Cases that feature business-threatening claims (e.g., claims inviting negative publicity, risking loss of substantial revenues, seeking to enjoin crucial corporate decisions/activities, or threatening receivership or plummeting stock value).
- Cases that threaten punitive damages or findings of fraud or criminal conduct (especially cases involving director/officer liability, which risk the personal reputations and livelihoods of executives).

Practice Point: Business disputes often require resolution by arbitration or a judge. To foretell their decisions, conduct a mock proceeding with arbitrators or retired judges who reflect the

temperaments and predispositions of the decision-maker(s) at the arbitration or the bench trial.

When Is It Cost-Effective?

It is most cost-effective to conduct a mock trial after important discovery has been completed and crucial motions have been decided. Why then? The change of a key fact used in the mock trial could undermine its efficacy. Moreover, by conducting a mock trial after dispositive motions, counsel can limit the number of issues being addressed. This is especially applicable to contract cases (where the judge may grant summary judgment on a key provision) and patent cases (where the judge will decide the meanings of relevant key words at the Markman hearing).

Practice Point: It is also valuable to conduct mock trials earlier in the litigation. This allows corporate counsel to gauge the strength of the case, based upon reasonable assumptions, to consider settlement opportunities before incurring additional legal costs, to reconfigure trial themes/strategies and to focus discovery and preparation on issues most likely to be unresolved in the minds of decision-makers (thereby helping to control litigation costs). Alternatively, clients may consider using lower-priced types of pretrial audience research tools (despite their inherent limitations), such as focus groups, online research or surveys.

How Can You Cut Costs?

Because they have many moving parts, mock trials present clients with an opportunity to cut costs at multiple levels. For example, a full-fledged mock trial generally consists of:

1. **Jury research/selection:** Consultants design and implement a recruitment process to assemble panels that accurately reflect the demographics and attitudes of the actual jury. *Possible Cuts:* Consider having in-house personnel place a blind ad for jurors and pick jurors according to a general guide provided by counsel. (Caveat: This will be a less scientific method and less likely to provide accurate results.)

Practice Point: Be careful of local court rules and ethical practices, especially in jurisdictions with smaller jury pools, to avoid allegations of tainting the jury pool.

2. **Mock jurors:** Mock trials generally involve two to three panels of twelve jurors. Juror fees generally range from \$200 to \$350 per juror per day, plus costs.

Possible Cuts: Consider using two panels of six jurors. Having at least two panels will: lessen the impact of one "rogue" juror with a strong personality and provide an opportunity to: (a) compare deliberations by two panels and identify consistencies in reasoning; and (b) identify the types of favorable/unfavorable jurors (which will assist with voir dire).

3. **Location and facility costs:** It is advantageous to conduct a mock trial near the location of the actual trial because the mock jurors will better reflect the attitudes present in that community. Facility choices are courtrooms, market research facilities, conference facilities, law schools/universities and law firms. Costs vary based upon the locale, the length of the mock trial, appearance/technology preferences and travel/lodging costs.

Possible Cuts: Consider conducting the mock trial closer to where the lawyers and live witnesses are located. Although the mock jurors will not as closely resemble those at trial, this will lessen travel/lodging costs. Also consider using a facility, such as a courtroom, with lower rental rates than specially equipped market research facilities. Certain trial consulting firms have mock courtrooms and jury deliberation rooms with hidden cameras, and observation rooms with screens showing deliberations "real time" (which may be included in the firm's total project cost). At a minimum, choose a facility that appears neutral and formal, thereby impressing on all participants the seriousness of the proceedings.

Practice Point: Given the relatively low costs of recording and even wireless hidden cameras, it makes sense to videotape the mock trial and jury deliberations. The videotape will catch details that observers may miss during the proceedings, and make it possible to subsequently review and evaluate key segments of the proceedings. Moreover, using hidden cameras in the jury deliberation rooms allow the consultants, counsel and their clients to observe the deliberations "real time." They can also take notes and discuss strategies as they watch the jury's discussion of the facts and the credibility of the evidence, witnesses and counsel.

4. **Trial consultant/jury psychologist:** Although not a requirement, consultants can be valuable players in the mock trial process. Given their specialized training and experience, consultants may provide unparalleled insights into trial and jury deliberations, and generate a report that describes: (a) the attitudes and reasoning that led to the decision, (b) advantageous/disadvantageous juror types; (c) the exhibits, witnesses and arguments that were most persuasive; (d) effective/ineffective thematics; and (e) the presentations and witness examinations that can be improved to maximize the chances of success at trial. Consultants also may assist with preparing demonstrative exhibits, recruiting mock jurors, arranging for the facility/technology and managing and recording the proceedings. Moreover, by involving a consultant during mock trial, that consultant's advice during the trial may become even more valuable (including, for example, the organization of witnesses, use of exhibits, voir dire and/or even supervising a "shadow jury").

Possible Cuts: A good consultant's hourly rate is generally no more than that of an experienced attorney—probably less. Nonetheless, most consulting firms will provide a budget and even flat fees for various aspects of the mock trial, such as:

- Preparing the juror demographic profile;
- Recruiting and paying jurors;
- Furnishing a judge, bailiff, jury room facilitators, and audiovisual services; and
- Analyzing videotapes and mock trial results, and preparing a written report.
- 5. **Attorneys:** If the attorneys are charging on an hourly basis, attorney fees and expenses will usually cost substantially more than the mock trial expenses. Nevertheless, mock trials may save money in the long run. For example, every activity performed by the lawyers for mock trial should be performed anyway to prepare for the actual proceedings. A mock trial simply compels the attorneys to do it sooner, measures their effectiveness and highlights the legal pursuits most/least likely to be productive. Moreover, a mock trial allows corporate counsel to gauge the strength of the case and, ultimately, to maximize the chances of success at trial (which should be the biggest cost savings).

Possible Cost Cuts: Consider a truncated mock trial that only focuses on key issues and evidence, without live witnesses, and that is limited to one day or less. For example, have someone read aloud to the jurors stipulated facts, have the attorneys present closing-type arguments with limited exhibits, videotaped deposition testimony and demonstrative exhibits, and then have the jurors deliberate on only the key issues in the case. The mock trial schedule could be limited to a one-day exercise with:

1. Greeting/introduction: 20/min

2. Stipulated facts: 30/min

3. Plaintiff closing: 90/min

4. Break: 15/min

5. Defense closing: 60/min

6. Plaintiff rebuttal: 10/min

7. Lunch: 45/min

8. Jury deliberations: 15/min

9. Break: 15/min

10. Jury debriefing/questioning: 60/min

Practice Point: To avoid skewing the results of the mock trial, make sure the attorneys present each side of the case with the same degree of advocacy and thoroughness.

The Bottom Line

By following the teachings of Sun Tzu with mock trials managed cost-effectively, corporate counsel are likely to find themselves winning disputes before ever setting foot in the courtroom.

This article does not constitute legal advice and is not intended to be used as a substitute for legal advice or opinions.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EPIC SYSTEMS CORP. v. LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16-285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 5–25.

^{*}Together with No. 16–300, Ernst & Young LLP et al. v. Morris et al., on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, National Labor Relations Board v. Murphy Oil USA, Inc., et al., on certiorari to the United States Court of Appeals for the Fifth Circuit.

- (a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2—recognizes only "generally applicable contract defenses, such as fraud, duress, or unconscionability," AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," id., at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 5–9.
- (b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551. To prevail, the employees must show a "clear and manifest" congressional intention to displace one Act with another. *Ibid*. There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by §7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. §157. But §7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in §7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, i.e., things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speak-

ing of various "concerted activities" in §7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., e.g., 29 U. S. C. §§216(b), 626, or to override the Arbitration Act, see, e.g., 15 U. S. C. §1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings-matters that are usually left to, e.g., the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, e.g. American Express Co. v. Italian Colors Restaurant, 570 U. S. 228; and its §7 cases have generally involved efforts related to organizing and collective bargaining in the

workplace, not the treatment of class or collective action procedures in court or arbitration, see, e.g., NLRB v. $Washington\ Aluminum\ Co.$, 370 U. S. 9.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.*, at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." *Id.*, at 865. And after "employing traditional tools of statutory construction," *id.*, at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 9–21.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 16-285, 16-300, 16-307

EPIC SYSTEMS CORPORATION, PETITIONER v.

JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS v.

STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER 16-307 v.

MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

Ι

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by ... a court" in the relevant jurisdiction. App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.*, at 44.

After his employment ended, and despite having agreed

Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U. S. C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F. 3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see 9 U. S. C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U. S. C. §157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that

arbitration agreements like those before us must be enforced according to their terms. See, e.g., Owen v. Bristol Care, Inc., 702 F. 3d 1050 (CA8 2013); Sutherland v. Ernst & Young LLP, 726 F. 3d 290 (CA2 2013); D. R. Horton, Inc. v. NLRB, 737 F. 3d 344 (CA5 2013); Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 327 P. 3d 129 (2014); Tallman v. Eighth Jud. Dist. Court, 131 Nev. 71, 359 P. 3d 113 (2015); 808 F. 3d 1013 (CA5 2015) (case below in No. 16–307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. D. R. Horton, Inc., 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See D. R. Horton, 737 F. 3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16-285); 834 F. 3d 975 (case below in No. 16-300); NLRB v. Alternative Entertainment, Inc., 858 F. 3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion. 580 U.S. (2017).

П

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, n. 4 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. Id., at 511. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. §2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395 (1967)); see id., at 404 (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify with whom the

parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011); *Italian Colors*, *supra*; *DIRECTV*, *Inc.* v. *Imburgia*, 577 U. S. ___ (2015). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F. 3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the

side the question of what it takes to qualify as a ground for "revocation" of a contract. See *Concepcion*, *supra*, at 352–355 (THOMAS, J., concurring); *post*, at 1–2 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. Kindred Nursing Centers L. P. v. Clark, 581 U. S. ____, ___ (2017) (slip op., at 4). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability." Concepcion, 563 U.S., at 339. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid*. Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." Id., at 344; see Kindred Nursing, supra, at ___ (slip op., at 5).

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as uncon-

scionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U.S., at 338, 341. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." Id., at 347, 348. Not least, Concepcion noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. Ibid. All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid*. In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. *Id.*, at 344–351; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l*

Corp., 559 U. S. 662, 684–687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," Concepcion teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish Concepcion fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, Concepcion tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in Concepcion. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

Ш

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements

like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" Morton v. Mancari, 417 U.S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention" that such a result should follow. Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995). The intention must be "'clear and manifest." Morton, supra, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. United States v. Fausto, 484 U. S. 439, 452, 453 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

"the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. 14 Penn Plaza LLC v. Pyett, 556 U. S. 247, 256–260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23–Class Actions, 28 U.S.C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; Concepcion, 563 U.S., at 349; see also Califano v. Yamasaki, 442 U. S. 682, 700-701 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that

the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." U. S. C. §157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) (discussing ejusdem generis canon); National Assn. of Mfrs. v. Department of Defense, 583 U.S. __, ___ (2018) (slip op., at 10). All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." Alternative Entertainment, 858 F. 3d, at 414-415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for

the recognition of exclusive bargaining representatives, 29 U. S. C. §159, explains employees' and employers' obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E.g.*, 29 U. S. C. §§216(b), 626; 42 U. S. C. §§2000e–5(b), (f)(3)–(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain condi-

tions are met, 15 U. S. C. §1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U. S. C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other employees similarly situated," 29 U.S.C. §216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and Why not? Presumably because this collective actions. Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does not displace the Arbitration Act or prohibit individualized arbitration proceedings. Gilmer v. Interstate/Johnson

Lane Corp., 500 U. S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. Alternative Entertainment, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the

Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected every such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. Italian Colors, 570 U.S. 228; Gilmer, 500 U.S. 20; CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "individual attempts at conciliation" through arbitration. supra, at 32. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. CompuCredit, supra, at 103–104; McMahon, supra, at 227; Italian Colors, supra,

at 234. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. 570 U.S., at 234 (internal quotation marks omitted). In Gilmer, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age Discrimination in Employment Act "expressly permitted collective legal Italian Colors, supra, at 237 (citing Gilmer, supra, at 32). And in CompuCredit, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a "right to sue," "repeated[ly]" used the words "action" and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be 565 U.S., at 99–100 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, e.g., NLRB v. Washington Aluminum Co., 370 U. S. 9 (1962) (walkout to protest workplace conditions); NLRB v. Textile Workers, 409 U. S. 213 (1972) (resignation from union and refusal to strike); NLRB v. J. Weingarten, Inc., 420 U. S. 251

(1975) (request for union representation at disciplinary Neither do the two cases the employees cite prove otherwise. In Eastex, Inc. v. NLRB, 437 U.S. 556, 558 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "continuing organizational efforts." Id., at 575, and n. 24. In NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 831–832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collectivebargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565–566; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that

"resort to administrative and judicial forums" isn't "entirely unprotected." Id., at 566. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." Ibid., n. 15. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions Eastex discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See D. R. Horton, 357 N. L. R. B. 2277; 823 F. 3d 1147 (case below in No. 16–285).

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc.* v. *Iancu, ante,* at 11. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." 467 U.S., at 841, 844. Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in

isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own-effectively "bootstrap[ping] itself into an area in which it has no jurisdic-Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. See Hemel & Nielson, *Chev*-

ron Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. 467 U. S., at 843, n. 9. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment*, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. *Post*, at 3–17, 30 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Post*, at 8. Those rights stand every bit as strong today as they did yesterday. And

rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of Lochner, it turns around and criticizes the Court for trying too hard to abide the Arbitration Act's "liberal federal policy favoring arbitration agreements," Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002), saying we "'ski" too far down the "'slippery slope" of this Court's arbitration precedent, post, at 23. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party has asked us to revisit. Compare post, at 18–23, 26 (criticizing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Gilmer, 500 U.S. 20, Circuit City, 532 U.S. 105, Concepcion, 563 U.S. 333, Italian Colors, 570 U.S. 228, and CompuCredit, 565 U.S. 95), with Mitsubishi, supra, at 645–650 (Stevens, J., dissenting), Gilmer, supra, at 36, 39–43 (Stevens, J., dissenting), Circuit City, supra, at 124–129 (Stevens, J., dissenting), Concepcion, supra, at 357–367 (BREYER, J., dissenting), Italian Colors, supra, at 240–253 (KAGAN, J., dissenting), and CompuCredit, supra, at 116-117 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and

its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. Post, at 9. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." Yates v. United States, 574 U. S. ____, ___ (2015) (plurality opinion) (slip op., at 7). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. Post, at 3–5; see also post, at 19–21. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute "'[w]e do not inquire what the legislature meant; we ask only what the statute means." Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 396, 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." D. R. Horton, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court for the Congress." Schwegmann, supra, at 396.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. *Post*, at 25. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly

"speaks directly to group action by employees," while the Arbitration Act doesn't speak to such actions. *Ibid*. But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. Post, at 26–30. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. U. S. C. §216(b); Gilmer, supra, at 32. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," post, at 9, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious claims," Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co., 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agree-

ments it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post*, at 28, n. 15); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

×

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

Nos. 16-285, 16-300, 16-307

EPIC SYSTEMS CORPORATION, PETITIONER v.

JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS 16–300 v. STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER 16–307 v.

MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern "the formation of the arbitration agreement." American Express Co. v. Italian Colors

THOMAS, J., concurring

Restaurant, 570 U. S. 228, 239 (2013) (concurring opinion) (quoting AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 353 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. See Restatement (Second) of Contracts §§178–179 (1979); McMullen v. Hoffman, 174 U. S. 639, 669–670 (1899). Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. Concepcion, supra, at 357. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 et seq., and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage

Workers, 2012 Mich. St. L. Rev. 1103, 1118-1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See id., at 1108– To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. §1 et seq., permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U.S.C. §151 et seq., "to engage in ... concerted activities" for their "mutual aid or protection"? §157. The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. §101 et seq., Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937). The Court today subordinates employeeprotective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 835 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the

NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

T

It was once the dominant view of this Court that "[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair* v. *United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage* v. *Kansas*, 236 U. S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E.

Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See id., at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, supra, at 59-60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, e.g., Coppage, 236 U. S., at 26; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See Coppage, 236 U. S., at 26; Frankfurter & Greene, supra, at While stating that legislatures could curtail 890-891. contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See Coppage, 236 U.S., at 16-19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great

Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

"Whereas ... the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, ... it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, ... and that he shall be free from the interference, restraint, or coercion of employers ... in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§2]." §103.¹ In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, supra, at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing con-

¹Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e.g.*, 29 U. S. C. §104(d) (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

certed action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, §7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." U. S. C. §157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7]." §158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959); see 29 U. S. C. §160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33–34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid*.

В

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-

one.² When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,³ the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge

²The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante*, at 1. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16–300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

³The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U. S. C. §216(b). In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

that they must have access to a judicial forum.⁴ They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

(

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in other concerted activities for the purpose of ... mutual aid or protection." 29 U. S. C. §157 (emphasis added); see, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9, 14–15 (1962) (§7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing Labor Law 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities ... for mutual aid or protection."); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1–2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; and (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

⁴Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16–285, at 35a.

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra*, at 27–28.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U.S.C. §151; see, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); City Disposal, 465 U.S., at 835 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also *supra*, at 5–6. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they partici-

pate in concerted appeals to the media, e.g., NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503, 505–506 (CA2 1942), legislative bodies, e.g., Bethlehem Shipbuilding Corp. v. NLRB, 114 F. 2d 930, 937 (CA1 1940), and government agencies, e.g., Moss Planing Mill Co., 103 N. L. R. B. 414, 418–419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." Eastex, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, e.g., Spandsco Oil and Royalty Co., 42 N. L. R. B. 942, 948–949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); Poultrymen's Service Corp., 41 N. L. R. B. 444, 460-463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); Sarkes Tarzian, Inc., 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); United Parcel Service, Inc., 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F. 2d 421 (CA6 1982); Harco Trucking, LLC, 344 N. L. R. B. 478, 478–479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." Leviton Mfg. Co. v. NLRB, 486 F. 2d 686, 689 (CA1 1973); see, e.g., Brady v. National Football League, 644 F. 3d 661, 673

(CA8 2011) (similar).⁵ The Court pays scant heed to this longstanding line of decisions.⁶

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante*, at 12. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read

⁵The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See ante, at 4, 19, 22. The General Counsel appeared to conclude that employees have a §7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10-06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a §7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See D. R. Horton, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. D. R. Horton, 357 N. L. R. B., at 2282-2283.

 $^{^6}$ In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. D.R. Horton, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a §7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their §7 rights. See id., at 2278, 2280. It broke no new ground. But cf. ante, at 2, 19.

to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid*. (internal quotation marks omitted), *i.e.*, "'self-organization,' 'form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively,'" *ibid*. The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid*. (quoting *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

The ejusdem generis canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See Russell Motor Car Co. v. United States, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See United States v. Powell, 423 U. S. 87, 90 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, i.e., to "protec[t] the exercise by workers of full freedom of association." 29 U. S. C. §151; see *supra*, at 9.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." *Ante*, at 12. Citing a handful of provisions that touch upon unionization, collective bar-

gaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. Ante, at 12–13. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. Ante, at 13. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn't speak to class and collective action procedures in the first place." Ibid.

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.*, at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding §8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141–142 (amending §8(a) and adding §8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding §8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance

regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court's conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood §7 to protect numerous activities for which the Act provides no "specific" regulatory guidance. See *supra*, at 9–10.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." Ante, at 13. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see supra, at 7, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, e.g., American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante*, at 14. The freedom to depart asserted by the Court, as already underscored, is entirely one sided.

See *supra*, at 2–5. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U. S. C. §§151, 157, 158.

4

Further attempting to sow doubt about §7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante*, at 11. In particular, the Court notes, the FLSA's collective-litigation procedure postdated §7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available Congress framed §7 in broad terms, "enin 1935? trust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); see Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, e.g., join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, e.g., Wray Electric Contracting, Inc., 210 N. L. R. B. 757, 762 (1974) (the NLRA protects concerted filing of

complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, the FLSA's collective-litigation procedure and the modern class action were "not written on a clean slate." 823 F. 3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, supra, §1751, at 12 (3d ed. 2005); see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363 (1921). See also Brief for Constitutional Accountability Center as Amicus Curiae 5–16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. E.g., Gorley v. Louisville, 23 Ky. 1782, 65 S. W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); Guiliano v. Daniel O'Connell's Sons, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation.⁷

⁷The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante*, at 14–15. But the employees' reliance on the NLRA is hardly a reason to "raise a judicial eyebrow." *Ante*, at 15. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared

Ε

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employerdictated collective-litigation stoppers, i.e., "waivers," are unlawful. As earlier recounted, see *supra*, at 6, §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U.S.C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in individual employment agreements.8 The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").9

workplace grievances of whatever kind.

⁸See, e.g., Bethany Medical Center, 328 N. L. R. B. 1094, 1105–1106 (1999) (holding employer violated §8(a)(1) by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); Mandel Security Bureau Inc., 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated §8(a)(1) by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

⁹I would similarly hold that the NLGA renders the collectivelitigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted

П

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante*, at 6. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the

activities" for their "mutual aid or protection." 29 U. S. C. §102; see *supra*, at 5. Section 3 provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." §103. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see *supra*, at 8–11, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970), provides no support for the Court's contrary conclusion. See ante, at 16. In Boys Markets, an employer and a union had entered into a collectivebargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U.S., at 238–239. When a dispute later arose, the union bypassed arbitration and called a strike. Id., at 239. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U.S.C. §104, with §301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U.S.C. §185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U.S., at 252-253. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A 1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See id., at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid*. The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e.g.*, 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes). ¹⁰

¹⁰American Bar Association member Julius H. Cohen, credited with

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." Id., at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in §1 of the Act, see Joint Hearings 2; 9 U. S. C. §1, and labor expressed no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).¹¹

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, e.g., 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the

drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.*, at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

¹¹ For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores*, *Inc.* v. *Adams*, 532 U. S. 105, 124–129 (2001) (Stevens, J., dissenting).

document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

9

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58year history, that the FAA evinces a "liberal federal policy favoring arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. E.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987). Further, in 1991, the Court concluded in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in Circuit City

Stores, Inc. v. Adams, 532 U. S. 105, 109 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After Gilmer and Circuit City, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, e.g., Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1–2, 4 (Sept. 27, 2017), available at https://www.epi.org/files/pdf/135056.pdf (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration, 12 employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129:

¹²In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After Bazzle, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 409-410 (2005). In AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at https://www.classactionsurvey.com/pdf/2017-class-actionsurvey.pdf (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

Colvin, supra, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See D. R. Horton, 357 N. L. R. B. 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013). Compare ante, at 3-4 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra*, at 10–11 (NLRB decisions recognizing a §7 right to engage in collective employment litigation), and supra, at 17, n. 8 (NLRB decisions finding employer-dictated waivers of §7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in §2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invali-

dated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see *ante*, at 7.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts §12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." Kaiser Steel, 455 U.S., at 77 (quoting McMullen v. Hoffman, 174 U.S. 639, 654 (1899)). For the reasons stated supra, at 8–17, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, AT&TMobility LLC v. Concepcion, 563 U.S. 333 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See ante, at 6–9. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." Ante, at 7. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. Kindred Nursing Centers L. P. v. Clark, 581 U. S. ____, ___ (2017) (slip op., at 5). In Concepcion, the Court held that the saving clause did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer contracts. 563 U.S., at 341-344, 346-352. Class proceed-

ings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*, at 348. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.*, at 346–352.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," *Kaiser Steel*, 455 U. S., at 77, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' §7 rights. See *supra*, at 17, and n. 8; cf. *Kindred Nursing Centers*, 581 U. S., at ____, n. 2 (slip op., at 7, n. 2) (States may enforce generally applicable rules so long as they do not "single out arbitration" for disfavored treatment).

 \boldsymbol{C}

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976) ("a specific statute" generally "will not be controlled or nullified by a

general one" (internal quotation marks omitted)). 13

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante*, at 13–14. The statutes the Court cites, however, are of recent vintage. Lach was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 116 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

Ш

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11–16, 21–22 (2009). One study estimated that in Chicago, Los

¹³ Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra*, at 17, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." 29 U. S. C. §115.

¹⁴See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

Angeles, and New York City alone, low-wage workers lose nearly \$3 billion in legally owed wages each year. Id., at The U.S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at https://www.epi.org/files/2014/wage-theft.pdf. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as Amici Curiae 29–33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150-1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See id., at 1184-1185 (because "the FLSA systematically tends to generate lowvalue claims," "mechanisms that facilitate the economics of claiming are required"); Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (class actions help "overcome the problem that

small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)). 15

Fear of retaliation may also deter potential claimants from seeking redress alone. See, e.g., Ruan 1119–1121; Bernhardt, supra, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See Califano v. Yamasaki, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision, ¹⁶ the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, e.g., Griggs v. Duke Power Co., 401 U. S. 424 (1971); Automobile Workers v. Johnson Controls, Inc., 499 U. S. 187 (1991). In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See

¹⁵Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." 82 Fed. Reg. 33210 (2017).

¹⁶The Court observes that class actions can be abused, see *ante*, at 24, but under its interpretation, even two employees would be stopped from proceeding together.

Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400, 401 (1968) (per curiam) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See supra, at 27.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as Amici Curiae 19-25, which some courts have concluded cannot be maintained by solo complainants, see, e.g., Chin v. Port Auth. of N. Y. & N. J., 685 F. 3d 135, 147 (CA2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., and other laws enacted to eliminate, root and branch, class-based employment discrimination, see Albemarle Paper Co. v. Moody, 422 U. S. 405, 417, 421 (1975). With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, e.g., App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. Encino Motor Cars,

LLC v. *Navarro*, *ante*, p. ___ (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

The Impact of Epic Systems on Wage and Hour Litigation

By:

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I. INTRODUCTION

This paper focuses on arbitration in the wake of the United States Supreme Court's decision in *Epic Systems Corp. v.* Lewis² finding that class waivers in arbitration agreements are generally valid and enforceable. It details the reasoning of justices in reaching their decision, summarizes cases related to arbitration post-*Epic*, discusses *Lamps Plus, Inc. v. Varela*, ³ and provides a real case study of the cost of arbitration.

II. ARBITRATION

A. Epic Systems Corp. v. Epic: Class Waivers in Arbitration Agreements

Epic was the consolidation of three separate cases. Although the facts of each case differed, they all involved the question of whether class waivers in arbitration agreements are enforceable under the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

Before *Epic*, there was the National Labor Relation Board's (NLRB) decision in *D.R. Horton*, *Inc.*, 357 NLRB 2277 (2012). There, the NLRB found that individual employment arbitration agreements ran afoul of the concerted activity portion of the NLRA. A split among the Federal Court of Appeals ensued, with some circuits finding that class and collective action waivers in arbitration agreements were valid and others finding they were not, holding that the NLRA preempted the FAA.

As arbitration agreements in employment contracts become increasingly popular, the Supreme Court's decision in *Epic* becomes increasingly relevant. The inability for employees to take collective action may deter employees from taking action against employers. Justice Gorsuch acknowledged that there is public policy disagreement over class action waivers in arbitration agreements. Justice Ginsburg, in her dissent, urges congressional correction of the majority decision.

1. Justice Gorsuch's Majority Opinion

As Justice Gorsuch wrote, the main question in *Epic* was "should employees and employers be allowed to agree that any disputes between them will be resolved through

¹ A special thanks to my partner Matthew Helland and our law clerk Rebecca Jones for their contributions to this paper.

² 138 S. Ct. 1612 (2018).

³ 138 S. Ct. 1697 (2018).

one-on-one arbitration? Or should employees always be permitted to bring their claim in class or collective actions, no matter what they agreed with their employers?"

As previously mentioned, *Epic* was the consolidation of three separate cases, each involving class action waivers in employee arbitration agreements.

In *Epic*, the employee alleged that he and his fellow employees were misclassified as exempt from the FLSA. The Seventh Circuit concluded that the arbitration agreement violated the NLRA because the agreement contained a class action waiver. It found that "[c]oncerted activities" under the NLRA included class, representative, and collective legal processes.⁵

In Morris v. Ernst & Young, LLP,⁶ employees brought a putative class action against their employer for misclassifying them and similarly situated employees as exempt. Similar to the Seventh Circuit, the Ninth Circuit held that class action waivers violated the NLRA because "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."⁷

Finally, Murphy Oil USA, Inc. v. NLRB⁸ involved a petition filed by an employer to review an order of the NLRB. The NLRB had previously found that the employer unlawfully required employees to sign arbitration agreements that contained class and collective action waivers. The Fifth Circuit noted that the "any claims" language found in the arbitration agreement implied that an employee was waiving administrative rights in addition to trial rights. This was a violation of Section 8(a)(1) of the NLRA. However, the "any claims" language removed from the agreement after 2012. With that language gone, the Fifth Circuit held that it would be unreasonable for an employee to believe that the agreement prevented him or her from filing an unfair labor charge against the company before the NLRB. 11

In analyzing whether class action waivers violated the NLRA, Justice Gorsuch first examined how the NLRA and FAA coexisted.¹² The NLRA was passed in 1935.¹³ The FAA was passed in 1925.¹⁴ "Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms."¹⁵ However, in 2012, the NLRB asserted that the NLRA effectively nullified the FAA because of the FAA's "savings clause."¹⁶ The "savings clause" allows courts to

⁴ 138 S. Ct. 1612, 1618 (2018).

⁵ Lewis v. Epic Systems Corp. 823 F.3d 1147, 1152 (7th Cir. 2016).

⁶ Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

⁷ Id. at 981 (quoting Brady v. NFL, 644 F.3d 661, 673 (8th Cir. 2011)).

⁸ Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

⁹ *Id.* at 1019.

¹⁰ Id. at 1011.

¹¹ *Id.* at 1019-20.

¹² Lewis, 138 S. Ct. at 1620.

¹³ *Id*.

¹⁴ *Id*.

¹⁵ *Id*.

¹⁶ Id. at 1621.

refuse to enforce an arbitration agreement "upon such grounds as exist at law or in equity" for the revocation of any contract." Essentially, the savings clause meant that if a contract would be nullified because of fraud, duress, unconscionability, or some other concept found in common law, the same could apply to a contract for arbitration. 18 Arbitration agreements were to be treated just as any other contract.¹⁹

Although the plaintiffs cited the savings clause in the FAA as grounds for unenforceability of the arbitration clause, Gorsuch and the rest of the majority believes that the savings clause does not apply to *Epic*. The employees in each lawsuit did not allege that the arbitration agreement was extracted through fraud, duress, etc. Instead, "they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones."²⁰

Even if arbitration agreements were illegal because of conflicting language in the NLRA, the plaintiffs would still fail under the majority's rationale because of the Supreme Court's holding in AT&T Mobility LLC v. Concepcion. 21 Concepcion involved customers bringing a class action against a telephone company, alleging that the company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent. However, the cellphone agreements contained an arbitration clause that did not permit class wide arbitration. The district court relied on the California Supreme Court's decision in Discover Bank that found class waivers in arbitration agreements unconscionable. Unconscionability is a reason for an arbitration agreement—or any contract—to be unenforceable. However, the Supreme Court overruled that finding. It stated that the FAA displaces a conflicting state law that outright prohibits arbitration of a particular type of claim. California's ruling would "interfere with the fundamental attributes of arbitration,"22 by forcing a slower, more costly, and more procedurally complicated resolution.²³

As it applies to *Epic*, Gorsuch summed up *Concepcion* by stating that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class wide arbitration procedures without the parties' consent."²⁴ Any argument that an arbitration agreement is "unenforceable just because it requires bilateral arbitration" is different than arguing that it is unconscionable or illegal.²⁵

The next argument Gorsuch tackles is that the NLRB overrides the FAA.²⁶ The burden is on the plaintiff to show "a clearly expressed congressional intent" to displace one statute over another.²⁷ The plaintiffs cited Section 7 of the NLRA, stating that

¹⁷ 9 U.S.C.A. § 2.

¹⁸ *Epic*, 138 S. Ct. at 1622. ¹⁹ *Id*.

 $^{^{20}}$ Id.

²² AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

²³ *Id.* at 348.

²⁴ Lewis, 138 S. Ct at 1623.

²⁵ *Id.* at 1623.

²⁶ Id. at 1623-24.

²⁷ Id. (quoting Vimar Seguros y Reasegoros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995)).

employees have a "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."²⁸ However, the Court found that this does not show a clear and manifest congressional command to displace the FAA and outlaw arbitration agreements with class action waivers.

First, Gorsuch points out that class action did not exist in 1935 when the NLRA was adopted.²⁹ Rule 23 did not exist until 1966 and the FLSA's collective action "postdated Section 7 by several years."30

Second, he explains that activities for "mutual aid or protection" cannot be read as class or collective actions.³¹ Gorsuch applies the statutory interpretation canon of *ejusdem* generis. Ejusdem generis states that where there is a list of specific classes of persons or things followed by a general statement, the general statement only applies to the same kind of persons or things specifically listed. Here, he reasoned, mutual aid or protection follows a list of activities such as self-organization, forming, joining, or assisting labor organizations, and bargaining collectively.³² Mutual aid or protection belongs with a list of actions that employees "just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, court-room bound 'activities' of class and joint litigation." Furthermore, the NLRA provides rules for bargaining, representation, and labor organization practices.³⁴ It does not prescribe rules for adjudication of class or collective actions.³⁵

Gorsuch also writes that Congress knows how to override the FAA when it wishes. Gorsuch cites multiple statutes, including the Motor Vehicle Franchise Contract Dispute Resolution Process, 36 whistleblower statutes for the agriculture industry, 37 Wall Street reforms and consumer protections, ³⁸ and military law. ³⁹ Gorsuch implies that the only reason Plaintiffs are trying to apply collective/class action to the NLRA, rather than the FLSA, is because the Court has already ruled that collective FLSA action does not displace the FAA.⁴⁰ Gorsuch also categorically claims that the Norris-LaGuardia Act, a precursor to the NLRA, does not add anything to the discussion.⁴¹

²⁸ 29 U.S.C. § 157.

²⁹ Lewis, 138 S. Ct at 1624.

³¹ *Id.* at 1625.

³² *Id.*; see also 29 U.S.C. § 157.

³³ Lewis, 138 S. Ct. at 1625 (quoting National Labor Relations Board v. Alternative Entertainment, Inc., 858 F.3d 393, 414-15 (6th Cir. 2017)).

³⁴ *Id*.

³⁵ *Id*.

³⁶ 15 U.S.C.A. § 1226(a)(2).

³⁷ 7 U.S.C. § 26(n)(2). ³⁸ 12 U.S.C. § 5567(d)(2).

³⁹ 10 U.S.C. § 987(e)(3).

⁴⁰ Lewis, 138 S. Ct. at 1626 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991)).

⁴¹ *Id.* at 1627.

Finally, Gorsuch addresses the application of *Chevron*.⁴² The plaintiffs state that the Court owes the NLRB—an administrative agency—deference to its interpretation of the law. 43 However, the NLRB is attempting to interpret the NLRA in a way that limits the FAA. 44 It does not make sense for Congress to "delegate[] to an agency authority to address the meaning of a second statute it does not administer."⁴⁵

Gorsuch ends his majority opinion by admitting that disagreeing with the policy of class action waivers in arbitration agreements is valid. 46 Still, even if there are strong public policy reasons to disagree with this judgment, the law itself is clear that the NLRA does not displace the FAA.47

2. Justice Thomas's Concurring Opinion

Readers of past Supreme Court decisions regarding the FAA will note that Justice Thomas writes a dissenting opinion when the FAA preempts conflicting state arbitration laws. Here, however, there is no conflicting state arbitration law. Instead, Thomas writes a concurring opinion to emphasize that the plaintiffs cannot prevail "under the plain meaning of the Federal Arbitration Act."48 Illegality, Thomas argues, is a public policy defense. It is not a defense to contract formation, therefore the savings clause does not apply.49

3. Justice Ginsburg's Dissenting Opinion

Ginsburg frames the dispute at issue as "[d]oes the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act to engage in concerted activities for their mutual aid or protection?"50

Ginsburg points out that the main idea behind the NLRA is that there is strength in numbers. The NLRA and its forerunner, the Norris-LaGuardia Act, operate on the premise that employees must have the capacity to act collectively in order to match their employers' ability to set terms and conditions of employment.⁵¹ In an important distinction, Ginsburg points out that the plaintiffs in this case are not asking for access to a judicial forum; rather, they are arguing that the NLRA prohibits their employer from denying them the right to pursue their work-related claims collectively.⁵² This fits comfortably under the NLRA, she explains, because it is a "concerted activit[y] for the

⁴² *Id.* at 1629. ⁴³ *Id.*

⁴⁴ *Id*.

⁴⁵ *Id*.

⁴⁶ *Id.* at 1632.

⁴⁷ Id.

⁴⁸ *Id*.

⁴⁹ *Id*.

⁵⁰ *Id.* at 1633 (internal quotations and citations omitted).

⁵¹ *Id.* at 1634.

⁵² Id. at 1636.

purposes of . . . mutual aid or protection."⁵³ Ginsburg criticizes Gorsuch's reliance on *ejusdem generis* because a canon of construction should only be used when there is doubt over Congress's intended statutory words or phrases.⁵⁴ Ginsburg believes that Congress expressed "an embracive purpose in enacting legislation to protect the exercise by workers of full freedom of association."⁵⁵

Ginsburg also addresses the assertion that class and collective actions were "unknown" when the NLRA was adopted in 1935.⁵⁶ Ginsburg believes that Congress framed Section 7 of the NLRA in broad terms to allow for it to be applied to future civil procedure changes.⁵⁷ Furthermore, permissive joinder was allowed when the NLRA was passed, and class action can be "trace[d] back to medieval times."⁵⁸

Therefore, because Section 7 includes the right to collective litigation regarding wages and hours, waiver of that collective action should be unlawful.⁵⁹ Illegality, Ginsburg writes, is an applicable contract defense.⁶⁰ Therefore, in contrast to what Gorsuch argues, the FAA's saving clause can put arbitration provisions "on the same footing as any other contract provision incompatible with controlling federal law."⁶¹ This is different than *Concepcion* because here the Court is being asked to apply a general contract defense, not enforce a promise made illegal by the NLRA.⁶²

Finally, even if the FAA and the NLRA are inharmonious, Ginsburg argues that the NLRA should control because the NLRA was enacted after the FAA, therefore it is an "implied repeal" of the FAA.⁶³

B. Court Decisions Post-Epic Regarding Arbitration

Davis v. Red Eye Jack's Sports Bar, Inc., 2018 WL 2734037 (S.D. Cal. June 7, 2018)

In this case, the plaintiff signed an arbitration agreement that covered all of the plaintiff's claims against the defendant. The only issue in dispute was whether the arbitration agreement was valid and enforceable as the result of its inclusion of a concerted action waiver. Per *Epic*, the arbitration agreement was found by the district court to be valid.

Internal Service Revenue v. Murphy, --- F.3d ---, 2018 WL 2730764 (1st Cir. 2018)

⁵³ Id. at 1637 (quoting 29 U.S.C. § 157).

⁵⁴ *Id.* at 1639.

⁵⁵ *Id.* (internal citations and quotations omitted).

⁵⁶ *Id.* at 1640.

⁵⁷ *Id*.

⁵⁸ *Id*.

⁵⁹ *Id.*

⁶⁰ Id. at 1645.

⁶¹ *Id*.

⁶² *Id*.

⁶³ *Id*.

Epic was cited for the proposition that Congress does not alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions; "it does not, one might say, hide elephants in mouse holes."

Curatola v. TitleMax of Tenn. and TMX Finance of Tenn, Inc., 2018 WL 2728037 (W.D. Tenn. June 6, 2018)

Defendants filed a motion to stay the proceedings and compel individual arbitration. The magistrate originally denied the motion based on *NLRB v. Alternative Entertainment*. Alternative Entertainment required an employee be permitted to opt-out of an arbitration agreement that otherwise waives the right to collective action.

However, after *Epic* was published, the defendants filed a motion of seeking review of that decision. The court noted that the Supreme Court's decision in *Epic* abrogated *Alternative Entertainment* and plainly dictated that TitleMax must prevail in the present matter of compelling arbitration.

Gomez v. MLB Enterprises, Corp., 2018 WL 3019102 (S.D.N.Y. June 5, 2018)

On June 11, 2015, the defendants moved to compel arbitration and dismiss the complaint. Both plaintiffs signed an arbitration agreement that required them to adjudicate employment-related claims through arbitration. However, one of the employee's signatures was forged.

After arbitrating, the defendant did not pay its arbitration fees. Thereafter, the AAA declined to administer any future employment matters involving defendant. Two additional plaintiffs—now unable to arbitrate—brought their claims before the court.

Here, the court concluded that it could not enforce the arbitration agreement because the defendant materially breached the contract. Citing *Epic*, the court stated that it was fine that the arbitration agreement contained a class action waiver. However, 30 plaintiffs were unable to bring their claims to the AAA because of a failure on the part of the defendant. The arbitration agreements and the waivers contained within were not enforceable because the contract was materially breached by the defendants, rendering plaintiffs unable to perform. Nothing in *Epic* is contrary to this—*Epic* held that an employer can enforce a ban on bringing class claims; it does not suggest that an employer who has breached or rendered performance impossible can still compel arbitration.

Camilo v. Uber Technologies, Inc., 2018 WL 2464507 (S.D.N.Y. May 31, 2018)

Uber moved to compel arbitration, strike the plaintiffs' class allegation, and dismiss the complaint on the basis of the arbitration and class waiver clause contained in the plaintiffs' agreement with Uber. Per *Epic*, class action waivers are valid and not precluded by § 7 of the NLRA. Therefore, the agreements were valid and enforceable.

Bayer v. Neiman Marcus Group, Inc., 2018 WL 2427787 (N.D. Cal. May 30, 2018)

The court notes that *Epic* is *not* applicable to the present situation. The plaintiff never agreed to be bound by an arbitration agreement—in fact, he refused to sign one. Therefore, *Epic* is not applicable because *Epic* is limited to employees who have agreed that any dispute between them and their employer will be resolved through one-on-one arbitration.

Williams v. Dearborn Motors 1, LLC, 2018 WL 2364051 (E.D. Mich. May 24, 2018)

In this case, the plaintiffs argued that the arbitration agreement was unenforceable because it required employees to waive any right to participate in any proceeding commenced by a third party, including the EEOC. The defendant responded by pointing out the delegation provision in the arbitration agreement gave the arbitrator exclusive authority to resolve any and all disputes over the validity of "any part of the lease."

However, because the agreement referred to *lease* and not arbitration agreement, the Court concluded that the class waiver provision was for the court and not an arbitrator to decide.

Relying on *Epic*, the Court concluded that the NLRA did not displace the FAA. Therefore, the motion to compel arbitration was granted.

Williams v. FCA US LLC, 2018 WL 2364068 (E.D. Mich. May 24, 2018)

The defendants sought to compel arbitration pursuant to two arbitration policies. There was a dispute over whether the class agreed to arbitrate its claims. Two of the employees did not sign arbitration agreements, but continued to work after an arbitration policy was implemented.

Although the court noted that case law does not suggest that continued employment by itself is sufficient to manifest assent to an arbitration policy, continued employment can manifest assent when the employee *knows* that continued employment manifests assent. The language in the agreement ("IT APPLIES TO YOU. It will govern all future disputes between you and Chrysler that was covered under the Process.") did not sufficiently put employees on notice that continued employment would constitute assent. Those employees are not bound by the arbitration agreement.

The plaintiffs additionally argued that a waiver of class or collective action is unenforceable. The court disagreed, citing *Epic*.

C. Varela v. Lamps Plus, Inc: No Express Class Waiver

The Supreme Court recently granted certiorari in Lamps Plus, Inc. v. Varela. 64 The question at issue is whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Specifically, the arbitration agreement at issue does not contain an express waiver of class wide arbitration.

⁶⁴ Lamps Plus, Inc. v. Varela, 138 S. Ct. 1697 (2018).

At the district court level, the defendants moved to compel arbitration. The plaintiff had been an employee of Lamps Plus for approximately nine years. As a condition of employment, Lamps Plus required Varela to provide it with his personal information. Although Valera does not recall signing an arbitration agreement, there is evidence that he did. The pertinent part of the arbitration agreement read "The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. Later, the plaintiff's personal information—along with information of 1300 other employees—was stolen as the result of a data breach.

At the district court, Lamps Plus contended that arbitration should be compelled on an individual basis.⁷¹ The plaintiff responded that the arbitration agreement did not waive class-wide arbitration because the agreement stated *all* claims arising in connection with employment.⁷² Citing *Stolt-Nielsen*, ⁷³ the defendant stated that it cannot be compelled to submit to class arbitration unless there was a contractual basis for concluding that it agreed to do so.⁷⁴ *Stolt-Nielsen*, it argued, also states that "parties cannot be compelled to submit their disputes to class arbitration" if the arbitration agreement is silent on the issue.⁷⁵

However, the district court distinguished the facts here from *Stolt-Nielsen*. It stated that the lack of explicit mention of class arbitration is not the type of "silence" contemplated by *Stolt-Nielsen*. Constructing the ambiguity in the agreement against the drafter—the defendant—the court concluded that the agreement allowed for class-wide arbitration. The employer appealed.

On appeal, both parties agree that the agreement includes no express mention of class proceedings. The Echoing its argument at the district court level, the defendants say that they did not agree to class arbitration. The Court of Appeals stated that the "silence" found in this agreement differed from the silence in Stolt-Nielsen. Stolt-

⁶⁵ Varela v. Lamps Plus, Inc., 2016 WL 9110161 (C.D. Cal. July 7, 2016).
66 Id. at *1.
67 Id.
68 Id.
69 Id. (emphasis added).
70 Id.
71 Id. at *6.
72 Id.
73 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 599 U.S. 662, 684 (2010)
74 Id.
75 Id.
76 Id.
77 Id.
78 Varela v. Lamps Plus, Inc., 701 Fed. App'x. 670, 672 (9th Cir. 2017).
79 Id.
80 Id.

Nielsen constituted more than a mere absence of language explicitly referring to class arbitration—instead, it was purposeful absence of class arbitration because the parties did not agree to arbitrate on a class-wide basis.⁸¹ This is different than a party simply not contemplating class-wide arbitration.

The Court of Appeals applies state contract principles to interpret the agreement.⁸² Under California law, a contract is ambiguous if it is capable of two or more reasonable constructions. 83 Here, arbitration is "in lieu of" judicial actions that include class actions. 84 In addition, arbitration in this agreement includes all claims or controversies the parties may have against each other. 85 Finally, the contract defines arbitral claims as those that would have been available to the parties by law. 86 This would include claims as part of a class action proceeding.⁸⁷

Therefore, it found the district court was correct when it constructed any ambiguity in the contract against the drafter of the contract. It properly found the necessary contractual basis for agreements to class arbitration.

Judge Fernandez writes a short dissent. He states that "We should not allow Varela to enlist us in the palpable evasion of Stolt-Nielsen."88

D. A Cost/Benefit Analysis of Arbitration

In the wake of several pro-arbitration decisions issued by the Supreme Court, many employers view arbitration agreements with class action waivers as the surest defense against wage and hour class litigation. However, employers instituting these arbitration programs must consider the costs of defending a large-scale, coordinated filing of individual arbitrations.

This section recounts recent litigation involving over 150 individual overtime exemption misclassification arbitrations, with a focus on the costs of defending each arbitration case to resolution. The litigation can serve as an instructive case study in the costs of defending mass arbitrations in the wage and hour context.

1. Litigation Timeline

Early Litigation Activity

The litigation began as a class and collective action, filed by a single Named Plaintiff in federal court. Plaintiff alleged that Defendant misclassified a group of its employees as exempt from overtime under state and federal law. One additional Plaintiff filed an FLSA consent form with the initial complaint.

⁸¹ *Id*.

⁸² Id.

⁸³ *Id.* 84 *Id.* 85 *Id.*

⁸⁶ Id. 87 Id.

⁸⁸ Id.

Soon after Plaintiff filed the case, Defendant advised Plaintiffs' Counsel that Plaintiffs signed arbitration agreements. The arbitration agreements contained class and collective action waivers, and according to Defendant, were signed by the vast majority of putative class members. The arbitration agreements mandated arbitration with JAMS in the employer's headquarters city. Befendant asked the original Plaintiffs to voluntarily move the case to Arbitration.

However, it was soon clear that the litigation would not be limited to two Plaintiffs. Employee response was enthusiastic from the outset; eleven additional Plaintiffs joined the case in the first three weeks. Because some worked in a second job position, Plaintiffs were prepared to amend their case to expand the classes. Armed with this early, enthusiastic participation and expanded case, Plaintiffs' Counsel asked Defendant reconsider its decision to enforce its arbitration agreements. Plaintiffs' Counsel warned that participation would be high and that individual arbitration would be prohibitively expensive and disruptive for the company.

