*Chapter 1*

**Law and Legal Reasoning**

Answer to Critical Thinking Question

**in the Feature**

**Ethics Today—Critical Thinking**

***When is the Supreme Court justified in* not *following the doctrine of* stare decisis*?*** The doctrine of *stare decisis* requires a court to adhere to precedent to promote predictability and consistency. To overcome the doctrine of *stare decisis* a precedent must be more than just wrongly decided. There has to be a special reason to overrule it. It is more likely that the Supreme Court waves the doctrine of *stare decisis* when issues unrelated to business are the focus of cases at bar. Specifically, issues that involve discrimination, freedom of speech, privacy, and so on are more likely to involve disregarding of the doctrine of *stare decisis* if the political atmosphere has changed since the original decision.

Answers to Questions in the Practice and Review Feature

at the End of the Chapter

**1A.** ***Parties***

The automobile manufacturers are the plaintiffs, and the state of California is the defendant.

**2A.** ***Remedy***

The plaintiffs are seeking an injunction, an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

**3A.** ***Source of law***

This case involves a law passed by the California legislature and a federal statute; thus the primary source of law is statutory law.

**4A.** ***Finding the law***

Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in these sources to find the relevant state and federal statutes.

Answer to Debate This Question in the Practice and Review Feature at the End of the Chapter

 ***Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute?*** Both England and the U.S. legal systems were constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

 In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

Answers to Issue Spotters

at the End of the Chapter

**1A. *Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts’ interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

**2A. *After World War II, several Nazis were convicted of “crimes against humanity” by an international court. Assuming that these convicted war criminals had not disobeyed any law of their country and had merely been following their government’s orders, what law had they violated? Explain.*** At the time of the Nuremberg trials, “crimes against humanity” were new international crimes. The laws criminalized such acts as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. These international laws derived their legitimacy from “natural law.”

Natural law, which is the oldest and one of the most significant schools of jurisprudence, holds that governments and legal systems should reflect the moral and ethical ideals that are inherent in hu­man nature. Because natural law is universal and discoverable by reason, its adherents believe that all other law is derived from natural law. Natural law therefore supersedes laws created by humans (national, or “positive,” law), and in a conflict between the two, national or positive law loses its legitimacy.

The Nuremberg defendants asserted that they had been acting in accordance with German law. The judges dismissed these claims, reasoning that the defendants’ acts were commonly regarded as crimes and that the accused must have known that the acts would be considered criminal. The judges clearly believed the tenets of natural law and expected that the defendants, too, should have been able to realize that their acts ran afoul of it. The fact that the “positivist law” of Germany at the time required them to commit these acts is irrelevant. Under natural law theory, the international court was justified in finding the defendants guilty of crimes against humanity.

Answers to Business Scenarios and Case Problems

**at the End of the Chapter**

**1–1A.**  ***Binding versus persuasive authority***

A decision of a court is binding on all inferior courts. Because no state’s court is inferior to any other state’s court, no state’s court is obligated to follow the decision of another state’s court on an issue. The decision may be persuasive, however, depending on the nature of the case and the particular judge hearing it. A decision of the United States Supreme Court on an issue is binding, like the decision of any court, on all inferior courts. The United States Supreme Court is the nation’s highest court, however, and thus, its decisions are bind­ing on all courts, including state courts.

**1**‑**2A.** ***Sources of law***

**(a)** The U.S. Constitution—The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced.

 **(b)** The federal statute—Under the U.S. Constitution, when there is a conflict between a federal law and a state law, the state law is rendered invalid.

 **(c)** The state statute—State statutes are enacted by state legislatures. Areas not covered by state statutory law are governed by state case law.

 **(d)** The U.S. Constitution—State constitutions are supreme within their respective borders unless they conflict with the U.S. Constitution, which is the supreme law of the land.

**1**‑**3A.** **Stare decisis**

*Stare decisis* is a Latin phrase meaning “to stand on decided cases.” In the King’s Courts of medieval England, it became customary for judges to refer to past decisions (precedents) in deciding cases involving similar issues. Over time, because of application of the doctrine of *stare decisis* to issues that came before the courts, a body of jurisprudence was formed that came to be known as the “common law”—because it was common to the English realm. Common law was applied in the American colonies prior to the War of Independence and was adopted by the American states following the Revolution. Common law continues to be applied today in all cases except those falling under specific state or federal statutory law. The doctrine of *stare decisis* is fundamental to the development of our legal tradition because without the acceptance and application of this doctrine, the evolution of any objective legal concepts—and thus a legal “tradition”—would have been impossible.

**1–4A. Spotlight on AOL*—Common law***

The doctrine of *stare decisis* is the process of deciding case with reference to former decisions, or precedents. Under this doctrine, judges are obligated to follow the precedents established within their jurisdiction.

 In this problem, the enforceability of a forum selection clause is at issue. There are two precedents mentioned in the facts that the court can apply The United States Supreme Court has held that a forum selection clause is unenforceable “if enforcement would contravene a strong public policy of the forum in which suit is brought.” And California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

In the actual case on which this problem is based, the court determined that the clause is not enforceable under those precedents.

**1**‑**5A.** **Business Case Problem with Sample Answer*—Reading citations***

The court’s opinion in this case—*Ryan Data Exchange, Ltd. v. Graco*, 973 F.3d 726 (th Cir. 2019)—can be found in volume 973 of the *Federal Reporter, Third Series* on page 726. The U.S. Court of Appeals for the Eighth Circuit issued this opinion in 2019.

**1–6A. A Question of Ethics—*The doctrine of precedent***

**(a)** In this problem, White operated a travel agency. To obtain low fares for her clients, she submitted fake military identification cards to the airlines. She was charged with the crime of identity theft, which requires the “use” of another’s identification. In a previous case, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. Miller’s conviction for identity theft was overturned on the ground that he had not “used” the investors’ identities—he had only *said* that they had done something when they had not. In a second case, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician’s signature. White’s actions most closely resemble Medlock’s forgery. White not only told the airlines that her clients were members of the military—she created false identification cards and sent them to the airlines.

In all of these cases, the defendants lied about their actions. Whether or not their conduct fell within the meaning of a word within a statute, or matched the actions of a perpetrator in another case, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful about their actions.

In the actual case on which this problem is based, the court concluded that White’s actions were most similar to Medlock’s. White was convicted of identity theft. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction.

**(b)** No, in the two cases cited by the *White* court—and in the *White* case—there were no ethical differences in the actions of the parties.

Almost any definition of ethics, and any set of ethical standards, includes honesty as a component. In the *White* case, Sandra White lied to the airlines that her clients were members of the military, and created false identification cards to obtain cheaper fares. In the first case cited by the *White* court, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. In the second case cited by the *White* court, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician’s signature.

In all of these cases, the defendants lied. Whether or not their conduct fell within the meaning of a word within a statute, or matched the unlawful actions of each other, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful.

Answers to Time-Limited Group Assignment Questions

**at the End of the Chapter**

**1–7A. *Court opinions***

 **(a)** A majority opinion is a written opinion outlining the views of the majority of the judges or justices deciding a particular case. A concurring opinion is a written opinion by a judge or justice who agrees with the conclusion reached by the majority of the court but not necessarily with the legal reasoning that led the conclusion.

 **(b)** A concurring opinion will voice alternative or additional reasons as to why the conclusion is warranted or clarify certain legal points concerning the issue. A dissenting opinion is a written opinion in which a judge or justice, who does not agree with the conclusion reached by the majority of the court, expounds his or her views on the case.

 **(c)** Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote—but such opinions may be used by another court later to support its position on a similar issue.

**Alternate Case Problems**

*Chapter 2*

**Business and the Constitution**

**2-1. Commerce Clause.** In 1957, Rhodes and several other Georgia landowners entered into a sixty-five-year timber purchase contract with Inland-Rome, Inc. Thereafter, Inland-Rome cut timber from the landowners’ land and then removed it for processing in certain Georgia facilities, after which it was shipped as lumber products to points throughout the country. In 1986, the landowners claimed that Inland-Rome had breached the contract, and they filed suit. Inland-Rome moved to compel arbitration because the parties had agreed, in their contract, to arbitrate any disputes arising thereunder. Georgia law enforces arbitration clauses only if they are contained in construction contracts. Arbitration clauses are enforceable under the Federal Arbitration Act only if the contracts in which they appear affect interstate commerce. Inland-Rome contended that because lumber products from the cut timber were shipped throughout the nation, the contract related to interstate commerce, and therefore the Federal Arbitration Act should apply. Will the court agree? Discuss. [*Rhodes v. Inland-Rome, Inc.,* 195 Ga.App. 39, 392 S.E.2d 270 (1990)]

**2-2. Freedom of Speech.** The City of Tacoma, Washington, enacted an ordinance that prohibited the playing of car sound systems at a volume that would be “audible” at a distance greater than fifty feet. Dwight Holland was arrested and convicted for violating the ordinance. The conviction was later dismissed, but Holland filed a civil suit in a Washington state court against the city. He claimed in part that the ordinance violated his freedom of speech under the First Amendment. On what basis might the court conclude that this ordinance is constitutional? (Hint: In playing a sound system, was Holland actually expressing himself?) [*Holland v. City of Tacoma,* 90 Wash.App. 533, 954 P.2d 290 (1998)]

**2-3. Equal Protection.**  With the objectives of preventing crime, maintaining property values, and preserving the quality of urban life, New York City enacted an ordinance to regulate the locations of commercial establishments that featured adult entertainment. The ordinance expressly applied to female, but not male, topless entertainment. Adele Buzzetti owned the Cozy Cabin, a New York City cabaret that featured female topless dancers. Buzzetti and an anonymous dancer filed a suit in a federal district court against the city, asking the court to block the enforcement of the ordinance. The plaintiffs argued in part that the ordinance violated the equal protection clause. Under the equal protection clause, what standard applies to the court’s consideration of this ordinance? Under this test, how should the court rule? Why? [*Buzzetti v. City of New York,* 140 F.3d 134 (2d Cir. 1998)]

**2-4. Freedom of Speech.** In 1988, as a result of a general election, Arizona added Article XXVIII to its constitution. Article XXVIII provided that English was to be the official language of the state and required all state officials and employees to use only the English language during the performance of government business. Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, frequently spoke in Spanish to Spanish-speaking persons with whom she dealt in the course of her work. Yniguez claimed that Article XXVIII violated constitutionally protected free speech rights and brought an action in federal court against the state governor, Rose Mofford, and other state officials. Does Article XXVIII violate the freedom of speech guaranteed by the First Amendment to the U.S. Constitution? Why or why not? [*Yniguez v. Mofford,* 730 F.Supp. 309 (D.Ariz. 1990)]

**2-5. Equal Protection.** Adela Izquierdo Prieto, age forty-two, had worked for a govern­ment-owned and -operated radio and television station in Puerto Rico for over a decade when, without any prior notice, she was suddenly transferred from her television pro­gram to a position in radio. Her replacement in the television program was a twenty-eight-year-old woman with less experience. Agustin Mercado Rosa, the administrator of the television channel, explained to a newspaper reporter that Izquierdo was removed because “we need new faces” and because Izquierdo’s replacement “is young, attractive and refreshing.” Izquierdo sued Mercado, alleging in part that the transfer discriminated against her on the basis of age and therefore violated her rights under the equal protection clause. Mercado claimed that the transfer was rationally related to furthering a legitimate state interest in maximizing viewership for the public television chan­nel and therefore was a permissible action. Will the court agree with Mercado? (In forming your answer, disregard the fact that Prieto could have sued Mercado under a federal law pro­hibiting age discrimination in employment. She based her claim only on the equal protection clause. The sole issue here is whether the state’s interest was sufficient to justify replacing Prieto.) [*Izquierdo Prieto v. Mercado Rosa,* 894 F.2d 467 (1st Cir. 1990)]

**2-6. Freedom of Speech.** The Board of Trustees of the Loudoun County Library in Virginia opted to provide Internet access for its patrons. The board also adopted a “Policy on Internet Sexual Harassment.” This required that Web site blocking software be installed on all library computers to “a. block child pornography and obscene material (hard core pornography)” and “b. block material deemed harmful to juveniles under applicable Virginia statutes and legal precedents (soft core pornography).” Mainstream Loudoun, an association of individuals, claimed that this policy blocked their access to such sites as the Quaker Home Page. Mainstream filed a suit in a federal district court against the board, alleging that this was an unconstitutional restriction on their right to access protected speech on the Internet. The board filed a motion for summary judgment. Does the First Amendment limit the ability of a public library to restrict its patrons’ access to information on the Internet? Discuss. [*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library,* 7 F.Supp.2d 783 (1998)]

**2-7. Due Process.** Ashland, Inc., was the sole owner of the St. Paul Park Refinery, an oil refinery in Minnesota, when Ashland and Marathon Oil Co. announced their intent to combine their refining and marketing assets into a new entity, Marathon Ashland Petroleum LLC (MAP). Marathon was to own the largest share of MAP, and control its operations, while Ashland was to own about a third of the new company. The day after this announcement, a series of explosions and fires at the St. Paul Park Refinery injured several workers. Ashland pleaded guilty to criminal charges relating to the release of a hazardous air pollutant into a sewer line. A federal district court sentenced Ashland to, among other things, five years’ probation subject to various conditions, including an upgrade of the sewer at the St. Paul Park Refinery, to which a probation officer was to have continual access. Meanwhile, as part of the deal with Marathon, Ashland had transferred ownership of the refinery to MAP. Ashland appealed to the U.S. Court of Appeals for the Eighth Circuit, contending in part that the probation conditions violated its due process rights. Should the court rule in Ashland’s favor on this point? Why or why not? [*United States v. Ashland, Inc.,* 356 F.3d 871 (8th Cir. 2004)]

**2-8. Due Process.** In 1994, the Board of County Commissioners of Yellowstone County, Montana, created Zoning District 17 in a rural area of the county and a planning and zoning commission for the district. The commission adopted zoning regulations, which provided, among other things, that “dwelling units” could be built only through “on-site construction.” Later, county officials were unable to identify any health or safety concerns that were addressed by requiring on-site construction. There was no evidence that homes built off-site would negatively affect property values or cause harm to any other general welfare interest of the community. In December 1999, Francis and Anita Yurczyk bought two forty-acre tracts in District 17. The Yurczyks also bought a modular home and moved it onto the property the following spring. Within days, the county advised the Yurczyks that the home violated the on-site construction regulation and would have to be removed. The Yurczyks filed a suit in a Montana state court against the county, alleging in part that the zoning regulation violated their due process rights. Does the Yurczyks’ claim relate to procedural or substantive due process rights? What standard would the court apply to determine whether the regulation is constitutional? How should the court rule? Explain. [*Yurczyk v. Yellowstone County,* 2004 MT 3, 319 Mont. 169, 83 P.3d 266 (2004)]

**2-9.** **The Commerce Clause.** Under the federal Sex Offender Registration and Notification Act (SORNA), sex offenders must register and update their registration as sex offenders when they travel from one state to another. David Hall, a convicted sex offender in New York, moved to Virginia, where he did not update his registration. He was charged with violating SORNA. He claimed that the statute is unconstitutional, arguing that Congress cannot criminalize interstate travel if no commerce is involved. Is that reasonable? Why or why not? [*United States v. Guzman,* 591 F.3d 83 (2d Cir. 2010)]

**2-10. A Question of Ethics**

In 1999, in an effort to reduce smoking by children, the attorney general of Massachusetts issued comprehensive regulations governing the advertising and sale of tobacco products. Among other things, the regulations banned cigarette advertisements within one thousand feet of any elementary school, secondary school, or public playground and required retailers to post any advertising in their stores at least five feet off the floor, out of the immediate sight of young children. A group of tobacco manufacturers and retailers filed suit against the state, claiming that the regulations were preempted by the federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, as amended. That act sets uniform labeling requirements and bans broadcast advertising for cigarettes. Ultimately, the case reached the United States Supreme Court, which held that the federal law on cigarette ads preempted the cigarette advertising restrictions adopted by Massachusetts. The only portion of the Massachusetts regulatory package to survive was the requirement that retailers had to place tobacco products in an area accessible only by the sales staff. In view of these facts, consider the following questions. [*Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S.Ct. 2404, 69 L.Ed.2d 532 (2001)]

**1.** Some argue that having a national standard for tobacco regulation is more important than allowing states to set their own standards for tobacco regulation. Do you agree? Why or why not?

**2.** According to the Court in this case, the federal law does not restrict the ability of state and local governments to adopt general zoning restrictions that apply to cigarettes, as long as those restrictions are “on equal terms with other products.” How would you argue in support of this reasoning? How would you argue against it?

**Alternate Case Problem Answers**

*Chapter 2*

**Business and the Constitution**

**2-1A. *Commerce clause***

The court did not agree with Inland-Rome that the contract related to interstate commerce. Therefore, the Federal Arbitration Act did not apply and the arbitration clause was not enforceable. The court found that the contract between the parties did not in itself relate to the interstate shipment of any product. “To the contrary,” the court stated, “it relates solely to the sale of standing timber located exclusively in Georgia.” Interstate commerce was affected but only *after* Inland-Rome’s performance under the contract with the landowners was completed. Therefore, federal law did not apply, and the contract was subject to Georgia law. The state of Georgia enforced arbitration clauses, but only if they were contained in construction contracts. Therefore, arbitration of the contract could not be compelled.

**2-2A. *Freedom of speech***

The court dismissed Holland’s complaint, and he appealed. The state intermediate appellate court affirmed the lower court’s decision. The state intermediate appellate court initially determined that, in playing a car sound system loud enough to violate the ordinance, Holland was not actually expressing himself. (He was only listening.) This meant that, as to Holland, the ordinance regulated only his conduct, not his expression. The court held that the First Amendment “protect[s] the communication and expression of someone attempting to broadcast music or another type of message, but that noise is subject to regulation.” The court concluded that Holland failed to show “a real and substantial threat to expression in relation to the ordinance’s legitimate sweep.” The court also pointed out that “[t]his ordinance has clear guidelines. A person of ordinary intelligence knows what it means for sound to be ‘audible’ at more than 50 feet away.”

**2-3A. *Equal protection***

The district court dismissed the plaintiffs’ complaint. The plaintiffs appealed. The U.S. Court of Appeals for the Second Circuit affirmed the lower court’s decision. The plaintiffs argued that because the ordinance applied to female topless entertainment, but not to male topless entertainment, it violated the equal protection clause. As a gender-based distinction, this ordinance’s classification was subject to intermediate scrutiny. The appellate court pointed out that gender-based distinctions are acceptable in circumstances in which the two genders are not similarly situated. The court concluded that “New York City’s objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are important. We also believe that the [ordinance’s] regulation of female, but not male, topless dancing, in the context of its overall regulation of sexually explicit commercial establishments, is substantially related to the achievement of New York City’s objectives.” The court noted that, in drafting the ordinance, the city regulated “only the types of establishments that have been found to produce negative impacts on the communities in which they are located.” Male topless establishments were not among those found to have negative effects. “The male chest is routinely exposed on beaches, in public sporting events and the ballet, and in general consumption magazine photography without involving any sexual suggestion. In contrast, public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones. It is therefore permissible for New York City \*  \*  \* to classify female toplessness differently from the exhibition of the naked male chest. This does not constitute a denial of equal protection.”

**2-4A. *Freedom of speech***

The court held that the state constitutional provision establishing English as the official language for state employees was invalid because it was overbroad and gave rise to substantial potential for inhibiting constitutionally protected free speech rights. The court stated that “Article XXVIII, by its literal wording, is capable of reaching expression protected by the First Amendment, such as Gutierrez’s [a co-plaintiff’s] right to communicate in Spanish with his Spanish-speaking constituents.” To determine whether the Article XXVIII reached a substantial amount of constitutionally protected conduct, the court had to first interpret the meaning of Article XXVIII. The plaintiffs (Yniguez and others) claimed that it was a blanket prohibition on the use of any lan­guage other than English in the state workplace. The defendants, however, considered the article to be merely a directive for state and local governmental entities to act in English when acting in their sovereign capacities. The court held that the article’s plain language indicated that with limited exceptions, the article prohibited the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties. Given this interpretation, the court concluded that “there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII.” The article was therefore voided by the court.

**2-5A. *Equal protection***

The court agreed with Izquierdo. Mercado appealed to the U.S. Court of Appeals for the First Circuit, which reversed this decision. Under the rational-basis test, the question was whether there was any rational basis under which Mercado’s actions related to a legitimate state interest. Mercado’s ostensible objective was to replace Ms. Izquierdo with someone with greater audience appeal. The court stated that “Mr. Mercado could have rationally believed that having ‘new [and young] faces’ would maximize audience drawing power.” The purpose of public television “includes serving the public by providing increased access to information and enhanced opportunities for education. Benefit to the public as a whole is maximized the more people take advantage of the services provided. Thus, to maximize viewership by making programs as appealing as possible is a legitimate objective in the operation of government-owned television stations.”

**2-6A. *Freedom of speech***

Yes. The court denied the board’s motion for summary judgment. The court held that the library did not have to provide Internet access, but that if it did, it could not restrict its patrons’ access to sites on the Internet because the library “disfavors their content.” According to the court, under the free speech clause of the First Amendment, the library could impose content-based restrictions on access to the Internet only on showing “a compelling state interest and means narrowly drawn to achieve that end.” The court explained that even when a library, or any government entity, has a legitimate purpose—”whether it be to prevent the communication of obscene speech or materials harmful to children”—the means it uses to regulate must be a reasonable response that “will alleviate the harm in a direct and material way.” The court concluded that the plaintiffs adequately alleged a lack of such a reasonable means in this case.

**2-7A. *Due process***

The U.S. Court of Appeals for the Eighth Circuit held that “it would be fundamentally unfair to hold Ashland accountable on probation for actions beyond its control. Ashland maintains that it would violate its due process rights to punish it for probation violations based solely on the future acts or omissions of MAP, which is a separate company not under Ashland's control. We agree.” The court reasoned that "a defendant may not be sentenced for the crimes of another .  .  . . We believe that the probation conditions challenged here similarly improperly conditioned Ashland's probation on the conduct of MAP.” The St. Paul Park Refinery “is no longer a business site of Ashland, but is owned, operated, and controlled by MAP, a third party that was not charged or sentenced in this case. As a minority stakeholder of MAP, Ashland has no control over or ability to direct MAP's day-to-day operation of the refinery, and is not in a position to ensure that continual access is granted to the probation office.” Ashland had upgraded the sewer at the St. Paul Park Refinery, but “it had to obtain MAP's consent in order to implement this project at MAP's facility.” The court “excise[d] the objectionable conditions” from the probation order, although finding it “reasonable that, to the extent that it can, Ashland should allow the probation office to monitor its compliance” with the sewer upgrade.

**2-8A. *Due process***

The court agreed with the Yurczyks’ reasoning, as regarded their substantive due process rights, that the on-site construction requirement did “not have a substantial bearing upon the public health, safety, morals, or general welfare of the community” and “was not based upon a legitimate governmental objective.” The county appealed this ruling to the Montana Supreme Court, which affirmed the judgment of the lower court. The state supreme court held that the on-site construction requirement was not rationally related to a legitimate governmental interest. The court pointed out that county officials were “unable to identify any health and only minimal safety concerns that the on-site construction provision addressed. As to general welfare \*  \*  \* the preservation of property values may implicate legitimate government concerns in some zoning situations, [but] there is nothing \*  \*  \* here that demonstrates these concerns actually drove the formulation of the regulations at issue. Indeed \*  \*  \* the modular home would not have affected property values in the area,” according to one official, who “testified that homes built off-site ‘would have no real bearing upon market values at all,’ ” because District 17 “is a rural setting, and it’s spread out into large

**2-9A. *The commerce clause***

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall’s indictment. On the government’s appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

**2-10A. A Question of Ethics**

**1.** According to the United States Supreme Court in this case, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), “Congress pre-empted state cigarette advertising regulations like [Massachusetts’] because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the [U.S. Court of Appeals for the] First Circuit concentrated on whether they are ‘with respect to’ advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising.” The Supreme Court did not agree: “There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. The Attorney General’s argument that the regulations are not ‘based on smoking and health’ since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is intertwined with the smoking and health concern.”

**2.** Regarding a state’s or a locality’s ability to enact generally applicable zoning restrictions, the Supreme Court recognized that “state interests in traffic safety and esthetics may justify zoning regulations for advertising. Although [in the FCLAA] Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not ‘based on smoking and health.’ ” The Court noted that the pre-emption provision “in no way affect[s] the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes.” An argument against local governments’ exercise of their zoning power to regulate tobacco products’ advertising is that “states and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes.”

*Chapter 1*

**Law and Legal Reasoning**

***Sample Case***

719 Fed.Appx. 844

This case was not selected for publication in West’s Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals, Tenth Circuit.

**Navid YEASIN, Plaintiff-Appellant,**

**v.**

**Tammara DURHAM, Defendant-Appellee.**

No. 16-3367

Filed January 5, 2018

[Gregory A. Phillips](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0277326201&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), Circuit Judge

Dr. Tammara Durham, the Vice Provost for Student Affairs at the University of Kansas, expelled Navid Yeasin from the university after finding that by physically restraining and later tweeting indirectly but disparagingly about his ex-girlfriend, he had violated the university’s student code of conduct and sexual-harassment policy. After Yeasin sued Dr. Durham in Kansas state court, the university reinstated him. Yeasin then sued Dr. Durham in federal court, asserting a claim under [42 U.S.C. § 1983](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) based on his First Amendment right to freedom of speech and his Fourteenth Amendment right to substantive due process. He argued that Dr. Durham had violated these rights when she expelled him for his off-campus online speech. Dr. Durham successfully moved to dismiss Yeasin’s complaint based on qualified immunity. Yeasin appealed. Exercising jurisdiction under [28 U.S.C. § 1291](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1291&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), we affirm.

