

Opinions for the week of August 31 – September 4, 2020

Barbara Jones v. Andrew Saul No. 19-3031

Argued August 4, 2020 — Decided August 31, 2020

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:18-cv-03383-MJD-TWP — **Mark J. Dinsmore**, *Magistrate Judge*.

Before DANIEL A. MANION, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

ORDER

Barbara Jones, a 60-year-old woman who suffers primarily from pain in her right knee and shoulder, challenges the denial of her application for Social Security disability insurance benefits. In concluding that Jones could perform past relevant work, the administrative law judge rejected the opinions of her own agency's physicians, who concluded that Jones's limitations were potentially disabling. Because the ALJ impermissibly relied on her own judgment to reject those uncontradicted medical opinions, and because substantial evidence does not support the denial of benefits, we vacate the judgment and remand the case for further proceedings.

Sandor Demkovich v. St. Andrew the Apostle Parish No. 19-2142

Argued November 5, 2019 — Decided August 31, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:16-cv-11576 — **Edmond E. Chang**, *Judge*.

Before FLAUM, ROVNER, and HAMILTON, *Circuit Judges*.

FLAUM, *Circuit Judge*, dissenting.

HAMILTON, *Circuit Judge*. The First Amendment prohibits enforcement of federal employment discrimination statutes against decisions of churches and other religious organizations to hire or fire their “ministerial employees.” *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). This interlocutory appeal presents a question about extending this exemption beyond hiring and firing decisions: should the constitutional exemption be extended to categorically bar all hostile environment discrimination claims by ministerial employees, even where there is no challenge to tangible employment actions like hiring and firing? Our answer is no... Accordingly, we AFFIRM the decision of the district court denying dismissal of the disability claim, and REVERSE its decision dismissing the sexual orientation claim. The case is REMANDED for further proceedings consistent with this opinion.

USA v. Ladmarald Cates No. 19-1806

Argued January 15, 2020 — Decided September 1, 2020

Case Type: Criminal

Eastern District of Wisconsin. No. 2:11-cr-00200-LA-1 — **Lynn Adelman**, *Judge*.

Before BAUER, EASTERBROOK, and HAMILTON, *Circuit Judges*.

BAUER, *Circuit Judge*. Ladmarald Cates, an officer with the Milwaukee Police Department, sexually assaulted Iema Lemons in her home after Cates responded to Lemons' 911 call. A jury convicted Cates by special verdict of aggravated sexual abuse and the district court judge sentenced him to 24 years in prison. We affirmed on direct appeal. Cates filed an action alleging ineffective assistance of counsel. The district court judge denied the motion. We reversed, finding Cates' trial and appellate counsel performed deficiently. The district court reopened the criminal case and the government obtained a three-count superseding indictment. Facing a second trial, Cates moved to dismiss the aggravated sexual abuse by force allegation based on issue preclusion. After his motion was denied, this appeal followed. For the subsequent reasons, we affirm the district court's denial of that motion.

Jason Burkett v. Mark Sevier No. 20-1389

Submitted August 17, 2020 — Decided September 2, 2020

Case type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:19-cv-01081-JMS-DLP — **Jane Magnus-Stinson**, Chief Judge.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

A disciplinary hearing officer found Jason Burkett guilty of violating a prison rule and sanctioned him with the loss of 30 days of good-time credit. Burkett petitioned under 28 U.S.C. § 2254 for a writ of habeas corpus, alleging that the sanction violated his due-process rights because there was no evidence that he broke the rule. The district court denied the petition, concluding that some evidence supported the hearing officer's decision. We agree and affirm the judgment.

Travis Dickerson v. Allison Gersy No. 20-1256

Submitted August 17, 2020 — Decided September 2, 2020

Case Type: Prisoner

Eastern District of Wisconsin. No. 19-CV-177 — **Nancy Joseph**, *Magistrate Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

Without first pursuing an administrative remedy, Travis Dickerson, a Wisconsin inmate, sued Allison Gersy and Dillion Beverly, two corrections officers, after they refused to add his friend to the prison's list of his permitted visitors. The district court dismissed his suit for failure to exhaust his administrative remedies. Because Dickerson had an available administrative remedy that he did not use, we affirm.

Christel Van Dyke v. Village of Alsip No. 20-1041

Submitted August 26, 2020 — Decided September 2, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 18 C 6112 — **Virginia M. Kendall**, *Judge*.

Before MICHAEL S. KANNE, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

ROVNER, *Circuit Judge*, dissenting in part.