Defendant elected to stand by its arbitration agreements and their class and collective action waivers. Rather than challenging the arbitration agreement, most Plaintiffs⁹⁰ willingly filed their claims in arbitration in exchange for Defendant's waiver of certain (arguably unenforceable) provisions in the arbitration agreements. Importantly, Defendant also agreed to pay Plaintiffs' half the arbitration filing fees, based on Plaintiffs' argument that federal opt-in Plaintiffs (who could file a consent in federal court for free) could not be forced to pay a filing fee in arbitration. See Armandariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 110-11 (2000) (In employer-mandated arbitration, employees cannot be forced to bear "any type of expenses that the employee would not be required to bear" if they filed in court).

b. <u>Litigation Proceeds in Arbitration</u>

New Plaintiffs⁹¹ continued to join the case after the litigation moved to arbitration. JAMS began sending arbitrator strike lists, and it quickly became apparent that the list of potential arbitrators was very short. And because JAMS rules allow each side to strike two arbitrators (and rank the rest), the vast majority of Plaintiffs' cases were assigned to three arbitrators.

Nine months into the case, the list of participating Plaintiffs grew from thirteen to over seventy-five. Litigation began in earnest. Defendant steadfastly adhered to the individualized nature of the arbitrations – and Plaintiffs complied with the company's desires. Plaintiffs scheduled arbitration hearings on a first-come, first-served basis,

⁸⁹ The employees at issue all worked in the headquarters city.

⁹⁰ A small handful of Plaintiffs terminated employment before Defendant launched its arbitration agreements. These Plaintiffs remained in federal court.

⁹¹ Plaintiffs in arbitration are commonly called "Claimants." This paper uses the term "Plaintiff" throughout for consistency and clarity.

taking the first available dates for each arbitrator. Plaintiffs filled the arbitrator's schedules as fully and completely as the arbitrators would allow.

Discovery was also individualized. Although Defendant provided Fed. R. Civ. P. 30(b)(6) depositions that could be used in all cases, written discovery and individual depositions focused on a handful of cases at a time. Thus, even though a supervisor may have supervised twenty Plaintiffs in the group, Defendant limited that supervisor's deposition testimony to Plaintiffs who were next up for hearing. As a result, almost every individual case involved at least one supervisor deposition.

As the first hearing dates approached, Defendant provided settlement offers to those Plaintiffs with imminent hearing dates. Some Plaintiffs accepted the settlements and others did not. This strategy had immediate benefits for Defendant, as the company saved a great deal in JAMS filing fees and legal fees. However, the settlements also provided an escape hatch for Plaintiffs with credibility issues, extenuating circumstances, or little desire to pursue their claims through full discovery and a hearing. Those Plaintiffs who wanted to fight for full payment pushed forward.

c. The First Plaintiff Loses, the Next Four Plaintiffs Win

The first arbitration hearing took place in December 2013. The arbitrator for the hearing ("Arbitrator 1") was very low on Plaintiffs' ranking list, and thus was only assigned to one case. After a three day hearing and submission of post-hearing briefs, Arbitrator 1 found in Defendant's favor on its exemption affirmative defense and awarded zero damages. Plaintiffs' Counsel paid approximately \$10,000 in costs to Defendant on its client's behalf.

If Defendant had permitted class arbitration and drawn Arbitrator 1 the litigation would have been over. Instead, the right to strike arbitrators ensured Plaintiffs they would never see Arbitrator 1 again. The adverse ruling had no issue preclusive effect. Plaintiffs moved forward trusting that later arbitrators would find the decision poorly reasoned and unpersuasive.

The second and third hearings took place in February 2014 in front of Arbitrator 2. Those hearings were quickly followed in March 2014 by the fourth and fifth hearings, in front of Arbitrator 3. Because of the timing of post-hearing briefings and the loaded schedule, Defendant was forced to pay nonrefundable arbitration fees on the fourth and fifth cases before receiving a ruling on the second and third cases. Plaintiffs declined Defendant's request to continue the fourth and fifth hearings.

The day before the fourth hearing (in front of Arbitrator 3), Arbitrator 2 issued Final Awards in Plaintiffs' favor in the second and third hearings. Arbitrator 2 rejected

⁹²Coincidentally (or not), Arbitrator 1 had the most immediate availability for hearing dates, which led to his case coming up for hearing first.

Defendant's exemption defense and awarded wage loss damages of \$20,000 and \$30,000. He later awarded \$186,888 in attorneys' fees and costs.

Arbitrator 3 followed suit in the fourth and fifth hearings, also rejecting Defendant's affirmative defense and awarding damages of \$15,067 and \$43,631. Arbitrator 3 later awarded \$104,793 in fees and costs.

d. Resolution

With four Plaintiff victories in the books, the parties agreed to pull a number of hearings off calendar for a global mediation. Unfortunately, that mediation was unsuccessful. Thus, the hearings continued once again, with three September hearings scheduled in front of Arbitrator 3 (who had already rejected Defendant's exemption defense) and one hearing scheduled in front of a new arbitrator ("Arbitrator 4").

The parties took depositions, exchanged documents, drafted witness and exhibit lists, and filed opening briefs for the four September cases. On the morning of the first September hearing, however, the four cases settled. Settling the four September cases gave the parties time to hold a second global mediation, which resulted in a global settlement for 156 Plaintiffs.

2. Payments Prior to Second Global Mediation

a. <u>Defendant Owed Almost \$650,000 in Settlements and Awards</u>

The second global mediation did not include the thirteen Plaintiffs who had already won or settled their cases. At the time of the mediation, Defendant owed or had paid \$642,441.92 in settlements and awards to thirteen Plaintiffs. Those settlements and awards were enlightening for several reasons.

First, the cost of each case increased dramatically the closer it got to hearing. Defendant owed over \$400,000 in damages, fees and costs, or \$100,000 a head, on the four cases it lost. That number does not include the substantial JAMS fees and defense fees Defense incurred in each case. When it settled on the eve of trial, on the other hand, Defendant paid less. Even factoring in the plaintiffs who took a quick payout instead of litigating, Defendant owed (or had paid) an average of over \$49,000 per head on the thirteen Plaintiffs whose cases resolved.

Second, any savings to Defendant in identifying and cheaply resolving weaker plaintiffs was far outweighed by the cost of going to hearing against strong plaintiffs. The plaintiffs who settled their cases early all faced extenuating circumstances unrelated to the facts of their case. Those plaintiffs still received valuable settlements. While there may have been other Plaintiffs with similar weaknesses, Defendant would have had to proceed through individualized discovery to find them. And for every such plaintiff Defendant found, it would have to pay hundreds of thousands of dollars in settlements, awards, defense costs, and JAMS fees to successful plaintiffs.

Third, as outlined in more detail below, Defendant's costs of defense were far greater than the cost to settle cases, even on the eve of trial. Defendant would certainly spend more than \$49,000 in JAMS fees and defense fees on each individual hearing. Thus, even a win on the merits was a financial loss for Defendant. Settling cases on the eve of trial – when the cases cost the most, JAMS fees had become non-refundable, and Defendant had paid tens of thousands of dollars in defense counsel fees – was the worst financial decision for Defendant.

b. JAMS Fees and Costs of Defense for Initial Hearings

Plaintiffs estimate that Defendant paid JAMS between \$17,000 and \$34,000 for the hearing in front of Arbitrator 1, between \$19,000 and \$24,000 each for the two hearings in front of Arbitrator 2, and between \$22,000 and \$28,000 each for the two hearings in front of Arbitrator 3. Thus, the JAMS fees for these five arbitrations alone were between \$99,000 and \$138,000.

Of course, Defendant paid its own lawyers as well. Assuming a very conservative \$250,000 in defense fees and costs to litigate through the first five cases (an average of \$50,000 per case), and subtracting the \$10,000 Plaintiffs' Counsel reimbursed Defendant for the first loss, Defendant spent at least \$240,000 in its own attorneys' fees to defend the first five cases.

By Plaintiffs' very conservative estimate, therefore, the first five arbitration hearings cost Defendant approximately \$775,000. Extrapolated across 156 hearings, the potential cost of continued litigation to Defendant was a whopping \$24,180,000. Knowing Defendant would argue that it could litigate subsequent arbitrations more efficiently and cost-effectively, Plaintiffs created a detailed cost of defense analysis.

3. Costs of Defense Going Forward

Arbitrator	Cases Assign	Cases Resolved	Cases Outstanding
Arbitrator 1 (Ruled for Def.)	1	1	0
Arbitrator 2 (Ruled for Plf.)	13	6	7
Arbitrator 3 (Ruled for Plf.)	37	6	31
Arbitrator 4	22	1	21
Arbitrator 5	1	0	1
Arbitrator 6	1	0	1
Arbitrator 7	1	0	1
Unfiled/Unassigned			94
TOTAL		14	156

The second global mediation covered 156 Plaintiffs, each of whom returned a consent form to Plaintiffs' Counsel. Many had filed arbitration demands but others had not yet done so. (Various tolling agreements throughout the litigation obviated the need

for Plaintiffs to file their arbitration demands immediately.) The chart below outlines the number of Plaintiffs per arbitrator.

Defendant's exposure included not only damages or settlement payments to Plaintiffs, but also JAMS fees and costs of defense. Defendant's exposure was significant.

a. JAMS Fees

JAMS fees for each individual case were substantial. Defendant was first responsible for an \$800 filing fee and a \$5,000 retainer for each case. Plaintiffs had filed 106 arbitration demands at the time of mediation, meaning Defendant had paid (or owed) over \$626,000 to JAMS just in initial filing costs. If mediation had failed and the remaining Plaintiffs had all filed their claims, Defendant would have owed JAMS another \$226,200 in initial filing fees.

The initial JAMS filing fees were substantial. But the JAMS fees increase significantly 30 days before each hearing, when they become nonrefundable. For a two day hearing, Defendant must pay two daily arbitrator fees (ranging from \$5,000-\$6,500 per day) and two daily case management fees (\$800 per day), on top of the initial \$800 filing fee and \$5,000 deposit. JAMS credits the \$5,000 deposit to the arbitrator's research and writing time.

Assuming the arbitrator devotes two days for preparation, research, reviewing the record, and writing an award, the cost for a single two-day arbitration ranges from \$22,000 to \$28,000. This does not include any time spent on a motion for fees and costs. Thus, total JAMS fees for arbitrating all 156 remaining cases would have been \$3,820,800.

JAMS fees might have gone down the longer the cases were litigated. For example, the parties might have limited later hearings in front of repeat arbitrators to one day. Likewise, arbitrators might spend less time researching and writing in subsequent hearings. However, JAMS costs would be substantial even with these costs savings. Assuming only five additional two day hearings, with the rest of the hearings taking one day of hearing time and one day of arbitrator prep, the JAMS fees would be a minimum of \$1,999,000.

b. Defense Counsel Fees and Costs

While Defendant might have been able to defend subsequent arbitration hearings cheaply, it could not do so for free. Each hearing involved a claimant deposition, a defense witness deposition, witness preparation, document production, document review, briefing and/or argument preparation, and general hearing preparation. Defendant must also pay for transcripts and other costs.

Using conservative hours and rate estimates⁹³, Plaintiffs estimated that Defendant might be able to defend the remaining cases for approximately \$43,400 apiece. Over an additional 156 cases, that amounts to \$6,770,400 in defense fees and costs. For the sake of argument, and to put the most conservative spin possible on these numbers, one might assume that Defendant could cut defense costs in half through efficiency measures. Even if it only spent \$21,700 to defend each arbitration, however, Defendant would still pay over \$3,385,200 in defense fees and costs to arbitrate the remaining cases.

c. Payments to Claimants and Claimants' Counsel

The first four awards averaged approximately \$100,000: \$27,000 in damages and almost \$73,000 in fees and costs. For various reasons too detailed to include here, Plaintiffs believed that \$27,000 in damages per Plaintiff was a *very* conservative projection for future hearings. By improving presentation of documentary evidence and witness testimony, future Plaintiffs were likely to be significantly more successful than the first four.

Importantly, the \$27,000 average award was *free and clear* of attorneys' fees and costs. Even assuming Plaintiffs' Counsel continued to streamline its prosecution, thus incurring only the \$43,400 of fees and costs estimated for Defense Counsel, each loss would still cost Defendant over \$70,000 in payments to Claimants and Claimants' Counsel.

d. Defendant's Exposure

When one tallies the JAMS fees, defense counsel fees and costs, and payments to Plaintiffs and Plaintiffs' Counsel, Defendant's exposure was staggering. The chart below uses the following variables:

- Single day hearing and one day of Arbitrator prep, research, review, and writing (with only five more two day hearings)
- \$21,700 in defense fees and costs in each case
- \$27,000 per Plaintiff for each Plaintiff victory
- \$43,400 in Plaintiffs' fees and costs for each Plaintiff victory
- \$5,000 in costs reimbursed to Defendant for each Defendant victory

16

⁹³ Plaintiffs estimated a rate \$600/hour, although in 2011, Defense Counsel's cheapest partner billed at \$540/hour, and the average partner rate was \$646/hour. The vast majority of the work in the litigation, including every deposition and every hearing, was performed by partners.

COSTS OF DEFENSE: 1 Day Hearing, 1 Add'l Day				
DEFENDANT'S COST TO LOSE ALL REMAINING CASES	\$16,366,			
DEFENDANT'S COST TO WIN 50% OF REMAINING CASES	\$10,485,			
DEFENDANT'S COST TO WIN 75% OF REMAINING CASES	\$7,544,8			
DEFENDANT'S COST TO WIN 90% OF REMAINING CASES	\$5,780,4			

Of course, these numbers did not reflect reality – they ignore that Arbitrator 2 and Arbitrator 3 already ruled on the exemption defense based on Defendant's corporate testimony, and that there were multiple cases pending before each of these arbitrators. Therefore, Defendant's best case scenario was to win *every single case* not assigned to Arbitrator 2 or Arbitrator 3, *as well as every single case* which has not yet been assigned to an arbitrator. That highly unlikely turn of events would still cost Defendant mightily:

DEFENDANT'S	COST	TO	WIN	EVERY	CASE	
ASSIGNED TO ARBITRATOR 1 OR ARBITRATOR 2					\$7,589,400	

Importantly, these calculations do not include a dollar value for the unproductive supervisor time required for each hearing. To bring a case to hearing, Defendant had to produce, at the very least, a supervisor for the hearing and witnesses regarding job duties. If Defendant actually litigated 156 future arbitrations, it would essentially employ a manager for a year to do nothing but attend hearings.

4. Arbitration Scenario Conclusion

The litigation recounted above settled after five arbitration hearings and the expenditure of significant resources by Plaintiffs and Defendant. Although the parties were able to settle the litigation at a second global mediation, there is no guarantee of resolution at any point in the case. Defendant was contractually bound to litigate each individual arbitration hearing to resolution. The costs of defense exposure was real, and it was significant.

At the end of the day, most plaintiffs' counsel will prefer class or collective litigation over individual arbitrations. However, the right to arbitrate – and the right to arbitrate individually – arises from contract. Accordingly employees who are subject to arbitration agreements with class action waivers may choose to arbitrate individually, in order to impose greater litigation costs on the defendant in hopes of higher individual awards. Employers considering an arbitration program must consider the worst case scenario: mass individual arbitrations leading to stifling costs of defense.

Annotated Bibliography

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Seymour M. Hersh, My Lai 4: A Report on the Massacre and its Aftermath. New York: Random House, 1970. xii, 210 pp.

Seymour M. Hersh, "My Lai 4: A Report on the Massacre and its Aftermath." A set of excerpts from the above book, published in *Harper's* Magazine, May 1970, pp. 53-84. The text has been placed on-line in the <u>Virtual Vietnam Archive</u> of the Vietnam Project, at Texas Tech University.

Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident. Report and supporting documents from a U.S. Army inquiry headed by General William R. Peers. 4 vols. All four volumes have been published on microfilm; see The Peers Inquiry of the Massacre at My Lai. Large portions are also being placed online by the Library of Congress:

<u>Volume I, The Report of the Investigation</u>. Dated 14 March 1970, but actually declassified and published Washington, D.C.: U.S. Government Printing Office, 1974. The full text of the official report of the U.S. Army inquiry headed by General William R. Peers. (See also above under Goldstein, and below under Linder.)

<u>Volume II, Testimony</u>. The volume is divided into 33 books, of which 32 had been placed online at this site the last time I checked. The last one should be scanned and added to the site soon.

<u>Volume III, Exhibits</u>. The exhibits include crucial documents, such as directives on rules of engagement, but also maps, and many photographs.

Volume IV, CID Statements [not online]

Richard Lester, ed., <u>A Guide to the Microfilm Edition of The Peers Inquiry of the Massacre at My Lai</u>. Bethesda, MD: University Publications of America (CIS), 1997. xix, 36 pp. A general introduction, followed by a very detailed listing of the contents of the twelve reels of the microfilm set.

Captain Jordan J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility." *Military Law Review*, Vol. 57 (Summer 1972), pp. 99-187.

Professor Doug Linder, of the University of Missouri-Kansas City Law School, has created a web page <u>The My Lai Courts-Martial</u>, 1970, that has a large quantity of documentary material, an interpretive essay, and some other information. This site includes:

<u>The Peers Report</u>. This is a substantial portion of the official report of the investiation of the massacre conducted by General William Peers.

DOCUMENTS RELATING TO THE COURT MARTIAL OF WILLIAM L. CALLEY.

Includes a fairly long excerpt from Calley's testimony, and briefer excerpts from the testimony of some other witnesses.

DOCUMENTS RELATING TO THE COURT MARTIAL OF ERNEST L. MEDINA.

Did not include actual transcripts of testimonyn

UNITED STATES, Appellee v WILLIAM L. CALLEY, JR., First Lieutenant, U.S. Army, Appellant

No. 26,875

United States Court of Military Appeals

22 U.S.C.M.A. 534

December 21, 1973

QUINN, Judge; DUNCAN, Judge (concurring in the result); DARDEN, Chief Judge (dissenting).

QUINN, Judge:

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of May Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments.

We consider first whether the public attention given the charges was so pernicious as to prevent a fair trial for the accused. At the trial, defense counsel moved to dismiss all the charges on the ground that the pretrial publicity made it impossible for the Government to accord the accused a fair trial. The motion was denied. It is contended that the ruling was wrong.

The defense asserts, and the Government concedes, that the pretrial publicity was massive. The defense perceives the publicity as virtulent and vicious. At trial, it submitted a vast array of newspaper stories, copies of national news magazines, transcripts of television interviews, and editorial comment. Counsel also referred to comments by the President in which he alluded to the deaths as a "massacre" and to similar remarks by the Secretary of State, the Secretary of Defense, the Secretary of the Army, and various members of Congress. Before us, defense counsel contend that the decisions of the United States Supreme Court in Marshall v United States, 360 US 310 (1959), Irvin v Dowd, 366 US 717 (1961), and Sheppard v Maxwell, 384 US 333 (1966) require reversal of this conviction. In our opinion, neither the cited cases, nor others dealing with pretrial publicity and its effect upon an accused's constitutional right to a fair trial, mandate that result.

Under our constitutional system of government and individual rights, the exercise of a constitutional right by one person can affect the constitutional right of another. Thus, the First Amendment guarantees to the public and the news media the right to comment on and discuss impending or pending criminal prosecutions. The content of the comments can pose a danger to the right of an accused to the fair trial assured by the Due Process clause of the Fifth Amendment. The accommodation of such competing rights has been, and will continue to be, a challenge to the courts. As we construe the Supreme Court's decisions in this area, the trier of the facts, and more particularly, a juror, is not disqualified just because he has been exposed to pretrial publicity or even has formulated an opinion as to the guilt or innocence of an accused on the basis of his exposure. "[I]f the juror can lay aside his impression or opinion and render a verdict based on the

evidence presented in court," he is qualified to serve. <u>Irvin v Dowd, supra at 723.</u> The difficult is that sometimes the impact of the quantity and character of pretrial publicity is so patently profound that the juror's personal belief in his impartiality is not sufficient to overcome the likelihood of bias, as assessed by the court. <u>Id. at 728;</u> see also <u>United States v Deain, 5 USCMA 44, 17 CMR 44 (1954).</u> Our task, therefore, is not merely to ascertain that there was widespread publicity adverse to the accused, but to judge whether it was of a kind that inevitably had to influence the court members against the accused, irrespective of their good-faith disclaimers that they could, and would, determine his guilt from the evidence presented to them in open court, fairly and impartially.

We have reviewed the material submitted to support the defense argument on the issue. In contrast to the publicity in some of the cases cited, most of the matter is factual and impersonal in the attribution of guilt. Many accounts note that the accused had not been tried and the question of his culpability remained undetermined by the standard of American law. A number of editorials appear to regard the tragedy as another reason to deplore or oppose our participation in the war in Vietnam. A considerable amount of the material is favorable to Lieutenant Calley; some stories were largely expressions of sympathy.

First official government statements were to the effect that a full investigation would be conducted to determine whether the killings took place and, if so, to establish the identity of those responsible. Later statements described what occurred at My Lai as a massacre and promised that those who perpetrated it would be brought to justice. By the time of the trial few persons in the United States who read, watched or listened to the daily news would not have been convinced that many Vietnamese civilians, including women and children, had been killed during the My Lai operation. It is by no means certain, however, that the conviction that people had died included a judgment that Lieutenant Calley was criminally responsible for those deaths. Our attention has not been called to any official statement or report that demanded Lieutenant Calley's conviction as the guilty party.

Unlike the situation in the *Sheppard* case, neither the trial judge nor government counsel ignored the potentially adverse effect of the extensive publicity. In pretrial proceedings, the prosecution labored jointly with the defense to minimize the effects of the publicity. The military judge issued special orders to prospective witnesses to curb public discussion of the case and to insulate them from the influence of possible newspaper, magazine, radio and television reports of the case. At trial, the judge was exceedingly liberal in the scope of the voir dire of the court members and in bases for challenge for cause, but defense counsel challenged only two members because of exposure to the pretrial publicity.

We have carefully examined the extensive voir dire of the court members in the light of the pretrial materials submitted to us and we are satisfied that none of the court members had formed unalterable opinions about Lieutenant Calley's guilt from the publicity to which they had been exposed and that the total impact of that publicity does not oppose the individual declaration by each member retained on the court that he could, fairly and impartially, decide whether Lieutenant Calley was guilty of any crime upon the evidence presented in open court. Irvin v Dowd, supra;; Reynolds v United States, 98 US 145, 146 (1879). We conclude that this assignment of error has no merit.

In his second assignment of error the accused contends that the evidence is insufficient to establish his guilt beyond a reasonable doubt. Summarized, the pertinent evidence is as follows:

Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. In that role it would assault and neutralize May Lai 4, 5, and 6 and then mass for an assault on My Lai, 1. Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his tropps that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense." However, Lieutenant Calley testified that Captain Medina informed the tropps they were to kill every living thing -- men, women, children, and animals -- and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. This platoon formed a defense perimeter until the remainder of the force was landed. The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mothers' arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the platoon. On being told that a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told him, "'You know what to do,'" and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed. Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several

soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, "'We got another job to do, Meadlo,'" and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With his radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice or *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation.

In assessing the sufficiency of the evidence to support findings of guilty, we cannot reevaluate the credibility of the witnesses or resolve conflicts in their testimony and thus decide anew whether the accused's guilt was established beyond a reasonable doubt. Our function is more limited; it is to determine whether the record contains enough evidence for the triers of the facts to find beyond a reasonable doubt each element of the offenses involved. United States v Papenheim, 19 USCMA 203, 41 CMR 203 (1970); United States v Wilson, 13 USCMA 670, 33 CMR 202 (1963).

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, at 788-91.

While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms . . . is murder."

Digest of Opinions of the Judge Advocates General of the Army, 1912, at 1074-75 n. 3.

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release

those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us.

At trial, Calley's principal defense was that he acted in execution of Captain Medina's order to kill everyone in My Lai 4. Appellate defense counsel urge this defense as the most important factor in assessment of the legal sufficiency of the evidence. The argument, however, is inapplicable to whether the evidence is *legally* sufficient. Captain Medina denied that he issued any such order, either during the previous day's briefing or on the date the killings were carried out. Resolution of the conflict between his testimony and that of the accused was for the triers of the facts. <u>United States v Guerra, 13 USCMA 463, 32 CMR 463 (1963)</u>. The general findings of guilty, with exceptions as to the number of persons killed, does not indicate whether the court members found that Captain Medina did not issue the alleged order to kill, or whether, if he did, the court members believed that the accused knew the order was illegal. For the purpose of the legal sufficiency of the evidence, the record supports the findings of guilty.

In the third assignment of error, appellate defense counsel assert gross deficiencies in the military judge's instructions to the court members. Only two assertions merit discussion. One contention is that the judge should have, but did not, advise the court members of the necessity to find the existence of "malice aforethought" in connection with the murder charges; the second allegation is that the defense of compliance with superior orders was not properly submitted to the court members.

The existence *vel non* of malice, say appellate defense counsel, is the factor that distinguishes murder from manslaughter. See <u>United States v Judd, 10 USCMA 113, 27 CMR 187 (1959)</u>. They argue that malice is an indispensable element of murder and must be the subject of a specific instruction. In support, they rely upon language in our opinion in United States v Roman, 1 USCMA 244, 2 CMR 150 (1952).

Roman involved a conviction of murder under Article of War 92, which provided for punishment of any person subject to military law "found guilty of murder." As murder was not further defined in the Article, it was necessary to refer to the common law element of malice in the instructions to the court members in order to distinguish murder from manslaughter. United States v Roman, supra; cf. United States v Judd, supra. In enactment of the Uniform Code of Military Justice, Congress eliminated malice as an element of murder by codifying the common circumstances under which that state of mind was deemed to be present. Hearings on HR 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess. 1246-1248 (1949); HR Rep No. 491, 81st Cong, 1st Sess 3 (1949). One of the stated purposes of the Code was the "listing and definition of offenses, redrafted and rephrased in modern legislative language." S Rep No 486, 81st Cong, 1st Sess 2 (1949). That purpose was accomplished by defining murder as the unlawful killing of a human being, without justification or excuse. Article 118, Uniform Code of Military Justice, 10 USC § 918. Article 118 also provides that murder is committed if the person, intending to kill or inflict grievous bodily harm, was engaged in an inherently dangerous act, or was engaged in the perpetration or attempted perpetration of certain felonies. In each of these instances before enactment of the Uniform Code, malice was deemed to exist and the homicide was murder. The Code language made it unnecessary that the court members be instructed in the earlier terminology of "malice aforethought." Now, the conditions and states of mind that must be the subject of instructions have been declared by Congress; they do not require reference to malice itself. Cf. United States v Craig, 2 USCMA 650, 10 CMR 148 (1953).

The trial judge delineated the elements of premeditated murder for the court members in accordance with the statutory language. He instructed them that to convict Lieutenant Calley, they must be convinced beyond a reasonable doubt that the victims were dead; that their respective deaths resulted from specified acts of the accused; that the killings were unlawful; and that Calley acted with a premediated design to kill. The judge defined accurately the meaning of an unlawful killing and the meaning of a "premediated design to kill." These instructions comported fully with requirements of existing law for the offense of premeditated murder, and neither statute nor judicial precedent requires that reference also be made to the pre-Code concept of malice.

We turn to the contention that the judge erred in his submission of the defense of superior orders to the court. After fairly summarizing the evidence, the judge gave the following instructions pertinent to the issue:

The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killings justifiable in this case. The law attempts to project whose persons not actually engaged in warefare, however; and limits the circumstances under which their lives may be taken.

Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views, or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established procedures, by competent authority sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law. Further, it's clear under the evidence presented in this case, that hostile acts or support of the enemy North Vietnamese or Viet Cong forces by inhabitants of My Lai (4) at some time prior to 16 March 1968, would not justify the summary execution of all or a part of the occupants of My Lai (4) on 16 March, nor would hostile acts committed that day, if, following the hostility, the beligerents surrendered or were captured by our forces. I therefore instruct you, as a matter of law, that if unresisting human beings were killed to My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order.

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

. . . In determining what orders, if any, Lieutenant Calley acted under, if you find him to have acted, you should consider all of the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in

substance and effect to kill unresisting occupants of My Lai (4), you must determine whether Lieutenant Calley actually knew those orders to be unlawful.

. . . In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including basic training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful. If you find beyond a reasonable doubt, on the basis of all the evidence, that *Lieutenant Calley actually knew* the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. You deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

Think back to the events of 15 and 16 March 1968. . . . Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lieutenant Calley to have committed. Unless you are satisfied from the evidence, beyond a reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lieutenant Calley for committing acts done in accordance with the order. (Emphasis added.)

Appellate defense counsel contend that these instructions are prejudicially erroneous in that they require the court members to determine that Lieutenant Calley knew that an order to kill human beings in the circumstances under which he killed was illegal by the standard of whether "a man of ordinary sense and understanding" would know the order was illegal. They urge us to adopt as the governing test whether the order is so palpably or manifestly illegal that a person of "the commonest understanding" would be aware of its illegality. They maintain the standard stated by the judge is too strict and unjust; that it confronts members of the armed forces who are not persons of ordinary sense and understanding with the dilemma of choosing between the penalty of death for disobedience of an order in time of war on the one hand and the equally serious punishment for obedience on the other. Some thoughtful commentators on military law have presented much the same argument. n1

n1 In the words of one author: "If the standard of reasonableness continues to be applied, we run the unacceptable risk of applying serious punishment to one whose only crime is the slowness of his wit or his stupidity. The soldier, who honestly believes that he must obey an order to kill and is punished for it, is convicted not of murder but of simple negligence." Finkelstein, Duty to Obey as a Defense, March 9, 1970 (unpublished essay, Army War College). See also L. Norene, Obedience to Orders as a Defense to a Criminal Act, March 1971 (unpublished thesis presented to The Judge Advocate General's School, U.S. Army).

The "ordinary sense and understanding" standard is set forth in the present Manual for Courts-Martial, United States, 1969 (Rev) and was the standard accepted by this Court in <u>United States v Schultz</u>, 18 USCMA 133, 39 CMR 133 (1969) and <u>United States v Keenan</u>,

18 USCMA 108, 39 CMR 108 (1969). It appeared as early as 1917. Manual for Courts-Martial, U.S. Army, 1917, paragraph 442. Apparently, it originated in a quotation from F. Wharton, Homicide § 485 (3d ed. 1907). Wharton's authority is Riggs v State, 3 Coldwell 85, 91 American Decisions 272, 273 (Tenn 1866), in which the court approved a charge to the jury as follows:

"[I]n its substance being clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order."

Other courts have used other language to define the substance of the defense. <u>Typical is McCall v McDowell</u>, <u>15 F Cas 1235</u>, <u>1240 (CCD Cal 1867)</u>, in which the court said:

But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . . The first duty of a solider is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and solider were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Colonel William Winthrop, the leading American commentator on military law, notes:

But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face*, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate defense counsel acknowledge that rule of law and its continued viability, but they say that Lieutenant Calley should not be held accountable for the men, women and children he killed because the court-martial could have found that he was a person of "commonest understanding" and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. The United States Supreme Court has pointed out that "[t]he rule that 'ignorance of the law will not excuse' [a positive act that constitutes a crime] . . . is deep in our law." Lambert v California, 355 US 225, 228 (1957). An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is, in my opinion, so palpably illegal that whatever conceptional difference there may be between a person of "commonest understanding" and a person of "common understanding," that difference could not have had any "impact on a court of lay members receiving the respective wordings in instructions," as appellate defense counsel contend. In my judgment, there is no possibility of prejudice to Lieutenant Calley in the trial judge's reliance upon the established standard of excuse of criminal conduct, rather than the standard of "commonest understanding" presented by the defense, or by the new variable test postulated in the dissent, which, with the inclusion of such factors for consideration as grade and experience, would appear to exact a higher standard of understanding from Lieutenant Calley than that of the person of ordinary understanding.

In summary, as reflected in the record, the judge was capable and fair, and dedicated to assuring the accused a trial on the merits as provided by law; his instructions on all issues were comprehensive and correct. Lieutenant Calley was given every consideration to which he was entitled, and perhaps more. We are impressed with the absence of bias or prejudice on the part of the court members. They were instructed to determine the *truth* according to the law and his they did with due deliberation and full consideration of the evidence. Their findings of guilty represent the truth of the facts as they determined them to be and there is substantial evidence to support those findings. No mistakes of procedure cast doubt upon them.

Consequently, the decision of the Court of Military Review is affirmed.

DUNCAN, Judge (concurring in the result):

My difference of opinion from Judge Quinn's view of the defense of obedience to orders is narrow. The issue of obedience to orders was raised in defense by the evidence. Contrary to Judge Quinn, I do not consider that a presumption arose that the appellant knew he could not kill the people involved. The Government, as I see it, is not entitled to a presumption of what the appellant knew of the illegality of an order. It is a matter for the factfinders under proper instructions.

Paragraph 216, Manual for Courts-Martial, United States, 1969 (Rev), provides for special defenses: excuse because of accident or misadventure; self-defense; entrapment; coercion or duress; physical or financial inability; and obedience to apparently lawful orders. Subparagraph *d* of paragraph 216 is as follows:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

The military judge clearly instructed the members pursuant to this provision of the Manual. The heart of the issue is whether, under the circumstances of this case, he should have abandoned the Manual standard and fashioned another. The defense urges a purely subjective standard; the dissent herein yet another. I suggest that there are important general as well as certain specific considerations which convince me that the standard should not be abandoned. The process of promulgating Manual provisions is

geared to produce requirements for the system only after most serious reflection by knowledgeable and concerned personnel. These persons have full regard for the needs of the armed forces and genuine concern for the plight of one accused. Those who prepared the Manual provision and the President of the United States, the Commander-in-Chief, who approved and made the provision a part of our law, were aware that disobedience to orders is the anathema to an efficient military force. Judge Quinn points out that this Court has established as precedent the applicability of the special defense upon proof adduced pursuant to the Manual standard. These are important general reasons for not aborting a standard that has been long in existence and often used.

It is urged that in using the Manual test of "a man of ordinary sense and understanding" those persons at the lowest end of the scale of intelligence and experience in the services may suffer conviction while those more intelligent and experienced would possess faculties which would cause them to abjure the order with impunity. Such an argument has some attraction but in my view falls short of that which should impel a court to replace that which is provided to us as law.

It appears to me that all tests which measure an accused's conduct by an objective standard -- whether it is the test of "palpable illegality to the commonest understanding" or whether the test establishes a set of profile considerations by which to measure the accused's ability to assess the legality of the order -- are less than perfect, and they have a certain potential for injustice to the member having the slowest wit and quickest obedience. Obviously the higher the standard, the likelihood is that fewer persons will be able to measure up to it. Knowledge of the fact that there are other standards that are arguably more fair does not convince me that the standard used herein is unfair, on its face, or as applied to Lieutenant Calley.

Perhaps a new standard, such as the dissent suggests, has merit; however, I would leave that for the legislative authority or for the cause where the record demonstrates harm from the instructions given. I perceive none in this case. The general verdict in this case implies that the jury believed a man of ordinary sense and understanding would have known the order in question to be illegal. n4 Even conceding arguendo that this issue should have been resolved under instructions requring a finding that almost every member of the armed forces would have immediately recognized that the order was unlawful, as well as a finding that as a consequence of his age, grade, intelligence, experience, and training, Lieutenant Calley should have recognized the order's illegality, I do not believe the result in this case would have been different.

n4 This assumes that the jury found that the order the appellant contends he obeyed was given.

I believe the trial judge to have been correct in his denial of the motion to dismiss the charges for the reason that pretrial publicity made it impossible for the Government to accord the accused a fair trial.

Both the principal opinion and the analysis of the Court of Military Review state that in the enactment of the Uniform Code of Military Justice Congress has, in effect, codified the requirement of malice aforethought by defining murder as the unlawful killing of a human being, without justification or excuse. Article 118 UCMJ, 10 USC § 918. It should also be noted that in the case at bar the members of the panel were charged that a finding that the homicides were without justification or excuse was necessary to convict for premeditated murder. Furthermore, I cannot say that the evidence lacks sufficiency to convict in respect to any of the charges.

DARDEN, Chief Judge (dissenting):

Although the charge the military judge gave on the defense of superior orders was not inconsistent with the Manual treatment of this subject, I believe the Manual provision is too strict in a combat environment. Among other things, this standard permits serious punishment of persons whose training and attitude incline them either to be enthusiastic about compliance with orders or not to challenge the authority of their superiors. The standard also permits conviction of members who are not persons of ordinary sense and understanding.

The principal opinion has accurately tracted the history of the current standard. Since this Manual provision is one of substantive law rather than one relating to procedure or modes of proof, the Manual rule is not binding on this Court, which has the responsibility for determining the principles that govern justification in the law of homicide. <u>United States v Smith, 13 USCMA 105, 32 CMR 105 (1962)</u>. My impression is that the weight of authority, including the commentators whose articles are mentioned in the principal opinion, supports a more liberal approach to the defense of superior orders. Under this approach, superior orders should constitute a defense except "in a plain case of excess of authority, where at first blush it is apparent and plapable to the commonest understanding that the order is illegal."

While this test is phrased in language that now seems "somewhat archaic and ungrammatical," the test recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by "those persons at the lowest end of the scale of intelligence and experience in the services." This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part.

It is true that the standard of a "reasonable man" is used in other areas of military criminal law, *e.g.*, in connection with the provocation necessary to reduce murder to voluntary manslaughter; what constitutes an honest and reasonable mistake; and, indirectly, in connection with involuntary manslaughter. But in none of these instances do we have the countervailing consideration of avoiding the subversion of obedience to discipline in combat by encouraging a member to weigh the legality of an order or whether the superior had the authority to issue it. See <u>Martin v Mott, 25 US 19, 30 (1827)</u>.

The preservation of human life is, of course, or surpassing importance. To accomplish such preservation, members of the armed forces must be held to standards of conduct that will permit punishment of atrocities and enable this nation to follow civilized concepts of warfare. In defending the current standard, the Army Court of Military Review expressed the view that:

Heed must be given not only to the subjective innocence-through-ignorance in the soldier, but to the consequences for his victims. Also, barbarism tends to invite reprisal to the detriment of our own force or disrepute which interferes with the achievement of war aims, even though the barbaric acts were preceded by orders for their commission. Casting the defense of obedience to orders solely in subjective terms of *mens rea* would operate practically to obrogate those objective restraints which are essential to functioning rules of war. United States v Calley, 46 CMR 1131, 1184 (ACMR 1973).

I do not disagree with these comments. But while humanitarian considerations compel us to consider the impact of actions by members of our armed forces on citizens of other

nations, I am also convinced that the phrasing of the defense of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty.

The test of palpable illegality to the commonest understanding properly balances punishment for the obedience of an obviously illegal order against protection to an accused for following his elementary duty of obeying his superiors. Such a test reinforces the need for obedience as an essential element of military discipline by broadly protecting the soldier who has been effectively trained to look to his superiors for direction. It also promotes fairness by permitting the military jury to consider the particular accused's intelligence, grade, training, and other elements directly related to the issue of whether he should have known an order was illegal. Finally, that test imputes such knowledge to an accused not as a result of simple negligence but on the much stronger circumstantial concept that almost anyone in the armed forces would have immediately recognized that the order was palpably illegal.

I would adopt this standard as the correct instruction for the jury when the defense of superior orders is in issue. Because the original case language is archaic and somewhat ungrammatical, I would rephrase it to require that the military jury be instructed that, despite his asserted defense of superior orders, an accused may be held criminally accountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognized that the order was unlawful, and (2) that the accused should have recognized the order's illegality as a consequence of his age, grade, intelligence, experience, and training.

The temptation is to say that even under this new formulation Lieutenant Calley would have been found guilty. No matter how such a position is phrased, essentially it means that the appellate judge rather than the military jury is functioning as a fact finder. My reaction to this has been expressed by the former chief justice of the California Supreme Court in these words:

If an erroneous instruction or an erroneous failure to give an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict.

The same authority also expressed this thought:

The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal of saving time and money. Unfortunately it does not measure up to accepted standards of fairness.

In the instant case, Lietuenant Calley's testimony placed the defense of superior orders in issue, even though he conceded that he knew prisoners were normally to be treated with respect and that the unit's normal practice was to interrogate Vietnamese villagers, release those who could account for themselves, and evacuate those suspected of being a part of the enemy forces. Although crucial parts of his testimony were sharply contested, according to Lieutenant Calley, (1) he had received a briefing before the assault in which he was instructed that every living thing in the village was to be killed, including women and children; (2) he was informed that speed was important in securing the village and moving forward; (3) he was ordered that under no circumstances were any Vietnamese to be allowed to stay behind the lines of his forces; (4) the residents of the village who were taken into custody were hindering the progress of his platoon in

taking up the position it was to occupy; and (5) when he informed Captain Medina of this hindrance, he was ordered to kill the villagers and to move his platoon to a proper position.

In addition to the briefing, Lieutenant Calley's experience in the Pinkville area caused him to know that, in the past, when villagers had been left behind his unit, the unit had immediately received sniper fire from the rear as it pressed forward. Faulty intelligence apparently led him also to believe that those persons in the village were not innocent civilians but were either enemies or enemy sympathizers. For a participant in the My Lai operation, the circumstances that could have obtained there may have caused the illegality of alleged orders to kill civilians to be much less clear than they are in a hindsight review. n8

n8 A New York Times Book Reviewer has noted, "One cannot locate the exact moment in his [Calley's] narrative when one can be absolutely certain that one would have acted differently given the same circumstances." See Paris ed., New York Herald Tribune, September 13, 1971.

Since the defense of superior orders was not submitted to the military jury under what I consider to be the proper standard, I would grant Lieutenant Calley a rehearing.

I concur in Judge Quinn's opinion on the other granted issues.

Activism Through Advocacy: How Lawyers Can Fight for the Public Good

2018 AABANY Fall Conference

LETTER TO A LAW STUDENT INTERESTED IN SOCIAL JUSTICE

WILLIAM P. QUIGLEY*

Dear Bridgette:

I am delighted to learn of your commitment to social justice law. Despite many decades practicing some form or other of social justice advocacy, I too still have much to learn. I hope some of these thoughts will help you; it helped me to write them down.

Let Me Start With a True Story. After Hurricane Katrina, hundreds of law students volunteered to work in the Gulf Coast region over the winter holidays. Dozens of students helped out with a case in the lower ninth ward challenging the City of New Orleans' unilateral demolition of hundreds of damaged homes without notice to the owner or an opportunity to be heard. Most of these homes had been literally swept off their foundations by the brutal onrush of huge walls of tons of water when the levees broke. Many homes were upside down, some were sitting in the middle of the street blocks away from where they started, and some were on top of cars or even other homes. Regular methods of property ownership checks were insufficient since the houses were often scattered far from the lots and street addresses where they originally sat. Since all of the homeowners were still displaced far outside of the city and still prohibited by martial law from living in their houses, they had no way of knowing that the authorities planned to demolish their homes before they

^{*} Janet Mary Riley Professor of Law and Director of the Law Clinic and the Gillis Long Poverty Law Center at Loyola University New Orleans College of Law. For further reading on this topic, see William P. Quigley, Revolutionary Lawyering: Addressing the Root Causes of Poverty & Wealth, 20 Wash. U. J.L. & Pol'y 101, 125 (2006).

could get back to either fix them up or even remove personal effects. In teams, students went to each house scheduled to be demolished to see if they could figure out who the owners were. Then, the teams tried to contact the displaced owners to see what they wanted us to do about the impending demolition.

At the end of a week of round-the-clock work trying to save people's homes, a group of law students met together in one room of a neighborhood homeless center to reflect on what they had experienced. Sitting on the floor, each told what they had been engaged in and what they learned. As they went around the room, a number of students started crying.

One young woman wept as she told of her feelings when she discovered a plaster Madonna in the backyard of one of the severely damaged homes — a Madonna just like the one in her mother's backyard on the West Coast. At that moment, she realized her profound connection with the family whom she had never met. This was not just a case, she realized, it was a life — a life connected to her own.

Another student told of finding a small, hand-stitched pillow amid the ruins of a family home. The pillow was stitched with the words "Blessed Are the Meek." It told a lot about the people who lived in that small home. Not the usual sentiment celebrated in law school.

The last law student to speak had just returned from working in the destroyed neighborhood. He had been picking through a home trying to find evidence that might lead to the discovery of who owned the property. He also was on the verge of tears. The experience was moving. The student felt that it was a privilege to be able to assist people in such great need. It reminded him, he paused for a second, of why he went to law school. He went to law school to help people and to do his part to change the world. "You know," he said quietly, "the first thing I lost in law school was the reason that I came. This will help me get back on track."

Social Justice Lawyering Is Counter-Cultural in Law School and in the Legal Profession

"The first thing I lost in law school was the reason that I came." What a simple and powerful indictment of legal education and of our legal profession. It is also a caution to those of us who want to practice social justice lawyering.

Many come to law school because they want in some way to help the elderly, children, people with disabilities, undernourished people around the world, victims of genocide, or victims of racism, economic injustice, religious persecution or gender discrimination.

Unfortunately, the experience of law school and the legal profession often dilute the commitment to social justice lawyering.

The repeated emphasis in law school on the subtleties of substantive law and many layers of procedure, usually discussed in the context of examples from business and traditional litigation, can grind down the idealism with which students first arrived. In fact, research shows that two-thirds of the students who enter law school with intentions of seeking a government or public-interest job do not end up employed in that work.¹

¹ Christa McGill, Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear, 31 Law and Social Inquiry 677, 698-701 (2006). McGill makes some very painful points about law schools and government and public interest careers.

^{... [}W]omen and minorities (African Americans and Hispanics) were much more likely to go into public service jobs after graduation. Students who stated at the start of their second year that they placed a high value on helping people through their work were also significantly more likely to enter GPI [government or public interest] careers as were people who rated the ability to bring about social change as very important. Students who began law school with the desire to enter GPI were significantly more likely to do so. And students who worked in GPI jobs in either summer during law school were much more likely to enter public service careers than those who held other summer jobs. School type also had some significant effects. Students who attended schools in the small, ra-

It pains me to say it, but justice is a counter-cultural value in our legal profession. Because of that, you cannot be afraid to be different than others in law school or the profession – for unless you are, you cannot be a social justice lawyer.

Those who practice social justice law are essentially swimming upstream while others are on their way down. Unless you are serious about your direction and the choices you make and the need for assistance, teamwork and renewal, you will likely grow tired and start floating along and end up going downstream with the rest. We all grow tired at points and lose our direction. The goal is to try to structure our lives and relationships in such a way that we can recognize when we get lost and be ready to try to reorient ourselves and start over.

There are many legal highways available to people whose goal is to make a lot of money as a lawyer – that is a very mainstream, traditional goal and many have gone before to show the way and carefully tend the roads.

cially mixed cluster (SMALL MINORITY) were significantly more likely than others to enter GPI jobs. Students who attended elite schools, the most expensive schools, were least likely to enter public service careers.

... Students from REGIONAL PUBLIC and SMALL MI-NORITY schools were significantly more likely (2 and 3.4 times) than students from ELITE schools to enter GPI jobs, regardless of educational debt, demographic characteristics, and grades. As a group, African Americans and Hispanic were more likely to enter GPI than their white and Asian counterparts, irrespective of debt and school type. Better grades decreased the likelihood that a student would enter government or public interest work.

... All things being equal, students who worked in GPI jobs during the summer following their second year of law school were five times more likely than those who did not to take a GPI job following graduation. Even a first summer spent in GPI had a direct, positive effect; students who spent their first summer in GPI were twice as likely as others to enter GPI upon graduation regardless of their employment in the second summer and all other variables considered.

For social justice lawyers, the path is more challenging. You have to leave the highway sending you on towards the traditional legal profession. You have to step away from most of the crowd and create a new path – one that will allow you to hold onto your dreams and hopes for being a lawyer of social justice.

Your path has different markers than others. The traditional law school and professional marks of success are not good indicators for social justice advocates. Certainly, you hope for yourself what you hope for others – a good family, a home, good schools, a healthy life and enough to pay off those damn loans. Those are all achievable as a social justice lawyer, but they demand that you be more creative, flexible and patient than those for whom money is the main yardstick.

Our profession certainly pays lip service to justice, and because we are lawyers this is often eloquent lip service, but that is the extent of it. At orientations, graduations, law days, swearingin days and in some professional classes, you hear about justice being the core and foundation of this occupation. But everyone knows that justice work is not the essence of the legal profession. Our professional essence is money, and the overwhelming majority of legal work consists of facilitating the transfer of money or resources from one group to another. A shamefully large part of our profession in fact consists of the opposite of justice - actually taking from the poor and giving to the rich or justifying some injustice like torture or tobacco or mass relocation or commercial exploitation of the weak by the strong. The actual message from law school and on throughout the entire legal career is that justice work, if done at all, is done in the margins or after the real legal work is done.