**BACKGROUND**

*A.* [*Yeasin’s*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) *Expulsion*

Yeasin and A.W. dated from the fall of 2012 through June 2013. On June 28, 2013, Yeasin physically restrained A.W. in his car, took her phone from her, threatened to commit suicide if she broke up with him, threatened to spread rumors about her, and threatened to make the University of Kansas’s “campus environment so hostile, [that she] would not attend any university in the state of Kansas.” Appellee’s Suppl. App. at 19.

For this conduct, Kansas charged Yeasin with criminal restraint, battery, and criminal deprivation of property. On July 25, 2013, A.W. sought and obtained a protection order against Yeasin from the Johnson County District Court. The order was “entered by consent without any findings of abuse.” Appellee’s Suppl. App. at 3. In August 2013, Yeasin entered a diversion agreement with the state on these charges. [*Yeasin v. Univ. of Kansas*, 51 Kan.App.2d 939, 360 P.3d 423, 424 (2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_424&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_424).[1](#co_footnote_B00012043551755_1)

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| [1](#co_fnRef_B00012043551755_ID0EVGAE_1) | We are entitled to take judicial notice of Yeasin’s prior Kansas Court of Appeals case, just as the district court was entitled to do so, because it is a public record that “bear[s] directly upon the disposition of the case at hand.” [*United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012342246&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1192&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1192). |

That same month, A.W. filed a complaint against Yeasin with the university’s Office of Institutional Opportunity and Access (IOA), alleging that Yeasin had sexually harassed her. Jennifer Brooks, an IOA investigator, interviewed A.W. about her **\*846** complaint. [*Yeasin*, 360 P.3d at 424](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_424&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_424). Another IOA investigator, Steve Steinhilber, “interviewed Yeasin regarding the complaint” and “advised Yeasin of his rights and responsibilities during the investigation.” [*Id.* at 425](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_425&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_425). Then, “[a]fter considering the Johnson County District Court’s final protection from abuse order,” the IOA decided to issue Yeasin a no-contact order. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0000460&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))

The no-contact order informed Yeasin that the university had “received information concerning an allegation that [he] may have violated the University’s Sexual Harassment Policy in interactions with University of Kansas student [A.W.].” Appellant’s App. at 49. The letter also put Yeasin on notice that he was “prohibited from initiating, or contributing through third-parties, to any physical, verbal, electronic, or written communication with [A.W.], her family, her friends or her associates.” *Id.*

After Yeasin received the no-contact order, he tweeted the following messages on August 15, August 23, and September 5:

• Oh right, negative boob job. I remember her. (August 15, 2013);[2](#co_footnote_B00022043551755_1)

• If I could say one thing to you it would probably be “Go fuck yourself you piece of shit.” #butseriouslygofuckyourself #crazyassex (August 23, 2013); and

• Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. #psycho #lolwhat (September 5, 2013).

*Id.* at 51; Appellee’s Suppl. App. at 11–13.

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| [2](#co_fnRef_B00022043551755_ID0EJMAE_1) | Yeasin would later admit that he and his friends referred to A.W. as “negative double boob job” or “negative boob job” because of A.W.’s genetic condition and subsequent reconstructive surgery. Appellant’s App. at 53. |

Shortly thereafter, A.W.’s friend showed her Yeasin’s tweets. A.W. couldn’t see the tweets first-hand because Yeasin had removed her from his approved followers when they stopped dating. A.W. then complained to Brooks that Yeasin had tweeted about her despite the no-contact order. On September 6, 2013, Brooks e-mailed Yeasin the following warning:

While your August 23rd tweet does not specifically state the name of your ex-girlfriend, this communication is in violation of the No Contact Order. I am writing to you to clarify that any reference made on social media regarding [A.W.], even if the communication is not sent to her or [does not] state her name specifically, it is a violation of the No Contact Order.

Appellant’s App. at 51. The e-mail further stated, “Going forward, if you make any reference regarding [A.W.], directly or indirectly, on any type of social media or other communication outlet, you will be immediately referred to the Student Conduct Officer for possible sanctions which may result in expulsion from the University.” *Id.*

Yeasin then tweeted the following messages:

• #lol you’re so obsessed with me you gotta creep on me using your friends accounts #crazybitch (September 7, 2013);

• 30 Reasons to Love Natural Breasts totalfratmove.com/30-reasons-to-... via @totalfratmove #doublenegativeboobjob (September 13, 2013).

*Id.* at 54; Appellee’s Suppl. App. at 14–16 (alteration in original).

Concerned Yeasin’s behavior was escalating, IOA Executive Director Jane McQueeny conducted a follow-up interview with Yeasin on September 17. [*Yeasin*, 360 P.3d at 425](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_425&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_425). She reiterated to him that the no-contact policy applied to his indirect **\*847** tweets. [*Id.* at 425](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_425&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_425). Shortly thereafter, Yeasin posted the following tweet:

• “At least I’m proportionate.” #NDB #boobs @MorganLCox (October 23, 2013).

Appellee Suppl. App. at 16.

All told, Yeasin posted fourteen tweets referring to A.W. without specifically naming her; of these, three were posted after the IOA e-mailed Yeasin and told him to stop.

On October 7, 2013, the IOA issued an investigative report concluding that Yeasin had sexually harassed A.W. in violation of university policy by physically restraining her during the June 28, 2013 incident and by posting the fourteen tweets. The report concluded that “ ‘while some of the conduct in this case occurred off campus this past summer,’ the preponderance of the evidence nevertheless showed that Yeasin’s conduct had affected the on-campus environment for [A.W.], thus violating the University’s sexual harassment policy.” [*Yeasin*, 360 P.3d at 426](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_426&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_426) (quoting the IOA’s report). The IOA also determined that Yeasin had violated the no-contact order “by continually ‘harassing’ [A.W.] on social media.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0000460&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (quoting the IOA’s report).

Later that month, Nicholas Kehrwald, the university’s director of student conduct and community standards, received the IOA’s report and scheduled a formal hearing for November 4, 2013, to adjudicate A.W.’s complaint against Yeasin. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0000460&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) Kerhwald notified Yeasin of the hearing and “specified that Yeasin’s conduct violated Article 22.A.1 of the Student Code, the University’s sexual[-]harassment policy, and the no-contact order.”[3](#co_footnote_B00032043551755_1) [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0000460&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) Kerhwald outlined the following evidence against Yeasin: that Yeasin had posted demeaning tweets about [A.W.]; that Yeasin had physically restrained [A.W.] and held her against her will for three hours in his car; that he had called her demeaning names; that he had threatened suicide when she tried to break-up with him; and that Yeasin’s behavior had on-campus effects. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0000460&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))

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| [3](#co_fnRef_B00032043551755_ID0EGXAE_1) | At the time of Yeasin’s discipline, Article 22, which was titled, “Non-Academic Misconduct,” stated the following: “While on University premises or at University sponsored or supervised events, students ... are subject to disciplinary action....” Appellant’s App. at 65. And Article 22.A.1 specifically prohibited students from “maliciously and repeatedly follow[ing] or attempt[ing] to make unwanted contact, including but not limited to physical or electronic contact, with another person.” *Id.*The university’s sexual-harassment policy stated that “sexual harassment is a form of illegal discrimination in violation of ... Title IX....” *Id.* at 52. The policy defined sexual harassment to include:conduct, including physical contact, advances, and comments in person, through an intermediary, and/or via phone, text message, email, social media, or other electronic medium, that is unwelcome; based on sex or gender stereotypes; and is so severe, pervasive and objectively offensive that it has the purpose or effect of substantially interfering with a person’s academic performance.*Id.* at 53. |

On November 4, 2013, the IOA held the formal hearing. A university student, a university staff member, Kerhwald, and Jamie Kratky[4](#co_footnote_B00042043551755_1) constituted the hearing panel. The panel reviewed the written documents in the case and then heard from A.W., Yeasin, IOA Executive Director Jane McQueeny, and IOA investigators Steinhilber and Brooks. [*Yeasin*, 360 P.3d at 426](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_426&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_426). Following the hearing, the panel prepared a recommendation and submitted it to Dr. Durham so she could make her final decision regarding whether and how to sanction Yeasin’s conduct. In their recommendation, the panel explained that “there was no information presented at **\*848** any time to dispute the actions set forth in [A.W.’s] complaint or to demonstrate Yeasin did not violate[ ] Article 22, A and the University’s Sexual Harassment policy.” Appellee’s Suppl. App. at 20. Moreover, they observed, “Yeasin admitted that some tweets that appeared to indirectly target [A.W.] were, in fact, direct references to [A.W.].” *Id.*

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| [4](#co_fnRef_B00042043551755_ID0EY2AE_1) | Kratky was only identified in the record as the hearing panel chair. |

Two days after receiving the panel’s recommendation, Dr. Durham informed Yeasin of her decision by letter. In the letter, Dr. Durham explained that she reviewed the student code, the complaint brought by A.W., the evidence presented at the hearing, and the hearing panel’s recommendation before making her decision. She informed him that “[b]ased on a preponderance of [i]nformation, the hearing panel [found him] in violation of **Article 22. Section A. 1** and the University’s Sexual Harassment Policy” and she outlined the language of both policies. Appellant’s App. at 52 (emphasis in original); *see supra* n.3.

Dr. Durham said her decision was based on several facts supported by the preponderance of the evidence, such as the Johnson County protection order and A.W.’s hearing statement that “her grades had slipped significantly during the summer because of the emotional toll her interactions with Mr. Yeasin had taken on her.” Appellant’s App. at 54. Dr. Durham further relied on A.W.’s statement to the hearing panel that her relationship with Yeasin had “affected her day-to-day on-campus activities, since she [couldn’t] enter public campus places without receiving glares and remarks from Yeasin’s friends telling her she needs to leave and that her presence is unwanted.” Appellee’s Suppl. App. at 19. She indicated that Yeasin admitted during the formal hearing that when he was tweeting about “negative double boob job” or “negative boob job”, he was referring to A.W. Appellant’s App. at 53.

On these bases, Dr. Durham found that Yeasin’s June 28, 2013 conduct and his tweets were “so severe, pervasive and objectively offensive that it interfered with [A.W.]’s academic performance and equal opportunity to participate in or benefit from University programs or activities.” *Id.* at 54. She found that his tweets violated the sexual-harassment policy because they were “unwelcome comments about [A.W.]’s body.” *Id.* And she found that his conduct “threatened the physical health, safety and welfare of [A.W.], making the conduct a violation of **Article 22, A. 1** of the *Code*.” *Id.* (emphasis in original).

As a result of his conduct, Dr. Durham decided to expel Yeasin from the university and ban him from campus.

*B. Court Proceedings*

Yeasin contested his expulsion in Kansas state court. *See* [*Yeasin*, 360 P.3d at 427](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_427&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_427). The court set aside Yeasin’s expulsion, reasoning that the hearing panel’s findings, adopted by Dr. Durham, “were not supported by substantial evidence.” Appellant’s App. at 10. The court also determined that “KU and [Dr.] Durham erroneously interpreted the Student Code of Conduct by applying it to off-campus conduct.” *Id.*

The university then appealed. It argued that Article 20 of the student code was a jurisdictional statement that modified the scope of Article 22’s language to include the ability to punish students for off-campus conduct that violates federal, state, or local law. [*Yeasin*, 360 P.3d at 432](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_432&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_432). Article 20 provides, “The University may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on University premises or at University sponsored or supervised events, or as otherwise required by **\*849** federal, state, or local law.” Appellant’s App. at 64. The university argued that its interpretation of Article 20 was “consistent with the obligations imposed on it under Title IX.” [*Yeasin*, 360 P.3d at 429](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_429&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_429).

But the Kansas Court of Appeals concluded that Article 20 wasn’t a jurisdictional statement and that its plain language supported disciplinary actions only against students who violate federal, state, or local law on-campus or at school-sponsored activities. [*Yeasin*, 360 P.3d at 431–32](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_431&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_431). Similarly, the court determined that Article 22’s plain language didn’t give Dr. Durham authority to expel him because his conduct had occurred off campus. [*Yeasin*, 360 P.3d at 432](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_432&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_432). So the court upheld the order requiring Yeasin’s re-enrollment. [*Id.* at 432](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037240423&pubNum=0004645&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_4645_432&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4645_432).

Yeasin then brought this suit in federal court, claiming that Dr. Durham had violated his First and Fourteenth Amendment rights by expelling him for the content of his online, off-campus speech. Under [Federal Rule of Civil Procedure 12(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR12&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), Dr. Durham moved to dismiss both of Yeasin’s claims on qualified-immunity grounds. The district court granted the motion after concluding that Dr. Durham hadn’t violated Yeasin’s clearly established rights.

**DISCUSSION**

“We review de novo a district court’s dismissal under [Federal Rule of Civil Procedure 12(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR12&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). We assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the light most favorable to the plaintiffs.” [*Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025230679&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_723&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_723) (quoting [*Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018931400&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1178&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1178)). In First Amendment cases, we independently examine “the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” [*Id.* at 723](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025230679&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_723&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_723) (quoting [*Thomas v. City of Blanchard*, 548 F.3d 1317, 1322 (10th Cir. 2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017576091&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1322&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1322)).

“To survive a motion to dismiss [under [Rule 12(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR12&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) ], a complaint must contain sufficient factual matter ... to ‘state a claim to relief that is plausible on its face.’ ” [*Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018848474&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (quoting [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012293296&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). A plaintiff states a facially plausible claim by pleading “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” [*Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018848474&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). But a pleading based on only “labels and conclusions” or “formulaic recitation[s]” of a claim for relief’s elements is insufficient. [*Twombly*, 550 U.S. at 555, 127 S.Ct. 1955](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012293296&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

In this case, Dr. Durham predicated her motion to dismiss on her claim of qualified immunity. Qualified immunity protects government officials from liability for civil damages if their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” [*White v. Pauly,* ––– U.S. ––––, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040717314&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_551&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_551) (quoting [*Mullenix v. Luna*, ––– U.S. ––––, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037557174&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_308&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_308)); *accord* [*A.M. v. Holmes*, 830 F.3d 1123, 1134 (10th Cir. 2016)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039446890&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1134&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1134). Qualified immunity “protects ‘all but the plainly incompetent or those who knowingly violate the law.’ ” [*Mullenix*, 136 S.Ct. at 308](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037557174&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_308&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_308) (quoting [*Malley v Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986111440&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))).

To overcome a government official’s qualified-immunity defense, a plaintiff must “demonstrate ‘(1) that the official violated a statutory or constitutional right, *and* (2) that the right was ‘clearly established.’ ” **\*850** [*Holmes*, 830 F.3d at 1134](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039446890&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1134&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1134) (quoting [*Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2035617880&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1004&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1004)) (emphasis in original). We can analyze either prong of the qualified immunity test first and can resolve the case solely on the clearly established prong. *See* [*Panagoulakos v. Yazzie*, 741 F.3d 1126, 1129 (10th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032351689&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1129&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1129).

A clearly-established right exists if “existing precedent ... place[s] the statutory or constitutional question beyond debate.” [*Mullenix*, 136 S.Ct. at 308](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037557174&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_308&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_308) (quoting [*Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025376455&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). “The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’ ” [*Mullenix*, 136 S.Ct. at 308](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037557174&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_308&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_308) (quoting [*al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025376455&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). A plaintiff needn’t supply a case directly on point from our circuit or the Supreme Court but must do more than cite case law announcing a legal rule “at a high level of generality.” [*White*, 137 S.Ct. at 552](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040717314&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_552&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_552) (quoting [*Al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025376455&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). The relevant case law “must be ‘particularized’ to the facts of the case” currently before the court. [*Id.* at 552](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040717314&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_552&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_552) (quoting [*Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987079684&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))).

For the reasons set forth below, we conclude that Yeasin has failed to show that Dr. Durham violated his clearly established rights under either the First Amendment or the Fourteenth Amendment. As a result, we needn’t resolve whether Yeasin could meet the first prong of the qualified-immunity analysis for either issue.

*A. First Amendment*

The First Amendment states, “Congress shall make no law ... abridging the freedom of speech[ ]....” [U.S. Const. amend. I](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDI&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). But what happens when one student’s off-campus speech interferes with another student’s education on a university campus?

Yeasin’s case presents interesting questions regarding the tension between some students’ free-speech rights and other students’ Title IX rights to receive an education absent sex discrimination in the form of sexual harassment. Department of Education Office for Civil Rights Dear Colleague Letter on Sexual Violence (OCR Sexual Violence DCL), April 4, 2011, at 1, https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html (“Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.”).[5](#co_footnote_B00052043551755_1) But even if Yeasin could show that Dr. Durham violated his First Amendment rights, we conclude that he has failed to show a violation of clearly established law. We don’t decide whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university.

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| [5](#co_fnRef_B00052043551755_ID0EE3AG_1) | This guidance is no longer in effect. *See* OCR DCL, Sept. 22, 2017, at 1, www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (“The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the ... Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.”). |

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.” [*Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). But both the Supreme Court and our circuit permit schools to circumscribe students’ free-speech rights in certain contexts.[6](#co_footnote_B00062043551755_1) Broad legal principles in student **\*851** free-speech cases provide some guidance on issues Yeasin raises, but they cannot suffice as clearly established law.

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| [6](#co_fnRef_B00062043551755_ID0EN5AG_1) | *See, e.g.,* [*Morse v. Frederick*, 551 U.S. 393, 397, 408, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012538428&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (allowing school to discipline a student for flying a banner reading “BONG HiTs 4 JESUS” at an off-campus, school-approved activity because the banner could reasonably be viewed as promoting drug use); *see also* [*Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004108542&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1285&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1285) (holding that the [*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988007755&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) framework for free-speech analysis is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum). |

[*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132915&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), announced that secondary-school students retain free-speech rights but that schools can still prohibit actions that “would materially and substantially disrupt the work and discipline of the school.” The Supreme Court has announced three additional exceptions to First Amendment doctrine in public schools. Secondary public schools may restrict student speech even absent a forecast of disruption in cases involving lewd, vulgar, or indecent speech, [*Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986134543&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), school-sponsored speech, [*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988007755&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), and speech advocating illegal drug use, [*Morse v. Frederick*, 551 U.S. 393, 408, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012538428&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). But Yeasin contends that [*Tinker*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132915&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) and its progeny are inapplicable in the university setting.

Yeasin argues that [*Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (per curiam), [*Widmar v. Vincent*, 454 U.S. 263, 268–69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), and [*Healy*, 408 U.S. at 180, 92 S.Ct. 2338](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), clearly establish the “underlying principle[ ]” that universities may not restrict university-student speech in the same way secondary public school officials may restrict secondary-school student speech. Appellant’s Opening Br. at 11–12. Yeasin also argues that [*Reed v. Town of Gilbert*, ––– U.S. ––––, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_2226&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2226), clearly establishes that content-based restrictions “are disfavored and presumptively invalid under the law.” Appellant’s Opening Br. at 12. Taken together, Yeasin argues, these cases clearly establish his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, the contents of his tweets.

But none of the above cases present circumstances similar to his own. [*Papish*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [*Healy*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), and [*Widmar*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) don’t concern university-student conduct that interferes with the rights of other students or risks disrupting campus order.

In [*Papish*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), a university expelled a graduate student for distributing a newspaper on campus allegedly “containing forms of indecent speech” in violation of university by-laws. [410 U.S. at 667, 93 S.Ct. 1197](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The Supreme Court explained that because the newspaper’s content didn’t interfere “with the rights of others” or disrupt “the University’s functions,” the sole question “was whether a state university could proscribe [the newspaper’s] form of expression.” [*Id.* at 670 n.6, 93 S.Ct. 1197](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

[*Healy*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) concerned a state college’s refusal to officially recognize a student group known as Students for a Democratic Society because of its potential affiliation with a national organization known for campus disruption. [408 U.S. at 170–71, 92 S.Ct. 2338](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The [*Healy*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) Court determined that because the college’s refusal to recognize the student group stemmed from undifferentiated fear or apprehension that the particular **\*852** individuals forming the group “posed a substantial threat of material disruption,” the college’s action was unconstitutional under [*Tinker*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132915&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). [*Healy*, 408 U.S. at 189–91, 92 S.Ct. 2338](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); *see also* [*Tinker*, 393 U.S. at 508, 89 S.Ct. 733](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132915&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

And in [*Widmar*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), a university disallowed a registered religious student group from meeting in university buildings. [454 U.S. at 265, 102 S.Ct. 269](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). [*Widmar*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) decided that “having created a forum generally open to student groups,” it was unconstitutional for a university to “enforce a content-based exclusion of religious speech.” [*Id.* at 277](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_277&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_277). [*Widmar*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) doesn’t say whether the religious student group had somehow threatened to disrupt campus order or interfere with other students’ educations. But after reciting the strict-scrutiny test for content-based restrictions, the Supreme Court quoted [*Healy*’*s*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) proposition that “[w]hile a college has a legitimate interest in preventing disruption on the campus, which ... may justify [a prior] restraint, a heavy burden rests on the college to demonstrate the appropriateness of that action.” *See* [*Widmar*, 454 U.S. at 270 n.7, 102 S.Ct. 269](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (ellipsis in original) (internal quotation marks omitted) (quoting [*Healy*, 408 U.S. at 184, 92 S.Ct. 2338](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). This language suggests that the Supreme Court believes that the material-and-substantial-disruption test applies in the university setting.

[*Papish*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126351&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [*Healy*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127178&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [*Widmar*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981151373&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), and [*Reed*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) provide broad principles that are too general to have clearly established Yeasin’s rights to tweet about A.W. free from university discipline. Yeasin’s conduct differs from that of the students in his cited cases—in those cases no student had been charged with a crime against another student and followed that up with sexually harassing comments affecting her ability to feel safe while attending classes. Dr. Durham had a reasonable belief based on the June 28, 2013 incident and on Yeasin’s tweets that his continued enrollment at the university threatened to disrupt A.W.’s education and interfere with her rights.

At the intersection of university speech and social media, First Amendment doctrine is unsettled. *Compare* [*Keefe v. Adams,* 840 F.3d 523, 525–26 (8th Cir. 2016)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040178062&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_525&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_525) (concluding that college’s removal of a student from school based on off-campus statements on his social media page didn’t violate his First Amendment free-speech rights), *with* [*J.S. v. Blue Mountain. Sch. Dist.,* 650 F.3d 915, 920 (3d Cir. 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025477766&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_920&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_920) (holding that a school district violated the First Amendment rights of a plaintiff when it suspended her for creating a private social media profile mocking the school principal and containing adult and explicit content). It is thus unsurprising that Yeasin’s broad propositions of law don’t meet the standard required to show clearly established law under [*White*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040717314&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) and [*Mullenix*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037557174&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

In conclusion, Yeasin can’t establish that Dr. Durham violated clearly established law when she expelled him, in part, for his online, off-campus tweets.

*B. Substantive Due Process*

Yeasin’s substantive-due-process claim is similarly flawed. The Fourteenth Amendment’s Due Process Clause protects interests in life, liberty, and property from arbitrary government action. [*Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1200 (10th Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003584635&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1200&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1200). We have held that university students have a property interest in their continued education. [*Harris v. Blake*, 798 F.2d 419, 424 (10th Cir. 1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_424&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_424). But to establish that a deprivation of a property interest violates substantive due process, a student must prove that the university’s decision to expel her was arbitrary, lacked a rational basis, or shocks the conscience. [*Butler*, 341 F.3d at 1200–01](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003584635&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1200&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1200). We don’t resolve whether Dr. Durham’s **\*853** decision to expel Yeasin violated his right to substantive due process but decide only that she violated no clearly established law in doing so.

Yeasin points to [*Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [*Harris*, 798 F.2d at 424–25](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_424&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_424), and [*Gossett v. Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172, 1181–82 (10th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1181&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1181), as sufficient to notify Dr. Durham that she would violate his substantive-due-process rights if she expelled him for off-campus, online conduct. Appellant’s Opening Br. at 25–26. But as Yeasin concedes, these cases “are not exactly on point.” Appellant’s Opening Br. at 26.

In [*Ewing*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), a student pursuing a joint degree failed an exam that was necessary to advance in the program. [*Ewing*, 474 U.S. at 215–16, 106 S.Ct. 507](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The student unsuccessfully petitioned various university bodies for his readmission and a chance to retake the exam. [*Id.* at 216–17, 106 S.Ct. 507](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). When those appeals were unsuccessful, he sued the university, alleging that the university acted arbitrarily and deprived him of substantive due process by dropping him from the joint degree program without allowing him to retake the exam. [*Id.* at 217, 223–25, 106 S.Ct. 507](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The Supreme Court disagreed and determined that his dismissal from the “program rested on an academic judgment that is not beyond the pale of reasoned academic decision-making when viewed against the background of his entire career” in the program, including his failing exam score. [*Id.* at 227–28, 106 S.Ct. 507](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

[*Harris*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) involved a university student who was forced to withdraw from a psychology program after his grade-point average fell below the minimum requirement. [798 F.2d at 421](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_421&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_421). Upon learning that a professor placed a letter in his academic file expressing reservations about his fitness for the psychology program before his withdrawal, he persuaded the dean of his college to have the letter removed from his file. [*Id.* at 421–22](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_421&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_421). Meanwhile, he challenged the low grades he received and the placement of the letter into his file before an academic appeals board. [*Id.* at 422](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_422&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_422). The appeals board upheld his grades and declined to rule on the letter issue since the dean had it removed from his file. [*Id.* at 422](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_422&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_422). Subsequently, he sued the university and alleged he was denied substantive due process because of the letter and his low grades. [*Id.* at 422, 424–25](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_422&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_422). Our court determined that [*Ewing*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) was dispositive and that the student hadn’t made out a substantive due process claim because the essence of the student’s claim was that the university “misjudged his fitness to remain a student.” [*Id.* at 424–25](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_350_424&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_424).