ORDER

Rather than complying with a zoning ordinance or applying for a variance, Christel Van Dyke sued the Village of Alsip and its building commissioner for enforcing it against her and preventing her from renting out a garden apartment. She admitted the noncompliance but asserted that the defendants targeted her while not enforcing the ordinance against others, violating the Equal Protection Clause. She also claimed that enforcing the ordinance against her amounted to a taking, requiring compensation. Because these allegations do not state a claim for either an equal protection violation or an unlawful taking, we affirm the district court's dismissal of her suit.

Continental Vineyard LLC v. Randy Dzierzawski Nos. 19-2089 & 19-2173

Argued June 1, 2020 — Decided September 2, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 3375 — **Thomas M. Durkin**, *Judge*.

Before RIPPLE, WOOD, and SCUDDER, *Circuit Judges*.

WOOD, *Circuit Judge*. This case pits two wine enterprises against one another. In one corner, we have Gerald Forsythe, who formed Indeck-Paso Robles, LLC ("Indeck") for the purpose of creating and managing a wine-grape vineyard. In the other, we have Randy Dzierzawski, who started out as Forsythe's business associate and vice-president and later branched out on his own. In time, Forsythe became convinced that Dzierzawski and his company stole valuable business opportunities from Forsythe's operations. Litigation ensued, with an ultimate outcome largely favoring Dzierzawski, but also giving Forsythe's company \$285,731 as disgorgement. Forsythe and his related companies have appealed from the judgment in favor of the Dzierzawski parties, largely on the ground of allegedly fatal inconsistencies in the jury's verdict. Dzierzawski has cross-appealed from the disgorgement order... We AFFIRM the decision of the district court.

Jesse Norwood v. East Allen County Schools No. 19-171

Submitted August 17, 2020 — Decided September 2, 2020

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:15-cv-00249-SLC — **Susan L. Collins**, *Magistrate Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

Jesse Norwood, an African-American special-education teacher, received a series of poor reviews and voluntarily quit his job with the East Allen County Schools in Indiana. He then sued the school district for discrimination, asserting that it forced him to resign because of his race. The district court entered summary judgment for the school district. Because no reasonable juror could conclude that Norwood was meeting the legitimate expectations of his job or that he was forced to resign, we affirm the judgment.

Illinois Republican Party v. J. B. Pritzker No. 20-2175

Argued August 11, 2020 — Decided September 3, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 20 C 3489 — **Sara L. Ellis**, *Judge*.

Before WOOD, BARRETT, and ST. EVE, *Circuit Judges*.

WOOD, *Circuit Judge*. As the coronavirus SARS-CoV-2 has raged across the United States, public officials everywhere have sought to implement measures to protect the public health and welfare. Illinois is no exception: Governor J. B. Pritzker has issued a series of executive orders designed to limit the virus's opportunities to spread. In the absence of better options, these measures principally rely on preventing the transmission of viral particles (known as virions) from one person to the next. Governor Pritzker's orders are similar to many others around the country. At one point or another, they have included stay-at-home directives; flat prohibitions of public gatherings; caps on the number of people who may congregate; masking requirements; and strict limitations on bars, restaurants, cultural venues, and the like. These orders, and comparable ones in other states, have been attacked on a variety of grounds. Our concern here is somewhat unusual. Governor Pritzker's Executive Order 2020-43 (EO43, issued June 26, 2020) exhibits special solitude for the free exercise of

religion... We conclude with some final thoughts. The entire premise of the Republicans' suit is that if the exemption from the 50-person cap on gatherings for free-exercise activities were found to be unconstitutional (or if it were to be struck down based on the allegedly ideologically driven enforcement strategy), they would then be free to gather in whatever numbers they wished. But when disparate treatment of two groups occurs, the state is free to erase that discrepancy in any way that it wishes. See, e.g., *Stanton v. Stanton*, 429 U.S. 501, 504 n.4 (1977) ("[W]e emphasize that Utah is free to adopt either 18 or 21 as the age of majority for both males and females for child-support purposes. The only constraint on its power to choose is ... that the two sexes must be treated equally."). In other words, the state is free to "equalize up" or to "equalize down." If there were a problem with the religious exercise carve-out (and we emphasize that we find no such problem), the state would be entitled to return to a regime in which even religious gatherings are subject to the mandatory cap. See *Elim*, 962 F.3d 341. This would leave the Republicans no better off than they are today. We AFFIRM the district court's order denying preliminary injunctive relief to the appellants.

Madelyn Genskow v. Stacey Prevost No. 20-1601

Submitted September 2, 2020 — Decided September 3, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 19-C-1474 — **William C. Griesbach**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Madelyn Genskow, an Oneida Nation elder, was forcibly removed by tribal police officers from a meeting of the tribe's governing body after she voiced her opinion that the scheduled agenda was not being followed. Genskow sued the four officers who carried her out, alleging that they violated her constitutional rights. The district court, concluding that the real party in interest was the tribe and not the officers, dismissed the suit based on the doctrine of tribal sovereign immunity. We affirm.

