

Seventh Circuit Opinions will not be sent on December 28, 2015. Publication will resume on January 4, 2016. **Happy Holidays!**

Opinions for the week of December 14 - December 18, 2015

SirGerald Akbar v. Calumet City, Illinois No. 14-3610

Argued October 6, 2015 — Decided December 14, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 10 C 7993 — **James B. Zagel**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

ORDER

After her son, Prince Akbar, was killed by a Calumet City police officer, Lajuana Lampkins sued the City and two of its police officers for civil-rights and state-law violations. She purported to bring this suit on behalf of her son's estate, despite the fact that she was not then, and never became, the administratrix of the estate. After the suit was filed, but before the district court disposed of the case, Prince's brother SirGerald Akbar was appointed as the Independent Administrator by order of the Circuit Court of Cook County, Probate Division. Without delving into the problems posed by Lampkins's earlier effort to represent the estate, the district court granted the defendants' motion for summary judgment and dismissed the action. We affirm.

Tempest Horsley v. Jessica Trame No. 14-2846

Argued April 17, 2015 — Decided December 14, 2015

Case Type: Civil

Southern District of Illinois. No. 13 CV 00321 — **Nancy J. Rosenstengel**, *Judge*.

Before POSNER and WILLIAMS, *Circuit Judges*, and WOOD, *District Judge*.

WILLIAMS, *Circuit Judge*. Tempest Horsley's application to possess an Illinois Firearm Owner's Identification Card, commonly known as a "FOID card," was returned to her as in- complete because she was over 18 but not yet 21 and her application did not contain a parent or guardian signature. Although she could have under Illinois law, she did not seek further review from the Director of the Illinois State Police. We disagree with Horsley that the Illinois statutory scheme violates her rights under the Second Amendment. Illinois does not impose a categorical ban on firearm possession for 18-to- 20-year-olds whose parents do not consent. Rather, when an applicant cannot obtain a parent or guardian signature, he or she may appeal to the Director for a FOID card, and the Director will make a determination. We conclude that this process for 18-to-20-year-olds is not unconstitutional, so we affirm the decision of the district court.

Indiana Petroleum Marketers v. David Cook No. 14-2559

Argued January 7, 2015 — Decided December 14, 2015

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-00784-RLY-DML — **Richard L. Young**, *Chief Judge*.

Before RIPPLE, WILLIAMS, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. An association of Indiana convenience stores filed this lawsuit seeking to invalidate a state law that restricts the sale of cold packaged beer. The suit claims the law violates the Equal Protection Clause because some kinds of stores may sell cold beer but grocery and convenience stores may not. The district court upheld the law and entered judgment for Indiana. We affirm. A threshold

question is the extent to which the Twenty-first Amendment affects this case. Indiana argues it has “nearly absolute” authority to regulate alcohol sales under the Twenty-first Amendment and no further analysis is necessary. That’s not correct. But the district court was right to uphold the law. Indiana’s cold-beer statute is subject to rational-basis review and survives that lenient standard.

Ammar Mousa v. Loretta E. Lynch No. 15-1778

Submitted October 27, 2015 — Decided December 15, 2015

Case Type: Agency

United States Board of Immigration Appeals. No. A089-554-590

Before MICHAEL S. KANNE, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; COLIN S. BRUCE, *District Judge*.

