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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CAROLYN JEWEL, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	Case No. 4:08-cv-4373-JSW **GOVERNMENT DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITIES FOR DECEMBER 19, 2014 HEARING** Date: December 19, 2014 Time: 9:00 a.m. Courtroom 5, Second Floor Hon. Jeffrey S. White

Pursuant to the Notice of Questions for Hearing (ECF No. 309), the Government Defendants respectfully submit the following attached additional authorities, not cited in their briefing on the parties' cross-motions for partial summary judgment or four question briefing, on which the Government Defendants may rely at the December 19, 2014 hearing.

Exhibit A: 50 U.S.C. § 3605.

Exhibit B: Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the

Foreign Intelligence Surveillance Act of 1978, as Amended, dated Oct. 31, 2011.

Exhibit C: *United States v. Heckenkamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007).

Exhibit D: *American Fed. of State, County & Mun. Employees v. Scott*, 717 F.3d 851, 880-82 (11th Cir. 2013).

Exhibit E: *Ollier v. Sweetwater Union High Sch.*, 768 F.3d 843, 859-61 (9th Cir. 2014).

Exhibit F: *United States v. Bonds*, 608 F.3d 495, 502, 504 (9th Cir. 2010).

Exhibit G: *United States v. Bridgeforth*, 441 F.3d 864, 868-69 (9th Cir. 2006).

Exhibit H: *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1134 (N.D. Cal. 2008).

Dated: December 17, 2014

Respectfully Submitted,

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EXHIBIT A

Effective:[See Notes]

United States Code Annotated Currentness
Title 50. War and National Defense (Refs & Annos)
Chapter 47. National Security Agency
§ 3605. Disclosure of Agency's organization, function, activities, or personnel

(a) Except as provided in subsection (b) of this section, nothing in this chapter or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935) shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(b) The reporting requirements of section 1582 of Title 10 shall apply to positions established in the National Security Agency in the manner provided by section 3603 of this title.

CREDIT(S)

(Pub.L. 86-36, § 6, May 29, 1959, 73 Stat. 64.)

HISTORICAL AND STATUTORY NOTES

References in Text

The first section and section 2 of the Act of August 28, 1935, referred to in subsec. (a), are sections 1 and 2 of Act Aug. 28, 1935, c. 795, 49 Stat. 956, 957, which were classified to section 654 of former Title 5, Executive Departments and Government Officers and Employees, prior to repeal by Pub.L. 86-626, Title I, § 101, July 12, 1960, 74 Stat. 427.

Section 1582 of Title 10, referred to in subsec. (b), was repealed by Pub.L. 97-295, § 1(19)(A), Oct. 12, 1982, 96 Stat. 1290, and a new section 1582, relating to assistive technology, was subsequently added by Pub.L. 106-398, § 1 [[Div. A], Title XI, § 1102(a)], Oct. 30, 2000, 114 Stat. 1654, 1654A-311.

Section 3603, referred to in subsec. (b), was repealed by Pub.L. 104-201, Div. A, Title XVI, § 1633(b)(1), Sept. 23, 1996, 110 Stat. 2751.

Codifications

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Section was formerly classified in a note under section 402 of chapter 15 of this title prior to editorial reclassification in chapter 47 of this title.

Effective and Applicability Provisions

1959 Acts. Section effective on the first day of the first pay period which begins later than the thirtieth day following May 29, 1959, see section 8 of Pub.L. 86-36, set out as a note under section 3604 of this title.

50 U.S.C.A. § 3605, 50 USCA § 3605

Current through P.L. 113-185 approved 10-6-14

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EXHIBIT B

2011 OCT 31 PM 5:10

EXHIBIT B

MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED

Section 1 - Applicability and Scope (U)

These National Security Agency (NSA) minimization procedures apply to the acquisition, retention, use, and dissemination of non-publicly available information concerning unconsenting United States persons that is acquired by targeting non-United States persons reasonably believed to be located outside the United States in accordance with section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"). (U)

If NSA determines that it must take action in apparent departure from these minimization procedures to protect against an immediate threat to human life (e.g., force protection or hostage situations) and that it is not feasible to obtain a timely modification of these procedures, NSA may take such action immediately. NSA will report the action taken to the Office of the Director of National Intelligence and to the National Security Division of the Department of Justice, which will promptly notify the Foreign Intelligence Surveillance Court of such activity. (U)

For the purposes of these procedures, the terms "National Security Agency" and "NSA personnel" refer to any employees of the National Security Agency/Central Security Service ("NSA/CSS" or "NSA") and any other personnel engaged in Signals Intelligence (SIGINT) operations authorized pursuant to section 702 of the Act if such operations are executed under the direction, authority, or control of the Director, NSA/Chief, CSS (DIRNSA). (U)

Section 2 - Definitions (U)

In addition to the definitions in sections 101 and 701 of the Act, the following definitions will apply to these procedures:

(a) Acquisition means the collection by NSA or the FBI through electronic means of a non-public communication to which it is not an intended party. (U)

(b) Communications concerning a United States person include all communications in which a United States person is discussed or mentioned, except where such communications reveal only publicly-available information about the person. (U)

(c) Communications of a United States person include all communications to which a United States person is a party. (U)

Derived From: NSA/CSSM 1-52
Dated: 20070108
Declassify On: 20320108

(d) Consent is the agreement by a person or organization to permit the NSA to take particular actions that affect the person or organization. To be effective, consent must be given by the affected person or organization with sufficient knowledge to understand the action that may be taken and the possible consequences of that action. Consent by an organization will be deemed valid if given on behalf of the organization by an official or governing body determined by the General Counsel, NSA, to have actual or apparent authority to make such an agreement. (U)

(e) Foreign communication means a communication that has at least one communicant outside of the United States. All other communications, including communications in which the sender and all intended recipients are reasonably believed to be located in the United States at the time of acquisition, are domestic communications. ~~(S//SI)~~

(f) Identification of a United States person means (1) the name, unique title, or address of a United States person; or (2) other personal identifiers of a United States person when appearing in the context of activities conducted by that person or activities conducted by others that are related to that person. A reference to a product by brand name, or manufacturer's name or the use of a name in a descriptive sense, e.g., "Monroe Doctrine," is not an identification of a United States person. ~~(S//SI)~~

(g) Internet transaction, for purposes of these procedures, means an Internet communication that is acquired through NSA's upstream collection techniques. An Internet transaction may contain information or data representing either a discrete communication [redacted] or multiple discrete communications [redacted] (TS//SI)

(h) Processed or processing means any step necessary to convert a communication into an intelligible form intended for human inspection. (U)

(i) Publicly available information means information that a member of the public could obtain on request, by research in public sources, or by casual observation. (U)

