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### INTRODUCTORY REMARKS

For this installment of the Recent Developments, we examine one recent United States Supreme Court decision, two cases recently argued before the U.S. Supreme Court, and two recent U.S. Courts of Appeals decisions. Note One examines *Philip Morris USA v. Williams*,<sup>1</sup> where the U.S. Supreme Court examined the propriety of a punitive damages award in tobacco litigation where the award considered harm to nonlitigant third parties.<sup>2</sup> Note Two examines *Hein v. Freedom from Religion Foundation, Inc.*,<sup>3</sup> a taxpayer standing case recently argued before the U.S. Supreme Court.<sup>4</sup> Note Three examines *Frederick v. Morse*,<sup>5</sup> another recently argued case, which involves high school students’ First Amendment rights.<sup>6</sup> Note Four examines *Leonard v Robinson*,<sup>7</sup> a Sixth Circuit decision discussing the First Amendment right not to be arrested for speaking angrily at a town meeting.<sup>8</sup> Finally, Note Five examines *Hamdan v. Rumsfeld (Hamdan 2)*,<sup>9</sup> where the D.C. Circuit Court continued the contentious litigation between Hamdan and the U.S. government.<sup>10</sup>

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1. 127 S. Ct. 1057 (2007).  
2. Andrew Collinson contributed this Note.  
3. 127 S. Ct. 722 (2006).  
4. Stephanie Tañada contributed this Note.  
5. 439 F.3d 1114 (9th Cir. 2006).  
6. Jeremy W. Harris contributed this Note.  
7. 477 F.3d 347(6th Cir. 2007).  
8. Noah Nadler contributed this Note.  
9. 464 F. Supp. 2d 9 (D.D.C. 2006).  
10. Brian Sites contributed this Note.

TORT LAW—PUNITIVE DAMAGES—A PUNITIVE DAMAGES AWARD BASED ON A JURY'S DESIRE TO PUNISH A DEFENDANT FOR HARMING NONPARTIES AMOUNTS TO A TAKING OF PROPERTY FROM THE DEFENDANT WITHOUT DUE PROCESS—*Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

In a state negligence and deceit lawsuit, an Oregon jury found that Jesse Williams' death was caused by smoking and that petitioner Philip Morris, the manufacturer of the cigarettes Williams smoked, knowingly and falsely led him to believe that smoking was safe.<sup>11</sup> During the trial the jury was asked to consider how many other people had been deceived by Philip Morris in the State of Oregon over the past forty years.<sup>12</sup> As a result, the jury awarded Williams' estate \$821,000 in compensatory damages and \$79.5 million in punitive damages.<sup>13</sup> On appeal by Philip Morris, the United States Supreme Court vacated the ruling by the Oregon Supreme Court, holding that the Due Process Clause forbids a jury from basing a punitive damages award upon its desire to punish the defendant for harming persons who are not a party to the lawsuit.<sup>14</sup> The Court held that such punitive damages amount to a taking of property from the defendant without due process.<sup>15</sup>

This lawsuit arose out of the death of Jesse Williams, a heavy cigarette smoker.<sup>16</sup> Respondent, Williams' widow, represented his estate in this state lawsuit for negligence and deceit against Philip Morris, the manufacturer of the cigarettes that Williams had preferred.<sup>17</sup> An Oregon jury found that Williams' death had been caused by smoking, that Williams had smoked because he had thought it safe to do so, and that Philip Morris knowingly and falsely encouraged Williams to believe in the safety of its product.<sup>18</sup> The jury further found that Philip Morris was negligent and had engaged in deceit.<sup>19</sup> As a result of this finding, the jury awarded punitive damages in a nearly 100 to 1 ratio to compensatory damages.<sup>20</sup>

The trial judge, citing *BMW of North America, Inc. v. Gore*,<sup>21</sup> found the punitive damages to be excessive and reduced the award to \$32 million.<sup>22</sup> Both sides appealed the ruling, and the Oregon Court

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11. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060-61 (2007).

12. *Id.* at 1061.

13. *Id.*

14. *Id.* at 1060.

15. *Id.*

16. *Id.*

17. *Id.* at 1060-61.

18. *Id.* at 1061.

19. *Id.*

20. *Id.*

21. 517 U.S. 559 (1996).

22. *Williams*, 127 S. Ct. at 1061.

of Appeals rejected Philip Morris' arguments and restored the jury award to \$79.5 million.<sup>23</sup> Philip Morris immediately appealed to the Oregon Supreme Court, which denied review; the company then petitioned the U.S. Supreme Court for a writ of certiorari, which was granted.<sup>24</sup> In light of its decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>25</sup> the Court remanded the case.<sup>26</sup>

On review in the Oregon Supreme Court, Philip Morris argued that the trial court should have read a proposed punitive damages instruction to the jury specifically instructing the jury that it could not seek to punish Philip Morris for injury to persons not party to the lawsuit.<sup>27</sup> In refusing to give such an instruction to the jury, Philip Morris argued that there was a "significant likelihood" that a portion of the \$79.5 million award represented punishment for harming others in addition to Williams and that this was forbidden by the Due Process Clause.<sup>28</sup> The Oregon Supreme Court rejected Philip Morris' arguments, finding that the Constitution does not prohibit a state jury from "using punitive damages to punish a defendant for harm to nonparties."<sup>29</sup> The U.S. Supreme Court granted certiorari to Philip Morris to consider whether Oregon had unconstitutionally permitted Philip Morris to be punished for harming nonparty victims.<sup>30</sup>

Writing for the majority, Justice Breyer ruled, "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."<sup>31</sup> The reasoning for this stems from the Due Process prohibition against punishing an individual without first providing the individual with "an opportunity to present every available defense."<sup>32</sup> To Breyer, permitting punishment for injury to nonparty victims allows the defendant

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23. *Id.*

24. *Id.*

25. 538 U.S. 408 (2003).

26. *Williams*, 127 S. Ct. at 1061.

27. *Id.*

28. *Id.*

29. *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1175 (2006).

30. *Williams*, 127 S. Ct. at 1062. Philip Morris had further argued that the punitive damages award was "grossly excessive" in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), and *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408, 416-17 (2003). While the Supreme Court also granted certiorari on the question of whether Oregon had disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm," the Court ended up considering only whether the punishment for harm to nonparty victims was constitutional, as remand of this case could lead to a new trial or change in the amount of punitive damages awarded. *Williams*, 127 S. Ct. at 1061-62, 1065.

31. *Williams*, 127 S. Ct. at 1063.

32. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

no opportunity to defend against the charge by showing how other victims were not entitled to damages because of their own negligence.<sup>33</sup>

Of additional concern to the Court was that permitting punishment for the injury of nonparty victims “would add a near standardless dimension to the punitive damages equation.”<sup>34</sup> The questions of how many victims, the seriousness of injury, and the circumstances of each victim’s injury would not likely be answered during a trial, leaving the jury to speculate as to appropriate damages.<sup>35</sup> Thus, wrote Breyer, “the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified.”<sup>36</sup>

While punitive damages may not be awarded for injury to nonparties, the majority made clear that the Due Process Clause does not preclude evidence of harm to nonparties from being introduced for the purpose of demonstrating reprehensibility.<sup>37</sup> According to Justice Breyer, “[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . .”<sup>38</sup> However, such evidence is to be used in determining whether an award is ultimately justified or excessive and may not be used by the jury to punish a defendant for harm alleged to have been inflicted on nonparties.<sup>39</sup> Thus, the majority wrote, “the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.”<sup>40</sup>

The error in the Oregon Supreme Court’s opinion, the majority held, was that it focused on more than reprehensibility in upholding the punitive damages award.<sup>41</sup> In rejecting Philip Morris’ claim that the Constitution forbids the use of punitive damages to punish a defendant for harm to nonparties, the Oregon court made three statements.<sup>42</sup> The majority found that the first statement—that the Court in *State Farm* had held only that a jury could not base an award on dissimilar acts of a defendant—was correct, but held that a jury may

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 416 (2003)).

