Creative Appellate Practice

Faculty of Federal Advocates
August 4, 2021
Panelists: Josh Lee, Ruth Moore, Karl Schock
Moderator: Kathleen Shen

Creative Procedural Tactics

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1. Joint Motion for Summary Disposition, *United States v. Lawless*, No. 17-1148 (10th Cir. December 30, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	Case No. 17-1148
v.	)	
DAVID J. LAWLESS, Defendant-Appellant.	)	

JOINT MOTION FOR SUMMARY DISPOSITION

Plaintiff-Appellee United States of America and Defendant-Appellant David Lawless jointly move this Court to cancel the oral argument scheduled for January 21, 2020, and to summarily dispose of this matter by reversing the district court's order and remanding to the district court with directions, pursuant to 28 U.S.C. § 2106, to (a) vacate Mr. Lawless's conviction for violating 18 U.S.C. § 924(c), (b) enter a judgment of conviction for arson, in violation of 18 U.S.C. § 844(i), as a valid and lesser-included substitute for Mr. Lawless's § 924(c) conviction, and (c) re-sentence Mr. Lawless on the arson conviction.

In support of this Motion, the parties jointly state:

1. In 2012, Mr. Lawless was charged by superseding indictment with three counts of arson, in violation of § 844(i), and four related counts of using a destructive device to commit a crime of violence, in violation of § 924(c). *See* R. vol. I at 15–19.

2. Subsequently, Mr. Lawless pleaded guilty to Count 2 of the indictment, R. vol. II at 87, which charged Mr. Lawless with using a destructive device to commit the arson charged in Count 1, R. vol. I at 16. On the Government's motion, the remaining counts of the superseding indictment were dismissed. R. vol. II at 87.

3. Years later, Mr. Lawless moved to vacate his § 924(c) conviction as unconstitutional. R. vol. I at 37–45. The district court denied relief. *Id.* at 105. Mr. Lawless appealed, and while his appeal was pending, the Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019).

4. The Government has previously acknowledged and continues to acknowledge that Mr. Lawless's § 924(c) conviction is invalid under *Davis* and cannot stand.

5. Until now, however, the parties have disputed the appropriate remedy. The parties are now in agreement as to the appropriate remedy.

6. The Government has previously argued that, because Mr. Lawless's plea to the § 924(c) count admitted all the elements of the arson charged in Count 1 of the superseding indictment, the Court should effectively reduce Mr. Lawless's invalid § 924(c) conviction to a valid arson conviction. Mr. Lawless has, until now, contested the propriety of that remedy.

7. The Government's most recent filing—its supplemental brief of December 2, 2019—stated at pp. 9–10 that, if this Court directed entry of a judgment of conviction for arson, then the Government would stand by its dismissal of the remaining counts of the indictment.

8. In reliance on the Government's assurance that the remaining counts of the superseding indictment will not be reinstated, Mr. Lawless hereby stipulates that the Court should direct imposition of a conviction for the arson offense charged in Count 1 of the indictment in place of the invalid § 924(c) conviction.

9. In connection with the guilty plea underlying his § 924(c) conviction, Mr. Lawless admitted all of the elements of arson as set forth in Count 1 of the superseding indictment, *see* R. vol. I at 25, Supp. R. vol. II at 17, and Mr. Lawless hereby reconfirms those admissions.

10. In connection with the guilty plea underlying his § 924(c) conviction, Mr. Lawless entered a stipulation of facts as to the conduct underlying the charges against him, *see* R. vol. I at 26–32, Supp. R. II at 18, and Mr. Lawless hereby reconfirms that stipulation of facts.

11. Mr. Lawless has signed a copy of this Motion *in propria persona* after being thoroughly advised by counsel.

12. Except as specified above, the agreement in this motion supersedes and replaces the plea agreement entered by the parties in 2012.

13. In light of the foregoing, the parties now jointly submit that this Court has the authority, pursuant to 28 U.S.C. § 2106, not only to vacate Mr. Lawless's § 924(c) conviction but also to direct the district court to enter a judgment of conviction for the lesser-included arson offense charged in Count 1 of the superseding indictment. Section 2106 grants this Court broad equitable authority to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." The parties agree that, on the strength of the instant motion, vacating Mr. Lawless's § 924(c) conviction and directing the district court to enter a judgment of conviction for arson would be "appropriate" and "just under the circumstances" within the meaning of § 2106.

14. Because the parties are now in complete agreement regarding how this matter should be resolved, the parties jointly submit that the oral argument presently set for January 21, 2020, is not necessary and that this case should be summarily resolved as described above.

WHEREFORE, the parties jointly request that this Court grant this Motion, that it cancel the pending oral argument, and that it summarily dispose of this matter by reversing the district court's order and remanding to the district court with directions, pursuant to 28 U.S.C. § 2106, to (a) vacate Mr. Lawless's conviction for violating 18 U.S.C. § 924(c), (b) enter a judgment of conviction for arson, in violation of 18 U.S.C. § 844(i), as a valid and lesser-included substitute for Mr. Lawless's § 924(c) conviction, and (c) resentence Mr. Lawless on the arson conviction.

Respectfully submitted,

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David Lawless

12/30/19
Date

CERTIFICATIONS

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This motion is 901 words long and, therefore, complies with any applicable type-volume restrictions.

(2) Any required privacy redactions have been made.

(3) If required to file additional hard copies, the ECF submission is, with the exception of any redactions, an exact copy of those hard copies.

(4) The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses.

(5) This motion is being jointly filed by both parties and, therefore, no service is necessary. In any event, the motion is being filed via the CM/ECF system, which will send notice to all counsel.

(6) I sent a copy of the foregoing, via U.S. Mail, to David Lawless.

Josh Lee

JOSH LEE
Assistant Federal Public Defender

2. Motion for Summary Disposition, *United States v. Hall*, No. 18-1241 (10th Cir. Sept. 6, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Case No. 18-1241
JOSHUA HALL, Defendant-Appellant.	)	

MOTION FOR SUMMARY DISPOSITION

Defendant-Appellant Joshua Hall, through counsel, respectfully requests that the Court summarily reverse the judgment below based on its intervening and controlling decision in the case of Mr. Hall's co-defendant, Aaron Bowen. *See United States v. Bowen*, ___ F.3d ___, No. 17-1011, 2019 WL 4146452 (10th Cir. Sept. 3, 2019).

Because the procedural posture of this appeal is complex, Mr. Hall's request for summary reversal requires him to ask for four interrelated forms of relief:

First, that the Court lift the abatement on this case, which was based on the pendency of *Bowen*;

Second, that the Court grant Mr. Hall leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a)(3), because his appeal is not frivolous;

Third, that the Court grant Mr. Hall a certificate of appealability pursuant to 28 U.S.C. § 2253, because reasonable jurists could conclude that the district court's decision denying relief was wrong; and

Fourth, that the Court exercise its discretion to dispense with full briefing and summarily dispose of this appeal pursuant to 10th Cir. R. 27.3(A)(1)(b), because *Bowen* controls the outcome of this case.

These requests are related, and have been presented together, in that they all turn on the merits of Mr. Hall's post-conviction challenge to his § 924(c) conviction. And Mr. Hall maintains that all four requests should be granted based on the Court's recent decision in *Bowen*, which resolves the issues in this appeal in favor of Mr. Hall.

The Government's position on Mr. Hall's requests are as follows. The Government does not object to lifting the abatement. The Government does not plan to oppose Mr. Hall's requests that he be granted leave to proceed in forma pauperis and that a certificate of appealability be granted, inasmuch as the Government ordinarily has no involvement in such preliminary matters. The Government does, however, oppose Mr. Hall's request for summary disposition, and it will ask that this case be set for normal briefing.

I. Background

Mr. Hall and his co-defendant, Aaron Bowen, were each convicted of witness retaliation, conspiracy to commit witness retaliation, and possession and brandishing of a firearm in furtherance of a federal crime of violence in violation of 18 U.S.C. § 924(c). R. vol. I at 44–45; *Bowen*, 2019 WL 4146452, at *1. In the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), both Mr. Hall and Mr. Bowen filed post-conviction motions challenging their § 924(c) convictions, arguing (i) that § 924(c)'s residual clause is unconstitutionally

vague and (ii) that their § 924(c) convictions rested on that statute's residual clause. R. vol. I at 55–65, 85–99; *Bowen*, *supra*, at *2.

The district court denied both motions on essentially identical grounds. R. vol. I at 101–12; *Bowen*, *supra*, at *2. In Mr. Hall's case, the district court also denied a certificate of appealability and revoked Mr. Hall's permission to proceed in forma pauperis on appeal based on its view that any appeal would be frivolous. *Id.* at 111.

Both Mr. Hall and Mr. Bowen appealed to this Court. Mr. Bowen's case reached this Court first. On June 22, 2018, Mr. Hall filed an unopposed motion to abate this appeal, positing that this appeal was substantively identical to Mr. Bowen's and that briefing both cases would be a waste of resources. This Court granted that motion in an order that issued the same day.

The abatement continued uneventfully until the Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis* held that § 924(c)'s residual clause is unconstitutionally vague—just as Mr. Hall had been arguing.

In the wake of *Davis*, on June 27, 2019, Mr. Hall filed a status report maintaining that his appeal should remain abated pending the outcome of Mr. Bowen's appeal. Mr. Hall's status report asserted that, after *Davis*, the question of whether retaliating against a witness remained a crime of violence under the elements clause remained contested and that Mr. Bowen's appeal would resolve that question. The status report further asserted that "this Court's decision in *Bowen* (assuming it is precedential) should definitively resolve Mr. Hall's case and render this appeal appropriate for summary disposition." This Court

called for the views of the Government on continuing the abatement, and on June 28, 2019, the Government responded in pertinent part: "For the reasons stated in the Appellant's status report, the United States agrees that this case should remain abated pending this Court's issuance of a decision in *Bowen*."

On September 3, 2019, this Court decided *Bowen* in a precedential opinion. The Court reversed the district court's decision and ordered it to vacate Mr. Bowen's § 924(c) conviction. *Bowen*, 2019 WL 4146452, at *13.

Mr. Hall now requests a summary disposition in accordance with the decision in his co-defendant's essentially identical case.

II. Argument

As noted above, the order from which Mr. Hall appeals made three interrelated rulings: it denied Mr. Hall's post-conviction motion, it refused a certificate of appealability, and it revoked Mr. Hall's right to proceed in forma pauperis. Each of these rulings depended on the district court's view that Mr. Hall is not entitled to post-conviction relief. In light of this Court's decision in *Bowen*, however, Mr. Hall plainly *is* entitled to post-conviction relief, so all three of the district court's rulings must be rejected.

These are the legal standards:

- Leave to proceed *in forma pauperis* should be granted if an indigent appellant[1] has "a rational argument on the law or the facts," such that an appeal wouldn't be "frivolous," *Regan v. Cox*, 305 F.2d 58, 59–60 (10th Cir. 1962).

[1] Mr. Hall was previously determined to be indigent, and his indigence is not in dispute.

- A certificate of appealability should be granted if "jurists of reason could disagree with" the district court's denial of post-conviction relief. *E.g.*, *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

- This Court may grant a summary disposition (and summarily reverse the decision below) if it determines in its discretion that "a supervening change of law" renders a full-dress appeal unnecessary. *See* 10th Cir. R. 27.3(A)(1)(b).