(j) Technical data base means information retained for cryptanalytic, traffic analytic, or signal exploitation purposes. ~~(S//SI)~~

(k) United States person means a United States person as defined in the Act. The following guidelines apply in determining whether a person whose status is unknown is a United States person: (U)

(1) A person known to be currently in the United States will be treated as a United States person unless positively identified as an alien who has not been admitted for permanent residence, or unless the nature or circumstances of the person's communications give rise to a reasonable belief that such person is not a United States person. (U)

(2) A person known to be currently outside the United States, or whose location is unknown, will not be treated as a United States person unless such person can be

positively identified as such, or the nature or circumstances of the person's communications give rise to a reasonable belief that such person is a United States person. (U)

(3) A person known to be an alien admitted for permanent residence loses status as a United States person if the person leaves the United States and is not in compliance with 8 U.S.C. § 1203 enabling re-entry into the United States. Failure to follow the statutory procedures provides a reasonable basis to conclude that the alien has abandoned any intention of maintaining his status as a permanent resident alien. (U)

(4) An unincorporated association whose headquarters or primary office is located outside the United States is presumed not to be a United States person unless there is information indicating that a substantial number of its members are citizens of the United States or aliens lawfully admitted for permanent residence. (U)

Section 3 - Acquisition and Processing - General (U)

(a) Acquisition (U)

The acquisition of information by targeting non-United States persons reasonably believed to be located outside the United States pursuant to section 702 of the Act will be effected in accordance with an authorization made by the Attorney General and Director of National Intelligence pursuant to subsection 702(a) of the Act and will be conducted in a manner designed, to the greatest extent reasonably feasible, to minimize the acquisition of information not relevant to the authorized purpose of the acquisition. ~~(S//SI)~~

(b) Monitoring, Recording, and Processing (U)

(1) Personnel will exercise reasonable judgment in determining whether information acquired must be minimized and will destroy inadvertently acquired communications of or concerning a United States person at the earliest practicable point in the processing cycle at which such communication can be identified either: as clearly not relevant to the authorized purpose of the acquisition (e.g., the communication does not contain foreign intelligence information); or, as not containing evidence of a crime which may be disseminated under these procedures. Except as provided for in subsection 3(c)(2) below, such inadvertently acquired communications of or concerning a United States person may be retained no longer than five years from the expiration date of the certification authorizing the collection in any event. ~~(S//SI)~~

(2) Communications of or concerning United States persons that may be related to the authorized purpose of the acquisition may be forwarded to analytic personnel responsible for producing intelligence information from the collected data. Such communications or information may be retained and disseminated only in accordance with Sections 4, 5, 6, and 8 of these procedures. ~~(C)~~

(3) Magnetic tapes or other storage media that contain acquired communications may be processed. ~~(S)~~

(4) As a communication is reviewed, NSA analyst(s) will determine whether it is a domestic or foreign communication to, from, or about a target and is reasonably believed to contain foreign intelligence information or evidence of a crime. Only such communications may be processed. All other communications may be retained or disseminated only in accordance with Sections 5, 6, and 8 of these procedures. ~~(S//SI)~~

(5) Processing of Internet Transactions Acquired Through NSA Upstream Collection Techniques ~~(TS//SI)~~

a. Notwithstanding any processing (e.g., decryption, translation) that may be required to render an Internet transaction intelligible to analysts, NSA will take reasonable steps post-acquisition to identify and segregate through technical means Internet transactions that cannot be reasonably identified as containing single, discrete communications where: the active user of the transaction (i.e., the electronic communications account/address/identifier used to send or receive the Internet transaction to or from a service provider) is reasonably believed to be located in the United States; or the location of the active user is unknown. ~~(TS//SI)~~

1. Internet transactions that are identified and segregated pursuant to subsection 3(b)(5)a. will be retained in an access-controlled repository that is accessible only to NSA analysts who have been trained to review such transactions for the purpose of identifying those that contain discrete communications as to which the sender and all intended recipients are reasonably believed to be located in the United States. ~~(TS//SI)~~

(a) Any information contained in a segregated Internet transaction [redacted] may not be moved or copied from the segregated repository or otherwise used for foreign intelligence purposes unless it has been determined that the transaction does not contain any discrete communication as to which the sender and all intended recipients are reasonably believed to be located in the United States. Any Internet transaction that is identified and segregated pursuant to subsection 3(b)(5)a. and is subsequently determined to contain a discrete communication as to which the sender and all intended recipients are reasonably believed to be located in the United States will be destroyed upon recognition. ~~(TS//SI)~~

(b) Any information moved or copied from the segregated repository into repositories more generally accessible to NSA analysts will be processed in accordance with subsection 3(b)(5)b. below and handled in accordance the other applicable provisions of these procedures. ~~(TS//SI)~~

(c) Any information moved or copied from the segregated repository into repositories more generally accessible to NSA analysts will be marked, tagged, or otherwise identified as having been previously segregated pursuant to subsection 3(b)(5)a.

2. Internet transactions that are not identified and segregated pursuant to subsection 3(b)(5)a. will be processed in accordance with subsection 3(b)(5)b. below and handled in accordance with the other applicable provisions of these procedures.

b. NSA analysts seeking to use (for example, in a FISA application, intelligence report, or section 702 targeting) a discrete communication within an Internet transaction that contains multiple discrete communications will assess whether the discrete communication: 1) is a communication as to which the sender and all intended recipients are located in the United States; and 2) is to, from, or about a tasked selector, or otherwise contains foreign intelligence information. ~~(TS//SI)~~

1. If an NSA analyst seeks to use a discrete communication within an Internet transaction that contains multiple discrete communications, the analyst will first perform checks to determine the locations of the sender and intended recipients of that discrete communication to the extent reasonably necessary to determine whether the sender and all intended recipients of that communication are located in the United States. ~~(TS//SI)~~

2. If an NSA analyst seeks to use a discrete communication within an Internet transaction that contains multiple discrete communications, the analyst will assess whether the discrete communication is to, from, or about a tasked selector, or otherwise contains foreign intelligence information. ~~(TS//SI)~~

(a) If the discrete communication is to, from, or about a tasked selector, any U.S. person information in that communication will be handled in accordance with the applicable provisions of these procedures. ~~(TS//SI)~~

(b) If the discrete communication is not to, from, or about a tasked selector but otherwise contains foreign intelligence information, and the discrete communication is not to or from an identifiable U.S. person or a person reasonably believed to be located in the United States, that communication (including any U.S. person information therein) will be treated in accordance with the applicable provisions of these procedures. ~~(TS//SI)~~