But do not despair! Just because social justice lawyering is counter-cultural does not mean it is nonexistent.

Social Justice Lawyers by the Thousands

There is a rich history of social justice advocacy by lawyers whose lives rise above the limited horizons of the culture of lawyers. We can take inspiration from social justice lawyers like Mohandas Gandhi, Nelson Mandela, Shirin Ebadi, Mary Robinson, Charles Hamilton Houston, Carol Weiss King, Constance Baker Motley, Thurgood Marshall, Arthur Kinoy and Clarence Darrow.² Attorneys Dinoisia Diaz Garcia³ of Honduras and Digna Ochoa⁴ of Mexico were murdered because of their tireless advocacy of human rights issues. Ella Bhatt is one of the founders of an organization that supports the many women of India who are self-employed.⁵ Salih Mahmoud Osman is a human rights lawyer in Sudan, a nation struggling with genocide and other human rights violations.⁶ In addition to those named

² Mohandas Gandhi was a lawyer in South Africa for twenty years. Nelson Mandela was also a South African barrister. Shirin Ebadi is an Iranian lawyer who won the Nobel Peace Prize. Mary Robinson is an Irish lawyer who headed the United Nations Commission on Human Rights. Charles Hamilton Houston was a law professor and pioneer in civil rights litigation. Carol Weiss King was a human rights lawyer in the middle of the 20th century. Constance Baker Motley was a civil rights lawyer and federal judge. Thurgood Marshall was also a civil rights lawyer and Justice of the United States Supreme Court. Arthur Kinoy was a law professor and advocate for civil and human rights. Clarence Darrow was a lawyer celebrated for the Scopes trial but made his name and living as a defender of unions. This information comes from an online subscription-based website. Biography Resource Center. Farmington Hills, Mich.: Thomson Gale (2007), http://galenet.galegroup.com/servlet/BioRC (perform search of individual name and results will be displayed).

³ See Press Release from the Association for a More Just Society (Dec. 4, 2006), available at http://ajshonduras.org/dionisio/press_release.htm (last visited July 13, 2007).

⁴ See Untouchable?, THE ECONOMIST, Nov. 3, 2001, at 46.

⁵ For general information on the work of Ella Bhatt see the account of her work for human rights in her own words. Ella Bhatt, We Are Poor but So Many: The Story of Self-Employed Women in India, 3-6 (2006).

⁶ See "Human Rights Watch Honors Sudanese Activist: Darfur Lawyer Defends Victims of Ethnic Oppression." http://hrw.org/english/docs/2005/10/25/sudan11919.htm (last visited, July 13, 2007).

here, there are thousands of other lawyers working for social justice, mostly unknown to history, but many still living among us.

It is our job to learn the history of social justice lawyering. We must become familiar with these mentors of ours and understand the challenges they faced to become advocates for justice.

We must also be on the lookout for contemporary examples of social justice lawyering. There are many, and they are in every community, even though they may not be held up for professional honors like lawyers for commercial financiers or lawyers for the powerful and famous. But if you look around, you will see people doing individual justice work — the passionate advocate for victims of domestic violence, the dedicated public defender, the volunteer counsel for the victims of eviction, the legal services lawyer working with farm workers or the aging, the modestly-paid counsel to the organization trying to change the laws for a living wage, or affordable housing, or the homeless or public education reforms. These and many more are in every community.

LEARNING ABOUT JUSTICE

Some people come to law school not just to learn about laws that help people but also with a hope that they might learn to use new tools to transform and restructure the world and its law to make our world a more just place.

There is far too little about justice in law school curriculum or in the legal profession. You will have to learn most of this on your own.

One good working definition of "social justice" is the commitment to act with and on behalf of those who are suffering be-

⁷ More examples of social justice lawyers are available at the website for the Reginald Hebert Smith Award. http://nejl.wcl.american.edu/RegSmith.html (last visited Aug. 2, 2007).

cause of social neglect, social decisions or social structures and institutions.8

Working and thinking about how to transform and restructure the world to make it more just is a lifelong pursuit.

Social justice is best described by a passage from a speech Dr. Martin Luther King, Jr. gave on April 4, 1967:

I am convinced that if we are to get on the right side of the world revolution, we as a nation must undergo a radical revolution of values. We must rapidly begin the shift from a "thing-oriented" society to a "person-oriented" society. When machines and computers, profit motives and property rights are considered more important than people, the giant triplets of racism, materialism, and militarism are incapable of being conquered. A true revolution of values will soon cause us to question the fairness and justice of many of our past and present policies.9

BE WILLING TO BE UNCOMFORTABLE

One night, I listened to a group of college students describe how they had spent their break living with poor families in rural Nicaragua. Each student lived with a different family, miles apart from each other, in homes that had no electricity or running water. They ate, slept and worked with their family for a week. I knew these were mostly middle-class, suburban students, so I asked them how they were able to make the transition from their homes in the United States to a week with their

⁸ Social justice has been defined and interpreted in many ways. See, e.g., Jon A. Powell, Lessons from Suffering: How Social Justice Informs Spirituality, 1 U. St. Thomas L.J. 102, 104 (2003).

⁹ Martin Luther King, Jr., A Testament OF Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 240 (1991).

host families. One student said, "First, you have to be willing to be uncomfortable."

I think this is the first step of any real educational or transformative experience – a willingness to go beyond your comfort zone and to risk being uncomfortable.

The revolutionary social justice called for by Dr. King is not for the faint of heart – it calls on the courage of your convictions. It takes guts.

Questioning the fairness and justice of our laws and policies is uncomfortable for most because it makes other people uncomfortable.

Many people are perfectly satisfied with the way things are right now. For them, our nation is the best of all possible nations, and our laws are the best of all possible laws, and therefore, it is not right to challenge those in authority. For them, to question the best of all possible nations and its laws is uncalled for, unpatriotic and even un-American. These same criticisms were leveled at Dr. King and continue to be leveled at every other person who openly questions the fairness and justice of current laws and policies.

So, if you are interested in pursuing a life of social justice, be prepared to be uncomfortable – be prepared to press beyond your comfort zone, be prepared to be misunderstood and criticized. It may seem more comfortable to engage in social diversions than to try to make the world a better place for those who are suffering. But if you are willing to be uncomfortable and you invest some of your time and creativity in work to change the world, you will find it extremely rewarding.

NEVER CONFUSE LAW AND JUSTICE

We must never confuse law and justice. What is legal is often not just. And what is just is often not at all legal.

Volume I, Number I

Fall 2007

Consider what was perfectly legal 100 years ago: children as young as six were employed in dangerous industries. Bosses could pay workers whatever they wanted. If injured on the job – no compensation, you went home and need not return when you recovered. Women and African Americans could not vote. Any business could discriminate against anyone else on the basis of gender, race, age, disability or any other reason. Industrialists grew rich by using police and private mercenaries to break up unions, beat and kill strikers and evict families from their homes.

One hundred years ago, lawyers and judges and legislators worked in a very professional manner enforcing laws that we know now were terribly unjust.

What is the difference between 100 years ago and now? History has not yet judged clearly which laws are terribly unjust.

Social justice calls you to keep your eyes and your heart wide open in order to look at the difference between law and justice. For example, look at the unjust distribution of economic wealth and social and political power. It is mostly legally supported, but is actually the most unjust, gross inequality in our country and in our world. You must examine the root causes and look at the legal system that is propping up these injustices.

CRITIQUE THE LAW

Critique of current law is an essential step in advancing justice. Do not be afraid to seriously criticize an unjust or inadequate set of laws or institutions. People will defend them saying they are much better than before, or they are better than those in other places. Perhaps they will make some other justification. No doubt many of our laws today and many of our institutions represent an advance over what was in place in the past; however, that does not mean that all of our laws and institutions are better than what preceded them, nor does it mean that the justice critique should stop.

Volume 1, Number 1

Fall 2007

Critique alone, however, is insufficient for social justice advocates. While you are engaged in critique, you should also search for new, energizing visions of how the law should and might move forward.

You have some special talents in critiquing the difference between law and justice because of your legal training.

All laws are made by those with power. There are not many renters or low-wage workers in Congress or sitting on the bench. The powerless, by definition, are not involved in the lobbying, drafting, deliberating and compromising that are essential parts of all legislation. Our laws, by and large, are what those with power think should apply to those without power. As a student of law, you have been taught how to analyze issues and how to research.

Social justice insists that you first examine these laws and their impacts not only from the perspective of their legislative histories, but also from the perspective of the elderly, the working poor, the child with a learning disability and the single mom raising kids, who are often the targets of these laws.

So how do you learn what the elderly, the working poor or the single moms think about these laws? It is not in the statute, nor the legislative history, nor the appellate decision. That is exactly the point. If you are interested in real social justice, you must seek out the voices of the people whose voices are not heard in the halls of Congress or in the marbled courtrooms.

Keep your focus on who is suffering and ask why. Listen to the voices of the people rarely heard, and you will understand exactly where injustice flourishes.

Second, look for the collateral beneficiaries. *Qui bono*? Who benefits from each law, and what are their interests? Why do you think that the minimum wage stays stagnant for long periods of time while expenditures on medical assistance soar year after year?

This inquiry is particularly important since the poor and powerless – by definition – rarely have any say in the laws that apply to them.

"Follow the money," they say in police work. That is also good advice in examining legislation. Do not miss the big picture. You probably have a hunch that the rich own the world. Do you know the details of how much they actually own? You are a student of the law, you have learned the tools of investigation — you use these tools to find out. Then ask yourself: if the rich own so much, why are the laws assisting poor, elderly and disabled people, at home and abroad, structured in the way they are?

Third, carefully examine the real history of these laws. 10 Push yourself to learn how these laws came into being. Learning this history will help you understand how change comes about. Social security, for example, is now a huge statutory entitlement program that is subject to a lot of current debate and proposals for reform. But for dozens of decades after this country was founded, there was no national social security at all for older people who could not work. As you look into how social security came into being, who fought for it, how people fought to create it and the number of years it took to pass the law, you will discover some of the stepping stones for change.

As part of your quest to learn the history of law and justice, learn about the heroic personalities involved in the social changes that prompted the changes in legislation. Biographies of people who struggled for social change are often excellent sources of inspiration.

Once you learn about the sheroes and heroes, push beyond these personalities and learn about the social movements that really pushed for revolutionary change. There is a strong tendency for outsiders to anoint one or more people as THE lead-

¹⁰ There are many ways to look at the real history of laws. Start with The Politics of Law: A Progressive Critique (David Kairys, ed., 1998).

ers or mothers or fathers of every social justice struggle. Unfortunately, that suggests that social change occurs only when these one-in-a-million leaders happen to be in the right place at the right time. That is false history. For example, as great as Dr. Martin Luther King, Jr. was, he was not the civil rights movement – he was a part of a very widespread and diverse and often competitive and conflicting set of local, regional, national and even international groups and organizations of people pushing for civil rights.¹¹

So, look for real histories about the social movements behind social change and legislation. See how they came about. You will again discover some of the methods used to bring about revolutionary social justice.

Fourth, look at the unstated implications of race, class and gender in each piece of the law. Also look carefully at the way laws interconnect into structures that limit particular groups of people. Race, gender and economic justice issues are present in every single piece of social legislation. They are usually not stated, but they are there. You must discover them and analyze them in order to be a part of the movements to challenge them.

The critique of law is actually a process of re-education – challenging unstated assumptions about law. This is also a lifelong process. I have been doing this work for more than 30 years and I still regularly make mistakes based on ignorance and lack of understanding. We all have much to learn. Real education is tough work, but it is also quite rewarding.

¹¹ The trilogy of books by Taylor Branch does a great job in detailing the many fronts on which the many people and organizations that comprised the civil rights movement were fighting. See Taylor Branch, Parting the Waters: America in the King Years, 1954-63 (1989); Taylor Branch, Pillar of Fire: America in the King Years, 1963-65 (1998); and Taylor, Branch, At Canaan's Edge: America in the King Years, 1965-1968 (2006).

CRITIQUE THE MYTHS ABOUT LAWYERS AND SOCIAL JUSTICE

There is a lawyer-led law school and legal profession myth that suggests social justice law and the lawyers practicing it are at the cutting edge of social change. I think history demonstrates it is actually most often the opposite – developments in law follow social change rather than lead to it.

Lawyers who invest time and their creativity to help bring about advances in justice will tell you that it is the most satisfying and the most fulfilling work of their legal careers. But they will also tell you that social justice lawyers never work alone – they are always part of a team that includes mostly non-lawyers.

Take civil rights for example. There is no bigger legal, social justice myth than the idea that lawyers, judges and legislators were the engines that transformed our society and undid the wrongs of segregation. Civil rights lawyers and legislators were certainly a very important part of the struggle for civil rights, but they were a small part of a much bigger struggle. Suggesting that lawyers led and shaped the civil rights movement is not accurate history. This in no way diminishes the heroic and critical role that lawyers played and continue to play in civil rights advances, but it does no one a service to misinterpret what is involved in the process of working for social justice.

Law school education, by its reliance on appellate decisions and legislative histories of statutes, understandably overemphasizes the role of the law and lawyers in all legal developments. But you who are interested in participating in the transformation of the world cannot rely on a simplistic overemphasis of the role of the law and lawyers. You must learn the truth.

In fact, the law was then and often is now actually used against those who seek social change. There were far more lawyers, judges and legislators soberly and profitably working to uphold the injustices of segregation than ever challenged it. The same is true of slavery, child labor, union-busting, abuse of the environment, violations of human rights and other injustices. The courts and the legislatures are but a few of the tools used in the struggle for social justice. Organizing people to advocate for themselves is critically important, as is public outreach, public action and public education. Social justice lawyers need not do these actions directly, but the lawyer must be part of a team of people that are engaged in action and advocacy.

Build Relationships with People and Organizations Challenging Injustice: Solidarity and Community

"If you have come to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, then let us struggle together." 12

Social justice advocacy is a team sport. No one does social justice alone. There is nothing more exciting than being a part of a group that is trying to make the world a better place. You realize that participating in the quest for justice and working to change the world is actually what the legal profession should be about. And you realize that in helping change the world, you change yourself.

Solidarity recognizes that this life of advocacy is one of relationships. Not attorney-client relationships, but balanced personal relationships built on mutual respect, mutual support and mutual exchange. Relationships based on solidarity are not ones where one side has the questions and the other the answers. Solidarity means together we search for a more just world, and together we work for a more just world.

Part of solidarity is recognizing the various privileges we bring with us. Malik Rahim, founder of the Common Ground Collec-

¹² This quote is often attributed to Lila Watson an aboriginal activist. However, through telephone interviews conducted by Ricardo Levins Morales with Ms. Watson's husband in 2005, Ms. Watson indicated that the quote was the result of a collective process and thus should be attributed to "Aboriginal activists group, Queensland, 1970s."

tive¹³ in New Orleans, speaks about privilege often with the thousands of volunteers who come to help out with the grassroots repair of our community. In a recent interview with Amy Goodman, Rahim said:

First, you have to understand the unearned privilege you have in this country just by being born in your race or gender or economic situation. You have to learn how you got it. You have to learn how to challenge the systems that maintain that privilege. But while you are with us, we want to train you to use your privilege to help our community.¹⁴

This is the best summary of the challenge of privilege and solidarity in social justice advocacy I have heard recently. This is a lifelong process for all of us. None of us have arrived. We all have much to learn, and we have to make this a part of our ongoing re-education.

So, how do social justice advocates build relationships of solidarity with people and organizations struggling for justice? These relationships are built the old-fashioned way, one person at a time, one organization at a time, with humility.

Humility is critically important in social justice advocacy. By humility, I mean the recognition that I need others in order to live a full life, and I cannot live the life I want to live by myself. By humility, I mean the understanding that even though I have had a lot of formal education, I have an awful lot to learn. By humility, I mean the understanding that every person in this world has inherent human dignity and incredible life exper-

¹³ Common Ground Collective is an organization in New Orleans created after Hurricane Katrina that provides short-term victim relief and long-term rebuilding of hurricane-affected communities. Common Ground Collective, http://www.commonground.relief.org (last visited Aug. 23, 2007).

¹⁴ Democracy Now! is a daily television and radio news program. The interview can be found at http://www.democracynow.org/article.pl?sid=06/08/28/1342226&mode=thread&tid=25 (last visited Aug. 23, 2007).

iences that can help me learn much more about the world and myself.

There is a wise saying, "What you see depends on where you stand." Latin American liberation theologians insist that a preferential option for the poor must be one of the principles involved in the transformation of the world.¹⁵

Our choices in relationships build our community. If we want to be real social justice advocates, we must invest ourselves and develop relationships in the communities in which we want to learn and work. That sounds simple, but it is not. As law students and lawyers, we are continually pulled into professional and social communities of people whose goals are often based on material prosperity, comfort and insulation from the concerns of working and poor people. If we want to be true social justice advocates, we must swim against that stream and develop relationships with other people and groups.

For example, helping preserve public housing may seem controversial or even idiotic to most of the people at a law school function or the bar convention, yet totally understandable at a small church gathering where most people of the congregation are renters.

Seek out people and organizations trying to stand up for justice. Build relationships with them. Work with them. Eat with them. Recreate with them. Walk with them. Learn from them. If you are humble and patient, over time people will embrace you, and you will embrace them, and together you will be on the road to solidarity and community.

REGULARLY REFLECT

In order to do social justice for life, it is important to engage in regular reflection. For physical and mental health, regular re-

¹⁵ Gustavo Gutiérrez, A Theology of Liberation (Orbis Books 1988) (1971).

flection on your life and the quest for justice is absolutely necessary. For some people, this is prayer. For others, it is meditation. For still others, it is yoga or some other method of centering reflection and regeneration.

Most of the people I know who have remained engaged in social justice advocacy over the years have been people who regularly make time to reflect on what they are doing, how they are doing it and what they should be doing differently. Reflection allows the body and mind and spirit to reintegrate. Often, it is in the quiet of reflection that insights have the chance to emerge.

I am convinced that ten hours of work is considerably less effective than nine and a half hours of work and 30 minutes of reflection.

In an active social justice life, there is the tendency to be very active because the cause is so overwhelming. Advocates who do not create time for regular reflection can easily become angry and overwhelmed and bitter at the injustices around and ultimately at anyone who does not share their particular view about the best way to respond. They consider themselves activists, but they may be described as hyper-activists. They have often lost their effectiveness and the respect of others, which just makes them even more angry and more accusatory of everyone who disagrees with them. We all sometimes end up like that. When we do, we need to step back, reflect, recharge and reorder our actions.

PRACTICE, PATIENCE AND FLEXIBILITY IN ORDER TO PREPARE FOR CHAOS, CRITICISM AND FAILURE

One veteran social justice advocate told me once, "If you cannot handle chaos, criticism and failure, you are in the wrong business." The path to justice goes over, around and through chaos, criticism and failure. Only by experiencing and overcoming these obstacles can you realistically be described as a social justice advocate.

Volume 1, Number 1

We must be patient and flexible in order to do this work over the long run. There are no perfect people. There are no perfect organizations. Most grassroots social justice advocacy is carried out by volunteers – people who have jobs and families and responsibilities that compete with their social justice work for time and energy. There is usually not any money for the work. Often the people on the other side, who are upholding the injustices you are fighting against, are well-paid for their work and have staff and support to help them preserve the unjust status quo. This translates into challenging work. Patience with our friends, patience with ourselves and patience with the shortcomings of our organizations are essential. That is not to suggest that we must tolerate abusive or dysfunctional practices, but while we work to overcome those, we must be patient and flexible.

If you challenge the status quo, you better expect criticism from the people and organizations that are benefiting from the injustices you are seeking to reverse. Though it is tough to really listen to criticism, our critics often do have some truth in their observations about us or our issues. Sometimes criticism can be an opportunity to learn how to better communicate our advocacy or to think about changes we had not fully considered. Other criticism just hurts your backside, and you just have to learn how to tolerate it and move on.

Successes do occur, and we are all pretty good at handling success. However, failure is also an inevitable part of social justice advocacy. Failure itself cannot derail advocacy, it is the response to failure that is the challenge. Short-term social justice advocates feel the sting of failure and are depressed and hurt that good did not triumph. They become disillusioned and lose faith in the ability of people and organizations to create justice. People doing social justice for life are also hurt and depressed by failure. They spend some time tending to their wounds. But then they get back up, and patiently start again, trying to figure out how to begin again in a more effective manner.

JOY, HOPE, INSPIRATION AND LOVE

In order to live a life of social justice advocacy, it is important to have your eyes and heart wide open to the injustices of the world. But it is equally important that your eyes and heart be wide open to and seek out and absorb the joy, hope, inspiration and love you will discover in those who resist injustice.

It may seem paradoxical, but it is absolutely true that in the exact same places where injustices are found, joy, hope, inspiration and love are found. This has proven true again and again in my experiences with people and communities in the United States, in Haiti, in Iraq and in India. In fact, many agree with my observation that the struggling poor are much more generous and have more joy in their lives than other people living with much more material comfort.

Since Katrina devastated the Gulf Coast, I have been inspired again and again by the resiliency and determination of people who suffered tremendous loss.

Recently, I attended an evening meeting of public housing residents held in the bottom room of a small, newly-repaired church. I was pretty tired and feeling pretty overwhelmed. It was a small group. There were a dozen plus residents and a couple of children there. All had been locked out of their apartments for more than 20 months. One was in a wheelchair, Another was in her cafeteria-worker smock. One was the exclusive caregiver for a paralyzed child. Most had no car, yet they got a ride to a meeting to try to come up with another plan to save their apartment complex. Many of their neighbors were still displaced. Others who were back in the metro area were overwhelmed and had given up. We held hands, closed eyes and started with a prayer. Then we dreamed together of ideas about how to turn their unjust displacement around. Some of our dreams were impractical, others unrealistic, a few held out possibility. All at once, I realized almost everyone there was a grandmother. They had already raised their kids, and many were now

helping raise their kids' kids. Most were on disability or social security. They had a fraction of the resources that I had, and they had been subjected to injustices unfathomable in my world; yet they were still determined and fighting to find a way to reclaim affordable housing for themselves and their families and their neighbors. When we finished, we said another prayer, set the date for another meeting, hugged and laughed, and people piled into a van and drove away.

These grandmothers inspire me and keep me going. If they can keep struggling for justice despite the odds they face, I will stand by their side.

Hope is also crucial to this work. Those who want to continue the unjust status quo spend lots of time trying to convince the rest of us that change is impossible. Challenging injustice is hopeless they say. Because the merchants of the status quo are constantly selling us hopelessness and diversions, we must actively seek out hope. When we find the hope, we must drink deeply of its energy and stay connected to that source. When hope is alive, change is possible.

A friend, who has been in and out prison for protesting against the School of the Americas at Fort Benning, Georgia, 16 once told me that there are only three ways to respond to evil and injustice. I listened to her carefully because when she is not in jail for protesting, she is a counselor for incest survivors, so she knows about evil. She told me that there are only three ways to respond to evil and injustice. The first is to respond in kind, perhaps to respond even more forcefully. The second response is to go into denial, to ignore the situation. Most of our international, national, communal and individual responses to injustice and evil go back and forth between the first and second variety. We strike back, or we look away. We forcefully swat down evil,

¹⁶ The official name of the School of the Americas has been changed to the Western Hemisphere Institute for Security Cooperation (WHINSEC). 10 U.S.C. § 4155 (2000); 10 U.S.C. § 2166 (2002). See also http://www.benning.army.mil/WHINSEC/ (last visited Aug. 23, 2007).

or we try to ignore it. But there is a third way to respond. That is to respond to evil and injustice with love. Though a response of love is the most difficult, it is truly the only way that injustice and evil can be transformed.

Love ends up at the center of social justice advocacy. Love in action; not the love of dreamy-eyed, soft-music television commercials, but the love of a mother for her less able child, the love of a sister who will donate her kidney to save her brother, the love of people who will band together to try to make a better world for their families. These are examples of real love. This is the love that will overcome evil and put justice in its place.

Conclusion

Every good law or case you study was once a dream. Every good law or case you study was dismissed as impossible or impractical for decades before it was enacted. Give your creative thoughts free reign, for it is only in the hearts and dreams of people seeking a better world that true social justice has a chance.

Finally, remember that we cannot give what we do not have. If we do not love ourselves, we will be hard pressed to love others. If we are not just with ourselves, we will find it very difficult to look for justice with others. In order to become and remain a social justice advocate, you must live a healthy life. Take care of yourself as well as others. Invest in yourself as well as in others. No one can build a house of justice on a foundation of injustice. Love yourself and be just to yourself and do the same with others. As you become a social justice advocate, you will experience joy, inspiration and love in abundant measure. I look forward to standing by your side at some point.

Peace,
Bill Quigley

Volume I, Number I

SUPPORTING JUSTICE

A Report on the Pro Bono Work of America's Lawyers





SUPPORTING JUSTICE A FOURTH REPORT ON THE PROBEIND WORK OF AMARICALS LAWYER

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE 321 N CLARK STREET CHICAGO, ILLINOIS 60654 WWW.ABAPROBONO.ORG

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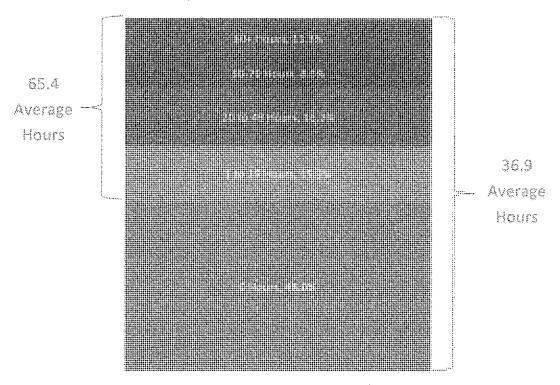
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| SECTION 1 | Amount and Type of Pro Bono

Providing pro bono services is an integral part of being a member of the legal profession. Indeed, most (81%) attorneys have provided pro bono services at some point in their careers and over half provided pro bono services in 2016.

The number of attorneys who provide regular and significant pro bono work is not ubiquitous, suggesting that there is room for expanding such services. Overall, attorneys provided an average of 36.9 hours⁴ of pro bono service in 2016, suggesting that many of the attorneys are providing well below the aspirational goal of 50 hours per year set forth in ABA Model Rule 6.1 and followed by many states. As shown in Figure 1, only 20% of the attorneys had provided 50 hours or more of pro bono service in 2016. Meanwhile, there is a significant segment of the attorney population — approximately one out of five attorneys — that has *never* undertaken pro bono of any kind.

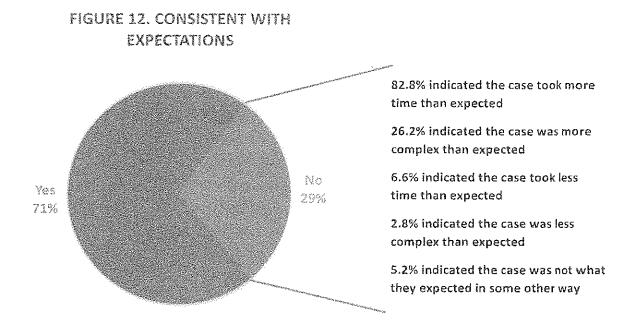
FIGURE 1: HOURS OF PRO BONO SERVICE PROVIDED IN 2016, BY PERCENT OF ATTORNEYS



⁴ Among the surveyed attorneys, the average hours of pro bono provided in 2016 was 36.9, with a median of 3. The average number of matters was 6.5. The average hours specifically among the attorneys who had provided 1 or more hour of pro bono in 2016 was 65.4, with a median of 30, and the average number of matters was 11.4

According to the data, attorneys tend to accept cases within their area of expertise. Specifically, 69% indicated that their most recent pro bono experience was within their area of expertise, leaving only 31% accepting a case outside their area of expertise. The areas of law for which attorneys were most likely to take a case outside their area of expertise were: military, immigration, housing, civil rights, and public benefits. See Figure 13.

Meanwhile, most responding attorneys (71%) indicated that their most recent pro bono experience was consistent with their expectations. Approximately 24%, however, indicated that the case took more time than expected, and 7.6% said that the case was more complex than expected. See Figure 12.

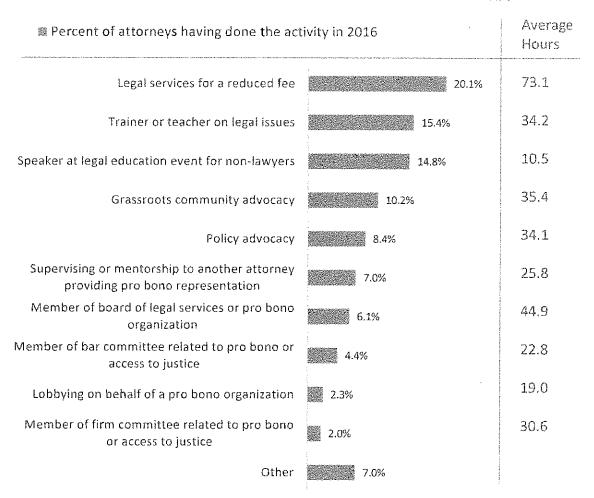


Notably, the areas of law for which attorneys were most likely to report that the case was inconsistent with their expectations – medical malpractice, securities, banking, tribal/Native American, and technology – were not the areas of law for which attorneys were typically going outside their areas of expertise. See Figure 13.

| SECTION 4 | Public Service Activities

In 2016, the surveyed attorneys provided a range of public service activities that expand beyond the traditional definition of pro bono. The most common public service activities reported were legal services for a reduced fee, being a trainer or teacher on legal issues, and being a speaker at a legal education event for non-lawyers. See Figure 22.

FIGURE 22. PUBLIC SERVICE ACTIVITIES PROVIDED IN 2016



Of the list of public service activities provided in 2016, reduced fee legal services was the most common. Approximately 20% of the attorneys reported that they had provided such services and that the average hours they had committed to this activity were 73.1 for the year. Of the attorneys providing this service, 1 out of 4 had reduced their fees by 46-50%, followed by 1 out of 5 attorneys reducing their fees by 71-75%.

Analysis – The aggregate results were analyzed and summarized for the attorney population in the 24 states. These results were also broken down by work setting, geography, gender, age, and race/ethnicity. All significant results noted throughout this report are at the 95 percent confidence level. Additionally, each of the 24 states received a report of the state's findings in more detail than is included in this report and the findings can be obtained by contacting the state's bar association, access to justice commission, or court administrator.

Figure 36. Weighted Distributions

Category	Percent
Race/Ethnicity	
White, Not Hispanic	84.4%
Black, Not Hispanic	4.1%
Hispanic	4.5%
Asian, Pacific American, Not Hispanic	2.9%
Other	4.1%
Gender	
Male	61.6%
Female	37.5%
Gender Non-Conforming	0.2%
Age	
29 or younger	7.7%
30-34	12.1%
35-39	10.6%
40-44	8.8%
45-49	9.8%
50-54	9.8%
55-59	11.3%
60-64	11.9%
65-69	9.5%
70-74	5.4%
75+	3.3%
Practice Setting	Established and Associate Association
Private Practice	68.3%
Corporate Counsel	8.7%
Government	12.1%
Non-profit	5.1%
Other	5.9%
License Status	
Active	97.2%
Inactive	2.4%
Emeritus/Pro Bono License	0.4%

Civil Disobedience as Legal Ethics: Cause Lawyers and the Tension between Morality and "Lawyering Law"

Louis Fisher, J.D. Candidate, 2016

"An individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law" 1

The "standard conception" of American legal ethics is not primarily concerned with lawyers' ability to promote either substantive justice or systemic change.² Situations often arise where a lawyers' moral reasoning conflicts with the dictates of the codified professional ethics. Instead, legal ethics often provide lawyers with a discourse of nonaccountability and neutrality, allowing them to disclaim moral responsibility for the consequences of their actions as advocates.³ This paper investigates situations where a lawyers' moral reasoning conflicts with the dictates of the codified professional ethics and provides moral (if not legal) justification for the expression of dissent in such situations, especially where the lawyer represents a vulnerable party.

In his seminal article on the regulation of the legal profession, David Wilkins correctly points out that the answer to questions about proper professional conduct necessarily vary depending on the power relationships between particular clients and their adversaries. Scholars have traditionally focused on the perceived failure of the "dominant model" of legal ethics to preserve space for moral reasoning in the face of power imbalances; numerous theorists of legal ethics have criticized the "dominant model" for promoting "literalistic adherence to what appears to be the letter of ethics

¹ Martin Luther King, Jr., Letter from a Birmingham Jail, Apr. 16, 1963, AFR. STUD. CENTER, UNIV. OF PENN., available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

² The standard conception of legal ethics is based on three related principles: partisanship, neutrality, and nonaccountability. See, e.g., Ayers, The Lawyers' Perspective, infra note 28, at 89. These three principles are the starting point for most theories of legal ethics. See id.; see also W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 6, 29 (2010).

³ See id. David Luban's book, Lawyers and Justice, discussed infra, describes and critiques this tendency within the legal profession. See David Wasserman, Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation, 49 MD. L. REV. 392, 393 (1990) (describing Part I of Luban's book as "sustained attack" on the use of "adversary system excuse" to justify morally objectionable behavior).

⁴ See David B Wilkins, Who Should Regulate Lawyers?, in LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 25, 40 (Susan D. Carle ed., 2005) (questioning the "assumption that a single enforcement structure will be appropriate for all lawyers in all contexts" and arguing that "[c]orporate clients are substantially different from individual consumers of legal services"); see also Theories of Professional Regulation, in LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 13, 16 (Susan D. Carle ed., 2005) (crediting Wilkins' article with raising the question of whether "clients' relative power" should "make a difference in the permissible conduct" of their lawyers) [hereinafter Theories of Professional Regulation].

Scholars use the term "dominant model" interchangeably with what Ayers and Luban call the Standard Conception.

codes" over "careful attention to ethical issues." William H. Simon, for example, has argued that lawyers should respond to circumstances where there is an unusual degree of aggressiveness or vulnerability on the part of another party" by "taking reasonable action" to bring about the proper substantive solution. In other words, lawyers "basic consideration" should be "whether assisting the client" in a particular course of action "would further justice." Simon's "discretionary model" seems particularly useful in scenarios where a professional obligation, such as zealous advocacy, to a powerful client conflicts with a lawyer's notions of morality or justice. It is less clear, however, how this theory might apply to conflicts between professional norms and personal morality when lawyers represent the weaker party.

This paper builds upon Simon's theory of ethical discretion by considering how lawyers should respond to explicit conflicts between the "laws of lawyering" and the individual lawyers' conceptions of morality or justice in the context of "cause lawyering." For the cause lawyer, moral and political commitments are inextricably entwined with the practice of law. Because political morality is constitutive of the cause-lawyers professional self-conception, conflicts between "professional ethics" and practical ethics or personal morality are particularly acute—a cause lawyer faced with such a conflict will feel morally compelled to spurn the code of professional ethics. This paper seeks to theorize a philosophical justification for the cause lawyers' choice to privilege political morality over the code of legal ethics; this theory will also supplement

⁶ Samuel J. Levine, Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation, 37 IND. L. REV. 21, 23 (2003).

⁷ William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1098 (1988).

⁸ *Id.* at 1083.

⁹ Levine, supra note 6, at 23 (citing WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998))

¹⁰ See, e.g., Simon, supra note 7, at 240 – 41 (applying ethical discretion model to hypothetical personal injury litigation where defense counsel realizes plaintiff's counsel is negotiating under a clearly mistaken assumption about the law, which will result in a skewed settlement and arguing that defense counsel should disclose the error to opposing counsel to ensure fairness in settlement).

To use Simon's example, imagine a personal injury lawsuit where plaintiff's counsel realizes that defense counsel is operating under a clearly erroneous assumption about the law but that disclosure would be likely to reduce justice because the plaintiff will not be able to settle the case for an amount sufficient to fully compensate his injuries nor can the plaintiff afford to go to trial. ? Simon's theory requires lawyers to take responsibility for reaching a substantively just result where "procedural deficiencies" will otherwise lead to an unjust result. See id. at 240–42. Would Simon encourage the lawyer to exploit her opponents' mistake to gain a negotiating advantage in this situation? See also Luban, infra note 23, at 428 (arguing that the institutional excuse of moral nonaccountability for lawyers is harder to justify in civil suits where adversaries are "relatively evenly matched"). Relatedly, it is unclear whether Simon's theory of ethical discretion provides a morally satisfactory course of action to cause lawyers who view the law itself as substantively unjust, even assuming perfect procedures. See notes 104 and 105 and accompanying text, infra.

Cause lawyers are "activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients." Etienne, *infra* note 88, at 1198.

¹³ Austin Sarat & Stuart Scheingold, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 2, 4 (2004) (describing moral and political commitments as defining attributes of cause lawyers and noting that cause lawyers are able to "harmonize personal conviction and professional life.") ¹⁴ See id. at 9 (claiming cause lawyers "choos[e] to privilege their moral aspirations and political purposes even if doing so leads to violations of the profession's ethical code").

models such as Simon's ethical discretion by justifying cause lawyers' occasional contravention of professional ethics in an effort to promote substantively just outcomes for less powerful clients. 15

The paper argues that cause lawyers may engage in justifiable civil disobedience of the ethical code when they take action to promote their substantive moral vision of justice over the dictates of professional ethics. The argument proceeds in three parts. First, this theory hinges on an assumption about the nature of "legal ethics": the codes of professional ethics are not prescriptions for ethics qua morals but rather are a set of positive "laws of lawyering." This assumption about nature of codes of professional ethics 17 has implications for the degree to which lawyers are morally bound to adhere to these codes. The second part of this paper outlines various theories about whether a general moral obligation to obey the law, including the "law of lawyering," actually exists. Finally, assuming that there is some moral obligation to obey the law of lawyering, the paper argues that the rules of professional ethics can be the proper subject of civil disobedience by the cause lawyer when the ethics code conflicts with the lawyer's moral cause or substantive vision of justice. The fourth section of the paper explores the implications of the moral argument for civil disobedience of ethics code on the regulation of the legal profession and for the practice of cause lawyering.

This argument makes a contribution to the scholarly discourse on professional at the intersection of two bodies of literature. It adds to literature on the relationship between legal ethics and personal morality by justifying a course of action that sometimes privileges personal political morality over the code of ethics. Moreover, it supplements the literature on the ethics of cause lawyering, which tends to focus on scenarios where a lawyers' devotion to a political or moral cause conflicts with her representation of an individual client. This paper instead addresses a broader set of ethical dilemmas: situations where the mandates of an ethical code, including but not limited to the lawyers' duties to her client, conflict with the lawyers' vision of a substantively just outcome. Finally, the paper suggests reasons why a constrained exercise of civil disobedience by cause lawyers in the context of professional ethics might be normatively desirable as a means of enhancing democratic deliberation and fostering the political influence of marginalized client populations.

1.

¹⁵ Note that the term "cause lawyering" can encompass representation of powerful, entrenched interests (e.g., NRA Civil Rights Defense Fund). See Sarat and Scheingold, supra note 13, at 5 (distinguishing "cause lawyer" from "public interest lawyer").

¹⁶ See Maynard E. Pirsig, Book Review, 7 N. ILL. U. L. REV. 133 (1987) (reviewing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (1985)); Robert P. Burns, The Purposes of Legal Ethics and the Primacy of Practice, 39 WM. & MARY L. REV. 327, 331 (1998).

¹⁷ Each state has its own set of ethical rules governing lawyers, which are "promulgated and enforced by the state's highest court under its 'inherent power' to make rules for its own operation. DAVID LUBAN, LAWYERS AND JUSTICE xxvii (1988). Every state except California has based its ethical code one of two model codes promulgated by the ABA. See id. The ABA's codes have no legal force themselves until they are adopted by the state's highest court (often with modifications). See id.

¹⁸ See William H. Simon, Should Lawyers Obey the Law?, infra note 42, at 253.

¹⁹ See Sarat & Scheingold, supra note 13, at 9; see also Stuart A. Scheingold, Essay for the In-Print Symposium on the Myth of Moral Justice, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 47, 49 (2006).

I. "Lawyering Law": The Nature of Legal Ethics and the Cause Lawyer's Moral Obligations

Although the terms "legal ethics" or "professional ethics" inherently connote moral authority, legal ethicists have long acknowledged and actively promoted the distinction between "common morality" and "role morality." The theory of role morality distinguishes between common "universal moral duties" that apply to all persons as moral agents and "special duties" that attach to particular social roles, such as the lawyer. The standard conception of legal ethics holds that role morality must trump common morality when the two conflict; in fact, the lawyer can be "morally required to do things that seem immoral" because of her social role. Yet it is not immediately apparent why role morality should so dominate over common morality: what is the source of the standard conception's claim to moral authority?

According to David Luban, professional duties (the duties of role morality) originate from "the requirements of social institutions (such as our adversary system) the rationality of which must be appraised with a generous yet skeptical eye."23 For Luban, "the weight of our professional obligations" under the standard conception is not absolute, but rather is "bounded above by the weighted product of the worth of the institution [i.e. the adversary system], the centrality of the professional role to that institution, and the importance to that role of a putative professional duty."²⁴ On this view, the moral authority of the standard conception of professional ethics is derivative of and contingent upon the effectiveness of the adversary system, which is itself contingent in part upon the relative power differential of the parties.²⁵ The adversary system, and by extension the standard conception of professional ethics, assumes a relative balance of power between the parties—the consequentialist justifications for this system break down, however, in the face of gross power disparities. Luban thus argues for an alternative vision of legal ethics that would hold lawyers accountable for the "ends that their clients are pursuing" and would encourage "moral activism," whereby lawyers would attempt to "influence" the client to adopt a more just course of action. 26 From this perspective, the standard conception alone is a morally unsatisfying model of legal ethics, even if it may have moral authority under certain circumstances. For the cause lawyer, whose "common morality" is inextricably tied to her self-conception as lawyer, it will

²⁰ See, e.g., Luban, supra note 17, at xx. See also id. at xix ("The adjective qualifies the noun: the 'ethics' at work is not the ethics of private engagement but of institutional life, and the professional will engage in ethical deliberation by asking herself questions about what her profession and its institutions ought to be doing.")

²¹ See id.

²² Id.

²³ David Luban, Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice, 49 MD. L. REV. 424, 427 (1990).

²⁴ *Id.* Note that Luban argues that the institutional value of the adversary system varies with the relative power differential between the two parties. *See* note 11, *supra*.
²⁵ *Id.* at 427–28.

²⁶ Luban, supra note 18, at 160.

matter whether or not the code of legal ethics binds not only as "professional obligation" but also as moral obligation.²⁷

In addition to inquiring into the roots of the standard conception's moral authority, it is also important to clarify precisely "what the Standard Conception is supposed to be a conception of."28 Andrew Ayers offers three potential answers to this question. First, the Standard Conception might be "a conception of lawyering law," capturing the "deep values that are expressed in the specific rules and regulations governing lawyers' behavior."²⁹ Second, the Standard Conception might embody the "informal social norms that constitute the role of lawyer" and the "basic expectations" that apply to this social role.³⁰ Finally, Ayers suggests the Standard Conception might represent "a set of claims about practical reasoning," which defines "what sorts of considerations lawyers should recognize as reasons for action."31 Ayers' basic argument is that legal ethicists have failed to provide a satisfactory account of why the Standard Conception's "role morality" should trump "common morality" because they have not framed the problem in terms of practical reasoning.³² He sketches two general scholarly orientations towards legal ethics: "the policy-maker's perspective" and the "lawyer's perspective."33 While the legal-ethicist-as-policy-maker is concerned with the collective consequences of generally applicable rules, 34 the lawyer's perspective focuses on "specific experiences and decisions faced by individual lawyers." 35

Viewed from the policy-maker's perspective, the field of legal ethics represents a corpus of positive law geared at regulating the practice of law. ³⁶ The conventional

²⁷ See id. at xix (claiming that, as a general matter, "the study of professional ethics" must consider both individual conscience and social institutions").

²⁸ Andrew Ayers, *The Lawyer's Perspective: The Gape Between Individual Decisions and Collective Consequences in Legal Ethics*, 36 J. LEGAL PROF. 77, 90 (2011).

²⁹ Id.

³⁰ *Id*.

³¹ Id.

³² Id.

³³ *Id.* at 77.

³⁴ Id. at 77, 82. Ayers identifies scholars such as Alice Woolley and Bradley Wendel with the policy-maker's perspective. According to Ayers, "Woolley argues that legal ethicists should treat their subject as a field of doctrinal analysis; their project should be to expound and criticize lawyering law in the same way that legal scholars in other areas expound and criticize other kinds of substantive law." Id. at 84 (internal citations omitted). Wendel also explicitly rejects the "lawyer's perspective" as defined by Ayers: "Unless one is prepared to argue that the obligations of a professional role should be modified to reduce immorality from a first-person perspective, what business is it of legal ethics that lawyers may feel their lives are not well-lived?" Id. at 85; W. Bradley Wendel, Methodology and Perspective in the Theory of Lawyers' Ethics: A Response to Professors Woolley and Markovits, 60 U. TORONTO L.J. 1011, 1018 (2010).

³⁵ Id. at 81. Ayers identifies Daniel Markovitz with the lawyer's perspective: "The norms that form the core of adversary advocacy, according to Markovits, require lawyers to be guilty of 'professional vices,' which place a significant ethical burden on lawyers' integrity. A system that is justified from the policy-maker's perspective, Markovits argues, can still be ethically unappealing from the practitioner's perspective." Id. at 86 (quoting Daniel A. Markovits, Legal Ethics from the Lawyer's Point of View, 15 YALE, J.L. & HUMAN, 209, 223 (2003)).

³⁶ See Ayers, supra note 28, at 80–81 (associating rules and regulations under "law of lawyering" with the policy makers' perspective); W. BRADLEY WENDEL, ETHICS AND LAW: AN INTRODUCTION 17 (describing codes of ethics as "domain of positive law, not ethics"); Serena Stier, Legal Ethics: A Paradigm?, in

approach to legal ethics fits squarely within the policymaker's perspective.³⁷ Yet for the cause lawyer, the regulatory model of legal ethics crafted from the policy-maker's perspective offers insufficient and inadequate guidance in scenarios where their cause-driven political morality clashes with the dictates of the ethics code.³⁸

For the cause lawyer, the lawyers' perspective is indispensable to a practically useful system of legal ethics. Personal morality for such lawyers is inseparable from professional practice. Therefore, a worthwhile account of legal ethics for the cause lawyer "must take into account" their "first-personal concerns" about their ideological mission. As a prescriptive matter, this paper theorizes legal ethics from the lawyer's perspective by justifying the choice of cause lawyers to privilege common morality over the standard conception of role morality in certain circumstances. This paper engages with scholars who operate from the policy-maker's perspective, however, by descriptively adopting their assumptions about legal ethics; the next section assumes that legal ethics are a set of generally applicable rules, justified on policy grounds by their collective consequences, which regulate the legal profession. In other words, the paper treats legal ethics as "lawyering law" akin to other areas of substantive law. As the next section will demonstrate, if legal ethics is in fact nothing more than "lawyering law," then this has implications for the degree to which cause lawyers are morally bound to adhere to codes of professional ethics.

II. Lawyering Law and Civil Disobedience: Is there a Moral Duty to Obey the Code of Ethics?

Whether citizens (and in this case, lawyers) have a moral duty to obey the law is a basic and longstanding question in political philosophy. Section I established that legal ethics may be viewed as a set of substantive laws governing lawyering. Therefore, when conflicts arise between a lawyer's personal morality and lawyering law, legal ethics are morally binding on the lawyer only insofar as there is a general moral duty to obey the law. As William Simon has pointed out, the "answer to the question whether lawyers

PROFESSIONAL ETHICS & SOCIAL RESPONSIBILITY 139, 148 (Daniel E. Wueste ed., 1994). Serena Stier coined the term "Integrative Positivism" to refer to the principle that codes of legal ethics operate similarly to legislatively-promulgated positive laws (codes of ethics, however, are generally adopted by state supreme courts). Stier, Legal Ethics: A Paradiem?, at 148.

supreme courts). Stier, Legal Ethics: A Paradigm?, at 148.

37 See Daniel Markovits, How (and How Not) to do Legal Ethics, 23 GEO. J. LEGAL ETHICS 1041, 1041 (2010) ("Conventional legal ethicists deploy moral theory in order to develop regulative principles that might govern lawyers' professional conduct. Indeed, being reform-minded, they typically seek even to cast these principles in forms that might be incorporated, as improvements, into the positive law governing lawyers.").

³⁸ Cf. Ayers, supra note 28, at 80 (discussing practitioners' relationship to "law of lawyering.").

³⁹ Cf. id. (discussing Markovits' view that legal ethics must account for the first-personal concerns of lawyers in general about integrity).

⁴⁰ Cf. Wooley, supra note 34 (as cited by Ayers, The Lawyer's Perspective, at 84).