And in [*Gossett*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), a male nursing student alleged he was denied substantive due process when he was involuntarily withdrawn from his nursing program after receiving a ‘D’ grade in a class. [245 F.3d at 1175–76](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1175&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1175). Specifically, he argued that nursing students who were men were “not given the same help, counseling, and opportunities to improve [their] performance[s]” as the school gave nursing students who were women. [*Id.* at 1176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1176&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1176). The district court granted the university summary judgment. [*Id.* at 1175](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1175&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1175). But on appeal, our court remanded the student’s substantive due process claim because he presented sufficient evidence to create a fact issue as to whether he was dismissed “based on an exercise of professional judgment as to his academic ability” or “impermissible gender discrimination.” [*Id.* at 1182](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1182&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1182).

In each of the above cases, the underlying principle is that in order to have a substantive-due-process claim for being expelled “based on an academic decision,” a university student “must show that the decision was the product of arbitrary state **\*854** action rather than a conscientious, careful and deliberate exercise of professional judgment.” [*Gossett*, 245 F.3d at 1182](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1182&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1182). Students can prove this with “evidence that the challenged decision was based on ‘nonacademic or constitutionally impermissible reasons,’ rather than the product of conscientious and careful deliberation.” [*Gossett*, 245 F.3d at 1182](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_506_1182&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1182) (quoting [*Ewing*, 474 U.S. at 225, 106 S.Ct. 507](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). We can’t apply the [*Ewing*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) principle to Yeasin’s case because Dr. Durham’s decision was explicitly and purposefully non-academic.[7](#co_footnote_B00072043551755_1) [*Ewing*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985160400&pubNum=0000780&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [*Harris*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986141954&pubNum=0000350&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), and [*Gossett*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304415&pubNum=0000506&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) don’t clearly establish that Dr. Durham expelling Yeasin, in part, for off-campus, online tweets that affected another student’s ability to get an education, was arbitrary, lacked a rational basis, or shocks the conscience.

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| [7](#co_fnRef_B00072043551755_ID0EVBAI_1) | *Compare* [*Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 88–90, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978194195&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (holding that academic dismissals from universities require only minimal due-process protections because courts are reluctant to second-guess an educator’s expert judgment on educational matters), *with* [*Goss v. Lopez*, 419 U.S. 565, 581–84, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129722&pubNum=0000708&originatingDoc=I4c6ce080f28711e7b393b8b5a0417f3d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (holding that dismissal from a school based on non-academic, disciplinary reasons requires notice and a hearing commensurate with the circumstances and severity of the situation). Yeasin doesn’t contend that he received an insufficient amount of process. |

In sum, Dr. Durham didn’t violate clearly established law when she expelled Yeasin for non-academic misconduct related to the June 29, 2013 incident and his tweets.

**CONCLUSION**

For the reasons stated, we AFFIRM the district court’s grant of Dr. Durham’s motion to dismiss on the basis of qualified immunity.

**Supplemental Case Printout for: *Ethics Today***

135 S.Ct. 2401

Supreme Court of the United States

**Stephen KIMBLE et al., Petitioners**

**v.**

**MARVEL ENTERTAINMENT, LLC, successor to Marvel Enterprises, Inc.**

No. 13–720.

Argued March 31, 2015.

Decided June 22, 2015.

**Opinion**

Justice [KAGAN](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) delivered the opinion of the Court.

[**[1]**](#co_anchor_F12036504422_1) In [*Brulotte v. Thys Co.,* 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99 (1964)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), this Court held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis,* we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

[**[2]**](#co_anchor_F22036504422_1) In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as “a spider person” by shooting webs—really, pressurized foam string—“from the palm of [the] hand.” [U.S. Patent No. 5,072,856](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991329987&pubNum=0004074&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=PA&docFamilyGuid=Ib9d23830749511d79ccbd455e2fa80ef&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), Abstract (filed May 25, **\*2406** 1990).[1](#co_footnote_B00212036504422_1) Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider–Man, among other comic-book characters. Seeking to sell or license his patent, Kimble met with the president of Marvel’s corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the “Web Blaster”—a toy that, like Kimble’s patented invention, enables would-be action heroes to mimic Spider–Man through the use of a polyester glove and a canister of foam.

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| [1](#co_footnoteReference_B00212036504422_ID0) | Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we refer only to Kimble. |

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble’s patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel’s future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider–Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte,* the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent’s expiration. See [379 U.S., at 32, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). So the decision’s effect was to sunset the settlement’s royalty clause.[2](#co_footnote_B00322036504422_1) On making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble’s patent term. The court approved that relief, holding that *Brulotte* made “the royalty provision ... unenforceable after the expiration of the [Kimble patent.” 692 F.Supp.2d 1156, 1161 (D.Ariz.2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021470193&pubNum=0004637&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_4637_1161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4637_1161). The Court of Appeals for the Ninth Circuit affirmed, though making clear that it was none too happy about doing so. “[T]he *Brulotte* rule,” the court complained, “is counterintuitive and its rationale is arguably unconvincing.” [727 F.3d 856, 857 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030996656&pubNum=0000506&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_506_857&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_857)*.*

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| [2](#co_footnoteReference_B00322036504422_ID0) | In *Brulotte,* the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See [379 U.S., at 29–30, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way. |

We granted certiorari, [574 U.S. ––––, 135 S.Ct. 781, 190 L.Ed.2d 649 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000708&cite=135SCT781&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.[3](#co_footnote_B00432036504422_1) For reasons of *stare decisis,* we demur.

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| [3](#co_footnoteReference_B00432036504422_ID0) | See, *e.g.,* [*Scheiber v. Dolby Labs., Inc.,* 293 F.3d 1014, 1017–1018 (C.A.7 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002373591&pubNum=0000506&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_506_1017&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1017) (Posner, J.) (*Brulotte* has been “severely, and as it seems to us, with all due respect, justly criticized.... However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court’s current thinking the decision seems”); Ayres & Klemperer, [Limiting Patentees’ Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non–Injunctive Remedies, 97 Mich. L.Rev. 985, 1027 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0110726547&pubNum=0001192&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=LR&fi=co_pp_sp_1192_1027&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1192_1027) (“Our analysis ... suggests that *Brulotte* should be overruled”). |

II

[**[3]**](#co_anchor_F32036504422_1) [**[4]**](#co_anchor_F42036504422_1) Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to **\*2407** discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See [35 U.S.C. § 154(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS154&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_7b9b000044381). But a patent typically expires 20 years from the day the application for it was filed. See [§ 154(a)(2)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS154&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_d86d0000be040). And when the patent expires, the patentee’s prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See [*Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 230, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124786&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

This Court has carefully guarded that cut-off date, just as it has the patent laws’ subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have struck down state statutes with that consequence. See, *e.g.,* [*id.,* at 230–233, 84 S.Ct. 784](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124786&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 152, 167–168, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989026580&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*Compco Corp. v. Day–Brite Lighting, Inc.,* 376 U.S. 234, 237–238, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124784&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). By virtue of federal law, we reasoned, “an article on which the patent has expired,” like an unpatentable article, “is in the public domain and may be made and sold by whoever chooses to do so.” [*Sears,* 376 U.S., at 231, 84 S.Ct. 784](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124786&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In [*Scott Paper Co. v. Marcalus Mfg. Co.,* 326 U.S. 249, 66 S.Ct. 101, 90 L.Ed. 47 (1945)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945116150&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), for example, we determined that a manufacturer could not agree to refrain from challenging a patent’s validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, “would deprive ... the consuming public of the advantage to be derived” from free exploitation of the discovery. [*Id.,* at 256, 66 S.Ct. 101](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945116150&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). And to permit such a result, whether or not authorized “by express contract,” would impermissibly undermine the patent laws. [*Id.,* at 255–256, 66 S.Ct. 101](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945116150&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); see also, *e.g.,* [*Edward Katzinger Co. v. Chicago Metallic Mfg. Co.,* 329 U.S. 394, 400–401, 67 S.Ct. 416, 91 L.Ed. 374 (1947)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947114969&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (ruling that *Scott Paper* applies to licensees);[*Lear, Inc. v. Adkins,* 395 U.S. 653, 668–675, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969133016&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent’s validity).

*Brulotte* was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents’ expiration dates. The Court (by an 8–1 vote) held the agreement unenforceable—“unlawful *per se* ”—to the extent it provided for the payment of royalties “accru[ing] after the last of the patents incorporated into the machines had expired.” [379 U.S., at 30, 32, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). To arrive at that conclusion, the Court began with the statutory provision setting the length of a patent term. See [*id.,* at 30, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (quoting the then-current version of [§ 154](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS154&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). Emphasizing that a patented invention “become[s] public property once [that term] expires,” the Court then quoted from *Scott Paper* : Any attempt to limit a licensee’s post-expiration use of the invention, “whatever the legal device employed, runs counter to the policy and purpose of the patent laws.” [379 U.S., at 31, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (quoting [326 U.S., at 256](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945116150&pubNum=0000780&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_780_256&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_256)). In the *Brulotte* Court’s view, contracts to pay royalties for such use continue “the patent monopoly beyond the [patent] period,” even though only as to the licensee affected. [379 U.S., at 33, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). And in so doing, those agreements conflict with patent law’s policy of establishing a **\*2408** “post-expiration ... public domain” in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month or year covered, to a product’s commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term’s end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e.g.,* 3 R. Milgrim & E. Bensen, Milgrim on Licensing § 18.05, p. 18–9 (2013). As to either goal, *Brulotte* may pose an obstacle.

[**[5]**](#co_anchor_F52036504422_1) [**[6]**](#co_anchor_F62036504422_1) [**[7]**](#co_anchor_F72036504422_1) [**[8]**](#co_anchor_F82036504422_1) Yet parties can often find ways around *Brulotte,* enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are royalties for using an invention after it has moved into the public domain. See [379 U.S., at 31, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 136, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132989&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). A licensee could agree, for example, to pay the licensor a sum equal to 10% of sales during the 20–year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte,* royalties may run until the latest-running patent covered in the parties’ agreement expires. See [379 U.S., at 30, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e.g.,* 3 Milgrim on Licensing § 18.07, at 18–16 to 18–17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

[**[9]**](#co_anchor_F92036504422_1) Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in favor of “flexible, case-by-case analysis” of post-expiration royalty clauses “under the rule of reason.” Brief for Petitioners 45. Used in antitrust law, the rule of reason requires courts to evaluate a practice’s effect on competition by “taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice’s] history, nature, and effect.” [*State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997219814&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be able to curtail competition. See Brief for Petitioners **\*2409** 47–48; [*Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 44, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008558382&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“[A] patent does not necessarily confer market power”). Resolving that issue, Kimble notes, entails “a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like.” Brief for Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 3.2e, p. 3–12.1 (2d ed., Supp. 2014) (Hovenkamp)).

III

[**[10]**](#co_anchor_F102036504422_1) [**[11]**](#co_anchor_F112036504422_1) Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today’s Court should stand by yesterday’s decisions—is “a foundation stone of the rule of law.” [*Michigan v. Bay Mills Indian Community,* 572 U.S. ––––, ––––, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033456179&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2036&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2036). Application of that doctrine, although “not an inexorable command,” is the “preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” [*Payne v. Tennessee,* 501 U.S. 808, 827–828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

[**[12]**](#co_anchor_F122036504422_1) [**[13]**](#co_anchor_F132036504422_1) [**[14]**](#co_anchor_F142036504422_1) Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually “more important that the applicable rule of law be settled than that it be settled right.” [*Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123079&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a “special justification”—over and above the belief “that the precedent was wrongly decided.” [*Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. ––––, ––––, 134 S.Ct. 2398, 2407, 189 L.Ed.2d 339 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2407&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2407).

[**[15]**](#co_anchor_F152036504422_1) [**[16]**](#co_anchor_F162036504422_1) [**[17]**](#co_anchor_F172036504422_1) What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte,* interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e.g.,* [*Patterson v. McLean Credit Union,* 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989089493&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). That is true, contrary to the dissent’s view, see *post,* at 2417 – 2418 (opinion of ALITO, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e.g.,* [*Bilski v. Kappos,* 561 U.S. 593, 601–602, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394590&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Indeed, we apply statutory *stare decisis* even when a decision has announced a “judicially created doctrine” designed to implement a federal statute. [*Halliburton,* 573 U.S., at ––––, 134 S.Ct., at 2411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2411&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2411). All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress’s court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever **\*2410** sees. *Brulotte* has governed licensing agreements for more than half a century. See [*Watson v. United States,* 552 U.S. 74, 82–83, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014313734&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (stating that “long congressional acquiescence,” there totaling just 14 years, “enhance[s] even the usual precedential force we accord to our interpretations of statutes” (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision ([35 U.S.C. § 154](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS154&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))) on which *Brulotte* rested. See, *e.g.,* Uruguay Round Agreements Act, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte* ‘s *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e.g.,* S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of “illegal extension of the patent right by reason of his or her licensing practices ... unless such practices ... violate the antitrust laws”); S. 438, 100th Cong., 2d Sess., § 201(3) (1988) (same). Congress’s continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

[**[18]**](#co_anchor_F182036504422_1) Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements). And we have often recognized that in just those contexts—“cases involving property and contract rights”—considerations favoring *stare decisis* are “at their acme.” *E.g.,* [*Payne,* 501 U.S., at 828, 111 S.Ct. 2597](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*Khan,* 522 U.S., at 20, 118 S.Ct. 275](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997219814&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32–33; see 1 D. Epstein, Eckstrom’s Licensing in Foreign and Domestic Operations § 3.13, p. 3–13, and n. 2 (2014) (noting that it is not “necessary to specify the term ... of the license” when a decision like *Brulotte* limits it “by law”). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no “meaningful number of [such] license agreements ... actually exist.” Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel and Kimble). But even uncertainty on this score cuts in Marvel’s direction. So long as we see a reasonable possibility that parties have structured their business transactions in light of *Brulotte,* we have one more reason to let it stand.

As against this superpowered form of *stare decisis,* we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte* ‘s statutory and doctrinal underpinnings have not eroded over time. When we reverse our statutory interpretations, we most often point to subsequent legal developments—“either the growth of judicial doctrine or further action taken by Congress”—that have removed the basis for a decision. [*Patterson,* 491 U.S., at 173, 109 S.Ct. 2363](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989089493&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (calling this “the primary reason” for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: [Section 154](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS154&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) now, as then, draws **\*2411** a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention after its patent’s expiration. See *supra,* at 2406 – 2407. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court’s other decisions refusing to enforce either state laws or private contracts constraining individuals’ free use of formerly patented (or unpatentable) discoveries. See *supra,* at 2406 – 2407. *Brulotte,* then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Compare, *e.g.,* [*Alleyne v. United States,* 570 U.S. ––––, –––– – ––––, 133 S.Ct. 2151, 2164–2166, 186 L.Ed.2d 314 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030794220&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2164&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2164) (SOTOMAYOR, J., concurring). To the contrary, the decision’s close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law.[4](#co_footnote_B00542036504422_1)

|  |  |
| --- | --- |
| [4](#co_footnoteReference_B00542036504422_ID0) | The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i.e.,* contracts conditioning a licensee’s right to use a patent on the purchase of an unpatented product. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (adding the market power requirement in the patent misuse context); [*Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 41–43, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008558382&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte* ‘s legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and “conclud[ing]” that post-patent royalties are “unlawful *per se*.” [379 U.S., at 32, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). And even if that analogy played some real role in *Brulotte,* the development of tying law would not undercut the decision—rather the opposite*.* Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra,* at 2410 (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte,* and so further supports adhering to *stare decisis*. |

And second, nothing about *Brulotte* has proved unworkable. See, *e.g.,* [*Patterson,* 491 U.S., at 173, 109 S.Ct. 2363](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989089493&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (identifying unworkability as another “traditional justification” for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte* ‘s ease of use appears in still sharper relief when compared to Kimble’s proposed alternative. Recall that he wants courts to employ antitrust law’s rule of reason to identify and invalidate those post-expiration royalty clauses with anti-competitive consequences. See *supra,* at 2408 – 2409. But whatever its merits may be for deciding antitrust claims, that “elaborate inquiry” produces notoriously high litigation costs and unpredictable results. [*Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 343, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982127302&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, **\*2412** Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that *Brulotte* suppresses technological innovation and so harms the nation’s economy. (The dissent offers versions of those same arguments. See *post,* at 2415 – 2417.) We consider the two claims in turn, but our answers to both are much the same: Kimble’s reasoning may give Congress cause to upset *Brulotte,* but does not warrant this Court’s doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty “arrangements are invariably anticompetitive.” Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id.,* at 36–40. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra,* at 2407. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent’s own users. See Brief for Petitioners 38. And after the patent’s expiration, Kimble continues, further benefits follow: Absent high barriers to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12–13, 23), the licensee’s continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38–39. In light of those realities, Kimble concludes, “the *Brulotte per se* rule makes little sense.” *Id.,* at 11.

We do not join issue with Kimble’s economics—only with what follows from it. A broad scholarly consensus supports Kimble’s view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.,* at 13–18 (citing numerous treatises and articles critiquing *Brulotte* ). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55–56 (citing, *e.g.,* [*Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012562227&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*Illinois Tool Works,* 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008558382&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). But to agree with Kimble’s conclusion, we must resolve two questions in his favor. First, even assuming Kimble accurately characterizes *Brulotte* ‘s basis, does the decision’s economic mistake suffice to overcome *stare decisis* ? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

[**[19]**](#co_anchor_F192036504422_1) If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e.g.,* [*Khan,* 522 U.S., at 20–21, 118 S.Ct. 275](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997219814&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Congress, we have explained, intended that law’s reference to “restraint of trade” to have “changing content,” and authorized courts to oversee the term’s “dynamic potential.” [*Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 731–732, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988056342&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). We have therefore felt relatively free to revise our **\*2413** legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice’s competitive consequences. See [*Leegin,* 551 U.S., at 899–900, 127 S.Ct. 2705](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012562227&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court’s rulings necessarily turned on its understanding of economics. See [*Business Electronics Corp.,* 485 U.S., at 731, 108 S.Ct. 1515](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988056342&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them “on [their] own terms.” [*Halliburton,* 573 U.S., at ––––, 134 S.Ct., at 2410](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2410).

[**[20]**](#co_anchor_F202036504422_1) [**[21]**](#co_anchor_F212036504422_1) But *Brulotte* is a patent rather than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See [*supra,* at 2409](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2409&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2409). And as we have shown, that doctrine does not ordinarily bend to “wrong on the merits”-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See [*supra,* at 2408 – 2409](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2408&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2408). Nor does Kimble offer any reason to think his own “the Court erred” claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Compare, *e.g.,* [*Halliburton,* 573 U.S., at ––––, 134 S.Ct., at 2409–2411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2409&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2409) (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36–40. That claim, even if itself dead-right, fails to clear *stare decisis* ‘s high bar.

[**[22]**](#co_anchor_F222036504422_1) [**[23]**](#co_anchor_F232036504422_1) And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra,* the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the “restraint of trade” standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice’s likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See [*Brulotte,* 379 U.S., at 30–32, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [*supra,* at 2406 – 2408](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2406&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2406). Or more specifically put, the Court held, as it had in *Scott Paper,* that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee’s access to the invention clash with that principle. See [*Brulotte,* 379 U.S., at 31–32, 85 S.Ct. 176](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124883&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (a licensee’s obligation to pay post-patent royalties conflicts with the “free market visualized for the post-expiration period” and so “runs counter to the policy and purpose of the patent laws” (quoting [*Scott Paper,* 326 U.S., at 256, 66 S.Ct. 101](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945116150&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)))). That patent (not antitrust) policy gave rise to the Court’s conclusion that post-patent royalty contracts are unenforceable—utterly “regardless of a demonstrable effect on competition.” 1 Hovenkamp § 3.2d, at 3–10.

**\*2414** [**[24]**](#co_anchor_F242036504422_1) Kimble’s real complaint may go to the merits of such a patent policy—what he terms its “formalis[m],” its “rigid[ity]”, and its detachment from “economic reality.” Brief for Petitioners 27–28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law’s insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte,* he contends, “discourages technological innovation and does significant damage to the American economy.” Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra,* at 2407. If the parties’ ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some “breakthrough technologies will never see the light of day.” *Id.,* at 33.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral and risk-spreading alike. See *supra,* at 2408. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any “significant real-world economic harm.” Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has “serious and harmful consequences” for innovation are (to repeat this opinion’s refrain) “more appropriately addressed to Congress.” [*Halliburton,* 573 U.S., at ––––, 134 S.Ct., at 2413](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2413&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2413). That branch, far more than this one, has the capacity to assess Kimble’s charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, considering concerns of just the kind Kimble raises. See [*supra,* at 2410](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033642715&pubNum=0000708&originatingDoc=Ib0bca52a18dd11e5b86bd602cb8781fa&refType=RP&fi=co_pp_sp_708_2410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2410). In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

**\*2415** V

What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee and S. Ditko, Amazing Fantasy No. 15: “Spider–Man,” p. 13 (1962) (“[I]n this world, with great power there must also come—great responsibility”). Finding many reasons for staying the *stare decisis* course and no “special justification” for departing from it, we decline Kimble’s invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

United States Court of Appeals,

Ninth Circuit.

DOE 1, Doe 2, and Kasadore Ramkissoon, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

AOL LLC, Defendant-Appellee.

No. 07-15323.

Argued and Submitted Dec. 6, 2007.

Filed Jan. 16, 2009.

**Background:** Members of internet company brought an action, on behalf of themselves and a putative nationwide class of members, alleging violations of federal electronic privacy law and California law. The United States District Court for the Northern District of California, [Saundra B. Armstrong](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0166767601&FindType=h), J., internet company's motion to dismiss for improper venue. Members appealed.

**Holdings:** The Court of Appeals held that:

[(1)](#Document1zzB42017895133) designation of “the courts of Virginia” in forum selection clause of internet company's member agreement meant the state courts of Virginia, and

[(2)](#Document1zzB92017895133) forum selection clause was unenforceable.

Reversed and remanded.

 [D.W. Nelson](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0224378501&FindType=h), Senior Circuit Judge, and [Reinhardt](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245335801&FindType=h), Circuit Judge, filed a concurring opinion.

 [Bea](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245076401&FindType=h), Circuit Judge, filed a concurring opinion.

West Headnotes

[**[1]**](#Document1zzB12017895133) **Federal Courts 170B 818**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BVIII](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII) Courts of Appeals

            [170BVIII(K)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII%28K%29) Scope, Standards, and Extent

                [170BVIII(K)4](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII%28K%294) Discretion of Lower Court

                      [170Bk818](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk818) k. Dismissal. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk818)

An appellate court reviews a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion.

[**[2]**](#Document1zzB22017895133) **Federal Courts 170B 776**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BVIII](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII) Courts of Appeals

            [170BVIII(K)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII%28K%29) Scope, Standards, and Extent

                [170BVIII(K)1](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVIII%28K%291) In General

                      [170Bk776](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk776) k. Trial De Novo. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk776)

Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, an appellate court reviews a district court's interpretation de novo.

[**[3]**](#Document1zzB32017895133) **Federal Courts 170B 95**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BII](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BII) Venue

            [170BII(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BII%28A%29) In General

                [170Bk95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk95) k. Objections, Waiver and Consent. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk95)

**Federal Courts 170B 96**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BII](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BII) Venue

            [170BII(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BII%28A%29) In General

                [170Bk96](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk96) k. Affidavits and Other Evidence. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk96)

A motion to enforce a forum selection clause is treated as a motion to dismiss for improper venue; pleadings need not be accepted as true, and facts outside the pleadings may be considered. [Fed.Rules Civ.Proc.Rule 12(b)(3), 28 U.S.C.A](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L).

[**[4]**](#Document1zzB42017895133) **Contracts 95 206**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95II](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II) Construction and Operation

            [95II(C)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II%28C%29) Subject-Matter

                [95k206](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k206) k. Legal Remedies and Proceedings. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k206)

Designation of “the courts of Virginia” in forum selection clause of internet company's member agreement meant the state courts of Virginia, and did not include federal courts located in Virginia; courts “of” Virginia referred to courts proceeding from, with their origin in, Virginia.

[**[5]**](#Document1zzB52017895133) **Federal Courts 170B 412.1**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BVI](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVI) State Laws as Rules of Decision

            [170BVI(C)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVI%28C%29) Application to Particular Matters

                [170Bk412](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk412) Contracts; Sales

                      [170Bk412.1](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk412.1) k. In General. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk412.1)

A federal court applies federal law to the interpretation of a forum selection clause.

[**[6]**](#Document1zzB62017895133) **Contracts 95 147(2)**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95II](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II) Construction and Operation

            [95II(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II%28A%29) General Rules of Construction

                [95k147](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k147) Intention of Parties

                      [95k147(2)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k147%282%29) k. Language of Contract. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k147%282%29)

**Contracts 95 152**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95II](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II) Construction and Operation

            [95II(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II%28A%29) General Rules of Construction

                [95k151](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k151) Language of Instrument

                      [95k152](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k152) k. In General. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k152)

Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself; whenever possible, the plain language of the contract should be considered first.

[**[7]**](#Document1zzB72017895133) **Contracts 95 143.5**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95II](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II) Construction and Operation

            [95II(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II%28A%29) General Rules of Construction

                [95k143.5](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k143.5) k. Construction as a Whole. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k143.5)

Under federal law, a court reads a written contract as a whole, and interprets each part with reference to the whole.