Anthony Stelmokas v. Bank of America, N.A. No. 20-1273

Submitted September 2, 2020 — Decided September 3, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 18 C 8262 — **John Z. Lee**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Anthony Stelmokas appeals the district court's dismissal of this suit, his second one against Bank of America, in which he seeks damages arising out of funds that the bank withheld from his account. Because the district court correctly ruled that the doctrine of res judicata bars this second suit, we affirm the dismissal.

Austin Ware v. Illinois Department of Corrections No. 19-3521

Argued August 4, 2020 — Decided September 3, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 19 C 3139 — **John Z. Lee**, *Judge*.

Before DANIEL A. MANION, *Circuit Judge* DIANE P. WOOD, *Circuit Judge* AMY C. BARRETT, *Circuit Judge*

ORDER

Austin Ware, an employee of the Illinois Department of Corrections ("IDOC"), appeals the district court's dismissal of his second suit alleging discrimination, harassment, and retaliation by his employer and others. Because the district court correctly held that the doctrine of claim preclusion barred Ware's second action, we affirm its judgment.

Firas Ayoubi v. Wexford Health Sources, Inc. No. 19-2794

Submitted September 2, 2020 — Decided September 3, 2020

Case Type: Prisoner

Southern District of Illinois. No. 18-cv-1689-NJR-GCS — **Nancy J. Rosenstengel**, *Chief Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Firas Ayoubi, an Illinois inmate who sued prison doctors for deliberate indifference to his painful neurological condition, appeals the denial of his request for a preliminary injunction. Ayoubi believes that Wexford Health Sources, Inc., and two of its doctors have ignored his condition—which he describes as a "nervous tick" that causes involuntary twitching and jerking—and sought an injunction compelling his treatment by an outside specialist. The district court denied Ayoubi's request, concluding that he had not demonstrated a reasonable likelihood of success on the merits. We see no error in the district court's decision and affirm.

USA v. Howard Fleming No. 19-2271

Submitted September 2, 2020 — Decided September 3, 2020

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:18CR127-001 — **Jon E. DeGuilio**, Chief Judge.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Howard Fleming pleaded guilty to possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), and possessing a firearm as a felon, 18 U.S.C. § 922(g), and received a sentence of 97 months' imprisonment. Although, in his plea agreement, Fleming expressly waived his right to appeal his conviction and "all components of his sentence," he filed a notice of appeal. His appointed counsel asserts that the appeal is frivolous and seeks to withdraw. *See Anders v. California*, 386 U.S. 738, 746 (1967). Counsel's brief explains the nature of the case and addresses potential issues that an appeal of this kind would be expected to involve. Because her analysis appears thorough, and Fleming has not responded to her motion, see CIR. R. 51(b), we limit our review to the subjects counsel discusses... Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.

USA v. Roland Pulliam No. 19-2162

Argued May 20, 2020 — Decided September 3, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 16-cr-328 — **Sara L. Ellis**, *Judge*.

Before SYKES, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Roland Pulliam was arrested after fleeing from two Chicago police officers. During the chase, both officers saw a gun in Pulliam's hand. Pulliam had previously been convicted of multiple felonies, making it a federal crime for him to possess a gun. The government charged him with possessing a firearm as a felon, 18 U.S.C. § 922(g)(1); Pulliam was convicted after a jury trial. After Pulliam was sentenced, the Supreme Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which clarified the elements of a § 922(g) conviction. Now, in addition to proving that the defendant knew he possessed a firearm, the government must also prove the defendant belonged to "the relevant category of persons barred from possessing a firearm." *Id.* at 2200. This knowledge-of-status element was not mentioned in the jury instructions at Pulliam's trial. Pulliam now argues that the erroneous jury instructions and three evidentiary errors require the reversal of his conviction. But none of these alleged errors call for the reversal of Pulliam's conviction, so we affirm.

Yeison Meza Morales v. William Barr No. 19-1999

Argued April 7, 2020 — Decided June 26, 2020 — Amended September 3, 2020

Case Type: Agency

Board of Immigration Appeals. No. A216-222-551

Before ROVNER, HAMILTON, and BARRETT, *Circuit Judges*.