⁴¹ See, e.g., Christopher Heath Wellman & A. John Simmons, IS THERE A DUTY TO OBEY THE LAW? (2005) (arguing opposing sides of this debate).

should obey the law turns out to depend on what we mean by law."⁴² Under a Positivist definition of law, under which the "existence and content of law depends on social facts and not on its merits,"⁴³ it is difficult to justify a moral duty to obey the law. ⁴⁴ In contrast, under a "Substantive" conception of law, which rejects Positivism's separation of law and morals, "an officially promulgated norm merits respect only by virtue of its substantive validity."⁴⁶ The substantive conception of law by definition imposes a moral duty to obey law because it collapses the distinction law and morals. ⁴⁷ For this reason, however, the substantive conception also seems inconsistent with the "dominant view" or "standard conception" of legal ethics, which insists on a separation between common morality and the dictates of legal ethics. ⁴⁸ This Section will outline several philosophical positions on the moral duty to obey the law, each of which conceives of a moral duty of varying strength. Section III will then apply these philosophical models of obedience (and disobedience) to several scenarios of ethically-embroiled cause lawyering.

Richard Wasserstrom has identified three possible philosophical positions on the nature of the duty to obey the law, which serves as a rough roadmap for this section:

(1) One has an absolute obligation to obey the law; disobedience is never justified. (2) One has an obligation to obey the law but this obligation can be overridden by conflicting obligations; disobedience can be justified, but only by the presence of outweighing circumstances. (3) One does not have a special obligation to obey the law, but it is in fact usually obligatory, on other grounds, to do so; disobedience to the law often does turn out to be unjustified. 49

Although a number of scholars defend the view that citizens are under a *general* moral duty to obey the law, ⁵⁰ few would defend Wasserstrom's first position, which

⁴⁸ See id. at 220 ("Positivism has a strong affinity with the commitment of the Dominant View to categorical judgment.").
 ⁴⁹ Josephine Berces, Is There an Obligation to Obey the Law, available at

⁴² William H. Simon, Should Lawyers Obey the Law, 38 WM. & MARY L. REV. 217, 253 (1996).

⁴³ Leslie Green, Legal Positivism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3 2003), available at http://plato.stanford.edu/entries/legal-positivism/; see also Simon, supra note 42, at 220 ("Positivism is committed to differentiating legal from nonlegal norms and to doing so by virtue of a norm's pedigree rather than its intrinsic content. A pedigree links a legal norm to a sovereign institution through jurisdictional criteria that specify institutional formalities.")

⁴⁴ Simon, *supra* note 42, at 253.

⁴⁵ Simon uses this term to cover any non-Positivist conception of law, including natural law theory or Dworkinian interpretivism.

⁴⁶ Simon, *supra* note 42, at 224,

⁴⁷ Id.

^{**} Josephine Berces, Is There an Obligation to Obey the Law, available at http://www.scribd.com/doc/136186696/Is-There-an-Obligation-to-Obey-the-Law#scribd (citing Richard A. Wasserstrom, The Obligation to Obey the Law, in THE DUTY TO OBEY THE LAW 21 (William A. Edmundson ed., 1999)).

⁵⁰ See George C. Christie, On the Moral Obligation to Obey the Law, 39 DUKE L. J. 1311, 1315, 1336 (1990) (identifying several scholars who subscribe to this view and arguing that all arguments against a duty to obey fail); see also Leslie Green, Legal Obligation and Authority, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 29, 2003), available at http://plato.stanford.edu/entries/legal-obligation/ ("Political association, like family or friendship and other forms of association more local and intimate, is itself

holds that disobedience is never justified.⁵¹ For the Legal Positivist, such a position is incomprehensible: "It cannot be the case that turning in a runaway slave in the pre-Civil War U.S. was morally required, or that harboring a Jew in Nazi Germany was morally forbidden."52 Joseph Raz, for example, has argued that there is no moral obligation to obey the law, even in a society "with a good and just legal system." On the other hand, scholars who defend some general moral duty to obey the law, such as George C. Christie, generally adopt a position closer to Wasserstrom's second category rather than the first category's absolute duty to obey: "to say that one has a moral obligation to obey the law does not mean that one must necessarily obey the law . . . it may be outweighed by other relevant moral considerations."⁵⁴ This position on the duty to obey thus forces an inquiry into when disobedience of the law can be justified by such "important countervailing moral obligations."55

In A Theory of Justice, John Rawls developed the most "widely accepted account"⁵⁶ of civil disobedience and its justifications in a "more or less just democratic state."⁵⁷ Rawls assumes that there is a general duty to comply with unjust laws, within certain limits, provided that such unjust laws arise under a "just constitution." Because the Rawlsian account of the duty to obey assumes a reasonably just society governed by a democratic regime, he argues citizens will be required to comply with some unjust laws

pregnant of obligation.") (quoting RONALD DWORKIN, LAW'S EMPIRE 206 (1986) (defending a moral duty to obey grounding in "associative obligation")).

⁵³ Bradley Wendel makes an important argument that lawyers bear a special duty to obey lawyering law, adopting a position close to Wasserstrom's first category in this regard: "[E]xcept in cases where the law governing lawyers expressly permits the exercise of discretion on the basis of first-order moral considerations, lawyers should be prohibited from making reference to these values when deliberating about their actions in the course of representing clients. W. Bradley Wendel, Civil Obedience, 104 COLUM. L. REV. 363, 364 (2004). In discussing unjust laws, Wendel adopts a perspective close to the Rawlsian position, discussed infra, asserting that even lawyers may challenge unjust laws, so long as the challenge is mounted overtly. Id. at 366. But Wendel completely denies the moral justifiability of (lawyerly) disobedience, arguing that lawyers must only advocate for change through "certain channels, such as legislation, administrative rulemaking, or the evolution of the common law." Id. at 401; see generally WENDEL, supra, at 7 (arguing that "the norms associated with the lawvering role" and legal ethics "have significant moral weight, which are derived from a freestanding morality of public life.").

⁵² See Berces, supra note 49, at 2. Of course, on a Substantive view of the nature of law, patently unjust laws like the Fugitive Slave Laws or the Nazi Race Laws are not laws at all, but rather failed attempts at law. Compare Lon L. Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958) with H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958); see also Scott J. Shapiro, The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, MICH, L. PUBLIC LAW AND WORKING PAPER SERIES 5 (2007) (describing Dworkin's view that "legality is ultimately determined not by social facts alone, but by moral facts as well"). Although questions about the nature of law are inextricably tied to whether there exists a moral duty to obey, an inquiry into the validity of Legal Positivism is beyond the scope of this paper.

⁵³ Joseph Raz. The Obligation to Obey the Law, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 233, 245(1979). 54 Christie, *supra* note 50, at 1312.

⁵⁶ Kimberley Brownlee, Civil Disobedience, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 20, 2013), http://plato.stanford.edu/entries/civil-disobedience/.

⁵⁷ JOHN RAWLS, A THEORY OF JUSTICE 319 (1971).

⁵⁸ Id. at 308. ("The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation . . . is a sufficient reason for going along with it.")

"to the extent necessary to share equitably in the inevitable imperfections of a constitutional system." He cautions against general disobedience of unjust laws: "we have a natural duty of civility not to invoke the faults of social arrangement as a too ready excuse for not complying with them" Yet the duty to obey unjust laws is not absolute: where a law "exceed[s] certain bounds of injustice," the duty to comply may "cease to be binding in view of the right to defend one's liberties and the duty to oppose injustice" through civil disobedience. 61

Rawls provides a relatively narrow definition of civil disobedience as a "public." nonviolent, conscientious yet political act contrary to law usually done with the aim of brining about a change in the law or policies of the government."62 He then proceeds to give an account of the limited circumstances under which civil disobedience can be justified in a reasonably just society. 63 As a preliminary matter, Rawls argues for a "presumption in favor of restricting civil disobedience to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity."64 Rawls also places an exhaustion requirement on civil disobedience: the "normal appeals to the political majority [must] have already been made in good faith" and other "legal means of redress [must] have proved of no avail."65 Third, Rawls expresses a concern about the potential for "serious disorder" if every "group with an equally sound case" for engaging civil disobedience chose to do so. 66 With this concern in mind, he argues that justified civil disobedience is limited to situations where "the dissenter allows that anyone else subjected to similar injustices would have a right to disobey in a similar way (and only when such general disobedience would have acceptable consequences)."67 Finally, Rawls counsels that even justified civil disobeyers should take account of prudential concerns about whether their civil disobedience will be effective before engaging in such actions.68

⁵⁹ *Id.* at 312.

⁶⁰ Id.

⁶¹ Id. at 312, 319.

⁶² Id. at 319.

⁶³ Id. at 326

⁶⁴ *Id.* at 326. While a full explication of Rawls' theory of justice is beyond the scope of this paper, it is important to clarify that his theory holds that a just society must adopt two fundamental principles of justice. Under the first principle, "[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all." The second principle states that social and economic inequalities must satisfy two conditions: a) the difference principle and b) fair equality of opportunity. The difference principle requires that any social inequality exists "to the greatest benefit of the least-advantaged members of society." The equality of opportunity principle requires that any social inequalities are "attached to offices and positions open to all under conditions of *fair equality of opportunity*." Leif Wanar, *John Rawls*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 24, 2012), *available at* http://plato.stanford.edu/entries/rawls/#TwoGuildeJusFai.

⁶⁶ *Id.* at 328.

⁶⁷ Julia Markovits, *Rawls*, "The Justification of Civil Disobedience," in PHILOSOPHY OF LAW READING NOTES, available at http://ocw.mit.edu/courses/linguistics-and-philosophy/24-235j-philosophy-of-law-spring-2012/reading-notes/MIT24_235JS12_Session11.pdf; Rawls, *supra* note 57, at 328–29.

⁶⁸ Rawls, *supra* note 57, at 330 ("[T]he exercise of civil disobedience should, like any other right, be rationally framed to advance one's end or the ends of those one wishes to assist.").

Despite the wide influence of the Rawlsian account of civil disobedience, it is not universally accepted. Kimberley Brownlee, for example, has raised numerous objections to Rawls' definitional elements of civil disobedience and to his conditions of justifiability.⁶⁹ Brownlee notes that the Rawlsian account is confined to reasonably just societies, which can credibly command some duty of fidelity to law from its citizens. 70 It is unclear, however, whether Rawls' conception of civil disobedience can be "applied, without radical alteration to less just, more realistic societies [such as ours]."⁷¹ In addition, Brownlee questions the Rawlsian insistence on publicity as an element of civil disobedience: publicity can undermine the communicative intent of civil disobedience by providing "political opponents and legal authorities with an opportunity to abort those communicative efforts."72 Therefore, Brownlee argues that "unannounced (or initially covert) disobedience" may be better able to ensure that the act is successful and can still be "taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it."73

Brownlee also questions some of assumptions underlying Rawls' preconditions for justified civil disobedience. First, Brownlee rejects Rawls' empirical claim that civil disobedience is necessarily "divisive" and likely to cause disorder 74 by encouraging more disobedience. 75 Even if these consequences did follow from acts of civil disobedience, Brownlee does not accept the Rawlsian assumption that such increased dissent would inevitably "be a bad thing." She also casts doubt on the usefulness of Rawls' "prudential concerns" about the need to assess the expected effectiveness 77 of potential acts civil disobedience: "Even when general success seems unlikely, civil disobedience may be defended for any reprieve from harm that it brings to victims of a bad law or policy."78

Brownlee's own position on civil disobedience⁷⁹ focuses on the "conscientious

⁶⁹ See Kimberlee Brownlee, Conscientious Objection and Civil Disobedience, MANCHESTER SCHOOL OF SOCIAL SCIENCES 2,

http://www.socialsciences.manchester.ac.uk/medialibrary/politics/research/workingpapers/mancept/Brownl ee-ConscientiousObjectionandCivilDisobedienee.pdf [hereinaster Brownlee, Conscientious Objection and Civil Disobedience] (criticizing elements of Rawls' definition of civil disobedience); see id. at 13 (arguing that although Rawls' conditions on justifiability seem "plausible at first glance" many can "ultimately be rejected.") 70 *ld.* at 5.

⁷¹ *Id*

 $^{^{72}}$ ld. For an example of how the publicity requirement can allow more powerful actors to preempt the communicative impact of civil disobedience, see O'Shea v. Littleton, 414 U.S. 488, 492 (1974), where plaintiffs alleged a pattern and practice of racial discrimination by state officials alleged "carried out intentionally to deprive respondents and their class of the protections of the county criminal justice system and to deter them from engaging in their boycott and similar activities."

⁷⁴ See text accompanying notes 62–64, supra.

⁷⁵ See Brownlee, supra note 69, at 14.

⁷⁷ See text accompanying notes 64, supra.

⁷⁹ In this essay, Brownlee also describes and critiques Joseph Raz's definition of civil disobedience, which is somewhat broader than Rawls': Raz defines civil disobedience as a "politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest

motivations of its practitioners." She offers two compelling arguments in favor of a moral *right* to conscientious disobedience. First, "[t]he most compelling ground for a moral right to conscientious disobedience is society's duty to honor human dignity." Under this "humanistic principle," the civil disobeyer is "protected by a right of conscientious disobedience . . . when he is willing to be seen to dissociate himself from" a law he views as unjust, and "to bear the risks of communicating and defending that decision to his society." Second, Brownlee defends a right to civil disobedience on consequentialist grounds, as such "practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views." This consequentialist argument dovetails with Brownlee's view about the relative merits of civil disobedience by the powerful and vulnerable members of society respectively. Because of the "inherent comparative unfairness" in the political power differential "between majorities and vulnerable minorities," she argues that "the scope for participation should accommodate some suitably constrained civil disobedience by vulnerable minorities" as a means to remedy this imbalance.

Finally, Brownlee discusses several scenarios "where conformity to formal norms" by institutional actors (such as judges in death penalty cases, intelligence officers using extreme interrogation techniques) rightly elicits condemnation" to highlight the gap between law and morality that drives justified civil disobedience. In discussing the moral burdens placed on institutional actors (including lawyers) by society, Brownlee seems to cast doubt on the ability of systems like codified legal ethics to resolve individual moral dilemmas: "what morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person's office or position. An individual must on some occasions have the courage to rise above all that and obey the dictates of (good) conscience." While her main point is that social institutions should be designed with a view toward minimizing "the genuine moral burdens" it places on actors and reducing the situations where civil disobedience is the only "morally acceptable course of action," her discussion of civil disobedience by institutional actors also has important implications for the interaction between civil

against, and dissociation from, a law or a public policy." *Id.* at 7 (quoting Raz, THE AUTHORITY OF LAW, at 264). Brownlee objects to Raz's failure to 1) consider breaches of law protesting the actions of nongovernmental institutions (e.g. private universities, trade unions); 2) recognize the inherently communicative aspect of civil disobedience, which must be "other-directed" not just "expressive"; and 3) identify a particular feature that signifies or explains the *civility* of civil disobedience. *Id.* at 7–8. Raz, unlike Rawls, argues that there is no moral duty to obey the law, even in a reasonably just society. *See* text accompanying note 50. It is therefore unsurprising that Raz's conception of civil disobedience is somewhat "broader" than Rawls'. *Id.* at 3. Raz, for example, disagrees with Rawls that civil disobedience is "justified only as an action of last resort." *See* Raz, AUTHORITY OF LAW, at 275. In fact, Raz suggests that civil disobedience may actually be a moral *obligation* where the alternative is to "give up any action in support of a just cause." *Id.*

⁸⁰ Brownlee, supra note 69, at 8,

⁸¹ *Id*, at 17,

⁸² *ld.* at 18–19.

⁸³ *ld.* at 21.

⁸⁴ *ld.* at 17.

⁸⁵ ld. at 14-15.

 $^{^{86}}$ Id. at 15 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW (2003)).

⁸⁷ *Id.* at 16.

disobedience and codified legal ethics for individual lawyers.

III. The Moral Dilemmas of the Cause Lawyer: Is the Code of Ethics a Justified Subject of Civil Disobedience?

For the cause lawyer, morality and the practice of law are inseparable. The cause lawyer engages in the practice of law with a view toward directly promoting a moral vision of social change. Many scholars have noted that this morally-infused mode of practice inevitably conflicts with the positive law of lawyering, which is simply "not well-equipped" to address cause lawyering, if not in irreconcilable conflict with cause lawyering. The most commonly cited ethical tension in cause lawyer is the conflict between professional duties to the client and the lawyer's moral commitment to the cause. The potential for conflicts between the cause lawyers' personal morality and the dictates of professional ethics, however, extend beyond the context of client-oriented duties; cause lawyering can also conflict, for example, with the lawyers' duties to opposing counsel, or even to the court, under the professional ethics code. This section will consider certain examples of conflict between the cause lawyers' morality and the law of lawyering and will consider whether the ethical rules can be the proper subject of civil disobedience under the philosophical models discussed in Section II.

⁸⁸ See Margareth Etienne, The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers , 95 J. CRIM. L. AND CRIMINOLOGY 1195, 1997 (2005) (describing cause lawyers as "passionately seeking to advance their political and moral visions through the representation of their clients"); Sarat & Scheingold, supra note 13, at 4 (identifying political or moral commitment as a defining feature of cause lawyer); Deborah J. Cantrell, Lawyers, Loyalty, and Social Change, 89 DENV. U. L. REV. 941, 941 n.1 (2011) (cause lawyers "commit to a particular kind of substantive work or a particular category of clients because the lawyer is committed to some broader set of social or political principles.").

⁸⁹ Etienne, supra note 88, at 1196; see also Sarat & Scheingold, supra note 13, at 9 (cause lawyers choose to privilege "moral aspirations and political purposes" even if it leads to "violations of the profession's ethical code); Luban, supra note 17, at 317 ("[T]here will be times when [cause lawyers'] handling of tests cases serves, not the enlightened self-interest of the poor, but the political theories of the lawyers themselves.").

⁹⁰ See Scheingold, supra note 19, at 49 ("Cause lawyering and moral justice are at odds with the ethical standards of the legal profession.").

⁹¹ See, e.g. Etienne, supra note 88, at 1196 ("The worry for the cause lawyer is that the pursuit of her "cause" may at times conflict with the client's interest."); see also William B. Rubenstein, Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns, 106 YALE L. J. 1623, 1625 (discussing "dictates of professional ethics" in the context of civil rights litigation, with a special emphasis on "lesbian/gay civil rights").

⁹² Cause lawyers' moralism unsurprising often leads them to "identify strongly with their side of the issue and distrust with a similar intensity participants on the other side." Cantrell, *supra* note 88, at 942. This tendency, which Cantrell terms "hyper loyalty," is probably augmented by the fact that cause lawyers engage opposing counsel against the backdrop of the adversarial norms of the profession.

⁹³ Cf. Monroe H. Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 HOFSTRA L. REV. 1167, 1179 (2003) (arguing that rules of professional ethics actually create obligation to raise frivolous arguments in capital cases, even though there is a familiar ethical rule prohibiting frivolous arguments).

⁹⁴ Cause lawyers' moralism unsurprising often leads them to "identify strongly with their side of the issue and distrust with a similar intensity participants on the other side." Cantrell, *supra* note 88, at 942. This tendency, which Cantrell terms "hyper loyalty," is probably augmented by the fact that cause lawyers engage opposing counsel against the backdrop of the adversarial norms of the profession.

The Section concludes that the cause lawyer may engage in civil disobedience of lawyering law under certain circumstances, especially when the cause lawyer is faced with an egregious power imbalance. While this approach does not in itself make the code of ethics more responsive to cause lawyering, it has anticipated two benefits. First, civil disobedience will contribute both to democratic exchange by forcing the proponents of the Standard Conception of legal ethics to "reflect upon and defend their views." On a related note, it will also have the secondary effect of promoting democratic discourse related to the cause lawyers' moral position (e.g. gay/ lesbian civil rights, death penalty abolition, pro-life, pro-choice, etc.). Second, the option of civil disobedience presents cause lawyers with a means, even if necessarily temporary and makeshift, to bridge the gap between "codified law" and the "non-codifiable morality" so central to their legal practice. 97

A. An Opposing Counsel's Negotiating Error in Criminal Defense and Indigent Eviction Defense 98

Scholars have identified both criminal defense lawyers ⁹⁹ and poverty lawyers ¹⁰⁰ as examples of "cause lawyers": practitioners in these areas often approach their work with an ideological fervor fueled by a moral vision of combatting a fundamentally unjust system. Imagine that in the course of plea negotiations on a charge of possession of crack cocaine with intent to distribute, the parties agree that the defendant will serve a prison sentence of 7 years. ¹⁰¹ The prosecutor insists on drafting the agreement, and accidentally writes "7 months." Alternatively, in the civil context, ¹⁰² imagine that plaintiff has accidentally drafted a move-out agreement to give the defendant-tenant 12 months to move instead of 2. The prosecutor/plaintiff then signs the agreement and sends it to defense counsel, who immediately notices the error. In both situations, defense counsel is arguably obligated by the positive law of lawyering to disclose this error to the

⁹⁵ Cf. Brownlee, supra note 69, at 17; Luban, supra note 23, at 428.

⁹⁶ Cf. Brownlee, supra note 69, at 21.

⁹⁷ Cf. id. at 14.

This hypothetical dilemma was inspired by a seminar meeting of the Fellowship at Auschwitz for the Study of Professional Ethics (FASPE) in Summer 2015, in which the author paricipated. The students and the faculty concluded that when an opposing counsel makes a typographical error in negotiating a settlement and is prepared to execute that settlement without realizing the error, the lawyer has an ethical duty to disclose this error before executing the settlement. There was some dissent, however, when the scenario was adjusted to represent a situation of extreme power imbalance, such as a criminal plea bargain or even a move-out agreement for an impoverished tenant of a corporate management company.

⁹⁹ See, e.g., Etienne, supra note 88, at 1198 (outlining argument that "many criminal defense lawyers are in fact cause lawyers").

¹⁰⁰ See, e.g., John O. Calmore, A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty, 67 Fordham L. Rev. 1927, 1928 (1999) ("In the quest for justice, representing the poor has generally attracted 'cause lawyers."); see also Scheingold & Sarat, supra note 13, at 118 (identifying landlord-tenant conflict as a subject of "transformative-left" cause lawyering).

¹⁰¹ See Federal Mandatory Minimums, FAMILIES AGAINST MANDATORY MINIMUMS, http://famm.org/wp-

content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf (10 year mandatory minimum for possession with intent to distribute of 280 grams of crack cocaine for first-time offender).

¹⁰² It is worth considering an example from the civil context as well, given that the widely-shared position that the ethics of the defense lawyer are unique because the entire coercive power of the state is arrayed against the individual defendant. See, e.g., Freedman, supra note 93, at 1168 (noting "criminal defense is different from other types of advocacy.")

prosecutor/plaintiff. ¹⁰³ Both the cause-defense lawyer and the cause-poverty lawyer, however, will likely feel an intense, moral impulse to give their client a chance at a more just outcome. The criminal defense lawyer, for example, might view it as morally incumbent upon her to challenge the inherent injustice in the structure of the criminal justice system. ¹⁰⁴ The practice of indigent eviction defense is also often ideologically motivated: the poverty cause lawyer perceives how her client as "synergistically and simultaneously, racially and economically subordinated within the spatially constrained and the opportunity-denying circumstances of ghetto and barrio life" and might therefore feel morally obligated to allow the client the chance for an extra several months in her home.

B. Consensual Capital Punishment?: The Death-Penalty Abolitionist and the "Volunteering" Client

A second example of tension between the practice of cause lawyering and the ethical codes of the profession arises when the client's goals diverge from the cause lawyer's ideological mission. The dominant model of professional ethics obligates lawyers to "provide vigorous and skillful representation" to clients, even if the clients "values and behavior are reprehensible to the lawyer." To this end, legal ethical codes often explicitly provide that lawyers may represent clients without endorsing their values, interests, or goals, encouraging lawyers to "market [their] legal expertise" while putting aside any of the "moral or political implications" of their advocacy in each individual case. This directly conflicts, however, with the cause lawyering model, which often privileges advocacy of a particular moral or political mission above the goals of the individual client.

The professional dilemma faced by the death penalty abolitionist lawyer whose client "volunteers" ("the volunteer dilemma") for capital punishment throws into particularly stark relief the tensions that cause lawyers encounter when their cause conflicts with their individual client's goals. The dilemma of the capital volunteer arises

¹⁰³ See Comment to Rule 4.1, MODEL RULES OF PROFESSIONAL CONDUCT,

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/comment_on_rule_4_1.html. ("A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

¹⁰⁴ See, e.g., Etienne, supra note 88, at 1212 (criminal defense cause lawyers seek to reform aspects of criminal justice system through their practice, objecting to practices such as automatic detention for certain crimes or mandatory minimum sentences."); cf. Minow, infra note 152, at 730.

¹⁰⁵ Calmore, *supra* note 100, at 1931.

¹⁰⁶ Scheingold, supra note 19, at 49-50.

¹⁰⁷ Id. at 50.

¹⁰⁸ Id.; Sarat & Scheingold, supra note 13, at 9.

¹⁰⁹ As J.C. Oleson has pointed out, the term "volunteer" is misleading, although it is the term most often used in the capital defense community to describe this scenario. J. C. Oleson, Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution, 63 WASH. & LEE L. REV. 147, 154 n. 38 (2006). Perhaps a more accurate description of this scenario would be "a prisoner's decision to end his appellate process," given the seemingly contradiction inherent in the idea of "consensual execution." Id. (internal citations omitted).

when a client desires "to waive his appeals and to expedite his own execution." This scenario is no wooden ethical hypothetical: volunteering represents an intractable and recurring ethical conundrum for capital defense attorneys. Since the Supreme Court effectively reinstated the Death Penalty in 1976, 12 at least 141 capital defendants have "volunteered" for execution. In such situations, the Model Code of Ethics requires lawyers to "abide by the client's decisions. Consequently, for the death penalty "abolitionist" cause lawyer, who practices law to actualize her goal of eliminating capital punishment, the "volunteer" scenario presents an irreconcilable conflict with the dictates of professional ethics.

Before hypothesizing what such lawyerly civil disobedience might look like, it is important to note the difference between the case of the death penalty volunteer case and the scrivener's error case above. In the scrivener's error scenario, the lawyer's civil disobedience promotes her client's goals, while violating a positive law duty to opposing counsel. In the death penalty volunteer scenario, in contrast, the lawyer acts in direct contravention of her client's expressed wishes, thereby undeniably threatening the value of client autonomy at the core of client-centered legal practice. ¹¹⁷ As the Unabomer case, ¹¹⁸ where the defendant chose to plead guilty rather than allow his lawyers to mount

¹¹⁰ *Id.* Like Oleson, I intentionally use the male pronoun in discussing the example of the capital volunteer. *See id.* at 154 n.39 ("The gendered pronoun is warranted in this context: the overwhelming majority of death row inmates are male.").

¹¹¹ Id. at 155 (describing the capital volunteering as ethical "Gordian Knot").

¹¹² Gregg v. Georgia, 428 U.S. 153, 187 (1976).

Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers", DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers. (providing list of 141 individuals who "continued to waive at least part of their ordinary appeals" at time of execution); Oleson, *supra* note 109, at 157 ("Contemporary volunteering is a worsening problem.").

¹¹⁴ Model Rule 1.2, MODEL CODE OF PROFESSIONAL ETHICS,

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html.

See Anthony V. Alfieri, Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists, 31 HARV, C.R.-C.L. L. REV, 325, 325 n.2 (1996) (defining "abolitionists" as "mean civil rights and criminal defense lawyers committed to the invalidation of the death penalty.").

¹¹⁶ See Janill L. Richards, A Lawyer's Ethical Considerations When Her Client Elects Death: The Model Rules in the Capital Context, 3 SAN DIEGO JUST. J. 127, 131 (1995) (characterizing any action in contravention of client's wishes as arguably "opposed to the general mandate that a lawyer will follow the wishes of her client and will not substitute her own conception of what is in the client's best interest.").

¹¹⁷ See, e.g., Katherine R. Kruse, Fortress in the Sand: The Plural Values of Client-Centered

Representation, 12 CLINICAL L. REV. 369, 370–71, 373 (2006) (noting the predominance of the client-centered approach to lawyering in legal education and exploring "the question of what respect for client autonomy might mean for the dilemmas of when or how forcefully to intervene in client decision-making").

¹¹⁸ United States v. Kaczynski, 239 F.3d 1108, 1118 (9th Cir. 2001) (holding that denial of defendant's Faretta request to represent himself did not render his guilty plea involuntary nor did the threat of presentation of a mental state defense with which defendant disagreed render his plea involuntary). Ted Kacynzski, known as the "Unabomber," killed three people and injured 23 others in between 1978 and 1995 in a bombing campaign conducting through U.S. mail. Michael Mello, The Non-Trial of the Century: Representations of the Unabomber, 24 VT. L. REV. 417, 420–21 (2000); see also Ollie Gillman, 'I think your brother's the Unabomber': Ted Kaczynski's sister-in-law and brother speak of the moment they realized they knew who the twisted mass murderer was, DAILYMAIL.COM (Feb. 11, 2016 11:12 AM).

a mental illness-based defense at trial, ¹¹⁹ starkly reminded the legal profession and society writ large, the autonomy of the criminal defendant must be carefully respected, as it is "the defendant who most immediately experiences the effects of a given criminal adjudication." ¹²⁰

At the same time, there are other significant moral values that conflict with this strong notion of defendant autonomy and that support morally justifiable civil disobedience in at least the particular case of the death penalty volunteer. Assuming that the client is mentally competent, it seems clear that the positive law of lawyering precludes her from attempting to frustrate the client's choice to submit to the death penalty. Yet perhaps civil disobedience of this positive law duty might be justified, especially in light of the unique conditions death penalty context, including the irrevocability and the profoundly coercive situation confronting a defendant who considers waiving his appeals. Ultimately the lawyer must consider for herself whether her deep, conscientious, political commitment to abolition of the death penalty and her concerns about the "systemic inequality and injustice" in the administration of the death penalty suffice to overcome her moral discomfort with acting in direct contravention of her client's express wish to submit to capital punishment. Given the weight of the countervailing moral norm of client autonomy, perhaps especially in the criminal context, the capital defense cause lawyer should carefully consider whether

http://www.dailymail.co.uk/news/article-3442524/I-think-brother-s-Unabomber-Ted-Kaczynski-s-sister-law-brother-speak-moment-realized-knew-twisted-mass-murderer.html. Kazcynski was called the "Unabomber" because he initially target universities and airlines. Mello, *supra*, at 421. He was apprehended after his anonymous 35,000-word manifesto decrying modern industrial society and technology was published in 1995 in the Washington Post and the New York Times, and his brother David alerted the police that he suspected Ted Kacynski was behind the bombings. *Id.*

See Mello, supra note 118, at 431; Kaczynski, 239 F.3d 1108, 1121 (9th Cir. 2001) (Reinhardt, J., dissenting) ("From the outset, however, Kaczynski made clear that a defense based on mental illness would be unacceptable to him, and his bitter opposition to the only defense that his lawyers believed might save his life created acute tension between counsel and client.").

Recent Case, United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2001), 115 Harv, L. Rev. 1253, 1256 (2002). I am indebted to Professor David Luban for pointing out the relevance of this example.
 See ,e.g., Richards, supra note 116, at 170.

¹²² Cf. id. at 152–53 (arguing that broader conception of lawyers' ability to engage in "protective measures" on behalf of their clients under the Model Rules should apply in death penalty volunteer scenarios, grounded in a presumption of incompetence, because "death is different") (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Richards specifically points to the unique irrevocability, information asymmetry, mental health concerns, coercive circumstances, and potential for client vacillation in the capital punishment context. id. at 155–61

Justice Marshall, for instance, dissenting in *Lenhard v. Wolff*, 444 U.S. 807, 811 n.2, noted that the capital defendant faced several institutional pressures, which combined to push him towards waiver of further appeals: (1) the allegedly inhumane conditions of his incarceration; (2) a feeling of hopelessness and a desire to minimize the time that his family suffered while his appeals were pending; and (3) an aversion to "begging" for "mercy" or "pity." *See id.* at 159.

¹²⁴ Cf. Toone, *infra* note 125, at 662 (noting that autonomy discourse in Supreme Court's right to self-representation jurisprudence "mask[s] systemic inequality and injustice."); Luban, *supra* note 17, at 323 (arguing that manipulation of client but lawyer can by justified in service a of "just and sufficiently weighty" political cause).

weighty" political cause).

125 See, e.g., Faretta v. California, 422 U.S. 806, 821 (1975) (establishing defendant's right to self-representation); Christopher Slobogin, Mental Illness and Self-Representation: Faretta, Godinez, and Edwards, 7 OHIO ST. J. CRIM. L. 39, 394 (2009) (describing how autonomy value underlies Faretta

she truly feels morally compelled to disobey lawyering law in the death penalty volunteer context.

Assuming the death penalty cause lawyer decides to proceed with civil disobedience in this scenario, the question remains: what form would such civil disobedience take? First, the lawyer might decide to go beyond the bounds of ethically-permissible advice 126 by trying to actively persuade or even pressure her client to continue to file appeals; at the very least, this approach to civil disobedience would continue to actively involve the client in the decisionmaking process, even if it clearly intrudes upon his autonomy. Second, the lawyer might argue that his client is choosing to forgo his appeals due to mentally incompetence (although the client is in fact competent). While the Ninth Circuit once attempted to reconcile such action with lawyering law by characterizing it as an attempt to "act[] in the best interests of his client, 129 such circumvention of the express wishes of a client, even a client who desires to accept capital punishment, is more accurately described as civil disobedience of lawyering law.

C. Cause Lawyering, Civil Disobedience, and the Code of Ethics

The above examples, from the drafting errors of opposing counsel to the death penalty "volunteer," concretely demonstrate the inherent "ethical tension between cause lawyering and mainstream professionalism." The normative question of how cause lawyers should respond when faced with such conflicts is vitally important, especially in light of the proliferation and (begrudged) acceptance of cause lawyering as a legitimate and even desirable component of the organized bar. Given the inability of the

opinion). But see Robert E. Toone, The Incoherence of Defendant Autonomy, 83 N.C. L. REV.621, 622, 650, 656 (2005) (criticizing the idea, traccable to Faretta, that defendant autonomy should trump other societal values, such as fairness, order, efficiency, and accuracy, and arguing that the constraints of criminal process preclude the exercise of true autonomy by the criminal defendant); Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163 (2000) (holding states are not constitutionally required to recognize right to self-representation of direct appeal from criminal conviction).

126 See Rule 2.1. MODEL RULES OF PROFESSIONAL CONDUCT,

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule 2 1 advisor.html.

127 Cf. Richards, supra note Error! Bookmark not defined., at 167; Luban, supra note 17, at 323.
128 Cf. Mason By & Through Marson v. Vasquez, 5 F.3d 1220, 1222 (9th Cir. 1993) (Against his client's wishes, attorney "filed opposition papers and declarations from several mental health professionals stating that [client] was suffering from mental illnesses that were affecting his decision to withdraw his petition."); see also Richards, supra note 116, at 128. As Richards notes, this might also involve a breach of the lawyer's duty of confidentiality, if she relies on confidential communications to convince the judge that a competency hearing is necessary. Richards, supra note 116, at 144.

¹²⁹ *Mason*, 5 F.3d at 1223. ¹³⁰ Richards, *supra* note 116, at 131.

¹³¹ Scheingold, *supra* note 19, at 52; *see also* Etienne, *supra* note 88, at 1196 ("The cause-motivated approach to lawyering contradicts the traditional view of those in the legal profession as rights-enforcers or as neutral advocates of their clients' interests.").

¹³² See Sarat & Scheingold, supra note 13, at 25, (discussing "conditional and precarious" place of cause lawyers within the profession, despite "grudging acceptance"; noting how profession was able to "capitaliz[e] on the luster of cause lawyering" to improve the reputation and social capital of the profession generally).

dominant model of professional ethics to address these problems, this subsection argues that the positive laws of lawyering represent a subject of morally justifiable civil disobedience in the context of cause lawyering. 133

In order to morally justify cause lawyers' civil disobedience of ethical codes, one must reject the restrictive Rawlsian framework in favor of Brownlee's more expansive account of justified dissent. Recall that Rawls posited a presumptive general duty to obey even unjust laws. 134 Only when a law "exceed[s] certain bounds of injustice" might the general moral duty to comply with the laws be suspended. 135 The generally applicable rules of professional ethics certainly do not satisfy this high standard. Even if they did, the Rawlsian account further limits the circumstances where civil disobedience is morally justified. 136 Moreover, Rawlsian civil disobedience must be "public," 137 which renders it inapplicable to at least the failure to disclose drafting errors ("drafting error dilemma"). 138 Moreover, it is unclear whether Rawls (in contrast to Raz and Brownlee, for instance) would morally approve of *indirect*, in addition to *direct*, civil disobedience. 139 Direct civil disobedience occurs when one breaches the very same law that is opposed (e.g., the lunch counter sit-ins during the civil rights movement). 140 Indirect civil disobedience, in contrast, refers to breaches of laws, which ceteris paribus. are not themselves opposed but are disobeyed in order to convey objection to another law, norm, or policy. ¹⁴¹ Civil disobedience by cause lawyers of the ethical codes in the context of either the drafting error dilemma or the volunteer dilemma would exemplify indirect disobedience, which most contemporary philosophers agree is morally justifiable.¹⁴²

Although civil disobedience of the ethics code might be morally problematic from the Rawlsian perspective, it is justifiable under Brownlee's approach. First of all, Brownlee rejects the Rawlsian insistence on publicity; therefore, in the drafting error dilemma, even initially covert civil disobedience can be morally justified, when the disobedience is later acknowledged and the rationale explained. ¹⁴³ The cause lawyer in the drafting error scenario could refuse to disclose the error of her opponent initially, in

¹³³ While this provides the cause lawyer with a morally justifiable course of action, it does not address the shortcomings in the code of ethics itself. The next Section will discuss the anticipated benefits of applying morally justified civil disobedience in this context, and will also engage with the possibility of revising the code of ethics to better accommodate the tension between cause lawyering and the standard conception of professional ethics.

134 See text accompanying notes 58–59, supra.

¹³⁵ See text accompanying note 61, supra.

¹³⁶ See text accompanying notes 62-68, supra.

¹³⁷ See text accompanying note 62, supra.

¹³⁸ See Section III.A, supra.

¹³⁹ See Brownlee, supra note 69, at 7 (noting that Rawls' conception does not "explicitly" or "consistently" recognize that "civil disobedience can be either direct or indirect.").

¹⁴⁰ Id.: see also Kimberlee Brownlee, Civil Disobedience, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 20, 2013), http://plato.stanford.edu/entries/civil-disobedience/.

Brownlee, supra note 69, at 7; Kimberlee Brownlee, Civil Disobedience, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 20, 2013), http://plato.stanford.edu/entries/civil-disobedience/.

¹⁴² See Brownlee, supra note 140 ("There is more agreement amongst thinkers that civil disobedience can be either direct or indirect.").

¹⁴³ See text accompanying note 73, supra.

order to ensure the success of her action. Leventually, the cause lawyer must disclose her action, in order to ensure that her civil disobedience serves its communicative goal: to express, for instance, moral criticism of the power imbalances inherent in the system of criminal justice plea-bargaining. The communicative value of this dissent provides the foundational core of the moral justifiability of civilly disobeying the ethics code.

The cause lawyer's civil disobedience of the ethics code in the drafting error dilemma and the volunteer dilemma is grounded in her conscientious commitment to social change. ¹⁴⁷ From the cause lawyer's perspective, ¹⁴⁸ the value of insulating their choice to civil disobey in these scenarios from moral criticism is rooted in human dignity: the system of legal ethics places "burdensome pressure" on the cause lawyer to act in contravention of her deeply held, conscientious convictions. 149 Assuming that the cause lawyers in these scenarios "are willing to risk being seen, and thus held to account, for their conscientious disobedience," 150 there can be no realistic doubts about the sincerity of their beliefs. Through an act of civil disobedience, the cause lawyer can simultaneously communicate "their concerns about perceived injustices in law or policy," while also effectively dissociating themselves from perceived injustices in the legal system itself. [3] Civil disobedience in the drafting error dilemma and volunteer dilemma are thus morally justified by the communicative value of the lawyers' dissent and the dignitary value, from the lawyer's perspective, of creating moral space for her to dissociate herself from perceived, system-wide injustices. ¹⁵² As Kimberley Brownlee has noted, this carves out an important moral space for dissent by institutional actors subject to formal professional norms: in the context of cause lawyering, morally challenging questions simply cannot be resolved by a value-neutral appeal to the positive law of lawyering, but instead require the courage to exercise independent moral judgment. 153

IV. Implications for Legal Ethics and Practicing Cause Lawyers

¹⁴⁴ See id.

¹⁴⁵ See generally Jed. S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

¹⁴⁶ Cf. id. (covert civil disobedience can still "taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it.").

¹⁴⁷ See note 88, supra (collecting sources describing cause lawyers' conscientious commitment to promoting moral vision of social change); cf. Brownlee, supra note 69, at 8 (focusing moral inquiry on the conscientious motivations of civil disobedience); Minow, infra note 152, at 734 (The "basic argument justifies disobedience in the face of particular rules that seem to implicate individuals in immoral actions or coercion to violate their own beliefs.").

¹⁴⁸ See text accompanying note 35 & n. 40, supra (defining the "lawyer's perspective" in professional ethics and explaining its significance in designing system of professional ethics).

¹⁴⁹Cf. Brownlee, supra note 69, at 17–18.

¹⁵⁰ *Id.* at 18.

¹⁵¹ *Id.* at 12.

¹⁵² Cf. Martha L. Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. PITF. L. REV. 723, 730 (1991) ("[T]he very effort to make legal arguments may require accepting assumptions and terms of debate that advocates most deeply wish to challenge.")

¹⁵³ Id. at 15 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW (2003)) ("[W]hat morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person's office or position."); cf. William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1083 (1988).

This paper has argued that the positive law of lawyering inherently conflicts with the project of cause lawyering. In considering concrete examples of this conflict, the paper has argued that civil disobedience of professional ethics can be *morally justified*. The question thus becomes: what difference, if any, does this make for how the legal professional conceptualizes and designs its normative system of professional responsibility, embodied by the codes of ethics? While the project of proposing systematic revisions to the model code of professional ethics is beyond the scope of this paper, ¹⁵⁴ this section will sketch some conclusions about the nature of professional ethics in the context of cause lawyering.

First, it is important to emphasize the narrowness of the claim above about the moral justifiability of civil disobedience in the context of "lawerying law." This paper does not argue that the organized bar should codify unconstrained lawyerly discretion, unbounded by any notion of client goals or interests, simply in order to accommodate the cause lawyers' choice "to privilege their moral aspirations and political purposes." Instead, recognizing the value of Ayers' concept of the "lawyer's perspective," the argument offers cause lawyers a moral framework through which to evaluate and potentially to morally justify their choice to privilege individual morality over role morality and substantive justice over the positive law of lawyering.

Adopting the lawyer's perspective is particularly important in the context of cause lawyering, given the prevalence of cause lawyers in the modern profession ¹⁵⁶ and the seemingly irreconcilable disconnect between cause lawyering and the norms of professional ethics. Given the reality that these cause lawyers often pursue their ideological missions at the expense of strict obedience to the code of ethics, ¹⁵⁷ perhaps the ethics codes should be revised in a process of "reflective equilibrium," ¹⁵⁸ whereby the norms "on the books" are brought into line with the norms of the cause lawyers "on the ground." By striving for coherence between the ideals of the ethical codes and the empirical reality of cause lawyers' conduct contravening these codes, the profession might pragmatically encourage respect for the norms of professional ethics while simultaneously demonstrating enhanced respect for the "lawyer's perspective" in policymaking. Perhaps, in light of these considerations, the ethical code should be adapted to promote moral deliberation in hard cases, as Samuel Levine has suggested. Levine's "deliberative model" would avoid the need for open defiance of the ethics codes by replacing *optional* Model Rules (e.g., "a lawyer 'may' reveal confidential information in

¹⁵⁴ As Sarat and Scheingold have described, the work of civil rights and poverty cause lawyers in the 1950s, 1960s, and 1970s "expanded definitions of professional responsibility." As a result, the modern bar has incorporated cause lawyering into its "definition of civic professionalism," albeit to a limited extent. It is worth noting, however, that in the context of contemporary politics, the organized bar's enthusiasm for cause lawyering is "waning," and its "definition of what constitutes legimitate cause lawyering" is narrowing. Sarat & Scheingold, *supra* note 13, at 49–50.

¹⁵⁵ Scheingold, supra note 19, at 50.

¹⁵⁶ See Sarat & Scheingold, supra note 13, at 48 (describing cause lawyers' "foothold, however tenuous," within legal profession); Scheingold, supra note 19, at 50 ("Even a cursory summary of the causes pursued by cause lawyers provides ample evidence that cause lawyers are indeed pursuing their moral muses.") ¹⁵⁷ See Scheingold, supra note 19, at 50,

¹⁵⁸ See generally Norman Daniels, Reflective Equilibrium, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 12, 2011), http://plato.stanford.edu/entries/reflective-equilibrium/.

order to save a life") with a "discretionary rule" ("the individual lawyer retains discretion not to disclose when such a decision is based on *demonstrable ethical deliberation*). 159

Second, given the political valence of the ethical dilemmas presented in this paper, a concern might arise that civil disobedience and ethical discretion represent an effort to free lawyers to pursue left-leaning causes. Yet this concern about political bias is somewhat of a red herring: as Ann Southworth has demonstrated, "conservative and libertarian legal advocacy groups have multiplied" since the mid-1970s, "creat[ing] a vibrant, highly differentiated field of conservative legal advocacy organizations modeled on liberal public interest law firms." A further and more difficult objection to both the discretionary model of professional ethics and the moral defense of civil disobedience by cause lawyers implicates a legitimate concern about democratic legitimacy: allowing cause lawyers to exercise unconstrained discretion to leverage the law to advance personal views (in a way that non-lawyers simply cannot) appears elitist and antidemocratic. [61]

These antidemocratic concerns, however, can be alleviated in two ways: (1) by constraining the situations under which the profession deems moral discretion and/or civil disobedience justified; and (2) by recognizing the democracy-enhancing consequences of civilly disobeying the ethical codes. First, cause lawyers should constrain civil disobedience of the ethics code to situations where they represent the more vulnerable party against background conditions of severe power imbalance. Legal ethicists have already recognized that "clients' relative power" should "make a difference in the permissible conduct" of their lawyers. 162 The normative value of civil disobedience in the face of such power imbalance is buttressed by Luban's insight into the moral justifications for the adversary system, which undergirds the entire system of professional responsibility. In the face of gross power differentials, the assumptions supporting our trust in the adversary system evaporate, emptying our commitment to the adversary system of any normative value. 163 As Brownlee has argued, in situations of palpable power imbalance, civil disobedience can serve an important political function, helping to "rectif[y] the imbalance in meaningful avenues for political participation" between powerful majorities and vulnerable minorities. 164 The cause lawyers' civil disobedience thus serves the communicative function of drawing attention to the perceived systemic injustices faced by marginalized clients.

159 Levine, supra note 6, at 52-53 (emphasis added).

Lawyers and the Contest over the Meaning of Public Interest Law, 2 UCLA L. Rev. 1223, 1223 (2005); see generally ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008). See also Scheingold, supra note 19, at 48 ("Included under the umbrella of cause lawyering are such polar ideological opposites as poverty and property rights lawyers, feminist and right-to-life lawyers...").

161 See, e.g., ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE

¹⁶¹ See, e.g., ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION ix (2008) (describing "mistrust of lawyers and legal activism" as a "unifying grievance" of conservatives).

¹⁶² Theories of Professional Regulation, supra note 4, at 16.

¹⁶³ See text accompanying notes 31–33, supra.

¹⁶⁴ Brownlee, *supra* note 69, at 17.

Secondly, both constrained civil disobedience and the codified deliberative discretion 165 could actually serve an important democracy-enhancing function, despite the above-noted concerns about antidemocratic activist lawyering. ¹⁶⁶ Even under a hypothetical, Rawlsian, "reasonably just" democratic regime, ¹⁶⁷ the political voices of "discrete and insular minorities" will be stifled. 168 With this seemingly perpetual problem in mind, the democracy-enhancing potential of civil disobedience, deliberative lawyerly discretion, and dissent generally, are illuminated: "These practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views." Thus, even though civil disobedience of lawyering laws is indirect, in that it is intended to challenge collateral injustices existing independent of the ethics code, democratic deliberation is still augmented in the process. Furthermore, "when their causes are well founded and their actions justified," the civilly disobedient cause lawyer "serv[es] society not only by questioning, but by inhibiting departures from justice and correcting departures when they occur, thereby acting as a stabilizing force within society." Of course, the question of which causes are "well founded" will be inevitably contentious. The point is the dissenting voices, offering contested notions of the meaning of social justice, will improve the quality of democratic discourse.