(c) If the discrete communication is not to, from, or about a tasked selector but is to or from an identifiable U.S. person or a person reasonably believed to be located in the United States, the NSA analyst will document that determination in the relevant analytic repository or tool if technically possible or reasonably feasible. Such discrete communication cannot be used for any purpose other than to protect against an immediate threat to

human life (e.g., force protection or hostage situations). NSA will report any such use to the Office of the Director of National Intelligence and to the National Security Division of the Department of Justice, which will promptly notify the Foreign Intelligence Surveillance Court of such use. ~~(TS//SI)~~

3. An NSA analyst seeking to use a discrete communication within an Internet transaction that contains multiple discrete communications in a FISA application, intelligence report, or section 702 targeting must appropriately document the verifications required by subsections 3(b)(5)b.1. and 2. above. ~~(TS//SI)~~

4. [redacted]

(6) Magnetic tapes or other storage media containing communications acquired pursuant to section 702 may be scanned by computer to identify and select communications for analysis. Computer selection terms used for scanning, such as telephone numbers, key words or phrases, or other discriminators, will be limited to those selection terms reasonably likely to return foreign intelligence information. Identifiers of an identifiable U.S. person may not be used as terms to identify and select for analysis any Internet communication acquired through NSA's upstream collection techniques. Any use of United States person identifiers as terms to identify and select communications must first be approved in accordance with NSA procedures. NSA will maintain records of all United States person identifiers approved for use as selection terms. The Department of Justice's National Security Division and the Office of the Director of National Intelligence will conduct oversight of NSA's activities with respect to United States persons that are conducted pursuant to this paragraph. ~~(S//SI)~~

(7) Further processing, retention and dissemination of foreign communications will be made in accordance with Sections 4, 6, 7, and 8 as applicable, below. Further processing, storage and dissemination of inadvertently acquired domestic communications will be made in accordance with Sections 4, 5, and 8 below. ~~(S//SI)~~

(c) Destruction of Raw Data ~~(C)~~

(1) Telephony communications, Internet communications acquired by or with the assistance of the Federal Bureau of Investigation from Internet Service Providers, and other discrete forms of information (including that reduced to graphic or "hard copy" form such as facsimile, telex, computer data, or equipment emanations) that do not meet the retention standards set forth in these procedures and that are known to contain communications of or concerning United States persons will be destroyed upon recognition, and may be retained no longer than five years from the expiration date of the certification authorizing the collection in any event. ~~(S//SI)~~

(2) Internet transactions acquired through NSA's upstream collection techniques that do not contain any information that meets the retention standards set forth in these procedures and that are known to contain communications of or concerning United States persons will be destroyed upon recognition. All Internet transactions may be retained no longer than two years from the expiration date of the certification authorizing the collection in any event. The Internet transactions that may be retained include those that were acquired because of limitations on NSA's ability to filter communications. Any Internet communications acquired through NSA's upstream collection techniques that are retained in accordance with this subsection may be reviewed and processed only in accordance with the standards set forth in subsection 3(b)(5) of these procedures. ~~(TS//SI)~~

(d) Change in Target's Location or Status ~~(S//SI)~~

(1) In the event that NSA determines that a person is reasonably believed to be located outside the United States and after targeting this person learns that the person is inside the United States, or if NSA concludes that a person who at the time of targeting was believed to be a non-United States person is in fact a United States person, the acquisition from that person will be terminated without delay. ~~(S//SI)~~

(2) Any communications acquired through the targeting of a person who at the time of targeting was reasonably believed to be located outside the United States but is in fact located inside the United States at the time such communications were acquired, and any communications acquired by targeting a person who at the time of targeting was believed to be a non-United States person but was in fact a United States person, will be treated as domestic communications under these procedures. ~~(S//SI)~~

Section 4 - Acquisition and Processing - Attorney-Client Communications ~~(C)~~

As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment in the United States and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring of that communication will cease and the communication will be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the communication containing that conversation will be segregated and the National Security

Division of the Department of Justice will be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence information contained therein. Additionally, all proposed disseminations of information constituting United States person attorney-client privileged communications must be reviewed by the NSA Office of General Counsel prior to dissemination. ~~(S//SI)~~

Section 5 - Domestic Communications (U)

A communication identified as a domestic communication will be promptly destroyed upon recognition unless the Director (or Acting Director) of NSA specifically determines, in writing, that: ~~(S)~~

(1) the communication is reasonably believed to contain significant foreign intelligence information. Such communication may be provided to the FBI (including United States person identities) for possible dissemination by the FBI in accordance with its minimization procedures; ~~(S)~~

(2) the communication does not contain foreign intelligence information but is reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed. Such communication may be disseminated (including United States person identities) to appropriate Federal law enforcement authorities, in accordance with 50 U.S.C. §§ 1806(b) and 1825(c), Executive Order No. 12333, and, where applicable, the crimes reporting procedures set out in the August 1995 "Memorandum of Understanding: Reporting of Information Concerning Federal Crimes," or any successor document. Such communications may be retained by NSA for a reasonable period of time, not to exceed six months unless extended in writing by the Attorney General, to permit law enforcement agencies to determine whether access to original recordings of such communications is required for law enforcement purposes; ~~(S)~~

(3) the communication is reasonably believed to contain technical data base information, as defined in Section 2(i), or information necessary to understand or assess a communications security vulnerability. Such communication may be provided to the FBI and/or disseminated to other elements of the United States Government. Such communications may be retained for a period sufficient to allow a thorough exploitation and to permit access to data that are, or are reasonably believed likely to become, relevant to a current or future foreign intelligence requirement. Sufficient duration may vary with the nature of the exploitation. ~~(S//SI)~~

a. In the context of a cryptanalytic effort, maintenance of technical data bases requires retention of all communications that are enciphered or reasonably believed to contain secret meaning, and sufficient duration may consist of any period of time during which encrypted material is subject to, or of use in, cryptanalysis. ~~(S//SI)~~

b. In the case of communications that are not enciphered or otherwise thought to contain secret meaning, sufficient duration is five years from the expiration date of the certification authorizing the collection unless the Signal Intelligence Director, NSA, determines in writing that retention for a longer period is required to respond to authorized foreign intelligence or counterintelligence requirements; or ~~(S//SI)~~

(4) the communication contains information pertaining to a threat of serious harm to life or property. ~~(S)~~

Notwithstanding the above, if a domestic communication indicates that a target has entered the United States, NSA may advise the FBI of that fact. Moreover, technical data regarding domestic communications may be retained and provided to the FBI and CIA for collection avoidance purposes. ~~(S//SI)~~

Section 6 - Foreign Communications of or Concerning United States Persons (U)

(a) Retention (U)

Foreign communications of or concerning United States persons collected in the course of an acquisition authorized under section 702 of the Act may be retained only:

(1) if necessary for the maintenance of technical data bases. Retention for this purpose is permitted for a period sufficient to allow a thorough exploitation and to permit access to data that are, or are reasonably believed likely to become, relevant to a current or future foreign intelligence requirement. Sufficient duration may vary with the nature of the exploitation.

a. In the context of a cryptanalytic effort, maintenance of technical data bases requires retention of all communications that are enciphered or reasonably believed to contain secret meaning, and sufficient duration may consist of any period of time during which encrypted material is subject to, or of use in, cryptanalysis.

b. In the case of communications that are not enciphered or otherwise thought to contain secret meaning, sufficient duration is five years from the expiration date of the certification authorizing the collection unless the Signals Intelligence Director, NSA, determines in writing that retention for a longer period is required to respond to authorized foreign intelligence or counterintelligence requirements;

(2) if dissemination of such communications with reference to such United States persons would be permitted under subsection (b) below; or

(3) if the information is evidence of a crime that has been, is being, or is about to be committed and is provided to appropriate federal law enforcement authorities. ~~(S//SI)~~

(b) Dissemination (U)

A report based on communications of or concerning a United States person may be disseminated in accordance with Section 7 or 8 if the identity of the United States person is deleted and a generic term or symbol is substituted so that the information cannot reasonably be connected with an identifiable United States person. Otherwise, dissemination of intelligence reports based on communications of or concerning a United States person may only be made to a recipient requiring the identity of such person for the performance of official duties but only if at least one of the following criteria is also met:

(1) the United States person has consented to dissemination or the information of or concerning the United States person is available publicly;

(2) the identity of the United States person is necessary to understand foreign intelligence information or assess its importance, e.g., the identity of a senior official in the Executive Branch;

(3) the communication or information indicates that the United States person may be:

a. an agent of a foreign power;

b. a foreign power as defined in Section 101(a) of the Act;

c. residing outside the United States and holding an official position in the government or military forces of a foreign power;

d. a corporation or other entity that is owned or controlled directly or indirectly by a foreign power; or

e. acting in collaboration with an intelligence or security service of a foreign power and the United States person has, or has had, access to classified national security information or material;

(4) the communication or information indicates that the United States person may be the target of intelligence activities of a foreign power;

(5) the communication or information indicates that the United States person is engaged in the unauthorized disclosure of classified national security information or the United States person's identity is necessary to understand or assess a communications security vulnerability, but only after the agency that originated the information certifies that it is properly classified;

(6) the communication or information indicates that the United States person may be engaging in international terrorist activities;

(7) the acquisition of the United States person's communication was authorized by a court order issued pursuant to the Act and the communication may relate to the foreign intelligence purpose of the surveillance; or

(8) the communication or information is reasonably believed to contain evidence that a crime has been, is being, or is about to be committed, provided that dissemination is for law enforcement purposes and is made in accordance with 50 U.S.C. §§ 1806(b) and 1825(c), Executive Order No. 12333, and, where applicable, the crimes reporting procedures set out in the August 1995 "Memorandum of Understanding: Reporting of Information Concerning Federal Crimes," or any successor document. (U)

(c) Provision of Unminimized Communications to CIA and FBI ~~(S//NF)~~

(1) NSA may provide to the Central Intelligence Agency (CIA) unminimized communications acquired pursuant to section 702 of the Act. CIA will identify to NSA targets for which NSA may provide unminimized communications to CIA. CIA will process any such unminimized communications received from NSA in accordance with CIA minimization procedures adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(e) of the Act. ~~(S//SI//NF)~~

(2) NSA may provide to the FBI unminimized communications acquired pursuant to section 702 of the Act. The FBI will identify to NSA targets for which NSA may provide unminimized communications to the FBI. The FBI will process any such unminimized communications received from NSA in accordance with FBI minimization procedures adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(e) of the Act. ~~(S//SI)~~

Section 7 - Other Foreign Communications (U)

Foreign communications of or concerning a non-United States person may be retained, used, and disseminated in any form in accordance with other applicable law, regulation, and policy. (U)

Section 8 - Collaboration with Foreign Governments ~~(S//SI)~~

(a) Procedures for the dissemination of evaluated and minimized information. Pursuant to Section 1.7(c)(8) of Executive Order No. 12333, as amended, NSA conducts foreign cryptologic liaison relationships with certain foreign governments. Information acquired pursuant to section 702 of the Act may be disseminated to a foreign government. Except as provided in subsection 8(b) of these procedures, any dissemination to a foreign government of information of or concerning a United States person that is acquired pursuant to section 702 may only be done in a manner consistent with subsections 6(b) and 7 of these NSA minimization procedures. ~~(S)~~

(b) Procedures for technical or linguistic assistance. It is anticipated that NSA may obtain information or communications that, because of their technical or linguistic content, may require further analysis by foreign governments to assist NSA in determining their meaning or significance. Notwithstanding other provisions of these minimization procedures, NSA may disseminate computer disks, tape recordings, transcripts, or other information or items containing unminimized information or communications acquired pursuant to section 702 to foreign governments for further processing and analysis, under the following restrictions with respect to any materials so disseminated: ~~(S)~~

(1) Dissemination to foreign governments will be solely for translation or analysis of such information or communications, and assisting foreign governments will make no use of any information or any communication of or concerning any person except to provide technical and linguistic assistance to NSA. ~~(S)~~

(2) Dissemination will be only to those personnel within foreign governments involved in the translation or analysis of such information or communications. The number of such personnel will be restricted to the extent feasible. There will be no dissemination within foreign governments of this unminimized data. ~~(S)~~

(3) Foreign governments will make no permanent agency record of information or communications of or concerning any person referred to or recorded on computer disks, tape recordings, transcripts, or other items disseminated by NSA to foreign governments, provided that foreign governments may maintain such temporary records as are necessary to enable them to assist NSA with the translation or analysis of such information. Records maintained by foreign governments for this purpose may not be disseminated within the foreign governments, except to personnel involved in providing technical or linguistic assistance to NSA. ~~(S)~~

(4) Upon the conclusion of such technical or linguistic assistance to NSA, computer disks, tape recordings, transcripts, or other items or information disseminated to foreign governments will either be returned to NSA or be destroyed with an accounting of such destruction made to NSA. ~~(S)~~

(5) Any information that foreign governments provide to NSA as a result of such technical or linguistic assistance may be disseminated by NSA in accordance with these minimization procedures. ~~(S)~~

12-31-11
Date

Eric H. Holder, Jr.
Attorney General of the United States

EXHIBIT C

482 F.3d 1142, 07 Cal. Daily Op. Serv. 3575, 2007 Daily Journal D.A.R. 4551
(Cite as: 482 F.3d 1142)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Jerome T. HECKENKAMP, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Jerome T. Heckenkamp, Defendant–Appellant.