[**[8]**](#Document1zzB82017895133) **Contracts 95 143(2)**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95II](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II) Construction and Operation

            [95II(A)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95II%28A%29) General Rules of Construction

                [95k143](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k143) Application to Contracts in General

                      [95k143(2)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k143%282%29) k. Existence of Ambiguity. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k143%282%29)

That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation.

[**[9]**](#Document1zzB92017895133) **Contracts 95 127(4)**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95I](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I) Requisites and Validity

            [95I(F)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I%28F%29) Legality of Object and of Consideration

                [95k127](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k127) Ousting Jurisdiction or Limiting Powers of Court

                      [95k127(4)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k127%284%29) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k127%284%29)

Forum selection clause in internet company's member agreement designating Virginia state courts was unenforceable as to California resident plaintiffs bringing class action claims under California consumer law; class action relief for consumer claims was unavailable in Virginia state court, and California state court had previously found a California public policy against consumer class action waivers and waivers of consumer rights under California consumer law.

[**[10]**](#Document1zzB102017895133) **Federal Courts 170B 412.1**

[170B](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170B) Federal Courts

      [170BVI](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVI) State Laws as Rules of Decision

            [170BVI(C)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170BVI%28C%29) Application to Particular Matters

                [170Bk412](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk412) Contracts; Sales

                      [170Bk412.1](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=170Bk412.1) k. In General. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=170Bk412.1)

A federal court applies federal law to determine the enforceability of a forum selection clause.

[**[11]**](#Document1zzB112017895133) **Contracts 95 141(1)**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95I](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I) Requisites and Validity

            [95I(F)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I%28F%29) Legality of Object and of Consideration

                [95k141](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k141) Evidence

                      [95k141(1)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k141%281%29) k. Presumptions and Burden of Proof. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k141%281%29)

A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a heavy burden to establish a ground upon which a court will conclude the clause is unenforceable.

[**[12]**](#Document1zzB122017895133) **Contracts 95 127(4)**

[95](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95) Contracts

      [95I](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I) Requisites and Validity

            [95I(F)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95I%28F%29) Legality of Object and of Consideration

                [95k127](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k127) Ousting Jurisdiction or Limiting Powers of Court

                      [95k127(4)](http://www.westlaw.com/KeyNumber/Default.wl?rs=dfa1.0&vr=2.0&CMD=KEY&DocName=95k127%284%29) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. [Most Cited Cases](http://www.westlaw.com/Digest/Default.wl?rs=dfa1.0&vr=2.0&CMD=MCC&DocName=95k127%284%29)

A forum selection clause is unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

[Joseph J. Tabacco, Jr.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0173749801&FindType=h), [Christopher T. Heffelfinger](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0202161401&FindType=h), Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA; [C. Oliver Burt, III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0241704901&FindType=h), Berman DeValerio Pease Tabacco Burt & Pucillo, West Palm Beach, FL; [Richard R. Wiebe](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0214677501&FindType=h), Law Office of Richard R. Wiebe, San Francisco, CA; and [James K. Green](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0280516801&FindType=h), James K. Green, P.A., West Palm Beach, FL, for the plaintiffs-appellants.

[Patrick J. Carome](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0181169401&FindType=h), [Samir C. Jain](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0106798101&FindType=h), [D. Hien Tran](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0363408901&FindType=h), Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; [Saundra B. Armstrong](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0166767601&FindType=h), District Judge, Presiding. D.C. No. CV-06-05866-SBA.

Before: [D.W. NELSON](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0224378501&FindType=h), [STEPHEN REINHARDT](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245335801&FindType=h), and [CARLOS T. BEA](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245076401&FindType=h), Circuit Judges.

Per Curiam Opinion; Concurrence by Judge [D.W. NELSON](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0224378501&FindType=h); Concurrence by Judge [BEA](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245076401&FindType=h).

PER CURIAM:

On July 31, 2006, AOL LLC (formerly America Online, Inc.) made publicly available the internet search records of more than 650,000 of its members. The records contained personal and sometimes embarrassing information about the members. Plaintiffs, members of AOL, brought an action in federal district court in California on behalf of themselves and a putative nationwide class of AOL members, alleging violations of federal electronic privacy law, [18 U.S.C. § 2702(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS2702&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). A subclass of AOL members who are California residents also alleged various violations of California law, including the California Consumers Legal Remedies Act, [California Civil Code § 1770](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1770&FindType=L).

Under the AOL Member Agreement, all plaintiffs agreed to a forum selection clause that designates the “courts of Virginia” as the fora for disputes between AOL and its members. The Member Agreement also contains a choice of law clause designating Virginia law to govern disputes.

AOL moved to dismiss the action for improper venue pursuant to [Federal Rule of Civil Procedure 12(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L), on the basis of the parties' forum selection clause. AOL contends the clause permits plaintiffs to refile their consumer class action in state *or* federal court in Virginia. Plaintiffs contend the forum selection clause limits them to Virginia state court, where a class action remedy would be unavailable to them; this, they contend, violates California public policy favoring consumer class actions and renders the forum selection clause unenforceable.

The district court granted AOL's motion and dismissed the action without prejudice to plaintiffs refiling it in a state or federal court in Virginia. We hold the district court erred when it interpreted the forum selection clause to permit actions in either state or federal court in Virginia; the plain language of the clause-courts “of” Virginia-demonstrates the parties chose Virginia state courts as the only fora for any disputes. We reverse and remand for further proceedings.

**I.**

**A. The Complaint**

Plaintiffs Kasadore Ramkissoon and Doe 1 and Doe 2,[FN1](#Document1zzB00112017895133) members of AOL, filed a class action complaint in the District Court for the Northern District of California against AOL on behalf of themselves and a nationwide putative class of AOL members. The complaint alleges Ramkissoon currently is a resident of New York, while Doe 1 and Doe 2 currently are residents of California. The complaint does not state when Doe 1 and Doe 2 became residents of California, where they resided when they entered into the Member Agreement with AOL, or where they resided when they used AOL's services.

[FN1.](#Document1zzF00112017895133) Plaintiffs and AOL filed a joint stipulation and proposed order to allow Doe 1 and Doe 2 to proceed anonymously, because of the sensitive nature of the personal information Doe 1 and Doe 2 claim AOL publicly disclosed about them. The district court granted the motion, which ruling is not at issue on appeal.

AOL provides its members with access to the Internet and a variety of related features, including search tools and security features. The complaint alleges that on July 31, 2006, “roughly twenty million AOL Internet search records were packaged into a database” and made publicly available for download for a period of approximately ten days. The data consisted of the records of which internet sites were visited by nearly 658,000 AOL members who conducted such visits from approximately March 2006 through May 2006. AOL does not contest this occurrence.

The complaint alleges the data contained the addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information of AOL members. Plaintiffs also allege the searches reveal members' “personal struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape,” by revealing their Internet searches for information on these issues. Although AOL admitted it made a “mistake” and took down the data, “mirror” websites appeared on the internet that reproduced the data. Some of these websites present the data in a searchable form and others “invite the public to openly criticize and pass judgment on AOL members based on their searches.”

Plaintiffs' complaint alleges seven causes of action. Two of the causes of action-violation of the federal Electronic Communications Privacy Act, [18 U.S.C. § 2702(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS2702&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4),[FN2](#Document1zzB00222017895133) and unjust enrichment under federal common law-are brought on behalf of all plaintiffs and the putative nationwide class.

[FN2.](#Document1zzF00222017895133) [18 U.S.C. § 2702(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS2702&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) prohibits an entity that provides an electronic communications service or remote computing service from knowingly divulging, except in certain circumstances, the contents of an electronic communication or a record or other information about a subscriber.

The other five causes of action are brought under California statutory and common law. Doe 1 and Doe 2 bring these claims on behalf of the putative sub-class of AOL members who are California residents. They allege AOL violated the following California statutes: (1) the California Consumers Legal Remedies Act (CLRA),[FN3](#Document1zzB00332017895133) which prohibits unfair methods of competition and unfair or deceptive acts or practices resulting in the sale of goods or services; (2) the California Customer Records Act,[FN4](#Document1zzB00442017895133) which requires businesses to destroy customers' records that are no longer to be maintained, and requires businesses to maintain security procedures to protect customers' personal information; (3) California False Advertising law; [FN5](#Document1zzB00552017895133) and (4) California Unfair Competition law,[FN6](#Document1zzB00662017895133) which prohibits unfair, unlawful, and fraudulent business practices. These California plaintiffs also allege AOL committed the tort of public disclosure of private facts under California common law.

[FN3.](#Document1zzF00332017895133) [Cal. Civ.Code § 1770](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1770&FindType=L).

[FN4.](#Document1zzF00442017895133) [Cal. Civ.Code § 1798.81](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1798.81&FindType=L).

[FN5.](#Document1zzF00552017895133) [Cal. Bus. & Prof.Code § 17500 *et seq.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000199&DocName=CABPS17500&FindType=L)

[FN6.](#Document1zzF00662017895133) [Cal. Bus. & Prof.Code § 17200 *et seq.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000199&DocName=CABPS17200&FindType=L)

**B. The Forum Selection and Choice of Law Clause**

AOL's headquarters are located in Dulles, Virginia. All members of AOL's online service, including all plaintiffs and putative class members, must agree to the AOL Member Agreement as a prerequisite to register for AOL service. Each member must click on a box that states the member has agreed to the terms of the Member Agreement before he can complete his registration.

The Member Agreement contains a choice of law clause that designates Virginia law, excluding its conflict-of-law rules. It also contains a forum selection clause that designates the “courts of Virginia” as the fora for disputes between AOL and its members. The choice of law and forum selection clause of the Member Agreement in effect during the time period relevant to the complaint-January 1, 2004 through September 22, 2006-states in its entirety:

The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Member Agreement and your membership. You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or AOL Services. The foregoing provision may not apply to you depending on the laws of your jurisdiction. This Agreement shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

**C. District Court Order**

Based on the forum selection clause, AOL moved to dismiss the action for improper venue under [Federal Rule of Civil Procedure 12(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) (“[Rule 12(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L)”), or, alternatively, to transfer venue to the District Court for the Eastern District of Virginia pursuant to [28 U.S.C. § 1406(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1406&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4).[FN7](#Document1zzB00772017895133) The district court granted AOL's [Rule 12(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L) motion to dismiss and adopted AOL's proposed order in its entirety. The district court held the forum selection clause “expressly requires that this controversy be adjudicated in a court in Virginia” and that “[p]laintiffs agreed the courts of Virginia have ‘exclusive jurisdiction’ over any claims or disputes with AOL, and venue in the Northern District of California is improper.” The order dismissed plaintiffs' complaint “without prejudice to the refiling of their claims in a state or federal court in Virginia.”

[FN7.](#Document1zzF00772017895133) [28 U.S.C. § 1406(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1406&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) states: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”

**II.**

[[1]](#Document1zzF12017895133)[[2]](#Document1zzF22017895133) We review a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion. [*Argueta v. Banco Mexicano, S.A.,* 87 F.3d 320, 323 (9th Cir.1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996140517&ReferencePosition=323). Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, we review the district court's interpretation *de novo.* [*Hunt Wesson Foods, Inc. v. Supreme Oil Co.,* 817 F.2d 75, 77 (9th Cir.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1987059777&ReferencePosition=77).

[[3]](#Document1zzF32017895133) A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to [Rule 12(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR12&FindType=L); pleadings need not be accepted as true, and facts outside the pleadings may be considered. [*Argueta,* 87 F.3d at 324](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996140517&ReferencePosition=324).

**III.**

[[4]](#Document1zzF42017895133) As a threshold matter, the parties dispute the meaning of the forum selection clause, specifically the phrase “exclusive jurisdiction ... resides *in the courts of Virginia.*” AOL claims the phrase “courts of Virginia” refers to state and federal courts in Virginia, while plaintiffs claim it refers to Virginia state courts only. We agree with plaintiffs' interpretation.

[[5]](#Document1zzF52017895133) We apply federal law to the interpretation of the forum selection clause. [*Manetti-Farrow, Inc. v. Gucci Am., Inc.,* 858 F.2d 509, 513 (9th Cir.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988122621&ReferencePosition=513). When we interpret a contract under federal law, we look for guidance “to general principles for interpreting contracts.” [*Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1210 (9th Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000042044&ReferencePosition=1210).

[[6]](#Document1zzF62017895133)[[7]](#Document1zzF72017895133)[[8]](#Document1zzF82017895133) “Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000042044) (internal citation omitted). We apply the “primary rule of interpretation ... that the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.” [*Hunt Wesson Foods, Inc.,* 817 F.2d at 77](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1987059777&ReferencePosition=77) (internal quotation marks and alteration omitted). We read a written contract as a whole, and interpret each part with reference to the whole. [*Klamath Water Users Protective Ass'n,* 204 F.3d at 1210.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000042044&ReferencePosition=1210) That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous “if reasonable people could find its terms susceptible to more than one interpretation.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000042044)

The district court, without discussion, interpreted the forum selection clause to refer to state *and* federal courts of Virginia. We determine the meaning of the phrase “courts of Virginia” *de novo,* [*Hunt Wesson Foods, Inc.,* 817 F.2d at 77,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1987059777&ReferencePosition=77) and look first to its plain meaning. We have not previously addressed the meaning of a forum selection clause designating the courts “of,” rather than “in,” a state. We hold that the forum selection clause at issue here-designating the courts of Virginia-means the state courts of Virginia only; it does not also refer to federal courts in Virginia.

The clause's use of the preposition “of”-rather than “in”-is determinative. Black's Law Dictionary defines “of” as a term “denoting that from which anything proceeds; indicating origin, source, descent, and the like....” [FN8](#Document1zzB00882017895133) *Black's Law Dictionary* 1080 (6th ed.1990). Thus, courts “of” Virginia refers to courts proceeding from, with their origin in, Virginia-i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their origin in, the federal government.[FN9](#Document1zzB00992017895133)

[FN8.](#Document1zzF00882017895133) In contrast, the proposition “in” “express[es] relation of presence, existence, situation, inclusion, action, etc.; inclosed or surrounded by limits, as in a room; also meaning for, in and about, on, within etc. ....” *Black's Law Dictionary* 758 (6th ed.1990).

[FN9.](#Document1zzF00992017895133) Reading the forum selection and choice of law clause as a whole further supports this reasonable interpretation. *See* [*Klamath Water Users Protective Ass'n,* 204 F.3d at 1210.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000042044&ReferencePosition=1210) The clause contains both a forum selection provision by which the parties agreed to the “courts of Virginia” as the fora for their disputes, *and* a choice of law provision by which the parties agreed to apply the “laws of the Commonwealth of Virginia.” The *state* courts of Virginia are the ultimate determiners of the “laws of the Commonwealth of Virginia”; a federal court in Virginia merely follows Virginia law.

Our interpretation finds support among opinions by our sister circuits who have addressed the meaning of forum selection clauses designating the “courts of” a state-all of whom have interpreted such clauses to refer to the state courts of the designated state, and not also to the federal courts in the designated state. *See* [*Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.,* 428 F.3d 921, 926 (10th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2007654674&ReferencePosition=926) (interpreting “Courts of the State of Colorado” to mean Colorado state courts; the clause “refers to sovereignty rather than geography”); [*Dixon v. TSE Int'l Inc.,* 330 F.3d 396, 398 (5th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003329439&ReferencePosition=398) (interpreting “Courts of Texas, U.S.A.” to mean Texas state courts; “[f]ederal district courts may be *in* Texas, but they are not *of* Texas”); [*LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.,* 739 F.2d 4, 7 (1st Cir.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1984134234&ReferencePosition=7) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to “the law, and in the courts, of the Commonwealth of Massachusetts” to designate the state courts of Massachusetts; “the word ‘of’ as it appears in the phrase in question must have been intended to restrict the meaning of both ‘law’ and ‘courts' to those that trace their origin to the state.”).

Accordingly, we hold the plain meaning of the forum selection clause's designation of the “courts of Virginia” is the state courts of Virginia; it does not include federal district courts located in Virginia.[FN10](#Document1zzB010102017895133)

[FN10.](#Document1zzF010102017895133) We find no ambiguity in the forum selection clause. Even if we did find the phrase ambiguous, we would interpret it in plaintiffs' favor. The parties produced no other evidence of their expressed intent. Accordingly, we would construe the contract against AOL as the drafter and adopt plaintiffs' reasonable interpretation of the phrase to mean the state courts of Virginia. *See* [*InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.,* 719 F.2d 992, 998 (9th Cir.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1983149614&ReferencePosition=998).

**IV.**

[[9]](#Document1zzF92017895133) Having interpreted the AOL forum selection clause to designate Virginia state courts, we turn to the enforceability of the clause.

Plaintiffs contend the forum selection clause so construed is unenforceable as a matter of federal law, because it violates California public policy against waivers of class action remedies and rights under the California Consumers Legal Remedies Act. AOL, however, steadfastly has asserted the forum selection clause permits plaintiffs to maintain an action in federal court in Virginia, where plaintiffs could pursue their consumer class action remedies. AOL has raised no contention that the forum selection clause, construed to mean only Virginia state courts, nevertheless is enforceable and does not violate California public policy.

[[10]](#Document1zzF102017895133)[[11]](#Document1zzF112017895133)[[12]](#Document1zzF122017895133) We apply federal law to determine the enforceability of the forum selection clause. [*Manetti-Farrow,* 858 F.2d at 513.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988122621&ReferencePosition=513) A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a “heavy burden” to establish a ground upon which we will conclude the clause is unenforceable. [*M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127141). Under the directives of the Supreme Court in [*Bremen,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1972127141) we will determine a forum selection clause is unenforceable “if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute *or by judicial decision.*” [*Id.* at 15, 92 S.Ct. 1907](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127141) (emphasis added).

California has declared “by judicial decision” the same AOL forum selection clause at issue here contravenes a strong public policy of California-as applied to California residents who brought claims under California statutory consumer law in California state court. In [*America Online, Inc. v. Superior Court of Alameda County (Mendoza),* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=2001534864), Mendoza, a California resident and member of AOL, brought a putative class action on behalf of AOL members in California state court, alleging violations of California state law, to wit: the California Consumers Legal Remedies Act, the California Unfair Business Practices Act, and common law conversion and fraud. [*Mendoza,* 108 Cal.Rptr.2d at 702](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=702).

AOL moved to dismiss Mendoza's action based on its forum selection clause designating the “courts of Virginia.” [*Id.* at 701-02.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) The state trial court denied AOL's motion, holding the forum selection clause was unenforceable because it “diminished” the rights of California consumers, and remedies available in Virginia were not “comparable” to those in California.[FN11](#Document1zzB011112017895133) [*Id.* at 703.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864)

[FN11.](#Document1zzF011112017895133) The trial court also denied AOL's motion on the basis the forum selection clause was unconscionable under California law because the clause was not negotiated, was contained in a standard form contract, and “was in a format that was not readily identifiable by Mendoza.” [*Id.* at 703.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) The Court of Appeal did not reach the trial court's unconscionability ruling, because it affirmed on other grounds. [*Id.* at 713 n. 17.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864)

AOL filed a petition for writ of mandamus. The California Court of Appeal denied the writ, thereby leaving in place the trial court's denial of AOL's motion to dismiss. Relevant to the instant appeal, the California Court of Appeal held the AOL forum selection clause was unenforceable, because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California public policy that strongly favors consumer class actions, because consumer class actions are not available in Virginia state courts, [*id.* at 712;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) [FN12](#Document1zzB012122017895133) and (2) enforcement of the forum selection clause violates the anti-waiver provision of the Consumer Legal Remedies Act (CLRA), [*id.* at 710,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) which states “[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.” [Cal. Civ.Code § 1751](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1751&FindType=L). The state Court of Appeal held the forum selection clause, together with the choice of law provision, effect a waiver of statutory remedies provided by the CLRA in violation of the anti-waiver provision, as well as California's “strong public policy” to “protect consumers against unfair and deceptive business practices.” [FN13](#Document1zzB013132017895133) [*Mendoza,* 108 Cal.Rptr.2d at 710](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=710).

[FN12.](#Document1zzF012122017895133) The California Court of Appeal expressed “the importance class action consumer litigation has come to play” in California and noted California courts have “extolled” “the right to seek class action relief in consumer cases.” [*Mendoza,* 108 Cal.Rptr.2d at 712.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=712) In Virginia state court, in contrast, class action relief for consumer claims is unavailable. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864); Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.11 (4th ed. 2003) (Virginia “does *not* have a statute or rule authorizing a ‘class action’ comparable to such proceedings under [Rule 23 of the Federal Rules of Civil Procedure](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR23&FindType=L) or the statutes and rules of most sister states.”) (emphasis in original).

[FN13.](#Document1zzF013132017895133) The California Court of Appeal noted its conclusion on this point was “reinforced by a statutory comparison of California and Virginia consumer protection laws, which reveals Virginia's law provides significantly less consumer protection to its citizens than California law provides for our own.” [*Id.* at 710.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) Specifically, the court noted Virginia consumer protection law has a shorter statute of limitations, has a lower required minimum recovery amount, and does not provide the enhanced remedies for disabled and senior citizens which the CLRA provides. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864)

We agree with plaintiffs that [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) is the kind of declaration “by judicial decision” contemplated by [*Bremen.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1972127141) [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) found a California public policy against consumer class action waivers and waivers of consumer rights under the CLRA that California public policy applies to California residents bringing class action claims under California consumer law. As to such California resident plaintiffs, [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.

Accordingly, the forum selection clause in the instant member agreement is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law.[FN14](#Document1zzB014142017895133)

[FN14.](#Document1zzF014142017895133) The members of this panel, however, disagree as to whether the plaintiffs in the instant case have established the AOL forum selection clause is unenforceable as to them, or whether further development of the record is necessary on remand.

**REVERSED and REMANDED.**[FN15](#Document1zzB015152017895133)

[FN15.](#Document1zzF015152017895133) Plaintiffs' requests for judicial notice of an AOL memorandum of law in an unrelated litigation and an AOL press release stating AOL will move its headquarters to New York are denied as moot.

[D.W. NELSON](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0224378501&FindType=h), Senior Circuit Judge, and [REINHARDT](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245335801&FindType=h), Circuit Judge, concurring:

Plaintiffs Doe 1 and 2 have alleged sufficient facts to invoke California's public policy. California courts have made clear that they will “refuse to defer to the selected forum if to do so would substantially diminish the rights of California *residents* in a way that violates our state's public policy.” [*Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=707) (emphasis added). In this case, plaintiffs, who allege that they were California *residents* at the time of the filing of the complaint, are bringing claims under California's consumer protection statutes, while the defendant seeks to enforce the same AOL contract by relying on the exact contract provisions that [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) refused to apply. Nothing in California law suggests that a plaintiff must have been a resident for any period of time before invoking California's public policy. To the contrary, being a resident at the time the complaint is filed is sufficient. *See* [*id.* at 708, 709](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) (evaluating the effect of the forum selection clause on the rights of “California residents”).

As the per curiam opinion recognizes, California's Consumer Legal Remedies Act states that “[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.” [Cal. Civ.Code § 1751](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1751&FindType=L). California public policy is offended by *any* clause that would require the plaintiffs, being California *residents,* to pursue their claims in a forum that does not permit class actions. This is true regardless of whether plaintiffs' rights are waived directly by a forum selection clause or indirectly, as our colleague proposes, through conflicts of law analysis. As [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) made clear, “Enforcement of the contractual forum selection *and choice of law clauses* would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law.” [*Mendoza,* 108 Cal.Rptr.2d at 702](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=702) (emphasis added). As a result, no further pleadings are necessary. Any purported waiver of the rights of a California consumer is unenforceable.

Our colleague has created a pleading requirement premised on a supposed distinction between California “consumers” and California “residents.” However, [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) treats California consumers and California residents as interchangeable, making it clear that, at least for the purposes of the California Consumers Legal Remedies Act, no such distinction exists under California law. This is not surprising given that it is difficult, if not impossible, to reside somewhere without also consuming there. Every California resident is a California consumer. Moreover, the California courts have never applied a pleading requirement such as that proposed by our colleague. If California wishes to adopt such a requirement, its courts are free to do so. However, as a federal court sitting in diversity jurisdiction, we apply, but do not create, state law. *See* [*Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1938121079). Thus, we may not do so here.

We would add that we do not share our colleague's fear that there will be a rush by out-of-staters to establish California residency in order to file consumer class actions-that we face a new “Gold Rush.” No such rush has occurred in the past despite the state's policy designed to protect California consumers' right to file class actions in cases of fraud or “unfair and deceptive business practices.” [*Mendoza,* 108 Cal.Rptr.2d at 710.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=710)[FN1](#Document1zzB01612017895133) The chain of horrors tactic is not a credible one as urged in this case. There are far better reasons to move to the Golden State than are conjured up here by our imaginative and creative colleague.

[FN1.](#Document1zzF01612017895133) Judge Bea's reliance on the example of Seymour Lazar is entirely out of place. Mr. Lazar was a Californian from childhood. *See* Rhonda L. Rundle, “Legal Setback: A Career in Courts Leads to Trouble For Seymour Lazar,” Wall St. J., Jan. 19, 2006, at A1.

[BEA](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0245076401&FindType=h), Circuit Judge, concurring:

I concur in the court's judgment reversing the district court's dismissal order and remanding for further proceedings. However, I would remand to allow the plaintiffs an opportunity to plead and prove facts to establish California law and public policy apply to their action and that, therefore, California public policy is violated by enforcement of the AOL contractual forum selection clause.