Because *Bowen* (a supervening change of law) makes plain that the district court's decision was wrong and merits summary reversal, it follows *a fortiori* that this appeal is taken in good faith and jurists of reason could disagree with the district court's decision. In *Bowen*, the Court held (1) that witness retaliation and conspiracy to commit witness retaliation are not a crimes of violence under § 924(c)'s elements clause, (2) that Mr. Bowen's § 924(c) conviction rested on the unconstitutional residual clause, and (3) that Mr. Bowen's challenge to his § 924(c) conviction was not procedurally barred because he is actually innocent of violating § 924(c). *Bowen*, 2019 WL 4146452, *3–*13. The same conclusions follow in Mr. Hall's case. Mr. Hall's predicate offenses of witness retaliation and conspiracy to commit witness retaliation are not crimes of violence under the elements clause. Mr. Hall's § 924(c) conviction rested on the unconstitutional residual clause. And Mr. Hall's challenge to his § 924(c) conviction is not procedurally barred because he is actually innocent of violating § 924(c). Accordingly, Mr. Hall's § 924(c) conviction, like Mr. Bowen's, must be vacated.

III. Conclusion

Mr. Hall respectfully submits that the Court should grant him the relief requested. The Court should lift the abatement because it was based on the pendency of *Bowen*, and

Bowen has now been decided. It should allow him to proceed *in forma pauperis* because this appeal is not frivolous. It should grant a certificate of appealability because jurists of reason could think he is entitled to relief. And it should grant a summary disposition pursuant to 10th Cir. R. 27.3(A)(1)(b) because this Court's intervening decision in *Bowen* makes plain that the district court must be reversed.

Respectfully submitted,

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Counsel for Defendant-Appellant

CERTIFICATIONS

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This motion is proportionally spaced and contains 1292 words and therefore complies with the applicable type-volume limitations.

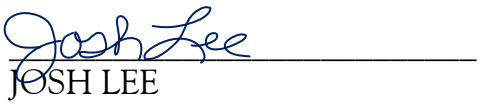
(2) Any required privacy redactions have been made.

(3) If required to file additional hard copies, the ECF submission is, with the exception of any redactions, an exact copy of those hard copies.

(4) The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses.

(5) On September 6, 2019, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel, *viz.*: Karl Schock, Karl.Schock@usdoj.gov

(6) I sent a copy of the foregoing, via U.S. Mail, to Joshua Hall.



JOSH LEE
Assistant Federal Public Defender

3. Response to Motion for Summary Disposition, *United States v. Hall*, No. 18-1241 (10th Cir. Sept. 19, 2019)

No. 18-1241

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA HALL,

Defendant-Appellant.

RESPONSE TO MOTION FOR SUMMARY DISPOSITION

The government opposes Appellant Joshua Hall's motion for summary disposition and requests that this case be set for normal briefing. Although this Court recently held that witness retaliation under 18 U.S.C. § 1513(b) is not *categorically* a crime of violence, the Court left open whether the statute is divisible, such that the modified categorical approach applies. *United States v. Bowen*, 2019 WL 4146452, at *7 n.5 (10th Cir. Sept. 3, 2019). To the extent the statute is divisible, the Court "easily conclude[d] that witness retaliation through bodily injury qualifies as a crime of violence." *Id.* at *7.

In this case, the government intends to argue that the witness retaliation statute is divisible, and that Hall was convicted of *causing bodily injury* with the intent to retaliate against a witness. The divisibility issue needs to be resolved before the Court can rule on whether Hall's predicate offense is a crime of violence under § 924(c).

I. Background

Hall was convicted of retaliation against a witness, conspiracy to retaliate against a witness, and possession and brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). Vol. 1 at 44-45. The predicate crime of violence for the § 924(c) count was each of the other two counts of conviction. *Id.* at 8-9, 34.

The indictment specified that the witness retaliation charge was for causing (and threatening to cause) bodily injury to another person:

> On or about September 8, 2004, in the State and District of Colorado, JOSHUA J. HALL . . . did knowingly engage in conduct and **thereby caused bodily injury to another person,** and threatened to do so, with intent to retaliate against the person for his providing information to a law enforcement officer relating to the commission or possible commission of a federal offense . . . .

Vol. 1 at 6 (emphasis added). So did the jury instructions. *Id.* at 29 (listing as element "that the physical conduct by defendant

caused bodily injury to [the victim]") Neither the indictment nor the jury instructions made any mention of damage to property.

Hall moved to vacate his § 924(c) conviction after *Johnson v. United States*, 135 S. Ct. 2551 (2015). Vol. 1 at 55-66. He argued that the "risk of force" clause in § 924(c)(3)(B) was unconstitutional, and that his predicate offense of witness retaliation did not qualify as a crime of violence under the elements clause of § 924(c)(3)(A). *Id.*

The district court denied the motion on three alternative grounds: (1) it was untimely; (2) it was procedurally defaulted; and (3) even if it were procedurally proper, it would fail on the merits because witness retaliation qualifies as a predicate crime of violence under the still-valid elements clause of § 924(c)(3)(A). *Id.* at 101-12. The district court denied a certificate of appealability. *Id.* at 111. Hall appealed.

II. The *Bowen* decision

Aaron Bowen was Hall's co-defendant. He was convicted of the same charges and his case followed the same procedural path: he moved to vacate his conviction on the ground that witness retaliation does not qualify as a crime of violence, that motion was denied, and he appealed.

But Bowen's motion was denied more than a year before Hall's. So by the time Hall appealed, Bowen's appeal had been fully briefed. Hall therefore moved – with no opposition from the government – to abate this appeal pending the Court's decision in *Bowen*. The Court granted Hall's motion and the case has remained abated since then.

In the *Bowen* appeal, the government argued, among other things, that retaliating against a witness is categorically a crime of violence under § 924(c)'s elements clause. The government did not argue, however, that the witness retaliation statute was divisible between retaliation by bodily injury and retaliation by property damage.

On September 3, 2019, this Court issued its opinion in *Bowen*. 2019 WL 4146452. The Court concluded that Bowen's witness retaliation offense was not categorically a crime of violence. *Id.* at *6. It "easily conclude[d] that witness retaliation through bodily injury qualifies as a crime of violence." *Id.* at *7. But because the government had not argued the statute was divisible, the Court assumed without deciding that it was not and, therefore, applied the "pure categorical approach." *Id.* at n.5. The Court then held that witness retaliation through property damage is not a crime of violence.

Id. at *8. Thus, Bowen's offense – construed to encompass *either* causing bodily injury or damaging property – did not so qualify. *Id.*

The government is considering whether to seek rehearing en banc in *Bowen* and has received an extension of time to file its petition.

III. The outstanding divisibility question

Bowen expressly leaves open the question of whether the federal witness retaliation statute underlying Hall's § 924(c) conviction is divisible. In other words, does § 1513(b) define a single offense that can be committed by various factual means (as *Bowen* assumed), or does it define two (or more) offenses with different elements – one for retaliation that causes bodily injury and one for retaliation that damages property? *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016); *Bowen*, 2019 WL 4146452, at *7 n.5. The answer to this question is critical because *Bowen* makes clear that the first alternative qualifies as a crime of violence, while the second does not. *Id.* at *7-8. And the indictment and jury instructions in this case confirm that Hall's predicate offense was of the first variety. *See United States v. Titties*, 852 F.3d 1257, 1265 (10th Cir. 2017) (explaining that when a

statute is divisible, court may consult record documents to determine which of the alternative elements formed the basis of the conviction).

In this appeal, the government intends to raise the divisibility argument that was left unresolved in *Bowen*:

1. The indictment in this case charges only "caus[ing] bodily injury to another person," with no mention of damaging property. Vol. 1 at 6-7; *see Mathis*, 136 S. Ct. at 2257 (observing that indictment's "referencing one alternative term to the exclusion of all others" is an indication that statutory alternatives are elements of separate crimes).

2. The jury instruction for witness retaliation also references only bodily injury, and not property damage. Vol. 1 at 29; *see Mathis*, 136 S. Ct. at 2557 (noting that jury instructions may also indicate divisible statute by referencing one alternative to exclusion of others).

3. Tenth Circuit case law defines the elements of witness retaliation without reference to property damage. *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009) (listing elements of offense as (1) the defendant knowingly engaged in conduct either causing, or threatening to cause, bodily injury to another person, and (2) acted with the intent to retaliate for testimony or information).

4. The language of the statute supports this construction because the two offenses are preceded by different verbs *and* have different objects. The statute uses the verb "causes" before the noun "bodily injury," and then uses a different verb, "damages," before the noun "tangible property," further implying two distinct crimes.

5. The divisibility of the witness retaliation statute is currently before the Fourth Circuit in *United States v. Allred*, No. 18-6843.[1]

These factors all support the conclusion that § 1513(b) is divisible into at least two offenses: causing bodily injury with the intent to retaliate against a witness, and damaging tangible property with the intent to retaliate. If it is, the Court would not apply the "pure categorical approach" it applied in *Bowen*. 2019 WL 4146452, at *7 n.5. Instead, it would apply the "modified categorical approach" to determine which alternative § 1513(b) offense was the predicate for Hall's § 924(c) conviction. *See Titties*, 852 F.3d at 1266. Under that approach, Hall's predicate offense would qualify as a crime of violence under § 924(c)(3)(A) because the indictment and jury instructions leave no question that Hall committed the bodily injury version of the crime.

[1] Oral argument was held in *Allred* on September 18, 2019.

Because this issue was left open by *Bowen*, this issue should be fully briefed before Hall's appeal can be resolved.

In addition, the government is considering filing a petition for rehearing en banc in *Bowen*. If the government files a petition, the disposition of this case should await resolution of that petition.

IV. Conclusion

Hall's motion for summary disposition should be denied, and this case should be set for a normal briefing schedule.

September 19, 2019

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee Agent, Version 5.0.6.586, dated 09/19/19 and according to the program are free of viruses.

/s/ Ma-Linda La-Follette
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 27(d)(2)(A) and 32(g)(1) I certify that the **RESPONSE TO MOTION FOR SUMMARY DISPOSITION** is proportionally spaced and contains 1,634 words, according to the Microsoft Word software used in preparing the brief.

/s/ Ma-Linda La-Follette
Ma-Linda La-Follette
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2019, I electronically filed the foregoing **RESPONSE TO MOTION FOR SUMMARY DISPOSITION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Ma-Linda La-Follette
Ma-Linda La-Follette
U.S. Attorney's Office

4. Supplemental Authority filed by United States, *United States v. Aguayo*, No. 21-1009 (10th Cir. June 15, 2021)

U.S. Department of Justice

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June 15, 2021

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RE: *United States v. Aguayo*, No. 21-1009

Dear Mr. Wolpert:

Pursuant to Fed. R. App. P. 28(j), the government alerts the Court and counsel to relevant supplemental authority:

- *Greer v. United States*, --- S. Ct. ----, 2021 WL 2405146 (U.S. June 14, 2021).

Aguayo argues in his Opening Brief at 10-11 that a *Rehaif* error is structural. The Supreme Court expressly rejected that claim in *Greer*, concluding that omitting the *Rehaif* element from the plea colloquy is not structural but is instead subject to plain-error review. *See Greer*, 2021 WL 2405146, at *6-7.

The Court also observed that a defendant "faces an uphill climb" in establishing the third prong of plain error, for a simple reason: "If a person is a felon, he ordinarily knows he is a felon." *Id.* at *4. Accordingly, defendants raising *Rehaif* claims on plain-error review will have difficulty establishing "a 'reasonable probability' that, but for the

Rehaif error, the outcome of the district court proceedings would have been different." *Id.*

For the reasons explained in the government's Answer Brief at 18-32, Aguayo has not carried his burden on plain-error review.