37. *Id.* at 1064.

38. *Id.*

39. *Id.* See *BMW*, 517 U.S. at 574-75 (excessiveness decision depends upon the reprehensibility of the defendant’s conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions “authorized or imposed in comparable cases”).

40. *Williams*, 127 S. Ct. at 1064.

41. *Id.*

42. *Id.* at 1064-65.

not punish for harm to others.<sup>43</sup> The majority disagreed with the second statement—that if a jury cannot punish for the conduct, there is no reason to consider it—because while the Due Process Clause prohibits punishment for harm to nonparties, it permits a jury to consider such harm in determining reprehensibility. The third statement—that it is difficult to see how a jury could consider harm to nonparties without using that consideration in determining punishment—raises the practical problem of knowing what the jury was thinking when it imposed its punishment.<sup>44</sup> The answer the majority endorsed is that “state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.”<sup>45</sup> Although States have some flexibility in determining what kind of procedures to implement in protecting against the risk of confusion, “federal constitutional law obligates them to provide *some* form of protection” where the “risk of . . . misunderstanding is a significant one.”<sup>46</sup>

The principle dissent by Justice Ginsburg criticized the majority’s approach, finding that it unnecessarily vacated the judgment of the Oregon Supreme Court, which had “deprive[d] [no jury] of proper legal guidance” and had “endeavored to follow our decisions.”<sup>47</sup> Ginsburg expressed her belief that the Court had identified no charge by the Oregon courts inconsistent with the allowable scope of reprehensibility in determining punitive damages and thus should not have overturned the Oregon ruling.<sup>48</sup> Furthermore, Ginsburg argued, in making its decision, “the Court reaches outside the bounds of the case as postured when the trial court entered its judgment.”<sup>49</sup> Accordingly, Ginsburg wrote, “I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.”<sup>50</sup>

While joining Justice Ginsburg’s dissent, Justice Thomas wrote a one-paragraph dissent separately to emphasize his view that “the Constitution does not constrain the size of punitive damages awards.”<sup>51</sup> To Thomas, it did not matter that the Court called the ruling “procedural,” as “the ‘procedural’ rule is simply a confusing im-

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43. *Id.* at 1065.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1068 (Ginsburg, J., dissenting).

48. *Id.*

49. *Id.* at 1069.

50. *Id.*

51. *Id.* at 1067 (Thomas, J., dissenting) (quoting *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 429-30 (2003) (Thomas, J., dissenting)).

plementation of the substantive due process regime this Court has created for punitive damages.”<sup>52</sup>

In a separate dissent, Justice Stevens wrote that he saw “no reason why” the harm of persons not before the court “should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.”<sup>53</sup> To Stevens, “punitive damages are a sanction for the public harm the defendant’s conduct has caused or threatened.” In Stevens’ view, “[t]here is little difference between the justification for a criminal sanction, such as a fine or term of imprisonment, and an award of punitive damages.”<sup>54</sup>

Justice Stevens pointed to the difference between compensatory and punitive damages when dealing with third parties.<sup>55</sup> He noted that in this case no party argued for punitive damages to be used to compensate nonparty victims.<sup>56</sup> If this had happened, “[t]o award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process.”<sup>57</sup> Instead of serving a compensatory purpose in this case, however, the punitive damages award “serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction.”<sup>58</sup> To Stevens, this retributive purpose behind punitive damages was even more important in this case because under Oregon law the award was payable in part to the State rather than to the private litigant.<sup>59</sup>

Justice Stevens took further issue with the majority’s distinction between taking nonparty harm into account in order to assess reprehensibility—which is permitted—from taking nonparty harm into account in order to punish the defendant directly—which is forbidden.<sup>60</sup> To Stevens, “[w]hen a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant—directly—for third-party harm.”<sup>61</sup>

Despite the vocal dissents to this opinion, the majority spent little time addressing the dissenters’ concerns. In the end, as the Oregon Supreme Court had applied the wrong constitutional standard when

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52. *Id.*

53. *Id.* at 1066 (Stevens, J., dissenting).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1066-67.

61. *Id.* at 1067.

considering Philip Morris' appeal, the case was remanded for application of the correct standard set forth in the majority opinion.<sup>62</sup>

CONSTITUTIONAL LAW—STANDING—UNITED STATES SUPREME COURT  
TO DECIDE IF TAXPAYERS MAY CHALLENGE GOVERNMENT ACTION  
VIOLATING THE ESTABLISHMENT CLAUSE WHEN ACTION IS FINANCED  
BY UNEARMARKED TAXPAYER FUNDS—*Hein v. Freedom from Religion  
Foundation, Inc.*, 127 S. Ct. 722 (2006)

The United States Supreme Court recently granted a writ of certiorari in the case of *Hein v. Freedom from Religion Foundation, Inc.*<sup>63</sup> The Court heard oral argument on February 28, 2007, and will soon determine whether taxpayers have standing under Article III of the Constitution to challenge government action that possibly violates the First Amendment's establishment clause when the conduct was financed by taxpayer money not specifically earmarked for the challenged action.<sup>64</sup>

In 2004, three members of the Freedom from Religion Foundation filed a complaint in the United States District Court, Western District of Wisconsin, against Jim Towey, the director of White House Faith-Based and Community Initiatives (FBCI), as well as other directors of such offices spread throughout several federal agencies.<sup>65</sup> The plaintiffs alleged that the defendants' actions violated the principle of separation of church and state by using taxpayer money to fund activities that promote religion, specifically conferences where "faith-based organizations are singled out as particularly worthy of federal funding because of their religious orientation."<sup>66</sup>

The conferences took place after President Bush's formation of FBCI, which was created through several executive orders.<sup>67</sup> The Presidential orders provided for an official office for FBCI in the White House as well as for centers within several federal departments.<sup>68</sup> Various executive branch agencies had held the challenged conferences to promote FBCI.<sup>69</sup> However, the goal of these conferences was "to promote community organizations whether secular or religious."<sup>70</sup> The White House established the conferences to

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62. *Id.* at 1065 (majority opinion).

63. 127 S. Ct. 722 (2006).

64. 433 F.3d 989, 990 (7th Cir. 2006).

65. Complaint at 1, *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), available at [http://ffrf.org/legal/faithbased\\_complaint.pdf](http://ffrf.org/legal/faithbased_complaint.pdf).

66. *Id.* at 4, 5.

67. *Freedom from Religion Found.*, 433 F.3d at 993.

68. *Id.*

69. *Id.*

70. *Id.*

provide participants with information about the Federal funding process, available funding opportunities, and the requirements that come with the receipt of Federal funds . . . [and] also provide an opportunity to inform State and local officials about equal treatment regulations and other central elements of the Faith-Based and Community Initiative.<sup>71</sup>

After the plaintiffs alleged that the conferences were merely designed to promote religious organizations over the secular organizations, the trial court held that the plaintiffs did not have standing to sue.

However, in a 2-1 opinion, the United States Court of Appeals for the Seventh Circuit reversed the trial court's decision and ultimately held that the taxpayers did have standing.<sup>72</sup> The plaintiffs alleged that the conferences were funded by the government and therefore based on an exercise of the Taxing and Spending Clause in addition to the Establishment Clause, thus giving them standing as taxpayers.<sup>73</sup> The Government argued that the funding for the conferences was provided by the President generally for the operation of his executive office and not directly by Congress; in reality, the objection was to the President using the funds for these conferences and not to Congress's spending.<sup>74</sup>

Judge Posner, writing for the Seventh Circuit, first delved into the history of judicial limitation in the Cases and Controversies Clause of Article III.<sup>75</sup> He examined Justice Frankfurter's concurring opinion in *Coleman v. Miller*, which stated that the framers of Article III wanted courts to look at problems "only if a concrete, living contest between adversaries called for the arbitrament of law" and limited federal jurisdiction to "cases in which the plaintiff alleged the kind of injury that would have supported a lawsuit in the eighteenth century."<sup>76</sup> Future cases placed taxpayer standing outside the reach of Article III because this would not have satisfied standing requirements in the eighteenth century.<sup>77</sup>

However, Judge Posner stated, the concept of standing has changed.<sup>78</sup> U.S. Supreme Court cases from the 1990s upheld standing for a variety of reasons primarily centered on voter status, such as the standing to sue for lists of political action committee donors and standing for voters challenging new congressional districts as

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71. *Id.* (citing White House Conferences on Faith-Based and Community Initiatives, <http://www.dtiassociates.com/fbci/> (last visited Aug. 15, 2007)).