ORDER

Petitioner, Ammar Mousa, is a stateless Palestinian. He was born in Jordan and grew up in the West Bank. On, or about, August 5, 2006, Petitioner traveled from Jordan and was admitted to the United States as a non-immigrant student to attend Moraine Valley Community College in Palos Hills, Illinois. Petitioner stopped attending college on May 18, 2007, and filed a Form I-589 Application for Asylum and for Withholding of Removal, with the Department of Homeland Security (DHS). DHS did not grant Petitioner’s application and initiated removal proceedings against him by filing a Notice to Appear with the Chicago Immigration Court. The Immigration Judge (IJ) granted Petitioner two substantial continuances to obtain evidence to corroborate his claims. After those two continuances, Petitioner’s first attorney ceased her representation, citing Petitioner’s failure to secure any evidence and his unwillingness to cooperate. Eventually, Petitioner obtained another attorney who asked for a third continuance to produce evidence. The IJ denied the third continuance, noting that Petitioner had already been given ample time to obtain evidence to support his claim. A hearing on Petitioner’s claims was held on March 8, 2012. Following the hearing, the IJ issued an order denying Petitioner’s Application for Asylum and for Withholding of Removal. The IJ also denied Petitioner’s request for protection under the Convention Against Torture (CAT). The IJ ordered that Petitioner be removed to Jordan. Although the judge found Petitioner credible, she concluded that his testimony was insufficient to meet his burdens of proof. Petitioner appealed the IJ’s order to the Board of Immigration Appeals (BIA), challenging: (1) the denial of his application for asylum and for withholding removal and his request for protection under CAT; (2) the denial of his third motion to continue; and (3) the designation of Jordan as the country of removal. The BIA dismissed the appeal... Petitioner’s final contention before this court is that the IJ erred in designating Jordan as the country of removal. Because Petitioner did not designate a country of removal, the IJ designated Jordan. This designation was appropriate since Petitioner departed from Jordan before he came to the United States and was born in Jordan. See 8 U.S.C. § 1231(b)(2)(E)(ii), (iv). Although Petitioner claims that he will be detained upon arrival in Jordan, the record does not support that contention. Therefore, this court does not find error with the designation of Jordan as the country of removal. Based upon the foregoing, the petition for review is DENIED.

Cincinnati Insurance Company v. Vita Food Products, Incorporated No. 15-1405

Argued November 2, 2015 — Decided December 16, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 5181 — **Edmond E. Chang**, *Judge*.

Before BAUER, POSNER, and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. The Cincinnati Insurance Company issued a liability insurance policy to a company called Painters USA for a one-year period beginning on January 15, 2011. It has brought this suit to try to avoid having to provide coverage to another company, Vita Food Products, which claims to be an “additional insured”—that is, to also be covered by the liability insurance policy that Cincinnati had issued to Painters... So if Vita can prove that there was an oral agreement to add it as an additional insured prior to the accident to Ovando, it will be entitled to coverage under Cincinnati Insurance’s policy.

The judgment of the district court in favor of the insurance company is therefore REVERSED and the case REMANDED for further proceedings consistent with this opinion.

Hair Rodriguez-Molinero v. Loretta E. Lynch No. 15-1860

Argued November 18, 2015 — Decided December 17, 2015

Case Type: Agency

Board of Immigration Appeals. No. A075-614-869

Before POSNER, MANION, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. Rodriguez-Molinero seeks deferral of removal to Mexico on the ground that he will be tortured if forced to return there. The Convention Against Torture, an international convention to which the United States is a party, forbids the return of “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Senate Treaty Doc. No. 100–20, p. 20, 1465 U.N.T.S. 85, Art. 3(1). A federal regulation states that “an alien who: has been ordered removed; has been found ... to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal ... shall be granted deferral of removal to the country where he or she is *more likely than not* to be tortured.” 8 C.F.R. § 1208.17(a) (emphasis added). The phrase we’ve italicized, though repeated in numerous opinions, see, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *Milosevic v. INS*, 18 F.3d 366, 372 (7th Cir. 1994), cannot be and is not taken literally, and this for several reasons: It would contradict the Convention (which as noted above requires only “substantial grounds for believing that” if removed the alien “would be *in danger* of being” tortured). It would dictate that while an alien who had a 50.1 percent probability of being tortured in the country to which he had been ordered removed would be granted deferral of removal, an otherwise identical alien who had “only” a 49.9 percent probability of being tortured would be removed—an absurd distinction. And it is not enforceable. The data and statistical methodology that would enable a percentage to be attached to a risk of torture simply do not exist. All that can be said responsibly on the basis of actually obtainable information is that there is, or is not, a substantial risk that a given alien will be tortured if removed from the United States. As we pointed out in *Yi-Tu Lian v. Ashcroft*, 379 F.3d 457, 461 (7th Cir. 2004): “How one translates all this vague information into a probability that [the alien, if removed] will be tortured (remember the test is ‘more likely than not’) is a puzzler. Maybe probability is the wrong lens through which to view the problem. ‘More likely than not’ is the standard burden of proof in civil cases (the ‘preponderance’ standard) and rarely is the trier of fact asked to translate it into a probability (i.e., more than 50 percent). Maybe some strong suspicion that [the alien] is at risk of being tortured if he is [removed] ... would persuade the immigration authorities to let him stay.” (We should note—it relates to this case—that “torture” as defined in the Convention Against Torture as well as in the regulations includes killing whether or not accompanied by other torture—and it is indeed death as well as torture that the petitioner in this case fears. See 1465 U.N.T.S. 85, Art. 1(1), defining torture to include “any act by which severe pain or suffering ... is intentionally inflicted,” and 8 C.F.R. § 1208.18(a)(4)(iii), including “the threat [and *a fortiori* the actuality] of imminent death.”) ... If the Mexican government could be expected to protect the petitioner from the Zetas should he be returned to Mexico, the risk that he would be tortured or killed might be too slight to entitle him to deferral of removal. But the legal team representing our government in this case presented no evidence of this—indeed, it presented no evidence at all. And though the immigration judge remarked that the Mexican government was trying to control the drug gangs, it is success rather than effort that bears on the likelihood of the petitioner’s being killed or tortured if removed to Mexico. And finally the government made no effort to refute the expert’s testimony that the petitioner could not relocate to a safe part of Mexico—that no part is safe for him—a proposition that neither the immigration judge nor the BIA member challenged. For all the reasons we have given, we grant the petition for review and remand the case to the Board of Immigration Appeals for further proceedings consistent with this opinion.

