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AID, ET AL. V. ALLIANCE FOR OPEN SOCIETY INTERNATIONAL

Appealed from the U.S. Court of Appeals for the Second Circuit

Oral argument: April 22, 2013

Questions Presented

“Whether the United States Leadership Against HIV/ AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7631(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.”

Issue

Does the government violate the First Amendment by funding organizations to stop the spread of HIV/AIDS only if they also oppose prostitution and sex trafficking?

Facts

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act) to reinforce the commitment of the United States in preventing the worldwide spread of HIV/AIDS, tuberculosis, and malaria. The Act requires that organizations funded through the Act have active policy provisions opposing prostitution and sex trafficking.

Respondent Alliance for Open Society International (AOSI) filed for an injunction to stop enforcement of the requirement for a policy opposing prostitution. AOSI argued that the Act’s requirement violates the First Amendment because it imposes the government’s viewpoint on prostitution and so compels speech. In response to the injunction, Petitioner United States Agency for International Development (USAID) argued that Congress may infringe on the First Amendment rights of agencies that receive discretionary government funding. USAID contended that the Spending Clause of the U.S. Constitution

allows the Act to impose various conditions on the receipt of federal funds.

The first court to review the case granted AOSI’s motion for an injunction to stop enforcement of the anti-prostitution and anti-sex trafficking policy requirement because the court found the provision in likely violation of the First Amendment. USAID appealed the decision to the Second Circuit, which agreed with the injunction. The Second Circuit reasoned that, although Congress has broad powers, the Spending Clause does not give Congress the power to condition receiving federal money upon compliance with a provision that infringes on an agency’s constitutional rights. The Second Circuit concluded that for the purpose of deciding whether the lower court erred in granting the injunction, AOSI demonstrated a likelihood of success in showing a First Amendment violation. Dissatisfied with this result, USAID appealed to the U.S. Supreme Court, which granted certiorari on January 11, 2013, to determine whether the Act’s anti-prostitution and anti-sex trafficking policy requirement on federally funded organizations violates the First Amendment.

Implications

In deciding whether a law requiring an anti-prostitution and anti-sex trafficking policy for receiving federal funding is constitutional, the U.S. Supreme Court may impact the range of restrictions that Congress imposes on agencies applying for government funding. Petitioner United States Agency for International Development (USAID) urges that the policy requirement under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act) allows the government to fund organizations that are effective by targeting practices that spread HIV/AIDS. However, according to respondent Alliance for Open Society International (AOSI), upholding the policy requirement would compel organizations to align their policies with governmen-

tal viewpoints and so hinder their flexibility in addressing HIV/AIDS prevention in the ways they find most effective.

Is Prohibiting Prostitution a Necessary Policy to Reduce the Spread of HIV/AIDS?

In support of USAID, the American Center for Law and Justice (ACLJ) argues that Congress may constitutionally require organizations to meet certain criteria to be eligible for receiving federal funding. ACLJ distinguishes eligibility requirements from “unconstitutional conditions” and notes that Congress may select which organizations to fund based in part on the goals of the organization. Additionally, the Coalition Against Trafficking in Women (CATW) promotes the stance that the government should regulate prostitution and sex trafficking because they are abusive and exploitive practices that spread HIV/AIDS. Arguing that the anti-prostitution and anti-sex trafficking policy requirement is a rational requirement, CATW contends that condemning prostitution is a necessary condition for any agency seeking to prevent the spread of HIV/AIDS.

In response, AOSI argues that an anti-prostitution and anti-sex trafficking policy unconstitutionally restricts localized methods for preventing the spread of HIV/AIDS. AOSI claims that the policy requirement has the potential to alienate sex workers and hinder the building of trust between workers and the non-governmental organization (NGO). Drawing upon its experience, AOSI argues that a neutral policy allows the NGO to organize, inform, and coordinate efforts to reduce HIV/AIDS with sex workers. According to AOSI, maintaining good relationships and open communication with marginalized groups is vital to effectively reducing rates of infection, and adopting the Act’s policy requirement would introduce barriers in connecting with people in most need of assistance and protection.