72. *Id.* at 997.

73. *Id.* at 998.

74. *Id.*

75. *Id.* at 990.

76. *Id.* (citing *Coleman v. Miller*, 307 U.S. 433 (1939) (concurring opinion)).

77. *Id.*

78. *Id.*

gerrymandering.<sup>79</sup> One recent case “assumed (without discussion)” that the plaintiffs as voters and taxpayers had standing to dispute an amendment that limited certain candidates on a ballot.<sup>80</sup>

Judge Posner then went into general standing specifically for Establishment Clause cases.<sup>81</sup> He looked at *American Civil Liberties Union v. City of St. Charles*<sup>82</sup> and *Abington School District v. Schempp*<sup>83</sup> to determine how minimal standing requirements actually were for the Establishment Clause.<sup>84</sup> In *St. Charles*, taxpayers brought suit to object to a cross on public property during Christmas-time; the plaintiffs claimed they had to detour to avoid seeing the cross.<sup>85</sup> The court held that detouring or “curtail[ing] of their use of the public rights of way” was injurious enough for standing.<sup>86</sup> In *Schempp*, parents complained that having their children read the Bible and recite the Lord’s Prayer in public schools violated the Establishment Clause.<sup>87</sup> The *Schempp* Court noted that the actual injury could have been avoided by taking their children out of that specific public school.<sup>88</sup> But, Judge Posner noted, the plaintiffs in both cases still had standing to sue under the Establishment Clause, even with options of avoiding the injury.<sup>89</sup>

Judge Posner then discussed *Flast v. Cohen*,<sup>90</sup> a taxpayer challenge under the Establishment Clause.<sup>91</sup> In *Flast*, the plaintiffs complained that federal grant money had funded parochial schools, violating the Establishment Clause.<sup>92</sup> The *Flast* Court determined standing on “prudential” principles instead of the actual injury to a taxpayer from having his or her taxes used for an offensive purpose.<sup>93</sup> Prudential principals, a judge-made doctrine, “deny standing to someone who has been injured as a result of the defendant’s conduct . . . but who is not the ‘right’ person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation.”<sup>94</sup> Because prudential principles of standing are common law, they are still subject to change.<sup>95</sup> In *Flast*,

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79. *Id.*

80. *Id.* at 990-91.

81. *Id.* at 991.

82. 794 F.2d 265 (7th Cir. 1986).

83. 374 U.S. 203 (1963).

84. *Freedom from Religion Found.*, 433 F.3d at 991.

85. *Id.* (citing *St. Charles*, 794 F.2d at 268).

86. *Id.*

87. *Id.* at 990 (citing *Schempp*, 374 U.S. 203).

88. *Id.*

89. *Id.* at 991.

90. 392 U.S. 83 (1968).

91. *Freedom from Religion Found.*, 433 F.3d at 991.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 992.

the Court created a two-part test and stated that plaintiffs can challenge congressional exercises of taxing and spending power as long as the expenditures are not “incidental” and the challenged exercise goes beyond specific and not general constitutional limitations<sup>96</sup>—“specific” because the Establishment Clause has a “specific” limitation on congressional expenditures for funding religion.<sup>97</sup>

Judge Posner then discussed and compared *Bowen v. Kendrick*<sup>98</sup> and ultimately decided *Freedom from Religion Foundation* would be governed by *Bowen*.<sup>99</sup> In *Bowen*, the Court held that taxpayers did have standing to attack the Adolescent Family Life Act, even though grants had not been made by Congress itself.<sup>100</sup> The Adolescent Family Life Act was a congressional spending program administered by the Secretary of Health and Human Services.<sup>101</sup> *Bowen* gave taxpayers standing even if a violation was not complete until the executive branch acted.<sup>102</sup> A taxpayer had to show only that a statute was enacted “pursuant to Congress’s taxing and spending powers” and did not necessarily have to show that a statute violated the Establishment Clause.<sup>103</sup> If it were actually proven that the conferences were used as promotional tools for religion, it was possible that the defendants violated the Establishment Clause.<sup>104</sup>

Judge Posner found that the difference between this case and *Flast* and *Bowen* revolved around the type of expenditures.<sup>105</sup> The *Freedom from Religion Foundation* plaintiffs’ complaint alleged that the conferences were funded by expenditures from “appropriations,” or from Congress’s spending power, and that these appropriations were not earmarked for a specific purpose.<sup>106</sup> Therefore, funding had to come from appropriations for the “general administrative expenses.”<sup>107</sup> The President, as well as other executive officials, had some discretion over the use of this money.<sup>108</sup> In both *Flast* and *Bowen*, the expenditures in question were “specific congressional grant programs,” while in the case at hand there was no actual “program,” just generally appropriated money given to the executive branch.<sup>109</sup>

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96. *Id.*

97. *Id.*

98. 487 U.S. 589 (1988).

99. *Freedom from Religion Found.*, 433 F.3d at 993.

100. *Bowen*, 487 U.S. 589.

101. *Id.* at 593.

102. *Id.* at 618-20.

103. *Id.*

104. *Id.* at 623-24.

105. *Freedom from Religion Found.*, 433 F.3d at 994.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

However, Judge Posner did not believe this difference should be controlling.<sup>110</sup> He gave two examples of opposite extremes: first, if the Secretary of Homeland Security used his general funds to build a mosque because he believed that giving financial assistance to Islam would reduce terrorism, taxpayer standing would not be essential to bringing suit—but it would be inconsistent to give taxpayers standing in cases that only “slightly” violated the Establishment Clause and not in cases where the violation was egregious.<sup>111</sup> Second, if the President violated the Establishment Clause by positively referencing religion in his State of the Union address, a suit brought against him would not involve an expenditure of any kind.<sup>112</sup> A taxpayer does not have standing to challenge executive branch actions that do not involve direct expenditures, even though almost all the activity of the executive branch is funded by general appropriations.<sup>113</sup>

Judge Posner reasoned that as the conferences give instructions to religious organizations regarding how to apply for government grants, the challenge was to the promotional tool (or to the conferences) and not the actual grants.<sup>114</sup> He noted that the line the government wanted to draw between the initiative and grants made because of that initiative would be “artificial”; executive officials could still promote religion without giving outright grants.<sup>115</sup> He further noted that the exception in *Flast* for “incidental” expenditures is relative.<sup>116</sup> Going back to the mosque example, the building of a mosque would probably be “incidental” to the Department of Homeland Security’s budget of \$30 billion.<sup>117</sup> “Incidental” does not necessarily mean the cost relative to the size of the budget—if it did, taxpayer standing would not exist.<sup>118</sup>

Judge Posner also stated that taxpayers did not have standing to attack an executive action funded by expenditures that were not consistent with congressional intent in allowing such expenditures.<sup>119</sup> This would make the courts a manager over the executive branch—a job expressly reserved for Congress.<sup>120</sup> He ultimately held that taxpayers do have standing to attack executive actions financed generally by Congress if they are alleged to promote religion.<sup>121</sup>

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110. *Id.*

111. *Id.* at 994-95.

112. *Id.* at 995.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 997.