V. Conclusion

The cause lawyer occupies a precarious and contentious position within the modern legal profession. Over time, the organized bar has grown "less hostile" to cause lawyers, recognizing their instrumental value in convincing the general public are "more than hired guns, using suspect means to defend often unsavory clients and profiting handsomely from doing so." Yet cause lawyers, especially those representing "subversive" causes or "clients who are perceived as unworthy or dangerous" by the lay public, continue to face considerable professional obstacles and impediments, often including diminished status and pay. 173 As Stuart Scheingold points out, the fact that the dogged persistence of cause lawyers in the face of such challenges represents "a tribute to

¹⁶⁵ See text accompanying note 159, supra.

¹⁶⁶ Cf. Minow, supra note 152, at 741 ("The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change,"),

¹⁶⁷ See text accompanying note 59: Rawls, supra note 57, at 312.

¹⁶⁸ United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938); see generally JOHN HART ELY DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (developing representation reinforcement theory of judicial review). See also Brownlee, supra note 69, at 17 ("[E] ven in liberal regimes, persistent and vulnerable minorities are, by nature, less able than majorities to make their views heard ").

¹⁶⁹ See Brownlee, supra note 69, at 21.

¹⁷⁰ Cf. Id. (citing RAWLS, supra note 57, at 383).

¹⁷¹ Scheingold, supra note 19, at 48 (arguing the "disparate eacophony of causes suggests just how contentious the pursuit of moral justice is likely to be.")

¹⁷² Scheingold, *supra* note 19, at 52. ¹⁷³ *Id.* 49, 52.

their moral fervor, but it is also a product of the career sacrifices that they make...."174

This paper offers cause lawyers respite from one of these many professional impediments: the inability of codified legal ethics to respond effectively to the particularly difficult ethical questions encountered by the cause lawyer. The modest goal was to offer cause lawyers a moral framework through which to justify their contravention of "lawyering law," despite the connotation of moral authority inherent in the "code of professional ethics." In the course of developing this moral framework, applying the familiar concept of civil disobedience, this paper also suggests that cause lawyers' dissent on behalf of marginalized and vulnerable clients is normatively desirable. Ultimately, the hope is that cause lawyering continues to provide the legal profession with an opportunity to embody "what conventional legal ethics den[ies]: "the opportunity to harmonize personal conviction and professional life" in pursuit of moral justice.

¹⁷⁴ Id. at 49.

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Immigrants with Prior Criminal Record Risk Removal from the United States—Impact on Asian Immigrants

Elizabeth R. OuYang, Esq.[†]

Lawful permanent residents in the United States with a criminal record can face double jeopardy, jail time, and removal from the United States. The case of Qing Wu underscores this dilemma. At the age of five, Qing Wu emigrated from China to the United States with his parents as a lawful permanent resident. Growing up in a crowded tenement building in Manhattan's Chinatown, Wu-like many low-income Asian male teenagers living there-began hanging out with the wrong people and got in trouble with the law. After accepting a plea bargain, Wu was convicted of robbery in October of 1996 and sentenced to three-to-nine years of imprisonment. Intent on turning his life around, Wu earned his General Education Degree (GED) in prison. After three years in a juvenile detention facility, he worked as a systems administrator with the Police Benevolent Association, obtained his Associate's Degree in Technology at New York City College of Technology, and worked his way up from a junior network administrator to Vice President of Technology at a major real estate asset management firm. He applied to become a U.S. citizen on his own, and, at age twentynine, was engaged to Anna Ng, a U.S. citizen. This is a classic example of someone who turned his life around and pursued the American Dream. Why, then, does his story not end on a happy note?

Many immigrants, including Asians, are now targets of aggressive immigration policies enforced after the September 11, 2001 terrorist

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Qing's aunt petitioned for his father, and Qing received his green card as a derivative child on his father's application.

attacks. Wu's citizenship application was denied because of his 1996 juvenile conviction. He was unaware of two immigration laws passed that year: the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Anti-Terrorism and Effective Death Penalty Act (AEDPA). These laws make it mandatory for Wu to be removed from the United States because of his prior conviction. The IIRIRA changed the definition of an "aggravated felony" for a violent crime from a five-year prison term to a one-year term, ² and the AEDPA eliminated discretionary relief for a lawful permanent resident convicted of a crime designated as an aggravated felony. ³ Prior to 9/11, Immigration and Customs Enforcement (ICE) was not aggressively enforcing the 1996 laws. However, after 9/11, ICE changed this practice.

After his citizenship application was denied, Wu was ordered to report to immigration. When he appeared, he was arrested by ICE and detained in a New Jersey jail, where he awaited mandatory removal to China. Legal remedies to save Wu from removal were a longshot. Under the Immigration and Nationality Act, only a pardon by a state governor or the President of the United States for an aggravated felony could stop the removal proceedings of a lawful permanent resident.

While the chances were remote to none, a pardon application was filed on Wu's behalf.⁶ The application was stacked with favorable letters: on top of the stack was a letter from Judge Michael Correiro, the judge who sentenced Wu nearly 15 years ago; elected officials, including U.S. Representative Nydia Velazquez;⁷ Wu's employers; several friends and

^{2.} Immigration and Nationality Act § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (2010); § 101(a)(43)(F).

^{3.} Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, § 440, 110 Stat. 1214 (1996).

^{4.} The first was an effort to have the local district attorney's office reopen Qing's criminal record from nearly fifteen years ago because his criminal defense attorney did not inform him of the immigration consequences of his plea. However, at the time Qing was detained by Immigration, the U.S. Supreme Court decision in Padilla v. Kentucky was imminent. In Padilla, the U.S. Supreme Court had to decide whether the failure to affirmatively advise a defendant of the immigration consequences of a criminal conviction violated the Constitution. With the Supreme Court decision pending, the local district attorney opted instead to support the pardon petition to the Governor. Meeting with representatives of the Manhattan District Attorney's Office, (Feb. 12, 2010). After Governor Paterson granted the pardon on March 5, 2010, the Supreme Court ruled in Padilla on March 31, 2010 that a criminal defense attorney's failure to advise their client about the immigration consequences of the criminal case constitutes ineffective assistance of counsel. The Court stated that "because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important." Padilla v. Kentucky, 130 S. Ct. 1473, 1478-80 (2010).

Immigration and Nationality Act § 237(a)(2)(A)(vi) (2010).

^{6.} Kendrick Nguyen, Esq. filed the pardon petition pro bono on Qing Wu's behalf.

^{7.} Nydia Volazquez is the U.S. Representative for the 12th Congressional District in New York. Congresswoman Velazquez is the first Puerto Rican woman elected to the U.S. Congress and has been a staunch supporter of immigration reform.

family members; community groups; and an online petition signed by thousands. With the unrelenting advocacy of Anna Ng and Wu's family, the support of OCA-NY leading the community advocacy and media strategy, and a New York Times article, "Judge Keeps His Word to Immigrant Who Kept His," published on February 18, 2010, Governor Paterson granted Wu's pardon application on March 5, 2010. At that time, Wu's pardon was one of only two pardons Governor Paterson had ever granted during his tenure. As a result of Wu's case, on May 3, 2010, Governor Paterson announced the establishment of a Special Immigration Board of Pardons (SIBP). This Board was created to review cases of legal U.S. residents who are at risk of being removed from the country because of minor or old convictions. An estimated 1,100 pardon applications have been received by the SIBP.

While Wu's outcome resulted in a pseudo-happy ending, how many other Asian, lawful permanent residents have been and could be at risk of mandatory removal from the United States because of a prior or minor criminal conviction?

To begin with, there have been a few notable, high-profile cases. Sentenced Home, a 2006 documentary film by Nicole Newnham and David Grabias, depicts the plight of three Cambodian male refugees: two were deported to Cambodia because of juvenile crimes; one, Many Uch, still fights to remain in the United States. In 1994, Uch was relocated from a refugee camp in the Philippines to a high-crime urban area known as Park Lake Homes in Seattle, Washington. For protection, he joined a gang. Uch was convicted of first-degree robbery with a deadly weapon for a crime in which he was the getaway driver. 12 Uch spent forty months in state prison, twenty-eight months in detention, and now sits in removal proceedings. Like Qing Wu, Uch has become a positive member of society. He works full-time, coaches a youth baseball team, and started a pool hall for at-risk youth. With his fiancée, Uch has a U.S.-born daughter. On June 11, 2009, in a packed courthouse full of Uch's supporters, the Clemency and Pardon Board of Seattle unanimously recommended to Washington Governor Christine Gregoire that Uch be granted a pardon. ¹³ In June of 2010,

^{8.} OCA was formerly known as "Organization of Chinese Americans." It now goes by the acronym "OCA" because the organization is becoming more pan-Asian.

^{9.} Nina Bernstein, Judge Keeps His Word to Immigrant Who Kept His, N.Y. TIMES, Feb. 18, 2010, at A1.

Danny Hakim & Nina Bernstein, New Paterson Policy May Reduce Deportations, N.Y.
 TIMES, May 3, 2010, at A1.

^{11.} Kirk Semple, Panel is Facing Deadline on Immigrants' Pardons, N.Y. TIMES, Oct. 22, 2010, at A24.

^{12.} SENTENCED HOME (Sentenced Home Productions 2006).

^{13.} Kery Murakami, Wait for Justice Almost Over for Cambodian Immigrant, SEATTLE POST GLOBE, June 11, 2009, http://seattlepostglobe.org/2009/06/11/wait-for-justice-almost-over-for-

Governor Gregoire pardoned Many Uch. 14

Eddy Zheng is a Chinese immigrant who came to the United States in 1982 at the age of twelve. Four years later, he pled guilty to robbery and received seven years to life in prison. Zheng spent nineteen years in prison, from age sixteen to thirty-seven, before being transferred to immigration detention for two additional years. While in jail, he learned English, camed his GED and Associate's Degree, and created the first San Quentin poetry slam. He joined S.Q.U.I.R.E.S., a mentoring program for at-risk youth, and has been promoted a third time to project manager in charge of nine staff members at Community Response Network, an advocacy organization that trains people in conflict mediation. Zheng is currently challenging his deportation order in federal court on the basis of ineffectiveness of counsel in his 1986 conviction.¹⁵

Kevin Auyeung emigrated from China to the United States at age fourteen. Three years later, he was convicted of robbery. While serving his prison term, Auyeung earned his GED and later established his own cellular communications service company. Because of his criminal record, he was placed in immigration detention in 2006; he was later placed under immigration community supervision because ICE was unable to obtain travel documents for him. Nevertheless, Mr. Auyeung managed to maintain steady employment and continued volunteering as an interpreter for elderly persons in Chinatown throughout this time period. He was subsequently granted an unconditional pardon from Governor Paterson as a result of the newly created Special Immigration Pardons Panel. ¹⁶

Tam Phan, a Vietnamese immigrant, came to the United States in 1981 at the age of six. He grew up in Midwood, Brooklyn, joined a gang in high school, and was subsequently convicted for his involvement in a series of armed robberies. He went to prison at age of seventeen. During his seventeen years of incarceration, he earned an Associate's Degree from Bard College and Sage College of Albany, and a Bachelor's Degree from Canisius College. He is now pursuing a graduate degree in urban policy and administration at Brooklyn College while working part-time at the Fortune Society, a non-profit organization that helps ex-convicts re-enter society.¹⁷

Beyond these cases, ICE's current statistics show nothing beyond an

cambodian-immigrant.

Posting of Austin Jenkins to The Crosscut Blog, http://erosscut.com/blog/crosscut/ (July 8, 2010).

^{15.} Michael R. Harris & Stephen Liebb, The Journey of Eddy Zheng, SAN QUENTIN NEWS, May 2009, at 1-2.

^{16.} Press Release, New York State Office of the Governor (Dec. 6, 2010) (on file with author).

^{17.} He applied for a pardon, but was not on the list of immigrants pardoned in the December 6, 2010 or December 24, 2010 release from the New York State Office of the Governor. Semple, *supra* note 11.

astounding number of Asian immigrants officially removed on the basis of a criminal record. According to the "2009 Yearbook of Immigration Statistics," approximately 10,600 out of 45,920 Asian immigrants who were deported from 2000 to 2009 had a criminal conviction. However, it is difficult to know precisely how many Asian immigrants living in the country could be subjected to removal for a previous criminal conviction.

Prior to 9/11, it was not a common practice for immigration enforcement and the criminal justice system to share and coordinate information when an immigrant defendant was released from a state jail. ¹⁹ Rather, a lawful immigrant resident convicted of a crime, like Qing Wu, served his time in state prison and was released. Now post-9/11, once the criminal sentence is completed, an immigrant is transferred directly from state prison to immigration detention to face removal proceedings. ²⁰ So the exact number of people who served their time and were released, and now could face the retroactive application of the 1996 immigration laws is unknown.

Before the 2010 Supreme Court decision in *Padilla*, Legal Aid Society and other public defender agencies did not track data on a client's immigration status.²² Other than anecdotal interviews from defense attorneys or from the immigrant defendants themselves, there is no paper trail. Many Asian defendants, in particular, sought the legal services of private criminal defense attorneys. Because of attorney/client privilege, these records are not available for public research.

Yet, despite these obstacles, the estimated number of Asian immigrants who are currently and could potentially be impacted by the 1996 immigration laws subjecting them to removal because of a criminal record remains significant.

For instance, the number of nationals from China who became lawful permanent residents (LPR) from 2000-2004 ranged from 40,000 to 61,082 each year. Most LPRs are eligible to apply for citizenship in three years if they received the green card through a U.S. spouse; otherwise, there is a five-year wait before one is eligible for citizenship. However, from 2004

^{18.} See U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 97-105 (2010). To arrive at these numbers, statistics were used from the following regions and countries of nationality: Bangladesh, Burma, Cambodia, People's Republic of China, Hong Kong, India, Indonesia, Japan, Kazakhstan, Korea, Laos, Malaysia, Mongolia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan, Thailand, Uzbekistan, and Vietnam. Some data regarding the number of criminals deported from certain regions and country of nationality was withheld by immigration to limit disclosure.

^{19.} Telephone Interview with Jojo Annobil, Esq., Legal Aid Soc'y (Sept. 23, 2010).

^{20.} Id.

^{21.} U.S. DEP'T OF HOMELAND SEC., supra note 18, at 12.

^{22.} U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., NATURALIZATION REQUIREMENTS INFORMATION (2011), available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=480

to 2009, the number of nationals from China who became U.S. citizens ranged from 27,309 to 40,017 each year. From these numbers, it appears many LPR's from China are not applying for or being granted U.S. citizenship and therefore could be subjected to mandatory removal if they commit crimes that trigger the 1996 immigration laws.

Asian youth with LPR status from low-income families are the most vulnerable. For more than two decades, joining gangs has been a growing lure for poor Asian immigrant youth whose parents either work long hours and/or leave them at home unsupervised. This has led to arrests of Asian youth for gang-related activity or to Asian youth being profiled or targeted for gang activity. In a study done of 62 Asian youths in gangs, half of the children stated "[m]oney" was the reason for joining gangs; twenty-three declared it was for "[p]rotection"; eighteen said it was for "[f]un"; and fifteen said it was for "[b]rotherhood."

Of this specific age group, Southeast Asian refugee youth are particularly at risk because of their lower socioeconomic status. In 1990, Southeast Asians represented 1.5 percent of the total population of California, but composed 4.5 percent of those held in the 9,000 wards of the California Youth Authority System: most were admitted because of gang wars. After 9/11, the U.S. government simultaneously increased deportation rates and pressured Cambodia to sign a repatriation agreement that would retroactively accept deportable Cambodian immigrants. As a result, many Cambodians who committed a crime as much as twenty years ago are now being sent back to Cambodia.

The trajectory of many who have entered the criminal justice system because of gang activity is that it serves as a temporary rite of passage for many Asian youth living in urban areas. Once they reach adulthood, there is a low level of recidivism as they leave for college, enter marriages, raise children, and lead productive lives. ²⁹ The tragedy is that now, like Qing, they face removal from the United States because of their juvenile criminal record.

Enforcement of the draconian 1996 immigration laws are tearing apart Asian American families and destroying productive lives. With more states

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^{23.} U.S. DEP'T OF HOMELAND SEC., supra note 18, at 53.

^{24.} See generally KYUNG-SEOK CHOO, GANGS AND IMMIGRANT YOUTH, (2007); Jungwon Kim, Shifting Scrutiny, Asians: Cops Too Focused on Race in Gang Crackdowns, NEWSDAY, Aug. 17, 1997.

^{25.} LO-LIN CHIN, CHINATOWN GANGS 108 (1996).

^{26.} Bill Ong Hing, Detention to Deportation: Rethinking the Removal of Cambodian Refugees, 38 U.C. DAVIS L. REV. 891, 939 (2005) (citing TONY WATERS, CRIME & IMMIGRANT YOUTH ix (1999)).

^{27.} Id. at 970.

^{28.} Id. at 899.

^{29.} Telephone Interview with Chanwoo Lee, Esq (Oct. 22, 2010).

entering into the Secure Communities Agreement with the Department of Homeland Security, an agreement that requires local police to report the identity of all persons they arrest to the federal government, more Asian immigrants with a prior criminal record will be subjected to mandatory removal. Discretion to consider rehabilitative factors and family unity must be restored to immigration judges in removal proceedings.

This issue affects all lawful permanent residents, not simply Asian immigrants. Asian immigrants, their families, and community organizations must unite with local and national immigrant advocacy organizations to fight for comprehensive immigration reform. New York is at the forefront of advocating for such reform. Governor Paterson's bold leadership in creating the Special Immigration Pardons Panel is a step in the right direction in responding to a broken federal immigration system, and other states should follow in creating similar panels. Before he left office, the Governor, based on the recommendations from this special panel, pardoned thirty immigrants with old or minor criminal records, 30 The New York Immigration Coalition, with its two hundred member organizations, including Families for Freedom and Northern Manhattan Coalition for Immigrant Rights, is relentless in its pursuit of justice to restore discretion in immigration judges. The vision of The New York Community Trust's Fund for New Citizens in funding the Legal Aid Society, Bronx Defenders, Brooklyn Immigrant Defense Project, and Immigrant Defense Project to provide quality and affordable legal representation and advice to immigrants facing removal because of a criminal conviction is essential. The private bar, including the role of Cleary, Gottlieb, Steen & Hamilton LLP, and the New York State Defenders Association in helping to provide pro bono counsel to applicants filing pardon petitions with the Special Immigration Pardons Panel is a strong example of coalition building between the private bar and community immigrant organizations, and should serve as a national model to replicate for other states that create Special Immigration Pardons Panels.

All immigrant communities must be educated on the importance of becoming U.S. citizens after obtaining LPR status, including LPR parents filing for naturalization on behalf of themselves and their minor immigrant children to avoid being vulnerable to removal from the United States because of a criminal record. Most importantly, advocates must emphasize the importance of becoming a U.S. eitizen, to exercise their constitutional right to vote so that elected officials can be held accountable for unjust

^{30.} Press Release, New York State Office of the Governor (Dec. 6, 2010) (on file with author) (describing six immigrants who were issued a pardon from the Governor); see also Press Release, New York State Office of the Governor (Dec. 24, 2010) (on file with author) (mentioning twenty-four immigrants who were issued a pardon).

immigration laws.

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Keep the Patels: How Culturally Competent Teamwork Can Alleviate the Law's Diversity Retention Problem

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Keep the Patels: How Culturally Competent Teamwork Can Alleviate the Law's Diversity Retention Problem

Danisha Brar[†]

INTRODUCTION	123
I. MEANINGFUL DIVERSITY	124
A. Minority Reports	125
B. Ladies First	126
C. Professionalism as Whiteness	128
II. CULTURAL COMPETENCE	130
A. Do We Even Need to Talk About This?	130
B. Colorblindness Can Lead to Invisibility	
C. Important Lessons from Cross-Cultural Lawyering Texts	
III. TEAMWORK IN THE LAW	
A. The Workplace is Not Culturally Neutral: Workplace	
Behavior is Largely White	137
B. Traditional Teamwork Training Neglects Cultural	
Components	139
C. Teamwork + Cultural Competency = More Inclusive	
Workplace	141
Conclusion	142

INTRODUCTION

In the midst of an argument with law school classmates, I once remarked that I felt simultaneously invisible as a woman of color, or more specifically as a South Asian woman. A well-intentioned friend offered consolation in the form of an assurance: she had never viewed me as not-white, and in fact had always thought of me as white. This statement was not intended to insult me—in fact, I immediately knew what she meant: she had always thought of me as a person first—her vision of me was free of any overt racism. But I did not want to be seen as white. To me, being seen as neutral or white felt like another form of racism. By excising the cultural

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component of my identity, my friend had been trying to do me a favor. She had not meant to insult me. Instead, she had inadvertently failed to recognize that the cultural component of my identity cannot and should not be excised. I am first and last a South Asian woman—this identity permeates every aspect of my being.

This Article will use the lens of the experience of the South Asian woman in the law to explain why the legal community should not bleach out the individual cultural identities of its members. The legal workplace should do its best to welcome new peers holistically, leaving cultural identities intact. Cultural competency should be integrated into already-existing legal teamwork training—such a change won't be a panacea, but it's a step in the right direction. This Article seeks to advance the conversation about how best to recognize and embrace the value of cultural identity in the legal workplace.

I. MEANINGFUL DIVERSITY

A spectre is haunting the legal community: a lack of meaningful diversity. As more and more attorneys of color join law firms, earn clerkships, and become a part of the legal community, the legal workplace must change. Unfortunately, the entrance of attorneys of color to the law does not guarantee a professional workplace that always embraces its growing diversity. In fact, the legal workplace seems content to add more lawyers of color to its ranks without meaningfully diversifying itself. Diversity and Inclusion (D&I) initiatives saturate the recruiting environment (legal or otherwise) but are often poorly managed and shallow indicators of true diversity or inclusion in the workplace. In the legal workplace specifically, this is problematic for attorneys of color and the people employing them.

This Article argues that one solution to this lack of real diversity

This Article seeks to make a larger point about how minority entrants to a culture often end
up adopting the traits of the majority culture in order to "fit in." This can be good sometimes, but it can
also be detrimental when it compromises effective representation and work performance in the name of
stability and normalization.

^{2.} Diversity Fatigue, THE ECONOMIST (Feb. 11, 2016), http://www.economist.com/news/business/21692865-making-most-workplace-diversity-requires-hard-work-well-good-intentions-diversity? [https://perma.cc/ S8SQ-7PTU] (noting that superficial attempts at diversity result in negative phenomena such as "diversity fatigue," which are a direct result of poorly managed Diversity & Inclusion programs).

^{3.} See Ciara Trinidad, How Most Companies Get Diversity Recruiting Completely, Embarrassingly Wrong, Lankedin (May 5, 2016), https://www.linkedin.com/pulse/how-most-companies-get-diversity-recruiting-wrong-ciara-trinidad (explaining that D&I programs are frustrating to diverse recruits, who are starting to feel more like prize cows at the state fair than potentially valuable employees). Further, attempts at retaining associates of color are failing: 85% of female attorneys of color quit large firms within seven years of starting their practice. See Liane Jackson, Minority Women Are Disappearing from BigLaw—and Here's Why. ABA J. (Mar. 1, 2016), http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_he res_why [https://perma.cc/5BY9-EPEM].

involves the integration of cultural competency in the legal workplace. Just as cultural competency training has been an effective tool to help lawyers work with *clients* of different backgrounds, so too could it function as a tool for lawyers to deal with *each other* when they are of different backgrounds. An emphasis on the development of cultural competency skills will serve the interests of the legal community as a whole.

This Article will discuss general workplace trends but focus on the experience of one particular group: South Asian women. As a group that is both underrepresented in the law and rarely discussed, South Asian women provide a particular, unique, and often overlooked insight into the larger phenomenon at play here. To begin, this Article will broadly discuss minority participation and professionalism in the legal workplace. As the Article continues, it will explore the relevance of cultural competence in the workplace through the lens of my own experience, and the experiences of other South Asian women, in the law. The Article concludes with a discussion of solutions applicable to South Asian women specifically, but also to the legal community as a whole.

A. Minority Reports

The legal workplace is slowly but surely diversifying its ranks. In 2000, the American Bar Association (ABA) reported that 4% of licensed attorneys were Black, 3% were Hispanic, and 2% were Asian Pacific American.⁵ Compare this to the 2010 survey, which stated that 5% of licensed lawyers were Black, 4% were Hispanic, and 3% were Asian Pacific American.⁶ More importantly, the ABA reports that total minority enrollment at law schools in the United States is up from 25,753 in 2000 to 34,584 in 2013.⁷ Although the percentages are moving up slowly, law schools' increased efforts to diversify will eventually give way to a more diverse group of licensed lawyers.⁸ Additionally, many employment trends indicate that the number of attorneys of color will continue to increase.⁹ As

^{4.} ABA Lawyer Demographics Year 2016, AM. BAR ASS'N, https://properpr.files.wordpress.com/2016/11/lawyer-demographics-tables-2016-authcheckdam.pdf [https://perma.cc/YH8Q-NULV] (stating that in 2010, 3% of ABA-licensed attorneys were classified as Asian Pacific American, although it is impossible to tell what percentage of this 3% is South Asian).

^{5.} *Id*.

^{6.} Id.

^{7.} Statistics, AM. BAR Ass'n, http://www.americanbar.org/groups/legal_education/resources/statistics.html (follow "Total Minority JD Enrollment" hyperlink) (last visited Feb. 9, 2018).

^{8.} The Law School Admission Council has instituted programs to increase diverse student enrollment in law schools, including the "Prelaw Undergraduate Scholars" program. DISCOVERLAW.ORG, https://www.discoverlaw.org/diversity/plus.asp [https://perma.cc/TTT7-BZDK]. The American Bar Association has also attempted to diversify the field with different programs and committees. *Diversity and Inclusion Portal*, AM. BAR Ass'N, http://www.americanbar.org/diversity-portal.html [https://perma.cc/S319-4EZK].

^{9.} See EEOC, DIVERSITY IN LAW FIRMS 6 (2003), https://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf [https://perma.ec/Z929-L5AZ]

people of color increase in the law, it comes as no surprise that Asian Americans are a part of this increase. From 1982 to 2002, the percentage of Asian Americans earning law degrees increased from 1.3% to 6.5%. The following section will compare this rise of Asian Americans in the law to the rise of women in the law.

B. Ladies First

It is helpful to analogize the entry of attorneys of color into the legal profession by examining the entry of women into the same space. To be clear, this is not to say that women and minorities entered the legal profession in a staggered line, in which women entered first and minorities followed. Nor is it to say that there is no intersection between the experiences of women and minorities entering the law. Rather, the well-documented experiences of women entering the legal profession can provide a helpful framework for analyzing the less-documented experiences of other minority groups entering the legal profession.

The entry of women into the legal field has risen as slowly and surely as that of minorities. As previously stated, from 2000 to 2015, the percentage of women that were licensed lawyers rose from 28% to 36%. The entrance of women into the legal profession understandably led to changes and adjustments. Any environment that undergoes a significant change in demographics will experience a shift of some sort, but it is not necessarily the environment itself that experiences this change. As some women in the law have realized, the legal workplace does not always change. Instead, as discussed below, some women are asked to adapt to the legal profession by normalizing to the standards of professionalism set by men.

In 1997, in their book *Becoming Gentlemen*, Lani Guinier, Michelle Fine, and Jane Balin advance the theory that law school effectively rewards women who become more like men in order to become effective attorneys.¹³ In essence, the profession rewards women who perform in a masculine manner and ignores those who do not. The authors posit that the legal profession does little to truly diversify itself when it considers the answer to gender underrepresentation to be "add women and stir." ¹⁴

Moreover, the authors' research showed that women in law school felt

⁽explaining that a variety of underlying data sources, such as the number of law degrees conferred, seem to indicate that the participation of women and minorities in the legal profession will continue to increase over time).

^{10.} See id. at 13.

^{11.} The overlap of people that are entering the legal workplace that are *both* people of color and women complicates this comparison and these statistics.

^{12.} ABA Lawyer Demographics Year 2016, supra note 4.

^{13.} See generally Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change (1997).

^{14.} Id. at 21.

excluded, were excluded, and were negatively affected by gender issues psychologically or in a job search.¹⁵ This exclusion is complemented by a change in behavior: a shift in exhibited characteristics to embody the norms of the legal workforce. In fact, the anecdote that inspired the title of the book is the most insightful incident of all. There, the authors tell a story of a law professor who greeted his class each morning with "Good morning, gentlemen":

In his view, this was an asexual term, one reserved for those who shared a certain civilized view of the world and who exhibited a similarly civilized demeanor. While the term primarily referred to men, and in particular, men of good breeding, it assumed "men" who possess neither a race nor a gender. If we were not already members of this group, law school would certainly teach us how to be like them. That lesson was at the heart of becoming a professional. By this professor's lights, the greeting was a form of honorific. It evoked the traditional values of legal education: to train detached, "neutral" problem solvers, unemotional advocates for their clients' interests. It anticipated the perception, if not the reality, of our *all* becoming gentlemen. ¹⁶

To be sure, the legal community has evolved since the time *Becoming Gentlemen* was written. Several examples of gender inequality no longer ring true; for example, law school enrollment has increased for women and the percentage of women in the legal profession has increased from 28.9% in 2000 to 36% in 2015.¹⁷ Further, the authors' position that women were underrepresented in prestigious positions and extracurricular activities is similarly no longer true.¹⁸ Although not dispositive, the increase in numbers is a helpful indicator of progress in the arena of equitable treatment. Regardless, the parallels between women entering the law and people of color entering the law are clear: both groups are entering a legal workplace that is increasingly and earnestly focused on diversity, but is not managing this diversity as well as it could.¹⁹ For women, this lack of inclusion may have led to pressure to manifest more masculine traits in order to meet the norm. For attorneys of color, this lack of inclusion may lead to a similar pressure to conform to white norms.

^{15.} Id. at 29, 58-71.

^{16.} Id. at 85. Please see my own anecdote on page one of this Article for an example of how this applies to attorneys of color entering the legal profession.

^{17.} A Current Glance at Women in the Law May 2016, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.aut hcheckdam.pdf [https://perma.cc/PQ75-XGA3]: A Snapshot of Women in the Law in the Year 2000, AM.

BAR ASS'N,

https://www.americanbar.org/content/dam/aba/marketing/women/snapshots.authcheckdam.pdf [https://perma.cc/JD9Z-X558].

^{18.} GUINIER ET AL., *supra* note 13, at 41. Women comprise 46% of leadership positions in Law Reviews at law schools ranked in the top 50. A Current Glance at Women in the Law May 2016, supra note 17.

^{19.} This is a problem that is highlighted by the fact that women of color rarely remain at big law firms. Jackson, *supra* note 3.

The current definition of professionalism will not sustain a productive, multicultural, diverse workplace. In order to dissect the current definition of professionalism, we must first dispel the myth that workplace professionalism is codified without bias, culture, or gender.

C. Professionalism as Whiteness

Although diversity in the law is steadily increasing, the legal profession is 88% white.²⁰ As the original stalwarts of this profession, white lawyers have necessarily set the standards of professionalism in the workplace. These standards do not necessarily present an issue by themselves: any workplace has standards and codes of conduct that encourage its employees to adopt a professional, working identity. However, these standards of legal professionalism have a cultural component—they embody the cultural aspects of the white lawyers who created them.²¹ Simply put, professionalism in the legal workplace still seems to be, for the most part, white professionalism.²²

To the extent this is true, legal professionalism can be seen as an extension of white culture. This notion contravenes the popularly held idea that professionalism is objective, sterile, and without bias.²³ Professionalism inevitably incorporates the ideas that a particular group finds appropriate; in this case, it incorporates the views of a predominately white group of people who have held sway in the legal profession since its inception in this country. It is common for legal professionals to think of whiteness as a neutral norm rather than a racial identity, which is what leads some legal professionals to demand assimilation with this supposed neutrality.²⁴

It is markedly difficult to parse out white cultural influence in the professional standards of the law. The current standards of the legal workplace are so deeply entrenched that it is challenging to see where neutrality ends and influence begins. In his article, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, Russell G. Pearce supports the idea of professionalism as an expression of whiteness with intergroup theory.²⁵ According to Pearce, intergroup theory suggests that

^{20.} ABA Lawyer Demographics Year 2016, supra note 4.

^{21.} Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. Rev. 1259, 1260-62 (2000).

^{22.} For a comprehensive breakdown of how "whiteness" is embedded in legal professionalism, see generally Russell G. Pearce, White Lawyering: Rethinking Race. Lawyer Identity, and Rule of Law, 73 FORDHAM L. REV. 2081 (2005). Another problem with highlighting the presence of white culture in the legal workplace is that it is often characterized as race-neutral or as having no particular racial identity. Id. at 2087.

^{23.} This is in keeping with the idea that professionalization sterilizes one's identity and the idea that one's racial identity is separate from professional identity. Consequently, one's professional identity is neutral. See id. at 2089–90.

^{24.} See id. at 2083.

^{25.} Id. at 2083-84.

group identities influence individual conduct in organizations:

Within these organizations, individuals "are shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant degree, and the groups with whom others associate them — whether or not they wish such an association." The two major groups in organizations are "identity groups and organization groups." As I noted in an earlier article, "[p]rofessional socialization as a lawyer is an organizational group identification."

After establishing the ways in which group identity plays into conduct, Professor Pearce goes on to point out that being part of the dominant racial group means that white lawyers often see themselves as having no particular racial identity.²⁷ Furthermore, white lawyers are often uncomfortable or poorly equipped to acknowledge the issues or privileges of their own race.²⁸ Consequently, white lawyers can be ill-disposed to discuss racial issues because they see those issues as being of specific concern to people of color rather than themselves.²⁹ Accordingly, some white lawyers see themselves as outside of racial issues and outside of race in general. This makes it difficult for white lawyers to acknowledge their own racial identities and the influences those identities can have on conduct and expectations of professionalism.

Professor Pearce rounds out this theory by intertwining whiteness and legal professionalism.³⁰ To begin, the dominant theory on professionalism suggests that lawyers leave any group-identity biases at home: "Under this view, all lawyers should be — and in most instances are — fungible. Not only should race play no role in how a lawyer approaches her work, but with few exceptions it will play no role."³¹ Professor Pearce refers to this standard as the "bleaching out" of racial differences among lawyers.³² Coupled with the belief that they have a racially neutral identity, this idea of "bleaching out" leads some white lawyers to conclude that their racial identity is irrelevant to their understanding of professional conduct. As a result, some white lawyers are reluctant to discuss and acknowledge the role that racial identity can play in developing expectations for workplace professionalism and cultural identity.

Consequently, we should dispel the myth that legal workplace standards of professionalism are neutral or without cultural identity: they

^{26.} Id.

^{27,} Id. at 2087.

^{28.} Id. at 2088; Peggy McIntosh, White Privilege: Unpacking the Invisible Knapsack, Wellesley Ctrs. for Women 1, 3 (2010), http://www.wcwonline.org/images/pdf/Knapsack_plus_Notes-Peggy_McIntosh.pdf [https://perma.cc/65UH-WURD].

^{29.} Pearce, supra note 22, at 2088.

^{30.} Id. at 2089.

^{31.} Id.

^{32.} *Id*.

are simply part of an identity that is so prevalent and ingrained that it seems neutral. Diversity in the workplace is not sufficient to alter these archaic standards of professionalism—as a cohesive professional body, we cannot alter what we refuse to acknowledge. The current standards stifle the willingness of attorneys of color to offer their diverse perspectives on issues of professionalism in the workplace. The current standards of professionalism are not objective or without bias, nor are they free from cultural influence. To say that legal professionalism is without group identity ignores the clear group identity it currently embodies—white group identity.

Since legal professionalism is not neutral and does incorporate group identity and culture, legal professionalism should change and grow in order to incorporate a more diverse group of attorneys in a holistic and meaningful way. One way this change could be facilitated is through increased cultural competency training in the legal profession.

II. CULTURAL COMPETENCE

Cultural competence is not an alien concept to attorneys. There is a body of legal scholarship that discusses the importance of cross-cultural competence in lawyer-to-client relationships.³³ Less common are articles about cultural competence in lawyer-to-lawyer relationships. In the lawyer-to-client context, there is an assumption that cultural competency training can help white lawyers better understand their clients of color. However, limiting the scope of cultural competency training to the lawyer-to-client relationship misses an opportunity to seek out meaningful diversity in lawyer-to-lawyer relationships. Cultural competency training should exceed the bounds of lawyer-to-client training to include lawyer-to-lawyer training.

A. Do We Even Need to Talk About This?

To some, a dearth of articles on cultural competence might suggest a general lack of interest in this issue. But cross-cultural competence training in the lawyer-to-lawyer context merits discussion because its absence from the legal workplace leads lawyers of color to normalize and suppress those key elements of their identity that stand out (i.e. portions of their identity that are not immediately identifiable as white).³⁴

As detailed above, the fact that the legal workplace has long been homogeneous is not unique to the legal workplace: many professional workplaces invite normalization and uniformity. In their article, *Working*

^{33.} For a comprehensive list of scholarship focused on cultural competency in legal practice, see Ascanio Piomelli, Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda, 4 HASTINGS RACE & POVERTY L.J. 131 (2006).

^{34.} See supro Part I; infra Part III.

Identity, Professors Devon W. Carbado and Mitu Gulati point out that people of color often feel pressured to counteract negative stereotypes by making changes to their identities to counteract these stereotypes.³⁵ On the other hand, workers who do not subvert their identities of color may be penalized by their superiors and colleagues.³⁶ As a result, employees often defensively battle stereotypes by fitting into expected workplace norms and actively subverting elements of their identities.³⁷

Professors Carbado and Gulati give a hypothetical example of a lesbian employee who does not disclose her sexual orientation to her colleagues because of concerns about harassment.³⁸ She may even display a picture of a male friend at her desk and suggest that their relationship is more than just a friendship.³⁹ At the very least, her lesbian identity remains sequestered and closeted in the interest of preserving workplace normalcy.

Similarly, a South Asian woman may scrub the henna off her hands before going back to work after a wedding. While it may be true that societal pressure to do so is declining, many South Asian women may still feel like they need to mask or disguise that aspect of their cultural identity in order to maintain the homogeneous status quo. ⁴⁰ An example of this need to remain unnoticed-if-different is present in the actions of any woman that has ever hidden a tampon up her sleeve on the way to the bathroom. ⁴¹

B. Colorblindness Can Lead to Invisibility

It might be tempting to assume that the lack of protest with respect to this issue means that culturally separate workers are not interested in engaging their colleagues in a discussion about cross-cultural communication. To test this assumption, I conducted a small, informal survey of six South Asian women in the San Francisco Bay Area. 42 While

^{35.} Carbado & Gulati, supra note 21, at 1262.

^{36.} *Id.* at 1263–64 (explaining that those unwilling to subvert their cultural identities in an effort to be collegial might be passed over for promotions).

^{37.} See id. at 1277 (acknowledging that identity is inherently performative and is a social construct, even if the definition of one's "identity" may inspire a philosophical discussion about the true nature of identity).

^{38.} *Id.*

^{39.} Id.

^{40.} Compare Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights (2007) (explaining a practice known as "covering," which involves hiding portions of identity in order to better blend with the mainstream), with Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1710–13 (1993) (providing an example of another phenomenon known as "passing," where one is mistaken for another race entirely).

^{41.} See Julie Beck, Don't Let Them See Your Tampons, THE ATLANTIC (Jun. 1, 2015), http://www.theatlantic.com/health/archive/2015/06/dont-let-them-see-your-tampons/394376/ [https://perma.cc/4S6D-J4SG].

^{42.} I compiled data for the survey by interviewing six South Asian women, who attended University of California, Hastings College of the Law and University of California, Berkeley, School of Law. I used a list of questions that asked about their experiences and requested their general feedback. For privacy purposes, I have omitted attributing the results of the survey to the names of the specific

individual experiences varied, the respondents were united in feeling set apart from their peers in the legal workplace and in law school. These divisions are nuanced but nonetheless pervasive.

Each participant surveyed indicated they felt distinct from their peers in the legal workplace in some unique way. For example, one participant felt that she was pigeonholed into public interest work by her fellow law students, while another mentioned that she felt pigeonholed into big law work by her family. Further, every participant acknowledged that she felt confused about her experiences but thought that there was no sounding board, literature, or mentor available to help her feel a little less confused. 43 For example, one participant mentioned that she had never heard of "On-Campus Interviews," a process by which second-year law students often procure post-graduate employment. She stated that she thought it was because her family did not have the contacts to guide her, that it was difficult to find mentors, and that she felt a little adrift in law school in general. The common bond among the survey participants was a feeling of alienation during law school. Beyond these law school frustrations, each participant also conveyed that they felt somewhat invisible within the profession after graduation as well.

While not necessarily ubiquitous, this invisibility presents many problems for the legal profession. Though often motivated by the laudable goal of promoting diversity and inclusion, some in the legal community tend to ignore the unique cultural identities of their employees or students in a misguided effort to make them feel more included. One practitioner mentioned that the cultural component of her identity was never acknowledged unless it was acknowledged negatively. This feeling was echoed across the survey: many participants felt singled out only at times when their culture made them stand out in a bad way. Most participants cited examples of their culture being in the foreground during some sort of negative experience. In one such example of a negative experience, a South Asian woman was told she should consider immigration work over other legal work due to her background. Another was told she should attach a picture to her employment application because she looked "exotic."

These examples show that the legal community is still struggling to meaningfully embrace diversity in ways that positively, or even neutrally, acknowledge the value of the different cultural traits that these attorneys possess. In another example, one survey participant reported a time when

women.

^{43.} The lack of mentorship is related to the lack of attorneys of color in leadership roles in the legal profession. Less than 1% of law firm partners are Asian women. Women and Minorities at Law Firms by Race and Ethnicity - An Update, NALP (Feb. 2014), http://www.nalp.org/0214research [https://perma.cc/3S3F-ZXKQ]. Peggy McIntosh's article also implies that white mentorship is often taken for granted by white professionals. McIntosh, supra note 28, at 4 ("I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally.").

she was asked to attend a client pitch because the client required diversity on its legal team. She was the only attorney that qualified as diverse in her practice group. The attorney's cultural characteristic was only relevant when it came in handy for, ironically, a supposedly progressive diversity initiative in which corporate clients require the law firms they hire to have strategically diverse teams.⁴⁴

The experiences shared by the survey participants also diverged in ways that invite new conversations about cultural identity in the workplace. For example, one participant expressed concerns about South Asian women being perceived as part of a "model minority" and consequently not a person of color in any meaningful sense of the word.⁴⁵ The same student also lamented that very little has been written about the experiences of South Asians in the law.⁴⁶ This reluctance to recognize the value of South Asian cultural identity may also have the ancillary effect of less targeted assistance for South Asian lawyers in the workplace.

There were other interesting, compelling, and heart-wrenching answers to this survey that brought to light the very real experiences of women in a profession that was previously unattainable, discouraged, or unrealistic for them, due to both extrinsic (the homogeneous nature of the profession itself) and intrinsic (South Asian culture) forces. Many women who noted a lack of attorneys in their families also noted a lack of female professionals of any type in those same families. This only furthers a sense of invisibility in such lawyers and highlights the lack of mentorship for female South Asian attorneys.⁴⁷ My own family comes chock-full of attorneys—all male, and all genuinely concerned about my ability to succeed in a profession they consider best suited for men. At the very least, the survey indicated that cross-cultural communication among South Asian female lawyers and their colleagues is a topic worthy of discussion and a topic that female South Asian attorneys are interested in broaching.

C. Important Lessons from Cross-Cultural Lawyering Texts

Clearly, a discussion of cross-cultural lawyering is needed. Diving into details, we can now examine what cross-cultural lawyering among

^{44.} This is supposed to result in greater diversity at law firms, but in this example it resulted in an attorney of color being invited to a client pitch meeting and nothing more—she was not invited to work with the client; rather, she was merely invited to be a diverse face at the pitch meeting.

^{45.} See generally Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 Wm. & Mary L. Rev. 1 (1994) (suggesting that being viewed as a "model minority" can be more harmful than not).

^{46.} Few pieces have been written explicitly about South Asian law students or lawyers. For a rare example, see Jasmine K. Singh, "Everything I'm Not Made Me Everything I Am": The Racialization of Sikhs in the United States, 14 ASIAN PAC, AM, L.J. 54 (2009).

^{47.} See generally MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (2008) (explaining that a lack of mentorship has been proven to put professionals at a disadvantage to other, mentored professionals).

lawyers actually entails. There are many skills taught in cross-cultural texts for lawyer-to-client interactions that would be equally beneficial in lawyer-to-lawyer interactions. Using the framework of lawyer-to-client cross-culture training, it is possible to see what cross-cultural competency could look like amongst lawyers.

The Five Habits: Building Cross-Cultural Competence in Lawyers is the seminal scholarship on cross-cultural lawyering.⁴⁸ This article was the first to outline important steps law students can take to increase their cultural competence in lawyer-to-client interactions.⁴⁹ These methods are intended to increase the students' ability to bridge cultural gaps in client representation so that they can better understand the cultural perspectives of their clients.⁵⁰ The methods themselves entail:

(1) identifying areas of similarity and difference between lawyer and client (and reflecting on their potential significance for the relationship); (2) identifying areas of similarity and difference between the client and legal system and between the attorney and legal system; (3) brainstorming multiple alternative explanations for client conduct; (4) anticipating and planning for potentially problematic aspects of cross-cultural communication; and (5) becoming non-judgmentally aware of one's own biases and stereotypes and learning to detect and minimize their impact on interactions.

Each of these Habits are applicable to the topic at hand.

In Habit One, Professors Bryant and Peters recommend articulating similarities and differences between the two parties involved and determining how those differences affect the representation.⁵² In the process, the parties diagram their similarities and differences and explore the significance of these characteristics for their relationships.⁵³

Habit One applies neatly to cross-cultural communication between lawyers. By making a detailed list of similarities we may be able to reveal connections between two seemingly different people in the workplace.⁵⁴ Similarly, by making a list of differences we may expose previously undiscovered biases or misunderstandings.⁵⁵ As in a law school clinic environment where student attorneys are often put into teams, attorney teams in law firms, government agencies, and public interest agencies would benefit from a comprehensive understanding of their similarities and differences.

Consider an associate and partner team in a law firm in which the associate is a South Asian woman and the partner is a Caucasian woman. Articulating similarities and differences early in the client engagement may reveal sources of bias and misunderstanding between the two lawyers. For

^{48.} Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 8 CLINICAL L. REV. 33 (2001).

^{49.} *ld.*

^{50.} Id. at 65.

^{51.} Piomelli, supra note 33, at 132 n.4.

^{52.} Bryant, supra note 48, at 64.

^{53.} *Id.*

^{54.} See id. at 64-65.

^{55.} Id. at 64.

example, let us assume the law firm's client is also South Asian. Without employing Habit One to better understand each other, the Caucasian partner may assume that the South Asian associate is better suited to take the lead in communicating with the client. Although the South Asian associate may welcome this increased responsibility, it is not necessarily true that she is "better suited" to do so simply because she is also South Asian. As such, Habit One can help illuminate and shed biases and stereotypes that attorneys were not even aware they harbored.

Next, using Habit Two, students are asked to identify differences and similarities between the client and legal system and between the student and legal system.⁵⁶ Students then work to see how these similarities and differences can influence their client interactions.⁵⁷ By asking students to compare themselves and their clients to the legal system, Professors Bryant and Peters partially seek to create awareness of the biases of both student and client toward or against the legal system.⁵⁸ Though Habit Two appears to assume that the student is biased *toward* the system while the client is likely biased *against* it (which unfortunately, in turn, assumes a white lawyer/minority client dynamic),⁵⁹ Habit Two offers sounds guidance for lawyer-to-lawyer interactions. Rather than viewing the three rings of Habit Two as the lawyer; client; and judge, jury, or justice system, a lawyer may compare her own relationship to the legal system to that of her peers or opposing counsel to explore ways in which culture may influence a case.

Habit Three asks students to look for alternative interpretations of their clients' potentially troubling behaviors. Labeled as "parallel universes," Habit Three teaches students that there may be multiple reasonable explanations for a client's behavior. In the lawyer-to-lawyer paradigm, attorneys can use Habit Three to explain workplace behavior.

Consider the story of one of the participants in my informal survey who was worried about how her South Asian identity was going to play out

^{56,} Id. at 68.

^{57.} Id.

^{58.} See generally id.

^{59.} *Id.* at 68–70. The obvious counterargument to this is that law students are more in line with the legal system as they are training to be a part of it. However, the text as a unified body is highly suggestive of the white lawyer/client of color paradigm. "Students might also begin to understand why clients are prone to view the lawyer as part of a hostile legal system when there is a high degree of overlap between the lawyer and the legal system but only a small degree of overlap between the client and legal system." *Id.* at 70.