California has a public policy against the waiver of the class action procedural mechanism by California consumers, as well as the waiver of consumer rights under the California Consumer Legal Remedies Act (CLRA). But that public policy applies to *California consumers* bringing class action claims under *California consumer law.* It is not a foregone conclusion that the AOL forum selection clause (or, for that matter, the choice of law clause) is unenforceable as to plaintiffs. For the forum selection and the choice of law clauses to be unenforceable, plaintiffs must establish they are protected by California law and public policy.

As the California Supreme Court has explained, a consumer class action waiver violates California public policy if it is unconscionable because it operates as an exculpatory clause, exempting a defendant from liability-to the extent the obligation at issue is governed by California law. *See* [*Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1109 (2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&ReferencePositionType=S&SerialNum=2006859502&ReferencePosition=1109) ( “Such one-sided, exculpatory contracts in a contract of adhesion, *at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law,* are generally unconscionable.” (emphasis added)). Where, however, liability is not controlled by California law-for example because a valid choice of law provision or conflict of laws principles dictate the application of the laws of another state or country-California's public policy against consumer class action waivers is not implicated. *See* [*id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2006859502)

Moreover, enforcement of the AOL forum selection and choice of law clause violates the CLRA statutory anti-waiver provision, [California Civil Code § 1751](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1751&FindType=L), only if plaintiffs are California consumers who otherwise would be protected by California law. *See* [Cal. Civ.Code § 1751](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000200&DocName=CACIS1751&FindType=L) (“Any waiver by a *consumer* of the provisions of this title is contrary to public policy and shall be unenforceable and void.”). If plaintiffs have no contacts with California and are not covered by the CLRA, they have no protection under the California law “which would otherwise govern”; hence, they have nothing to waive. *See* [*Am. Online Inc. v. Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 706, 708-09 (1st Dist.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=706).

Based on the allegations in plaintiffs' complaint, however, it is not clear whether they are California consumers protected by California law.[FN1](#Document1zzB01712017895133) Plaintiffs' complaint, as it currently stands, is devoid of factual allegations that would support a conclusion that California law would apply, notwithstanding the Virginia choice of law provision. Plaintiffs' complaint alleges Doe 1 and Doe 2 “currently”-as of the time they filed their complaint-are residents of California. It further alleges the “California subclass” of plaintiffs is comprised of “AOL members in the State of California.” The complaint is silent as to the place of the contracting, the place where the contract was negotiated, the place where the contract was performed, the location of the subject matter of the contract, or the residency of the AOL members at the time of their injuries. *Cf.* [*Klussman v. Cross Country Bank,* 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, 740-41 (1st. Dist.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&ReferencePositionType=S&SerialNum=2007898982&ReferencePosition=740) (noting that California had a materially greater interest than Delaware in the application of its own law where the consumer contracts were formed in California, the allegedly illegal conduct took place at the plaintiffs' homes in California, and the plaintiffs were residents of California at the time of injury). The sole relevant allegation is that, as of the time of filing the complaint, Doe 1 and Doe 2 were residents of California. That alone is simply insufficient to establish California law would govern plaintiffs' action. Even in the absence of a choice of law or forum selection clause, residency is but one factor to be considered in determining whether California law applies. “California, despite its interest in securing recovery for its residents, will not apply its law to conduct in other jurisdictions resulting in injury in those jurisdictions.” [*McGhee v. Arabian Am. Oil Co.,* 871 F.2d 1412, 1425 (9th Cir.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1989045748&ReferencePosition=1425).

[FN1.](#Document1zzF01712017895133) To determine whether California or Virginia law would apply, we would apply federal conflict of law rules, as set forth in the Restatement (Second) of Conflicts of Laws. *See* [*Huynh v. Chase Manhattan Bank,* 465 F.3d 992, 997 (9th Cir.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2010371778&ReferencePosition=997). Under the Restatement, the parties' chosen law of Virginia will apply unless either (a) Virginia has no substantial relationship to the parties or transaction and there is no other reasonable basis for the parties' choice of law, or (b) application of Virginia law “would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of [[Restatement (Second) of Conflict of Laws] § 188](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101576&FindType=Y&SerialNum=0289353612), would be the state of the applicable law in the absence of an effective choice of law by the parties.” [Restatement (Second) of Conflict of Laws § 187 (1971)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0101576&FindType=Y&SerialNum=0289353611). Plaintiffs do not claim Virginia has no substantial relation to the transaction; after all, Virginia is where AOL has its principal place of business. *See* [*Discover Bank v. Superior Court,* 134 Cal.App.4th 886, 36 Cal.Rptr.3d 456, 458-59 (2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7047&FindType=Y&ReferencePositionType=S&SerialNum=2007830810&ReferencePosition=458) (holding Delaware had a substantial relation to transaction where defendant Discover Bank was domiciled in that state).

To determine whether California “has a materially greater interest” than Virginia and would be the state of the applicable law in the absence of an effective choice of law by the parties, § 188 directs us to take into account the following contacts to determine the applicable law: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1971). Here, plaintiffs' voluminous complaint is curiously silent as to any and all of the determinative contacts mentioned in the Restatement.

There is no “declar[ation] by statute or by judicial decision,” [*M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127141), that California public policy against consumer rights waivers could possibly be offended by enforcing a contractual class action waiver against a party whose sole connection to California is residency at the time he filed a consumer class action in a California court.[FN2](#Document1zzB01822017895133) My colleagues' suggestion otherwise would permit a citizen of another state to move to California for the sole purpose of serving as a class representative and clothing himself with the protections of consumer-friendly California public policy. This would magnetize California courts to pull in out-of-state contracts, actions or omissions. I see nothing in California consumer-protection statutes or cases that would invite such a new Gold Rush.

[FN2.](#Document1zzF01822017895133) The majority cites [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) for the proposition that mere residency at the time of filing a complaint is sufficient to invoke California public policy. [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) neither said nor held any such thing. In [*Mendoza,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) there was no dispute whether the plaintiffs were California *consumers entitled to invoke the protection of California consumer law,* not merely California residents. *See* [*Mendoza,* 108 Cal.Rptr.2d at 706, 707, 708](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&ReferencePositionType=S&SerialNum=2001534864&ReferencePosition=706) (discussing “California consumers” and “this state's consumers”). What [*Mendoza*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) did was use the phrase “California residents” twice. *See* [*id.* at 708, 709.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) And in each case, the court explained California courts would not enforce contract provisions that would diminish the rights of California residents in a way that would violate California public policy. [*Id.* at 708, 709.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864) These statements assume, but do not put, analyze, nor determine, the ultimate question: whether the forum selection and choice of law clauses violate California public policy.

The majority's logical syllogism-all California residents are California consumers-says nothing about whether the plaintiffs are California consumers of AOL products entitled to invoke the protection of California public policy in the instant litigation.

I am admittedly not as sanguine as my colleagues as to the non-litigation attractions which bring class action plaintiffs to the Golden State. They mention, but do not describe, “far better reasons” for class action representative plaintiffs moving to California than simply to become class action plaintiffs. I am reminded of Mr. Lazar, of Palm Springs, California, recipient of Mel Weiss's kickbacks to become a class action representative plaintiff in several cases.[FN3](#Document1zzB01932017895133) With thanks to my colleagues for their encomium, it doesn't really require one to be “imaginative and creative” to suspect the class representatives may not have become California residents for reasons other than class action litigation status and are not really California consumers entitled to California consumer protection.

[FN3.](#Document1zzF01932017895133) *See* The Wall Street Journal Law Blog, http:// blogs. wsj. com/ law/? s= seymour+ lazar (last visited August 20, 2008).

My concurrence merely requires the plaintiff class representatives plead and prove they really are California *consumers* by stating facts which make California substantive law applicable to them, pursuant to the well-known rules of federal choice of law, set forth in the Restatement. This point seems to be brushed away by the majority as an unnecessary technicality by a misreading of [*Mendoza.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2001534864)

Accordingly, I would remand for plaintiffs to be permitted to file an amended complaint to allege facts-if they can so allege-that would demonstrate contacts with California sufficient to establish their causes of action are controlled by California law.

C.A.9 (Cal.),2009.

Doe 1 v. AOL LLC

552 F.3d 1077, 09 Cal. Daily Op. Serv. 636, 2009 Daily Journal D.A.R. 756

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479 Mass. 20

Supreme Judicial Court of Massachusetts,

Suffolk..

WORLDWIDE TECHSERVICES, LLC

v.

COMMISSIONER OF REVENUE & another[1](#co_footnote_B00012043870573_1) (and three consolidated cases 2).

SJC–12328

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November 7, 2017.

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February 22, 2018.

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| [1](#co_fnRef_B00012043870573_ID0EOG_1) | Econo–Tennis Management Corp., intervener, doing business as Dedham Health and Athletic Complex. |

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| 2 | BancTec Third Party Maintenance, Inc. vs. Commissioner of Revenue & another; QualxServ, LLC vs. Commissioner of Revenue & another; and Dell Marketing L.P. vs. Commissioner of Revenue & another. Banctec Third Party Maintenance, Inc., is now known as QualxServ Third Party Maintenance, Inc.; and QualxServ, LLC, is now known as WorldWide TechServices, LLC. |

**Synopsis**

**Background:** Computer-service-contract buyer that had successfully intervened in contract’s sellers’ abatement petition regarding sales or use tax collected for the contracts sought review of Appellate Tax Board’s denial of buyer’s motion to strike the sellers’ withdrawal of the petitions, which the sellers had withdrawn after final dismissal of a putative class action against them regarding the collection of tax for the contracts, even though Board had ruled that the contracts were not subject to taxation.

**Holdings:** The Supreme Judicial Court, [Kafker](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0218409301&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), J., held that:

Board did not abuse its discretion in its decision to accept withdrawals of abatement petitions, but

buyer, as an intervener, was entitled to proceed to defend its own interest after the petitions were withdrawn.

Reversed and remanded.

See also [454 Mass. 192, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [465 Mass. 470, 989 N.E.2d 439](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030699184&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [466 Mass. 1001, 993 N.E.2d 329](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); and [2015 WL 4460182](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036735299&pubNum=0000999&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

**\*\*651** Taxation, Abatement, Sales and use tax. Practice, Civil, Abatement, Intervention. Administrative Law, Intervention. Due Process of Law, Intervention in civil action.

APPEAL from a decision of the Appellate Tax Board.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**Attorneys and Law Firms**

[Edward D. Rapacki](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0131295901&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) for the intervener.

John A. Shope ([Michael Hoven](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0487708701&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) also present) for the taxpayers.

[Daniel J. Hammond](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0247598001&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), Assistant Attorney General ([Daniel A. Shapiro](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0283599901&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) also present) for Commissioner of Revenue.

[Ben Robbins](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0126480201&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) & [Martin J. Newhouse](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0196244001&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), for New England Legal Foundation, amicus curiae, submitted a brief.

Present: [Gants](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0331352501&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), C.J., Gaziano, Lowy, Budd, Cypher, & [Kafker](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0218409301&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), JJ.

**Opinion**

[KAFKER](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0218409301&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), J.

**\*\*652** **\*21** Fifteen years and three Supreme Judicial Court decisions ago, this protracted case commenced regarding taxes imposed on computer service contracts. The litigation began when purchasers of the service contracts filed a putative class action against the sellers,[3](#co_footnote_B00032043870573_1) claiming under G. L. c. 93A that the imposition of these taxes was unlawful and an unfair and deceptive practice. The sellers successfully moved to compel arbitration pursuant to the terms of the computer service contracts, and a judge in the Superior Court eventually confirmed the award. The next chapter in this tax saga, and the one we are required to decide today, then ensued.

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| [3](#co_fnRef_B00032043870573_ID0E1WAE_1) | We refer to BancTec Third Party Maintenance, Inc., QualxServ, LLC, and Dell Marketing L.P., the corporate appellees in the present litigation, collectively as the “sellers.” |

For the sole and express purpose of hedging their bets in response to the class action, the sellers had applied for tax abatements from the Commissioner of Revenue (commissioner) beginning in 2004. The commissioner denied the applications, and the sellers petitioned the Appellate Tax Board (board). The appellant, Econo–Tennis Management Corp., doing business as Dedham Health and Athletic Complex (Dedham Health), one of the consumers who purchased these service contracts, moved to intervene in the proceedings, which the board allowed. Thereafter, the board, with certain exceptions, reversed the decision of the commissioner and allowed the abatements, ordering the parties to compute the amounts to be abated. Taxes totaling $215.55 were imposed on the service contracts purchased by Dedham Health.[4](#co_footnote_B00042043870573_1) After the class action litigation on the claims under G. L. c. 93A ended in the sellers’ favor, the sellers withdrew their tax abatement petitions with prejudice. Dedham Health moved to strike the withdrawals. The board denied the motion to strike the withdrawals and terminated the proceedings, deciding that “any pending or further motions ... [were] moot” and that it would “take no further action on these appeals.” Dedham Health now appeals from that order. We transferred Dedham Health’s appeal to this **\*22** court on our motion and now conclude that although the board did not err as a matter of law in allowing the sellers’ withdrawals, the board’s termination of the proceedings in their entirety, after permitting Dedham Health to intervene and allowing the abatements, was an error of law. After the sellers’ withdrawals were allowed, Dedham Health should have been allowed to proceed as an intervener on its own claim to recover the taxes imposed on the service contracts it purchased.[5](#co_footnote_B00052043870573_1)

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| [4](#co_fnRef_B00042043870573_ID0EXXAE_1) | The sellers note that the evidence in the record before the Appellate Tax Board (board) only reflects that Dedham Health paid a total of $45.60, not $215.55. For the purposes of this opinion, we need not address this issue. |

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| [5](#co_fnRef_B00052043870573_ID0EYYAE_1) | We acknowledge the amicus brief submitted by the New England Legal Foundation in support of the sellers. |

1. Background. The instant cases arise out of the same tax dispute at issue in [Feeney v. Dell Inc., 454 Mass. 192, 908 N.E.2d 753 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) ([Feeney I](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))); [Feeney v. Dell Inc., 465 Mass. 470, 989 N.E.2d 439 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030699184&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) ([Feeney II](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030699184&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))); and [Feeney v. Dell Inc., 466 Mass. 1001, 993 N.E.2d 329 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) ([Feeney III](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). As we summarized in [Feeney I, supra at 194, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_194&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_194), “Dell Catalog Sales Limited Partnership (Dell **\*\*653** Catalog) and Dell Marketing Limited Partnership (Dell Marketing), wholly owned subsidiaries of Dell Inc. (formerly Dell Computer Corporation), sold computers and related products to consumers and businesses and, in connection with such sales, also sold optional computer hardware service contracts under which [the sellers] agreed to provide onsite computer repairs to the purchasers.” Dell Catalog and Dell Marketing collected tax on the optional service contracts from their customers and remitted the tax to the Department of Revenue. [Id. at 194, 908 N.E.2d 753 & n.6](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Under these service contracts, “BancTech, Inc. ... ; QualxServ LLC; or Dell Marketing agreed to provide onsite computer repairs to the purchasers.”[6](#co_footnote_B00062043870573_1) [Id. at 194, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Dedham Health was one such consumer who purchased Dell computer hardware and the accompanying service contracts. [Id.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) Dedham Health asserted that the tax on the optional service contracts was improper. [Id. at 193, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

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| [6](#co_fnRef_B00062043870573_ID0EP5AE_1) | As noted in note 2, supra, the names of two of these companies have since changed. |

Dedham Health and one other plaintiff who bought Dell hardware and service contracts[7](#co_footnote_B00072043870573_1) commenced a putative class action against Dell Computer Corporation (Dell Computer) in 2003, alleging that it had improperly collected and remitted tax on the service contracts that the plaintiffs purchased, and that collecting the tax violated the Massachusetts consumer protection act, G. L. c. 93A. [Id. at 193, 196, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_193&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_193). “The ‘Dell Terms and Conditions of Sale’ **\*23** ... in effect at the time of the plaintiffs’ purchases contain an arbitration clause compelling arbitration of any claim against Dell ... and mandating that any such claims be arbitrated on an individual basis” (emphasis in original; footnote omitted).[8](#co_footnote_B00082043870573_1) [Id. at 194–195, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_194&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_194). In July, 2003, Dell Computer moved to compel arbitration, and a judge in the Superior Court allowed the motion. [Id. at 196–197, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_196&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_196). “[The plaintiffs] each filed a claim of arbitration ‘under protest’ in November, 2004.” [Id. at 197, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_197&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_197). The arbitrator denied the plaintiffs’ request for class certification, and ruled in favor of the defendants on the merits in 2007. [Id. at 198, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_198&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_198).

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| [7](#co_fnRef_B00072043870573_ID0EZAAG_1) | The other plaintiff was John A. Feeney, now deceased, who is not a party to the present litigation. |

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| [8](#co_fnRef_B00082043870573_ID0ENCAG_1) | The relevant portion of the “Dell Terms and Conditions of Sale” provides:“ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS) AGAINST DELL, its agents, employees, successors, assigns or affiliates (collectively for purposes of this paragraph, ‘Dell’) arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell’s advertising, or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect (available via the Internet at http://www.arb-forum.com, or via telephone at 1–800–474–2371). The arbitration will be limited solely to the dispute or controversy between Customer and Dell. Any award of the arbitrator(s) shall be final and binding on each of the parties, and may be entered as a judgment in any court of competent jurisdiction.” |

“In February 2008, the plaintiffs moved in the Superior Court to vacate the arbitration award,” but their motion was denied and the case was dismissed with prejudice. [Id.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) The plaintiffs appealed, and we **\*\*654** granted their application for direct appellate review. [Id.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) In [Feeney I](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), this court held that the arbitration clause was void as against public policy, and reinstated the Superior Court action. [Id. at 205, 214, 908 N.E.2d 753](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019255725&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_205&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_205). Less than two years later, the United States Supreme Court ruled in [AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–352, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025172541&pubNum=0000708&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), that the Federal Arbitration Act precludes invalidating class waiver provisions in arbitration clauses on the basis of State public policy favoring class actions. In response to [Concepcion](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025172541&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), we held in [Feeney II](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030699184&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) that “a court may still invalidate a class waiver” post-[Concepcion](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025172541&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) where, as here, “class proceedings are the only viable way for a consumer plaintiff to bring a claim against a defendant.” [Feeney II, 465 Mass. at 501-502, 989 N.E.2d 439](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030699184&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). **\*24** One week later, the United States Supreme Court held in [American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 238–239, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816550&pubNum=0000708&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) ([Amex](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816550&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))), that an arbitration agreement’s class waiver is enforceable even if the class waiver effectively precludes the plaintiff from vindicating his or her Federal statutory rights. In light of the Supreme Court ruling in [Amex](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816550&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), we held in [Feeney III](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) that the class waiver in the present case could not be invalidated for effectively denying the plaintiffs a remedy, and remanded the case to the Superior Court. [Feeney III, 466 Mass. at 1003, 993 N.E.2d 329](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031192898&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

On remand, the Superior Court granted the sellers’ motion to confirm the original arbitration award dismissing the plaintiffs’ claims. [Feeney v. Dell Inc., Mass. Superior Ct., No. 2003–01158, 2013 WL 9925432 (Middlesex County Oct. 24, 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034894576&pubNum=0000999&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The Appeals Court affirmed in a memorandum and order pursuant to its rule 1:28, 87 Mass. App. Ct. 1137 (2015), and this court denied the plaintiffs’ application for further appellate review in October, 2015, ending the putative class action litigation.

While the putative class action was still ongoing, the sellers brought abatement claims against the commissioner for the taxes collected on the service contracts. The sellers indicated in their abatement filings that they only sought abatement in the event that the class action litigation resulted in a judgment requiring the sellers to refund the taxes to their customers. The sellers’ filings stated that if they prevailed in the class action, they would withdraw their abatement applications.

The commissioner denied the sellers’ abatement requests. The sellers filed timely petitions with the board challenging the commissioner’s denial of their abatement requests, and the petitions were consolidated. In their petitions to the board, the sellers again emphasized that they sought abatement to protect against a possible judgment against them in the putative class action litigation.

Dedham Health filed motions to intervene in the sellers’ petitions before the board, arguing that it and “other similarly situated customers” were the “real parties in interest” because the customers were entitled to be refunded in the amount of any abatement paid out to the sellers. Dedham Health also asserted that the commissioner prohibits customers from pursuing abatement claims themselves “where the challenged ‘tax’ was paid to, and remitted by, the seller.” However, Dedham Health did not ask for class action certification before the board because, as it conceded in its motion, “there is no procedure for certifying a class action **\*25** to the [board].” The board granted Dedham Health’s motions to intervene, concluding that it had alleged “sufficient facts ... to support its claims that the parties may not be adequately representing Dedham Health’s interests” and that Dedham **\*\*655** Health had “a substantial interest in the subject matter of this litigation.” In allowing Dedham Health’s intervention, the board noted that it “in no way extends or expands the limitations contained in [G. L. c. 62C, § 37](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST62CS37&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)),” the statute that sets forth the procedure for pursuing abatement.

The parties submitted a joint statement of facts and a joint evidentiary record to the board. The board ruled in December, 2013, that, with certain exceptions, the transactions did not fall within the statutory or regulatory framework for taxation and thus the sellers had not been required to collect the taxes at issue, and were therefore entitled to an abatement of all such taxes they had remitted. The board directed the parties to “compute the amounts to be abated based on the foregoing findings and rulings.” Because computing the abatement amounts would be a complex and expensive task, the board granted the sellers’ motion to stay the board proceedings until all appeals in the putative class action litigation had been exhausted.[9](#co_footnote_B00092043870573_1)

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| [9](#co_fnRef_B00092043870573_ID0EFSAG_1) | As grounds for their motion to stay, the sellers cited the significant expenses they would incur to compute the abatement amounts, particularly in light of the sellers’ anticipation that the Superior Court litigation would be resolved in their favor, at which time they intended to withdraw their petitions. |

After the final dismissal of the putative class action in favor of the sellers, the sellers withdrew all of their petitions before the board. Dedham Health filed a motion to strike the sellers’ withdrawals, arguing that allowing the withdrawals would leave consumers without a forum to pursue a tax refund. In July, 2016, the board denied Dedham Health’s motion to strike. Instead, the board ordered the proceedings closed in light of the sellers’ withdrawals, ruling that “any pending or further motions and discovery are moot.” The board’s ruling did not include a rationale for its decision. Dedham Health did not request findings and a report, available pursuant to [G. L. c. 58A, § 13](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST58AS13&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).[10](#co_footnote_B00102043870573_1)

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| [10](#co_fnRef_B00102043870573_ID0EWTAG_1) | The relevant portion of [G. L. c. 58A, § 13](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST58AS13&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), provides:“[T]he board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact and shall issue said findings within three months of the request .... Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings of fact and decision. If no party requests such findings and report, all parties shall be deemed to have waived all rights of appeal to the appeals court upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence.... The decision of the board shall be final as to findings of fact. Failure to comply with the time limits, as outlined above, shall not affect the validity of the board’s decision.” |

**\*26** On appeal, Dedham Health argues that the board (1) improperly denied Dedham Health’s motion to strike the sellers’ withdrawals, (2) incorrectly ruled that the withdrawals rendered all pending and future motions moot, and (3) violated Dedham Health’s right to due process by terminating the proceedings. We examine each of these arguments in turn.

2. Discussion. Pursuant to [G. L. c. 58A, § 13](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST58AS13&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), when the board issues a final order without findings of fact, within ten days a party may request that the board issue findings of fact and a report. By failing to request findings and a report here, Dedham Health has “waived all rights of appeal ... upon questions as to the admission or exclusion of evidence, or as to whether a finding was warranted by the evidence.” [G. L. c. 58A, § 13](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST58AS13&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). See [Assessors of Lynn v. Zayre Corp., 364 Mass. 335, 338, 304 N.E.2d 183 (1973)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973115800&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Our review of the board’s decision is therefore **\*\*656** limited to pure questions of law that were not otherwise waived. See [Supermarkets Gen. Corp. v. Commissioner of Revenue, 402 Mass. 679, 681–682, 524 N.E.2d 1342 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988082074&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Thus, we can only rule in Dedham Health’s favor if the board erred as a matter of law. See [id.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988082074&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) We review the board’s conclusions of law de novo. [Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 464, 42 N.E.3d 1133 (2016)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037936274&pubNum=0007902&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). “However, because the board is an agency charged with administering the tax law and has ‘expertise in tax matters,’ ... we give weight to its interpretation of tax statutes, and will affirm ... if [the board’s] interpretation is reasonable” (citations omitted). [AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 119, 907 N.E.2d 1090 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019088205&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

a. Withdrawal. Dedham Health contends that the board erred in allowing the sellers to withdraw their petitions for abatement. Dedham Health interprets the board’s final order as being predicated on the board’s assumption that it was required as a matter of law to accept the sellers’ withdrawals and thus had no discretion to strike them. On the basis of this assumption, Dedham Health asserts that the board did have discretion to strike the withdrawals, and that the board’s failure to recognize its own discretion constituted an error of law.

As discussed, the board’s final order did not include an explanation for its ruling. Because Dedham Health chose not to request **\*27** findings of fact and a report, we do not know the basis for the board’s decision. The board may have either (1) decided it had discretion to accept or reject the withdrawals, and chosen in the exercise of that discretion to accept the withdrawals; or (2) decided it had to accept the withdrawals as it lacked discretion to reject them as a matter of law. We cannot assume, in the absence of such findings and report, that the board’s decision was made on the latter basis, rather than the former, as Dedham Health contends. Having failed to request findings and a report, Dedham Health is left only with the argument that the board’s decision to accept the withdrawals was improper as a matter of law in these circumstances. See [Supermarkets Gen. Corp., 402 Mass. at 681–682, 524 N.E.2d 1342](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988082074&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

The board’s rules expressly provide for withdrawals in certain circumstances:

“When notice of the settlement of a pending appeal is received by the clerk from either party, unless a withdrawal of the petition or agreement for decision is filed forthwith, the clerk shall inform both parties or their attorneys by mail that the appeal should be disposed of by filing a withdrawal of the petition or agreement for decision according to the terms of the settlement” (emphasis added).