Do the Act’s Requirements Compel Speech?

Supporting USAID, ACLJ claims that

striking down the policy requirement confuses eligibility requirements with laws that compel speech. ACLJ argues that the policy requirement under the Leadership Act is limited to only those agencies applying for government funding. According to ACLJ, it is reasonable for Congress to insist that its funds go to organizations that oppose prostitution and sex trafficking, which are practices that Congress found to be major contributors to the spread of the diseases targeted in the Act. Additionally, ACLJ argues that striking down the policy requirement threatens to inhibit the ability of Congress to choose criteria for completing other government projects.

In contrast, AOSI argues that the policy requirement under the Act forces organizations seeking federal funding to adopt a viewpoint as though it were their own. According to the Becket Fund for Religious Liberty and the Christian Legal Society, upholding the policy requirement threatens to allow Congress to force any organization that receives federal funding to become mouthpieces for the government. Additionally several professors and deans of public health and public health law argue that practitioners, including those who receive federal funding, need the flexibility and freedom to pursue ideas without over-simplified restrictions on their research. They further argue that although Congress may refuse to fund certain programs, Congress cannot expand this power to force organizations to endorse one viewpoint or oppose another because doing so may distance public debate from those who are most affected by the issues.

Legal Analysis

Petitioner United States Agency for International Development (USAID) argues that the Spending Clause of the Constitution allows for Congress to implement restrictions when distributing federal funds. Additionally, USAID argues that the requirement to oppose prostitution and sex trafficking is central to effectuate the purpose of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act). In contrast, respondent Alliance for Open Society International (AOSI) states that the anti-prostitution and anti-sex trafficking policy requirement violates the First Amendment of the Constitution by compelling organizations to espouse an opinion of the government to receive federal funding.

The Spending Clause and the First Amendment

USAID argues that the Spending Clause of the Constitution empowers Congress to attach conditions to receiving federal funds to promote the public welfare of the United States. According to USAID, since the application for and acceptance of federal funds are voluntary, the Leadership Act does not force any organization to support any policy that it does not wish to follow. USAID argues that under *South Dakota v. Dole*, Congress may condition receiving federal funding on having certain policies that Congress would otherwise be prohibited from requiring through direct regulation. To USAID, because Congress found that opposing sex trafficking and prostitution is necessary to fight the spread of HIV/AIDS, it can choose to fund organizations that oppose sex trafficking and prostitution. Further, USAID explains that the policy requirement is not burdensome because an organization may have an anti-prostitution and anti-sex trafficking policy without actively propagating the policy.

In response, AOSI argues that the Spending Clause does not immunize Congress from violations of First Amendment protections. AOSI argues that the Supreme Court in *Sherbert v. Verner* held that a choice between forgoing federal benefits and relinquishing constitutional rights could violate First Amendment freedoms in the same way as direct regulation. According to AOSI, if the form of the anti-prostitution and anti-sex trafficking policy requirement were a direct restriction on speech instead of a condition for receiving funding it would unlawfully restrict speech; changing the form of the restriction does not change the unlawful function. Additionally, AOSI argues that the policy requirement forces an organization to express an idea that it may not wish to express. AOSI argues that Congress is preventing opposing viewpoints about the major contributing factors to the spread of HIV/AIDS from being taken seriously.

Central Provision and Affiliate Organizations

USAID argues that Congress, and not the Court, should decide whether a provision affecting freedom of speech is essential to a funding program. USAID argues that Congress, intending to target factors causing the spread of HIV/AIDS and not just the symptoms, determined that opposing prostitution and sex trafficking is important to reaching the goals of the Leadership Act. Accord-

ing to USAID, an organization complies with the anti-prostitution and anti-sex trafficking policy requirement by signing the contractual agreement for receiving federal funding without taking any further action to certify or publicize their compliance. Additionally, USAID notes that the Act allows a federally funded organization to work with groups that operate inconsistently with the policy requirement and so removes the injury if the policy requirement does violate the First Amendment.