Nos. 05–10322, 05–10323.
Argued and Submitted Aug. 17, 2006.
Filed April 5, 2007.

Background: Defendant was convicted in the United States District Court for the Northern District of California, James Ware, J., of recklessly causing damage by intentionally accessing a protected computer without authorization, and he appealed.

Holdings: The Court of Appeals, Thomas, Circuit Judge, held that:
(1) defendant's objectively reasonable expectation of privacy in his computer was not eliminated when he attached computer to network;
(2) university computer network investigator's remote search of defendant's computer was justified under special needs exception to search warrant exception; and
(3) evidence gathered by FBI agents pursuant to search warrant was admissible under independent source exception to exclusionary rule.

Affirmed.

West Headnotes

[1] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of privacy. Most Cited Cases

Telecommunications 372 1439

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer communications. Most Cited Cases

For Fourth Amendment purposes, defendant's objectively reasonable expectation of privacy in his computer was not eliminated when he attached computer to network of university at which he was a student; there was no announced monitoring policy on the network, university's computer policy stated that in general, all computer and electronic files should be free from access by any but the authorized user of those files, and defendant's computer was located in his dormitory room and was protected by a screensaver password. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of privacy. Most Cited Cases

Telecommunications 372 1439

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer communications. Most Cited Cases

A person's reasonable expectation of privacy may be diminished in transmissions over the Inter-

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net or e-mail that have already arrived at the recipient; however, the mere act of accessing a network does not in itself extinguish privacy expectations, nor does the fact that others may have occasional access to the computer. U.S.C.A. Const.Amend. 4.

[3] Telecommunications 372 1462

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1462 k. Necessity for judicial approval; emergency interception. Most Cited Cases

State university computer network investigator's remote search of defendant's computer was justified under special needs exception to search warrant exception; corporation employee reported someone using computer on university's network had hacked into corporation's computer network, investigator found evidence that someone on university network, using computer Internet Protocol (IP) address that investigator connected to defendant, hacked into corporation's network and gained root access to university server that housed 60,000 campus accounts and processed 250,000 daily emails, and although investigator knew FBI was seeking warrant to search defendant's computer, he testified he acted to secure server and not to collect evidence for law enforcement, and he acted against FBI agent's request that he wait. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In general. Most Cited Cases

Under the special needs exception, a warrant is not required when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. U.S.C.A. Const.Amend. 4.

[5] Criminal Law 110 392.39(11)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.39 Extent of Exclusion; "Fruit of the Poisonous Tree"
110k392.39(8) Exceptions
110k392.39(11) k. Causal nexus; independent discovery or basis or source. Most Cited Cases
(Formerly 110k394.4(6))

Even if university police and university computer network investigator violated defendant's Fourth Amendment rights by entering his dormitory room to investigate whether defendant had hacked into university server, evidence gathered by FBI agents in search of defendant's room pursuant to search warrant the following day was admissible under independent source exception to exclusionary rule, since warrant was supported by probable cause even without evidence gathered through search by university police; affidavit in support of warrant recited evidence that intrusion on server had been tracked to defendant's dormitory room computer, and that defendant had been disciplined in the past for unauthorized computer access to university's system. U.S.C.A. Const.Amend. 4.

***1143** Benjamin Coleman, San Diego, CA, for the appellant.

Hanley Chew, Assistant United States Attorney, San Francisco, CA, for the appellee.

Appeal from the United States District Court for the Northern District of California; James Ware, District Judge, Presiding. D.C. Nos. CR–03–20041–JW, CR–00–20355–JW.

Before CANBY, HAWKINS, and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

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In this case, we consider whether a remote search of computer files on a hard drive by a network administrator was justified under the "special needs" exception to the Fourth Amendment because the administrator reasonably believed the computer had been used to gain unauthorized access to confidential records on a university computer. We conclude that the remote search was justified.

Although we assume that the subsequent search of the suspect's dorm room was not justified under the Fourth Amendment, we conclude that the district court's denial of the suppression motion was proper under the independent source exception to the exclusionary rule.

I

In December 1999, Scott Kennedy, a computer system administrator for Qualcomm Corporation in San Diego, California, discovered that somebody had obtained unauthorized access to (or "hacked into," in popular parlance) the company's computer network. Kennedy contacted Special Agent Terry Rankhorn of the Federal Bureau of Investigation about the intrusion.

Kennedy was able to trace the intrusion to a computer on the University of Wisconsin at Madison network, and he contacted the university's computer help desk, seeking assistance. Jeffrey Savoy, the University of Wisconsin computer network investigator, promptly responded to Kennedy's request and began examining the university's system. Savoy found evidence that someone using a computer on the university network was in fact hacking into the Qualcomm system and that the user had gained unauthorized access to the university's system as well. Savoy was particularly concerned that the user had gained access to the "Mail2" server on the university***1144** system, which housed accounts for 60,000 individuals on campus and processed approximately 250,000 emails each day. At that time, students on campus were preparing for final exams, and Savoy testified that "the disruption on campus would be tremendous if e-mail was destroyed." Through his investigation of the Mail2 server, Savoy traced the source of intrusion to a computer located in university housing. The type of access the user had obtained was restricted to specific system administrators, none of whom would be working from the university's dormitories.

Savoy determined that the computer that had gained unauthorized access had a university Internet Protocol ("IP") address [FN1] that ended in 117. In addition, Savoy determined that Heckencamp, who was a computer science graduate student at the university, had checked his email from that IP address 20 minutes before and 40 minutes after the unauthorized connections between the computer at the IP address ending in 117, the Mail2 server, and the Qualcomm server. Savoy determined that the computer at that IP address had been used regularly to check Heckencamp's email account, but no others. Savoy became extremely concerned because he knew that Heckenkamp had been terminated from his job at the university computer help desk two years earlier for similar unauthorized activity, and Savoy knew that Heckenkamp "had technical expertise to damage [the university's] system."

FN1. An IP address is a standard way of identifying a computer that is connected to the Internet. An IP address is comprised of four integers less than 256 separated by periods.

Although Savoy was confident that the computer that had gained the unauthorized access belonged to Heckenkamp, he checked the housing records to ensure that the IP address was assigned to Heckenkamp's dorm room. The housing department initially stated that the IP address corresponded to a different room down the hall from Heckenkamp's assigned room. The housing department acknowledged that the records could be inaccurate but stated that they would not be able to verify the location of the IP address until the next morning. In order to protect the university's server, Savoy electronically blocked the connection between IP address 117 and the Mail2 server.

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After blocking the connection, Savoy contacted Rankhorn. After Savoy informed Rankhorn of the information he had found, Rankhorn told Savoy that he intended to get a warrant for the computer, but he did not ask Savoy to take any action or to commence any investigation.