^{60.} Id. at 70-71.

^{61.} Id, In Five Habits, Bryant explained that:

In another example, the student-lawyer of a client who fails to keep appointments can explore parallel universe explanations for the student's initial judgment that: "My client does not care about the case." Encouraged to think of alternatives, the student may attribute the behavior to a lack of earfare, failure to receive the letter scheduling the appointment, or losing her way to the office. Maybe the client had not done what she promised the lawyer to do before the next appointment or simply forgot about the appointment because of a busy life.

Id. at 71.

in the workplace, because her culture and family expected her to take care of her parents as they aged. She was concerned about explaining to her employer that she would need to attend doctor's appointments with her mom. She could have been saved the anxiety if only the people at her firm understood that South Asian culture expects this sense of family responsibility, akin to having to attend a child's ballet recital or soccer game. Applying the principles of Habit Three, a non-South Asian attorney could consider a "parallel universe" in which a South Asian attorney's need to leave work early to attend her mother's medical appointments is better understood. An increased focus on cultural competence need not be a large-scale upheaval; it may merely be a shift in perspective that allows for small changes that cumulatively make a big difference.

Habit Four asks students to anticipate and plan for the more problematic aspects of cross-cultural communication by promoting conversation and building a rapport with clients.⁶² This can be done by focusing on client understanding and culturally specific information about a client's problem. 63 Habit Four encourages students to listen attentively in an effort to understand their client's perspective. 64 Habit Four also posits that cross-cultural interactions generate anxiety for both parties, partially because each party is concerned that the other will not understand their position.65 While it may be impractical for attorneys to prepare for their interactions with other attorneys, Habit Four is relevant in lawyer-to-lawyer interactions because it encourages attorneys to actively listen to their colleagues and build a rapport based on mutual understanding. Moreover, one of the most useful lessons for an attorney to glean from Habit Four is that cross-cultural interactions can often be uncomfortable for either party, not just the party in the minority culture. Bearing Habit Four in mind, attorneys can alleviate this anxiety by sharing culturally-specific information with each other.66

Habit Five encourages student awareness of individual biases and stereotypes in hopes of minimizing the negative impact of bias on interactions with their clients.⁶⁷ Habit Five and Habit One work together to ensure that one's own biases play a smaller role in cross-cultural communication.⁶⁸ Students are also encouraged to create settings in which

^{62.} Id. at 74–75 ("Each culture has introduction rituals or scripts as well as trust-building exchanges that build rapport and promote conversation. Students are encouraged to consult translators and to pay careful attention to cues from the client in the beginning stages of the interview. For example, students are encouraged to think about what kind of exchange of information early in an interview is likely to build confidence and connection.").

^{63.} Id. at 73.

^{64.} *Id*.

^{65.} Id. at 75.

^{66.} Id.

^{67.} Id. at 77.

^{68.} Id. at 89. ("Habit Five depends on the analysis of similarities and differences from Habit One and on recognizing some of the more pernicious effects of bias and stereotyped thinking.")

their personal biases are less likely to govern or are sometimes eliminated altogether. For lawyer-to-lawyer interactions, attorneys can also self-reflect in an effort to understand their own biases and prejudices, which may influence their interactions with colleagues. They can then employ strategies to de-bias or control those factors that impact their interactions in a negative way.

Through structured group activities and training, attorneys could work to apply these Habits to foster a more cohesive work environment that appropriately recognizes individual cultural identity. Training processes, like those found in *The Five Habits*, can help peers work through these barriers to create more collaborative work environments. The next Part will compare this approach with some of the existing methodologies currently being applied in law schools and the legal community.

III. TEAMWORK IN THE LAW

As a law student or an attorney, it may be difficult to conceive of yourself as a team player. The profession is inherently competitive—many law schools grade on a curve, and most law students begin their careers by competing for jobs with their colleagues. The real world of lawyering is no different, as litigation is often constructed as a competition for who can best and most vocally prove her worth. Consequently, it is no surprise that teamwork is not always valued in the legal workplace, even amongst colleagues who are supposedly on the same team.

However, a change in this paradigm may help increase the success of diversity initiatives in the workplace. The legal profession would benefit from the cultural competency training discussed in Part II of this Article. At the very least, it would bring us a step closer to creating more culturally inclusive, diverse, and open work environments in the legal community.

A. The Workplace is Not Culturally Neutral: Workplace Behavior is Largely White

As briefly discussed in Part I of this Article, groups that have traditionally formed the workplace largely dictate workplace behavior by setting performance norms used in hiring and promotion decisions.⁷²

^{69.} Id. at 77.

^{70.} There is a movement in academia to reform this culture, but this reformation has yet to take roots in all schools across the country. See generally Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 VAND. L. REV. 515 (2007) (discussing law school reform measures and the prospects for creating a less competitive law school environment).

^{71.} See generally Carrie J. Menkel-Meadow, When Winning Isn't Everything: The Lawyer As Problem Solver, 28 HOFSTRA L. REV. 905 (2000) (discussing the black and white win-or-lose world that litigation often creates for lawyers, and how this affects a lawyer's ability to truly be a problem solver and engage in more optimal solutions for clients).

^{72.} This preference for traditional norms in the legal profession has been falsely equivocated

However, professional behaviors based on these norms do not always conform to an objective standard of professionalism. Some traditional norms of professionalism do not always consider the diverse cultural identities of all those in the workplace. The legal profession needs to take a critical look at how the gap between existing professionalism norms and culturally competent professionalism norms can create poor working environments for competent attorneys that do not fit comfortably into the existing paradigm.

Take, for example, a scene in a judge's chambers where the judge is discussing his childhood with his clerk. The judge is happy to discuss his childhood experiences growing up Catholic on the East Coast (with which the clerk can identify), but both men grow silent and a little uncomfortable when the South Asian extern ventures to collegially mention her own childhood growing up in New Delhi. It is a slight shift in mood, but one that illustrates how some white men in legal workplaces may feel out of their depth in situations like these. Diversity in the workplace may lead to discomfort on both sides in a way that is not intentionally malicious but merely scared, confused, or unsure. Racial tension can be caused by well-meaning people who lack the capacity to overcome discomfort and confusion.

It can be challenging to integrate cultural competence into the workplace because some believe it is not the proper place for culture. As briefly discussed in Part I, this presupposes the idea that culture is something people should leave at home. But the truth of the matter is that many white employees do not have to check their cultural identities at the door because their workplaces embody it. In contrast, employees of color may often feel pressure to suppress their individual cultural identities in an attempt to fit in at work. The problem is that some teamwork initiatives in the workplace ignore this discrepancy.

For instance, in my survey, I asked the respondents if they felt their cultural identity was a problem or barrier in the workplace. Every single South Asian woman responded that her cultural identity had posed some type of obstacle in the workplace: whether it was because of what was expected of her and what was not, or because of what was ignored about her and what was not. In each case, the South Asian woman felt that her cultural identity was simultaneously ignored and in the foreground of her workplace identity. This might manifest itself in many ways, such as an explicit expectation that a South Asian woman act in the same manner as her white male partners, or an invitation to participate in a client pitch

with perfection. For example, Mallun Yen argues that the "idea of 'perfect' is the enemy of diversity," implying that, in order to diversify, the legal profession must forego perfection. See Mallun Yen, Why 'Perfect' Is the Enemy of Diversity, The Recorder (Oct. 2, 2015). This is a dangerous thought process, as it equates augmented diversity with a lapse in perfection, which then cheats diversity out of a chance to be a positive and professionalism-neutral addition to the legal workplace.

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because she was the only attorney of color in the practice group. To the extent that these practices still persist in the legal workplace, cultural competency training can help.

The discomfort and confusion of some lawyers, coupled with the colorblind behavior of others, can lead to an insecure and sometimes uncomfortable workplace for the lawyer of color.⁷³ This insecurity may be the greatest problem with increased diversity in the workplace, because some lawyers do not know how to appropriately respond in situations where a sensitivity to diverse peers would be beneficial. Culturally competent teamwork training in law schools and law firms (and other legal settings) can help solve this problem.

B. Traditional Teamwork Training Neglects Cultural Components

Teamwork creates efficient and productive work environments.⁷⁴ In *Teaching Teamwork to Law Students*, the authors identify benefits of teamwork, such as the development of interpersonal and social skills, which include communication, organization, conflict resolution, and even personal satisfaction.⁷⁵ Employer and employee interests converge here because organized and satisfied employees directly benefit their employers.

Though lawyering can sometimes be an individual endeavor, the reality of legal work is that many workplaces are cooperative in nature, requiring several people to work on the same projects and oversee each other's work due to the scale of projects and the need for accuracy. Lawyers may find it necessary to work with one another whether they like it or not. However, in some work environments, teamwork remains on the margins. Many in the legal profession remain self-motivated and self-directed, which creates work environments that are not cohesive to teamwork or team building.

Part of the problem may start with legal education. Some law schools prioritize individualism and competition over teamwork. Teamwork is taught to some law students who participate in clinics or other experiential initiatives. Professor Weinstein and her colleagues submit a model for teaching teamwork that is often taught in clinical settings. Acknowledging that law students often feel hesitant about working together, the authors set

^{73.} See Pearce, supra note 22, at 2089-90 (tackling the argument that colorblindness is a valid or effective way to combat racist behavior); see also Osagie K. Obasogie, Blinded By Sight: See through the eyes of the blind (2013).

^{74.} There are several examples of teamwork leading to success in the legal workplace. See, e.g., John D. Russell, Yikes (Times Five) - Five Lawyers and a Baby, 67 Or. St. B. Bull., Feb.—Mar. 2007, at 32. Further, the effects of teamwork have been shown to increase time management and workplace enthusiasm. See, e.g., Dolly M. Garlo, Creating a Collaborative Law Office, 64 Tex. B.J. 904 (2001).

^{75.} Janet Weinstein et al., Teaching Teamwork to Law Students, 63 J. LEGAL EDUC. 36, 38 (2013).

^{76.} Id.

out to encourage teamwork by discussing its goals and benefits.⁷⁷ While the discussion stops short of looking at how teamwork applies to those with cultural differences, this framework provides a template to build on when designing culturally competent teamwork training for the legal profession.

Furthermore, teamwork is not always taught to lawyers as a valuable skill after law school. Some law firms are disinterested in management and do little to encourage teamwork in the workplace. Lawyers are trained to be independent problem solvers, and this comes with limited training about how to work together. While some firms doubtlessly emphasize teamwork and collaboration in an effort to build workplace cohesion, the verdict is still out as to whether this will become standard practice among law firms. As law firms grow more and more diverse due to globalization, diversity initiatives, and a more level playing field, the possibility of different types of people working together becomes increasingly likely. Double to globalization are supposed to the possibility of different types of people working together becomes increasingly likely.

Although some literature does stress the importance of teamwork in a global market—an emphasis that implies that cultural boundaries will be breached—there is little connection made between teamwork and individual members' cultural identities.⁸¹ To the extent that teamwork models neglect to include cultural issues into their models, some may assume that lawyers are not culturally different enough to merit a focus on culturally relevant teamwork models. This can encourage the assumption that everyone in the law should conform to white professional norms, and that consequently the only teamwork issues attorneys need to deal with are the traditional ones—being too individualistic, not being team players, etc. Neglecting cultural issues in teamwork training makes it easier for some to believe that everyone comes from the same cultural background. This gap helps perpetuate the myth that the legal workplace is culturally neutral and that cultural identity should be left outside of the workplace.⁸² It also hampers the ability of lawyers of color to use teamwork tools within their

^{77.} Id, at 36.

^{78.} See Allen M. Terrell, Jr., Managing the Big Firm, 19 Del. Law. 24, 24 (2001). ("Rarely have managing partners been trained in management or in business. In a sense, law firms worth millions of dollars are managed by amateurs.")

^{79.} See id. ("[T]he manager of a firm deals with lawyers who are not easily persuaded and who are accustomed to emphasizing the problems in a situation.")

^{80.} See Michael M. Boone & Terry W. Conner, Change, Change, and More Change: The Challenge Facing Law Firms, 63 Tex. B.J. 18, 24 (2000). ("[L]aw firms composed of monochrome lawyers will be displaced by diverse organizations that can offer a wider array of skill sets by virtue of education, race, gender, language capabilities, and technical background. In that regard, having strong women and ethnic minority lawyers will be a key factor in competing in a global economy. To compete for global business, successful law firms will find it necessary to attract and retain personnel that reflect their global clients. Women and ethnic minorities will increasingly emerge as law firm leaders.")

^{81.} Several pieces fall victim to this, but see Steven A. Lauer & Kenneth L. Vermilion, An Efficient. Effective Team Maximizes Value, 35 OF COUNSEL 7 (2016).

^{82.} See YOSHINO, supra note 40 (discussing the "covering" problem where attorneys of color feel pressured to act "white" in order to fit into the professional norms established by laws firms or other legal organizations).

workplace.

C. Teamwork + Cultural Competency = More Inclusive Workplace

In an effort to foster more inclusive work environments, the legal community must focus on teamwork and cultural competency training together. As discussed above, cultural competency training focuses almost exclusively on lawyer-to-client interactions. But as workplace demographics and power structures change, it will become more likely that cultural competence will involve lawyer-to-lawyer interactions as well. Cultural competency and teamwork training in the workplace can have positive effects on both lawyer-to-client and lawyer-to-lawyer interactions.

Some type of cultural competency or awareness training could easily supplement the teamwork training programs already in place in the legal community. As discussed above and in *Five Habits*, cultural competency involves an active effort by participants to understand each other's culture and use that understanding to facilitate positive interactions.⁸³ This process involves awareness of the role that culture plays in behavior: knowledge of specific and general cultural information that plays into this behavior; cross-cultural analytical skills that assess facts based on judgment (not bias); and communication skills that allow cross-cultural communication.⁸⁴ These concepts could be integrated with teamwork training that aims to efficiently use the skills and strengths of each individual team member, and in turn combat the ways in which implicit bias negatively affects lawyer-to-lawyer interactions.⁸⁵

However, as useful as these methods may be to law firms, ⁸⁶ it may be idealistic to expect law firms (and other legal professional organizations) to initiate workshops or creative exercises for the sake of promoting a more inclusive culture. Pushing aside the previously cited concerns of competition and division, it is impractical to think of law firms as good places for cultural competency training because so few attorneys of color

^{83.} See Bryant, supra note 48.

^{84.} Id. at 50-56.

^{85.} *Id.* at 77–78. ("Habit Five asks the student to acknowledge his every thought, including the ugly ones, and find a way to investigate and control for those factors that influence lawyering in unacceptable ways.")

^{86.} Focusing on a team-based approach will naturally increase the need to infuse cultural competency training as a means of developing stronger, more effective teams. Other potential strategies that could be employed by law firms (and in other legal settings) include installing a managing partner or senior leader focused on instilling a more team-based atmosphere at the firm, using the individual skills of each attorney in an efficient manner, see Terrell, Jr., supra note 78, at 24–26, or rewarding teams rather than individuals with origination credit when bringing new clients or business into the firm, see Joan C. Williams & Veta Richardson, New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women, 62 HASTINGS L.J. 597, 665–66 (2011). ("Reward teams, not individuals. The point of a law firm is to build teams of lawyers that, together, can serve a client's interests better than a sole practitioner could.")

are in positions of power or influence in law firms.⁸⁷ Consequently, it seems far more appropriate to institute culturally competent teamwork training in law schools, which may provide better opportunities for such training.

As it is the uniform gateway to the legal profession—all must pass through those gates in order to become attorneys—law school is the most natural fit for culturally competent teamwork training. As they are tasked with educating students on *how* to be lawyers, law schools are the best forum in which to emphasize the importance of cultural competency and teamwork training. Whether such training is infused in law student orientations, success skills coursework, or through clinical or other experiential learning curriculum, it is a necessary skill that should be part of every law student's education. To the extent that law students can learn to work together with the changing faces of the law, they will be better equipped to handle some of the changing realities within the legal profession.

CONCLUSION

For me, law school was difficult for many reasons—I do not want to conflate academic rigor with systemic oppression. Nonetheless, I had many negative, awkward experiences in law school that could easily have been avoided if my peers had been more culturally competent. My experience was tolerable, but rife with conversations and experiences I would have preferred to avoid. One purpose of this Article is to help others feel understood by fostering a discussion about ways that well-meaning attorneys and law students (like the friend that told me she always thought of me as white) can avoid creating negative, isolating environments for others.

The reason I felt out of place was not just because I was one of a handful of South Asian women on campus—it was because I felt out of place unless I acted "white." By the beginning of my third year of law school, the constant necessity to act "white" had grown tiresome. I was no longer willing to pretend to be someone or something else. I was no longer willing to hide certain pieces of my identity in the name of neutrality.

While I am sure many of my peers will tell you that my cover as a "white girl" was not a good one, I beg to differ. I strongly believe that many of the professional opportunities I have been presented with are partially attributable to the fact that I have acted "white" for the majority of my academic career. My desire to stop this performance was partially choked by fear. Knowing that this performance has gotten me to where I

^{87.} Women and Minorities at Law Firms by Race and Ethnicity - An Update, supra note 43 (finding that in 2014, 7.1% of partners were minorities, and only 2.26% were female minorities).

^{88.} See Yoshino, supra note 40.

am means that any changes I make might rob me of opportunities in the future.

Attorneys of color should be encouraged to present a holistic—but still professional—version of themselves at work that does not require them to deny or conceal portions of their identity in the name of neutrality. As a starting point, the legal profession must abandon the idea that its work environments are culturally neutral and must acknowledge that merely including more attorneys of color in the workplace and hoping for the best will not be sufficient to attain true diversity in the legal profession. Rather, law schools (as well as law firms and other legal organizations) should focus on cultivating attorneys that are culturally competent and willing to engage in culturally competent teamwork with the goal of creating a symbiotic work environment. A focus on cultural competence, combined with a team-building atmosphere, could help break down cultural barriers and create a work environment in which attorneys of color do not feel pressured to act "white" in order to feel like professionals. The impostor syndrome felt by attorneys of color today will only lead to failures in diversity initiatives as more and more attorneys of color quit or feel pushed out of the legal profession. The legal field will only be truly diverse once it decides that diversity is worth the effort of opening up the profession in deeper, more substantial ways.89 Culturally competent treatment training will equip attorneys with the tools they need to meaningfully welcome attorneys of color into the legal practice and will negate the ineffective approach of "add diversity and stir."90

^{89.} Diversity Fatigue, supra note 2. ("Companies will find it hard to make a success of diversity if they refuse to recognise that it brings challenges as well as opportunities. And they will find it impossible to confront these challenges if they dismiss any reasonable question that is raised about diversity policies as if it were a plea to go back to the age when white men ruled the roost.")

^{90.} GUINIER ET AL., *supra* note 13, at 21 (describing the inclusion of women in the law as an ineffective approach that simply requires legal institutions to "add women and stir").

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Thelton Henderson

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Social Change, Judicial Activism, and the Public Interest Lawyer

Hon. Thelton Henderson*

It is a great pleasure for me to be here as a part of the very distinguished Public Interest Law Speakers Series, and especially for me to be the Webster Society Annual Speaker. It is often said that we are known by the company we keep. I hope this saying is true, for the company in which I find myself in this speaker series including Barry Scheck, Dennis Archer, Scott Turow, and my fellow Californians and good friends professors Deborah Rhode and Angela Harris is indeed impressive.

Another reason I am so delighted to be a part of this series, which celebrates thirty years of excellence in clinical education, is my longheld belief that clinical education is a vital step in preparing public interest lawyers to launch their careers. Indeed, ever since 1968, when I taught clinical courses at Stanford Law School—after having been the director of a legal aid office for three years—I have believed that law schools have a duty to the community to provide clinical education for students who wish to practice public interest law.

Clinical education provides an invaluable service for any law student, no matter his or her career goals. For those who wish to work in the public interest arena, however, it plays an especially crucial role. I know that most of the students graduating from this fine university will go on to work in a traditional law firm setting. Traditional law firms will take your newly-minted diploma and your ability to think like a lawyer, a skill your professors have spent three years honing to perfection, and they will train and mentor you. The training that they will give you will most likely be deliberate and careful, often spanning several years. The client will usually pay for

^{*} Judge, United States District Court, Northern District of California. This speech was presented as part of Washington University School of Law's 2002-2003 Public Interest Law Speaker Series.

at least a part, if not most, of that training through something with which we're all familiar: the billable hour.

If, however, you want to work for a legal aid office, or some other non-profit public interest group that has scant resources, you might well receive a stack of files and find out that you are on your own to learn lawyering as you go, perhaps even by trial-and-error. There is virtually no budget in most of these operations for training new attorneys, and, of course, the billable hour is not applicable in this setting. Law school clinical education courses provide these students with most of the tools needed to hit the ground running, allowing them to better serve their clients.

I concluded long ago that the frequent academic assumptions that the law school mission is simply to hone the mind and that the nuts and bolts of law practice are best left to the employer are a bit misguided. While such assumptions poorly serve students generally, they do a particular disservice to the public interest community. Where else will young lawyers get the type of training, and at what expense, in order to go on to be the best they can be? Because of the particularly strong clinical education program here at Washington University School of Law, I realize that I am probably preaching to the converted. But elsewhere, this message very much needs to be heard.

This brings me to our topic today which is "Social Change, Judicial Activism, and the Public Interest Lawyer." Of course each of these three concepts could easily be the subject of an entire lecture. Because this is a work in progress, I apologize in advance for any lack of fullness or cohesion. I thought, though, that I would begin by sharing a few thoughts about what I think it means to be a public interest lawyer. I then turn to whether views on judicial activism and other factors have created new challenges for today's public interest lawyers working through the courts to achieve their goals.

What does it mean to be a public interest lawyer? I have had a keen interest in this question since I was in law school. I wondered how I was going to fashion a legal career for myself that would give me personal satisfaction, allow me to support myself and my family, and at the same time provide some benefit for the public good. Over the years I have come to believe that this question must necessarily

The prevailing view of the public interest lawyer is relatively narrow in scope. Given the persistent nexus between wealth and access to legal representation, our multi-layered society is always in need of lawyers committed to serving poor and under-represented people who would not otherwise have access to crucial legal advice. Our society is equally in need of lawyers who are committed to upholding rights and addressing issues that do not generally attract adequate financial backing, such as civil rights, immigrant rights, child poverty, and today more than ever, those who get caught, perhaps innocently, in the cross-fire of our war on terrorism. I believe that these lawyers deserve special recognition because they devote their careers to the public interest and they do so usually at a substantial personal financial sacrifice.

At the same time, the circle of lawyers who serve the public interest can be viewed as much broader than we sometimes think. In the profession of law, the public interest is always implicated, and we mistake ourselves by assuming otherwise. This premise is as true for a corporate transactional lawyer with Fortune 500 clients as it is for a public defender or an impact litigation attorney. The weighty legal and moral obligations that attorneys face leave ample room to vindicate the public interest if they so choose. Thus, even in the justifiable pride of electing a legal career explicitly dedicated to the public interest, one must never be so jealous of the term 'public interest' as to forget or deny that all lawyers are almost preternaturally so dedicated—else how can we invite our fellow lawyers to that higher purpose?

Indeed, I firmly believe that a prosecutor who wisely and fairly uses his or her power to forego prosecuting someone when the interest of justice so requires furthers the public interest just as much as a public defender who, from the trenches, defends the criminally-accused indigent. A partner in a major law firm who works to ensure that his or her corporate clients treat their employees in a non-discriminatory manner, or that his or her clients take the high road even as they pursue the bottom line (for example, consider Enron or Worldcom) furthers the public interest just as much as the plaintiffs' lawyer who sues the corporation for discrimination or the government lawyer who charges the corporate executive with fraud

One of the biggest and most significant civil rights cases I have tried in my 23 years on the bench, a case which challenged widespread unconstitutional conditions at the foremost maximum security prison in California, was litigated by a small prison law group in partnership with one of the country's leading law firms in high-tech litigation and transactional work. The partners and associates at that firm worked in a pro bono capacity and expended tremendous resources, including advancing costs well in excess of a million dollars, on behalf of this very important case. The public interest prison law group could not possibly have handled the case by themselves. The large law firm, in my view, personified the spirit and essence of public interest law.

Whether you can devote your life to being a public interest lawyer as I first defined that term, or whether your career path takes you in other or more varied directions, I hope that you will always consider how your position affects and implicates the public interest, and how you can strive to serve and further the public interest in whatever way your position permits.

As I stand here espousing these rather high-sounding views about the public interest, and about professional obligations balanced against professional privileges, it occurs to me that it is no accident that lawyers have shaped our constitutional history as well as the dayto-day events of our society at large. Lawyers are peculiarly equipped, by training and experience, to be partisans for a cause and to take the lead in the vigorous and frank discussions of our society's needs and problems. They have long functioned as architects as well as artisans of social reform, redesigning, reshaping, and creating not only legal institutions, but social, economic, and political institutions as well. To give one obvious example, it was largely lawyers who shaped and managed Franklin Delano Roosevelt's New Deal Administration in 1932, a program which brought us out of the most devastating depression in our country's history and positioned us to become the most powerful and prosperous country in the world. And in the early 1960s, lawyers of all colors and backgrounds, young and old, joined the civil rights movement en masse, and made it possible

for Dr. Martin Luther King, Jr. to fashion the most successful civil rights movement in our nation's history, one based upon a willingness to go to jail for passive resistance to immoral laws.

A very long time ago, I was a public interest lawyer myself, and I aspired to achieve social change through the courts, however modest that change might be. I know it isn't always easy. I recall, for example, how difficult it was, especially before the Rodney King incident, to convince a jury or judge that police sometimes misbehave with respect to the rights of minority citizens. Now juries and judges are much more open to considering such cases on their merits.

I have now been embosomed in the world of the judiciary for the last 23 years. I thought this lecture today, however, would provide me an opportunity to reflect upon some of what has occurred over the last 20 years, and specifically to think about whether debates over judicial activism and other such factors have created new or additional challenges for public interest lawyers who seek to use the courts as a vehicle to achieve social change or social justice. It will not come as a surprise that I have been called a judicial activist on more than one occasion.

I believe there are new challenges for those practicing in the public interest, and that these challenges come from different directions. First, as some of our social problems grow more intractable and complex, it becomes much more challenging for lawyers to tackle them through judicial avenues. It is much easier to bring a lawsuit in response to an incident of blatant discrimination than it is to prove forms of discrimination which are no less devastating in their results, but which occur in more subtle or indirect forms. When I began my legal career in 1962, the civil rights battle was over the right to vote, to sit in the front of the bus, eat at the drugstore lunch counter, or to have an official policy of not hiring minorities. Today, institutional red-lining, undisclosed higher interest rates on car and other loans, racial profiling, and subjective job interviews provide much more elusive and amorphous targets.

At the same time, we have seen federal funding for legal services drastically slashed, and legal aid offices around the country have had to consolidate or close to meet bare-bones funding limits set by the Legal Services Corporation. Studies show that at least eighty percent of the legal needs of the poor still go unmet.²

Strict restrictions on the types of cases that legal aid offices can bring have also been imposed. For example, legal aid offices are no longer allowed to bring class action cases,³ which further impedes their ability to efficiently and effectively enforce important rights. Before this restriction was in place, a legal aid office in northern California brought a class action in federal court, *Sneede v. Kizer*,⁴ contending that the State of California was improperly interpreting the Medicaid statute, and in the process depriving thousands of class members of medical benefits to which they were legally entitled. Legal Aid won that case, and thousands of Californians began to receive critically important medical benefits. Under today's restrictions, this class action could not be brought, and the important rights at stake could never be vindicated, at least not by a legal aid office, except on a one-client-at-a-time basis.

The current restrictions on impact litigation are, for me, particularly ironic. Back in the early days of Lyndon Johnson's war on poverty, when I directed the East Bayshore Neighborhood Legal Center, we would dutifully represent our clients on an individual basis in their grievances against landlords, collection agencies, and the like. I remember clearly when the lightbulb went off for legal aid offices around the country that the best way to fight the systemic problems faced by our clients was to conduct so-called impact litigation, which strikes at the heart of the problem that needs to be addressed. It is a pity this has been stopped.

Not only are resources more scarce, and social issues often more difficult to identify and address, but a more conservative Supreme Court has also significantly impacted the practice of public interest law. In recent years, Supreme Court decisions have dramatically changed the landscape for citizens and lawyers seeking to enforce civil rights or environmental laws.

^{2.} LEGAL SERVICES CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A SPECIAL REPORT TO CONGRESS 12 (2000), available at http://www.lsc.gov/pressr/EXSUM.pdf (last visited Mar. 13, 2003).

^{3. 45} C.F.R. § 1617.3 (2002) (prohibiting recipients of Legal Services Corporation funds from "initiating or participating in any class action"). http://openscholarshypusthydy/pwciquingh)aw_policy/vol12/iss1/4

For example, in three decisions in the 1998-99 Term the Court resoundingly pronounced the inviolability of state sovereignty in the federal system.⁵ In the three decisions, all decided by a majority of the same five justices, the Court dramatically curtailed the power of Congress to provide a judicial forum for redress of state infringement of federal rights.

We need not debate the soundness or the wisdom of this jurisprudential trend to expand states' rights in order to understand the concerns of the civil rights community where, historically speaking, the term "states' rights" has been considered synonymous with racial segregation and Jim Crow laws that perpetuated second class citizenship for blacks in our southern states.

Further compounding this effect is the growing trend to label decisions upholding or expanding civil rights as the product of judicial activism, with the pejorative implication that such decisions represent an attempt by judges to improperly disregard legal precedent or to thwart "the will of the legislature" or "the will of the people." Conversely, decisions that are consistent with a more politically conservative outlook are typically portrayed as products of judicial restraint.

It seems to me, however, that the term 'judicial activism' ultimately depends upon whose ox is being gored, and not upon judicial, political, or social persuasion. The truth is that the term 'judicial activism' is not a particularly coherent concept to begin with. All judges are required to act in every case, and every form of judicial action bears some social consequences, if only for the parties involved. Thus, the claim that a judge who maintains the status quo is quiescent whereas a judge whose decisions modify the status quo is active seems to me to be a distinction without a difference. In reality, there are plenty of issues on a conservative agenda that would require active judging to implement, just as there are a host of liberal issues that will only hold firm if judges are restrained in approaching them.

Indeed, the misleading nature of the judicial activism debate is made even more evident when one considers that it seems to be only invoked to describe decisions perceived as having a liberal bent.

^{5.} Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Washington University Open Scholarship (1999); United States v. Morrison, 529 U.S. 598 (2000).

The true nature of the judicial activism debate can, in my view, be fairly easily and obviously exposed, as was recently done by Professor William P. Marshall of the University of North Carolina. After comprehensively analyzing the decisions of the Supreme Court since 1995, Professor Marshall concluded that the current court is actually the most "activist" in our history. Among other things, he found that it has invalidated over twenty-six federal laws in the last six years. In striking contrast, he tells us that during the entire first 200 years following ratification of the constitution, the Supreme Court only struck down a grand total of 127 federal laws, an average of a little more than one law every two years.

It has also been frequently observed that the recent line of Eleventh Amendment cases that I mentioned earlier represents one of the most dramatic departures from precedent in Supreme Court history. Indeed, Judge John T. Noonan, a former Boalt Hall Law School professor, and now a highly regarded member of the Ninth Circuit Court of Appeals, who also happens to be a Reagan appointee and who is usually considered a judicial conservative, made this point quite passionately in his recent book. 11 In his extraordinary critique of the Supreme Court, Judge Noonan contends that the Supreme Court's recent expansion of the states' immunity from the reach of federal law is untethered from the Constitutional design, and "without justification of any kind,"12 thus threatening "intolerable injury to the enforcement of federal standards"13 and presenting a "danger to the exercise of democratic government."14 This is strong language indeed, especially from a federal judge who is supposed to take his marching orders from the Supreme Court. What reform or

^{6.} William P. Marshall, Conservatives and the Seven Sins of Judicial Activism, 73 U. Colo. L. Rev. 1217 (2002).

^{7.} Id. at 1223.

^{8.} Id. (citing Seth P. Waxman, Defending Congress, 79 N.C. L. REV. 1073, 1074 (2001)).

^{9.} Id.

^{10.} See supra note 5 and accompanying text.

^{11.} JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

^{12.} Id. at 154.

^{13.} Id. at 155.

^{14.} *Id.* at 140. http://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

improvement is more evidently needed than light on decisions that fail to carry out purposes set out by the Constitution itself.

Unfortunately, however, the persistent drumbeat of judicial activism may take a toll. While I would not expect that it would affect the outcome of any particular case, the persistent campaign against judicial activism inevitably contributes to the politicalization of the judiciary, especially at the federal level, which can only serve to undermine the overall independence of the judiciary and, in turn, the legitimacy and effectiveness of our courts as an institution. This, in turn, necessarily increases the challenge for the public interest lawyer who must rely upon a strong and independent judiciary to vindicate civil rights and implement its judgments.

Of course, no discussion of the challenges facing public interest lawyers would be complete without addressing the very real obstacles to effectuating social change through civil rights litigation, obstacles that have been revealed all too clearly by the last 25 years of civil rights history in this country.

The singular civil rights case of the last century, in my view, was *Brown v. Board of Education*. When *Brown* was decided in 1954, the black community rejoiced in a way it had not since Joe Louis defeated Max Schmeling in an historic heavyweight boxing match. There was great optimism throughout the land that, with the overturning of *Plessy v. Ferguson*, the days of segregated education in this county were on their way to becoming an unpleasant memory. However, painful experience has shown that this historic judicial ruling cannot, without legislative and executive action, and without grass-roots mobilization, achieve the degree of social change that many, infused with the optimism of the 1950s and 60s, may have hoped for.

Nearly half a century later, we must concede that our public schools are more segregated than ever.¹⁷ The New York Times recently reported on a new study by the Civil Rights Project at Harvard University that shows that white, black and Latino school children are more isolated within their own racial groups than they

^{15. 347} U.S. 483 (1954).

^{16. 163} U.S. 537 (1896).

were 30 years ago. ¹⁸ This is certainly not what Thurgood Marshall and others expected would be the legacy of *Brown* as they savored their legal victory in 1954. Indeed, the limits on the ability of courts alone to achieve social change cannot be more clearly illustrated than with the case of *Brown v. Board of Education*.

Interestingly, as the Harvard study found, demographics alone do not account for the rapid re-segregation of schools that has been occurring over the last ten years. Another significant factor has been the recent termination of court-ordered desegregation remedial plans. Since the early 1990s when the Supreme Court began making it easier to terminate such plans, many school districts have lifted desegregation orders. Thus, while *Brown* can be used to starkly illustrate the limits of the courts, it also serves to underscore their power. When courts utilized the full extent of their remedial power to enforce *Brown* vigorously through desegregation orders, it had a substantial impact. However, as soon as the courts were required to step back, the force of *Brown* quickly dissipated, and schools resegregated. As an aside, I might mention that I've seen this same pattern in prison reform cases, once the court ceases to supervise the constitutional remedies it has ordered.

The civil rights community will likely continue sorting out the complex lessons of *Brown* for some time, and I can not begin to do justice to that discussion here. Whatever conclusions one may draw, social change through the courts rarely involves a straight line from A to B, but rather is a far more complicated, tangled, and multilayered process in which litigation can play an important, but far from exclusive role.

Frankly, the public interest lawyers of today certainly have their work cut out for them, and, I think, much more so than in the days when I practiced law. The path is not laden with easy choices, quick

^{18.} ERICA FRANKENBURG ET AL., THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4 (2003), available at http://www.civilrightsproject.Harvard.edu/research/reseg03/AreWeLosingthe Dream.pdf (last visited Mar. 17, 2003).

^{19.} Id. at 16.

^{20.} Id. at 5.

^{21.} Id. at 19.

results, or even friendly precedent. Nor is the path bordered with baskets of resources and bundles of support.

The problems to be tackled today are more sophisticated and they are more entrenched. The focus on judicial activism has, in my view, been used to politicize judicial decisions in what I believe to be an unhealthy way. The current Supreme Court has not shown itself to be a friendly forum for the public interest lawyer. And resources available for representing poor people are ever more scarce.

That these formidable challenges exist, however, is no reason to stand back or give up on the courts as a component for social change. On the contrary, the courts remain at center stage, and rightly so, as our nation continues to grapple with the social issues of the day. After all is said and done, we are a nation of laws. As a result, our laws are not only symbols, but necessary avenues for our own development and evolution as a free society. It is simply the nature of a society based on the rule of law that change will evolve, at least in part, through our courts. As such, the lawyers and the public, will always press for social changes through the courts. Neither side of the political spectrum will be immune from this pressure.

Moreover, the significance of public interest litigation cannot always be measured by just one scale. For instance, the fact that Brown did not successfully prod our nation to a fully integrated public school system does not undermine the historical enormity of that decision. For the black school child, living with the knowledge and conviction that some measure of his or her plight is the result of unjust and legally disapproved conduct is a fundamentally different reality than having to live with the pain that such conduct is perfectly condoned and legal. Even if very little in day-to-day life changes and there is just the expectation of some material betterment, the knowledge that one's experience finds vindication in the eyes of the law is a good bit of what empowerment means. I think that this is especially true in democratic societies. I have been told by civil rights leaders from Martin Luther King to the remarkable Robert Moses of the Student Non-Violent Coordinating Committee that the new-found expectation that, unlike past administrations, John F. Kennedy would respond to Bull Connors's police dogs and fire hoses in Birmingham, was critically important fuel for the civil rights movement. While our

Washingerience with Rrown and other civil rights cases may provide a

sobering dose of realism for the public interest litigator, it should not be cause for discouragement.

One need not look far to see that courts remain vitally involved in the critical social issues of the day. In our post-September 11th world, the courts will ultimately sort out the parameters of our civil rights and liberties, and how they intersect with issues of national security. Cases addressing racial profiling, the constitutional limits on big-brother surveillance and secret detentions, as well as closed deportation hearings are already winding their way through the courts. As one example, the Immigrant Rights Project of the American Civil Liberties Union has been challenging the nearly 600 closed deportation hearings that began shortly after September 11th. So far, the Third and Sixth Circuit Courts are split on their constitutionality. The Supreme Court has also taken up the issue of affirmative action in higher education and the continuing validity of Regents of Univ. of California v. Bakke. These cases will have profound consequences for our society for years to come.

In discussing the new and many challenges facing public interest lawyers, I do not intend to dissuade young, idealistic students from pursuing a career in the public interest. Rather, my observations are meant only to illuminate what lies ahead as our society continues to strive to fulfill its promise of equal opportunity and justice for all. These challenges should excite you. They should invigorate you. They should involve you intensely.

Indeed, while the challenges are undeniable, I think the law students of today are in some ways better equipped than ever to take up the public interest mantle. Students today have the benefits of lessons learned, technology which has made the practice of law easier, and increased public interest fellowships and opportunities than when I graduated from law school. And you, here at Washington University, have an extraordinarily fine and comprehensive clinical

^{22.} Compare North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that exclusion of the media from September 11th-related deportation hearings is not a violation of the First Amendment); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that the First Amendment guarantee of freedom of the press applies to deportation hearings notwithstanding Attorney General Ashcroft's directive to the contrary).

^{23. 438} U.S. 912 (1978); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), cert. granted, http:///documents.com/law_journal_law_policy/vol12/iss1/4

education faculty to teach and inspire you. Clinical education was but a twinkle in Dean William Prosser's eye when I attended Boalt Hall.

It is up to each generation to move our country closer to the just and equal society we aspire to be. And it is beyond doubt that each generation of lawyers will find itself in the courts as facets of this struggle are played out upon the judicial stage. It is how it has always been, and how it will no doubt always be. I hope many of you will rise to the challenge and choose to assume your role upon that stage—whether it be in a supporting or leading role.

That is why I am so pleased to be here, so happy to look out and see so many of you here. I hope that whether you choose to practice public interest law in the traditional sense or have a job in which you can make a contribution to the public interest through pro bono work or in some other way, you always consider that the privilege of the practice of law must go hand in hand with the highest kind of duty and responsibility to the public to make certain that our system of justice represents the interests of not just a few, but of all Americans.

As I mentioned in the beginning, I cannot begin to do justice in these brief remarks to the weighty topics that I have chosen to discuss. I do hope, however, that I have at least raised some issues that can generate more substantive discussions in your classrooms or among yourselves.

How lawyers can help promote development

13 Jan 2015 ·

1. Christopher Colford Communications Officer. World Bank

The challenge of global development is so vast, and the need to deliver high-impact services is so urgent, that the drive to create a social movement to build shared prosperity must enlist people with every type of skill — marshalling all of the many kinds of expertise that drive the private sector as well as the public, academic, social and philanthropic realms.

"We need everybody," as World Bank Group President Jim Yong Kim has passionately argued. "We need writers who can write about this. We need engineers. We need doctors. We need lawyers. We need artists. We need everybody who can capture the imagination of the world to end poverty." There's a role in development for public-spirited people from every profession who seek to contribute to the cause.

Take It On: Enlisting In The Development Cause

Deep legal knowledge and deft legal reasoning are certainly part of the skill set needed to eradicate poverty and promote development. That's because "you can't have justice without advocates for justice," as the Justice Community of Practice at the World Bank Group recently learned from the leader of an energetic initiative to link public-spirited legal practitioners with the nonprofit and non-governmental organizations (NGOs) that need their skills.

The legal acumen that helps for-profit law firms succeed in the marketplace is often sought by nonprofits, human-services groups and human-rights advocates. Lawyers' skills can often make a crucial difference for organizations that deal with social prorities — whether it's by tackling complex challenges like protecting refugees or defending prisoners of conscience, or by pursuing routine tasks like negotiating an office-space lease or reviewing an employment contract.

Matching the needs of social organizations with the capacity of lawyers who have a bit of time to commit to *pro bono publico* ideals – and thus to "strengthen the global *pro bono*community" for the long term – is the goal of PILnet, the Global Network for Public Interest Law. PILnet president Edwin Rekosh recently told the Bank's justice-focused group that "promoting voluntarism among lawyers" often starts with the simple question, "Do you care about doing something good with your free time?" If so, "What do you care about?"

Lawyers within some of the world's largest international law firms, in particular, often find that they have some spare capacity when they're inbetween client assignments. Putting those flexible hours to good use for a *probono* client can both satisfy the lawyers' altruistic aspirations and reflect well on their firms' commitment to devote time and talent free of charge to worthy social causes.

In 2013, PILnet mobilized access to more than \$4.3 million worth of legal services for *pro bono* causes, helping provide 9,543 hours of legal services to 119 NGOs in 25 countries.

Founded in New York as the Public Interest Law Initiative in Transitional SocietiesatColumbia University (PILI) in 1997, PILnet originally aimed to provide support to social initiatives in Eastern Europe amid the region's post-communist transition process. After establishing an office in Budapest in 2002, PILnet has now expanded to create additional "clearinghouses" — matchmaking services that link potential *pro bono* clients with lawyers who have available time — in London, Budapest, Moscow, Beijing and Hong Kong. Having become an independent nonprofit, PILnet also pursues legal capacity-building, helping activist lawyers work with NGOs through fellowships, skill-building workshops and knowledge-exchange initiatives.

Offering examples of PILnet's work, Rekosh described the way that PILnet has helped enlist lawyers to help seek citizenship rights for the migratory Roma population in Central Europe; to build a public-sector/private-sector coalition for safe-workplace regulation and anti-human-trafficking protection for women in Nepal; and to strengthen anti-corruption safeguards and financial-sector transparency in Montenegro.

As PILnet's work has expanded, about 60 percent of its programs now address human-rights-related issues. About two-thirds of the NGOs receiving PILnet clearinghiouses' support are human-rights groups.

As an ingenious way to link legal practitioners with the activist groups that need them, it's intriguing to think of PlLnet – in a globalizing marketplace where professional services are often delivered through groups like *Médecins Sans Frontières* and *Journalistes Sans Frontières*— as mobilizing a kind of international "beyond borders" corps of legal talent, serving as *Avocats Sans Frontières*.

Lawyers' knowledge and problem-solving ability can surely make a strong contribution to the wide-ranging package of skills that are needed to promote development, advance democracy and uphold the rule of law worldwide. International institutions like the World Bank Group are eager to applaud the work of idealistic groups like PILnet as they #TakeOn the development challenge.

Author: Christopher Colford is a Communications Officer at The World Bank, in its Financial and Private Sector Development Network. Garam Dexter joined the "Women, Business and the Law" project in 2012.

Further Reading

A Portrait of Asian Americans in the Law
https://www.apaportraitproject.org/
Supporting Justice – ABA Report on Pro Bono Activity
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http://www.law.nyu.edu/sites/default/files/upload_documents/Brian%20Glick%20
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Practiced Moral Activism, Prof. Paul R. Tremblay
https://pdfs.semanticscholar.org/291c/36c9e74b8c541f04eaec7bed249670e0c72f.pdf
Interested in joining AABANY's Community Response Task Force?
Email CommunityResponseTaskForce@AABANY.org

EXAMINING THE STUDENT LOAN CRISIS

ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK

FALL CONFERENCE 2018

CONTENTS

Overview

The Student Loan Industry

Increasing
Defaults and
Distress

Issues Faced by Borrowers

Regulatory Issues

Discharge of Student Loans

OVERVIEW

- The United States alone has approximately \$1.53 trillion in outstanding student loan debt, 44 million borrowers and an average debt balance of approximately \$35,000. Lenders package these loans into student loan asset-backed securities ("SLABS") for investors to purchase.
- O The number of student loan borrowers and the average balance per borrower is rising year after year. Evidence has shown that even in the current recovering economy, the majority of new college graduates have not been able to find jobs that allow them to pay back their student loans. Could the student loan industry be the next market implosion to trigger a financial crisis?
- We have gathered a panel of finance, bankruptcy, and education law experts to discuss the motivations of various parties involved, and provide practical advice on how to navigate the market pressure revolving around student loans, including its effects on other industries, the regulatory environment for student loans, and other issues arising from the current state of student loan borrowing in the United States.

THE STUDENT LOAN **INDUSTRY**

SIZE OF THE STUDENT LOAN INDUSTRY

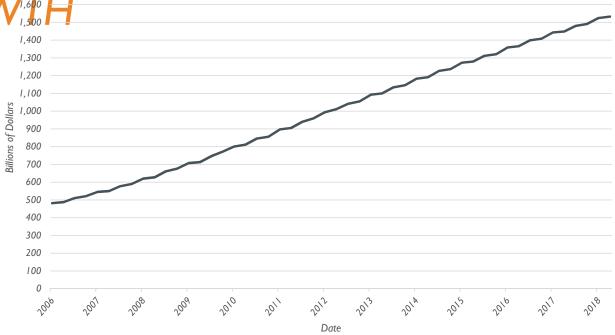
- Over 44 million borrowers
- Over \$1.53 trillion in student loan debt in the United States
- More student loan debt outstanding than credit card (\$1.0 trillion) or auto loan debt (\$1.1 trillion) and second only to mortgage debt
- Student loan debt has increased since the Great Recession while all other forms of household debt have decreased

PRECIPITOUS GROWTH

- The amount of student loan debt in the United States has more than quadrupled since 2001, from \$340 million to \$1.5 trillion. (See https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-20180221.htm)
- Increasing cost of higher education
- Increasing enrollment in higher education
- Increased borrowing during Great Recession—many people went to school during downturn and also needed to borrow more because of the economy
- Approximately \$29 billion in new student loans per quarter

Student Loans Owned and Securitized, Outstanding

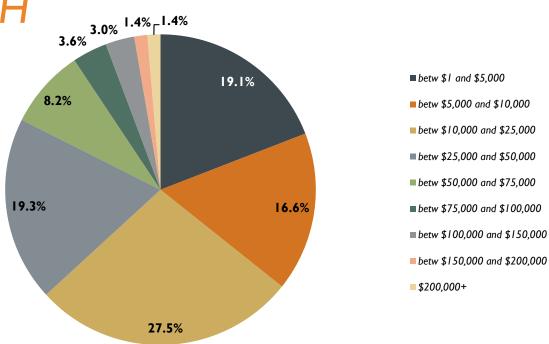
PRECIPITOUS GROW



Includes student loans originated under the Federal Family Education Loan Program and the Direct Loan Program; Perkins loans; and private student loans without government guarantees.

Distribution of Student Loan Borrowers by 2017Q4 Balance

PRECIPITOUS GROWTH



Source: FRBNY Consumer Credit Panel/Equifax

STUDENT LOAN SECURITIZATIONS

- Many student loans (both federal and private) are securitized
- According to SIFMA, there is currently approximately \$175 billion in outstanding student loan backed securitizations
 - Approximately \$130 million public loans and \$45 million private loans
- Over \$16 billion in student loan backed securities were issued in 2017
- O Attractive to investors because: (1) government guaranty of repayment (approximately 80% of securitized loans are federally guaranteed) and (2) student loans are generally bankruptcy proof.