Judge Ripple wrote a dissent expounding on his belief that precedent did not allow “such a dramatic expansion of current standing doctrine” by allowing taxpayers to sue based on executive branch conduct as long as it was funded by a congressional appropriation.<sup>122</sup> Judge Ripple expressly noted that constitutional standing had become a “well-established doctrine” and that the Seventh Circuit, as an intermediate appellate court, could not change Supreme Court doctrine.<sup>123</sup>

Judge Ripple focused his analysis on the concept of concrete injury.<sup>124</sup> He noted that standing was “rooted firmly” in Article III’s Case or Controversy Clause.<sup>125</sup> The traditional test

requires the party who invokes the court’s authority to show that he personally has suffered actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be traced to the challenged action and is likely to be redressed by a favorable decision.<sup>126</sup>

This test should be construed rigorously, as noted in *Flast v. Cohen*.<sup>127</sup> Taxpayers may challenge only congressional powers exercised under the Taxing and Spending Clause, found in Article I.<sup>128</sup> They must also show a “logical link” or nexus between these challenged congressional powers and taxpayer status<sup>129</sup> and show a nexus between taxpayer status and the actual constitutional infringement.<sup>130</sup>

Judge Ripple focused on the nexus between the taxpayers and the challenged congressional powers.<sup>131</sup> Before doing so, he examined why the Supreme Court would want this connection to be examined so closely.<sup>132</sup> Judge Ripple observed that taxpayer status has always stood on shaky ground in terms of constitutional standing, particularly due to taxpayers bringing suits for undifferentiated injuries, or “mere disagreement[s] with the government policy.”<sup>133</sup> The trend in the Supreme Court’s decisions indicated that many complaints were not really about the Taxing and Spending Clause, he declared, but other clauses such as the Account Clause, the Incompatibility

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (citing *Valley Forge Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

127. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 102-103 (1968)).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 997-98.

Clause, and the Property Clause.<sup>134</sup> As a result, the Supreme Court denied each of these taxpayers standing.<sup>135</sup> This case was based on the Establishment Clause, which does restrict Congress's power to spend, but Judge Ripple decided the proper inquiry was whether it was based on the Taxing and Spending Clause.<sup>136</sup>

Judge Ripple first analyzed *Flast* and its subsequent holdings regarding the subject.<sup>137</sup> Taxpayer standing is merely a small exception to the prohibition of generalized grievances, and to allow taxpayers to challenge general government fund expenditures in addition to specific expenditures would significantly widen the exception.<sup>138</sup> Taxpayer standing exists only so expenditure and tax violations of the Establishment Clause may be remedied and because the Clause is so difficult to enforce.<sup>139</sup> The Supreme Court has allowed standing for taxpayers to make "specific objections linked to a specific exercise of the taxing and spending power on the ground that it violates the Establishment Clause."<sup>140</sup> After *Flast* and subsequent cases, plaintiffs must challenge expenditures "made in the exercise of Congress' taxing and spending power" and directing attention to an executive branch program does not qualify.<sup>141</sup>

Judge Ripple also looked at *Bowen* in his analysis.<sup>142</sup> In *Bowen*, the Court stated that the Adolescent Family Life Act was really a "disbursement of funds pursuant to Congress' taxing and spending powers" and the fact that certain executive officials actually disbursed the money did not matter.<sup>143</sup> The *Bowen* Court interpreted the "touchstone" of *Flast* to be whether the executive official had authority under the challenged statute to administer spending programs created by Congress.<sup>144</sup> Judge Ripple disagreed with Judge Posner and Judge Wood that *Bowen* enlarged the concept of taxpayer standing by permitting plaintiffs to show that a general congressional appropriations statute allowed executive branch officials to violate the Establishment Clause because it would allow any taxpayer to bring a

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134. *Id.* at 998; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (rejecting standing based on the Property Clause); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (rejecting standing based on the Incompatibility Clause); United States v. Richardson, 418 U.S. 166 (1974) (rejecting standing based on the Account Clause).

135. *Freedom from Religion Found.*, 433 F.3d at 998.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 998-99.

141. *Id.* at 1000.

142. *Id.*

143. *Id.*

144. *Id.*

suit against any executive action.<sup>145</sup> Judge Ripple felt that *Bowen* did not authorize the judiciary to question executive actions at the request of someone who cannot show a specific connection to the action.<sup>146</sup> He specifically noted that “[t]he executive can do nothing without general budget appropriations from Congress.”<sup>147</sup>

Judge Ripple stated that the majority broadened the concept of taxpayer standing so that it could not be distinguished from the other forms of standing the Supreme Court has decided were “destructive of the case or controversy limitation on the power of the federal courts to intrude into the decision-making prerogatives of the executive branch.”<sup>148</sup> He also noted that the decision brought the circuit out of line from the other circuits.<sup>149</sup>

CONSTITUTIONAL LAW—FIRST AMENDMENT—A STUDENT’S RIGHT TO  
DISPLAY A BANNER AT AN EVENT DURING SCHOOL HOURS ACROSS THE  
STREET FROM THE SCHOOL—*Frederick v. Morse*, 439 F.3d 1114 (9th  
Cir. 2006)

On March 19, 2007, the United States Supreme Court heard oral arguments for *Frederick v. Morse*,<sup>150</sup> a First Amendment case originating out of the Ninth Circuit. The case involves the First Amendment rights of Joseph Frederick, then a high school senior at Juneau-Douglas High School in Juneau, Alaska.<sup>151</sup> The Supreme Court granted writ of certiorari for the case on March 5, 2007.<sup>152</sup> Famed Clinton-era former independent counsel Kenneth Starr argued the case on behalf of Principal Deborah Morse, whom the Ninth Circuit determined could be personally liable to Frederick for her actions.<sup>153</sup> The Supreme Court’s decision may have far-reaching consequences for both the First Amendment rights of students and the ability of school administrators to punish unwanted speech. This Note will fully explore the Ninth Circuit’s decision.

One January day the Olympic Torch was scheduled to pass the Juneau-Douglas High School (High School).<sup>154</sup> The High School let students out of classes to watch the torch pass.<sup>155</sup> The event, called the “Winter Olympics Torch Relay,” was sponsored by various com-

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1000-01.

150. 439 F.3d 1114 (9th Cir. 2006).

151. *Id.* at 1115.

152. *Morse v. Frederick*, 127 S. Ct. 722 (2007).

153. CNN, Justices Hear ‘Bong Hits for Jesus’ Case (Mar. 19, 2007), available at <http://www.cnn.com/2007/LAW/03/19/scotus.bonghits.ap/index.html>.

154. *Frederick*, 39 F.3d at 1115.

155. *Id.*

panies, including Coca-Cola.<sup>156</sup> Frederick arrived at school late because he was stuck in the snow, which meant he showed only in time to come to the event.<sup>157</sup> Frederick met with some friends on the sidewalk across from the High School.<sup>158</sup> Frederick waited until TV cameras were within range and then displayed a banner that read “Bong Hits for Jesus.”<sup>159</sup> Various fights and other roughhousing amongst the students occurred before Frederick unveiled the banner.<sup>160</sup> Principal Morse saw the banner, crossed the street, took the banner from him, and crumpled it up.<sup>161</sup> Immediately before Morse took the banner, Frederick “asked ‘What about the Bill of Rights and freedom of speech?’ ”<sup>162</sup> Morse responded that “she ‘felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs.’ ”<sup>163</sup> Frederick was suspended for ten days, and he unsuccessfully appealed his suspension.<sup>164</sup> Frederick then filed a § 1983 complaint in federal court, claiming his First Amendment rights had been violated.<sup>165</sup> The district court granted summary judgment for Morse, holding that no constitutional right had been violated and that if one had been violated, Morse had qualified immunity.<sup>166</sup> Frederick then filed his appeal with the Ninth Circuit.<sup>167</sup>

The Ninth Circuit first answered whether this should be a school case at all, as an amicus brief had argued that as Frederick was on a public sidewalk and not in school, his case should be treated as such.<sup>168</sup> However, without much discussion, the Ninth Circuit determined that this was a school case because school was in session and the High School did maintain supervision over the students to some extent.<sup>169</sup>

After concluding that this was a school speech case, the court noted that

[t]he school principal and school board [did] not claim that the display disrupted or was expected to disrupt any classroom work. They concede[d] that their objection to the display, and the reason why the principal ripped down the ban-

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1115-16.