In contrast, AOSI argues that the goal of the Leadership Act does not explain the anti-prostitution and anti-sex trafficking policy requirement; the Leadership Act distributes government funding to combat the spread of HIV/AIDS and not to end prostitution or sex trafficking. Further, AOSI maintains that allowing federally funded organizations to work with other entities lacking an anti-prostitution and anti-sex trafficking policy would not cure the inability of the federally funded organization to not have the required policy. According to AOSI, the Act's policy requirement allows federally funded organizations to work only with completely independent affiliates lacking the anti-prostitution and anti-sex trafficking policy; the Act enforces this independent relationship by investigating partnerships—a costly process that chills the flexibility of a federally funded organization in responding to localized concerns against the spread of HIV/AIDS.

Conclusion

USAID argues that Congress may constitutionally require a policy against prostitution and sex trafficking as a condition to accepting federal funds for fighting the spread of HIV/AIDS. In contrast, AOSI argues that the First Amendment prohibits Congress from requiring organizations to speak against prostitution and sex trafficking. AOSI cautions that if the Supreme Court upholds the policy requirement, the power of Congress will expand as it may condition receiving federal money on adopting political positions, however unrelated those positions are in effectuating the initial purpose of the funding. However, USAID cautions that striking down the policy requirement may shrink the power of Congress to allocate funds appropriately to address problems of pressing concern, such as preventing the spread of communicable diseases. ©

Written by Dean Caruwana and Claire Holton-Basaldua. Edited by Charlotte Davis.

UNITED STATES V. DAVILA

Appealed from the U.S. Court of Appeals for the Eleventh Circuit

Oral argument: April 15, 2013

Questions Presented

“Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant’s guilty plea, irrespective of whether the error prejudiced the defendant.”

Issue

Does a judge’s participation in plea negotiations automatically overturn the defendant’s guilty plea, or does it only overturn the plea if the judge’s participation actually harmed the defendant?

Facts

In May 2009, a federal grand jury in Georgia indicted the defendant, Anthony Davila, on one count of conspiracy to defraud the United States, eleven counts of presenting a false claim, eleven counts of mail fraud, and eleven counts of aggravated identity theft. Although Davila received a court-appointed lawyer, Davila later requested new counsel, claiming that his attorney failed to develop any defenses to the charges and only recommended pleading guilty.

On February 8, 2010, the magistrate judge held an *ex parte* hearing with Davila and his lawyer to discuss Davila’s request. At the hearing, the magistrate declined Davila’s request for a new lawyer. The magistrate reasoned that “oftentimes . . . the best advice a lawyer can give his client” is to plead guilty. The magistrate further advised Davila to:

[T]ell it all, brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he’s got a long criminal history but when we were in there talking about his case he gave it all up so give him a [reduced sentence]. ...

On May 11, 2010, Davila pled guilty to the charges. Then, on Nov. 15, 2010, the district court sentenced Davila to 115 months in prison. Subsequently, Davila appealed to the Eleventh Circuit Court of Appeals. Although

the Eleventh Circuit appointed Davila’s trial lawyer to represent Davila on appeal, Davila proceeded *pro se*. Davila’s primary argument on appeal was that the magistrate judge “violated his substantial rights” by improperly participating in the plea discussions and offering advice.

On Dec. 21, 2011, the Eleventh Circuit vacated Davila’s conviction and remanded the case to the District Court with instructions to use a different magistrate judge. The Eleventh Circuit adopted an “absolute ban on judicial participation” and held that a judge may *never* participate in plea negotiations under Federal Rule of Criminal Procedure 11(c)(1) (“11(c)(1)”), which states simply that “[t]he court [i.e., judge] must not participate in these discussions.” The Eleventh Circuit acknowledged that its decision exacerbated a circuit split because the Fifth Circuit has held that violations of 11(c)(1) are subject to harmless error review, which allows for “technical errors” that had no bearing on the outcome. On January 4, 2013, the Supreme Court granted certiorari to resolve this disagreement among the circuits.