Sincerely,

MATTHEW T. KIRSCH
Acting U.S. Attorney

/s/ Elizabeth S. Ford Milani
ELIZABETH S. FORD MILANI
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I certify that on June 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Ma-Linda La-Follette
MA-LINDA LA-FOLLETTE
U.S. Attorney's Office

5. Supplemental Authority filed by Michael Aguayo, *United States v. Aguayo*, No. 21-1009 (10th Cir. June 15, 2021)

Office of the
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June 15, 2021

Christopher M. Wolper, Clerk
United States Court of Appeals
for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: *United States v. Aguayo*, No. 21-1009

Dear Mr. Wolpert,

I write to respond to the government's letter of June 15, 2021, which cites the recent decision in *Greer v. United States*, ___ U.S. ___, No. 19-8709, 2021 WL 2405146 (U.S. June 14, 2021).

Mr. Aguayo agrees with the government that *Greer* forecloses Mr. Aguayo's preservation argument that he need not show outcome-determinative prejudice. *See* Opening Br. at 10–11. The government is wrong, however, that *Greer* undercuts Mr. Aguayo's primary argument that he can show outcome-determinative prejudice. *See* Opening Br. at 12–22; Reply Br. at 5–25.

The government quotes out-of-context language from *Greer* that obscures the fact that *Greer* is readily distinguishable from Mr. Aguayo's case. The *Greer* Court did observe that defendants face "an uphill climb" and will "ordinarily know[]" that they are a convicted felon, but it did so in the context of a case where the defendants had *actually served* substantially more than a year in prison. Doubtless for that reason, the defendant who had pleaded guilty

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did not even *claim* that he would not have pleaded guilty absent the *Rehaif* error. *See Greer*, 2021 WL 2405146, at *7 n.1.

The Court in *Greer* had no occasion to consider the entirely different situation in which a defendant has never been sentenced to more than a year in prison. In other words, it had no occasion to consider a case like Mr. Aguayo's.

In *Rehaif* itself, however, the Court *did* consider a situation analogous to Mr. Aguayo's. There, the Court recognized that a defendant convicted of a felony who served only probation, and thus was not *punished* with more than a year in prison, may not know that the crime was *punishable* by more than a year in prison. *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019).

Therefore, *Greer* sheds no real light on this case beyond foreclosing the preservation argument at pp. 10–11 of Mr. Aguayo's opening brief.

Respectfully submitted,

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Certifications

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This letter is proportionally spaced and contains 317 words and therefore complies with the applicable type-volume limitations.

(2) On June 15, 2021, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel, *viz.*: Elizabeth S. Ford Milani, elizabeth.ford.milani@usdoj.gov.

(3) I sent a copy of the foregoing, via U.S. Mail, to Michael Aguayo.

Josh Lee

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Assistant Federal Public Defender

6. Motion for Supplemental Briefing, *United States v. Bowen*, No. 17-1011 (10th Cir. Apr. 17, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Respondent-Appellee,	)	
	)	Case No. 17-1011
v.	)	
AARON BOWEN, Movant-Appellant.	)	

MOTION FOR SUPPLEMENTAL BRIEFING

Aaron Bowen, through counsel, respectfully requests that the Court order the parties to file supplemental briefs addressing *Sessions v. Dimaya*, No. 15-1498 (U.S. Apr. 17, 2018),[1] and *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), two potentially dispositive cases decided since this matter was fully briefed. In support of this Motion, counsel states:

1. In their briefing before this Court, the parties vigorously contest the threshold question of whether Mr. Bowen's vagueness challenge to 18 U.S.C. § 924(c)(3)(B) is timely under 28 U.S.C. § 2255(f)(3). The dispute boils down to whether, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court "recognized" a rule that renders § 924(c)(3)(B) unconstitutional.

[1] The slip opionion is available at www.supremecourt.gov/opinions/17pdf/15-1498_1b8e.pdf.

2. The intepretation of *Dimaya* and *Greer*, decided since the close of briefing, may well control the answer to that question.

3. In *Greer*, this Court held that *Johnson*, which concerned the ACCA, did not recognize a rule that rendered the residual clause of the Career Offender mandatory sentencing guideline unconstitutionally vague. This could be relevant because Mr. Bowen's challenge also involves a provision other than the ACCA.

4. In *Dimaya*, the Supreme Court held that 18 U.S.C. § 16(b) is unconstitutionally vague under *Johnson*, explaining that *Johnson* had "straightforward application" to § 16(b) and "effectively resolved" the issue. Slip op. at 6–11. *Dimaya* is significant because (i) § 16(b) is textually identical to § 924(c)(3)(B) and (ii) the case establishes that *Johnson* isn't limited to the ACCA.

5. Because the interpretation of *Greer* and *Dimaya* may in large part determine whether the Supreme Court has recognized a rule that renders § 924(c)(3)(B) unconstitutional and, thus, whether Mr. Bowen's motion is timely under § 2255(f)(3), this Court should order the parties to file supplemental briefs addressing those cases.

6. The Government opposes the relief requested in this Motion, but its opposition is misplaced. Counsel for the Government has informed the undersigned that its position is that the 350 words of a Rule 28(j) letter are sufficient to address

Greer and *Dimaya*, given the extent of the parties' existing briefing on the § 2255(f)(3) issue. With respect, the undersigned did try to craft a Rule 28(j) letter regarding *Greer* and *Dimaya* but was unable to address the complex issues presented by those cases in a minimally competent manner in 350 words. The Court would be better served by a meaningful analysis of *Greer* and *Dimaya* than by conclusory generalizations. Moreover, to the extent that the Court is concerned about the extent of the existing briefing, it can impose appropriate volume restrictions on the supplemental briefing.

WHEREFORE, this Court should grant this Motion and order the parties to file supplemental briefs addressing *Greer* and *Dimaya*.

Respectfully submitted,

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Federal Public Defender

s/ Josh Lee
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CERTIFICATIONS

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This motion is proportionally spaced and contains 455 words and therefore complies with the applicable type-volume limitations.

(2) Any required privacy redactions have been made.

(3) If required to file additional hard, the ECF submission is, with the exception of any redactions, an exact copy of those hard copies.

(4) The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses.

(5) On April 17, 2018, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel, *viz.*: Bishop Grewell, bishop.grewell@usdoj.gov

(6) I sent a copy of the foregoing, via U.S. Mail, to Aaron Bowen

/s/ Josh Lee
JOSH LEE
Assistant Federal Public Defender

commerce advertisements on websites, as well as through the use of social media. Affliction has and does also utilize print advertisements and athlete and other high-profile endorsements. (App. 171-172, 264-345)

From 2009 to 2017, Affliction spent over $3.2 million on marketing and advertising in connection with the Affliction Marks. (App. 172, 347) Generally, retail prices of t-shirts bearing the Affliction Marks range from approximately $19.50 to $68.00. Retail prices of tank tops bearing the Affliction Marks generally range between approximately $27.00 and $48.00, while pricing for hats bearing the Affliction Marks generally range from approximately $20.00 to $38.00. This information is also publicly available on www.afflictionclothing.com. (App. 172)

B. VA's Use of Appellant's Marks

In 2017 Affliction learned that VA was using at least three of its Marks in connection with its business. (App. 349) Specifically, VA was selling apparel bearing the Affliction Marks via its online retail store at www.vapeaffliction.net. This retail store was accessible to consumers across the United States, including those in the state of Utah. (App. 350, 345-356) VA also sells apparel and related accessories bearing Affliction Marks in its retail locations. (App. 352, 771)

VA utilizes the Affliction Marks in connection with the advertisement, marketing, and/or promotion of its products and services via multiple accounts on various social media platforms, including but not limited to Instagram and

Facebook. (App. 351, 358-416) VA utilizes the Affliction Marks in connection with the advertisement, marketing, and/or promotion of its products and services via Internet, social media, and general print advertisements. This marketing also includes multiple versions of fleur-de-lis as well as the "VA" word mark. (App. 352, 427-524)

Affliction LF Fleur-de-Lis (U.S. Reg. No. 4,700,142)	Defendant's Accused Marks

The many types of goods VA sells bearing the Affliction Marks includes but is not limited to apparel, shirts, t-shirts, tank tops, sweatshirts, hats and related accessories. (App. 619-639) VA's consumers purchase apparel bearing the Affliction Marks at the following retail price ranges: $6.75 to $10.00 for tank tops, shirts, and/or t-shirts; and $8.50 to $13.50 for hats. (App. 641-655, 908-1020)

B. Procedural History

On July 25, 2017 Affliction filed a complaint against VA in the United States District Court, Central District, alleging: 1) trademark in violation of the Lanham Act, 2) false designation of origin and false descriptions, 3) common law trademark infringement, 4) common law unfair competition, and 5) Unfair Competition in Violation of Utah Code Annotated Sections 13-5a-101 – 103. (App. 7)

On June 19, 2018 VA filed a Motion for Summary Judgment ("MSJ") regarding Affliction's first and second causes of action for trademark infringement under the Lanham Act, and third cause of action for common law trademark infringement. (App. 33) On July 17, 2018 Affliction filed its Memorandum in Opposition to VA's MSJ. (App. 136) On August 1, 2018 VA filed a belated Reply with new evidence not presented in its initial motion. (App. 1023) On August 1, 2018 Affliction filed an Objection to VA's Reply. (App. 1055)

8. Excerpt of *Affliction Holdings, LLC v. Utah Vap or Smoke, LLC*, No. 18-4146 (10th Cir. Aug. 27, 2019)

I

Affliction is an apparel company headquartered in California. It has registered trademarks which include the AFFLICTION Word Mark, and the "Affliction LF Fleur-de-Lis" (composed of a decorative upside-down fleur-de-lis contained inside of a circle, with the words "AFFLICTION LIVE FAST" in Gothic lettering).

Utah Vap is an electronic nicotine delivery system (i.e., e-cigarette) accessory company headquartered in Utah. It primarily sells vaping accessories but also sells some promotional apparel. Utah Vap's marks incorporate a right-side-up decorative fleur-de-lis within a circle, and the words "VAPE AFFLICTION" in a font dissimilar to the Gothic lettering on the Affliction LF Fleur-de-Lis mark.

Affliction alleged Utah Vap was selling products using marks that misrepresent the products as being from Affliction. It filed suit claiming: (1) trademark infringement under the Lanham Act; (2) false designation of origin and

false descriptions; (3) common law trademark infringement; (4) common law unfair competition; and (5) unfair competition in violation of a Utah statute. Affliction sought damages, noting in its initial discovery disclosures that it "currently lack[ed] information sufficient to calculate either [Utah Vap]'s profits or its actual damages." It later claimed damages based on Utah Vap's revenue.

Utah Vap moved for summary judgment, asserting that there was insufficient evidence to create a triable issue as to a likelihood of confusion between the marks, and that Affliction failed to disclose a computation of damages during the discovery period sufficient to introduce evidence of damages at trial. The district court granted summary judgment to Utah Vap. Affliction timely appealed.