161. *Id.* at 1115.

162. *Id.* at 1116.

163. *Id.*

164. *Id.* at 1115.

165. *Id.* at 1115-17.

166. *Id.* at 1116-17.

167. *Id.* at 1115.

168. *Id.* at 1117.

169. *Id.*

ner, was not concern that it would cause disruption but that its message would be understood as advocating or promoting illegal drug use.<sup>170</sup>

Although Frederick maintained that the message was not advocating illegal drug use and was instead just a nonsensical phrase, the court conducted its analysis assuming that the message expressed positive sentiments towards illegal drug use.<sup>171</sup>

With the above concessions and facts in mind, the Ninth Circuit proceeded to analyze the First Amendment claim, framing the issue in the following way: “whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school.”<sup>172</sup> The underlying legal issue that decided the case was how the court chose to categorize the speech, or more specifically, what case law the court believed was applicable. The Ninth Circuit believed this to be a *Tinker v. Des Moines Independent Community School District*<sup>173</sup> case, while Morse argued it was either a *Bethel School District No. 403 v. Fraser*<sup>174</sup> or *Hazelwood School District v. Kuhlmeier*<sup>175</sup> case.

In *Tinker*, students wore black arm bands to protest the war.<sup>176</sup> “*Tinker* held that ‘the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.’”<sup>177</sup>

In *Fraser*, a student was punished after giving a speech for a candidate for student office.<sup>178</sup> The speech, heavily laden with sexual innuendo, was given at a school assembly, and disruption immediately ensued.<sup>179</sup> The court believed that “*Fraser* focuses upon the sexual nature of the offensiveness in the in-school speech that can be punished, as contrasted with the ‘political viewpoint’ of the speech protected in *Tinker*.”<sup>180</sup> Furthermore, *Fraser* protects the school’s ability to protect its basic educational mission.<sup>181</sup>

170. *Id.*

171. *Id.* at 1117-18.

172. *Id.* at 1118.

173. 89 S. Ct. 733 (1969).

174. 106 S. Ct. 3159 (1986).

175. 108 S. Ct. 562 (1988).

176. *Frederick*, 39 F.3d at 1118.

177. *Id.* (quoting *Tinker*, 89 S. Ct. at 740).

178. *Id.* at 1119.

179. *Id.*

180. *Id.*

181. *Id.* at 1120.

In *Kuhlmeier*, a school-run newspaper attempted to publish an article that dealt with pregnancy and divorce.<sup>182</sup> Because the newspaper was run by the school and was part of the school curriculum, the newspaper's speech was an affirmative promotion by the school of the student author's speech, a promotion the First Amendment does not require.<sup>183</sup>

The Ninth Circuit believed this case to be a *Tinker* case.<sup>184</sup> The School Board, which was also a defendant, had argued that punishment was consistent with enforcing the High School's mission in opposing illegal drug use.<sup>185</sup> The student in *Tinker* was opposing a war, which, according to the Ninth Circuit, was opposition to the most important governmental mission, winning a war.<sup>186</sup> *Tinker* allows censorship or punishment towards student speech only when the school can "show a reasonable concern about the likelihood of substantial disruption to its educational mission."<sup>187</sup>

The court believed that *Fraser* did not apply for several reasons.<sup>188</sup> First, *Fraser* focused on the "sexual nature" of the speech, which was "plainly offensive" and caused disruption of a school assembly.<sup>189</sup> On the other hand, Frederick's speech was not sexual in nature and did not disrupt a school assembly.<sup>190</sup> Not only was Frederick's speech not "plainly offensive," but in a state where legalizing marijuana is often at issue, it very well could have been political speech in the same vein as *Tinker*.<sup>191</sup> Additionally, *Tinker* does not allow a school to define its mission in any way it sees fit and then punish students who oppose this mission.<sup>192</sup> Instead, *Fraser* adds to *Tinker* the notion that schools can punish speech that disrupts its educational function, which did not occur in this case.<sup>193</sup>

The court distinguished *Kuhlmeier* in an even quicker fashion, reasoning that Frederick's banner "was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity."<sup>194</sup> The court thought that *Kuhl-*

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182. *Id.* at 1119.

183. *Id.*

184. *Id.* at 1118.

185. *Id.* at 1119.

186. *Id.*

187. *Id.* at 1123.

188. *Id.* at 1119.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1120 (citing various examples where a school's mission could not interfere with legitimate First Amendment rights, such as a school's anti-alcohol message being undermined by a student e-mailing medical reports to other students showing the health benefits of alcohol).

193. *Id.*

194. *Id.* at 1119.

*meier* may have applied had Frederick insisted on creating the banner in a school art class; however, that was not the case.<sup>195</sup>

The School Board and Morse pointed to *Boroff v. Van Wert City Board of Education*,<sup>196</sup> a Sixth Circuit case that upheld a school dress code that prohibited wearing Marilyn Manson T-shirts, some of which contained pro-drug and anti-religious messages.<sup>197</sup> The Sixth Circuit read *Fraser* in a way that gave wide discretion to schools to determine the appropriateness of messages at school, concluding that the T-shirts could be banned because they were contrary to the school's educational mission.<sup>198</sup> The *Frederick* court declined to follow *Boroff* to the extent that *Boroff* implies that a school can regulate speech "as 'plainly offensive' whenever it conflicts with a vaguely-defined 'educational mission.'" <sup>199</sup> The *Frederick* court further believed that *Fraser* did not give schools the right to prohibit any speech that is "offensive," meaning that "offensive" speech did not automatically switch the analysis from *Tinker* to *Fraser*.<sup>200</sup> By the School Board's and Morse's standard, the High School could prohibit Frederick from distributing copies of an Alaskan Supreme Court decision upholding the right to possession of marijuana, when the case was distributed across the street from the school.<sup>201</sup> Instead, "*Fraser* only enables schools to prevent the sort of vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily promotes disruption and diversion from the *educational curriculum*."<sup>202</sup>

After determining that this case was properly decided under *Tinker*, the court determined that because Morse punished the speech not to stop disruption of its educational mission but because the speech disrupted the High School's anti-drug message, the punishment failed the *Tinker* test and thus violated Frederick's First Amendment rights.<sup>203</sup>

As previously noted, the U.S. Supreme Court's decision will likely have far-reaching consequences for both students and school officials. Although this Note does not offer a prediction as to the outcome, the holding will likely hinge on whether the Court decides to follow the Sixth Circuit's or the Ninth Circuit's interpretation of *Fraser*. It seems likely that the conservatives on the Court will side with the

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195. *Id.* at 1119-20.

196. 220 F.3d 465 (6th Cir. 2000).

197. *Frederick*, 39 F.3d at 1122.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1123. The court also went on to determine that the defendants did not have qualified immunity and could be subject to money damages because Frederick's rights were clearly established under the applicable precedent. *Id.* at 1123-25.

Sixth Circuit and hold that *Fraser* gives wide discretion to schools to determine its educational mission, while the liberals on the Court will likely side with the *Frederick* court and hold that *Fraser* is limited to sexual speech that causes a real disruption to the school's basic educational mission.