[831 Code Mass. Regs. § 1.21 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012167&cite=831MADC1.21&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (rule 1.21). Thus, at least where formal settlements are reached, the board expects that withdrawals be filed to formally dispose of the petition. While no such formal settlement has been reached and the withdrawals here were not filed pursuant to rule 1.21, the sellers effectively accepted the tax liability in its entirety, and thereby withdrew their petitions for abatement. Rule 1.21 thus provides support for the allowance and the board’s acceptance of the withdrawals in the instant matter.

Prior decisions by this court have also recognized taxpayers’ ability to withdraw and the board’s ability to accept such withdrawals at various stages of administrative tax proceedings. See [D’Errico v. Assessors of Woburn, 384 Mass. 301, 309, 424 N.E.2d 509 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981135375&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“plaintiff’s remedy was to pursue his appeal from the decision of the [board], but he withdrew that appeal. This withdrawal ... was perhaps an unfortunate **\*\*657** tactical decision but not one which this court can undo”); [O’Brien v. State Tax Comm’n, 339 Mass. 56, 61, 158 N.E.2d 146 (1959)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959112073&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“Two of these [buses] were garaged in Massachusetts but **\*28** these are not here involved for the applications for abatement of the excises with respect to them have been withdrawn”). See also [AA Transp. Co., 454 Mass. at 117 n.5, 907 N.E.2d 1090](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019088205&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Nor does Dedham Health argue otherwise; it contends only that the board had the discretion to strike the withdrawals, and did not recognize that it had such discretion. As explained above, Dedham Health waived that argument by not requesting findings and a report.

Without such findings and a report, we cannot conclude as a matter of law that the board abused its discretion in allowing the sellers’ withdrawals in these circumstances. See [O’Connor v. Director of the Div. of Employment Sec., 384 Mass. 798, 799, 424 N.E.2d 514 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981135376&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“In the absence of either such a request or an indication from the District Court judge that he felt constrained to dismiss the notice of appeal because he thought such action to be mandatory, we conclude that the judge considered the dismissal to be a matter of discretion and further conclude that, if such dismissals are indeed discretionary, the challenged dismissal would not have amounted to an abuse of discretion”). The proceedings had already gone on for thirteen years at that point; the putative class action lawsuit had ended in the sellers’ favor; there were limited amounts of money at stake for individual purchasers; and only two plaintiffs had been identified in the class action, one of whom had died in the interim.[11](#co_footnote_B00112043870573_1)

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| [11](#co_fnRef_B00112043870573_ID0EOBBG_1) | We also conclude that it would have been within the board’s discretion to deny the withdrawals, given the sellers’ over-all responsibility for collecting and abating the tax, which, according to one filing by the commissioner, involved as much as $50 million and as many as 7 million to 10 million purchasers. |

Finally, the board’s prior decision allowing Dedham Health to intervene on its own behalf lends further support to the board’s discretion to accept the sellers’ withdrawals. As an intervener, Dedham Health had rights separate from the sellers’ rights. Thus, the sellers’ withdrawal, by itself, did not leave Dedham Health without a right or remedy. We address those rights below.

b. Independent right to abatement. Dedham Health asserts that, as an intervening party, it had an independent right to continue to litigate the abatement proceedings even after the sellers’ withdrawal. To determine Dedham Health’s rights before the board, we look both to the statutory scheme of the tax in question and the rights the board provided Dedham Health as an intervener. [Commissioner of Revenue v. A.W. Chesterton Co., 406 Mass. 466, 467–468, 548 N.E.2d 883 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990023843&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (abatement is created by statute, so board only has jurisdiction to extent prescribed by governing statute). This **\*29** task is made somewhat more complicated by the fact that the board never made an explicit finding as to whether the taxes at issue were sales taxes, under the purview of G. L. c. 64H, or use taxes, under the purview of G. L. c. 64I.[12](#co_footnote_B00122043870573_1) We conclude that in these circumstances both statutory schemes place the legal responsibility for collecting and paying the taxes and seeking abatement on the sellers, leaving only limited rights to Dedham Health as an intervener.

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| [12](#co_fnRef_B00122043870573_ID0EODBG_1) | The interlocutory order of the board concluding that the taxes were unlawful refers to the taxes collectively as “sales and use taxes.” |

i. Statutory rights. In Massachusetts, sales and use taxes are designed as “complementary **\*\*658** components of a unitary taxing program created to reach all transactions ... in which tangible personal property is sold inside or outside the Commonwealth for storage, use, or other consumption within the Commonwealth.” [Boston Tow Boat Co. v. State Tax Comm’n, 366 Mass. 474, 476–477, 319 N.E.2d 908 (1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974116381&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The sales tax is imposed on retail purchases made inside the Commonwealth. See [G. L. c. 64H, § 2](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS2&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The use tax, “designed to prevent loss of sales tax revenue from ... out-of-State retail purchases,” is imposed on retail purchases made outside the Commonwealth that are stored, used, or otherwise consumed in Massachusetts. [D & H Distrib. Co. v. Commissioner of Revenue, 477 Mass. 538, 540, 79 N.E.3d 409 (2017)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2042275117&pubNum=0007902&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). See [G. L. c. 64I, § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). The sales tax and the use tax are mutually exclusive, and the tax rate is identical. [Regency Transp., Inc., 473 Mass. at 462, 42 N.E.3d 1133](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037936274&pubNum=0007902&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).

Vendors are responsible for collecting and remitting the sales tax and therefore are the party entitled to seek abatement. See [G. L. c. 64H, § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [First Agricultural Nat’l Bank of Berkshire County v. State Tax Comm’n, 353 Mass. 172, 179, 229 N.E.2d 245 (1967)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967120606&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), rev’d on other grounds, [392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131238&pubNum=0000708&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). By contrast, purchasers are generally responsible for payment of the use tax. See [G. L. c. 64I, § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). However, in practice purchasers “seldom remit use tax of their own volition, and are not likely even to be aware of the requirement.” [D & H Distrib. Co., 477 Mass. at 540, 79 N.E.3d 409](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2042275117&pubNum=0007902&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Rather, for applicable purchases outside Massachusetts from a vendor who conducts business in Massachusetts, the vendor is required to collect and remit the use tax, as it would a sales tax. See [G. L. c. 64I, § 4](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS4&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).[13](#co_footnote_B00132043870573_1) See also [G. L. c. 64H, § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). More specifically:

“Vendors ‘engaged in business in the commonwealth’ who sell tangible personal property or services ‘for storage, use or **\*30** other consumption in the commonwealth’ are required to collect the tax from the purchaser and give the purchaser a receipt, unless the ‘storage, use, or other consumption’ is not ‘taxable’ at the time of sale, in which case vendors are required to collect the tax when storage, use, or other consumption ‘becomes taxable.’ ”

[Town Fair Tire Ctrs., Inc. v. Commissioner of Revenue, 454 Mass. 601, 606, 911 N.E.2d 757 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019663049&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), quoting [G. L. c. 64I, § 4](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS4&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). In such instances where the vendor is required to collect the use tax, if the vendor fails to do so, the tax is “owed by the vendor to the commonwealth.” [G. L. c. 64I, § 4](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS4&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). See [Town Fair Tire Ctrs., Inc., supra.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019663049&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))[14](#co_footnote_B00142043870573_1)

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| [13](#co_fnRef_B00132043870573_ID0E4KBG_1) | [General Laws c. 64I, § 4](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS4&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), provides, in relevant part:“Every vendor engaged in business in the commonwealth and making sales of tangible personal property or services for storage, use or other consumption in the commonwealth not exempted under this chapter, shall at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property or services is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor in the manner and form prescribed by the commissioner. The tax required to be collected by the vendor shall constitute a debt owed by the vendor to the commonwealth. Such vendor shall collect from the purchaser the full amount of the tax imposed by this chapter, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.” |

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| [14](#co_fnRef_B00142043870573_ID0E2OBG_1) | Under both tax schemes, when added to the sales price, the amount taxed becomes a “debt from the purchaser to the vendor.” See [G. L. c. 64H, § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [G. L. c. 64I, § 4](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64IS4&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Both schemes include a “bad debt” provision, wherein “any vendor who has paid to the commissioner a tax for a sale on credit is ‘entitled’ to reimbursement if the account ‘is later determined to be worthless.’ ” [Household Retail Servs., Inc. v. Commissioner of Revenue, 448 Mass. 226, 229, 859 N.E.2d 837 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011178655&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). However, this provision is a mere “statutory courtesy,” as the vendor is still legally responsible for paying the tax. [Id. at 230, 859 N.E.2d 837](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011178655&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). See [Continental–Hyannis Furniture Co. v. State Tax Comm’n, 366 Mass. 308, 309, 318 N.E.2d 618 (1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974116068&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (prior to enactment of bad debt provision, vendor remained liable for sales tax even in instances where purchaser did not tender payment for tax). |

 **\*\*659** Thus, where the vendor has collected and remitted the use tax, such that it mirrors the implementation of the sales tax, the vendor is legally responsible for the tax and becomes the party entitled to seek abatement.[15](#co_footnote_B00152043870573_1) Contrast [First Agricultural Nat’l Bank of Berkshire County, 353 Mass. at 181-182 & n.16, 229 N.E.2d 245](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967120606&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (legal **\*31** incidence of use tax on purchaser where purchaser remitted tax and filed return).

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| [15](#co_fnRef_B00152043870573_ID0EMUBG_1) | When abatement is sought for either tax, the vendor who collected the tax cannot, however, receive a refund until he or she demonstrates that “he [or she] has repaid to the purchaser the amount for which the application for refund is made.” [G. L. c. 62C, § 37](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST62CS37&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |

Here, the taxes at issue were collected and remitted by the sellers, not Dedham Health. Therefore, regardless of whether the taxes at issue were sales taxes or use taxes, the sellers were the party statutorily responsible for the payment of the tax and statutorily entitled to seek abatement, not Dedham Health. This is true even though the economic burden of the taxes at issue were passed along to Dedham Health. See [First Agricultural Nat’l Bank of Berkshire County, 353 Mass. at 180, 229 N.E.2d 245](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967120606&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“There is no necessary inconsistency between imposing the legal incidence of a tax upon the vendor, yet recognizing a statutory right in the vendor to shift the tax to the purchaser”). Placing the legal responsibility for the tax on vendors is also in accord with the purpose of the tax scheme. By making the vendors responsible, the Legislature adopted “what it believed to be the most efficacious method of ensuring the payment” of the tax. [Baker Transport, Inc. v. State Tax Comm’n, 371 Mass. 872, 875–876, 360 N.E.2d 860 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977109413&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (Legislature’s decision to require tax payment prior to issuance or transfer of vehicle registration was intended to ensure taxes paid on all taxable sales of motor vehicles). See [First Agricultural Nat’l Bank of Berkshire County, supra at 178, 229 N.E.2d 245](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967120606&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_521_178&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_521_178) (“practical considerations necessitate its collection and remission to the State by the vendor”). Because the vendor is already collecting the tax from the purchasers, placing the legal responsibility for collecting, paying, and abating the tax on the vendor is a logical way of administering the tax burden, such that the State does not have to pursue individual purchasers for payment.

ii. Intervener rights. Although Dedham Health was not statutorily entitled to seek abatement here, the board allowed Dedham Health to intervene in the proceedings before the board. The sellers argue that such intervention violated the statutory scheme. See [A.W. Chesterton Co., 406 Mass. at 467–468, 548 N.E.2d 883](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990023843&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), quoting [Assessors of Boston v. Suffolk Law Sch., 295 Mass. 489, 492, 4 N.E.2d 342 (1936)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1936113540&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“Since the remedy by abatement is created by statute [the board] has no jurisdiction to entertain proceedings for relief by abatement begun at a later time or prosecuted in a different manner than is prescribed by the statute”). We disagree.

The board properly allowed the intervention in accordance with its own procedures. Under [831 Code Mass. Regs. § 1.37 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012167&cite=831MADC1.37&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), the “practice and procedure before the [b]oard shall conform to that heretofore prevailing in equity causes ... prior to the **\*32** adoption of the Massachusetts Rules **\*\*660** of Civil Procedure.”[16](#co_footnote_B00162043870573_1) Prior to the adoption of the Massachusetts Rules of Civil Procedure in 1973, an intervener needed a “substantial interest in the subject matter of the original litigation” to intervene in an equity claim. See [D.J. Doyle & Co. v. Darden, 328 Mass. 288, 290, 103 N.E.2d 248 (1952)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952108315&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [Check v. Kaplan, 280 Mass. 170, 178, 182 N.E. 305 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932113222&pubNum=0000577&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Here, the board determined that “Dedham Health has alleged sufficient facts relating to the subject matter of these appeals to support its claims that the parties may not be adequately representing [Dedham Health’s] interests and therefore [Dedham Health has] a substantial interest in the subject matter of this litigation.” The board also correctly cited controlling authority in its order allowing Dedham Health to intervene. See [Check, supra.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932113222&pubNum=0000521&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))

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| [16](#co_fnRef_B00162043870573_ID0E22BG_1) | This provision of the Code of Massachusetts Regulations also states that “substance and not form shall govern” in these proceedings. [831 Code Mass. Regs. § 1.37 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012167&cite=831MADC1.37&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |

In these circumstances, where the board ordered an abatement, but where the sellers indicated they would withdraw from the abatement proceedings if the putative class action were dismissed, allowing Dedham Health to intervene was appropriate. The board correctly recognized that Dedham Health, as the purchaser whose money was used to pay the tax, had a substantial interest in the abatement and that the sellers had no intention or incentive to protect that interest. Intervention was an appropriate means of protecting Dedham Health’s substantial interest, while also respecting the statutory structure and the expertise of the board. See [Raytheon Co. v. Commissioner of Revenue, 455 Mass. 334, 337, 916 N.E.2d 372 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020336180&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [French v. Assessors of Boston, 383 Mass. 481, 482, 419 N.E.2d 1372 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981119366&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“We have long recognized the board’s expertise in tax matters”).

As an intervener, Dedham Health became a party to the abatement proceedings entitled to protect its interest in the abatement. See [Spence v. Boston Edison Co., 390 Mass. 604, 611, 459 N.E.2d 80 (1983)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984100175&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [American Hoechest Corp. v. Department of Pub. Utils., 379 Mass. 408, 410, 399 N.E.2d 1 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980100639&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [Check, 280 Mass. at 178, 182 N.E. 305](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932113222&pubNum=0000577&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Cf. [Mass. R. Civ. P. 24](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1005735&cite=MASTRCPR24&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), 365 Mass. 769 (1974); [Massachusetts Fed’n of Teachers, AFT, AFL–CIO v. School Comm. of Chelsea, 409 Mass. 203, 205, 564 N.E.2d 1027 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991026030&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (specifying conditions under which party has right to intervention); [May v. Commissioner of Internal Revenue, 553 F.2d 1207, 1208 (9th Cir. 1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977104983&pubNum=0000350&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&fi=co_pp_sp_350_1208&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1208) (per curiam) (“Intervention in a proceeding before [the Tax Court] has been held to be within the sound discretion of the Tax Court”). Indeed, the board expressly **\*33** rejected attempts to limit Dedham Health’s role to that of an amicus allowed only to brief and argue before the board.

Both the sellers and the commissioner contend that Dedham Health has no right to recover the taxes it paid, as an intervener or otherwise, because Dedham Health did not file a request for abatement on its own. They make this argument despite recognizing that such a request would have been denied and was thus futile. See [Sullivan v. Brookline, 435 Mass. 353, 355 n.1, 758 N.E.2d 110 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001955395&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (where no administrative remedy exists, plaintiff is “not subject to any exhaustion requirement”); [Massachusetts Bay Transp. Auth. v. Labor Relations Comm’n, 425 Mass. 253, 258, 680 N.E.2d 556 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997127022&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (exhaustion not required where it would be futile). Indeed, the commissioner concedes that he would deny any such application, as would the board, because neither the commissioner nor the board recognizes a purchaser’s right to seek abatement independently. In other words, Dedham Health’s other avenue of relief was to chase a separate ostensible **\*\*661** “remedy” that would be denied as soon as it was pursued. We do not find this argument compelling.

The commissioner also suggests that Dedham Health could instead sue the sellers, relying on [G. L. c. 64H, § 3 (a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_8b3b0000958a4). The commissioner’s interpretation of [G. L. c. 64H, § 3 (a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_8b3b0000958a4), however, runs contrary to the plain meaning of this provision. [General Laws c. 64H, § 3 (a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST64HS3&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_8b3b0000958a4), requires the purchaser to reimburse the vendor for the sales tax that the vendor is statutorily required to remit to the Commonwealth. It is designed to protect the vendor by imposing a reimbursement requirement on the purchaser. As explained by the amicus: “Nowhere does G. L. c. 64H, § [3 (a),] mention or even suggest any right of action by the purchaser against the vendor.”

We recognize that Dedham Health’s rights as an intervener were limited. It did not have the same statutory powers and responsibilities as the sellers, and thus could not seek to displace the sellers or play an equivalent role in the abatement process. The intervention order itself expressly stated that it “in no way extends or expands the limitations contained in [G. L. c. 62C, § 37](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST62CS37&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)).” Dedham Health’s rights were appropriately limited to defending its own interest in the abatement that applied to its own transactions. It was not allowed or entitled to step into the sellers’ shoes or to intervene, as Dedham Health suggests, as to the entirety of the sellers’ tax abatement claims.

Although these rights were limited, we conclude that their existence could not be entirely contingent on the sellers’ decision **\*34** whether to continue the abatement process, once it had begun. In the instant cases, the board made this exact legal error. It decided Dedham Health had a substantial interest in the abatement and a limited right to intervene to defend that interest, but as soon as the sellers filed their withdrawals, the board terminated the proceedings, eliminating both the interest and the right. In these circumstances, where the board had already found that the taxes were improperly imposed, it could not simply terminate the proceedings and leave Dedham Health without a remedy. See [Spence, 390 Mass. at 611, 459 N.E.2d 80](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984100175&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [American Hoechest Corp., 379 Mass. at 410, 399 N.E.2d 1](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980100639&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)); [Check, 280 Mass. at 178, 182 N.E. 305](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932113222&pubNum=0000577&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Cf. [Mass. R. Civ. P. 24](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1005735&cite=MASTRCPR24&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). Dedham Health should have been permitted to proceed after the sellers’ withdrawal to recoup the tax payment the board found had been unlawfully imposed on Dedham Health. We therefore conclude that the board erred as a matter of law by instead choosing to terminate the proceedings after the sellers’ unilateral withdrawal.

c. Due process. Dedham Health also contends that terminating the abatement proceedings over its objection violates its constitutional right not to be deprived of property without due process of law. Because we conclude that the board erred as a matter of law where it allowed Dedham Health to intervene and then took away that right and remedy when the sellers filed their withdrawals, we need not address this argument. Cf. [Commonwealth v. Disler, 451 Mass. 216, 228, 884 N.E.2d 500 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015810957&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“It is, of course, our duty to construe statutes so as to avoid such constitutional difficulties, if reasonable principles of interpretation permit it [citation and quotations omitted] ); [Textron Inc. v. Commissioner of Revenue, 435 Mass. 297, 307, 756 N.E.2d 1142 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001883762&pubNum=0000578&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), cert. denied, [535 U.S. 986, 122 S.Ct. 1537, 152 L.Ed.2d 464 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002094955&pubNum=0000708&originatingDoc=Ie8b7f97017e911e8b0f5f1ddd5677a94&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (“As head of the agency charged with administering the corporate excise tax statutes, the commissioner has lawful discretion ... to interpret a statute in a manner that avoids potential constitutional issues”).

**\*\*662** 3. Conclusion. For the reasons discussed above, we reverse the final order of the board and remand for further proceedings consistent with this opinion.

So ordered.

**All Citations**

479 Mass. 20, 91 N.E.3d 650

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846 F.3d 170

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Sandra Maxine WHITE, Defendant-Appellant.

No. 15-2234

|

Argued: December 1, 2016

|

Decided and Filed: January 13, 2017

**Synopsis**

**Background:** Defendant was convicted in the United States District Court for the Western District of Michigan, [Paul Lewis Maloney](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0154284001&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), J., of mail fraud and aggravated identity theft, and she appealed.

**Holdings:** The Court of Appeals, [Karen Nelson Moore](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0222433501&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Circuit Judge, held that:

“use” of a means of identification, as required for an aggravated identity theft conviction, included defendant’s action in creating false military identification cards for her travel agency’s clients and attempting to pass them off as her clients’ own personal means of identification;

district court did not abuse its discretion in limiting evidence of defendant’s after-the-fact repayment negotiations; and

district court’s calculation of amount of loss was not clearly erroneous.

Affirmed.

**\*171** Appeal from the United States District Court for the Western District of Michigan **\*172** at Grand Rapids. No. 1:13-cr-00222—Paul Lewis Maloney, District Judge.

**Attorneys and Law Firms**

ARGUED: [Matthew T. Nelson](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0325503401&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), WARNER, NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellant. Hagen W. Frank, UNITED STATES ATTORNEY’S OFFICE, Grand Rapids, Michigan, for Appellee. ON BRIEF: [Matthew T. Nelson](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0325503401&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [C. Ryan Grondzik](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0469135401&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), WARNER, NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellant. Hagen W. Frank, UNITED STATES ATTORNEY’S OFFICE, Grand Rapids, Michigan, for Appellee.

Before: [Moore](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0222433501&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [Clay](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0193054001&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Circuit Judges; Hood, District Judge.[\*](#co_footnote_B00012040749317_1)

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| [\*](#co_footnoteReference_B00012040749317_ID0) | The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation. |

**OPINION**

[KAREN NELSON MOORE](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0222433501&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Circuit Judge.

Sandra White (“White”) and her husband Joseph White operated a travel agency. In order to obtain low airline fares for the agency’s clients, White routinely booked military-rate travel for her non-military-member clients. When airlines became suspicious of White’s practices, and asked her for proof of her clients’ military status, White manufactured fake military identification cards and sent them to the airlines as alleged proof of her clients’ military credentials. The airlines suspected that the military identification cards were forged and contacted investigators. After a jury trial, White was convicted of mail fraud and aggravated identity theft, and sentenced to a total of ninety-four months of imprisonment.

White now challenges her conviction and sentence on the basis that (1) the district court read an improper definition of the term “use” into the aggravated identity theft statute; (2) the district court abused its discretion in refusing to admit certain evidence of White’s intention to repay some of the airlines’ losses; and (3) the district court erred in calculating the amount of White’s victims’ losses. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

**I. FACTS AND PROCEDURE**

Defendant Sandra White and her husband Joseph White owned and operated Corporate Travel Consultants/Travel by Design, Inc. (“CTC”) from 1989 through 2011. R. 89 (Stipulation) (Page ID #480). The agency’s accreditation was revoked in 2003 after audits conducted by United Airlines determined that CTC generally and White specifically had engaged in fraudulent ticketing schemes that cost the airline nearly $100,000 in airfares. R. 112 (Presentence Investigation Report (“PSR”)) (Page ID #572). White nonetheless continued her work as a travel agent as a subcontractor for other accredited travel agencies throughout the country, enabling her to maintain her practice of acquiring and selling airfares. *Id.* White continued to obtain fraudulent ticket fares for her clients by providing false information about her clients’ ages, possession of various discount certificates, and military status. *Id.* As a travel agent, White had an opportunity to obtain additional revenue through commissions, service fees, and additional bookings. R. 143 (Trial Tr. Vol. 4 at 735) (Page ID #1477). At trial, White’s victims testified that she charged service fees and other airfare directly to her clients’ credit cards, sometimes for persons other than those specific clients, and sometimes without their permission. R. 142 (Trial Tr. Vol. 3) (Page ID #1264, 1343–44).

**\*173** When travel agencies violate an airline’s fare policy in a manner that causes the airline financial loss, the airline issues Agency Debit Memoranda (“ADM”) detailing the loss and requiring payment to the airline. R. 112 (PSR) (Page ID #571). An operator of one of the travel agencies with whom White subcontracted testified at trial that within two years of working with White, the agency received more than $100,000 in ADMs based on airfare that White booked with Delta and United Airlines. R. 144 (Trial Tr. Vol. 5 at 894–95, 909, 913–14) (Page ID #1636–37, 1651, 1655–56). During one six-month period between January 1, 2010 and June 30, 2010, one of the travel agencies for which White was a subcontractor saw its percentage of sales resulting in ADMs increase from “[n]ot even a quarter of one percent, less than a half of a percent” to nearly fifteen percent. *Id.* at Page ID #1654–57.

The fraudulent scheme that is largely at issue in this case concerns White’s practice of securing lower rates by falsely informing airlines that her clients were members of the United States Armed Forces. R. 143 (Trial Tr. Vol. 4) (Page ID #1497–99); R. 144 (Trial Tr. Vol. 5) (Page ID #1656–57). Because of the volume of White’s bookings, airlines and other travel agencies became suspicious. When White was asked by her subcontracting partners to produce proof that her customers qualified for military discounts, she created false Armed Forces Identification (“AFID”) cards using customers’ real names and actual dates of birth. R. 143 (Trial Tr. Vol. 4) (Page ID #1500–1501). The airlines determined that the cards White manufactured were fraudulent and subsequently notified the United States Secret Service. R. 139 (Trial Tr. Vol. 1) (Page ID #923–28).