Later that night, Savoy decided to check the status of the 117 computer from home because he was still concerned about the integrity of the university's system. He logged into the network and determined that the 117 computer was not attached to the network. However, Savoy was still concerned that the same computer could have "changed its identity," so he checked the networking hardware to determine if the computer that was originally logged on at the 117 address was now logged on at a different IP address. His search confirmed that the computer was now logged on at an IP address ending in 120.

Based on this discovery, Savoy became even more concerned that the Mail2 server "security could be compromised at any time," particularly because "the intruder at this point knows that he's being investigated" and might therefore interfere with the system to cover his tracks. Savoy concluded that he needed to act that night.

Before taking action, Savoy wanted to verify that the computer logged on at 120 was the same computer that had been ***1145** logged on at 117 earlier in the day. He logged into the computer, using a name and password he had discovered in his earlier investigation into the 117 computer. Savoy used a series of commands to confirm that the 120 computer was the same computer that had been logged on at 117 and to determine whether the computer still posed a risk to the university server. After approximately 15 minutes of looking only in the temporary directory, without deleting, modifying, or destroying any files, Savoy logged off of the computer.

Savoy then determined that "[the 120] machine need[ed] to get off line immediately or as soon as possible" based on "a university security need." He contacted both Rankhorn and a Detective Scheller, who worked for the university police. Savoy informed them of his discoveries and concerns. Rankhorn asked Savoy to wait to take action because he was attempting to get a search warrant. However, Savoy felt that he needed to protect the university's system by taking the machine off line immediately. Therefore, he made the decision to coordinate with the university police to take the computer off line and to "let [the] university police coordinate with the FBI."

Together with Scheller and other university police officers, Savoy went to the room assigned to Heckenkamp.[FN2] When they arrived at the room, the door was ajar, and nobody was in the room. Savoy and Scheller entered the room and disconnected the network cord attaching the computer to the network. Savoy noted that the computer had a screen saver with a password, which prevented him from accessing the computer. In order to be sure that the computer he had disconnected from the network was the computer that had gained unauthorized access to the Mail2 server, Savoy wanted to run some commands on the computer. Detective Scheller located Heckenkamp, explained the situation and asked for Heckenkamp's password, which Heckenkamp voluntarily provided.

> FN2. They also went to the room the housing department stated was connected to the IP address ending in 117 to ensure that those records were not correct.

Savoy used the password to run the commands on the computer and verified that it was the computer used to gain the unauthorized access. After Savoy confirmed that he had the right computer, Scheller advised Heckenkamp that he was not under arrest, but Scheller requested that Heckenkamp waive his Miranda rights and give a statement. Heckenkamp waived his rights in writing and answered the investigator's and detectives' questions. In addition, Heckenkamp authorized Savoy to make a copy of his hard drive for later analysis,

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which Savoy did. At no time did Savoy or Scheller search Heckenkamp's room. Throughout his testimony, Savoy emphasized that his actions were taken to protect the university's server rather than for law enforcement purposes.

The federal agents obtained a search warrant from the Western District of Wisconsin, which was executed the following day. Pursuant to the warrant, the agents seized the computer and searched Heckenkamp's room.

Heckenkamp was indicted in both the Northern and Southern Districts of California on multiple offenses, including counts of recklessly causing damage by intentionally accessing a protected computer without authorization, in violation of 18 U.S.C. § 1030(a)(5)(B). In separate orders, Judge Ware in the Northern District and Judge Jones in the Southern District denied Heckenkamp's motions to suppress the evidence gathered from (1) the remote search of his computer, (2) the image taken***1146** of his computer's hard drive, and (3) the search conducted pursuant to the FBI's search warrant. FN3

> FN3. Judge Ware later reaffirmed his denial of the motion to suppress when Heckenkamp filed a renewed motion to suppress after the cases were consolidated.

The two cases were eventually consolidated before Judge Ware. Heckenkamp entered a conditional guilty plea to two counts of violating 18 U.S.C. § 1030(a)(5)(B), which allowed him to appeal the denials of his motions to suppress. The district court entered its judgment and commitment orders on April 28, 2005, and Heckenkamp filed a timely notice of appeal.

We review de novo both a court's denial of a motion to suppress evidence and a court's determination of whether an individual's expectation of privacy was objectively reasonable. *United States v. Bautista,* 362 F.3d 584, 588–89 (9th Cir.2004).

II

[1] As a prerequisite to establishing the illegality of a search under the Fourth Amendment, a defendant must show that he had a reasonable expectation of privacy in the place searched. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). An individual has a reasonable expectation of privacy if he can " 'demonstrate a subjective expectation that his activities would be private, and he [can] show that his expectation was one that society is prepared to recognize as reasonable.' " *Bautista,* 362 F.3d at 589 (quoting *United States v. Nerber,* 222 F.3d 597, 599 (9th Cir.2000)). No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of warrantless government intrusion. *Rakas,* 439 U.S. at 152–153, 99 S.Ct. 421 (Powell, J., concurring). However, we have given weight to such factors as the defendant's possessory interest in the property searched or seized, *see United States v. Broadhurst,* 805 F.2d 849, 852 n. 2 (9th Cir.1986), the measures taken by the defendant to insure privacy, *see id.,* whether the materials are in a container labeled as being private, *see id.,* and the presence or absence of a right to exclude others from access, *see Bautista,* 362 F.3d at 589.

[2] The government does not dispute that Heckenkamp had a subjective expectation of privacy in his computer and his dormitory room, and there is no doubt that Heckenkamp's subjective expectation as to the latter was legitimate and objectively reasonable. *Minnesota v. Olson,* 495 U.S. 91, 95–96, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). We hold that he also had a legitimate, objectively reasonable expectation of privacy in his personal computer. *See United States v. Lifshitz,* 369 F.3d 173, 190 (2d Cir.2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *see also United States v. Buckner,* 473 F.3d 551, 554 n. 2 (4th Cir.2007) (recognizing a reasonable expectation of privacy in password-protected computer files); *Trulock v. Freeh,* 275 F.3d 391, 403 (4th Cir.2001) (same).

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[1] **[3]** The salient question is whether the defendant's objectively reasonable expectation of privacy in his computer was eliminated when he attached it to the university network. We conclude under the facts of this case that the act of attaching his computer to the network did not extinguish his legitimate, objectively reasonable privacy expectations.

[2] **[4]** A person's reasonable expectation of privacy may be diminished in "transmissions over the Internet or e-mail that have already arrived at the recipient." *Lifshitz*, 369 F.3d at 190. However, the mere act of accessing a network does not in itself extinguish privacy expectations, ***1147** nor does the fact that others may have occasional access to the computer. *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir.2001). However, privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user. *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir.2002); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir.2000).