Implications

The policy issues in this case center on the impact that the holding may have on the plea negotiation process. The United States argues that Federal Rule of Criminal Procedure 11(c)(1) (“11(c)(1)”) violations are not always prejudicial; that is, judicial intervention in plea negotiations does not necessarily harm the defendant. Furthermore, the United States contends that a holding for Davila will undermine the finality of guilty pleas. On the other hand, Davila argues that 11(c)(1) violations are particularly pernicious and almost always prejudicial. Finally, Davila disagrees with the United States and argues that a reversal would undermine the finality of convictions and increase the burden on courts.

The Prejudice of Judicial Intervention in Plea Negotiations

The United States argues that 11(c)(1) violations are not necessarily prejudicial. First, the United States contends that 11(c)(1) is a forward-looking rule in that it “prescribes a procedure” for judges to conduct their behavior during plea negotiations. In comparison, the United States points to Federal Rules of Criminal Procedure 11(h) (“11(h)”) and 52 (“52”), which posit and define a harmless error standard, as backward-looking rules because they evaluate such judicial interven-

tion after the fact. The United States believes that prejudice is a fact-intensive inquiry. Specifically, in this case, the United States notes three mitigating factors: that three months passed between the 11(c)(1) violation and sentencing, that the sentencing judge was a different person than the magistrate, and that Davila never raised any complaint about judicial intervention on appeal.

Davila counters that judicial intervention in plea bargaining is almost always prejudicial. Davila supports this assertion by noting that judges “occupy a special position of authority,” such that “[d]efendants and their attorneys will typically give great weight to the judgment’s pronouncements.” Davila further states that, while some appellate courts appear to apply a fact-intensive harmless error approach to judicial intervention in plea bargains, no case exists where the appellate court affirmed a conviction after the judge violated 11(c)(1). Consequently, Davila argues that a fact-intensive review of 11(c)(1) errors is effectively a waste of time.

The Finality of Convictions Secured by Guilty Pleas

The United States argues that mandatory reversal for 11(c)(1) violations would undermine the finality of convictions secured by guilty pleas. First, the United States casts harmless error analysis striking a balance between “societal costs” and “the rights of the accused.” Furthermore, the United States asserts that the finality of guilty pleas is particularly important given that such convictions inherently rest on the defendant’s confession to the crime. Stating that 97% of all criminal convictions in federal court are guilty pleas, the United States argues that an “automatic vacatur” rule will undermine the “speed, economy, and finality” of guilty pleas.

Davila disagrees with the United States and counters that a ruling for the United States would undermine the finality of convictions. Specifically, Davila worries about the burden that a ruling for the United States would impose on courts. Davila envisions that a non-automatic, fact-intensive inquiry on appeal would lead to time-intensive evidentiary hearings and extensive litigation. In Davila’s view, the automatic vacatur approach that he advocates would conserve judicial resources. Finally, Davila counters the concern that an automatic vacatur rule would make it difficult for courts to validly participate in certain aspects of plea bargains.

Legal Analysis

Davila argues that the trial judge's involvement in his decision to plead guilty was so egregious that further judicial review was so egregious that further judicial review of whether or not the judge's intervention affected his decision to plead guilty is unnecessary. He also asserts that such judicial involvement threatens defendants' fundamental rights, making it virtually certain that errors will result and influence court proceedings. The United States counters that the prospect relief from judicial involvement in a guilty plea is expressly stated in Federal Rule of Criminal Procedure 11(h) ("11(h)") as requiring an effect on substantial rights that did not occur in this case.