II

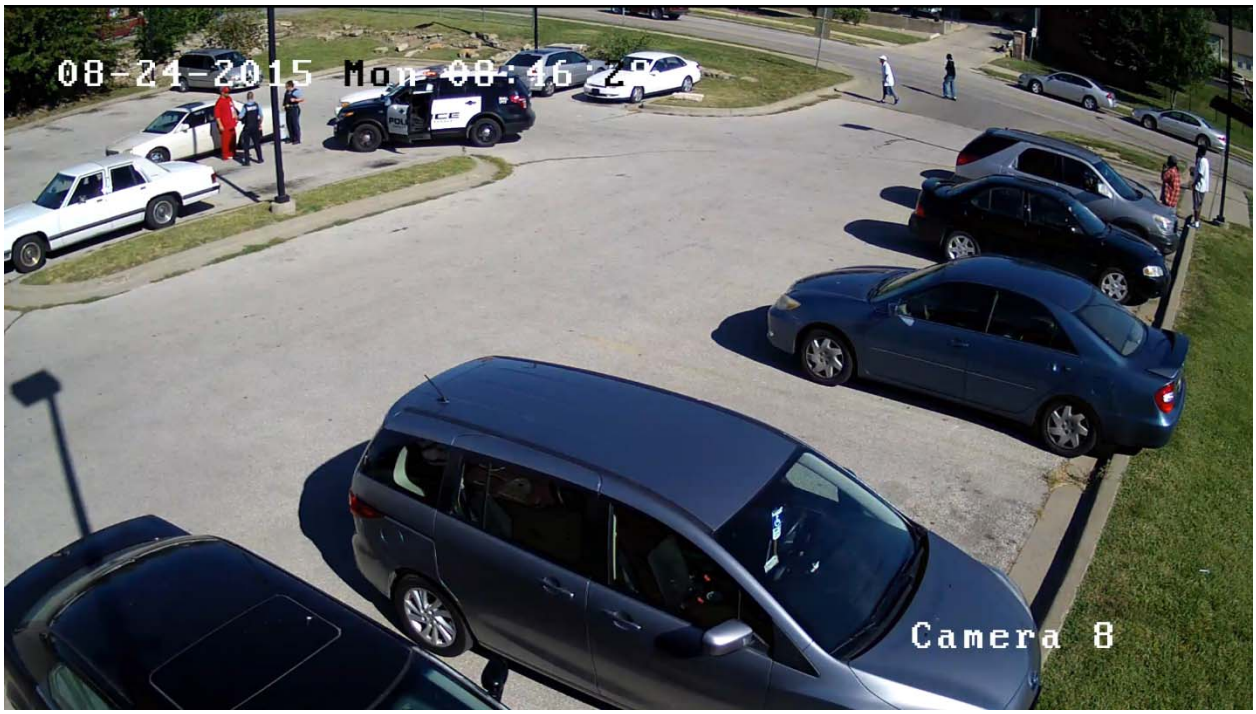
We review the grant of summary judgment de novo. Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009). A party is entitled to summary judgment if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Id.

Claims of trademark infringement require a party to establish that it has a legal right to a mark[1] and that the defendant's use of a similar mark is likely to generate consumer confusion in the marketplace. See 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1238 (10th Cir. 2013). Consumer confusion can arise prior to sale (in

[1] There is no dispute in this case that Affliction owns the relevant marks.

9. Excerpt of Opening Br., *United States v. Gaines*, No. 17-3270 (10th Cir. June 6, 2018)

Kansas City, Kansas Patrol Officer Carl Rowland was the first to pull into the lot. *Id.* at 10; Gov't Exh. 2 at 10:50. Patrol Officer Shenee Davis was right behind him. R1.57 at 12, 44; Gov't Exh. 2 at 10:59. Both officers were uniformed and armed, and both drove marked squad cars. R1.57 at 13, 20; Gov't Exh. 2 at 11:02. The officers did not seek out Officer Wilcox to determine what else he knew about the man in red. Nor did they talk with any of the people milling about the area. Nor did they attempt to surveil the white Cadillac or approach it in a low-key conversational style. Instead, they activated their emergency lights as if to conduct a traffic stop. R1.57 at 12-13, 28,



50. Officer Davis stated at the suppression hearing that this was because "we were blocking that lane of traffic entering into the parking lot." *Id.* at 50. But images of the event captured by the nearby pole camera (see image above) showed that once they

parked, the driveway into the parking lot was fully accessible. And neither officer explained why, if they truly believed they were not sufficiently visible (despite the daylight hour), they could not have simply used their hazard lights as any citizen driver would have done.

Officer Rowland pulled in "fairly close" to the Cadillac (within about ten feet, it appears from the pole-camera image above), and parked aiming his squad car (emergency lights still flashing) at the driver's side. R1.57 at 13; Gov't Exh. 2 at 11:05. He got out and approached the driver. Gov't Exh. 2 at 11:01. Officer Davis parked right next to Officer Rowland, with her squad car also aimed at the Cadillac. Exh. 2 at 11:05. The man in red—later identified as Mr. Gaines—got out of the Cadillac and closed the door. Exh. 2 at 11:02. Officer Rowland greeted him, asked him if he was "up here going to the food kitchen," and then immediately (within ten seconds of greeting him) dropped his voice to a more serious register and asked Mr. Gaines for ID, told him "we got a call about you, man," told him he was suspected of a crime ("Someone said that you were up here selling some dope.") and asked him an incriminating question: "You selling wet?" Gov't Exh. 3 at 9:44:41-9:44:57.

Mr. Gaines denied selling anything and Officer Rowland again asked him for his ID. *Id.* at 9:44:55-9:44:58. Mr. Gaines explained that he did not have his ID, and asked the officers to hold on while he retrieved it from the car. *Id.* at 9:45-9:45:04. Officer Rowland moved in close to Mr. Gaines and placed one hand on the front door of the Cadillac and his other hand on his service weapon while Mr. Gaines leaned into the

occur only if the suspect yielded to a police officer's show of authority. *Hodari D.*, 499 U.S. at 626–27.

So let's consider how a reasonable person would have felt, facing the same circumstances that Mr. Gaines confronted. The encounter began with Mr. Gaines sitting in his car in a parking lot. Two uniformed police officers arrived in marked police cars, both flashing their roof lights. Would a reasonable person have felt free to leave? Perhaps. But the flashing roof lights,[4] two marked police cars, and two uniformed officers[5] would undoubtedly have cast at least some doubt on a reasonable person's belief in his or her freedom to leave.

This doubt would likely have intensified in Kansas (where Mr. Gaines was stopped) because of Kansas's traffic laws. *See Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984) (considering the laws of most states, which criminalize the failure to heed a police officer's signal to

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[4] *See* 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.4(a), at 598–99 (5th ed. 2012) (stating that the "use of flashing lights as a show of authority . . . will likely convert the event into a Fourth Amendment seizure").

[5] *See United States v. Williams*, 615 F.3d 657, 660 (6th Cir. 2010) ("Williams was seized: a reasonable person would not have felt free to leave upon being approached by two uniformed officers in a marked car, singled out of a group, and immediately accused of a crime."); *see also United States v. Lopez*, 443 F.3d 1280, 1284 (10th Cir. 2006) (stating that the presence of uniformed officers bears on whether a police encounter constitutes a seizure).

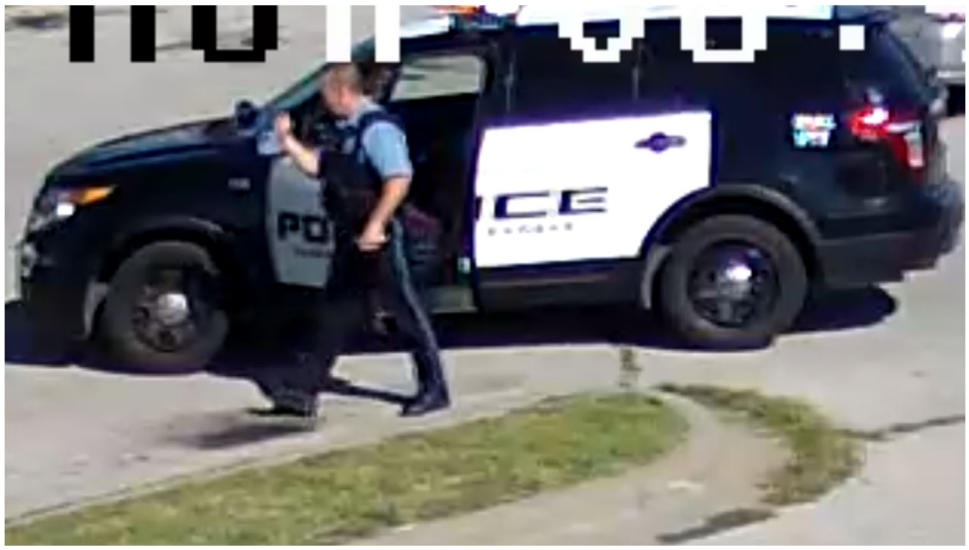
stop, as informative on whether the defendant reasonably believed that he wasn't free to leave). Under Kansas law, motorists must stop whenever a police officer flashes his or her emergency lights. Kan. Stat. Ann. § 8-1568(a)(1), (d).

The district court minimized the impact of the flashing roof lights, crediting testimony by the police officers that they had activated their lights only because their cars were blocking a lane of traffic. But the officers' subjective intent had little bearing on whether a reasonable person would have thought that he or she could leave. *See Brendlin v. California*, 551 U.S. 249, 260–61 (2007) ("The intent that counts under the Fourth Amendment" is the intent conveyed to the suspect, and the court does not consider the officers' "subjective intent when determining who is seized."); *see also United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (concluding that a law-enforcement agent's "subjective intention . . . to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent").

But let's assume that a reasonable person would have felt free to drive away at this point.[6] One of the police officers then exited his car and

[6] If the police officers had followed and reactivated their roof lights, Kansas law would have required the person to pull over. *See* Kan. Stat. Ann. § 8-1568(a)(1), (d); *State v. Morris*, 72 P.3d 570, 577 (Kan. 2003).

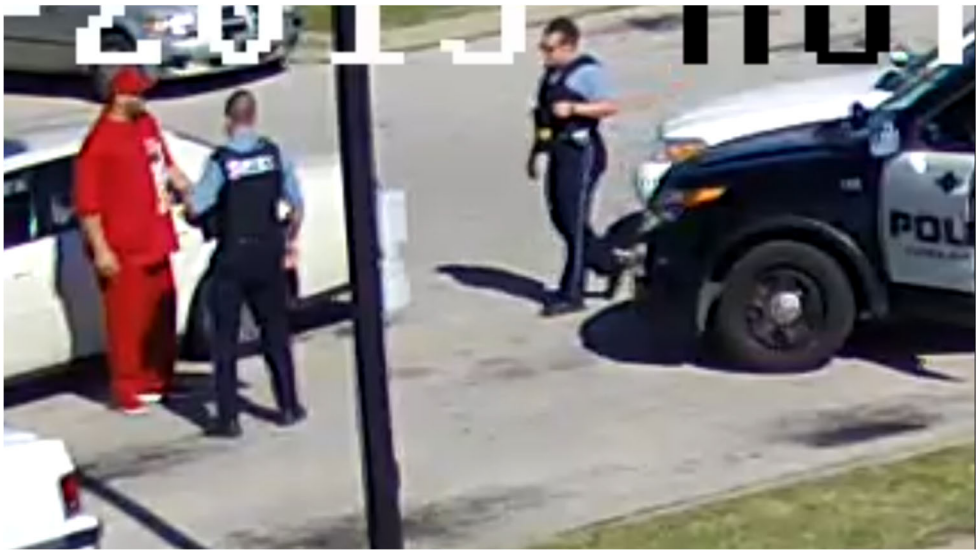
gestured for Mr. Gaines to get out of the car. Here is what our reasonable person would have seen:



At a minimum, the police officer's gesture would have cast further doubt on a reasonable person's belief that he or she was free to drive away. *See Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 462 (4th Cir. 2013) (holding that two deputy sheriffs' gestures to stay seated constituted a seizure).