RISKS INHERENT TO STUDENT LOAN SECURITIZATIONS

- Private non-qualified student loans may be dischargeable in a bankruptcy exposing investors to risk of loss
- FFELP securitizations may face maturity or extension risk when borrowers choose extended repayment plans such as the IBR or otherwise defer payment

INCREASED DEFAULTS AND **DISTRESS**

DEFAULTS

- 11% of student loans are delinquent (90 days or more overdue)
- 8.5 million borrowers in default on their student loans (over 270 days without payment)
- The Brookings Institution predicts that by 2023, 40% of student loans from the 2004 entry cohort will be in default
- Nearly half of all borrowers attending for-profit universities default and are nearly four times more likely to default than public two-year degree entrants

POTENTIAL IMPACTS Increased debt loads and cost of education creates pressure on borrowers and their families

DISTRESS

- O Defaults in private loans that have been securitized result in losses for investors and potential for disruption to securitization market
 - Increased defaults trigger government guarantees of repayment--taxpayers pick up the bill
- Increased defaults trigger higher interest rates on student loans going forward, increasing cost of education
 - O Potential impact on financial results of for-profit colleges
- Greater losses by non-governmental guarantors

MARBLEGATE ASSET MGMT., LLC V. EDUC. MGMT. FIN. CORP.

CASE STUDY

- Education Management ("EDMC") had over \$1.5 billion in debt outstanding, of which approximately \$1.3 billion was secured
- Education Management sought to restructure this debt out of court, believing that an in court bankruptcy could compromise its ability to receive federal funding under Title IV
- All noteholders, except for Marblegate, consented to a restructuring
 - The transaction was constructed such that noteholders that failed to participate in the restructuring were effectively wiped out
- Marblegate attempted to block the transaction via a preliminary injunction brought under the Trust Indenture Act ("TIA"), which was denied, and the proceeding was converted to a bench trial

CASE STUDY

- O The transaction was structured such that if less than unanimous consent was achieved, the following steps would be taken:
 - Consenting secured creditors foreclose on EDMC assets
 - Secured creditors release EDMC from its guarantee of its secured debt
 - O This release then releases the EDMC from its guarantee of the unsecured notes under the indenture
 - Secured creditors give consent to collateral agent to sell foreclosed assets to a new subsidiary of EDMC, which doesn't require consent of the unsecured creditors
 - The new EDMC subsidiary distributes debt and equity to only consenting creditors
 - Marblegate, as a non-consenting creditor, was left with rights only against an empty entity

SDNY, 11 F.SUPP.3D 542

- The issue before the District Court was whether a debt restructuring in which no "indenture term explicitly governing the right to receive interest or principal" was modified, but the bondholder would have "no choice but to accept a modification of the terms of their bonds" violated s. 316(b) of the TIA
- Section 316(b) bars impairing or affecting the right of any bondholder to receive payment on the principal or interest on their bond without consent

SDNY, 11 F.SUPP.3D 542

- O The District Court closely reviewed the legislative history of the TIA, and concluded that it favored Marblegate's broad interpretation of the section, which was that s.3 I 6(b) prohibited not only amendments of terms regarding rights to payment, but also amendments that had the effect of impairing such rights
- Accordingly, the Court held that the restructuring violated s. 316(b) of the TIA, and stated that there was "little question that the [transaction] is precisely the type of debt reorganization that the Trust Indenture Act is intended to preclude"
- As a remedy, the Court held that Education Management had to guarantee any past and future payments of principal and interest to Marblegate in accordance with the initial indenture

2D CIR., 846 F.3D I

- On appeal, the Second Circuit reversed the District Court's decision, after also engaging in a detailed review of the legislative history
- The Court noted that the "core disagreement...is whether the phrase 'right...to receive payment" barred (a) merely formal amendments to payment terms or (ii) formal amendments and amendments to other terms that affected payment terms as well
- In contrast with the District Court below, the Second Circuit adopted the narrower view that s. 3 I 6(b) of the TIA only barred formal amendments to payment terms

2D CIR., 846 F.3D I

- The Second Circuit noted that while it's ruling foreclosed on one avenue of recourse for Marblegate, it retained other options, including:
 - Pursuing remedies under state law, especially in light of the fact that an out of court restructuring does not give an issuer the benefit of a discharge
 - Drafting future indentures to prevent the kind of transactions at issue
 - O Bringing suit under state law theories of successor liability or fraudulent conveyance



REGULATORY BODIES AND LAWS

- Consumer Financial Protection Bureau (CFPB)
- State Attorney Generals
- U.S. Department of Education
- Enforcement of various Federal and State laws and regulations. For example:
 - Fair Credit Reporting Act
 - O Fair Debt Collections Practices Act
 - O State unfair and deceptive practices laws
 - Consumer Financial Protection Act
 - O New state servicer licensing regimes

SERVICING RELATED REGULATORY ACTIONS

- CFPB has commenced a number of actions against student loan servicers
 - O CFPB v. Navient
 - O CFPB v. NCSLT and Transworld Systems
- California, Illinois, Washington, Pennsylvania, and Massachusetts have all sued student loan servicers as well
- Numerous attorney generals have or are investigating student loan servicers, which has led to numerous settlements of loan servicing issues

SERVICING RELATED REGULATORY ACTIONS (CONT.)

- Servicing Issues
 - O Failure to advise borrowers on repayment options
 - Allegations that servicers steered federal student loan borrowers to less favorable repayment plans to avoid increased servicing costs
 - Abusive collection issues
 - Lost notes

CFPB V. NAVIENT M.D. PA CASE NO. 17-00101

- Navient is currently the largest student loan servicer in the United States, servicing the loans of 12 million borrowers and both federal and private loans totaling \$300 billion
- In January 2017, the CFPB commenced an action against Navient charging that it deceived borrowers and cheated them out of repayment options which would have lowered repayment costs

CFPB V. NCSLT ET AL D. DEL CASE NO. 1:17-CV-01323

- The National Collegiate Student Loan Trust holds 800,000 student loans, serviced by Transworld Systems
- In September 2017, the CFPB filed a complaint and announced a proposed consent order with NCSLT and Transworld that would:
 - (a) require an independent audit of all 800,000 loans;
 - Ouring the audit, all payments to investors in securities based on the loans would be placed into escrow
 - O (b) prohibit NCLST from attempting to collect on any loan the audit shows is unverified or invalid; and
 - (c) require NCSLT to pay a penalty of at least \$19.1 million and Transworld to pay a penalty of at least \$2.5 million.
- Case is still pending in Delaware District Court, with several motions to intervene filed by investors and industry groups

LENDING RELATED REGULATORY ACTIONS

- Agencies have focused on predatory lending charges
- Examples:
 - O CFPB v. Bridgepoint
 - CFPB v. Aequitas Capital (related to Corinthian Colleges)
 - O NY AG v. DeVry University
 - State Attorney Generals v. Education Management Corporation

STATE ATTORNEY GENERALS' SETTLEMENT WITH AEQUITAS CAPITAL MANAGEMENT

- Aequitas was a private student loan company that made loans to students at forprofit Corinthian College
- Corinthian was at risk of violating federal Title IV regulations that require forprofit schools to receive a certain portion of their revenue from sources other than federal student aid.
- O Aequitas entered into an arrangement with Corinthian, who then agreed to buy back all loans that defaulted within a specified period, eliminating Aequitas' risk of losses from defaults. The purpose of this arrangement was to make it appear that Corinthian was in compliance with Title IV regulations.
- Aequitas knew that the loans provided no financial benefit to Corinthian other than allowing Corinthian to access federal funds for which they would not have otherwise qualified. Aequitas and Corinthian also knew that students were unlikely to be able to repay the loans, even as they continued making loans. The loans had default rates of 50 to 70 percent.

STATE ATTORNEY GENERALS' SETTLEMENT WITH AEQUITAS CAPITAL MANAGEMENT (CONT.)

- In August 2017, Aequitas ultimately settled with the NY Attorney General and others in the amount of \$183.3 million.
- O Under the terms of the settlement:
 - Borrowers who attended a Corinthian school when it closed in 2014 or who defaulted on their loans will receive full discharges of their Aequitas student loans, including any accrued interest.
 - All other borrowers will have 55% of their Aequitas loan discharged, including any past-due interest on the forgiven amount

DISCHARGEABILITY OF STUDENT LOANS IN BANKRUPTCY

OVERVIEW OF DISCHARGEABILITY OF STUDENT LOANS

- Three avenues through which student loans can be discharged are:
 - Overcoming the presumption of nondischargeability by showing undue hardship
 - Establishing that the loans do not fall within the exception to dischargeability in Bankruptcy Code s. 523(A)(8)
 - Challenging the adequacy of the documentation showing that the loan is valid (similar to approach taken in RMBS defaults in Great Recession)

BANKRUPTCY DISCHARGE

- O Both federal and qualified private student loans are presumptively excepted from discharge in bankruptcy under section 523(a)(8) of the Bankruptcy Code.
- This code section requires a debtor to show "undue hardship" to defeat the presumption of nondischargeability.
- O Due to this presumption, a debtor seeking to discharge student loans must file an adversary proceeding in their own bankruptcy case.

UNDUE HARDSHIP

- The test for "undue hardship" utilized by most circuits requires debtors to prove each of three factors by a preponderance of the evidence:
 - (1) the inability to maintain a "minimal" standard of living for self and dependents if forced to repay the loans;
 - (2) additional circumstances indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
 - (3) good faith efforts to repay the loans.
- O Brunner v. New York State Higher Educ. Services Corp., 83 I F.2d 395, 396 (2d Cir. 1987)

APPLICATION OF THE UNDUE HARDSHIP STANDARD

- The undue hardship standard creates an extremely high bar to dischargeability.
- The vast majority of courts denied borrowers' attempts to discharge their student loan responsibilities.
- However, more recently, some courts have shown a greater propensity for granting undue hardship discharges of student loans.
- These courts have recognized some of the issues with the student lending industry, such as predatory lending and abusive servicing, in connection with finding an "undue hardship."

"QUALIFIED" PRIVATE STUDENT LOANS

- An alternative avenue for seeking a discharge of private student loans is for a debtor to argue that the loan does not fit within the s. 523(A)(8) exceptions to dischargeability
- Bankruptcy Code s. 523(a)(8) makes the following type of loans presumptively non-dischargeable
 - Funds that are an educational benefit overpayment or government made, insured, or guaranteed loan: s.523(a)(8)(i)
 - Funds that are an obligation to repay funds received as an educational benefit: s. 523(a)(8)(ii)
 - Funds that are an educational loan that is a "qualified educational loan": s. 523(a)(8)(B)
- Student loans meeting any of these three criteria are presumptively non-dischargeable
- Student loans that do not meet any of these criteria are dischargeable

"QUALIFIED" PRIVATE STUDENT LOANS

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- O Kashikar sought a discharge of student loans by arguing that the s. 523(a)(8) exception to discharge for student loans did not apply
- Kashikar's student loans were made directly by a private lender to St. Matthew's University School of Medicine (SMU) in Grand Cayman

"QUALIFIED" PRIVATE STUDENT LOANS CASE STUDY

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- In her Bankruptcy Court complaint, Kashikar argued on the basis of s. 523(a)(8)(B) that:
 - O Her loans were not "qualified education loan[s]" under s.523(A)(8)(B)
 - The purpose of the loans was not for an "eligible educational institution" under s. 523(a)(8)(B)
- On a subsequent motion, Kashikar also argued under s.523(a)(8)(A) that:
 - O SMU was not an "eligible educational institution" under s.523(a)(8)(A)(i)
 - O Her loans were not "funds received" under s. 523(a)(8)(A)(ii)
- The lender objected to Kashikar's s. 523(a)(8)(A) arguments on the basis that she did not plead them in her complaint, and in the alternative, that she received an "educational benefit" under s. 523(a)(8)(A)(ii)
- The Bankruptcy Court did not address s. 523(a)(8)(i), but ruled that the loans were **nondischargeable** because Kashikar received an educational benefit under s.523(a)(8)(ii)

"QUALIFIED" PRIVATE STUDENT LOANS CASE STUDY

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- Kashikar appealed the decision to the B.A.P.
- The B.A.P. addressed two main issues:
 - O Whether Kashikar's loan was an "educational benefit" under s. 523(a)(8)(A)(ii) and therefore nondischargeable
 - Whether the loan was actually "funds received" under s. 523(a)(8)(A)(ii)
- The B.A.P. remanded on the issue of the dischargeability of the loan under s.523(a)(8)(A)(i), stating that the Bankruptcy Court erred in failing to consider it

IN RE KASHIKAR CASE STUDY

2. EDUCATIONAL BENEFIT

- The B.A.P. held that the Bankruptcy Court erred in holding that the loan was not "funds received" under s. 523(a)(8)(A)(ii)
 - Funds advanced on behalf of Kashikar directly to the school constitute "funds received": actual receipt of the funds by Kashikar was not required
- The B.A.P. held that the loans were not an "educational benefit" under s. 523(a)(8)(A)(ii)
 - O This means that the educational benefit has to be **something more** than just a credit transaction bestowing an educational benefit on a debtor
- Because s. 523(a)(8) is a three-part disjunctive test, and one issue was remanded to the Bankruptcy Court, there was no final decision regarding the discharge of Kashikar's loan
- However, subject to the decision on remand, the door was opened for Kashikar to discharge her loans



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CAROLYN FAST

OCarolyn Fast is Special Counsel in the Consumer Frauds & Protection Bureau of the New York Attorney General's Office. Her work has involved student lending, for-profit colleges, debt collection, online advertising, and credit reporting agencies. She served as a Negotiator for the U.S. Department of Education's Negotiated Rulemaking for regulations governing online education providers and arrangements between colleges and banks. Prior to joining the Attorney General's Office, she was a law clerk for the Honorable Victor Marrero in the Southern District of New York. She received her undergraduate degree from Harvard University and her law degree from Columbia Law School.



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OJessica Liou is a senior associate in the Firm's Business Finance & Restructuring Department. Ms. Liou represents and advises debtors, creditors, equity holders, investors, and other interested parties in all aspects of distressed and insolvency situations. She has served as the lead associate or an integral member of multiple teams advising debtors and creditors in various industries, including power, oil & gas, renewable energy, manufacturing, hospitality, retail and telecommunications. Ms. Liou's debtor representations include, among others, Basic Energy Services, Inc., Westinghouse Electric Company LLC, Paragon Offshore plc, Essar Steel Algoma Inc., Endeavour International Corporation, Extended Stay Hotels, AES Eastern Energy, Nortek, Hawkeye Renewables, Steve & Barry's, and Recycled Paper Greetings. Her creditor representations include, among others, Brookfield, as one of the largest first lien creditors in the chapter 11 cases of Texas Competitive Electric Holdings Company LLC and its debtor affiliates, The Export-Import Bank of China as the largest secured creditor in the Baha Mar Ltd. insolvency proceedings, and Harbinger Capital Partners in the TerreStar Networks Inc. and TerreStar Corporation chapter 11 cases.

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EXAMINING THE STUDENT LOAN CRISIS

ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK

FALL CONFERENCE 2018

CONTENTS

Overview

The Student Loan Industry

Increasing
Defaults and
Distress

Issues Faced by Borrowers

Regulatory Issues

Discharge of Student Loans

OVERVIEW

- The United States alone has approximately \$1.53 trillion in outstanding student loan debt, 44 million borrowers and an average debt balance of approximately \$35,000. Lenders package these loans into student loan asset-backed securities ("SLABS") for investors to purchase.
- The number of student loan borrowers and the average balance per borrower is rising year after year. Evidence has shown that even in the current recovering economy, the majority of new college graduates have not been able to find jobs that allow them to pay back their student loans. Could the student loan industry be the next market implosion to trigger a financial crisis?
- We have gathered a panel of finance, bankruptcy, and education law experts to discuss the motivations of various parties involved, and provide practical advice on how to navigate the market pressure revolving around student loans, including its effects on other industries, the regulatory environment for student loans, and other issues arising from the current state of student loan borrowing in the United States.

THE STUDENT LOAN **INDUSTRY**

SIZE OF THE STUDENT LOAN INDUSTRY

- Over 44 million borrowers
- Over \$1.53 trillion in student loan debt in the United States
- More student loan debt outstanding than credit card (\$1.0 trillion) or auto loan debt (\$1.1 trillion) and second only to mortgage debt
- Student loan debt has increased since the Great Recession while all other forms of household debt have decreased

PRECIPITOUS GROWTH

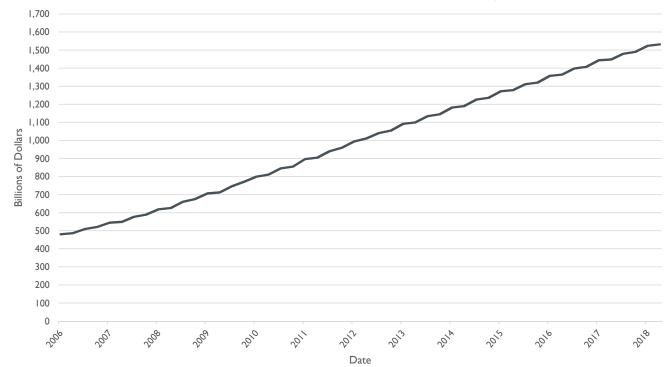
- The amount of student loan debt in the United States has more than quadrupled since 2001, from \$340 million to \$1.5 trillion. (See <a href="https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-notes/student-notes/studen
- Increasing cost of higher education

20180221.htm)

- Increasing enrollment in higher education
- Increased borrowing during Great Recession—many people went to school during downturn and also needed to borrow more because of the economy
- Approximately \$29 billion in new student loans per quarter

PRECIPITOUS GROWTH

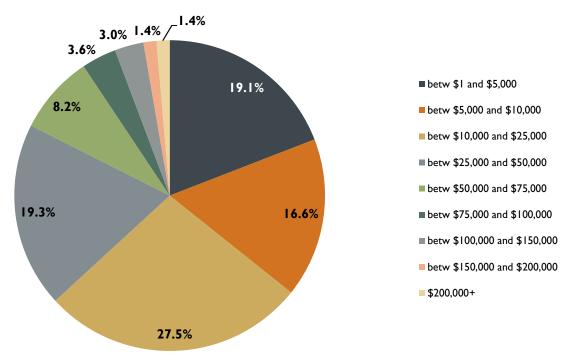
Student Loans Owned and Securitized, Outstanding



Includes student loans originated under the Federal Family Education Loan Program and the Direct Loan Program; Perkins loans; and private student loans without government guarantees.

PRECIPITOUS GROWTH

Distribution of Student Loan Borrowers by 2017Q4 Balance



Source: FRBNY Consumer Credit Panel/Equifax

STUDENT LOAN SECURITIZATIONS

- Many student loans (both federal and private) are securitized
- According to SIFMA, there is currently approximately \$175 billion in outstanding student loan backed securitizations
 - Approximately \$130 million public loans and \$45 million private loans
- Over \$16 billion in student loan backed securities were issued in 2017
- Attractive to investors because: (1) government guaranty of repayment (approximately 80% of securitized loans are federally guaranteed) and (2) student loans are generally bankruptcy proof.

RISKS INHERENT TO STUDENT LOAN SECURITIZATIONS

- Private non-qualified student loans may be dischargeable in a bankruptcy exposing investors to risk of loss
- FFELP securitizations may face maturity or extension risk when borrowers choose extended repayment plans such as the IBR or otherwise defer payment

INCREASED DEFAULTS AND DISTRESS

DEFAULTS

- I I% of student loans are delinquent (90 days or more overdue)
- 8.5 million borrowers in default on their student loans (over 270 days without payment)
- The Brookings Institution predicts that by 2023, 40% of student loans from the 2004 entry cohort will be in default
- Nearly half of all borrowers attending for-profit universities default and are nearly four times more likely to default than public two-year degree entrants

POTENTIAL IMPACTS OF DISTRESS

- Increased debt loads and cost of education creates pressure on borrowers and their families
- Defaults in private loans that have been securitized result in losses for investors and potential for disruption to securitization market
 - Increased defaults trigger government guarantees of repaymenttaxpayers pick up the bill
- Increased defaults trigger higher interest rates on student loans going forward, increasing cost of education
 - Potential impact on financial results of for-profit colleges
- Greater losses by non-governmental guarantors

MARBLEGATE ASSET MGMT., LLC V. EDUC. MGMT. FIN. CORP.

CASE STUDY

- Education Management ("EDMC") had over \$1.5
 billion in debt outstanding, of which approximately \$1.3 billion was secured
- Education Management sought to restructure this debt out of court, believing that an in court bankruptcy could compromise its ability to receive federal funding under Title IV
- All noteholders, except for Marblegate, consented to a restructuring
 - The transaction was constructed such that noteholders that failed to participate in the restructuring were effectively wiped out
- Marblegate attempted to block the transaction via a preliminary injunction brought under the Trust Indenture Act ("TIA"), which was denied, and the proceeding was converted to a bench trial

CASE STUDY

- The transaction was structured such that if less than unanimous consent was achieved, the following steps would be taken:
 - Consenting secured creditors foreclose on EDMC assets
 - Secured creditors release EDMC from its guarantee of its secured debt
 - This release then releases the EDMC from its guarantee of the unsecured notes under the indenture
 - Secured creditors give consent to collateral agent to sell foreclosed assets to a new subsidiary of EDMC, which doesn't require consent of the unsecured creditors
 - The new EDMC subsidiary distributes debt and equity to only consenting creditors
 - Marblegate, as a non-consenting creditor, was left with rights only against an empty entity

SDNY, II F.SUPP.3D 542

- The issue before the District Court was whether a debt restructuring in which no "indenture term explicitly governing the right to receive interest or principal" was modified, but the bondholder would have "no choice but to accept a modification of the terms of their bonds" violated s. 316(b) of the TIA
- Section 316(b) bars impairing or affecting the right of any bondholder to receive payment on the principal or interest on their bond without consent

SDNY, II F.SUPP.3D 542

- The District Court closely reviewed the legislative history of the TIA, and concluded that it favored Marblegate's broad interpretation of the section, which was that s.3 I 6(b) prohibited not only amendments of terms regarding rights to payment, but also amendments that had the effect of impairing such rights
- Accordingly, the Court held that the restructuring violated s. 316(b) of the TIA, and stated that there was "little question that the [transaction] is precisely the type of debt reorganization that the Trust Indenture Act is intended to preclude"
- As a remedy, the Court held that Education
 Management had to guarantee any past and future
 payments of principal and interest to Marblegate in
 accordance with the initial indenture

2D CIR., 846 F.3D I

- On appeal, the Second Circuit reversed the District Court's decision, after also engaging in a detailed review of the legislative history
- The Court noted that the "core disagreement...is whether the phrase 'right...to receive payment" barred (a) merely formal amendments to payment terms or (ii) formal amendments and amendments to other terms that affected payment terms as well
- In contrast with the District Court below, the Second Circuit adopted the narrower view that s. 316(b) of the TIA only barred formal amendments to payment terms

2D CIR., 846 F.3D I

- The Second Circuit noted that while it's ruling foreclosed on one avenue of recourse for Marblegate, it retained other options, including:
 - Pursuing remedies under state law, especially in light of the fact that an out of court restructuring does not give an issuer the benefit of a discharge
 - Drafting future indentures to prevent the kind of transactions at issue
 - Bringing suit under state law theories of successor liability or fraudulent conveyance



REGULATORY BODIES AND LAWS

- Consumer Financial Protection Bureau (CFPB)
- State Attorney Generals
- U.S. Department of Education
- Enforcement of various Federal and State laws and regulations. For example:
 - Fair Credit Reporting Act
 - Fair Debt Collections Practices Act
 - State unfair and deceptive practices laws
 - Consumer Financial Protection Act
 - New state servicer licensing regimes

SERVICING RELATED REGULATORY ACTIONS

- CFPB has commenced a number of actions against student loan servicers
 - CFPB v. Navient
 - CFPB v. NCSLT and Transworld Systems
- California, Illinois, Washington, Pennsylvania, and Massachusetts have all sued student loan servicers as well
- Numerous attorney generals have or are investigating student loan servicers, which has led to numerous settlements of loan servicing issues

SERVICING RELATED REGULATORY ACTIONS (CONT.)

- Servicing Issues
 - Failure to advise borrowers on repayment options
 - Allegations that servicers steered federal student loan borrowers to less favorable repayment plans to avoid increased servicing costs
 - Abusive collection issues
 - Lost notes

CFPB V. NAVIENT M.D. PA CASE NO. 17-00101

- Navient is currently the largest student loan servicer in the United States, servicing the loans of 12 million borrowers and both federal and private loans totaling \$300 billion
- In January 2017, the CFPB commenced an action against Navient charging that it deceived borrowers and cheated them out of repayment options which would have lowered repayment costs

CFPB V. NCSLT ET AL.
D. DEL
CASE NO. 1:17-CV-01323

- The National Collegiate Student Loan Trust holds 800,000 student loans, serviced by Transworld Systems
- In September 2017, the CFPB filed a complaint and announced a proposed consent order with NCSLT and Transworld that would:
 - (a) require an independent audit of all 800,000 loans;
 - During the audit, all payments to investors in securities based on the loans would be placed into escrow
 - (b) prohibit NCLST from attempting to collect on any loan the audit shows is unverified or invalid; and
 - (c) require NCSLT to pay a penalty of at least \$19.1 million and Transworld to pay a penalty of at least \$2.5 million.
- Case is still pending in Delaware District Court, with several motions to intervene filed by investors and industry groups

LENDING RELATED REGULATORY ACTIONS

- Agencies have focused on predatory lending charges
- Examples:
 - CFPB v. Bridgepoint
 - CFPB v.Aequitas Capital (related to Corinthian Colleges)
 - N.Y.AG v. DeVry University
 - State Attorneys General v. Education Management Corporation

SETTLEMENT BETWEEN STATE ATTORNEYS GENERAL AND AEQUITAS CAPITAL MANAGEMENT

- Aequitas was a private student loan company that made loans to students at for-profit Corinthian College
- Corinthian was at risk of violating federal Title IV regulations that require for-profit schools to receive a certain portion of their revenue from sources other than federal student aid.
- Aequitas entered into an arrangement with Corinthian, who then agreed to buy back all loans that defaulted within a specified period, eliminating Aequitas' risk of losses from defaults. The purpose of this arrangement was to make it appear that Corinthian was in compliance with Title IV regulations.
- Aequitas knew that the loans provided no financial benefit to Corinthian other than allowing Corinthian to access federal funds for which they would not have otherwise qualified. Aequitas and Corinthian also knew that students were unlikely to be able to repay the loans, even as they continued making loans. The loans had default rates of 50 to 70 percent.

SETTLEMENT BETWEEN STATE ATTORNEYS GENERAL AND AEQUITAS CAPITAL MANAGEMENT (CONT.)

- In August 2017, Aequitas ultimately settled with the NY Attorney General and others in the amount of \$183.3 million.
- Under the terms of the settlement:
 - Borrowers who attended a Corinthian school when it closed in 2014 or who defaulted on their loans will receive full discharges of their Aequitas student loans, including any accrued interest.
 - All other borrowers will have 55% of their Aequitas loan discharged, including any past-due interest on the forgiven amount

DISCHARGEABILITY OF STUDENT LOANS IN **BANKRUPTCY**

OVERVIEW OF DISCHARGEABILITY OF STUDENT LOANS

- Three avenues through which student loans can be discharged are:
 - Overcoming the presumption of nondischargeability by showing undue hardship
 - Establishing that the loans do not fall within the exception to dischargeability in Bankruptcy Code s. 523(A)(8)
 - Challenging the adequacy of the documentation showing that the loan is valid (similar to approach taken in RMBS defaults in Great Recession)

BANKRUPTCY DISCHARGE

- Both federal and qualified private student loans are presumptively excepted from discharge in bankruptcy under s. 523(a)(8) of the Bankruptcy Code.
- This code section requires a debtor to show "undue hardship" to defeat the presumption of nondischargeability.
- Due to this presumption, a debtor seeking to discharge student loans must file an adversary proceeding in their own bankruptcy case.

UNDUE HARDSHIP

- The test for "undue hardship" utilized by most circuits requires debtors to prove each of three factors by a preponderance of the evidence:
 - (I) the inability to maintain a "minimal" standard of living for self and dependents if forced to repay the loans;
 - (2) additional circumstances indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
 - (3) good faith efforts to repay the loans.
- Brunner v. New York State Higher Educ. Services Corp., 831F.2d 395, 396 (2d Cir. 1987)

APPLICATION OF THE UNDUE HARDSHIP STANDARD

- The undue hardship standard creates an extremely high bar to dischargeability.
- The vast majority of courts denied borrowers' attempts to discharge their student loan responsibilities.
- However, more recently, some courts have shown a greater propensity for granting undue hardship discharges of student loans.
- These courts have recognized some of the issues with the student lending industry, such as predatory lending and abusive servicing, in connection with finding an "undue hardship."

"QUALIFIED" PRIVATE STUDENT LOANS

- An alternative avenue for seeking a discharge of private student loans is for a debtor to argue that the loan does not fit within the s. 523(A)(8) exceptions to dischargeability
- Bankruptcy Code s. 523(a)(8) makes the following type of loans presumptively non-dischargeable
 - Funds that are an educational benefit overpayment or government made, insured, or guaranteed loan: s.523(a)(8)(i)
 - Funds that are an obligation to repay funds received as an educational benefit: s. 523(a)(8)(ii)
 - Funds that are an educational loan that is a "qualified educational loan": s. 523(a)(8)(B)
- Student loans meeting any of these three criteria are presumptively non-dischargeable
- Student loans that do not meet any of these criteria are dischargeable

"QUALIFIED" PRIVATE STUDENT LOANS CASE STUDY

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- Kashikar sought a discharge of student loans by arguing that the s. 523(a)(8) exception to discharge for student loans did not apply
- Kashikar's student loans were made directly by a private lender to St. Matthew's University School of Medicine (SMU) in Grand Cayman

"QUALIFIED" PRIVATE STUDENT LOANS CASE STUDY

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- In her Bankruptcy Court complaint, Kashikar argued on the basis of s. 523(a)(8)(B) that:
 - Her loans were not "qualified education loan[s]" under s.523(A)(8)(B)
 - The purpose of the loans was not for an "eligible educational institution" under s. 523(a)(8)(B)
- On a subsequent motion, Kashikar also argued under s.523(a)(8)(A) that:
 - SMU was not an "eligible educational institution" under s.523(a)(8)(A)(i)
 - Her loans were not "funds received" under s. 523(a)(8)(A)(ii)
- The lender objected to Kashikar's s. 523(a)(8)(A) arguments on the basis that she did not plead them in her complaint, and in the alternative, that she received an "educational benefit" under s. 523(a)(8)(A)(ii)
- The Bankruptcy Court did not address s. 523(a)(8)(i), but ruled that the loans were nondischargeable because Kashikar received an educational benefit under s.523(a)(8)(ii)

"QUALIFIED" PRIVATE STUDENT LOANS CASE STUDY

IN RE KASHIKAR, 567 B.R. 160, 162 (B.A.P. 9TH CIR. 2017)

- Kashikar appealed the decision to the B.A.P.
- The B.A.P. addressed two main issues:
 - Whether Kashikar's loan was an "educational benefit" under s. 523(a)(8)(A)(ii) and therefore nondischargeable
 - Whether the loan was actually "funds received" under s. 523(a)(8)(A)(ii)
- The B.A.P. remanded on the issue of the dischargeability of the loan under s.523(a)(8)(A)(i), stating that the Bankruptcy Court erred in failing to consider it

IN RE KASHIKAR CASE STUDY

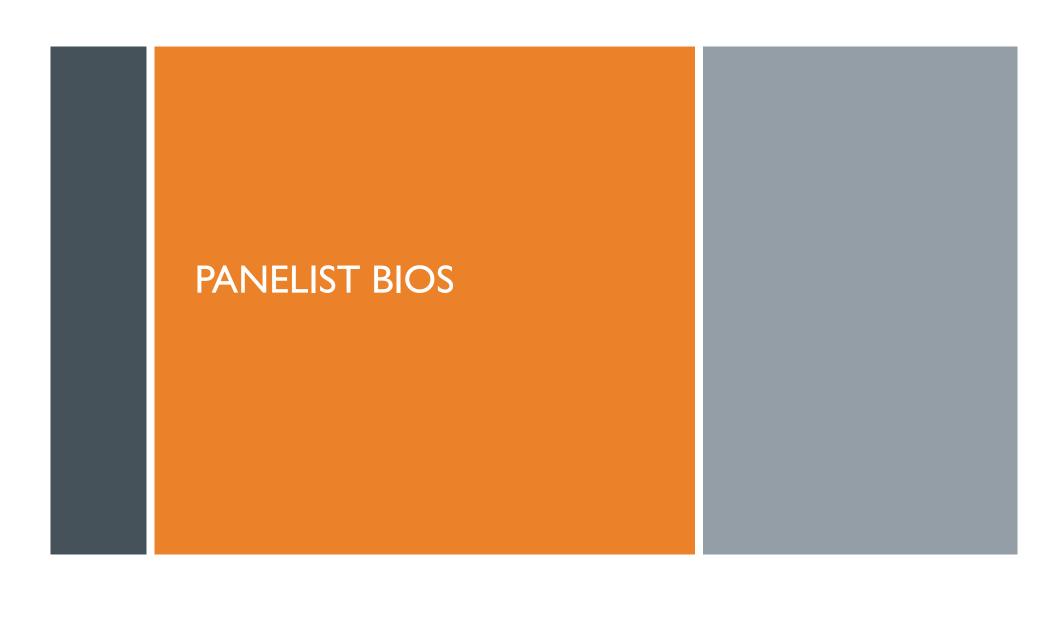
EDUCATIONAL BENEFIT

- The B.A.P. held that the Bankruptcy Court erred in holding that the loan was not "funds received" under s. 523(a)(8)(A)(ii)
 - Funds advanced on behalf of Kashikar directly to the school constitute "funds received": actual receipt of the funds by Kashikar was not required
- The B.A.P. held that the loans were not an "educational benefit" under s. 523(a)(8)(A)(ii)
 - This means that the educational benefit has to be something more than just a credit transaction bestowing an educational benefit on a debtor
- Because s. 523(a)(8) is a three-part disjunctive test, and one issue was remanded to the Bankruptcy Court, there was no final decision regarding the discharge of Kashikar's loan
- However, subject to the decision on remand, the door was opened for Kashikar to discharge her loans



WORKS CITED

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- Meta Brown et al., The Financial Crisis at the Kitchen Table: Trends in Household Debt and Credit, 19 CURRENT ISSUES IN ECON. & FIN. 3–6 (2013), available at http://www.newyorkfed.org/research/current_issues/ci19-2.pdf (analyzing consumer behavior in decreased spending and increased repayments during economic downturn).
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SPECIAL ACKNOWLEDGMENT
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AABANY TRIAL ADVOCACY PROGRAM ASSIGNMENT September 22, 2018

Read thoroughly the enclosed mock problem, *Shawn Wright* v. *Play and Learn Childcare Center*. You may consult any trial practice reference book to assist you in preparing for the exercises. You should have prepared direct and cross examination questions, and opening and closing statements. You must also be familiar with introducing tangible evidence, diagrams or photos, and business records. The last few pages of the mock problem have brief instructions on laying foundation.

Each TAP student is assigned to work as a member of a pair. In addition to playing the role of counsel, each student within a pair will serve as one of the two witnesses for his/her party (plaintiff or defendant). That is, a pair that is assigned to be plaintiff's counsel will have one student from that pair also play the part of Shawn Wright and the other student also play the part of Lee Morrison. And a pair that is assigned to be defendant's counsel will have one student from that pair also play the part of Sydney Little and the other student also play the part of Dell Anderson.

ASSIGNMENTS

- 1. Opening Statements: Each pair must prepare a 5-10 minute opening statement.
- 2. Direct Examination (~10 minutes each)
 - a. For the plaintiff, be prepared to conduct the direct examination of Shawn Wright and Lee Morrison.
 - b. For the defense, be prepared to conduct the direct examination of Sydney Little and Dell Anderson.
- 3. Cross Examination (~10 minutes each)
 - a. For the plaintiff, be prepared to conduct the cross-examination of Sydney Little and Dell Anderson.
 - b. For the plaintiff, be prepared to conduct the cross-examination of Shawn Wright and Lee Morrison.
- 4. Closing Statement: Each pair must prepare a 5-10 minute closing statement.

TO: AABANY TAP FACULTY

RE: HOW TO CRITIQUE STUDENT PERFORMANCES

Thank you again for taking the time to participate in TAP. Your expertise offers valuable feedback for our participants. We have provided below some guidelines for effective critique of participant performances. We appreciate your support.

The main thrust of AABANY's TAP is the student performance of a problem and the critique of it by the teaching team.

Each small group will consist of TWO faculty instructors and TWO to FOUR students. One member of the teaching team will be designated team leader. It is the team leader's job to call on the students, to stop the performance when enough material has been done to provide for a full critique, and to direct the cutoff of the critique.

A successful critique must be future oriented. It must be *data based* and *specific* so that if the student were asked for a repeat performance a few moments later, they could provide one, avoiding many of the errors of the previous performance.

Please try to provide specific critique as much as possible. General critique is of little value and does not provide the student with sufficient learning opportunity. An example of this is a critique which asserts: "You asked too many leading questions on your direct examination." This critique assumes that the student a) understands what a leading question is; b) knows when it is appropriate; c) recognizes which questions were inappropriate; and d) knows how to correct the situation. It is likely that, in fact, the student understands none of this. The general critique has not helped them in any respect.

The critique, therefore, must be specific in that it identifies several of the questions which were leading. It is data based because it uses the language of the questions actually asked. It should explain why one or more of these questions was improper; it should make certain that the student understands what is being stated; and, finally, it should offer specific suggestions as to how to phrase the offending question properly. Thus, the critique is data based and specific (i.e., based on what the students actually said, and future oriented in that as a result of the critique, the students can correct their mistakes). To accomplish these goals, we encourage faculty members to keep careful notes on the student's performance.

DIAGNOSIS

Since it is neither possible nor desirable to critique on every aspect of the performance, it is essential that the teacher diagnose that area or those few areas of most pressing concern.

For example, the student may have exhibited technical problems in presentation, failed in their organizational structure of the examination, and also failed to perceive the basic theory of what should have been accomplished.

The teacher must carefully diagnose the basic failure in the examination and concentrate his/her critique on that aspect. To concentrate the critique on a minor technical failure when the student has utterly failed to understand the nature of the witness's examination is a common misjudgment in a critique.

Since the teacher will be working as part of a team, the second critiquer should pick up the secondary problems and not rehash or repeat the primary critique. Note, however, if the second teacher disagrees with the primary critiquer, (s)he should not hesitate to raise the nature of the disagreement for discussion.

AVOID ASSUMPTIONS

Avoid making assumptions as to what the student intended or knew. An effective method of critique includes asking the student what (s)he sought to accomplish in the examination; how much material was intended to be covered; why a particular question or line of questioning was used; how much preparation was involved; and like matters. This avoids the problem of a prolonged critique on a particular theory of the examination only to find at the end that the student fully understood that theory and had perfectly acceptable reasons for choosing an alternative. Thus, ask first and then discuss.

BREVITY

Both the student performance and the faculty critique *must* be brief. Student performances should be limited to no more than 5-15 minutes, depending upon the nature of the problem and the portion of the course being covered. The critique should certainly take no more time than that performance and usually should take less.

By keeping both performance and critique brief, more time will be available to students to perform – and that is the heart of the program. Performances should be kept to no more than 10 minutes.

DEMONSTRATION

It may be helpful at times to briefly demonstrate a portion of the examination to show how you believe it should have been done. This should be done only when you or your teammate are fully prepared to do so, so that the student can observe a successful and effective example.

NO WAR STORIES

Please focus on the student's performance and avoid "war stories" or lengthy lectures during the instructional periods.

CLASS DISCUSSION

You will find time for appropriate class discussion. For the most part, these discussions will be accomplished during the large section meetings in the morning and afternoon. It should be kept to a minimum during the small group exercises. You do have the discretion to lead a class discussion; however, this is not a substitute for student performance.

TIME SCHEDULES

Given that TAP is a full-day program, please be conscientious and adhere to the schedules so as to keep the program on track and ensure that students receive the full benefit of TAP. Please kindly also be aware that the students have limited free time during the day, for meals and other luxuries, so it is important not to impinge on their break time.

AABANY TRIAL ADVOCACY PROGRAM (TAP) 1

Shawn Wright v. Play and Learn Childcare Center

In this civil action, the parent of a three-year-old sues a day care center for negligence after the child breaks his/her arm under staff supervision.

This problem was developed by the Street Law Clinic at the Georgetown University Law Center and is used by AABANY TAP with permission. The problem is slightly modified for TAP purposes.

PROGRAM RULES

- 1. The official mock trial materials, consisting of the Statement of Stipulated Facts,
 Applicable Law, Witness Statements, and Documents, comprise the sole source of information
 for testimony. The Stipulated Facts and any additional stipulations may not be disputed at trial.
- 2. Each witness is bound by the facts in the given witness statement. All participants agree that the witness statements are signed and sworn affidavits. Witness Statements may not be introduced as evidence, but may be used for impeachment. Fair additions which (a) are consistent with facts contained in the witness affidavits and (b) do not materially affect the witness's testimony are permitted. If a witness is asked a question on cross-examination which is not dealt with in the witness's statement, the witness may invent an answer favorable to that witness's position.
- 3. Students may read other cases, materials, or articles in preparation for the mock trial. However, they may only cite the materials given, and they may only introduce into evidence those documents given in the official mock trial packet.
- 4. If a witness testifies in contradiction of a fact in the witness statement, the opposition must show this on cross-examination through correct use of the affidavit for impeachment. This procedure is spelled out in the attached Simplified Rules of Evidence.
- 5. If on direct examination the witness invents an answer which is likely to affect the outcome of the trial, the opposition should show this on cross-examination through correct use of the affidavit for impeachment. This procedure is spelled out in the Rules of Evidence. The scoring panel should consider such inventions of facts in scoring the witness's presentation.
- 6. The trial proceedings are governed by the Mock Trial Simplified Rules of Evidence.

 Other more complex rules may not be raised in the trial.

Stipulated Facts

Shawn Wright is the parent of Junior Wright, a three-year-old. Shawn first visited the Play and Learn Day Care Center on July 14, 2017. S/he met with the center director, Sydney Little, and visited two classrooms for three year olds. On that day there were 15 students in each class with three adult teachers: one lead teacher and two assistant. Shawn met the lead teachers from each class, Joy and Lorraine. At that time, Shawn said that s/he had a couple of places to consider and would contact Sydney Little if s/he decided to enroll Junior.

On Monday, July 17 Shawn Wright returned to Play and Learn and completed an enrollment application and intake forms. These included Junior's social and medical histories.

Junior attended his/her first day at the center on Monday, July 24. S/he was placed in the Giraffe Class with Lorraine. This class was immediately next door to the Elephant Class where Joy was the lead teacher.

Junior Wright previously attended the Teach the Tots Preschool. Teach the Tots had asked Junior to leave, due to behavioral problems. Shawn withdrew Junior and immediately had him/her tested by a developmental pediatrician, Dr. Ellis Baldwin, who specialized in developmental issues. Dr. Baldwin diagnosed Junior with HID (Hyperactive and Impulsive Disorder). Dr. Baldwin referred Junior to Carla Thomas, a clinical psychologist, for a follow-up evaluation.

On Wednesday, July 26 the Play and Learn Day Care Center sent home its weekly newsletter. Each Wednesday the center sends out newsletters with weekly reminders, the calendar of events and field trips, and any other information the staff feels parents should have.

Shawn received the newsletter on July 26, which contained information about pinkeye and reduced staffing at the Center.

On July 28, an afternoon snack was served to the students in the Giraffe Room at 2:30 PM according to the master schedule. Joy, the head teacher in the Elephant Room, was absent from work because s/he contracted pinkeye. Sandy, the office manager, was serving as substitute head teacher that day in the Elephant Room. The Giraffe Room was staffed by Lorraine (the regular lead teacher) and Lee and Sherri (the regular assistants in that class). Adam, one of the assistant teachers from the Elephant Room, entered the Giraffe Room while a snack was being served and explained that they were having some problems with a student next door. Sherri left the Giraffe Room and went to help in the Elephant Room. At some point while Sherri was out of the room, Junior left his/her assigned table seat and climbed on top of the changing table located in the back corner of the room. Lee and Lorraine heard him/her hit the floor and rushed to his/her aid. The staff at Play and Learn immediately put in place their emergency medical plan. They called Shawn and paramedics. Lorraine accompanied Junior to Children's Hospital.

Junior's left arm was fractured in several places. There was also some tendon damage. S/he wore a cast for three months. During the time s/he was in the cast s/he was unable to use his/her left arm for any reason. Despite intense physical therapy, Junior's motor skills have been impaired. Even though s/he has tried to learn how to write and eat with his/her right hand, s/he has had problems because s/he is left-handed.

After Junior was released from the hospital, Shawn placed him/her in another day care center that continues his/her physical therapy and s/he has not had any other injuries since that time.

Shawn is suing Play and Learn on Junior's behalf for negligence for the full amount of his/her medical expenses and physical therapy, and for the income s/he has lost in having to manage his/her needs since the accident. Both parties stipulate to the amount of these damages. Shawn Wright is also suing for \$50,000 for pain and suffering that resulted from this accident.

Play and Learn defends by claiming that Shawn is at fault for what happened to Junior, because Shawn did not inform Play and Learn of Junior's diagnosed behavioral problems. It claims that Shawn was aware that Junior suffered from HID and failed to inform the day care center. Play and Learn further asserts that if it had known about Junior's behavior, the staff would follow different procedures regarding the care of special needs children. Play and Learn maintains it followed the regulations and customs of the child care industry.

Stipulation: Parties Stipulate to the following

Definition of HID (Hyperactive & Impulsive Disorder)¹ and Testimony

HID is a disorder characterized by inappropriate levels of three observable behaviors: inattention, impulsivity, and hyperactivity. Children with HID cannot stop their responses to events and situations long enough to think about and modify what they are saying or doing. They may be able to recite classroom rules, for example, but in the heat of the moment they are unable to stop, think about the rules, and alter their behavior. Therefore, their actions in these situations result not from willful disobedience but from the inability to apply their skills and knowledge appropriately.

Plaintiff waives any claim to confidentiality of medical records pertaining to this case.

5

HID is not a real disorder but was created for the purposes of this Mock Trial. Diagnostic and child care procedures followed in the mock trial are similar to but not intended to be the exact equivalents of, actual procedures required by federal and local laws.

Applicable Statutory Law

Section 18-101 Negligence. Standards Governing Tort Actions

- (A) Standard Governing Negligence Actions: To support a finding of negligence, a plaintiff must prove by a preponderance of the evidence that:
 - i) defendant owed plaintiff a duty of care;
 - ii) defendant breached that duty;
 - iii) defendant's breach caused plaintiff's injuries; and
 - iv) plaintiff suffered damages as a result.
- (B) Comparative Negligence: In a negligence action, to assess damages the finder of fact must:
 - i) determine the percentage of fault attributable to each party; and
 - ii) reduce the amount of the damages due plaintiff by the percentage of fault attributed to the plaintiff;
- (C) Parental Liability in Comparative Negligence: In suits brought by a parent on behalf of a minor child under the age of eight, any parental negligence that contributes towards any injury to the child, which injury is the subject of the suit, is imputed to the child. This section operates in effect to make the parents the same party as the child for purposes of comparative negligence assessment.

Selected Portions of Olympia Municipal Regulations

Title 29: Public Welfare

Chapter 3: Child Development Facilities

<u>Section 315.4</u> Teachers at child development centers shall be qualified by meeting the requirements of one of the following:

- A bachelor's degree in early childhood education or a related field with minimum of 15 hours in early childhood education courses;
- 2) Two or more years of college, including at least 15 hours of early childhood education courses; and one year of experience in a child development facility;
- 3) A high school diploma or its equivalent and three years of experience as an assistant teacher plus nine college credit hours in early childhood education; and
- 4) Experience as a teacher or assistant teacher in a licensed child development center provided that s/he has been awarded a child development associate credential.

<u>Section 315.5</u>: An assistant teacher shall be qualified by meeting the requirements of one of the following:

- Two or more years of college and demonstration, to the satisfaction of the director, of skill and competence with children; or
- 2) A high school diploma and certificate in child development from an accredited vocational school, or one year of experience in a child development center.

<u>Section 316.2</u>: There shall be a teacher, who may also be the director, and an assistant teacher or aide for each group of children at all times. During non-peak hours (before 8:30 a.m. and after 4:30 p.m.), an assistant teacher may substitute for a teacher.

SELECTIONS FROM APPLICABLE CASES

Carson v. La Petite Academy, 751 V.V. 67 (2015).

Facts: Jimmy Carson, who was three at the time, fell off the steps of a slide on the playground of La Petite Academy. La Petite argued that it was not negligent and that "children will be children."