EEOC v. CVS Pharmacy, Incorporated No. 14-3653

Argued October 29, 2015 — Decided December 17, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. 1:14-cv-00863 — **John W. Darrah**, *Judge*.

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

FLAUM, *Circuit Judge*. This appeal arises out of an enforcement action brought by the Equal Employment Opportunity Commission (“EEOC”) under Section 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6. The EEOC claims that CVS Pharmacy, Inc. (“CVS”) is violating Title VII by offering a severance agreement that could deter terminated employees from filing charges with the EEOC or participating in EEOC proceedings. The district court granted summary judgment for CVS because it interpreted Title VII as requiring the EEOC to conciliate its claim before bringing a civil suit, and the EEOC had refused to engage in conciliation. The district court was also skeptical that an employer’s decision to offer a severance agreement to terminated employees could serve as the basis for a “pattern or practice” suit under Title VII, without any allegation that the employer engaged in retaliatory or discriminatory employment practices. On appeal, the EEOC argues that Section 707(a) of Title VII gives it broad powers to sue without engaging in conciliation or even alleging that the employer engaged in discrimination. For the reasons that follow, we disagree with the EEOC and affirm the judgment of the district court.

Clarence Brown v. Brad D. Schimel No. 14-3511

Argued September 9, 2015 — Decided December 17, 2015

Case Type: Prisoner

Eastern District of Wisconsin. No. 13-cv-00570 — **William C. Griesbach**, *Chief Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Clarence E. Brown appeals the district court’s denial of relief under 28 U.S.C. § 2254 (habeas corpus) on his claim that Wisconsin’s prohibition against carrying a concealed weapon, Wis. Stat. § 941.23 (effective 2007–2011), is unconstitutional under the Second Amendment as applied to him. Because the district court did not err in finding that Brown’s as-applied claim was procedurally defaulted, we AFFIRM.

Kevin McCarthy v. Patricia Fuller Nos. 14-3308, 15-1839

Argued September 21, 2015—Decided December 18, 2015

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:08-cv-00994-WTL-DML — **William T. Lawrence**, *Judge*.

Before POSNER, WILLIAMS, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*, concurring.

POSNER, *Circuit Judge*. This suit, instituted in 2008, grows out of an event in Indiana in 1956: Mary Ephrem, a Catholic Sister of the Congregation of the Sisters of the Precious Blood, claimed to have encountered a series of apparitions of the Virgin Mary, which had told her: “I am Our Lady of America.” With support from the Catholic Archbishop of Cincinnati an elaborate program of devotions to Our Lady of America was launched. Our Lady has been credited with healing sick people who appealed to her for a cure, although whether either the apparitions or the cures are authentic has not been determined by the Congregation for the Doctrine of the Faith, the body within the Roman Catholic hierarchy that is responsible for making such determinations. In the wake of the visions and the Archbishop’s support, Sister Ephrem joined with other Sisters of her Congregation in a contemplative cloister—a “strictly cloistered house in the Congregation” created in order “to enable Sisters with a special calling to devote their entire energies to the worship and contemplation of God.” Approved in 1963 by Pope Paul VI, the new cloister remained in existence until 1979. Sister Therese (as Patricia Fuller, the principal defendant in