Sandra White was charged with wire fraud in a single-count Indictment on November 7, 2013. R. 1 (Indictment) (Page ID #1). On February 27, 2014, the Government filed a First Superseding Indictment charging White with wire fraud and aggravated identity theft. R. 2 (First Superseding Indictment) (Page ID #9). In addition, her husband, Joseph White, was charged. The Government offered the Whites a deal wherein White would plead guilty to the wire fraud count and Joseph White would accept a diversionary disposition. R. 31 (Plea Agreement) (Page ID #77). Joseph White refused the agreement, and the Whites proceeded toward trial. Two months before trial, White moved to dismiss Count Two, the aggravated identity theft count, which the government opposed. R. 53 (Mot. to Dismiss) (Page ID #190); R. 56 (Resp. in Opp.) (Page ID #215). The district court denied the motion. R. 148 (Mot. Hr’g) (Page ID #2160–61); R. 63 (Order) (Page ID #242). White filed a motion for reconsideration immediately before trial, R. 81 (Mot. for Reconsideration) (Page ID #453), and the district court again denied the motion to dismiss Count Two. R. 91 (Order) (Page ID #484); R. 139 (Trial Tr. Vol. 1) (Page ID #743–745).

During trial, White attempted to offer evidence about her repayment of some of the airlines’ and travel agencies’ losses that resulted from her scheme. The district court permitted White to examine witnesses about actual repayments that were made to victims; however, White was not permitted to delve into loss-recoupment negotiations that took place long after White was confronted by her victims. R. 143 (Trial Tr. Vol. 4) (Page ID #1530–31).

The jury found White guilty on both counts on June 2, 2015. Joseph White was acquitted. On September 25, 2015, the court sentenced White to seventy months of imprisonment on Count One and twenty-four months on Count Two, to be served **\*174** consecutively. R. 121 (Judgment) (Page ID #675). White filed a timely notice of appeal.

**II. ANALYSIS**

**A. Standard of Review**

Whether the district court properly construed the meaning of the word “uses” within the ambit of [18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is a question of statutory construction. We review issues of statutory interpretation de novo. [*United States v. Miller*, 734 F.3d 530, 539 (6th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_539&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_539). We also review a district court’s denial of a motion to dismiss the indictment de novo. [*United States v. Ali*, 557 F.3d 715, 720 (6th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018233455&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_720&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_720).

We review a district court’s evidentiary rulings for abuse of discretion. [*United States v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031540275&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_595&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_595). “An abuse of discretion occurs when a district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard.” [*United States v. Dixon*, 413 F.3d 540, 544 (6th Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006861907&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_544&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_544). “[W]e will leave rulings about admissibility of evidence undisturbed unless we are left with the definite and firm conviction that the [district] court ... committed a clear error of judgment in the conclusion it reached.” [*United States v. Wagner*, 382 F.3d 598, 616 (6th Cir. 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005051857&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_616&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_616) (internal quotation marks omitted).

“We review a district court’s calculation of the ‘amount of loss’ for clear error, but consider the methodology behind it *de novo*.” [*United States v. Meda*, 812 F.3d 502, 519 (6th Cir. 2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037863715&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_519&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_519). We have previously instructed district courts “to determine the amount of loss [under [U.S.S.G. § 2B1.1(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=0004057&cite=FSGS2B1.1&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) ] by a preponderance of the evidence, and the district court’s findings are not to be overturned unless they are clearly erroneous.” [*United States v. McCarty*, 628 F.3d 284, 290 (6th Cir. 2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024222627&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_290&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_290) (quoting [*United States v. Triana,* 468 F.3d 308, 321 (6th Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010569112&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_321&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_321)). “In order to challenge this calculation, [the defendant] must ‘carry the burden of demonstrating that the court’s evaluation of the loss was not only inexact but outside the universe of acceptable computations.’ ” [*United States v. Martinez*, 588 F.3d 301, 326 (6th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020562132&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_326&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_326) (quoting [*United States v. Raithatha*, 385 F.3d 1013, 1024 (6th Cir. 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005171541&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_1024&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1024), *vacated and remanded on other grounds*, [543 U.S. 1136, 125 S.Ct. 1348, 161 L.Ed.2d 94 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005891566&pubNum=0000708&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))).

**B. Defining “Use” Pursuant to** [**18 U.S.C. § 1028A**](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

White first argues that the district court incorrectly applied Sixth Circuit precedent in holding that “use” of a means identification under [18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) includes a situation where a defendant purports to act on behalf of another individual by employing that individual’s means of identification. Defendant White was found guilty of aggravated identity theft, which is defined by [18 U.S.C. § 1028A(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=SP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_7b9b000044381):

**(1) In general.**—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

[18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Congress enacted [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) in 2004 because at the time, “many identity thieves receive[d] short terms of imprisonment or probation” and “after their release, many of these thieves will go on to use false identities to commit much more serious crimes.” [H.R. Rep. No. 108–528](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0299576291&pubNum=0100014&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=TV&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), 2004 U.S.C.C.A.N. 779 (2004). The aggravated identity theft statute “is intended to reduce the incidence of identity **\*175** theft and fraud and address the most serious criminals by providing stronger penalties for those who would commit such crimes in furtherance of other more serious crimes.” *Id.* at 785.

White’s First Superseding Indictment alleged that she “did knowingly use, without lawful authority, means of identification of other persons, to wit, the names of 27 persons for whom she had previously obtained significantly reduced military fares by fraudulently representing that they were members of the Armed Forces of the United States....” R. 2 (First Superseding Indictment at 7) (Page ID #15). The Government further alleged that “[White] used the noted means of identification to manufacture fake Armed Forces Identification Cards, which she then sent by means of interstate wire communications to Delta Airlines, Cain Travel, and The Travel Agent Company in an attempt to justify reduced fares that she had previously obtained in the course of committing wire fraud.” *Id.*

White argues that the district court failed to apply correctly two of our decisions: [*United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), and [*United States v. Miller*, 734 F.3d 530 (6th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Although [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) are instructive, we cannot conclude that they counsel in favor of reversal.

In [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), defendant David Miller was convicted by a jury of two counts of making false statements to a bank and two counts of aggravated identify theft in violation of [18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). [734 F.3d at 534](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_534&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_534). Miller, like White, argued that the aggravated identity theft conviction was improper because he did not “use” a means of identification pursuant to [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) We agreed with Miller and reversed his aggravated identity theft convictions. [*Id.* at 542](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_542&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_542). Miller had received a loan from a bank for the purchase of land after pledging that land as collateral. [*Id*. at 534](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_534&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_534). As part of the closing process, Miller submitted to the bank a resolution stating that all persons with an investment stake in the land had attended a recent meeting to discuss the potential loan, and that at that meeting those individuals voted unanimously to allow the property to be pledged as collateral for the loan. [*Id.* at 535](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_535&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_535). Both statements were false. The resolution also contained the handwritten names of all individuals with an investment stake in the property, as written by Miller’s partner. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

The defendant’s argument in [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) was that “[18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) does not criminalize this conduct because he only lied about what [two of the investors whose names were written on the resolution] did, but he did not ‘use’ their names or identities.” [*Id.* at 539](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_539&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_539). Miller further asserted that he did not “use” another person’s name “because he did not steal or possess their identities, impersonate them or pass himself off as one of them, act on their behalf, or obtain anything of value in one of their names.” [*Id.* at 541](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_541&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_541). The government responded that “Miller ‘used’ their names to fraudulently obtain a loan from First Bank by misrepresenting that he had the authority to act on behalf of those individuals.” [*Id*. at 539](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_539&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_539).

In analyzing [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we concluded that the statute was ambiguous “[b]ecause the parties’ competing interpretations of ‘uses’ demonstrate that it is not entirely clear whether [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) criminalizes Miller’s conduct.” *Id.* at 541. After concluding that legislative history provided no guidance for how we should resolve the ambiguity in Miller’s case, and having been confronted with two reasonable interpretations of the term “uses,” we applied the rule of lenity, which “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *Id.* at 542 (quoting [*United States v. Beals*, 698 F.3d 248, 273 (6th Cir. 2012)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028879882&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_273&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_273)). In so doing, we concluded **\*176** that “as a matter of law, Miller did not ‘use’ a means of identification within the meaning of [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) by signing a document in his own name which falsely stated that Foster and Lipson gave him authority [to act on their behalf]....” [*Miller*, 734 F.3d at 542](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_542&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_542). Specifically, we concluded that “[n]othing inherent in the term ‘uses,’ its placement in the text of § 1028A, or the statute’s legislative history clearly and definitely indicates that the term, as applied to the names of persons, is broad enough to reach *the mere act of saying* that the persons did something” when they in fact had not. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (emphasis added).

We applied our holding in [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to a somewhat different set of facts in [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). There, Mr. and Mrs. Medlock operated a non-emergency ambulance service (“MAS”) that transported patients to [kidney dialysis](http://www.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iadf549e6475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&vr=3.0&rs=cblt1.0). [*Medlock*, 792 F.3d at 703](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_703&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_703). The couple’s transport company was later reimbursed for those transports by Medicare. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Pursuant to United States Department of Health and Human Services (“HHS”) guidelines, a non-emergency ambulance transport company is reimbursed “only when such transport is medically necessary for bedridden patients.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) In those circumstances, the ambulance company must have an Emergency Medical Technician (“EMT”) accompany the passenger. [*Id.* at 703–04](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_703&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_703). Additionally, “[t]he ambulance company documents each trip with a certification of medical necessity (CMN), signed by a doctor, and a ‘run sheet,’ which a Medicare contractor other than the ambulance company reviews to determine whether Medicare should reimburse the company for the trip.” [*Id.* at 704](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_704&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_704) (footnote omitted). An investigation into MAS concluded that the company’s records lacked some CMNs, and surveillance revealed “four patients walking, riding in the front seat, being double-loaded in an ambulance (i.e., being driven two patients, rather than one, at a time), being driven by single-staffed ambulances, or being transported by wheelchair (rather than stretcher).” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Each of those transports had been billed as “single-passenger and ‘stretcher required’ (or equivalent).” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Investigators also found at the couple’s home a number of forged CMNs and run tickets. [*Id*.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

The government in [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) argued “that the Medlocks ‘used’ the name and Medicare Identification Numbers of Medicare beneficiaries when they ‘caused a claim to be submitted to Medicare for reimbursement that contained’ such names and numbers ‘without lawful authority to do so because the claim falsely stated that’ stretchers were required for transport.” [*Id.* at 705](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_705&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_705). Finding the [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) rationale “persuasive,” we concluded that the term “use” “must have a more limited definition than the government suggests.” [*Medlock*, 792 F.3d at 706](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_706&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_706). In comparing [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we noted that “the defendant in [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) lied about what his *partners* did and the Medlocks lied about what *they* did....” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (emphasis in original). In finding that the Medlocks did not “use” the names of their patients in violation of [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we emphasized that the Medlocks “*did* transport the specific beneficiaries whose names they entered on the forms; they lied only about their own eligibility for reimbursement for the service.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (emphasis in original). While the Medlocks “misrepresented *how and why* the beneficiaries were transported, ... they did not use those beneficiaries’ identities to do so.” [*Id.* at 707](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_707&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_707) (emphasis in original). The addendum to our [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) opinion is also instructive. [*Id.* at 712](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_712&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_712). There, we affirmed Kathy Medlock’s conviction for aggravated identity theft where she “forge[d] a physician’s signature and thus us[ed] his identity to secure reimbursement fraudulently for unnecessary ambulance transports.” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) We concluded that “[o]ur rationale for reversing the convictions [on the **\*177** aggravated identity theft counts relating to the previously discussed falsely submitted Medicare claims] does not apply” to the conviction for signature forging. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

In responding to our decisions in [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), the Government argues here that “[v]iewed in a continuum, then, from (1) using names in a lie about what one did [[*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))], to (2) using names in a lie about what others did [[*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))], to (3) using names to manufacture fake identification documents and then purporting to submit them on behalf of those persons [White], the facts in this case are well within the reach of the statute as it has now twice been construed.” Gov. Br. at 30. The Government asks that we focus not “on what White did with clients’ names at the time she obtained economic value through fraud,” but “on what she did with their names afterwards when she was attempting to avoid having to repay that value.” *Id.* at 31. Indeed, Count Two of the First Superseding Indictment alleges that White “used the noted means of identification to manufacture fake Armed Forces Identification Cards, which she then sent by means of interstate wire communications to Delta Airlines, Cain Travel, and The Travel Agent Company in an attempt to justify reduced fares that she had previously obtained” during the commission of her wire fraud scheme. R. 2 (First Superseding Indictment at 7) (Page ID #15).

We conclude that White’s actions are distinguishable from both the [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) defendants, and that White’s actions in this case are most similar to Kathy Medlock’s affirmed aggravated identity theft conviction for signature forging in the [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) addendum. Both of those cases were principally about defendants who lied about their own actions. And, importantly, the personal information used in both [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) was memorialized in documents that were submitted to other parties with the [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) defendants’ names and identities included on those documents. White did more than simply lie about whether her clients were eligible for military discounts. Indeed, she did more than assert to the airlines that her clients were eligible. She took a significant additional step, and submitted what she represented to be actual identification that the United States Military purportedly had issued for her clients. When White’s scheme simply involved telling the airlines that her clients were members of the military, her statements to the airlines were similar to the resolution submitted to the bank in [*Miller*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031871867&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and the inaccurate CMNs in [*Medlock*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036717679&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) because she was submitting false information about others in her own name. The distinction in this case (and the similarity to Kathy Medlock’s valid conviction under [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) for signature forging) arises from White’s actions in creating false military identification cards and attempting to pass them off as her clients’ own personal means of identification.

The parties do not dispute whether the manufactured military identification cards constituted means of identification or whether they were possessed without lawful authority. We note that “the phrase ‘without lawful authority’ in [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is not limited to instances of theft, but includes cases where the defendant obtained the permission of the person whose information the defendant misused.” [*United States v. Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029802698&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_725&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_725). Further, White’s knowledge that she was submitting to the airlines the identification information of her clients satisfies the mens rea requirement of [§ 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). [*Flores-Figueroa v. United States*, 556 U.S. 646, 657, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018732673&pubNum=0000708&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). We therefore conclude that White was properly convicted pursuant to [18 U.S.C. § 1028A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1028A&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) because when she manufactured **\*178** and submitted to the airlines the fraudulent military identification cards, she “used,” without lawful authority, a means of identification of another person during and in relation to the wire-fraud felony of which she was convicted.

**C. Evidentiary Rulings on After-the-Fact Repayment Negotiations**

White next argues that the district court abused its discretion by limiting her ability to admit documents related to after-the-fact repayment negotiations with victims of her fraud. As noted supra, we review evidentiary rulings for abuse of discretion. White, however, argues that the district court was not ruling on evidentiary issues, but rather was ruling that a particular defense was not available to White as a matter of law. Def. Br. at 25. White is incorrect. The district court excluded some of the evidence of post-loss repayment negotiations on the ground that the evidence was inadmissible pursuant to [Federal Rules of Evidence 402](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER402&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [403](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER403&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The district court did, however, permit certain evidence of White’s attempts at repayment to proceed to the jury. We therefore conclude that the district judge’s decision to limit evidence of after-the-fact repayment negotiations must be reviewed for abuse of discretion.

The Government points to [*United States v. Carter*, 483 Fed.Appx. 70 (6th Cir. 2012)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027729931&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), a case upon which the district court relied, as the case most instructive on this point. Gov. Br. at 35; R. 146 (Trial Tr. Vol. 7) (Page ID #2007). In [*Carter*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027729931&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), a defendant sought to offer testimony from its corporate counsel that certain efforts were made to remedy and investigate apparent fraud after a demand for repayment had been made. The district court in [*Carter*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027729931&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) excluded the evidence, and we affirmed, stating:

A defendant’s intention to repay the victims of fraud is no defense. Likewise, subsequent investigations, repayments, or settlement attempts shed no light on whether a defendant had a previous intent to defraud. These efforts have at best ... small probative value for the purpose of showing lack of evil intent.

Defendant’s subsequent attempts to rectify the fraud are irrelevant to his earlier intent or state of mind, and the district court was within its broad discretion under [Rule 403](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER403&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to exclude that evidence.

[*Carter*, 483 Fed.Appx. at 75](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027729931&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_6538_75&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_6538_75) (citations omitted). Three other circuits join the Sixth Circuit in curtailing admission of evidence of post-accusation repayment. *See* [*United States v. Jimenez*, 513 F.3d 62, 75 (3d Cir. 2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014707750&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_75&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_75); [*United States v. Suba*, 132 F.3d 662, 677 (11th Cir. 1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998030344&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_677&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_677); [*United States v. Sirang*, 70 F.3d 588, 595 (11th Cir. 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995233997&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_595&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_595); [*United States v. Foshee*, 578 F.2d 629, 632 (5th Cir. 1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978119194&pubNum=0000350&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_350_632&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_632).

We note that the trial judge did admit evidence regarding repayments that White actually made. The district court did not, however, permit the admission of evidence of loss-recoupment negotiations that transpired after White’s plan was uncovered. White sought to admit evidence that, long after her fraudulent scheme was discovered, she attempted to repay some of her victims for some of their losses. These negotiations between White and her victims transpired only after White was confronted by the airlines, her victims, and law enforcement. The temporal relationship between the fraudulent activity and the attempts at repayment is too attenuated to warrant a reversal. The trial judge, having received full briefing on this issue, R. 94 (Def. Trial Br.) (Page ID #489); R. 98 (Gov. Resp.) (Page ID #500), decided that some of the evidence of repayment was inadmissible under both [*Carter*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027729931&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [Federal Rule of Evidence 403](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER403&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), R. 146 (Trial Tr. Vol. 7) (Page ID #2007); R. 145 **\*179** (Trial Tr. Vol. 6) (Page ID #1837), and we conclude that he did not abuse his discretion.

**D. Calculating Loss Attributable to Defendant White**

White’s final argument is that the district court was speculative and incorrect in calculating the amount of loss the airlines suffered. The Probation Office calculated the loss to White’s victims under [U.S.S.G. § 2B1.1(b)(1)(H)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=0004057&cite=FSGS2B1.1&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), which requires at least $400,000 but not more than $1,000,000 in intended loss. R. 112 (PSR) (Page ID #577). The method for calculating loss was adduced at trial from the testimony of various airline representatives. White argues that the airlines’ testimony regarding their loss calculation, which the district court admitted at trial over White’s repeated objections, was “subjective” and that it “significantly overestimated” the amount of loss to the airlines. Def. Br. at 30. The Government, noting that the district court correctly relied on the evidence presented at trial and distilled in the presentence investigation report in accepting the loss calculation, argues that “White challenges a body of documentary and testimonial evidence, provided by industry professionals with decades on the job, with nothing more than a line of ineffective cross-examination that she has recycled into a meritless appellate argument.” Gov. Br. at 40.

“We review a district court’s calculation of the ‘amount of loss’ for clear error, but consider the methodology behind it *de novo*.” [*Meda*, 812 F.3d at 519](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037863715&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_519&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_519). “[T]he district court is to determine the amount of loss [under [U.S.S.G. § 2B1.1(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=0004057&cite=FSGS2B1.1&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) ] by a preponderance of the evidence, and the district court’s findings are not to be overturned unless they are clearly erroneous.” [*United States v. Healy*, 553 Fed.Appx. 560, 564 (6th Cir. 2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032620230&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_6538_564&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_6538_564) (quoting [*United States v. McCarty,* 628 F.3d 284, 290 (6th Cir. 2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024222627&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_290&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_290)). In demonstrating clear error, “a defendant must show the calculation ‘was not only inexact but outside the universe of acceptable computations.’ ” [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032620230&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (quoting [*United States v. Martinez*, 588 F.3d 301, 326 (6th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2020562132&pubNum=0000506&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&fi=co_pp_sp_506_326&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_326)).

We cannot conclude from the record that the district court’s determination of loss in this case was “outside the universe of acceptable computations,” or that the methodology used to calculate loss was incorrect. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032620230&pubNum=0006538&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The trial record reveals that the airlines used standard ticket-auditing practices to determine the difference between the fares White obtained fraudulently and the next-cheapest fare possible. Several of the airline witnesses testified about the auditing process during trial, and several audit records were admitted into evidence.

Prior to sentencing, White filed several objections to the PSR, and the government responded. R. 115 (Def. Sent. Obj.) (Page ID #638); R. 116 (Gov. Resp.) (Page ID #654). In her sentencing memorandum, White stated her belief that “[t]he elements of the loss calculation are incorrect and overstated.” R. 115 at Page ID #645. At sentencing, the government represented that “[a]s far as the guidelines go, meeting with [White’s counsel], there is no dispute at this point as to the loss figures.... [White’s counsel] has looked over my filing, Docket Number 116, and agrees with the government’s calculations as far as loss goes.” R. 150 (Sent. Hr’g Tr. at 4) (Page ID #2203); R. 116 (Gov. Sent. Mem. at 7) (Page ID #660). The government then specified the loss amount as $663,610. R. 150 (Sent. Hr’g Tr. at 5) (Page ID #2204). White’s counsel then stated, “I agree on the loss number that we have come to, your Honor, in this sense: Of course we have raised objections about the **\*180** admissibility of the government’s evidence and, of course, preserve those objections. But we have no objections or want to present no different proofs on these points.... [W]e have come to an agreement on this loss number.” *Id.* at Page ID #2205. The parties thus agreed that the total loss attributable to White for guidelines calculation purposes was $663,610. R. 150 (Sent. Hr’g Tr. at 5–6) (Page ID #2204–05); R. 116 (Gov. Sent. Mem.) (Page ID #660).

The record does not support a finding that the loss calculation offered by the government and accepted by the district court was outside the universe of acceptable computations. Indeed, the method used to calculate the loss was one that several airline industry witnesses agreed was reasonable, and White did not present evidence that an alternate theory was preferable. Moreover, White did not present evidence that her method would result in an amount below the beginning of the range in [U.S.S.G. § 2B1.1(b)(1)(H)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=0004057&cite=FSGS2B1.1&originatingDoc=I5efa6300da0811e6baa1908cf5e442f5&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) of $400,000. The district court’s determination of the loss attributable to White was not clear error, and its method was reasonable. We therefore affirm the district court’s conclusion regarding calculation of the loss.

**III. CONCLUSION**

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

**All Citations**

846 F.3d 170

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| Chapter 1 |
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**Law and Legal Reasoning**

**Introduction**

 The first chapters in Unit 1 provide the background for the entire course. Chapter 1 sets the stage. At this point, it is important to establish goals and objectives. For your students to benefit from this course, they must understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

 Law consists of enforceable rules governing relationships among individuals and between individuals and their society. The tension in the law between the need for stability and the need for change is one of the concepts introduced in this chapter. How common law courts originated, and the rationale for the doctrine of *stare decisis* are also covered in this chapter.

 Another major concept in the chapter involves the distinctions among today’s sources of law and distinctions in its different classifications. The sources include the federal constitution and federal laws, state constitutions and statutes (including the UCC), local ordinances, administrative agency regulations, and case law. The classifications include substantive and procedural, national and international, public and private, civil and criminal, and law and equity. These sources and categories give students a framework on which to hang the mass of principles known as the law.

**Chapter Outline**

**I. Business Activities and the Legal Environment**

**A. Many Different Laws May Affect a Single Business Decision**

 Various areas of the law can affect different aspects of a business (such as Facebook). A businessperson should know enough about the law to know when to ask for advice.

**B. Ethics and Business Decision Making**

 Ethics can influence business decisions.

**II. Sources of American Law**

**A. Constitutional Law**

 The federal constitution is a general document that distributes power among the branches of the government. It is the supreme law of the land. Any law that conflicts with it is invalid. The states also have constitutions, but the federal constitution prevails if their provisions conflict.

**B. Statutory Law**

 Statutes and ordinances are enacted by Congress, state legislatures, and local legislative bodies. Much of the work of courts is interpreting what lawmakers meant when a law was passed and applying that law to a set of facts (a case).

**1. Uniform Laws**

 Panels of experts and scholars create uniform laws that any state’s legislature can adopt.

**2. The Uniform Commercial Code**

 The Uniform Commercial Code (UCC) provides a uniform flexible set of rules that govern most commercial transactions. The UCC has been adopted by all the states (only in part in Louisiana), the District of Columbia, and the Virgin Islands.

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| **Additional Background—** |
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| **National Conference of Commissioners on Uniform State Laws,****Co-Sponsor of the Uniform Commercial Code** |
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|  As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted. |
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|  **The National Conference of Commissioners on Uniform State Laws** is responsible for many of these acts. The National Conference of Commissioners on Uniform State Laws is an organization of state commissioners appointed by the governor of each state, the District of Columbia, and Puerto Rico. Their goal is to promote uniformity in state law where uniformity is desirable. The purpose is to alleviate problems that arise in an increasingly interdependent society in which a single transaction may cross many states. Financial support comes from state grants. The members meet annually to consider drafts of proposed legislation. |
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|  The American Law Institute works with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. |
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**C. Administrative Law**

 Administrative law consists of the rules, orders, and decisions of administrative agencies.

**1. Federal Agencies**

 Executive agencies within the cabinet departments of the executive branch are subject to the power of the president to appoint and remove their officers. The officers of independent agencies serve fixed terms and cannot be removed without just cause.

**2. State and Local Agencies**

 These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

**D. Case Law and Common Law Doctrines**

Another basic source of American law consists of the rules of law announced in court decisions. These rules include judicial interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

**III. The Common Law Tradition**

 American law is based on the English common law legal system. Knowledge of this tradition is necessary to students’ understanding of the nature of our legal system.

**A. Early English Courts**

 The English system unified its local courts in 1066. This unified system, based on the decisions judges make in cases, is the common law system.