Violations of Rule 11(c)

Davila begins by noting that 11(c) admonishes federal judges that they "must not participate in [plea] discussions." Davila asserts that by prohibiting judicial involvement in plea negotiations, the court itself is prohibited from influencing defendants into waiving their trial rights. Davila posits that because the court's participation in the plea bargain induced him to plead guilty, the judge's role was prosecutorial, rather than that of a neutral arbiter safeguarding Davila's rights. Davila notes that the language of 11(h) applies to a variance from the procedures required by the rule. Davila asserts that by referring to the procedure of plea bargains, 11(h) is intended to apply to only variances that happen after a plea bargain, not to actions prohibited by the Rule. From the language of 11(h), Davila concludes that the harmless error standard was not intended to apply to judicial involvement in plea bargains.

The United States responds by pointing to the language of 11(h). The original version of the Rule, enacted in 1983, stated that "any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." This language was changed in 2002, replacing the word "any" with "a," but the United States notes a court case where the change in language was only intended to be stylistic, not substantive. Therefore, the United States argues, judicial participation in the plea bargain process should be limited to harmless error review, and then only if it affects substantial rights. The United States posits that violations only affect substantial rights when they have a prejudice the result of a judicial proceeding. The United States also examines the enactment of 11(h), noting that automatic reversal

of any FRCP Rule 11 violation, no matter how minor, was an unacceptable outcome.

Substantial Rights

Davila notes that the Rule 11 advisory committee reported that some Rule 11 errors would remain automatically reversible. Davila points to a situation the advisory committee gave that would not be harmless error, a judge abdicating some responsibilities under Rule 11 to the prosecutor, and argues that a court encouraging a defendant to plead guilty is at least as prejudicial. Davila argues that a "judicial exhortation" to a defendant to plead guilty, by its very nature, affects substantial rights. First, Davila asserts that fundamental constitutional rights were affected by the judge's actions, including those rights pertaining to jury trial, self-incrimination, and due process. Next, Davila notes that defendants would be more likely to go along with a judge's encouragement to plead guilty because of the judge's authority, making it inherently coercive.

The United States counters that 11(c)(1) errors do not affect substantial rights. The United States argues that Rule 11 itself is not constitutionally required, but merely a rule intended to ensure that guilty pleas are voluntary. Because the rule is not constitutionally required, violating the rule would not violate a defendant's constitutional rights. The United States asserts that Rule 11 errors usually will not result in a conviction of an innocent defendant, and therefore the best way to address them is with case-specific analysis instead of automatic vacatur. The United States also argues that the analysis for finding prejudice in a Rule 11 violation is not too difficult to litigate. The United States concedes that judicial participation in plea bargains are likely to prejudice a defendant, but notes that courts have conducted an analysis and found harmless error in previous cases.

Conclusion

In this case, the Supreme Court will determine whether any judicial participation in plea-bargaining, as opposed to only "prejudicial" participation, requires courts to reverse a conviction. The United States, as petitioner, argues that under FRCP 11(h), courts must review any courts errors in the plea bargaining process under the harmless error standard of review. Respondent Davila counters that 11(c)(1) errors are universally prejudicial due to the repurposing of the judge in a prosecutorial role and interfering

with the adversarial process. This case will affect the finality of convictions and the role of judges in plea-bargaining. ©

Written by Ethan Roman and Dan Youngblut. Edited by Judah Druck.