CONSTITUTIONAL LAW—THE POLICE DO NOT HAVE PROBABLE CAUSE TO ARREST A CITIZEN UNDER A STATUTE THAT HASN'T BEEN RULED UNCONSTITUTIONAL, IF THE STATUTE ON ITS FACE WOULD BE CONSTRUED UNCONSTITUTIONAL BY A REASONABLE PERSON—*Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007)

Thomas Leonard appealed the summary judgment granted to the defendant, police officer Stephen Robinson, by the federal district court in a civil rights action resulting from Leonard's arrest at a township board meeting.<sup>204</sup> The district court dismissed the wrongful arrest civil case against Robinson, holding that he was protected by qualified immunity and that Leonard "could not make out a prima facie case" on his claim that his First Amendment rights were violated by an improper motive of the officer.<sup>205</sup> On appeal, the Sixth Circuit reversed the lower court's ruling, stating that it overlooked the application of the First Amendment to the state statute used to charge Leonard and ignored evidence which may have shown that Robinson had an improper motive.<sup>206</sup> The court of appeals held that "no reasonable officer would have found probable cause to arrest Leonard solely for uttering 'God damn' while addressing the township board," as this type of debate is clearly protected by the First Amendment.<sup>207</sup> The court additionally held that Leonard's retaliation claim survived summary judgment, as the motive for the arrest was a genuine issue of material fact that should be heard by a jury.<sup>208</sup>

Leonard's wife, Sara, operated a towing company, Auto Works, in Montrose, Michigan, until 2000.<sup>209</sup> Around that time, the Montrose police chief, Chief Abraham, was in the process of trying to extend the jurisdiction of the police force.<sup>210</sup> Sarah's mother was a member of the city council that heard the proposal brought by the police chief, and she opposed the plan.<sup>211</sup> "Abraham asked Sarah to lobby her mother in support of the plan. In return, he offered [that] Auto Works could continue to tow for the Township. When Sarah refused,

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204. *Leonard v. Robinson*, 477 F.3d 347, 351 (6th Cir. 2007).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

Auto Works lost its business with the Township.”<sup>212</sup> Sarah sued the town and Abraham for violating her First Amendment rights, and a settlement was later reached; however, before the settlement was reached Leonard and his wife attended a Township Board meeting.<sup>213</sup> Also at this meeting was Officer Robinson, who testified that Abraham ordered him to attend the meeting.<sup>214</sup> Leonard believed Abraham sent Robinson so that if given the chance, he would arrest Sarah in retaliation for the suit against Abraham.<sup>215</sup> “As a result of the lawsuit, according to Leonard, Chief Abraham hated him and his wife.”<sup>216</sup> At the meeting, Robinson was asked by another attendee why he was at the meeting and lied by stating that “I’d like to see what’s going on.”<sup>217</sup>

At the meeting, during a portion known as “citizen time,” Leonard was given the opportunity to speak, and he began by saying that he and his wife were being treated unfairly by the town.<sup>218</sup> A short conversation between Leonard and a board member followed, and before it ended Leonard used the phrase “God damn” and then sat down; he was then told by the board member to not use God’s name in vain.<sup>219</sup> Leonard responded to this statement by telling the board member that he could do whatever he wanted, and then he was interrupted by Robinson.<sup>220</sup> Leonard told Robinson to leave him alone, and Robinson replied that he was going to take Leonard with him.<sup>221</sup> Robinson then took Leonard outside and placed him under arrest.<sup>222</sup>

Leonard was charged with violating of Michigan laws applying to disorderly persons and obscenity, but one month later the citation was voided.<sup>223</sup> Leonard later filed suit against Officer Robinson in the United States District Court for the Eastern District of Michigan, “alleging that Robinson, under color of law, violated his Fourth Amendment right to be free of unreasonable seizure. The complaint also raised three state law torts: battery, false arrest, and false imprisonment.”<sup>224</sup> Robinson moved for summary judgment, asserting that he was protected by qualified immunity on the constitutional claims and that the state law claims should be dismissed because the arrest

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 352.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

was supported by probable cause.<sup>225</sup> Leonard responded by defending his claims on a First Amendment retaliation theory.<sup>226</sup> The district court ruled in favor of Robinson, granting summary judgment.<sup>227</sup>

The Sixth Circuit reviewed the grant of summary judgment *de novo*, as the main issues in the case were questions of law.<sup>228</sup> The overriding issue addressed by the court was the

question of whether an arrest for obscenity, vulgarity, or disturbing the peace, when based upon speech and not conduct, is valid when it occurs during a democratic assembly where there is no evidence that the individual arrested was out of order and some evidence of improper motive by the arresting officer.<sup>229</sup>

The court first examined whether Robinson's defense of qualified immunity protected him from civil liability.<sup>230</sup> The court's analysis continued with a review of whether Robinson had probable cause under state law to arrest Leonard.<sup>231</sup> The court stated that qualified immunity protects public officials from civil liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>232</sup> The court noted that, viewing the issue in the light most favorable to the injured party, it must determine whether a constitutional right was

225. *Id.* In his motion for summary judgment, to show probable cause for the arrest, Robinson claimed there were four statutes that Leonard violated: Michigan Compiled Laws sections 750.103 (cursing and swearing), 750.170 (disturbance of lawful meetings), 750.167 (disorderly person), and 750.337 (obscenity).

226. *Leonard*, 477 F.3d at 352.

227. *Id.* at 353.

The district court held that Robinson did not violate the Fourth Amendment because he had probable cause to arrest Leonard. The court declined to exercise supplemental jurisdiction over the state law claims. . . .

The district court denied Leonard's First Amendment retaliation claim by holding that there was no "causal connection between Plaintiff's protected speech and his arrest." . . . The court refused to make reasonable inferences favorable to Leonard's claims. Instead, it ignored his allegations regarding Robinson's motive for the arrest, the previous lawsuit by Leonard's wife, and Robinson's inconsistent statements and held that "there is absolutely no evidence of any improper motive." The district court concluded that it was illegal to "use [ ] objectionable language and become [ ] somewhat belligerent during a public meeting," and that Leonard should have just calmed down and not made a federal case of it.

*Id.* (internal citations omitted) (alterations in original).

228. *Id.*

229. *Id.* at 351. The facts of what happened were to be construed in the light most favorable to Leonard. *Id.*

230. *Id.* at 354.

231. *Id.* at 355.

232. *Id.* at 354 (quoting *Estate of Carter v. Detroit*, 408 F.3d 305, 310-11 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

violated and whether that right is clearly established.<sup>233</sup> “For a right to be clearly established, the ‘contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’ ”<sup>234</sup>

The court held that Robinson inhibited First Amendment freedoms that have been clearly established for a generation, thus precluding “a finding of probable cause because the laws cited by Robinson are either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct) at a democratic assembly where the speaker is not out of order.”<sup>235</sup> The court further noted that the facts of the case represented the universally perceived First Amendment protection of the free discussion of governmental affairs.<sup>236</sup> The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>237</sup> The court declared that even the narrowest interpretation of the rights protected under freedom of speech would include the holding that one should refrain from interrupting or regulating speech in a democratic forum such as a town meeting.<sup>238</sup>

The court then looked at the four sections of Michigan’s Penal Code that Robinson claimed gave him probable cause for the arrest.<sup>239</sup> The first statute that Leonard was accused of violating was section 750.337, Michigan Compiled Laws, “regulating speech in the presence of women or children.”<sup>240</sup> The court held that Leonard’s vio-

233. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *see also* *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (noting that reasonable public officials should know the law governing their conduct).

234. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “For a plaintiff to state a claim for First Amendment retaliation, he must show that the injury was material, ‘that his conduct was constitutionally protected,’ and that it was a ‘motivating factor’ behind the government’s actions.” *Id.* at 355 (quoting *Adair v. Charter County of Wayne*, 452 F.3d 482, 492 (6th Cir. 2006)) (internal citation omitted).

235. *Id.* at 356.

236. *Id.* (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931))).

237. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

238. *Id.* The court noted the long-standing precedent of courts finding that constitutional protection should be accorded only to speech that is explicitly political and that even if speech is political, there may be a few exceptions when it may be limited, such as when it entails the use of fighting words or when the social interest outweighs the right of free speech. *Id.*

239. *Id.*

240. *Id.* (This law stated that “[a]ny person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor.”).

lation of this law did not create probable cause, as this law had been ruled unconstitutional in prior decisions.<sup>241</sup> The court explained how this law had been determined to be constitutionally vague, as it delegated “basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis [and created the danger of] arbitrary and discriminatory enforcement.”<sup>242</sup> The court opined that it would be hard to envision a more vague statute than the one before it and that the language within the statute outlawing “insulting language” would subject many people to the threat of misdemeanor prosecution without knowledge of what constituted a violation.<sup>243</sup>

The court noted that the constitutionality of the other three statutes relied upon by Robinson had not been as “clearly or directly” examined by Michigan courts as had section 750.337.<sup>244</sup> Adding that a police officer’s duty is to enforce laws “until and unless they are declared unconstitutional,”<sup>245</sup> the court further stated that the passing of a law by the legislature eliminates the need for speculation by the police as to whether the statute is constitutional except when the law is so clearly and blatantly unconstitutional that any reasonable person would be hard pressed to not see the flaws.<sup>246</sup> The court explained that when looking at the facts “in the light most favorable to the plaintiff, no reasonable police officer would believe that any of the three other Michigan statutes relied upon by the district court are constitutional as applied to Leonard’s political speech during a democratic assembly.”<sup>247</sup>

The court then discussed why the other three statutes could not support probable cause as applied to Leonard’s speech.<sup>248</sup> Section 750.167 defines “disorderly person,” in part, as “[a] person who is engaged in indecent or obscene conduct in a public place.”<sup>249</sup> The court explained that the plain language of the statute regulates conduct and not speech; the statute reads as regulating indecent conduct such as the exposing of one’s body parts. Even if speech was not meant to be regulated by this statute, however, the statute would be

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241. *Id.* at 358.

242. *Id.* The court explained that “in order to pass constitutional muster, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* (quoting *People v. Boomer*, 655 N.W.2d 255, 258 (Mich. Ct. App. 2002)).

243. *Id.*

244. *Id.* at 358-59.

245. *Id.* at 359.

246. *Id.* (“Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”).

247. *Id.*

248. *Id.*

249. *Id.* at 356.

similar to section 750.337, which as noted before has been ruled to be flagrantly unconstitutional.<sup>250</sup>

The court further explained that Leonard's conduct could not be punished under section 750.103, which makes "profanely curs[ing] or damn[ing] or swear[ing] by the name of God, Jesus Christ or the Holy Ghost a crime."<sup>251</sup> The court noted that the U.S. Supreme Court ruled in *Cohen v. California*<sup>252</sup> that a state may not make the use of a "single four letter expletive" a crime and that there is no distinction between the facts in *Cohen* and the ones found in this case.<sup>253</sup> The court also noted that the use of the phrase "God damn" by Leonard during his political speech did not fall under the category of fighting words. Thus, the court held, barring Leonard from using the expletive in his display of political speech during a town meeting was unconstitutional.<sup>254</sup>

The last statute the court examined was section 750.103, prohibiting "[a]ny person [from making or exciting] any disturbance or contention . . . at any . . . public meeting where citizens are peaceably and lawfully assembled."<sup>255</sup> The court noted that this statute had already been ruled to be overbroad by the Michigan Court of Appeals, which held that the phrase "excite any contention" must be stricken from the statute for the law to be constitutional,<sup>256</sup> adding that there was no conduct exhibited by Leonard that would be prohibited under this statute.<sup>257</sup>

After elaborating on why there was no probable cause for Leonard's arrest under Michigan statutes, the court explained why it disagreed with the dissent's statement that, as the record contained a video of the incident, certain facts were undisputed.<sup>258</sup> The judge writing for the majority stated that he viewed the video and came to a different conclusion personally, but, more importantly, believed that a rational juror may come up with a different conclusion.<sup>259</sup> The majority concluded that this "judgment means that there is a genuine issue of material fact as to whether Leonard's conduct could con-

250. *Id.* at 359.

251. *Id.*

252. *Cohen v. California*, 403 U.S. 15 (1971).

253. *Id.* (quoting *Cohen*, 403 U.S. at 16 (where "the defendant was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words 'Fuck the Draft'")).

254. *Id.* at 359-60.

255. *Id.* at 360.

256. *Id.* (citing *People v. Purifoy*, 191 N.W.2d 63 (Mich. Ct. App. 1971) (finding that the statute was meant to deal with intentional acts of violence and holding that for someone to be punished under this statute, the activity must be shown to present a threat to public welfare)).

257. *Id.*

258. *Id.* at 361.

259. *Id.*

stitutionally be considered criminal by any rational officer.”<sup>260</sup> Before looking at the retaliation claim, the majority stated that the facts in this case could lead a reasonable fact finder to conclude that Leonard did not disrupt the peace.<sup>261</sup> The court therefore held

that no reasonable officer would [have found] that probable cause exist[ed] to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker [was] determined to be out of order by the individual chairing the assembly.<sup>262</sup>

The court finished its opinion by discussing why the district court’s analysis of the retaliation claim was also flawed.<sup>263</sup> The court noted that the district court never considered whether Leonard’s speech at the town meeting was protected and that the lower court wrongly assumed that all the statutes listed by Robinson were valid, as no court had specifically struck them down.<sup>264</sup> The court also noted that the district court failed to look at the evidence relevant to Leonard’s claim that Robinson had a motive in making the arrest.<sup>265</sup> The dispute between the police chief and the Leonard family and that another attendee stated that the officer lied about why he was attending the meeting, along with a lawsuit being filed before the town meeting, was evidence that Leonard may have been arrested in retaliation for constitutionally protected conduct.<sup>266</sup> The court concluded by holding “that Leonard . . . set out a prima facie case of First Amendment retaliation and . . . created a genuine issue of material fact.”<sup>267</sup>

The dissenting judge felt that Robinson had probable cause to arrest Leonard, reasoning that while he believed the four statutes used as support for the arrest may indeed be unconstitutional, he was “not prepared to accept [the majority’s] judgment that the Supreme Court, our court or the Michigan courts [have] clearly established the unconstitutionality of all four of [the] duly enacted laws before this incident.”<sup>268</sup> The dissent further stated that although section 750.337 had been ruled unconstitutional, he was not ready to find that the other three statutes would be found by a reasonable person to have been ruled unconstitutional by the courts.<sup>269</sup> For example, the dissent

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260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 361-62.

264. *Id.* at 362.

265. *Id.*

266. *Id.*

267. *Id.* at 363.

268. *Id.*

269. *Id.*

noted, section 750.170 (“Disturbance of lawful meetings”) had withstood several constitutional challenges, including one in the past couple of decades, and even if Robinson had looked the statute up before arriving at the meeting, he would not have reasonably known that it was “clearly established” that he should not enforce it in this type of setting.<sup>270</sup> The dissent reasoned that as “the Supreme Court [and the majority of other district courts have] never rejected a claim of qualified immunity to a police officer who enforced a statute that had not been declared unconstitutional at the time of the citizen-police encounter,” the three statutes which had not been directly found to be in violation of the constitution were enough to grant probable cause for the arrest.<sup>271</sup> The dissent further stated that “[t]he First Amendment properly protected Leonard from being prosecuted for his unruly speech and conduct—and for now that is enough[, and that to] expose Robinson to money damages for enforcing these laws . . . seems unfair.”<sup>272</sup> The dissenting judge concluded by stating that he believed the retaliation claim was moot as well, as there was probable cause; even if there weren’t probable cause, Robinson had done nothing more than try to restore order to a meeting that was getting out of hand, and Leonard had failed to show any concrete evidence that the police were out to get him.<sup>273</sup>

HABEAS CORPUS—CONSTITUTIONAL RIGHTS OF ALIENS—*Hamdan v. Rumsfeld* (*Hamdan 2*), 464 F.Supp.2d 9 (D.D.C. 2006)

On the heels of the complex, controversial opinion from the United States Supreme Court in *Hamdan v. Rumsfeld 1*,<sup>274</sup> the District Court for the District of Columbia, Judge Robertson, again faced the difficult questions encircling military commissions, enemy combatants, and the jurisdiction of federal courts. Quite familiar by now with the facts in *Hamdan*, Judge Robertson recalled:

Salim Ahmed Hamdan, a Yemeni national, was taken into United States military custody in Afghanistan in November 2001. He was transported to the Defense Department’s detention facility at

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270. *Id.* at 364.