But let's assume that a reasonable person would still have felt free to leave. As Mr. Gaines exited the car, one police officer stood just a few feet away and said that they had come because of a report that Mr. Gaines was "up here selling some dope." The police officer then asked Mr. Gaines

whether he had been selling "wet" (street-language for PCP). Meanwhile, another uniformed police officer circled the car, looking inside.[7]



Would a reasonable person have felt free to leave? At a minimum, the accusatory question would have added to the reasonable person's doubt about his or her freedom to return to the car and drive away. *See United States v. Glass*, 128 F.3d 1398, 1407 (10th Cir. 1997) (stating that "particularized focus" on an individual "is certainly a factor" to consider when determining whether a seizure took place).[8]

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[7] At a hearing, a prosecutor told the district court that the police officers had "encircle[d] the location" because the situation was "heightened." R., vol. I at 372.

[8] We have sometimes cautioned that the mere existence of incriminating questions is not relevant to the existence of a seizure. *See United States v. Little*, 18 F.3d 1499, 1506 (10th Cir. 1994) (en banc); *United States v. Ringold*, 335 F.3d 1168, 1173 (10th Cir. 2003). We do not question these cautionary statements. But here the police officer didn't just ask incriminating questions; he began by explaining that he had come (with roof lights flashing) because of a report that this person was selling drugs

These were the five circumstances that confronted Mr. Gaines:

1. He was sitting in his car when two marked police cars approached and stopped right behind him with their roof lights flashing.

2. Both police officers were uniformed.

3. One police officer gestured for Mr. Gaines to get out of his car.

4. Mr. Gaines exited his car, and one of the police officers said that they had come based on a report that he was selling PCP in the parking lot.

5. While one police officer told Mr. Gaines that someone had accused him of selling PCP, the other police officer circled Mr. Gaines's car and looked inside.

in the parking lot. *See United States v. Smith*, 794 F.3d 681, 686 (7th Cir. 2015) ("The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime.").

Viewing these circumstances as a whole, we conclude that (1) the police officers showed their authority and (2) no reasonable person would have felt free to leave.

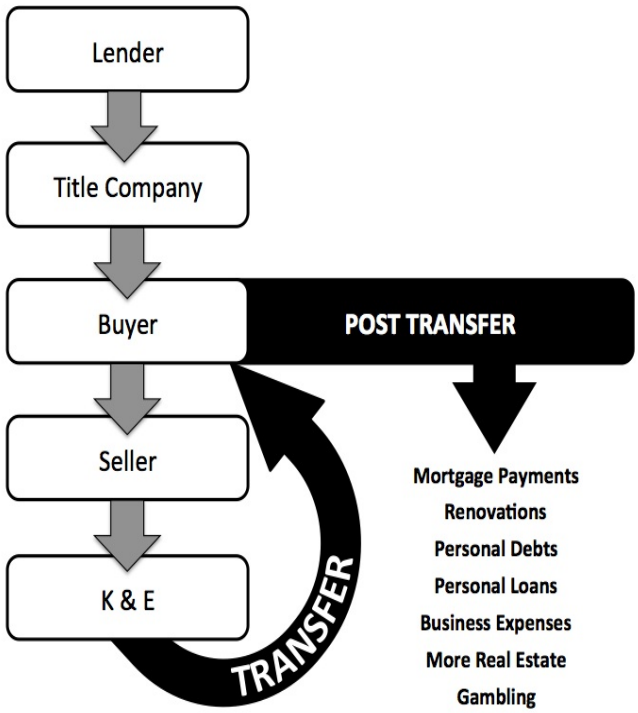
Still, the encounter would constitute a seizure only if Mr. Gaines had yielded to the show of authority. He ultimately fled, so the government denies that Mr. Gaines yielded. We disagree. One officer gestured for Mr. Gaines to get out of his car, and he did. When Mr. Gaines was asked questions, he responded. *See United States v. Camacho*, 661 F.3d 718, 726 (1st Cir. 2011) (stating that a suspect "submitted" to a police officer's "show of authority by responding to his questions"). And when Mr. Gaines was asked for his identification, he opened his car trunk to look for his identification.

Mr. Gaines then fled. But by that point, he had already yielded to the show of authority. We addressed a similar issue in *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991). There the defendant exited his car and fled after asking the officer: "What do you want?" *Morgan*, 936 F.2d at 1566. We considered this single question enough to conclude that the defendant had yielded to authority. *Id.* at 1567. By comparison, Mr. Gaines had done more to yield: getting out of his car, answering the officer's questions, and looking for his identification.

We thus conclude that Mr. Gaines was seized.

11. Excerpt of Opening Br., *United States v. Powers*, No. 11-2190 (10th Cir. May 25, 2012)

As buyer Prouty confirmed: "The title company would cut a check to K&E Construction. And then that money would be turned around into a cashier's check to be given to me." *Id.* at 2449-50. The process worked like this:



As the chart above shows, "the money had come in" and "immediately had gone out" to the buyers. Vol. 3 at 2785.

Prouty's testimony explains why the Buyers needed the cash back funds and how they expected to receive the money:

> Government: [H]ow were you going to be able to make mortgage payments?
>
> Prouty: The loans there were taken out on the properties included some additional moneys [sic], and that

12. Excerpt of Answer Br., *Magluta v. Daniels*, No. 19-1130 (10th Cir. Nov. 6, 2019)

III. In separate orders, the district court accepts the magistrate judge's recommendations to dismiss claim 1 and the remainder of claim 3.

The magistrate judge concluded that the official-capacity portion of claims 1 and 3 had to be dismissed based on sovereign immunity, mootness, and failure to state a claim. III: 83-86 & n.7. The district court accepted that recommendation. III: 128-29, 131.

Magluta's official-capacity claims for money damages were barred by sovereign immunity. III: 83-84.

Because his kidney problems had been resolved, Magluta's official-capacity claims for injunctive relief were moot. III: 85-86. There were no allegations suggesting a continuing injury. III: 85-86. And his claims for injunctive relief regarding dental health suffered from a combination of failure to exhaust and failure to state a claim. See II: 16-19, 24; III: 85-86 & n.7. He had not identified any wrongful conduct regarding his dental health that occurred on or before October 31, 2013. II: 16-19. Allegations of wrongful conduct after that time had not been exhausted. II: 150.

The magistrate judge also dismissed the remainder of the individual-capacity claims. As already noted, Magluta had failed to

identify any wrongful conduct regarding the portion of the dental claim (claim 3) that was exhausted. II: 16-19, 37; III: 80. For that reason, the defendants were entitled to qualified immunity. *Id.*

The individual-capacity claims for three of the five named defendants (Daniels, McDermott, and Nehls) to the kidney claim (claim 1) were dismissed on statute of limitations grounds. II: 11, 20-21, 25, 37. Magluta simply hadn't identified wrongful conduct attributable to those defendants in the two years prior to filing his lawsuit. *Id.*

The last two defendants to claim 1 were dismissed on qualified-immunity grounds. III: 88-92, 128, 131. Magluta had not identified any wrongful conduct undertaken by Dr. Allred during the exhausted time period. II: 21-23; III: 88-89, 128, 131. The same was true for Dr. Santini. III: 89-92, 128, 131. The allegations actually showed that Dr. Santini had been "attentive to Plaintiff's condition." III: 90. The next page summarizes how Magluta's claims were dismissed.

Claim	Summary judgment grant for failure to exhaust	Individual claims dismissed					Official-capacity claims dismissed
		Daniels, McDermott	Nehls	Dr. Allred	Roberts	Dr. Santini	
1 (kidney)	None of claim.	Dismissed: statute of limitations (II: 11-14, 20-21, 25, 37).	Dismissed: statute of limitations (II: 11-14, 20-21, 25, 37).	Dismissed: qualified immunity (II: 21-23; III: 88-89, 128, 131).	No claim against (I: 599-600).	Dismissed: qualified immunity (III: 89-92, 128, 131).	Dismissed: sovereign immunity/ mootness (III: 83-86, 128-29, 131).
2	All of claim (II: 150).						
3 (dental)	All except March 27, 2013 to October 31, 2013 (II: 150).	Dismissed: qualified immunity (II: 14-19, 37).	No claim against (I: 600).	No claim against (I: 600).	Dismissed: qualified immunity (II: 18-19, 37; III: 80).	No claim against.	Dismissed: sovereign immunity/failure to state a claim (II: 16-19, 24; III: 83-86, 128-29, 131).
4 - 8	All of claim (II: 150).						

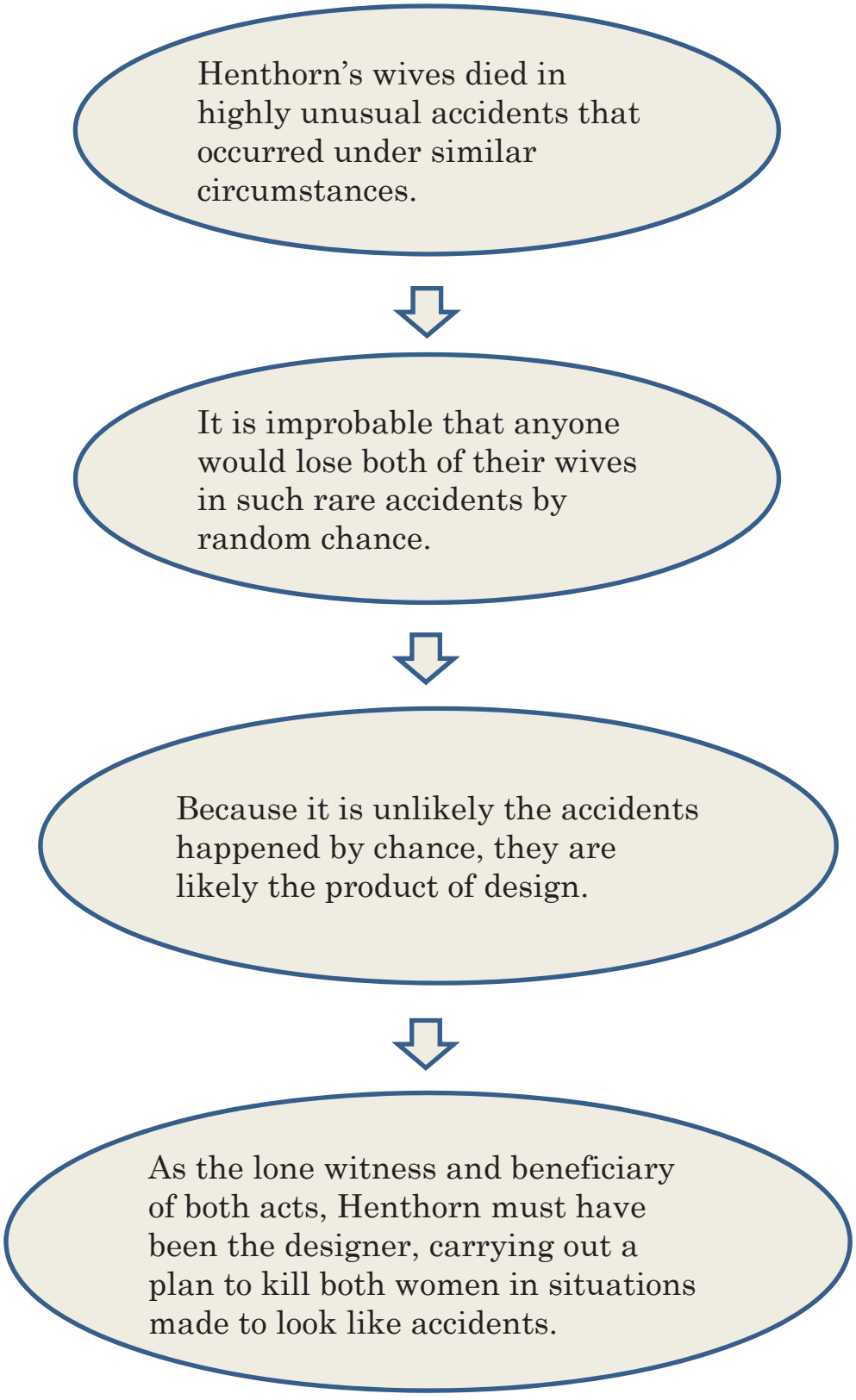
Logical Relevance, the Doctrine of Chances, 40 U. RICH. L. REV. 419, 430 (2006) ("*Evidentiary Paradox*") (The issue is not an either-or problem; rather, the issue is both-and. Does the item also possess relevance on a legitimate non-character theory?").