ADOPTIVE COUPLE V. BABY GIRL

Appealed from the South Carolina Supreme Court

Oral argument: April 16, 2013

Petitioners, Adoptive Couple, decided to adopt a baby girl from a single mother. After Baby Girl's birth, Adoptive Couple began the official adoption process and Birth Father, a member of the Cherokee Nation, signed a form relinquishing his rights to Baby Girl. Later, however, Birth Father claimed that he did not intend to relinquish his rights and sought to invoke the Indian Child Welfare Act (ICWA) because Baby Girl is of Indian heritage. Both the Charleston County Family Court and the Supreme Court of South Carolina held that Birth Father should have custody of Baby Girl. Adoptive Couple argues that Birth Father does not qualify as a "parent" under the ICWA and, thus, does not have parental rights to stop Baby Girl's adoption. Respondents Birth Father and the Cherokee Nation claim that Birth Father does meet the "parent" definition of ICWA because he has proven his biological link to Baby Girl and also acknowledged her as his child. The Supreme Court's decision in this case will have an impact of the adoption process for children of Indian heritage, their biological parents, and prospective adoptive parents. Full text is available at www.law.cornell.edu/supct/cert/12-399. ©

Written by Sherry Jarons and Z. Angela Lu. Edited by Brooks Kaufman.

AMERICAN TRUCKING ASS'NS V. CITY OF LOS ANGELES

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral argument: April 16, 2013

Starting in 2008, one of the busiest ports in the United States, the Port of Los Angeles (POLA), entered into "concession agreements" with motor carriers doing business at the port. POLA enforced the agreements through a system of tariffs levied against non-

compliant carriers and remedial provisions that empowered it to revoke noncompliant carriers' access to the port. The American Trucking Association (ATA) sued POLA, arguing that the agreements were barred under the Federal Aviation Administration Authorization Act of 1994 (FAAAA) and the Supreme Court's decision in *Castle v. Hayes Freight Lines, Inc.* The Central District of California and Ninth Circuit found that multiple provisions of the concession agreements were exempted from the FAAAA's preemption clause and held that *Castle* did not bar suspension of carriers' port access. In resolving the questions presented, the Supreme Court will determine the scope of the market-participant exemption to FAAAA preemption and whether *Castle* bars POLA from enforcing its concession agreements through revocation or suspension of port access. The case directly affects local and state governments' power to regulate and contract under the FAAAA and similar Congressional legislation. Full text is available at www.law.cornell.edu/supct/cert/11-798. ©

Written by Thomas Santoro and Stephen Wirth. Edited by Charlotte Davis.

ASSOCIATION FOR MOLECULAR PATHOLOGY, ET AL. V. MYRIAD GENETICS, INC.

Oral argument: April 15, 2013

Court below: United States Court of Appeals for the Federal Circuit

Myriad Genetics first identified and isolated the BRCA1 and BRCA2 genes responsible for diagnosing an elevated risk of breast and ovarian cancer. Myriad claims patents on the isolated BRCA genes along with cDNA, which is a synthetic product that mirrors the coding sections of the BRCA genes, and "primers" used in diagnostics. The Patent Act defines the scope of patentable subject-matter in 35 U.S.C. § 101; however, the Supreme Court has consistently held that laws of nature, abstract ideas, and natural phenomenon cannot be patented. Myriad claims that the isolated and modified genes that they hold patents for never occur in nature, and subsequently are patentable subject-matter. Conversely, the Association for Molecular Pathologists contends that Myriad only isolated, and did not modify, a gene already existing in nature and that this isolated gene performs a similar function as the gene in natural form. The dis-

trict court held that naturally-occurring genes were not patentable subject matter, but the Federal Circuit court reversed. A narrowing or a broadening of current subject matter eligibility by the Supreme Court will have significant effects on the incentives for inventors as well as what information is available for and usable by the general public. Full text is available at www.law.cornell.edu/supct/cert/12-398. ©

Written by Jonathan Goddard and Zachary Glantz. Edited by Brandon Bodnar.