**1. Courts of Law and Remedies at Law**

A court of law is limited to awarding payments of money or property as compensation.

**2. Courts of Equity**

Equity is a branch of unwritten law, which was founded in justice and fair dealing, and seeks to supply a fairer and more adequate remedy than a remedy at law.

**3. Remedies in Equity**

A court of equity can order specific performance, an injunction, or rescission of a contract.

**4. Equitable Maxims**

 These guide the application of equitable remedies.

**B. Legal and Equitable Remedies Today**

Today, in most states, a plaintiff may request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.

**C. The Doctrine of *Stare Decisis***

**1. Case Precedents and Case Reporters**

The common law system involves the application, in current cases, of principles applied in earlier cases with similar facts.

**2. *Stare Decisis* and the Common Law Tradition**

 The use of precedent forms the basis for the doctrine of *stare decisis*.

**3. Controlling Precedents**

 A court’s application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules.

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| Enhancing Your Lecture— |
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|  Is an 1875 Case Precedent Still Binding?  |
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|  In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret *oral* agreement he had made with the CIA. The federal trial court dismissed Korczak’s claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit. |
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|  At issue on appeal was whether a Supreme Court case decided in 1875, *Totten v. United States****,*a** remained the controlling precedent in this area. In *Totten,* the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate army during the Civil War. When the plaintiff sued the government for compensation for his services, the Supreme Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that “might compromise or embarrass our government” or cause other “serious detriment” to the public. |
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|  In Korczak’s case, the federal appellate court held that the *Totten* case precedent was still “good law,” and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, “*Totten,* despite its age, is the last pronouncement on this issue by the Supreme Court. .  .  . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed.”**b** |
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| The Bottom Line |
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|  Supreme Court precedents, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation. |
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| a. 92 U.S. 105 (1875). |
| b. *Korczak v. United States,* 124 F.3d 227 (Fed.Cir. 1997). |
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**4. *Stare Decisis* and Legal Stability**

• This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

• A judge may decide that a precedent is incorrect, however, if there may have been changes in technology, for example, business practices, or society’s attitudes.

**5. When There Is No Precedent**

 When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature’s passing a specific statute; society’s values and custom; and data and principles from other disciplines.

**D. *Stare Decisis* and Legal Reasoning**

**1. Basic Steps in Legal Reasoning**

 Through the use of legal reasoning, judges harmonize their decisions with those that have been made before, as the doctrine of *stare decisis* requires. The IRAC method of legal reasoning is an acronym for *Issue*, *Rule, Application*, and *Conclusion.*

**2. There Is No One “Right” Answer**

Of course, there is no one “right” answer to every legal question.

**E. The Common Law Today**

**1. Courts Interpret Statutes**

 Through the courts, the common law governs all areas *not* covered by statutory or administrative law, as well as interpretations of the application of statutes and rules.

**2. *Restatements of the Law* Clarify and Illustrate the Common Law**

 The common law principles are summarized in the American Law Institute’s *Restatements of the Law*, which do not have the force of law but are an important secondary source on which judges often rely.

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| **Additional Background—**Restatement (Second) of Contracts |
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|  The American Law Institute (ALI), a group of American legal scholars, is responsible for the *Restatements.* These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice.  |
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|  The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the summaries are published as the *Restatements*. Each *Restatement* is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is ***Restatement (Second) of Contracts***, Section 1 (that is, Section 1 of the second edition of the *Restatement of Contracts*) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section. |
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| **Chapter 1** |
| **MEANING OF TERMS** |
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|  Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this *Restatement* are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum. |
|  |
|  In the *Restatement,* an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as “contract” or “promise.” The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters. |
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| **§ 1. Contract Defined** |
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| A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. |
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| **Comment:** |
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| \*  \*  \*  \* |
|  |
| **c. Set of promises.** A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a “set,” promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court. |
|  |

**IV. Schools of Legal Thought**

**A. The Natural Law School**

 Adherents of the *natural law* school believe that government and the legal system should reflect universal moral and ethical principles that are inherent in the nature of human life.

**B. The Positivist School**

 Followers of the *legal positivism* believe that there can be no higher law than a nation’s positive law (the law created by a particular society at a particular point in time).

**C. The Historical School**

 Those of the *historical school* emphasize legal principles that were applied in the past.

**D. Legal Realism**

 *Legal realists* believe that judges are influ­enced by their unique individual beliefs and attitudes, that the application of precedent should be tempered by each case’s specific circumstances, and that extra-legal sources should be considered in making decisions. This influenced the sociological school of jurisprudence, which views law as a tool to promote social justice.

**V. Classifications of Law**

• *Substantive law* defines, describes, regulates, and creates rights and duties. *Procedural law* includes rules for enforcing those rights.

• Other classifications include splitting law into federal and state divisions or private and public categories. One of the broadest classification systems divides law into national law and international law.

**A. Civil Law and Criminal Law**

 *Civil law* regulates relationships between persons and between persons and their governments, and the relief available when their rights are violated. *Criminal law* regulates relationships between individuals and society, and prescribes punishment for proscribed acts.

**B. Cyberlaw**

 *Cyberlaw* is an informal term that describes the body of case and statutory law dealing specifically with issues raised in the context of the Internet.

**VI. How to Find Primary Sources of Law**

A brief introduction to case reporting systems and legal citations is included in the text. Also discussed are publications collecting statutes and administrative regulations.

**A. Finding Statutory and Administrative Law**

 Publications collecting statutes and administrative regulations are discussed in the text.

**B. Finding Case Law**

 A brief introduction to case reporting systems and legal citations is also included.

**VII. How to Read and Understand Case Law**

To assist students in reading and analyzing the court opinions digested in the text, the format is dissected, terms are defined, and a sample case is annotated.

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| **Additional Background—** |
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| ***Federal Reporter*** |
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|  Federal court decisions are published unofficially in a variety of publications. These reports are organized by court level and issued chronologically. Opinions from the United States Court of Appeals, for example, are reported in the ***Federal Reporter***. Thomson Reuters publishes these decisions with headnotes condensing important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue,* as published with headnotes in the *Federal Reporter*. |
|  |
| **Betty Ann FERGUSON, Petitioner-Appellant,** |
| **v.** |
| **COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.** |
|  |
| **No. 90-4430** |
|  |
| Summary Calendar. |
| United States Court of Appeals, |
| Fifth Circuit. |
|  |
| Jan. 22, 1991. |
|  |
|  Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm. |
|  |
|  Reversed and remanded. |
|  |
| **1. Constitutional Law 92K84(2)** |
|  |
|  Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate reli­gious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052 |
|  |
| **2. Witnesses 410K227** |
|  |
|  Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052 |
|  |
|  Betty Ann Ferguson, Metairie, La., pro se. |
|  |
|  Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee. |
|  |
|  Appeal from a Decision of the United States Tax Court.  |
|  Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges. |
|  |
| ***PER CURIAM:*** |
|  Betty Ann Ferguson appeals the Tax Court’s dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court’s failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse. |
|  |
| I. |
|  This First Amendment case ironically arose out of a hearing in Tax Court. Although the government’s brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson’s refusal to “swear” or “affirm” before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. \* \* \* |
|  |
|  Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought,* 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation: |
|  |
| I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete. |
|  |
|  Judge Korner abruptly denied her request, commenting that “[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had” and that he did not think affirming “violates any recognizable religious scruple.” Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court. |
| II. **[1]** The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm’n of Florida,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness “declare that [she] will testify truthfully, by oath or affirmation adminis­tered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.” As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion: |
|  |
| The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990). |
|  The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States,* 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (*per curiam*), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word “solemnly” in their affirmations for religious reasons. |
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|  \* \* \* \* |
|  **[2]** The government offers only two justifications for Judge Korner’s refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent. |
|  |
|  The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of “an oath” an element of the crime of perjury. *Accord* *Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson’s proposal would not suffice as “an oath” for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)). |
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|  The parties’ briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows: |
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|  MS. FERGUSON: I have religious objections to taking an oath. |
|  THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm. |
|  MS. FERGUSON: Sir, may I present this to you? I do not— |
|  THE COURT: Just a minute. The Clerk will ask you. |
|  THE CLERK: You are going to have to stand up and raise your right hand. |
|  MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court. |
|  THE COURT: I don’t care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge. |
|  MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus— |
|  THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify. |
|  MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify. |
|  |
|  Ms. Ferguson contends that Judge Korner insisted that she use either the word “swear” or the word “affirm”; the government suggests instead that Judge Korner only required an affirmation which the government defines as “an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603].” Even Ms. Ferguson’s proposed alternative would be an “affirmation” under the government’s definition. |
|  |
|  If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson’s religious belief, and concluding that it did not violate any “recognizable religious scruple,” but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing. |
|  |
|  We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion. |

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| Additional Background—Corpus Juris Secundum Because the body of American case law is huge, finding relevant precedents would be nearly im­practicable were it not for case digests, legal encyclopedias, and similar publications that classify deci­sions by subject. Like case digests, legal encyclope­dias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category “Theaters & Shows” (86 C.J.S. *Theaters & Shows* § 47). |
|  **f. Assumption of Risk** **A patron assumes the ordinary and natural risks of the char**­**acter of the premises, devices, and form of amusement of which he has actual or im**­**puted knowledge; but he does not assume the risk of injury from the neg**­**ligence of the proprietor or third persons.**  While it has been said that, strictly speaking, the doctrine of as­sumed  | risk is applicable only to the relationship of master and servant,3 pa­trons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,4 or to the devices located therein,5 or to the form of amusement,6 which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compul­sion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks  |
|  |  |  |
| **3.** Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.**4.** Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285. 62 C.J. p 877 note 62.**Darkened motion picture the**­**ater**Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.**5.** Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.62 C.J. p 877 note 63**Particular amusement devices** (1) “Dodge Em” cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b]. (2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93. (3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].**6.** Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.Mo.—Page v. Unterreiner, App.,106 S.W.2d 528.N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802. | Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.62 C.J. p 877 note 63.**Other statements of rule** (1) A spectator at game as­sumes risk of such dangers inci­dent to playing of game as are known to him or should be obvi­ous to reasonable and pru­dent person in exercise of due care un­der cir­cum­stances.Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22. (2) One participating in a race assumes the risk of injury from natural hazards necessarily in­ci­dent to, or which inhere in, such a race, under maxim “volenti non fit injuria,” which means that to which a person assents is not es­teemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591. (3) Patrons of a place of amusement assume the risk of ordinary dangers normally atten­dant thereon and also the risks ensuing from condi­tions of which they now or of which, in the par­tic­ular circumstances, they are charged with knowl­edge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.**Liability of proprietor of sports arena** Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are con­ducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Cen-tennial, 29 N.Y.S.2d 56.Risks of particular sports or en­tertain­ment (1) Baseball.Cal.—Quinn v. Recreation Park Ass’n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.La.—Jones v. Alexandria Baseball Ass’n, App., 50 So.2d 93.Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d  | N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.Tex.—Williams v. Houston Baseball Ass’n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.62 C.J. p 877 note 63 [a].(2) Basketball.—Paine v. Young Men’s Christian Ass’n, 13 A.2d 820, 91 N.H. 78.(3) Golf. Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211. (4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.(5) Hockey.Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311. (6) Horse racing.Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.N.Y.—Futterer v. Saratoga Ass’n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.(7) Ice skating.Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.N.D.—Filler v. Stenvick, 56 N.W.2d 798.Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374. |
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| Additional Background— |
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| United States Code |
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|  Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the **United States Code**. In the United States Code, all federal laws of a public and permanent nature are compiled according to subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the United States Code (15 U.S.C. § 1). |
|  |
| TITLE 15. COMMERCE AND TRADE |
| CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE |
|  |
| § 1. Trusts, etc., in restraint of trade illegal; penalty |
|  |
| Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. |
|  |
| (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.) |
|  |
| (As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.) |
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| **Additional Background—** |
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| **State Codes:** |
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| Pennsylvania Consolidated Statutes |
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|  State codes may have any of several names—Codes, General Statutes, Revisions, and so on—de­pending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101). |
|  |
| PURDON’S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED |
| DIVISION 1. GENERAL PROVISIONS |
| CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE |
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| --- |
| § 1101. Short title of title |
|  |
| This title shall be known and may be cited as the “Uniform Commercial Code.” |
|  |
| 1984 Main Volume Credit(s) |
|  |
| 1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980. |
|  |
| **California Commercial Code** |
|  |
|  The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101). |
|  |
| WEST’S ANNOTATED CALIFORNIA CODES |
| COMMERCIAL CODE |
| DIVISION 1. GENERAL PROVISIONS |
| CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE |
|  |
| § 1101. Short Title |
|  |
| This code shall be known and may be cited as Uniform Commercial Code. |
|  |
| 1964 Main Volume Credit(s) |
|  |
| (Stats.1963, c. 819, § 1101.) |
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| Additional Background— |
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| Code of Federal Regulations |
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|  Created by Congress in 1937, the **Code of Federal Regulations** is a set of softcover volumes that con­tain the regulations of federal agencies currently in effect. Items are selected from those published in the Federal Register and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the United States Code (discussed above). Each title is divided into chapters, parts, and sections. The Code of Federal Regulations is completely revised every year. The following is the text of Section 230.504 of Title 17 of the Code of Federal Regulations (17 C.F.R. § 230.504). |
|  |
| TITLE 17—COMMODITY AND SECURITIES EXCHANGE |
| Chapter II—Securities and Exchange Commission |
| **Part 230—General Rules and Regulations, Securities Act of 1933** |
| **REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS** |
| **Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933** |
|  |
| **§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.** |
|  |
| **(a) Exemption.** |
|  |
| Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act. |
|  |
| **(b) Conditions to be met—** |
|  |
| **(b)(1) General Conditions.** To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made: |
|  |
| (b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or |
|  |
| (b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities. |
|  |
| **(b)(2) Specific condition—** |
|  |
| (b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state’s securities laws. |
|  |
| Note 1.—The calculation of the aggregate offering price is illustrated as follows: |
|  |
| Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504. |
|  |
| Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months. |
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| Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale. |
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| Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the in­tegration principles set forth in § 230.502(a). |
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| (b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502. |
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| [53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989] |
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| AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37. |
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| Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless oth­er­wise noted. |
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| Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the re­spective rule number in Regulation C, under the Securities Act of 1933. |

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| Additional Background— |
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| United States Code Annotated |
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|  Published by West Publishing Company, the **United States Code Annotated** contains the complete text of laws enacted by Congress that are included in the United States Code (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the United States Code Annotated (15 U.S.C.A. § 1), including the historical notes and selected references. |
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| **TITLE 15. COMMERCE AND TRADE** |
| **CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE** |
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| **§ 1. Trusts, etc., in restraint of trade illegal; penalty** |
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| Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. |
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| (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.) |
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| (As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.) |
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| **HISTORICAL AND STATUTORY NOTES** |
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| Effective Date of 1975 Amendment. Section 4 of Pub.L. 94-145 provided that: “The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975].” |
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| Short Title of 1984 Amendment. Pub.L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: “That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the ‘Local Government Antitrust Act of 1984’.” |
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| Short Title of 1982 Amendment. Pub.L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that “This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the ‘Foreign Trade Antitrust Improvements Act of 1982’.” |
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| Short Title of 1980 Amendment. Pub.L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: “That this Act [enacting section 26a of this title] may be cited as the ‘Gasohol Competition Act of 1980’.” |
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| Short Title of 1975 Amendment. Section 1 of Pub.L. 94-145 provided: “That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the ‘Consumer Goods Pricing Act of 1975’.” |
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| Short Title of 1974 Amendment. Section 1 of Pub.L. 93-528 provided: “That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the ‘Antitrust Procedures and Penalties Act’.” |
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| Short Title. Pub.L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: “That this Act [sections 1 to 7 of this title] may be cited as the ‘Sherman Act’.” |
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| Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S. Code Cong. and Adm.News, p. 2322. |
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| For legislative history and purpose of Pub.L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub.L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569. |
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| **REFERENCES** |
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| **CROSS REFERENCES** |
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| Antitrust laws inapplicable to labor organizations, see § 17 of this title. |
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| Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation. |
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| Combinations in restraint of import trade, see § 8 of this title. |
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| Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure. |
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| Discrimination in price, services or facilities, see § 13 of this title. |
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| Fishing industry, restraints of trade in, see § 522 of this title. |
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| Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure. |
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| Monopolies prohibited, see § 2 of this title. |
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| Trusts in territories or District of Columbia prohibited, see § 3 of this title. |
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| **FEDERAL PRACTICE AND PROCEDURE** |
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| 1990 Pocket Part Federal Practice and Procedure |
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| Adding new parties, see Wright & Miller: Civil § 1504. |
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| Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765. |
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| Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167. |
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| Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730. |
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| Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031. |
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| Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942. |
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| Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564. |
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| Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668. |
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| Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126. |
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| Joinder of claims, see Wright & Miller: Civil § 1587. |
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| **CODE OF FEDERAL REGULATIONS** |
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| 1973 Main Volume Code of Federal Regulations |
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| Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 et seq. |
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| Common sales agency, see 16 CFR 15.46. |
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| Compliance with state milk marketing orders, see 16 CFR 15.154. |
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| Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254. |
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| **LAW REVIEW COMMENTARIES** |
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| Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986). |
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| Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24 |
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| **ANNOTATIONS** |
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| 1. Common law |
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| Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad man­date by drawing on common-law tradition. National Society of Professional Engineers v. U.S., U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637. |
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| This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. U.S. v. Socony-Vacuum Oil Co., Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421. |
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| Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. Denison Mattress Factory v. Spring-Air Co., C.A.Tex.1962, 308 F.2d 403. |
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| Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. Rogers v. Douglas Tobacco Bd. of Trade, Inc., C.A.Ga.1957, 244 F.2d 471. |
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| Federal statutory law on monopolies did not supplant common law but incorporated it. Mans v. Sunray DX Oil Co., D.C.Okl.1971, 352 F.Supp. 1095. |
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| Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. U.S. v. Arnold, Schwinn & Co., D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567. |
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| This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass’n, D.C.Mo.1949, 82 F.Supp. 147. |
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| **Case Synopsis—** |
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| **A Sample Court Case: *Yeasin v. Durham*** |
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|  Navid Yeasin and A.W. were students at the University of Kansas (KU). They dated for about nine months. When A.W. tried to end the relationship, Yeasin restrained her in his car, took her phone, and threatened to make the “campus environment so hostile that she would not attend any university in the state of Kansas.” He repeatedly tweeted disparaging comments about her. Tammara Durham, the university’s vice provost for student affairs, found that Yeasin’s conduct and tweets violated the school’s student code of conduct and sexual-harassment policy. She expelled him. |
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|  Yeasin filed a suit in a Kansas state court against Durham, and the university reinstated him. He then filed a suit in a federal district court against Durham, claiming that she had violated his First Amendment rights by expelling him for the content of his off-campus speech. The court dismissed the claim. Yeasin appealed to the U.S. Court of Appeals for the Tenth Circuit. |
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|  The U.S. Court of Appeals for the Tenth Circuit affirmed the lower court’s dismissal of Yeasin’s suit. Yeasin argued that three cases decided by the United States Supreme Court clearly established his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, his tweets. In response, the court here pointed out that those cases did not involve circumstances similar to Yeasin’s situation. In those cases, no student had been charged with a crime againstanother student and then made sexually harassing comments affecting her ability to feel safe while attending classes. And, the court concluded, in this case Dr. Durham could reasonably believe, based on Yeasin’s conduct and his tweets, that his presence at the university would disrupt A.W.’s education and interfere with her rights. |
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| **Notes and Questions** |
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|  ***Did the court hold that Yeasin had a right to post his tweets without being disciplined by the university?*** No, the court did not decide whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university. The question before the court was whether KU and Dr. Durham violated clearly established law when Yeasin was expelled for his tweets and his misconduct. The court held that Yeasin, the plaintiff and appellant, failed to show such a violation. |
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|  The First Amendment states, “Congress shall make no law \*  \*  \* abridging the freedom of speech.” The United States Supreme Court and other federal courts, however, permit schools to circumscribe students’ free speech rights in certain contexts. In the *Yeasin* case, in the court’s view, these broad statements of legal principle do not qualify as clearly established law. The court further concluded that the cases cited by Yeasin to argue the university could not discipline him for his tweets did not apply to his situation because the facts were not similar. |
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|  Considering these principles and cases, the court iterated that “at the intersection of university speech and social media, First Amendment doctrine is unsettled.” Yeasin could not establish that Dr. Durham violated clearly established law when she expelled him. And, the court concluded, in this case Dr. Durham and KU had a reasonable basis—Yeasin’s conduct and his tweets—to expel him from the university. His presence on campus would disrupt A.W.’s education and interfere with her rights. |
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| **Teaching Suggestions** |
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| **1.** Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal prin­ciples are presented in this course as “black letter law”—that is, in the form of basic principles generally ac­cepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the pur­poses of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems (“spot the issues”) when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision. |
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| **2.** Point out that the law assumes everyone knows it, or, as it’s often phrased, “Ignorance of the law is no excuse.” Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law’s presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions. |
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| **3.** As Oliver Wendell Holmes noted, “The life of the law has not been logic”—that is, the law does not re­spond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are man­made, that they can, and do, change over time as society changes. ***To what specific social forces does law respond? Are the changes always improvements?*** |
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| **4.** One method of introducing the subject matter of each class is to give students a hypothetical at the be­ginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective. |
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| **5.** You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement (“How could you prove that there was an *oral* contract?” for instance) will only undercut their learning. Once they have learned the principle for which a case is presented, then they can ask, “What if the facts were different?” |
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| *Cyberlaw Link* |
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| Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. ***What are the legal risks involved in transacting business over the Internet?*** As their knowledge of the law increases over the next few weeks, this question can be reconsidered. |
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**Discussion Questions**

**1. *If justice is defined as the fair, impartial consideration of opposing interests, are law and justice the same thing?*** No. There can be law without justice—as happened in Nazi-occupied Europe, for example. There cannot be justice without law.

**2. *Which of the schools of legal thought matches the U.S. system?***  None of the approaches mentioned in these sections is an exact model of the American legal system. They represent frameworks that can be used in evaluating the moral and ethical considerations that are an integral part of the law.

**3. *What is the common law?***  Students may most usefully understand common law to be case law—that is, the body of law derived from judicial decisions. The body of common law originated in England. The term common law is sometimes used to refer to the entire common law system to distinguish it from the civil law system.

**4. *What is the supreme law of the land?*** The federal constitution is the supreme law of the land. ***What are statutes?***  Laws enacted by Congress or a state legislative body. ***What are ordinances?***  Laws enacted by local legislative bodies. ***What are administrative rules?***  Laws issued by administrative agencies under the authority given to them in statutes.

**5. *What is the Uniform Commercial Code?***  A uniform law drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, governing commercial transactions (sales of goods, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted by all states (except Louisiana which has not adopted Article 2).

**6. *Discuss the differences within the classification of law as civil law and criminal law.***  Civil law concerns rights and duties of individuals between themselves; criminal law concerns offenses against society as a whole. (Civil law is a term that is also used to refer to a legal system based on a code rather than on case law.)

**7. *Discuss the differences between remedies at law and in equity.***  Remedies at law were once limited to payments of money or property (including land) as damages. Remedies in equity were available only when there was no adequate remedy at law. Today, in most states, either or both may be granted in the same action. Remedies in equity are still discretionary, guided by equitable principles and maxims. Remedies at law still include payments of money or property as damages. Today, the major practical difference between actions at law and actions in equity is the right to demand a jury trial in an action at law.

**8. *Identify and describe remedies available in equity.***  Three are discussed briefly in the text. Specific per­formance is available only when a dispute involves a contract. The court may order a party to per­form what was promised. An injunction orders a person to do or refrain from doing a particular act. Rescission undoes an agreement, and the parties are returned to the positions they were in before the agreement.

**9. *What is the primary function of law?*** The primary function of law is to simultaneously maintain stability and permit change. The law does this by providing for dispute resolution, the preservation of political, economic, and social institutions, and the protection of property.

**10. *What is* stare decisis*? Why is it important?*** *Stare decisis* is a doctrine that prescribes following earlier judicial decisions in deciding a current case if the facts and questions are similar. Courts attempt to be consistent with their own prior decisions and with the decisions of courts superior to them. *Stare decisis* is important because part of the function of law is to maintain stability. If the application of the law was unpredictable, there would be no consistent rules to follow and no stability.

**Activity and Research Assignments**

**1.** Have students research the laws of other common law jurisdictions (England, India, Canada), other legal systems (civil law systems, contemporary China, Moslem nations), and ancient civilizations (the Hebrews, the Babylonians, the Romans), and compare the laws to those of the United States. In looking at other legal systems, have students consider how international law might develop, given the differences in legal systems, laws, traditions, and customs.

**2.** Assign specific cases and statutes for students to find. If legal materials are not easily available, assign a list of citations for students to decipher.

**3.** Ask students to read newspapers and magazines, listen to radio news, watch television news, and search online for developments in the law—new laws passed by Congress or signed by the president, laws interpreted by the courts, proposals for changes in the law. The omnipresent effect of law on society should be easy to see.

**Explanations of Selected Footnotes in the Text**

 **Footnote 4:** In ***Brown v. Board of Education of Topeka,*** the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a non-segregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S. Constitution’s Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

 **Footnote 5:** In ***Plessy v. Ferguson*,** the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution’s Thirteenth and Fourteenth Amendments (the Civil War Amendments) “could not have been intended to abolish distinctions based on color, or to enforce social .  .  . equality, or a commingling of the two races upon terms unsatisfactory to either.” According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed “the race line from our governmental systems,” and the Constitution was thus “color-blind.”