A. The court admitted the death of Henthorn's first wife based on a theory of relevance that did not rely on character inferences.

To establish that 404(b) evidence does not rely upon an impermissible character inference, the proponent of the evidence must "precisely articulate the purpose of the proffered evidence." *Commanche*, 577 F.3d at 1266. The logic may not include a link based on an inference about the defendant's character. *Id.* at 1267.

In Henthorn's case, the court properly admitted the evidence of his first wife's death to establish plan and intent with respect to his second wife's death, as well as to rebut any claims of accident. I-1: 224, 226; VII: 48. The government articulated its theory of relevance in the logic chain laid out on the next page. I-1: 187. The theory relied on the sheer improbability of any person losing two spouses in bizarre accidents by random chance. The court agreed that this theory of relevance did not rely upon a character inference. I-1: 228.

Figure 1 Logic Chain:
Relevance of Lynn Henthorn's Death.



of a pretrial motion that requires a hearing until the hearing is concluded. *United States v. Smith*, 569 F.3d 1209, 1211 (10th Cir. 2009) (citing 18 U.S.C. § 3161(h)(1)(D)). The day that the motion is filed and the day of its disposition are excluded as well. *United States v. Williams*, 511 F.3d 1044, 1050 n.5 (10th Cir. 2007). The Speedy Trial Act also excludes time for "ends of justice" continuances. 18 U.S.C. § 3161(h)(7).

Between the first "ends of justice" continuance and pretrial motions, only 23 Speedy Trial days elapsed before trial. See Chart.[3]

Date	**Event**	**S.T. Days Elapsed (& total)**
October 19 – 27, 2010	No motions pending after Derek Zar appears.	8 (8)
October 28, 2010 – December 17, 2010	Motion to declare complex (S.Zar ROA I at 43) until hearing (ROA I at 71-72).	Excluded

[3] The pretrial motions are also shown in Addendum C to Derek Zar's brief. But his Addendum does not exclude both the day the motion is filed and the date of its disposition in his calculations, so his numbers are off by one day. For example, his excludable period #1 should be for 51 days rather than 50 and excludable period #2 should be for one day rather than zero.

December 17, 2010 – November 28, 2011	Ends of Justice Continuance (ROA III at 6, 17).	Excluded
April 11, 2011 – January 18, 2012.	Motion to change plea (Gov't Supp. ROA at Docs. 74, 75) until hearing (S.Zar ROA II at 10) and motion to sever (Jacoby ROA I at 78) until hearing (*id.* at 269).	Excluded
January 19 – 22, 2012	No pending motions.	4 (12)
January 23, 2012 – July 26, 2012	Motion to reconsider (Jacoby ROA I at 272) until hearing (ROA I at 266) and *Daubert* motion (ROA I at 247) until hearing (S.Zar ROA I at 219), plus 28 days under advisement (ROA I at 332).	Excluded
July 27, 2012 — August 6, 2012.	No pending motions.	11 (23)
August 7, 2012	Trial starts. ROA IV at 23.	

was not "in the United States" even though the port was occupied by the U.S. military during the Mexican-American war. 50 U.S. 603, 614–16 (1850). But the Court clarified that even though other nations had to regard Tampico as U.S. territory, the port was not "territory included in our established boundaries" without a formal cession or annexation. *Id.* So the opinion doesn't address whether territories of the United States are "in the United States."

3. Contemporary dictionaries, maps, and censuses included the territories as part of the United States.

We may also consider contemporary dictionaries, maps, and censuses. *See NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (looking to contemporary dictionaries to interpret the Recess Appointments Clause); *New Jersey v. New York*, 523 U.S. 767, 797–803, 810 (1998) (looking to historical censuses and maps to allocate Ellis Island between New York and New Jersey); *Michigan v. Wisconsin*, 270 U.S. 295, 301–07, 316–17 (1926) (using the same method to establish state boundaries).

Like judicial opinions, dictionaries of the era regarded territories as land "in the United States."

For example, the 1867 edition of *Webster's Dictionary* defined "Territory" as "2. A distant tract of land belonging to a prince or state. 3. In the United States, a portion of the country not yet admitted as a State into the Union, but organized with a separate legislature, a governor."

William G. Webster & William A. Wheeler, *Academic Edition. A Dictionary of the English Language, explanatory, pronouncing, etymological, and synonymous. Mainly abridged from the latest edition of the quarto dictionary of Noah Webster* at 434 (1867).

The next year, Judge John Bouvier's legal dictionary defined "Territory" even more broadly as "[a] portion of the country subject to and belonging to the United States which is not within the boundary of any of the States." II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 587 (George W. Childs 12th ed. rev. 1868).

Fifteen years later, this dictionary defined "United States of America" to include Alaska—an unincorporated territory—in the definition of "United States of America." II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 765 (J. P. Lippincott and Co., 15th ed. rev. 1883);[6] *see* note 8, below (discussing Alaska's unincorporated

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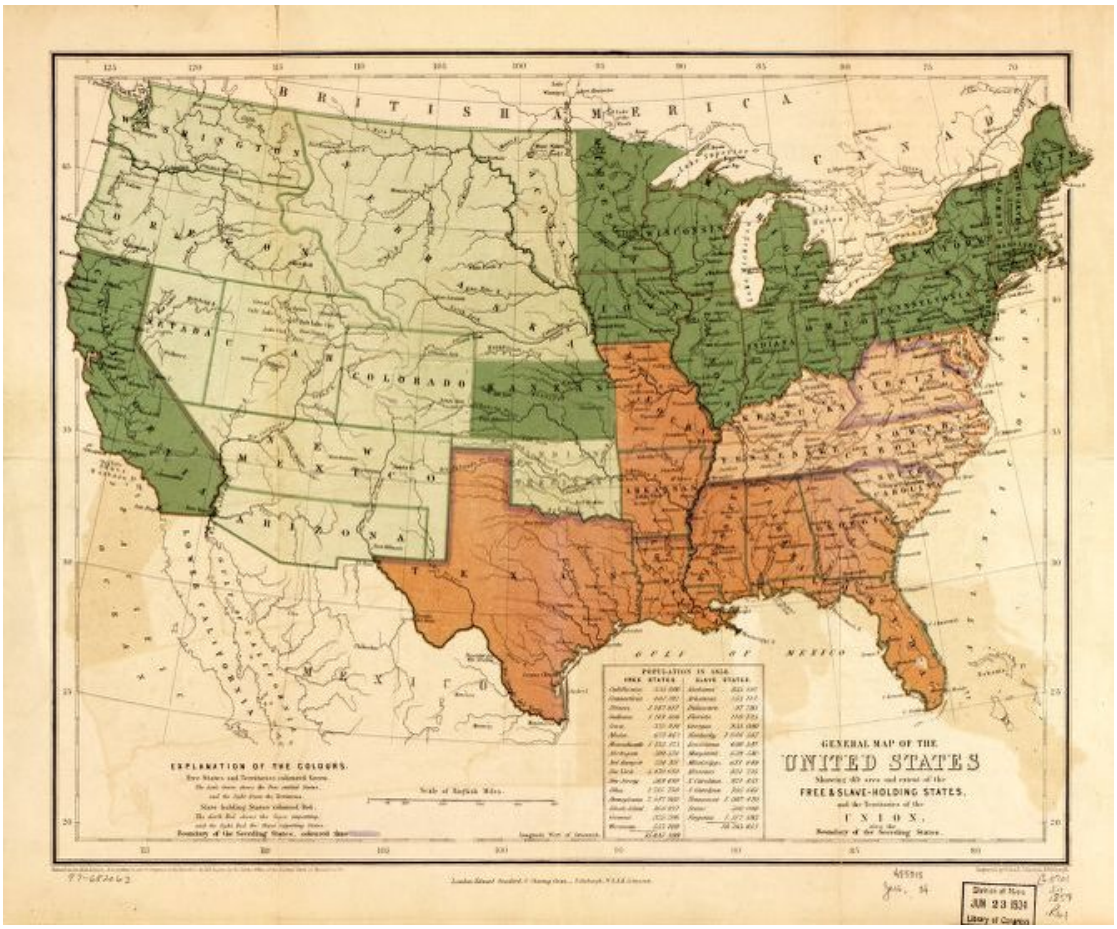
[6] The American Samoan government points out that Alaska is omitted from the definition of the "United States of America" in the 1868 edition of this dictionary. *See* II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 622 (George W. Childs 12th ed. rev. 1868). But later editions of the same dictionary added Alaska (even while it remained unincorporated), suggesting that the omission had been inadvertent. *See* text accompanying note. In any event, omission of Alaska in the 1868 edition sheds little insight into the meaning of the "United

status prior to 1891). So contemporary dictionaries regarded territories as "in the United States."

This understanding is also apparent in contemporary maps and census records. For example, the 1857 map of the United States included the territories of Washington, Oregon, Nebraska, Nevada, Utah, New Mexico, Arizona, Dakota, and Indian Territory (later Oklahoma):



States" during the drafting and ratification of the Citizenship Clause. Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 295 (2020).