HILLMAN V. MARETTA

Appealed from the Supreme Court of Virginia

Oral argument: April 22, 2013

Warren Hillman named his wife, Judy Maretta, the beneficiary of his Federal Employees' Group Life Insurance Act (FEGSIA) in 1996. The two subsequently divorced and Hillman remarried, but never changed the named beneficiary on his plan to his new wife, Jacqueline Hillman. Upon Warren Hillman's death, Jacqueline Hillman attempted to claim death benefits under this policy, but her claim was denied because she was not the named beneficiary. Maretta received the benefits instead and Jacqueline Hillman commenced for the full amount of the death benefits. Under Virginia state law, when a couple is divorced their beneficiary designations are automatically revoked. However, the FEGSIA states that the beneficiary named on the policy shall receive the death benefits regardless of current marital status. The Supreme Court will now decide whether FEGSIA preempts Virginia's state law. This case involves the proper balance of the federal government's interest in uniform rules for the distribution of FEGSIA benefits and the state of Virginia's interest in seeing the intended beneficiary, rather than the named beneficiary, receive the death benefits. Full text is available at www.law.cornell.edu/supct/cert/11-1221. ©

Written by Michaela Dudley and Allison Nolan. Edited by Brandon Bodnar.

METRISH V. LANCASTER

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: April 24, 2013

Former Detroit police officer Burt Lancaster

shot and killed his girlfriend Toni King in 1993. Lancaster suffered a history of mental illness and asserted defenses of insanity and diminished capacity during his trial, and was ultimately convicted by jury. After appeal and remand, Lancaster intended to assert again the defense of diminished capacity; however, the Michigan Supreme Court had abolished that defense in the time between trials. Lancaster was unable to assert the defense and the Michigan court convicted Lancaster again. Lancaster petitioned the federal courts for a writ of habeas corpus. The district court denied Lancaster's petition, but the Sixth Circuit reversed. On appeal, the State of Michigan argues that the Michigan court's decision to prohibit the diminished capacity defense was valid because the diminished capacity defense did not represent settled law. Lancaster responds that he has a right to present evidence on any defense available to him at the time he committed the act and that diminished capacity was a well-settled defense under Michigan law. This decision will further outline the effect of the retroactivity prohibition on changes in state judge-made law. Full text is available at: www.law.cornell.edu/supct/cert/12-547. ©

Written by Cristina Quiñones-Betancourt and Nathan Taylor. Edited by Brooks Kaufman.

SALINAS V. TEXAS

Appealed from the Texas Court of Criminal Appeals

Oral argument: April 17, 2013

Police in Houston, Texas questioned Genovevo Salinas in 1992 during a murder investigation. Salinas answered all of their questions until the police asked whether he thought that casings found at the murder scene would match the shotgun the police found in his house. In response, Salinas remained silent. Later, he was charged with murder, tried, and convicted partially on the basis of evidence that he had remained silent during police questioning. Salinas claims that the Texas trial court should not have admitted evidence of his silence because of the Fifth Amendment privilege against self-incrimination. The State of Texas argues that the evidence was appropriately admitted and outside the protection of Fifth Amendment privilege because Salinas's silence was non-testimonial and the police questioning was

non-coercive. The Supreme Court's decision will determine the scope of the Fifth Amendment protection against self-incrimination and whether it extends to the protection of a defendant's pre-arrest, pre-Miranda statements to the police. Full text is available at www.law.cornell.edu/supct/cert/12-246. ©

Written by Alexandra Cowen and Chan-woo Park. Edited by Lisa Schmidt.

SEKHAR V. UNITED STATES

Appealed from the U.S. Court of Appeals for the Second Circuit

Oral argument: April 23, 2013

Petitioner Giridhar C. Sekhar was convicted of extortion under federal law for threatening to expose an extramarital affair unless the General Counsel for the State Comptroller recommended that the state pension fund invest in a fund managed by Sekhar's company. The Court will determine the limits of the meaning of the word "property" under federal extortion law, and whether the General Counsel's recommendation was "property" that could be subject to extortion. The Court's decision will have implications for the scope of federal extortion law and for the balance between enforcement of federal and state criminal law when the two overlap. Petitioner argues for a narrow definition of property, limited to something of value that is transferable. Respondent calls for a broader view of property to include the legal advice given by lawyers. Full text is available at www.law.cornell.edu/supct/cert/12-357. ©

Written by Jeremy Amar-Dolan and Zachary Zemlin. Edited by Judah Druck.