Holding: The court ruled in favor of the plaintiff. It held that the mere fact that the nature of small children is such that they fall and hurt themselves is a consideration in the evaluation of the duty of care owed to the child.

Wood v. Wingfield, 457 V.V. 890 (2005).

Facts: The defendant day care center in this case was granted summary judgment in response to a suit by a parent on behalf of a child who injured his/her thumb. The nine-year-old tripped on a floor mat and injured his/her thumb while playing bean bag catch with another child. The legally required ratio for school age children to adults was 18 to 1; in this case, the actual numbers were 6 to 1. The defense also stated that no prior injuries have occurred while children played bean bag catch in the room.

Holding: The appellate court held that in order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of duty, and an injury proximately resulting therefrom. Whether a duty of care is owed to a particular plaintiff depends on whether the defendant should have foreseen that its conduct would likely cause harm to a person in the plaintiff's position. The dismissal of the case in favor of the defendant was upheld.

Witnesses

Plaintiff Witnesses:

Parent: Shawn Wright

Early Childhood Psychologist: Tyler Larsen, Ph.D.

Former Employee of Play and Learn: Lee Morrison

Defense Witnesses:

Director of Play and Learn: Sydney Little

Developmental Pediatrician: Dr. Ellis Baldwin

Neighbor: Dell Anderson

Witness Statement of Shawn Wright

I am a thirty year old parent with two children. Junior is three and Mark is eight. I lost my spouse a year and a half ago and now I work hard to raise our sons in a loving, nurturing environment. When Mark first entered kindergarten, we had some problems with his/her teacher. S/he felt that s/he was disruptive in the class, spoke out too often and failed to follow directions as other students of the same age did. My spouse and I were very upset, especially when we received his/her first report card. After several meetings we, the principal, and the teacher agreed that it would be best to move Mark to a different classroom. Once s/he began working with a different teacher, Mark absolutely thrived. S/he was even tested and placed in the program for gifted and talented students. That was three years ago. Mark has been on the honor roll ever since. It's true that I have been suspicious of teachers and anyone who wants to label my children since then, but I sincerely believe that as parents of young black males we cannot be too careful. My late spouse was labeled as learning disabled as a child and always felt it held him/her back.

That's why, when Junior first began having problems at Teach the Tots, I was less than happy at the idea of testing him/her. S/he was so young and was going through his/her "terrible twos." I thought it seemed very premature to label him/her. Junior was also in a transition stage. S/he was moved from a home day care situation where s/he was cared for by a neighbor with three other children to a big, bustling day care center, not to mention losing a parent. Ms./Mr. Ruby, the woman who kept Junior from the age of six months to two years, felt that it was time for him/her to move on. S/he told me about a program called "Child Find" that helps families diagnose disabilities. S/he said s/he thought that Junior was possibly hyperactive. I thought it was too early to tell. We placed him/her at Teach the Tots, a center known for aggressively educating young children. Since Junior and Mark are so close, Junior is exposed to a lot of

things for older children. In addition to being very bright, s/he has learned a great deal from his/her brother. I thought that s/he would do well in a center really focused on student learning.

Well, it was a disaster from the beginning. In the course of four months Junior spent time in two different rooms. I hoped s/he would bond with at least one of the teachers, but both felt that s/he was too active and could not control his/her behavior. We never had problems with him/her at home, but for some reason, they felt that s/he was disruptive in the classroom. Even the other parents were biased. In Junior's first month there s/he was invited to two birthday parties which s/he attended. Later, when I was picking him/her up one day I saw another parent putting party invitations in the student cubbies, but Junior did not receive one. A friend of mine who also had a child at Teach the Tots went to the birthday party with his/her child and told me that s/he heard parents saying that Junior really acted up at the two parties s/he did attend. I am convinced that it was just the teachers gossiping and complaining about him/her and not his/her behavior. After all, how can a child be an angel at home and so wild everywhere else?

That's really what led me to have Junior tested. Both of his/her teachers at Teach the Tots recommended it. I even took him/her to the specialist they suggested, Dr. Baldwin, who diagnosed him/her with HID. Dr. Baldwin referred Junior for more testing, but I didn't follow up. The HID diagnosis was what his/her teachers expected, but I was not happy with that and decided that things really were not working there. I looked into moving Junior again and selected Play and Learn Day Care Center. The director seemed not only nice, but very knowledgeable about early childhood education.

I didn't know what to think when Junior was injured at the Play and Learn Day Care

Center. One morning I dropped off a happy, energetic, extremely healthy three year old. Then I

got a call at the office around 3 PM. Junior's teacher, Miss Lorraine, said that s/he had been

taken to the hospital. I was so upset I couldn't even drive myself. When I got there Junior's entire arm was bandaged. His face was puffy and red and there were tubes in him/her. I couldn't even tell where s/he was hurt. The moment I touched his/her left hand I could feel that something really terrible had happened to my baby and I almost passed out.

When the doctor came out and explained Junior's injuries to me it was just too much. Apparently when s/he fell and hit the hard, linoleum floor of the classroom s/he broke his/her arm in several places. This would be a serious injury at any point, but to have such a thing happen to so young a child has been my worst nightmare as a parent. Junior was in a cast that covered his/her entire left arm for over three months. I had to take him/her to physical therapy three times a week and do exercises with him/her at home every night. I have also had to place him/her in a special day care center that has trained staff. They work on his/her motor skills with him/her there as well. Since Junior is left-handed, it has been especially difficult. S/he was doing so well, but in the last year went from learning to eat with his/her left hand to using his/her right hand to going back to using the left.

This has taken a serious toll on the entire family. As a single parent I am all that my children have. I have been devoting so much time to Junior's care and recovery that I worry that Mark feels neglected. I have enrolled him/her in gymnastics classes, as well as art, but that means that I spend even more time trying to coordinate their schedules. Between Junior's therapy, Mark's classes and Little League, and the fact that Junior's new day care center is so far from our home – I feel like I am on my last leg. It is a struggle to maintain this pace. I try to stay busy though, because when I think of how sad Junior looks watching his/her big brother who s/he admires so much playing softball, I am just overwhelmed. Who knows when, if ever, Junior will be able to swing a bat?

Play and Learn claims that this is my fault because I did not inform them of the fact that Junior was diagnosed with HID. However, when I first had Junior tested I was not convinced the doctor was right. The doctor who tested Junior was referred to me by the staff at Teach the Tots. Junior was at Teach the Tots for four months and always had problems, and the doctor used notes from Junior's teachers as part of his/her analysis. I met with his/her teachers repeatedly and they kept voicing the same complaints: s/he was hyperactive, impulsive, disruptive, and inattentive. They didn't seem to understand that Junior is an active and busy toddler. S/he is very close to his/her older brother and tries to imitate everything that s/he does. After the diagnosis I did some research and learned that many people are skeptical of the HID diagnosis. The "disorder" has only been known of for a couple of years, and some think it is just a way of tracking black males at an even earlier stage. I felt it was my duty as a parent not to allow my child to be labeled if I was not 100% certain that it was correct.

I did not tell Play and Learn about Junior's diagnosis because I knew that they would be difficult about it. Besides that, I planned on having Junior tested again to get a second opinion. I didn't have time to do the follow up until after the fall. I really don't see why everyone thinks it is so important that Junior may have these problems. The point is that s/he is a three year old and should be properly supervised at all times. Play and Learn should have had enough staff to supervise the children in their charge, even the active ones, and should not have had things that were so easy to climb (not to mention leaving the starfish crackers out). I did read the newsletter on July 26, but didn't think his/her behavior was so bad that I had to notify his/her teacher.

Witness Statement of Dr. Tyler Larsen (Early Childhood Psychologist)

I am a psychologist who specializes in early childhood development. I was trained at the University of DC and George Washington University. I teach several courses on child development and have published four books on the subject, including Active While Black: A Critical Look at the Over-diagnosis of Hyperactivity in Black Males. I also consult in the establishment and management of child care centers in Olympia. I have been in this field for over twenty (20) years and have worked with families with special needs children since I began my career. After recognizing a problem of active Black male students being over-diagnosed with any number of hyperactive disorders, I helped found the professional organization, Professionals Against Labeling Students (PALS). Our mission is to work to end the mislabeling of Black youth as having Hyperactive Impulsive Disorder (HID). Many of our members even doubt the existence of such a condition. We also work to educate the professional community about some of the reasons why black children are misdiagnosed. That includes working to dispel stereotypes and working to reform the testing that is currently used for assessment purposes. Many in the medical community do not agree that black males are often misdiagnosed. However, I am not a medical doctor but I am qualified to take a much more complete view of these matters, considering factors other than simple outward behaviors. I am receiving a fee of \$2,500 for my work in this case.

I have reviewed the records in this case and met with Junior Wright. In my professional opinion s/he does not suffer from HID. Dr. Baldwin's diagnosis was based in large part on the statements of Junior's teachers at Teach the Tots. For a truly accurate assessment of a child to be made, a doctor should directly observe the child in the classroom. That way the doctor can ascertain exactly what is going on without viewing the facts through the filter of the teacher's perceptions. In addition, even the experts who developed the diagnostic criterial for HID believe that it takes four months of observation to accurately assess and evaluate behavior. Most care givers have the best of intentions, but this is a world in which for a number of reasons certain children, especially young black males, are misdiagnosed with HID and other related conditions. I believe that this is what happened to Junior. Children develop at different rates. The range of normal behavior goes from "quiet children" to "active children." When black males fall into that active end of the normal range, they are often labeled as HID.

We don't have data on Olympia just yet, but in cities of similar sizes like Boston, blacks are enrolled in special education 30% more often than white students. Once placed in special education programs, black students are twice as likely to be placed in restrictive classroom environments. A New York study showed that, in New York school systems, once enrolled in special education programs, only one in 20 students are declassified and put back in regular classes. In almost every setting, black children are more likely to be deemed mentally handicapped. Black parents are more likely than other racial groups to be told by a school that a black child has behavioral problems. This leads to all kinds of unnecessary concerns, especially when the children get to school. That is why we advise parents to be careful in selecting doctors and always urge them to get second opinions when their children are diagnosed. We also encourage parents to seek options other than having their children placed in special programs. PALS offers, for a small fee, consulting services to parents with these needs.

When Shawn first came to see me and brought Junior, my immediate reaction was that this bright, energetic child could not possibly have HID. I met with Junior alone, saw him/her interact with Shawn and with his/her older brother Mark, observed him/her in the new day care center, and performed my own testing. As a result, I am convinced that while active and curious, s/he is not hyperactive or impulsive. Although s/he displayed some signs of inattention, many children his/her age do. Junior is not always in control of his/her behavior, but this is because s/he is an especially imaginative and thoughtful child. Mark and Junior lost their other parent rather tragically. Even though Junior is only three, s/he feels the stress of this. Much of what Dr. Baldwin calls hyperactivity and impulsiveness is really just a sign of Junior's anxiety and stress. These are the kind of factors that the tests used to diagnose children with behavioral problems and learning disabilities do not take into account.

For the Play and Learn Center to claim that Junior was so impulsive and out of control is ridiculous. S/he is an active and emotional child, but s/he does not have any type of condition that excuses the center of its negligence. I visited the Play and Learn Center and saw the room where the accident occurred. The first thing I observed was that immediately next to the changing table is a diaper disposal. Diaper disposals are commonly used in child care centers because they are so convenient and sanitary. However, the proximity of this diaper disposal to the changing table created a virtual staircase to something attractive, like the starfish cookies. It takes only a child with a little ingenuity, not one with a hyperactive disorder, to recognize and seize such an opportunity. If the diaper disposal were kept in the cabinet this would not have happened. It is common practice to keep diaper disposals out to the side of changing tables in rooms with children up to the age of two, but in a classroom for children over 36 months they should be kept away from children, and if even visible, should be in an open shelf and not simply freestanding. Not only is it no longer necessary to have them out in classes for children over 30 months (most children of that age are potty-trained or at least wearing tug-ups and no longer using the changing table), but by the time that children are 30 to 36 months old, they have the gross motor skills necessary to climb something like that. In this business, child care providers have to think beyond the municipal regulations and what makes their lives easier when it comes to classroom design. They have to think about the continuing and progressive motor development of the children. Any three-year-old with an average level of motor skills could have climbed that diaper disposal to reach the top of that changing table and fallen off. It is unfortunate that in this case the unlucky little boy had to also be misdiagnosed with HID.

Witness Statement of Lee Morrison (Former Play and Learn Teacher)

My name is Lee Morrison and I am a child care provider with Tender Years Preschool. Up until a few months ago I worked at Play and Learn as an assistant teacher. I really love kids and plan on going back to school to complete my undergraduate degree in early childhood education. I completed my two-year certification in 2016 and have been taking classes in education ever since. Sydney Little fired me a few months after Junior's accident and claims that it was because I couldn't get along with people and lowered staff morale. I can't believe that people like to work in that type of environment, no structure for employees, no rules for the kids – I just couldn't understand it. They were always saying, "They're children, Lee, cut them some slack," but if they don't learn what's right in preschool, the real world is going to be a shocker. There is no reason that young children can't "learn to color in the lines." I actually believe that children crave discipline and order. I know that some of the other assistants called me Major Morrison, but they are adults who lack order in their own lives. The real reason is that I was fired was that Sydney didn't like the suggestions I was making on how Play and Learn could change to better serve the children in its care. Play and Learn was all play. The curriculum was too unstructured and the only thing Sydney wanted us to teach was how to play games (and even then Sydney felt that the kids should make up and change the rules).

I worked at two other child care centers before going to Play and Learn. They spent more time on professional development and training than Play and Learn. Most day care centers struggle to keep good staff, but at Play and Learn not having enough adults to go around was a chronic problem. Often people from the office staff, like Sandy, would fill in. Sandy is a lovely person and has a degree in education, but all of his/her experience is in teaching high school kids. Sometimes having him/her as lead teacher just made more work for the assistants.

I worked with the Giraffe and Elephant Classes the entire year that I was there. We usually had about 15 kids to a class, but often had two assistant teachers and a lead teacher. It wouldn't have been so bad, but the teaching staff had no support from the administrators.

Someone is supposed to rotate into the room when one teacher has a lunch break or just has to run to the restroom, but that rarely happened. There was no formal training program. When I started, I had an interview with the director, s/he took me on a brief tour, and the next day I was in the classroom. No one really talked about policies. At the day care where I worked before Play and Learn, they had an orientation and explained things like how we were supposed to take kids to the playground, how we should serve lunch, all kinds of things like that. At Play and Learn, we just kind of figured it out as we went along.

Most of the time things ran fairly well. We had some difficulty at snack time because of the set up of the room. The rooms are really nice and large, but aside from the children's tables, we don't have a lot of flat surfaces. Since we had to serve snacks in the room, we would put the food wherever there was space, and sometimes that included the changing table. All of the kids in the three-year-old room were potty-trained (otherwise they were kept back with the two-year-olds), so the changing table evolved into a kind of extra flat surface for placing things.

I worked with Junior a lot during the week s/he was at Play and Learn. S/he was a happy child. S/he didn't mix too much with the other children, but that is normal. For one thing, s/he was new at the center. For another, three-year-olds do a lot of independent play. Even when they appear to play with other children, they are actually doing more of their own thing than playing what you could say "collaboratively." It's called "parallel play." They are just beginning to learn social interaction and how to play together at that age. Junior did have a strong will and did what s/he wanted to do, but that is common for many children his/her age. I had to

constantly remind him/her to follow our routines. S/he loved playing in the playground, too.

S/he constantly was running on our play equipment and was a real climber on the jungle gym. I talked to Lorraine from Junior's classroom, and s/he said that Junior should be evaluated for hyperactivity or some other developmental problem because of his/her activity. I didn't agree.

People shouldn't think that because Junior managed to get up to the top of the changing table that we weren't paying attention or anything like that. Sometimes things get chaotic because you are trying to keep 15 to 16 three-year-olds sitting still while you serve each one a snack. It's a lot of work – some kids have food allergies, some have to take medication with snack, some like Tommy always throw their cups (sometimes full of juice, sometimes not) – it's hard work! We had four tables to cover, and like I said, when another teacher in the room had to run out, even for a second, mutiny could happen before you realized it.

I was in the room when Junior fell. The other assistant, Sherri, had just gone into the hall with the assistant teacher from next door, something about a disruptive child next door. It was the kind of thing that happened all the time. On that particular day it was because Joy, the lead teacher in the Elephant Class, was out with pinkeye. Lorraine, the lead teacher, was helping other children at another table. I was putting the cups down for each child that we place the starfish crackers in. I guess Sherri had taken the starfish out of the food cupboard. When s/he was called to the door s/he probably set them down on the changing table. Junior sat at table two and I was at table one. I remember because Tommy would always throw his/her cup across the room and I wanted to make sure that s/he kept it right there. I was explaining to Tommy that we do not throw cups in the classroom and the next thing I knew I looked up in time to see Junior falling off of the changing table. I felt terrible for him/her. Junior was such a sweetheart, even if a bit of a busy bee, so it really seemed especially sad.

Witness Statement of Sydney Little (Director of Play and Learn)

My name is Sydney Little and I am the executive director of Play and Learn. I founded Play and Learn 10 years ago with one of my classmates from college. We had a vision of young children learning through their play, and Play and Learn was born. We are a full service child care provider and take infants from six weeks old and provide after school care for children up to 12.

I vividly remember my first meeting with Shawn Wright. S/he seemed quite anxious to find a suitable place for Junior, and said that s/he had not been happy with the dynamic between Junior and the teachers at Teach the Tots. I took Ms./Mr. Wright on a tour of our facility and s/he met with both of the head teachers of the three-year-olds. I was pleased when s/he returned a few days later to enroll Junior. I sat with Ms./Mr. Wright and Junior as Ms./Mr. Wright completed the application form and history. I also asked him/her if Junior had any special needs, anything from a favorite blanket to a tendency to have a hard time coming out of naps, anything at all, that perhaps the center or his/her teachers should be aware of, and Ms./Mr. Wright said no. I recall because I go through these questions with all parents. Sometimes they know their children so well they forget to tell us the important details. I did notice that Junior was very active and didn't pay much attention to his/her parent. S/he didn't look at any of the books we had for him/her, and s/he went rapidly from toy to toy. I didn't think much about it at the time because children can be restless during these interviews. Sometime during the week, though, Lorraine, the lead teacher, came to me about Junior. S/he told me that s/he thought Junior should be evaluated for hyperactivity or other developmental problems because of his/her inattention, his/her extreme activity, and his/her impulsiveness.

Ms./Mr. Wright told me that s/he had heard only positive things about Play and Learn.

We have an excellent reputation in the community because we hire only the best and most

qualified staff. It isn't enough to have the credentials required by the licensing board of Olympia. A Play and Learn teacher must truly love children and be ready to help them develop and grow into their own personalities, their own identity. I look for qualities like patience, character, and personal integrity in everyone we hire. This is certainly the first time we have ever been sued. In 10 years we have never had an incident like this before.

It's funny that our former employee, Lee Morrison, is so critical of our policies and training. I think it's really just Lee's way of lashing out for the ridicule s/he suffered at the hands of his/her colleagues. At first I felt bad for him/her, but when a person is as rigid and strict as Lee was its hard to have patience. Lee was a good worker but closed-minded. Lee saw nothing wrong with kids watching videos everyday as long as it was at the same time, nothing wrong with a morning going by in which Lee's was the only voice heard. Lee did not share our vision of children learning through play, so we had to let him/her go. Lee frequently said that s/he had two children in his/her class who were handfuls, Tommy and Junior.

Our training and policies are truly first rate. We have a manual that explains everything from procedure during fire drills to how to complete supply order forms. Play and Learn has received only the highest ratings from the licensing board. We have had some staffing problems in the past, but that is the case with all child care centers. When we anticipate problems in staffing, we take proactive steps like informing parents in our newsletter. Parents were informed of the pinkeye epidemic and were asked to inform the center of any problems. Fortunately, we also have a good office staff with several retired high school teachers like Sandy who assist when we are missing teachers.

We also put great care in the design of Play and Learn classrooms. Because we want to have as much flexibility within our building as possible, we had the changing tables installed in

each classroom in the preschool part of the building. We also keep diapers and changing supplies, including a diaper disposal, in each room just in case. But in 10 years we have never had a child use the diaper disposal as a step stool.

I was the director on site the day that Junior was injured. It is true that we had experienced a pinkeye epidemic around the center. Our attendance was down ten percent from normal and several staff members were also out. However, each class was adequately covered by other competent adults. In fact, in Junior's class that day, both his/her lead teacher and two regular assistants were present, unlike in many other classes around the center where there were more absences. When Junior fell, the assistant teacher, Lee, immediately went to his/her aid. The lead teacher in the same instant, called the ambulance and paged for me to come. Lorraine was absolutely frantic and said that Sherri left the room for just an instant, but s/he and Lee were both there with the children, and somehow one of the children had climbed and fallen off of the changing table. When I entered the room I saw Junior being given as much care and support as anyone could have wanted. His teacher even went to the hospital with him/her, and I conducted an investigation to determine what must have happened.

It was right around snack time and the children were seated at their tables with the cups and napkins passed out to three of the four tables. Junior's table had not yet received cups and napkins, and even after everything had happened, all of the other children remained seated at their assigned seats. I saw the changing table where Junior fell. There were some starfish crackers on the table, but we certainly do not serve food from the changing table. That would be unsanitary and inappropriate for any number of reasons. It's possible that one of the teachers pulled the crackers from the snack cabinet, had to take care of something immediately, and set the crackers down for a moment. However, there would be no reason to believe that a child

would leave his/her seat to get the crackers, especially when all of the children knew that they were about to be served. And it's not as if any toys or blocks were left out that the children could have used to climb to the top of the table.

The only reason this type of thing happened is that we were not informed of Junior's condition. There is another little boy in one of the four-year-old rooms who has HID. We have never had any problems with him/her because his/her parents informed us of his/her condition as soon as s/he was diagnosed. S/he is on a medication that works beautifully at controlling his/her impulsive behavior. Play and Learn has a policy of staffing all rooms with special needs children with at least one teacher or assistant teacher with special training pertaining to the special needs involved. We will meet their needs even if we are short of staff, as we indicated in the newsletter on July 26. If we had known about Junior we could have taken precautions like putting his/her seat closer to the teacher work station or simply monitoring him/her more closely. S/he had only been with us for a week, so it is understandable that we had not yet concluded that s/he had that type of problem. We are dependent upon the honesty of parents in completing their applications and in the interviews to become informed of such conditions, at least until we have some time to observe the child.

We are very sorry about what happened to Junior. S/he is a delightful child and really rather clever. But as sorry as we are, we cannot be responsible for the behavior of children when we are not given the information we need to care for them properly. No one at Play and Learn failed to fulfill each and every duty of a day care provider.

Witness Statement of Dr. Ellis Baldwin (Developmental Pediatrician)

My name is Ellis Baldwin and I am a developmental pediatrician. My training was conducted at Mercy Hospital. I went there for residency after graduating from Georgetown University with a B.S. in biology and behavioral sciences and Howard Medical School. I did my medical fellowship at Johns Hopkins Medical School in developmental pediatrics. I specialize in diagnosing and treating children with behavioral problems like HID and ADHD (Attention Deficit and Hyperactive Disorder). I have evaluated more than 800 children in the last nine years. In fact, the majority of my practice involves this type of testing. I have worked with many of the day care providers in Olympia and have done testing for Teach the Tots on numerous occasions. I know firsthand what an excellent center it is, both of my daughters went to preschool there and my spouse is on the board of directors. I am not being paid for my testimony because this relates to work done prior to this lawsuit and trial.

This is an especially tragic case because I see in Shawn Wright a kind and caring parent who is unable to come to grips with the fact that his/her son has a condition that needs treatment. I met with Junior for two hours in my office and not only reviewed the records from Teach the Tots, but also conducted a 15-minute phone interview with one of his/her teachers there. Junior displayed many tendencies of a HID child.

S/he was totally unable to control and direct his/her behavior in response to environmental and situational demands. When testing a child for HID, s/he is compared to other children of the same age. On the majority of tests, Junior was lacking in the self-control exhibited by the average three year old. For example, when I gave him/her some toys to play with, s/he went quickly from toy to toy and then threw them around. His may not be the easiest case to diagnose simply because s/he is sweet and charming, but it does not take a great deal of observation to see that Junior is hyperactive. Both of his/her teachers at Teach the Tots indicated

in their six-week progress report to Shawn Wright that Junior was disruptive and fidgety. I personally observed that Junior was a squirmer, was easily distracted by extraneous stimuli, and did not seem to listen when spoken to directly. These behavioral tendencies are each on the list of HID assessment factors. I'm not saying that Junior has every symptom on the board-approved list, but those that s/he does have are more than strong indicators that s/he has HID.

Another symptom is a child who runs or climbs excessively. It is quite likely that a child like Junior who is easily distracted could have seen something near the changing table that caught his/her eye and decided to go for it. Junior's motor skills are rather advanced, and s/he could have made great progress towards climbing the changing table before any adult who is also watching other children would have noticed.

HID is not an uncommon disorder. Since the development of the diagnostic criteria and treatment program in the last couple of years, many children have been diagnosed and helped. It is true that a disproportionately high number of these children have been black males, but that does not mean that the diagnosis of every black male child should raise suspicion. Parents should really be grateful that these children are being identified and helped before they get to school and it becomes more of a problem. With treatment including guided play and activities that channel children's energy, many kids with HID are able to start elementary school with regular classes and no medication. HID therapy can make it possible for kids to really succeed in a traditional classroom setting.

Of course, for preschool children, there may be other disabilities, like reduced language development, that cause communication problems and increased activity. These children may not have HID. That is why I referred Junior to Ms./Mr. Carla Thomas, the developmental specialist, for additional evaluation. These types of evaluations are common, and are important

in identifying developmental disabilities in their early stages. The federal law, Individuals with Disabilities Education Act, known as IDEA, provides that every child who is identified with disabilities is entitled to services to meet their specialized needs.

I sincerely wish that there was more accurate information about HID, perhaps then a parent like Shawn wouldn't feel compelled to hide it from a child care provider. The student with HID who runs to the window when a passing car honks or watches students passing in the hall instead of completing his/her coloring is no more choosing to disobey the rules or the teacher than the blind child is choosing not to see the blackboard.

Witness Statement of Dell Anderson (Shawn Wright's Neighbor)

I am 65 years old and have lived in Olympia all of my life. I have actually lived in the same neighborhood for the last 40 years. Unfortunately, Shawn and his/her children, those wild kids, live in the unit next to mine. Don't get me wrong, I liked kids well enough 30, even 20 years ago, but now my nerves just can't take it. Regular kids would be one thing, but that Junior is too much. S/he's a cute little kid, actually kind of small for his/her age. A person wouldn't think s/he could get into so much, but s/he can. S/he can be a real brat, too. When I first met him/her I would try to get his/her attention, but s/he was always too active to stay in one place. I didn't want to chase him/her around, so I never had much to do with him/her.

The real problems started with my flowerbed. First Junior would just run and play in my flowers when s/he and the brother were outside. Apparently that was not killing enough of my plants so then s/he decided it would be fun to pull them out of the ground. I've never seen anything like it. The older boy, Mark, would try to get him/her to stop, but once s/he got into something that was it. S/he was going to be into it until s/he broke it. Shawn was nowhere around when this happened.

I said something to Shawn about it. Shawn seemed shocked that anyone would think that the little angel could do anything wrong. When I told Shawn that s/he climbed to the top of my El Dorado s/he didn't believe it until I showed him/her the peanut butter and jelly stains that were the size of his/her hands all over my rag top roof. Imagine if my moon roof had been open! To say that s/he has a blind spot when it comes to that kid is like saying Luther Vandross can sing – it just isn't strong enough language.

Apparently Shawn heard that my friend Myrtle babysits on the weekends. S/he arranged to have Myrtle watch those two for an entire Saturday afternoon and evening. (Shawn was always looking for a babysitter – I guess it's a struggle to have such an active social life with two

young boys.) I tried to warn him/her, "Myrtle," I said, "you have no idea what you are in for – just watch out!" I babysat one time and all the kids did was run around from one toy to the next. They wouldn't even stay put in front of the TV. But Myrtle said the money Shawn was offering was good and that s/he been losing at bingo lately. Anyway, Myrtle called me when they left his/her place that night. S/he sounded like s/he barely had the energy to dial the phone. S/he told me that if s/he had known s/he was going to be babysitting a little dynamo, s/he would have said no, no matter how bad his/her bingo debts. Myrtle said that Junior climbed every piece of furniture in his/her house, including his/her curio cabinet full of porcelain bingo chips (s/he didn't tip it over, but two or three cracked from the jostling).

I see those kids all the time. As captain of the neighborhood patrol I make it my business to see. That Junior can't be still for two minutes put together. I've seen him/her get into it up and down the street. In my day, we would have straightened him/her out, but not Shawn. I just don't understand parents these days. Every time I stop by their house the TV is on, sometimes the radio too, and the boys clearly have the run of the house. Shawn never seems to discipline either boy at all. With Shawn, anything goes. I don't know if Shawn is trying to make up for the loss of their other parent or what, but Shawn should take a step back and see what the lack of rules is doing to those boys.

I did feel bad for the little tyke when s/he broke his/her arm so badly. It didn't seem like the same Junior with him/her whimpering about all the time. But I must say s/he is calmer. Nice enough kid, but I always suspected that s/he knew when *Oprah* was on. Seems like just when the interview was just getting good, s/he would decide to throw something against the wall. I can't believe it took so long for him/her to hurt his/her little self. Please don't think I'm glad s/he got hurt, but I do feel like I am getting my money's worth for cable now.

Table of Stipulations and Documents

Stipulation

Copy of Damages Stipulated to by Both Parties

Documents

- 1. Excerpts from Play and Learn Policy Manual
- 2. Copy of Dr. Baldwin's testing form and evaluation
- 3. Copy of the application form for Play and Learn completed by Shawn Wright
- 4. Excerpt from Play and Learn Newsletter
- 5. Map of the Giraffe Classroom where Junior was injured

Stipulated Damages*

The following amounts have been stipulated to by both plaintiff and defendant.

Medical Expenses

Initial Hospital Stay	\$25,000			
Physical Therapy	\$75,000 over 5 yrs.			
Rehabilitative Day Care				
Difference between cost of day care that provides	\$10,000 over 2 yrs.			
physical therapy and regular day care center				
Shawn Wright's Lost Wages	\$5,000			
Total	<u>\$115,000.00</u>			

^{*} Shawn Wright is requesting an additional \$50,000 for pain and suffering.

Excerpt from Play and Learn Policy Manual, Chapter 2, Staffing

Play and Learn will maintain a least one lead teacher and assistant in each toddler to preschool classroom. The following chart lists the numbers to be followed for each toddler and preschool age group in the Play and Learn Center. See modifications to the numbers of staff needed for special needs children in the Special Needs Chapter of this manual. In the case of an emergency, teachers and assistants should use their best judgment to determine how to meet the needs of the center.

Age of Students	Maximum Number of	Lead Teacher(s)	<u>Assistants</u>
	Students in Class		
24-35 months	8	2	0
3 years	16	1	1
4 years	20	1	1
5 years	25	1	1
6-12 years*	30	1	2**

^{*} Aftercare programs only. Look to Chapter 5 on Summer Camp for guidelines for staffing summer programs.

Excerpt from Play and Learn Policy Manual, Chapter 4, Special Needs Children

Play and Learn is a full service child care provider that accommodates children with special needs involving learning and/or behavioral issues. There will be at least two classes for each age group. If there are any special needs children in a class, the teachers will be provided with special training for the special needs of the children. At least one of the assistants in each class with a special needs child must have completed the course Special Education for Early Childhood Education that is offered at the University of Olympia and obtained a B average or better. If any assistant or lead teacher is interested in taking that course, Play and Learn will pay the course fees and purchase all necessary books.

^{**} Two assistants are only needed on the days when arts and crafts are offered or groups are taken on field trips.

Test for Hyperactive and Impulsive Disorder

Prepared by the Board Certified Pediatricians and Child Development Experts for Professional Use and Diagnosis [This form is to be used for children between 36 and 47 months old.]

Doctor: Ellis Baldwin, MD Date: June 30, 2017

Patient's Name: Tyrone (Junior) Wright

	Diagnostic Criteria for Hyperactive Impulsive Disorder	Present in Child
1	Often has difficulty sustaining attention in tasks of play activities.	
2	Often does not seem to listen when spoken directly to.	
3	Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort.	
4	Is often easily distracted by extraneous stimuli.	X
5	Often fidgets with hands or feet or squirms in seat.	X
6	Often has difficulty playing or engaging in leisure activities quietly.	
7	Is often "on the go" or acts as if "driven by a motor."	X
8	Often talks excessively.	
9	Often has difficulty waiting turn.	X
10	Often interrupts or intrudes on others.	
11	Often runs or climbs when s/he should not.	X
12	Often wanders off.	X

Instructions for form: A diagnosis of HID is appropriate if seven (or more) of the symptoms in the chart above of hyperactivity and impulsivity have existed for at least four months, according to a consistent observation by one teacher or child care provider who knows the child well. Such observation should reflect behavior to a degree that is maladaptive and inconsistent with the developmental level.

Evaluators should observe children for at least ninety (90) minutes. Additional information from other child care professionals may also be considered in determining whether HID characteristics are present in a child.

When observing children for the purposes of diagnosis, testers should keep in mind the widely held expectations for normal behavior for the age group of the child in question.

Widely Held Expectations for the Social and Emotional Development of Three-Year-Olds

Shows difficulty taking turn and sharing objects, activity changing form often during a

play period; lacks ability to solve problems well among peers; usually needs help to resolve a social situation if conflict occurs.

- Plays well with others and responds positively if there are favorable conditions in terms of materials, space, and supervision (less likely to engage in positive behavior if any of these are lacking).
- © Can follow simple requests; likes to be treated as an older child at times but may still put objects in mouth that can be dangerous or wander off if not carefully supervised.
- Toddlers react impulsively.

Additional comments or observations by tester.

This child runs in circles, doesn't stop to rest, bangs into objects or people, and asks questions constantly. Despite having spent time in a preschool setting and having turned three a few months ago, s/he still has difficulty attending, except briefly, to a storybook or a quiet task such as coloring or drawing.

In my professional opinion this child has Hyperactive Impulsive Disorder.

Signed: Ellis Baldwin, MD

Play and Learn Registration Form

Welcome to Play and Learn Child Care Center!
Please read the following, provide the requested information and sign on the last page.

Parent(s)'s or Guardian's Name(s): Shawn Wright Date: July 17, 2017

Child's Name: Tyrone Wright

Child's Nickname: Junior Child's Age: 3

Home Address: 315 East St SE Billing Address (if different):

Olympia, C.D. 39117

Home telephone: 501-789-6363 Work Telephone: 501-278-3001

Emergency Contact Name: Robin Sterling

Emergency Contact Telephone: 501-394-4899

Does your child have any allergies? If so, please list them.

No.

Is your child on any medications? If so, please list them.

No.

Is your child allergic to any medications? If so, please list them.

Yes, Benadryl.

Does your family have any dietary restrictions (kosher, vegetarian, etc.)?

No.

Is your child free to attend all field trips or do you prefer to have permission slips sent home for each outing?

S/he is free to attend all field trips.

Page 2 – Play and Learn Registration: Learning Information

Is your child reading yet? (All children are grouped in reading circles.)

Not really. S/he knows the alphabet and can write all of the letters. And s/he knows most of the words in his/her favorite Dr. Seuss books.

Does your child have any physical problems (e.g., hearing impairment, visual impairment, asthma, etc.)?

No.

Does your child have any learning disabilities of which you are aware? If so, please list them. If you are concerned that your child has any learning problems, please indicate those in the space below.

No.

Does your child have any behavioral problems (e.g., hyperactivity)? If so, please list them. No.

All About My Child

Does your child have any imaginary friends?

No.

Does your child have any favorite objects which s/he will want to keep with him/her at school? No.

Is there anything about your child we should know that would not be obvious? Is there anything we should know about your child's personalities or idiosyncrasies, likes or dislikes? (Feel free to tell us something that makes your little one special!)

S/he is the sweetest child in the world!

Play and Learn is a child care center devoted to the education and nurturing of all children. We want to establish a partnership between this center and your family. To do so, we must have accurate information about your child. Please review your answers and verify their accuracy. Sign below if you have answered everything to the best of your ability. Thank you.

Parent or Guardian Signature:

Shawn R. Wright

Play and Learn Newsletter (excerpt from page 1, July 26, 2017 edition)

Because of a bad outbreak of pinkeye, many students and several staff members have become ill. Therefore, the Center will be operating without its full staff. Parents, if your children are suffering from pinkeye and other ailments, please keep your children home.

Although the Center may have some staffing problems, we will still be able to provide the appropriate care for the identified special needs students. Any parents with other concerns about their child should speak directly to the lead teacher in their child's class.

Giraffe Classroom windows potty training diaper disposal teacher work area changing table cabinets student cubbies play snacks space paper products art supplies toys book station book station toy center

Simplified Rules of Evidence

To assure each side of a fair trial, certain rules have been developed to govern the types of evidence that may be introduced, as well as the manner in which evidence may be presented. These rules are called the "rules of evidence." The attorneys and the judge are responsible for enforcing these rules. Before the judge can apply a rule of evidence, an attorney must ask the judge to do so. Attorneys do this by making "objections" to the evidence or procedure employed by the opposing side. When an objection is raised, the attorney who asked the question that is being challenged will usually be asked by the judge why the question was not in violation of the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes, and these are presented below.

Rule 1. Leading Questions:

A "leading" question is one that suggests the answer desired by the questioner, usually by stating some facts not previously discussed and then asking the witness to give a yes or no answer.

Example: "So, Ms./Mr. Smith, you took

Ms./Mr. Jones to a movie that

night, didn't you?"

Leading questions may not be asked on direct or redirect examination. Leading questions may be used on cross-examination.

Objection: "Objection, Your Honor,

counsel is leading the witness."

Possible Response: "Your Honor, leading is

permissible on cross-

examination," or "I'll rephrase the question." For example, the question can be rephrased: "Ms./Mr. Smith, where did you go that night? Who did you go with?" (This would not suggest

the answer the attorney

desires.)

Rule 2. Narration:

Narration occurs when the witness provides more information than the question called for.

Example: Q

Question - "What did you do when you reached the front door of the

house?"

Witness - "I opened the door and walked into the kitchen. I was afraid that s/he was in the house – you know, s/he had been acting quite strangely the day before."

Witnesses' answers must respond to the questions. A narrative answer is objectionable.

Objection: "Objection, Your Honor, the

witness is narrating."

Response: "Your Honor, the witness is telling

us a complete sequence of events."

Rule 3. Relevance:

Questions and answers must relate to the subject matter of the case; this is called "relevance."

Questions or answers that do not relate to the case are "irrelevant."

Example: (In a traffic accident case)

"Mrs. Smith, how many times have

vou been married?"

Irrelevant questions or answers are objectionable.

Objection: "Your Honor, this question is

irrelevant to this case."

Response: "Your Honor, this series of

questions will show that Mrs. Smith's first husband was killed in an auto accident, and this fact has increased his/her mental

suffering in this case."

Rule 4. Hearsay:

"Hearsay" is something the witness has heard someone say outside the courtroom. Also, any written statement made outside the courtroom is hearsay.

Example: "Harry told me that s/he was going

to visit Ms./Mr. Brown."

Hearsay evidence is objectionable. However, there are two exceptions to the hearsay rule for purposes of the mock trial. If an exception applies, the court will allow hearsay evidence to be introduced. Exception: In a mock trial, hearsay evidence is allowed when the witness is repeating a statement made directly to the witness by one of the witnesses in the case. Hearsay is also allowed if one of the witnesses is repeating a statement made by an individual who is no longer alive.

Note that this exception to the hearsay rule does not extend to witness testimony about what another person heard a witness say. This is "double hearsay."

Example: Mary, the plaintiff, told me that

Harry, the defendant, was drunk the

night of the accident.

Objection: "Objection, Your Honor, this is

double hearsay."

Response: "Your Honor, since Harry is the

defendant, the witness can testify to a statement s/he heard Harry

make."

For mock trials, other exceptions to the hearsay rule are not used.

Rule 5. Firsthand Knowledge:

Witnesses must have directly seen, heard, or experienced whatever it is they are testifying about.

Example: "I know Harry well enough to

know that two beers usually make him/her drunk, so I'm sure s/he was

drunk that night, too."

A lack of firsthand knowledge is objectionable.

Objection: "Your Honor, the witness has no

firsthand knowledge of Harry's

condition that night."

Response: "The witness is just generally

describing his/her usual experience

with Harry."

Rule 6. Opinions:

Unless a witness is qualified as an expert in the appropriate field, such as medicine or ballistics, the witness may not give an opinion about matters relating to that field.

Example: (Said by a witness who is not a

doctor) "The doctor put my cast on wrong. That's why I have a limp

now."

Opinions are objectionable unless given by an expert qualified in the appropriate field.

As an exception to this rule, a lay witness may give an opinion based on common experience.

Objection: "Objection, Your Honor, the

witness is giving an opinion."

Response: "Your Honor, the witness may

answer the question because ordinary persons can judge whether

a cast was put on correctly."

Rule 7. Opinions on the Ultimate Issue:

Witnesses, including experts, <u>cannot</u> give opinions on the ultimate issue of the case: the guilt or innocence of the defendant or the liability of the parties. These are matters for the trier of fact to decide.

Example: "I believe that Ms./Mr. Smith was

negligent in driving too fast in this

case."

Opinions on the ultimate issue in a case are objectionable.

Objection: "Your Honor, the witness is giving

an opinion on the ultimate issue – the negligence of Ms./Mr. Smith."

Response: "The witness is commenting that

the driver was speeding. This is not the ultimate issue in this case."

Rule 8. Additional Rules of Evidence:

- Objections during the testimony of a witness must be made only by the direct examining and cross-examining attorneys for that witness.
- 2. Cross-examination is <u>not</u> limited to the scope of direct questioning.
- 3. A short redirect examination, limited to no more than two questions, will be allowed following cross-examination, if an attorney desires. Questions on redirection are limited to the scope of the cross-examination.

Rule 9. Special Procedures:

Procedure 1. Introduction of Documents or Physical Evidence:

Sometimes the parties wish to offer as evidence letters, affidavits, contracts, or other documents, or even physical evidence such as a murder weapon, broken consumer goods, etc. Special procedures must be followed before these items can be used in trial.

Step 1: Introducing the Item for Identification

- a. An attorney says to the judge, "Your Honor, I wish to have this (letter, document, item) marked for identification as (Plaintiff's Exhibit A, Defense Exhibit A, etc.)."
- b. The attorney takes the item to the clerk, who marks it appropriately.
- The attorney shows the item to the opposing counsel.
- d. The attorney shows the item to the witness and says, "Do you recognize this item marked as Plaintiff's Exhibit A?"

Witness: "Yes."

Attorney: "Can you please identify this

item?"

Witness: "This is a letter I wrote to John

Doe on September 1." (Or witness gives other appropriate

identification.)

e. The attorney may then proceed to ask the witness questions about the document or item

Step 2. Moving the Document or Item into Evidence.

If the attorney wishes the judge or jury to consider the document or item itself as part of the evidence and not just as testimony about it, the attorney must ask to move the item into evidence at the end of the witness examination. The attorney proceeds as follows:

- a. The attorney says, "Your Honor, I offer this (document/item) into evidence as Plaintiff's Exhibit A, and ask that the court so admit it."
- b. Opposing counsel may look at the evidence and make objections at this time.
- c. The judge rules on whether the item may be admitted into evidence.

Procedure 2. Impeachment

On cross-examination, an attorney wants to show that the witness should not be believed. This is best accomplished through a process called "impeachment," which may use one of the following tactics: (1) asking questions about prior conduct of the witness that makes the witness's truthfulness doubtful (e.g., "Isn't it true that you once lost a job because you falsified expense reports?"); (2) asking about evidence of certain types of criminal convictions (e.g., "You were convicted of shoplifting, weren't you?"); or (3) showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit. Witness statements in the Mock Trials Materials are considered to be affidavits.

In order to impeach the witness by comparing information in the affidavit to the witness's testimony, attorneys should use this procedure:

Step 1: Repeat the statement the witness made on direct or cross-examination that contradicts the affidavit.

Example: "Now, Mrs. Burke, on direct examination you testified that you were out of town on the night in question, didn't you?" (Witness responds, "Yes.")

Step 2: Introduce the affidavit for identification, using the procedure described in Procedure 1.

Step 3: Ask the witness to read from his or his/her affidavit the part that contradicts the statement made on direct examination.

Example: "All right, Mrs. Burke, will you read paragraph three?" (Witness reads, "Harry and I decided to stay in town and go to the theater.")

Step 4: Dramatize the conflict in the statements. (Remember, the point of this line of questioning is to demonstrate the contradiction in the statements, not to determine whether Mrs. Burke was in town or out of town.)

Example: "So, Mrs. Burke, you testified that you were out of town on the night in question, didn't you?" "Yes." "Yet, in your affidavit you said you were in town, didn't you?" "Yes."

Procedure 3. Qualifying an Expert

Only a witness who is qualified as an expert may give an opinion as to scientific, technical, or other specialized knowledge in the area of his/her expertise. (Note: A lay witness may give an opinion about something related to one's common experience (see Rule 6).) Experts **cannot** give opinions on the **ultimate issue** of the case.

Before an expert gives his/her expert opinion on a matter, the lawyer must first qualify the expert. There are two steps to qualify an expert. First, the lawyer must lay a foundation that shows the expert is qualified to testify on issues related to that expert's field of expertise. To lay a foundation, the lawyer asks the expert to describe factors such as schooling, professional training, work experience and books s/he has written that make a person an expert regarding a particular field. Second, once the witness has testified about his/her qualifications, the lawyer asks the judge to qualify the witness as an expert in a particular field.

Example: The wife of Harold Hart is suing Dr. Smith and General Hospital for malpractice. S/he claims they did not treat Ms./Mr. Hart for an obvious heart attack when s/he was brought to the hospital. Mrs. Hart's lawyer is examining his/her expert witness, Dr. Jones:

- Q: Dr. Jones, what is your occupation?
- A: I am a heart surgeon. I am Chief of Staff at the Howard University Medical Center.
- Q: What medical school did you attend?
- A: I graduated from Georgetown Medical School in 1978.
- Q: Where did you do your internship?
- A: I did a two-year internship in cardiology at John Hopkins University from 1978–1980.
- Q: Did you afterwards specialize in any particular field of medicine?
- A: Yes, I specialized in heart attack treatment and heart surgery.
- Q: Have you published any articles or books?
- A: I wrote a chapter in a medical text on heart surgery procedures after heart attacks.
- Q: Describe the chapter.
- A: I set out the steps for identifying heart attacks and doing open heart surgery.
- Q: What professional licenses do you have?
- A: I am certified by the D.C. Board of Medical Examiners to practice medicine in D.C.
- Attorney #1: Your Honor, I ask that Dr. Jones be qualified as an expert in the field of

medicine.

Judge: Any objection?

Attorney #2: We object. No foundation has been

laid regarding Dr. Jones's ability to render an opinion as to all fields of

medicine.

Judge: Objection sustained. Dr. Jones's

expertise seems to be limited to certain areas of medicine.

Attorney #1: Thank you, Your Honor. We ask

that Dr. Jones be qualified as an expert in the field of heart surgery.

Judge: Any objections?

Attorney #2: No, Your Honor.

Judge: Let the record reflect that Dr. Jones

is qualified to testify as an expert in

the field of heart surgery.

Once qualified, an expert may give opinions relating <u>only</u> to the expert's area of expertise. That is, an expert cannot give an opinion in an area outside his/her expertise.

Example: (Dr. Jones has been qualified as an expert on heart surgery.)

Q: Dr. Jones, what is your opinion as to Ms./Mr. Hart's cause of death?

A: The patient suffered a massive heart attack caused by clogged arteries.

Q: Dr. Jones, in your opinion was the patient also suffering from a rare lung disease transmitted through contact with the North American mongoose as the defense contends?

Objection: The witness is testifying outside his/her area of expertise.

Judge: Sustained. Please confine your opinion to matters related to care and treatment of the heart.

Q: Dr. Jones, in your opinion, how should the patient's doctors have treated him/her?

A: They should have recognized that the patient was having a heart attack based on his/her chest pains, purple face, difficulty breathing, and numbness in his/her left arm. They should have given him/her the proper medication and treated him/her in the emergency room right away.

O: Who was at fault in this matter?

A: Dr. Smith and General Hospital were definitely negligent.

Objection: The witness is testifying to the ultimate issue of the case, which is whether Dr. Smith and General Hospital are liable for malpractice. That is a

question of fact for the judge (or jury, when the case is tried before a jury) to decide.

Judge: Sustained.