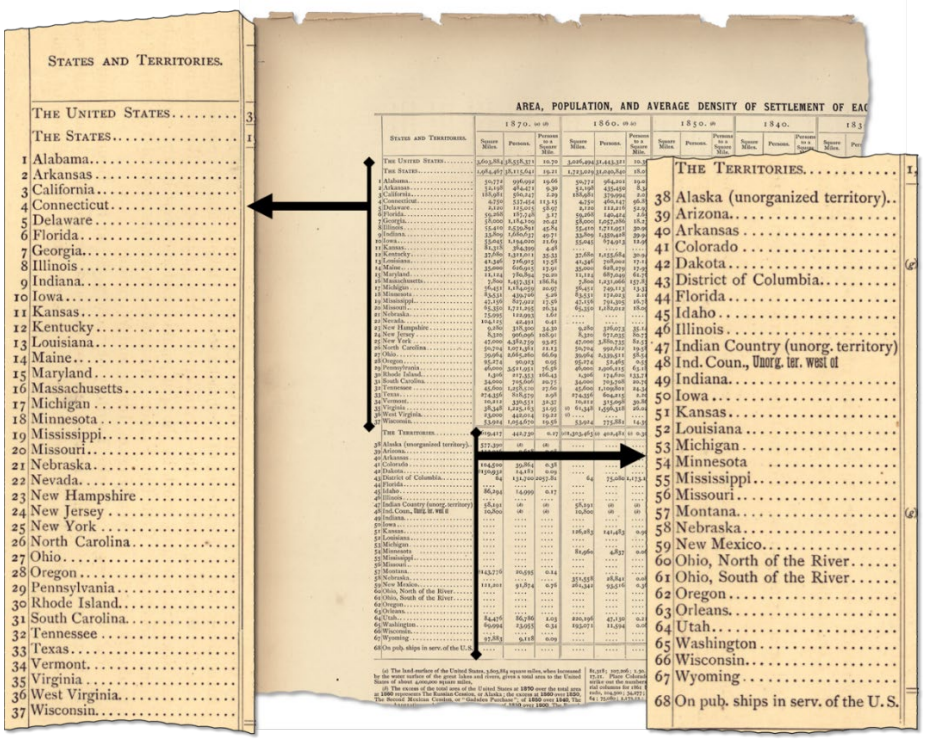
Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General map of the United States, showing the area and extent of the free & slave-holding states & the territories of the Union: also the boundary of the seceding states* (1857), available at https://www.loc.gov/resource/g3701e.cw1020000/ (last visited on May 13, 2021) (on file at the Library of Congress). Similarly, the 1868 map of the United States contained the territories, including the new unincorporated territory of Alaska:

H. H. Lloyd & Co., *The Washington map of the United States* (1868), available at https://www.loc.gov/resources/g3700.ct002969/ (last visited May 13, 2021) (on file at the Library of Congress).

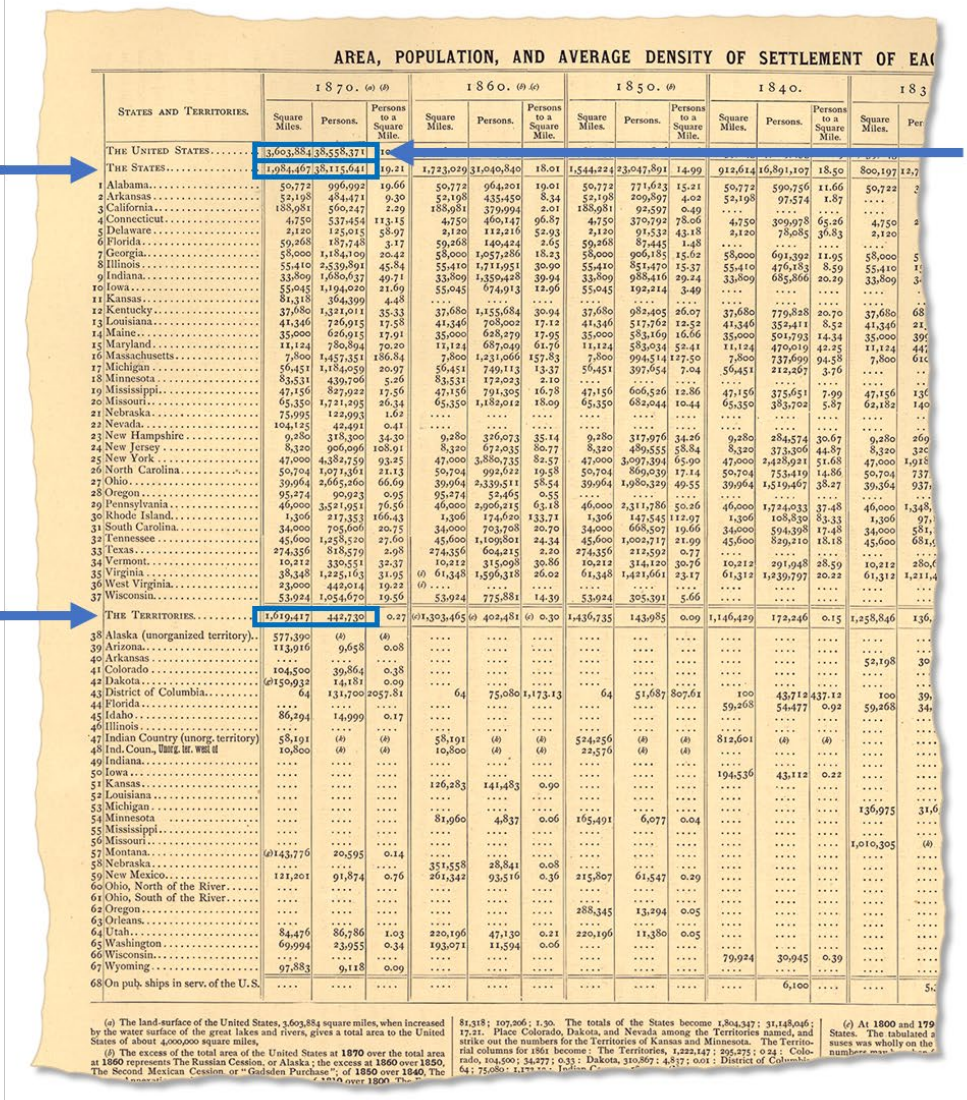
Like contemporary maps, the censuses of the era showed territories as part of the United States. For example, the 1854 census stated that "[t]he United States consist at the present time (1st July 1854,) of thirty-one independent States and nine Territories . . . ." J.D.B. De Bow, Superintendent of the U.S. Census, *Statistical View of the United States* 35–36 (A.O.P. Nicholson, 1854).

In 1870, the government conducted another census, again

- listing both states and territories as the region constituting the United States and
- including the unincorporated territory of Alaska:



Francis A. Walker, *Statistical atlas of the United States based on the results of the ninth census 1870 with contributions from many eminent men of science and several departments of the government* (image 32) (1874), available at https://www.loc.gov/loc.gmd/g3701gm.gct00008 (last visited May 13, 2021) (on file at the Library of Congress). The census thus derived the area of "the United States" by including the territories as well as the states.



AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EAC

States and Territories.	1870. (a) (d) Square Miles.	1870. Persons.	1870. Persons to a Square Mile.	1860. (b) (c) Square Miles.	1860. Persons.	1860. Persons to a Square Mile.	1850. (b) Square Miles.	1850. Persons.	1850. Persons to a Square Mile.	1840. Square Miles.	1840. Persons.	1840. Persons to a Square Mile.	183 Square Miles.	183 Per
The United States	3,603,884	38,558,371	10.											
The States	1,984,467	38,115,641	19.21	1,723,029	31,040,840	18.01	1,544,224	23,047,891	14.99	912,614	16,891,107	18.50	800,197	12,7
1 Alabama	50,772	996,992	19.66	50,772	964,201	19.01	50,772	771,623	15.21	50,772	590,756	11.66	50,722	2
2 Arkansas	52,198	484,471	9.30	52,198	435,450	8.34	52,198	209,897	4.02	52,198	97,574	1.87	....	
3 California	188,981	560,247	2.29	188,981	379,994	2.01	188,981	92,597	0.49	....	....	....	....	
4 Connecticut	4,750	537,454	113.15	4,750	460,147	96.87	4,750	370,792	78.06	4,750	309,978	65.26	4,750	2
5 Delaware	2,120	125,015	58.97	2,120	112,216	52.93	2,120	91,532	43.18	2,120	78,085	36.83	2,120	
6 Florida	59,268	187,748	3.17	59,268	140,424	2.65	59,268	87,445	1.48	....	....	....	....	
7 Georgia	58,000	1,184,109	20.42	58,000	1,057,286	18.23	58,000	906,185	15.62	58,000	691,392	11.95	58,000	5
8 Illinois	55,410	2,539,891	45.84	55,410	1,711,951	30.90	55,410	851,470	15.37	55,410	476,183	8.59	55,410	1
9 Indiana	33,809	1,680,637	49.71	33,809	1,350,428	39.94	33,809	988,416	29.24	33,809	685,866	20.29	33,809	3
10 Iowa	55,045	1,194,020	21.69	55,045	674,913	12.96	55,045	192,214	3.49	....	....	....	....	
11 Kansas	81,318	364,399	4.48	....	....	....	....	....	....	....	....	....	....	
12 Kentucky	37,680	1,321,011	35.33	37,680	1,155,684	30.94	37,680	982,405	26.07	37,680	779,828	20.70	37,680	68
13 Louisiana	41,346	726,915	17.58	41,346	708,002	17.12	41,346	517,762	12.52	41,346	352,411	8.52	41,346	21
14 Maine	35,000	626,915	17.91	35,000	628,279	17.95	35,000	583,169	16.66	35,000	501,793	14.34	35,000	39
15 Maryland	11,124	780,894	70.20	11,124	687,049	61.76	11,124	583,034	52.41	11,124	470,019	42.25	11,124	44
16 Massachusetts	7,800	1,457,351	186.84	7,800	1,231,066	157.83	7,800	994,514	127.50	7,800	737,699	94.58	7,800	61
17 Michigan	56,451	1,184,059	20.97	56,451	749,113	13.37	56,451	397,654	7.04	56,451	212,267	3.76	....	
18 Minnesota	83,531	439,706	5.26	83,531	172,023	2.10	....	....	....	....	....	....	....	
19 Mississippi	47,156	827,922	17.56	47,156	791,305	16.78	47,156	606,526	12.86	47,156	375,651	7.99	47,156	13
20 Missouri	65,350	1,721,295	26.34	65,350	1,182,012	18.09	65,350	682,044	10.44	65,350	383,702	5.87	62,182	14
21 Nebraska	75,995	122,993	1.62	....	....	....	....	....	....	....	....	....	....	
22 Nevada	104,125	42,491	0.41	....	....	....	....	....	....	....	....	....	....	
23 New Hampshire	9,280	318,300	34.30	9,280	326,073	35.14	9,280	317,976	34.26	9,280	284,574	30.67	9,280	26
24 New Jersey	8,320	906,096	108.91	8,320	672,035	80.77	8,320	489,555	58.84	8,320	373,306	44.87	8,320	32
25 New York	47,000	4,382,759	93.25	47,000	3,880,735	82.57	47,000	3,097,394	65.90	47,000	2,428,921	51.68	47,000	1,91
26 North Carolina	50,704	1,071,361	21.13	50,704	992,622	19.58	50,704	869,039	17.14	50,704	753,419	14.86	50,704	737
27 Ohio	39,964	2,665,260	66.69	39,964	2,339,511	58.54	39,964	1,980,329	49.55	39,964	1,519,467	38.27	39,364	937
28 Oregon	95,274	90,923	0.95	95,274	52,465	0.55	....	....	....	....	....	....	....	
29 Pennsylvania	46,000	3,521,951	76.56	46,000	2,906,215	63.18	46,000	2,311,786	50.26	46,000	1,724,033	37.48	46,000	1,348,
30 Rhode Island	1,306	217,353	166.43	1,306	174,620	133.71	1,306	147,545	112.97	1,306	108,830	83.33	1,306	97,
31 South Carolina	34,000	705,606	20.75	34,000	703,708	20.70	34,000	668,507	19.66	34,000	594,398	17.48	34,000	581,
32 Tennessee	45,600	1,258,520	27.60	45,600	1,109,801	24.34	45,600	1,002,717	21.99	45,600	829,210	18.18	45,600	681,
33 Texas	274,356	818,579	2.98	274,356	604,215	2.20	274,356	212,592	0.77	....	....	....	....	
34 Vermont	10,212	330,551	32.37	10,212	315,098	30.86	10,212	314,120	30.76	10,212	291,948	28.59	10,212	280,
35 Virginia	38,348	1,225,163	31.95	(f) 61,348	1,596,318	26.02	61,348	1,421,661	23.17	61,312	1,239,797	20.22	61,312	1,211,
36 West Virginia	23,000	442,014	19.22	(f)	....	....	....	....	....	....	....	....	....	
37 Wisconsin	53,924	1,054,670	19.56	53,924	775,881	14.39	53,924	305,391	5.66	....	....	....	....	
The Territories	1,619,417	442,730	0.27	(e) 1,303,465	(e) 402,481	(e) 0.30	1,436,735	143,985	0.09	1,146,429	172,246	0.15	1,258,846	136,
38 Alaska (unorganized territory)	577,390	(d)	(d)	....	....	....	....	....	....	....	....	....	....	
39 Arizona	113,916	9,658	0.08	....	....	....	....	....	....	....	....	....	....	
40 Arkansas	....	....	....	....	....	....	....	....	....	....	....	....	52,198	30
41 Colorado	104,500	39,864	0.38	....	....	....	....	....	....	....	....	....	....	
42 Dakota	(e) 150,932	14,181	0.09	....	....	....	....	....	....	....	....	....	....	
43 District of Columbia	64	131,700	2057.81	64	75,080	1,173.13	64	51,687	807.61	100	43,712	437.12	100	39,
44 Florida	....	....	....	....	....	....	....	....	....	59,268	54,477	0.92	59,268	34,
45 Idaho	86,294	14,999	0.17	....	....	....	....	....	....	....	....	....	....	
46 Illinois	....	....	....	....	....	....	....	....	....	....	....	....	....	
47 Indian Country (unorg. territory)	58,191	(d)	(d)	58,191	(d)	(d)	524,256	(d)	(d)	812,601	(d)	(d)	....	
48 Ind. Coun., Emrg. Ar. with U	10,800	(d)	(d)	10,800	(d)	(d)	22,576	(d)	(d)	....	....	....	....	
49 Indiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
50 Iowa	....	....	....	....	....	....	....	....	....	194,536	43,112	0.22	....	
51 Kansas	....	....	....	126,283	141,483	0.90	....	....	....	....	....	....	....	
52 Louisiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
53 Michigan	....	....	....	....	....	....	....	....	....	....	....	....	136,975	31,
54 Minnesota	....	....	....	81,960	4,837	0.06	165,491	6,077	0.04	....	....	....	....	
55 Mississippi	....	....	....	....	....	....	....	....	....	....	....	....	....	
56 Missouri	....	....	....	....	....	....	....	....	....	....	....	....	1,010,305	(d)
57 Montana	(e) 143,776	20,595	0.14	....	....	....	....	....	....	....	....	....	....	
58 Nebraska	....	....	....	351,558	28,841	0.08	....	....	....	....	....	....	....	
59 New Mexico	121,201	91,874	0.76	261,342	93,516	0.36	215,807	61,547	0.29	....	....	....	....	
60 Ohio, North of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
61 Ohio, South of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
62 Oregon	....	....	....	....	....	....	288,345	13,294	0.05	....	....	....	....	
63 Orleans	....	....	....	....	....	....	....	....	....	....	....	....	....	
64 Utah	84,476	86,786	1.03	220,196	47,130	0.21	220,196	11,380	0.05	....	....	....	....	
65 Washington	69,994	23,955	0.34	193,071	11,594	0.06	....	....	....	....	....	....	....	
66 Wisconsin	....	....	....	....	....	....	....	....	....	79,924	30,945	0.39	....	
67 Wyoming	97,883	9,118	0.09	....	....	....	....	....	....	....	....	....	....	
68 On pub. ships in serv. of the U. S.	....	....	....	....	....	....	....	....	....	....	6,100	....	....	5