this case, styled herself—we'll explain why we call her "Fuller" rather than "Sister Therese") entered the contemplative cloister in 1965. In 1978 or 1979 its three members (two of them being Fuller and Sister Ephrem) formed a new congregation, which they called the Contemplative Sisters of the Indwelling Trinity. And in 1993 Sister Ephrem founded Our Lady of America Center, dedicated to promoting the devotions to Our Lady. She directed the Center until her death in 2000, whereupon she was succeeded by Fuller. Sister Ephrem had willed all her property to Fuller, who also took control of the Center and thus obtained control over all property that belonged to either Sister Ephrem or the Center. Most of the property pertained to the devotions to Our Lady of America and had been created by Sister Ephrem or donated to the Contemplative Sisters or to Our Lady of America Center. Fuller registered trademarks for a variety of the artifacts related to Our Lady of America that had been acquired by the two organizations, including documents such as Sister Ephrem's diary (which Sister Ephrem had copyrighted, along with a song, a painting, and sculpture), medallions, plaques, and a statue of Our Lady. In 2005 Kevin McCarthy, a lawyer and Catholic layman, and Albert Langsenkamp, who claims to be a Papal Knight of the Holy Sepulchre, met Fuller and committed to help her promote the devotions to Our Lady—spread the word, as it were. The three worked together amicably at first, and in gratitude Fuller gave them the statue and other artifacts of Our Lady. But in 2007 Fuller had a falling out with McCarthy and Langsenkamp that erupted the following year into this bitter, protracted lawsuit, now in its eighth year. Langsenkamp established the Langsenkamp Family Apostolate and McCarthy and Langsenkamp (and the latter's apostolate) claim to be the authentic promoters of devotions to Our Lady of America and to be the lawful owners of all the documents and artifacts accumulated by Fuller and Sister Ephrem... So what to do? As we said, the jury found defamation without indicating which charges of defamation, of the nine listed in the jury instruction, they believed had been proved. The judge could have based the injunction on his own assessment of the evidence, since the issuance of an injunction is the responsibility of the trial judge rather than of the jury. But he didn't do that; he accepted the plaintiffs' formulation of the injunction without considering the defendants' response, because it was untimely, even though the preamble to the injunction was a patent violation of the First Amendment. To conclude, we affirm the entire judgment except the injunction, which we vacate, leaving it to the district judge to decide in the first instance whether to issue a new injunction, one consistent with the criticisms in this opinion of the injunction he issued. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

NLRB v. Big Ridge, Incorporated Nos. 15-1046, 15-1103

Argued November 5, 2015 — Decided December 18, 2015

Case Type: Agency

National Labor Relations Board. Nos. 14-CA-30379, 14-CA-30406, 14-RC-12824

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

MANION, *Circuit Judge*, concurring in part and dissenting in part.

FLAUM, *Circuit Judge*. In 2012, the National Labor Relations Board ("the Board") found that Big Ridge, Inc. violated the National Labor Relations Act, 29 U.S.C. § 158 ("the Act"). Big Ridge threatened employees with mine closure and job loss based on their support of the union and discharged employee Wade Waller because of his union support. Big Ridge petitioned this Court for review, and the appeal turned on the Board's authority to issue its order. We vacated the Board's order, finding that the Board lacked a quorum because three of the Board's five members were improperly appointed under the Recess Appointments Clause of the Constitution. In 2014, a validly constituted Board considered the case anew and again found that Big Ridge violated the Act. Big Ridge filed a petition for review, arguing that the Board lacked jurisdiction to issue the 2014 order and that even if the Board did have jurisdiction, the Board erred in holding that Big Ridge violated the Act by discharging Waller. The Board filed a cross-application to enforce its order. We deny Big Ridge's petition for review and grant the Board's cross-application for enforcement of its order.

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](#).