BARRETT, *Circuit Judge*. Yeison Meza Morales is a native and citizen of Mexico who entered the United States without inspection as a child. As an adult, Meza Morales petitioned for U nonimmigrant status, a special visa for victims of certain crimes. While his petition was pending, he was charged as removable based on two grounds of inadmissibility. Meza Morales cited his pending U visa petition as a defense to his removal. The immigration judge agreed to waive both grounds of inadmissibility to allow him to pursue the U visa petition, but later ordered Meza Morales removed as charged on those same grounds. Meza

Morales petitioned us for review of the removal order. He contends that the immigration judge's initial waiver of both grounds of inadmissibility precluded their use as grounds for an order of removal. We disagree; Meza Morales's position would effectively turn the inadmissibility waiver into a substitute for the U visa itself. We nevertheless grant his petition for review on two other bases. Meza Morales had asked the immigration judge to continue or administratively close his case instead of ordering removal. The immigration judge entered the removal order based on the conclusion that those alternative procedures were inappropriate, and the Board affirmed on the same basis. But those alternatives were wrongly rejected. We grant the petition for review and remand the case so that the Board can reconsider.

USA v. Tony Sparkman No. 17-3318

Argued May 13, 2020 — Decided September 3, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 09-cr-332 — **Joan B. Gottschall**, *Judge*.

Before RIPPLE, BARRETT, and BRENNAN, *Circuit Judges*.

BARRETT, *Circuit Judge*. Section 403 of the First Step Act of 2018 amended the mandatory minimum sentence for certain firearm offenses. Sentencing reform is generally prospective, but these amendments also apply to an offense committed before enactment "if a sentence for the offense has not been imposed as of such date of enactment." First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (codified at 18 U.S.C. § 924 note). Tony Sparkman's sentence was pending on appeal on the date of enactment, and, as he sees it, this means that he is entitled to be resentenced with the benefit of the statute's reforms. But our circuit rejected this very argument in *United States v. Pierson*, which holds that "a sentence is 'imposed' in the district court, regardless of later appeals." 925 F.3d 913, 927 (7th Cir. 2019). The district court sentenced Sparkman before the statute passed, so the First Step Act does not apply to him... Because section 403 of the First Step Act does not apply to Sparkman, we AFFIRM the district court's judgment.

Robbie Marshall v. Indiana Department of Correction No. 19-3270

Argued May 28, 2020 — Decided September 4, 2020

Case Type: Civil

Southern District of Indiana, Terre Haute Division. No. 2:18-CV-261 RLM-MJD — **Robert L. Miller, Jr.**, *Judge*.

Before MANION, KANNE, and WOOD, *Circuit Judges*.

MANION, *Circuit Judge*. Robbie Marshall claims his former employer, the Indiana Department of Correction, discriminated against him because of his sexual orientation and retaliated against him. The district court granted summary judgment to the DOC. We affirm.

Speech First, Inc. v. Timothy L. Killeen No. 19-2807

September 4, 2020

Case Type: Civil

Central District of Illinois. No. 3:19-cv-03142-CSB-EIL — **Colin S. Bruce**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

The opinion of this court issued on July 28, 2020, is amended as follows: In the caption, which appears on the first page, correct the name of the defendant-appellee from Thomas L. Killeen to Timothy L. Killeen. On consideration of the petition for rehearing en banc, filed by the plaintiff- appellant, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing en banc is DENIED.

Arthur Beatty, Sr. v. Chaplain Henshaw No. 19-2764

Submitted September 2, 2020 — Decided September 4, 2020

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:19-cv-00622-JRS-DML — **James R. Sweeney II**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

After another inmate tried to frame him as a snitch to get him attacked, Arthur Beatty, Sr., asked prison officials to investigate and remove that inmate from his dormitory. Not only did the officials refuse, he alleges, they also threatened that if he continued to press the issue, they would transfer him out of his favorable housing assignment and write him up for unfounded disciplinary violations. Beatty filed suit, alleging that the officials were threatening him to deter protected speech and that they were deliberately indifferent to the risk of violent attacks. The district court ruled that Beatty failed to state a claim and dismissed the case. Because Beatty adequately alleged a violation of his First Amendment rights, we vacate the judgment in part and remand for further proceedings. We affirm the judgment in all other respects.

Taniesheia Harden v. Comcast Corporation No. 19-2572

Submitted September 2, 2020 — Decided September 4, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 16 C 1931 — **Matthew F. Kennelly**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

After Taniesheia Harden was fired from her job in customer service, she sued her former employer, Comcast Corporation, for unlawful discrimination and a violation of the Illinois Personnel Records Review Act. The district court entered summary judgment on Harden's claim under the Act, and Comcast prevailed at a trial on the discrimination claims. Harden challenges only the entry of summary judgment under the Act. Because in opposing summary judgment Harden failed to point to evidence showing that Comcast violated the Act, and she cannot do so now, we affirm.

Only the text of the opinions is used. No editorial comment is added. For back issues or to send a comment, please contact [Sonja Simpson](#).