(a) The land-surface of the United States, 3,603,884 square miles, when increased by the water surface of the great lakes and rivers, gives a total area to the United States of about 4,000,000 square miles.

(b) The excess of the total area of the United States at 1870 over the total area at 1860 represents The Russian Cession, or Alaska; the excess at 1860 over 1850, The Second Mexican Cession, or "Gadsden Purchase"; of 1850 over 1840, The [illegible] over 1800. The [illegible] 81,318; 107,206; 1.30. The totals of the States become 1,804,347; 31,148,046; 17.21. Place Colorado, Dakota, and Nevada among the Territories named, and strike out the numbers for the Territories of Kansas and Minnesota. The Territorial columns for 1861 become: The Territories, 1,222,147; 295,375; 0.24; Colorado, 104,500; 34,277; 0.33; Dakota, 310,867; 4,837; 0.01; District of Columbia

(c) At 1800 and 179 States. The tabulated a suses was wholly on the numbers may

Area and population of "The States"

Area and population of "The Territories"

Area and population of "The United States," the sum of the States and the Territories

As shown by contemporary judicial opinions, dictionaries, maps, and censuses, U.S. territories were uniformly considered "in the United States." There was nothing uncertain or ambiguous about the application of the Citizenship Clause to the territories. So when the United States acquired American Samoa as a territory, everyone born in the territory became a U.S. citizen. We need not look beyond the text of the Citizenship Clause to determine the plaintiffs' citizenship.

4. The drafters and ratifiers interpreted the Citizenship Clause to encompass territories.

Even if we were to look beyond the constitutional text, however, we would find confirmation of the unambiguous meaning of the Citizenship Clause. One meaningful source is the congressional debates leading to the enactment of the Citizenship Clause; the statements in these debates provide "valuable" input on what "contemporaneous opinions of jurists and statesmen" regarded as the "legal meaning" of the Citizenship Clause. *United States v. Wong Kim Ark*, 169 U.S. 649, 699 (1898).[7] These

[7] Chief Judge Tymkovich discounts the historical value of these floor statements, suggesting that they "may not have aligned with common public understanding." Tymkovich, C.J. Concurrence at 2. But the Supreme Court thought differently, relying on the legislators' floor statements on the meaning of the Citizenship Clause as "valuable" "contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves." *Wong Kim Ark*, 169 U.S. at 699.

Disregarding the Supreme Court's own reliance on these floor statements, the concurrence points to a law review article by Professor

16. Excerpt of Order Denying Pet. for Rehearing En Banc, *Kennedy v. Bremerton Sch. Dist.*, No. 20-35222 (9th Cir. July 19, 2021) (Smith, J., concurring)

When Kennedy sought injunctive relief from the Supreme Court after we decided *Kennedy v. Bremerton School District (Kennedy I)*, 869 F.3d 813 (9th Cir. 2017), Justice Alito noted that "important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review." *Kennedy v. Bremerton Sch. Dist. (Kennedy II)*, 139 S. Ct. 634, 635 (2019) (mem.) (Alito, J., concurring in denial of certiorari). Specifically, Justice Alito believed that the Court was unable to review our decision until the record was clear about "the basis for the school's action" against Kennedy. *Id.* But after the case was remanded to the district court and discovery was completed, *the district court ruled that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him."* *Kennedy III*, 991 F.3d at 1010 (emphasis added).

Judge O'Scannlain recounts only the facts that he claims are "constitutionally relevant." While our panel—like the Supreme Court—"refuse[s] to turn a blind eye to the context in which" an Establishment Clause violation would arise, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 315 (2000), many of the facts that Judge O'Scannlain selectively deems "constitutionally relevant" in his statement are unmoored from the record. For the reader's convenience, I here provide each material unmoored statement below, along with the accurate version, as reflected in the record.

The unmoored claim	What the record actually shows
"[S]tudents and coaches began to join Kennedy in prayer of their own accord."	There is no support for the suggestion that players could have avoided

Statement at 46 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy's pre-game locker room prayers or post-game on-field prayers. At least one atheistic student athlete only participated in the post-game prayers because he feared he would get less playing time if he declined. No students prayed on the field without Kennedy when Kennedy paused his practice of doing so.
"Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment." Statement at 52 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy's prayer was public, audible, and created a scene that included students being knocked down in the rush to jump over the fence to join Kennedy on the field.
"Kennedy essentially asked his employer to *do nothing*—simply to tolerate the brief, quiet prayer of one man." Statement at 64 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy engaged in private prayer for several years. But when BSD learned that he had begun leading students in pre-game locker room prayers and giving overtly religious speeches on the field post-game, it directed him to stop that practice. Kennedy demanded that his employer allow him to

	engage in a public religious demonstration surrounded by school-age children in front of a large crowd, in an area he could only access because he was a public employee.
The panel relied "simply on the existence of a District policy that coaches should 'exhibit sportsmanlike conduct at all times'" to determine Kennedy's job duties. Statement at 52 (O'Scannlain, J., statement regarding denial of rehearing en banc).	The panel relied on numerous facts in the record, including BSD's direction that Kennedy engage in motivational speech to students of a secular nature at the end of each game. The panel also relied on Kennedy's own characterization of his duties as a role model and mentor, and his agreement to "maintain positive media relations," "obey all the Rules of Conduct before players and public," and "serve[] as a personal example." Kennedy "plainly understood that demonstrative communication fell within the compass of his professional obligations." *Kennedy I*, 869 F.3d at 826.
"[O]n the panel's view, a school can restrict any	A school can guide the content of demonstrative

speech for any reason so long as it instructs its employees to demonstrate good behavior in the presence of others." Statement at 54 (O'Scannlain, J., statement regarding denial of rehearing en banc).	speech to students during times when the employee's job duties require that speech. *Kennedy III*, 991 F.3d at 1015.
The panel held "that prayer was one of Kennedy's job duties when his employer maintained a policy banning it[.]" Statement at 58 (O'Scannlain, J., statement regarding denial of rehearing en banc).	The panel held that speech and demonstrative conduct after football games was one of Kennedy's job duties, and therefore, his carrying out of those duties was speech as a public employee. *Kennedy I*, 869 F.3d at 826. This is quintessential regulable government employee speech.
"Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's [prayer]." Statement at 67 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Given Kennedy's media campaign, if BSD had dropped its opposition to Kennedy's prayer instead of suspending him, an objective observer would believe that BSD now agreed that Kennedy was allowed to publicly pray surrounded by his players as a demonstration for the crowd. BSD's prior

	objection to the practice, followed by its accession, would magnify, not diminish, BSD's stamp of approval.
"[T]he panel neglects other, more narrowly tailored remedies." Statement at 68 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy rejected any compromise and demanded that he be allowed to pray on the field surrounded by his players and in front of all the game's attendees.
"[T]he district could have disclaimed Kennedy's prayer." Statement at 69 (O'Scannlain, J., statement regarding denial of rehearing en banc).	A disclaimer would have no effect on the proven coercive effect Kennedy's prayers had on his players. This coercive effect is documented in the record.

II.

With the *real* facts in mind, let us next consider the relevant law. Kennedy alleged BSD's actions violated his First Amendment Free Speech rights. We consider "a sequential five-step series of questions" when evaluating Free Speech claims brought by public employees. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). *Eng*'s second and fourth questions are at issue in this case: whether Kennedy spoke as a private citizen or as a public employee, and whether BSD had adequate justification for treating Kennedy differently from other members of the public. BSD argued Kennedy's Free Speech claim failed because he spoke as a public employee and, even if he spoke as a private