TARRANT REGIONAL WATER DISTRICT V. HERRMANN

Appealed from the U.S. Court of Appeals for the Tenth Circuit

Oral argument: April 23, 2013

Tarrant Regional Water District (Tarrant) seeks to export water to Texas from multiple sources within Oklahoma which are covered by the Red River Compact (Compact), a congressionally approved water apportionment agreement between Arkansas, Louisiana, Oklahoma, and Texas. In 2007, Tarrant sued members of the Oklahoma Water Resources Board (OWRB), including Herrmann, in the

U.S. District Court for the Western District of Oklahoma. Tarrant sought a declaratory judgment that certain Oklahoma statutes dealing with water apportionment are unconstitutional and an injunction preventing the OWRB from applying the statutes to Tarrant's application for water. Tarrant argued that the Oklahoma statutes violate the dormant Commerce Clause and that the statutes are preempted insofar as they conflict with the Compact's language. OWRB argues that the signatory states to the Compact did not surrender their sovereignty by signing the Compact and that the Commerce Clause does not apply in this case. Both parties fear that this decision, if decided for the opposing party, will cause severe social, economic, and environmental harm to their states. Full text is available at www.law.cornell.edu/supct/cert/11-889. ©

Written by Alfonso Dulcey and Ali Paradis. Edited by Jenny Liu.

UNITED STATES V. KEBODEAUX

Appealed from the U.S. Court of Appeals for the Fifth Circuit

Oral argument: April 17, 2013

While serving in the Air Force in 1999, a military tribunal convicted twenty-one-year-old Anthony Kebodeaux of statutory rape for having consensual sex with a fifteen-year-old girl. Following his sentence and discharge, Kebodeaux moved to Texas, where he became subject to lifetime registration requirements that include registration updates upon intrastate movement. Seven years later Congress enacted the Sex Offender Registration and Notification Act (SORNA), which imposes registration requirements on sex offenders convicted under state or federal law. After failing to update his registration following an intrastate move in 2008, Kebodeaux was convicted under SORNA in the United States District Court for the Western District of Texas. Kebodeaux appealed this conviction to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, sitting en banc, reversed the District Court's conviction, holding that as applied to Kebodeaux, SORNA's registration requirements were unconstitutional as exceeding Congress's Article I powers. On appeal to the Supreme Court of the United States, the United States argues that SORNA did not constitute overreaching by the federal government because

Kebodeaux was consistently subject to federal jurisdiction, having committed a federal offense under military law. In response, Kebodeaux contends that his release from prison pre-SORNA was unconditional, meaning that he is bound only by state registration requirements. Full text is available at www.law.cornell.edu/supct/cert/12-418. ©

Written by Belinda Liu and Sarah O'Laughlin. Edited by Jenny Liu.

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR

Appealed from the U.S. Court of Appeals for the Fifth Circuit

Oral argument: April 24, 2013

Dr. Naiel Nassar alleges that in his employment at the University of Texas Southwestern Medical Center he was subject to actions prohibited by Title VII of the Civil Rights Act. Nassar states that he resigned from his University position because of comments made regarding his Middle Eastern heritage. Nassar claims he was denied employment at the University's partner institution the Parkland Hospital as retaliation for disapproving remarks of those comments he made in his resignation letter. The Title VII issue revolves around whether an employee can prove a violation where the employer claims a mixed-motive in the alleged unlawful action or whether the retaliation must be the but-for (i.e. sole) cause of the employment action. If the Court finds that a mixed-motive standard governs, then employees may have an easier time bringing suits and employers could have more difficulty in defending against potentially meritless litigation. Full text is available at www.law.cornell.edu/supct/cert/12-484. ©

Written by Dillon Horne and Matthew Soares. Edited by Charlotte Davis.