[5] In the instant case, there was no announced monitoring policy on the network. To the contrary, the university's computer policy itself provides that "[i]n general, all computer and electronic files should be free from access by any but the authorized users of those files. Exceptions to this basic principle shall be kept to a minimum and made only where essential to ... protect the integrity of the University and the rights and property of the state." When examined in their entirety, university policies do not eliminate Heckenkamp's expectation of privacy in his computer. Rather, they establish limited instances in which university administrators may access his computer in order to protect the university's systems. Therefore, we must reject the government's contention that Heckenkamp had no objectively reasonable expectation of privacy in his personal computer, which was protected by a screen-saver password, located in his dormitory room, and subject to no policy allowing the university actively to monitor or audit his computer usage.

III

[3][4] **[6]** Although we conclude that Heckenkamp had a reasonable expectation of privacy in his personal computer, we conclude that the search of the computer was justified under the "special needs" exception to the warrant requirement. Under the special needs exception, a warrant is not required when " 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in the judgment)). If a court determines that such conditions exist, it will "assess the constitutionality of the search by balancing the need to search against the intrusiveness of the search." *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1059 (9th Cir.2002) (citing *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001)).

A

[7] Here, Savoy provided extensive testimony that he was acting to secure the Mail2 server, and that his actions were not motivated by a need to collect evidence for law enforcement purposes or at the request of law enforcement agents. This undisputed evidence supports Judge Jones's conclusion that the special needs exception applied. The integrity and security of the campus e-mail system was in jeopardy. Although Savoy was aware that the FBI was also investigating the use of a computer on the university network to hack into the Qualcomm system, his actions were not taken for law enforcement purposes. Not only is there no evidence that Savoy was acting at the behest of law enforcement, but also the record indicates that Savoy was acting contrary to law enforcement requests that he delay action.

[8] Under these circumstances, a search war-

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rant was not necessary because Savoy was acting purely within the scope of his role as a system administrator. Under the university's policies, to which Heckenkamp assented when he connected his computer to the university's network, Savoy was authorized to "rectif[y] emergency***1148** situations that threaten the integrity of campus computer or communication systems[,] provided that use of accessed files is limited solely to maintaining or safeguarding the system." Savoy discovered through his examination of the network logs, in which Heckenkamp had no reasonable expectation of privacy, that the computer that he had earlier blocked from the network was now operating from a different IP address, which itself was a violation of the university's network policies.

[9] This discovery, together with Savoy's earlier discovery that the computer had gained root access to the university's Mail2 server, created a situation in which Savoy needed to act immediately to protect the system. Although he was aware that the FBI was already seeking a warrant to search Heckenkamp's computer in order to serve the FBI's law enforcement needs, Savoy believed that the university's separate security interests required immediate action. Just as requiring a warrant to investigate potential student drug use would disrupt operation of a high school, *see T.L.O.*, 469 U.S. at 352–53, 105 S.Ct. 733 (Blackmun, J., concurring in the judgment), requiring a warrant to investigate potential misuse of the university's computer network would disrupt the operation of the university and the network that it relies upon in order to function. Moreover, Savoy and the other network administrators generally do not have the same type of "adversarial relationship" with the university's network users as law enforcement officers generally have with criminal suspects. 469 U.S. at 349–50, 105 S.Ct. 733 (Powell, J., concurring).

[10] The district court was entirely correct in holding that the special needs exception applied.

B

Once a court determines that the special needs doctrine applies to a search, it must "assess the constitutionality of the search by balancing the need to search against the intrusiveness of the search." *Henderson*, 305 F.3d at 1059 (citing *Ferguson*, 532 U.S. at 78, 121 S.Ct. 1281). The factors considered are the subject of the search's privacy interest, the government's interests in performing the search, and the scope of the intrusion. *See id.* at 1059–60.

[11] Here, although Heckenkamp had a subjectively real and objectively reasonable expectation of privacy in his computer, the university's interest in maintaining the security of its network provided a compelling government interest in determining the source of the unauthorized intrusion into sensitive files. The remote search of the computer was remarkably limited given the circumstances. Savoy did not view, delete, or modify any of the actual files on the computer; he was only logged into the computer for 15 minutes; and he sought only to verify that the same computer that had been connected at the 117 IP address was now connected at the 120 IP address. Here, as in *Henderson*, "the government interest served[ ] and the relative unobtrusiveness of the search" lead to a conclusion that the remote search was not unconstitutional. *Id.* at 1061.

[12] The district court did not err in denying the motion to suppress the evidence obtained through the remote search of the computer.

IV

[5] The district court also did not err in denying the motion to suppress evidence obtained during the searches of Heckenkamp's room. Assuming, without deciding, that Savoy and the university police violated Heckenkamp's Fourth Amendment rights when they entered his dormitory room for nonlaw-enforcement purposes, the evidence obtained through the search was nonetheless admissible under ***1149** the independent source exception to the exclusionary rule.

[13] Under the independent source exception, " 'information which is received through an illegal

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source is considered to be cleanly obtained when it arrives through an independent source.' " *Murray v. United States*, 487 U.S. 533, 538–39, 108 S.Ct. 2529, 101 L.Ed.2d 472, (1988) (quoting *United States v. Silvestri*, 787 F.2d 736, 739 (1st Cir.1986)). Therefore, we have held that " '[t]he mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant.' " *United States v. Reed*, 15 F.3d 928, 933 (9th Cir.1994) (quoting *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir.1987)). In order to determine whether evidence obtained through a tainted warrant is admissible, "[a] reviewing court should excise the tainted evidence and determine whether the remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *Id.* (quoting *Vasey*, 834 F.2d at 788).

[14] Here, even without the evidence gathered through the allegedly improper search, there is sufficient information in the affidavit to establish probable cause. The affidavit recited evidence that the server intrusion had been tracked "to a campus dormitory room computer belonging to Jerome T. Heckenkamp"; that "[t]he computer is in Room 107, Noyes House, Adams Hall on the University of Wisconsin–Madison"; and that "Heckenkamp previously had a disciplinary action in the past for unauthorized computer access to a University of Wisconsin system." This was sufficient evidence to obtain the warrant to search "Room 107, Noyes House, Adams Hall."

V

Although Heckenkamp had a reasonable expectation of privacy in his personal computer, a limited warrantless remote search of the computer was justified under the special needs exception to the warrant requirement. The subsequent search of his dorm room was justified, based on information obtained by means independent of the university search of the room. Therefore, the district courts properly denied the suppression motions.