271. *Id.* at 365.

The dissenting judge reasoned that “Leonard not only asks . . . to take a road less traveled but one never traveled. It is one thing to credit police officers with knowledge of all statutory and constitutional rulings potentially bearing on all statutes they enforce; but this necessary requirement needlessly loses any connection with reality when we hold police officers to the standard of anticipating a court’s later invalidation of a statute that was duly enacted by legislators sworn to uphold the Constitution, that is presumed constitutional, that has been on the books for 75 years and that has withstood two constitutional challenges.”

*Id.* at 367.

272. *Id.*

273. *Id.*

274. *Hamdan v. Rumsfeld* (*Hamdan 1*), 126 S. Ct. 2749 (2006).

Guantanamo Bay in June 2002. In July 2003, the President declared him eligible for trial by military commission. On April 6, 2004, Hamdan petitioned for mandamus or habeas corpus in the United States District Court for the Western District of Washington. On July 13, 2004, after having been held for about two years and eight months without formal charges, Hamdan was finally charged at Guantanamo Bay with a single count of conspiracy. In August 2004, his habeas petition was transferred to this court.

On November 8, 2004, I granted Hamdan's petition for a writ of habeas corpus after finding that he could not be tried lawfully before a military commission that had not been approved by Congress, *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C.2004). That decision was reversed by a panel of the D.C. Circuit on July 15, 2005, 415 F.3d 33, in a decision that was itself reversed a year later by the Supreme Court, *Hamdan v. Rumsfeld*, [], 126 S.Ct. 2749, [] (2006), four justices noting that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to lawfully try enemy combatants, *Id.* at 2799, (Breyer, J., concurring). On September 22, 2006, the Court of Appeals remanded the case to me "for further proceedings." The remand order contained no instructions, nor was it clear what proceedings, if any, would be possible—for, by that time, the President had indeed "return[ed] to Congress," and he had asked Congress to strip the federal courts of their jurisdiction to hear any habeas petitions of the Guantanamo detainees.

On September 29, 2006 Congress enacted, and . . . the President signed, the Military Commissions Act . . . which amends the federal habeas statute by removing jurisdiction of any 'court, judge, or justice' over habeas petitions and all other actions filed by aliens who are either detained as enemy combatants or are 'awaiting such determination.' ["The day after the MCA became law, the government filed, in each of the 181 Guantanamo habeas cases pending in this Court, a Notice of Military Commissions Act of 2006 [seeking dismissal], highlighting the jurisdiction-stripping and retroactivity provisions of the Act."] <sup>275</sup>

After recounting the facts, the district court construed Hamdan's claim as presenting three fundamental questions: (1) did the Military Commissions Act successfully remove statutory habeas jurisdiction over detainees like Hamdan; (2) if it did, is the Act constitutionally valid as a suspension <sup>276</sup> of the writ of habeas corpus; and (3) does Hamdan have a constitutional writ of habeas corpus that survives the Act? <sup>277</sup>

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275. *Hamdan v. Rumsfeld* (*Hamdan 2*), 464 F. Supp. 2d 9, 10-11 (D.D.C. 2006) (internal citations omitted).

276. See U.S. CONST. art. I, § 9, cl. 2 (the Suspension Clause).

277. *Hamdan 2*, 464 F. Supp. 2d at 11.

First, the district court concluded that the Military Commissions Act clearly intended to remove statutory habeas jurisdiction for detainees such as Hamdan. Although the standard for such clarity is high—“Congress must articulate specific and unambiguous statutory directives to effect a repeal [of jurisdiction]”<sup>278</sup>—section 7(a) and (b) of the Military Commissions Act provided such unambiguous directives.<sup>279</sup> Because the language of the Act was “so clear that it could sustain only one interpretation”<sup>280</sup>—and that interpretation was that no statutory jurisdiction remained for Hamdan—the court concluded the Act had foreclosed statutory habeas.<sup>281</sup>

Next the court turned to the second question: whether the Military Commissions Act was a valid suspension of the writ of habeas corpus. After tracing the history of the Great Writ from the fourteenth century to the present as “a guardian of liberty,”<sup>282</sup> the court turned to the language and jurisprudence of the Suspension Clause.<sup>283</sup> “Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I.”<sup>284</sup> In fact, Congress has authorized executive suspension of the writ of habeas corpus only four times in

278. *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 299 (2001)).

279. *Id.* at 11-12. Section 7 of the Act states:

a) IN GENERAL.—Section 2241 of title 28, United States Code [the habeas statute], is amended by . . .

inserting the following new subsection (e):

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

*Hamdan 2*, 464 F. Supp. 2d at 11-12.

280. *Hamdan 2*, 464 F. Supp. 2d at 12 (quoting *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997)).

281. *Id.*

282. *Id.* at 13.

283. *Id.* at 14. The Suspension Clause states: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” *Id.* (quoting Article I, section 9, clause 2).

284. *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting).

its history, and each such suspension “occurred during times of indisputable, and congressionally declared, rebellion or invasion.”<sup>285</sup> Though noting that there are aspects of the Suspension Clause that are still somewhat open questions,<sup>286</sup> the court concluded that the protection of the writ is “absolute in the absence of ‘invasion’ or ‘rebellion.’ Neither . . . was occurring at the time the MCA was enacted.”<sup>287</sup> As Congress “made no findings of the predicate conditions [of invasion or rebellion], as it did [in each of the prior four suspensions of the writ,]”<sup>288</sup> the court concluded that “Congress itself must not have thought that it was ‘suspending’ the writ with the enactment of the MCA.”<sup>289</sup> Thus, the Great Writ survived the Military Commissions Act and, “to the extent [it] operates to make the writ unavailable to a person who is constitutionally entitled to it, it must be unconstitutional.”<sup>290</sup>

Finally, the court turned to the third question: is Hamdan entitled to the constitutional writ that survives the Act? To answer this question, the court had to determine whether the Great Writ was available to an alien in the factual contours of Hamdan’s detention. Looking to past cases, the court held that habeas had been granted only to an alien that had “a significant relationship to the country in which the writ was sought.”<sup>291</sup> The court also noted that no prior, applicable cases had held an alien “captured abroad and detained outside the United States—or in [territory the U.S. controls]—had a . . . constitutionally protected right to the writ of habeas corpus.”<sup>292</sup> Because Hamdan did not reside “lawfully or unlawfully on American soil”<sup>293</sup> nor did he “become a part of the population enough to separate himself from the common law tradition generally barring non-resident enemy aliens from accessing courts in wartime,” Hamdan was not entitled to the Great Writ.<sup>294</sup> The court summed up the third question by stating that “Hamdan’s lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique[, but n]evertheless . . . his connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus.”<sup>295</sup> So, while the

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285. *Hamdan 2*, 464 F. Supp. 2d at 14, 15.

286. “The Supreme Court has never decided whether an Act of Congress alone has effectively ‘suspended’ the writ. . . . [I]ndeed, the Court has carefully avoided saying exactly what the Suspension Clause protects.” *Id.* at 15.

287. *Id.* at 16.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 17.

292. *Id.* (quoting *Rasul v. Bush*, 542 U.S. 466, 475 (2004)).

293. *Id.*

294. *Id.* (relying in part on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

295. *Id.* at 18.

Military Commissions Act had not suspended the Great Writ, it had modified statutory habeas jurisdiction, and therefore Hamdan's only access to habeas corpus, and thus to the District Court, would come through the Constitution. Here, his "lawful but involuntary [presence] is not the sort to indicate any substantial connections with our country that would justify the invocation of a constitutional right to habeas corpus."<sup>296</sup> Thus, Hamdan was denied access to federal court.

Although Hamdan was denied habeas corpus access to federal court, given the highly pertinent legal issues involved, this is likely just the beginning of another round of appeals—a round that may well again find its way to the Supreme Court.

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296. *Id.* (citation omitted).