The judgment of the district court is **AFFIRMED.**

C.A.9 (Cal.),2007.
U.S. v. Heckenkamp
482 F.3d 1142, 07 Cal. Daily Op. Serv. 3575, 2007 Daily Journal D.A.R. 4551

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EXHIBIT D

717 F.3d 851, 35 IER Cases 1273, 24 Fla. L. Weekly Fed. C 305
(Cite as: 717 F.3d 851)

United States Court of Appeals,
Eleventh Circuit.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 79, Richard Flamm,
Plaintiffs–Appellees,
v.
Rick SCOTT, in his official capacity as Governor of the State of Florida, Defendant–Appellant.

No. 12–12908.
May 29, 2013.

Background: Union representing more than 50,000 covered state employees brought § 1983 action against Florida governor challenging constitutionality of executive order (EO) directing all state agencies to provide for mandatory drug testing for all "prospective new hires" and random drug testing of all existing employees at covered agencies. The United States District Court for the Southern District of Florida, No. 1:11-cv-21976-UU, Ursula Ungaro, J., 857 F.Supp.2d 1322, granted union's motion for summary judgment and denied governor's motion for summary judgment. Governor appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:
(1) District Court's attempt at summary judgment stage to construe complaint as making more limited, as-applied Fourth Amendment challenge to EO was appropriate;
(2) grant of relief to union was facial in nature;
(3) relief was overly broad;
(4) appellate court would decline to refashion judgment and injunction simply by cutting them down to cover only those employees to whom EO's application was unconstitutional;
(5) employees' alleged consent to drug testing did not, standing alone, render EO constitutional; and
(6) state's alleged need for safe and efficient workplace did not establish special need for drug testing.

Vacated and remanded.

West Headnotes

[1] Searches and Seizures 349 12

349 Searches and Seizures
349I In General
349k12 k. Constitutional and statutory provisions. Most Cited Cases
Party is entitled to facial invalidation of law on Fourth Amendment grounds only if party can demonstrate that there are no constitutional applications of that law. U.S.C.A. Const.Amend. 4.

[2] Administrative Law and Procedure 15A 390.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak390 Validity
15Ak390.1 k. In general. Most Cited Cases

Statutes 361 1513

361 Statutes
361VIII Validity
361k1513 k. Scope of inquiry. Most Cited Cases
"Facial challenge," as distinguished from an as-applied challenge, seeks to invalidate statute or regulation itself.

[3] Administrative Law and Procedure 15A 391

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other

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Policymaking
15Ak390 Validity
15Ak391 k. Determination of validity; presumptions. Most Cited Cases

Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

When a plaintiff mounts facial challenge to statute or regulation, plaintiff bears burden of proving that law could never be applied in constitutional manner; put another way, challenger must establish that no set of circumstances exists under which law would be valid.

[4] Statutes 361 1511

361 Statutes
361VIII Validity
361k1511 k. In general. Most Cited Cases

Supreme Court case of *United States v. Salerno* , which holds that a plaintiff mounting facial challenge to law must establish that no set of circumstances exists under which law would be valid, also applies when a court grants relief that is "quasi-facial" in nature, that is, relief that reaches beyond plaintiffs in case.

[5] Federal Civil Procedure 170A 2554

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2554 k. Matters considered. Most Cited Cases

District court's attempt, at summary judgment stage, to construe complaint of union representing state employees as making more limited, as-applied Fourth Amendment challenge to executive order (EO) mandating random drug testing of state employees was appropriate, even though union's complaint requested only facial relief and union insisted during discovery that it was mounting facial challenge, since union was not stating new claim, only clarifying scope of its desire remedy. U.S.C.A. Const.Amend. 4; Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 839.1

170A Federal Civil Procedure
170AVII Pleadings
170AVII(E) Amendments
170Ak839 Complaint
170Ak839.1 k. In general. Most Cited Cases

Federal Civil Procedure 170A 2554

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2554 k. Matters considered. Most Cited Cases

It is ordinarily true that, at summary judgment stage, proper procedure for plaintiffs to assert new claim is to amend complaint in accordance with federal civil procedural rule governing amendment of pleadings. Fed.Rules Civ.Proc.Rules 15(a), 56, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 849(3)

170A Federal Civil Procedure
170AVII Pleadings
170AVII(E) Amendments
170Ak849 Motion and Proceedings for Allowance
170Ak849(3) k. Amendments by briefs or motion papers. Most Cited Cases

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(Formerly 170Ak849)

A plaintiff may not amend her complaint through argument in brief opposing summary judgment or one advocating summary judgment. Fed.Rules Civ.Proc.Rules 15(a), 56, 28 U.S.C.A.

[8] Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

Constitutional Law 92 657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as applied. Most Cited Cases

Constitutional Law 92 966

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k966 k. Pleading. Most Cited Cases

Distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control pleadings and disposition in every case involving constitutional challenge; distinction goes to breadth of remedy employed by court, not what must be pled in complaint.

[9] Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

Federal courts generally strongly disfavor facial constitutional challenges, and for good reason: claims of facial invalidity often rest on speculation, and as consequence, they raise risk of premature interpretation of statutes on basis of factually barebones records, facial challenges run contrary to fundamental principle of judicial restraint that courts should neither anticipate question of constitutional law in advance of necessity of deciding it nor formulate rule of constitutional law broader than is required by precise facts to which it is to be applied, and finally, facial challenges threaten to short circuit democratic process by preventing laws embodying will of people from being implemented in manner consistent with Constitution.

[10] Constitutional Law 92 657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as applied. Most Cited Cases

Federal courts construe a plaintiff's constitutional challenge, if possible, to be as-applied.

[11] Searches and Seizures 349 12

349 Searches and Seizures
349I In General
349k12 k. Constitutional and statutory provisions. Most Cited Cases

District court's grant of relief to union representing state employees, in union's action challenging governor's executive order (EO) mandating suspicionless drug testing of state employees on Fourth Amendment grounds, was facial, rather than

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as-applied, in nature; despite explicitly stating that it was granting only as-applied relief, court granted what effectively amounted to facial relief by declaring EO unconstitutional and enjoining its application to all 85,000 current state employees, and court's relief was not limited in any way by concession union itself made that Fourth Amendment did not bar random drug testing of government employees in high-risk, safety-sensitive jobs. U.S.C.A. Const.Amend. 4.

[12] Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

Constitutional Law 92 657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as applied. Most Cited Cases

Line between facial and as-applied relief is fluid one, and many constitutional challenges may occupy intermediate position on spectrum between purely as-applied relief and complete facial invalidation.

[13] Constitutional Law 92 3854

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3854 k. Fourth Amendment. Most Cited Cases

Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases

Fourth Amendment protects right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and applies to states through Due Process Clause of Fourteenth Amendment. U.S.C.A. Const.Amends. 4, 14.

[14] Searches and Seizures 349 14

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k14 k. Taking samples of blood, or other physical specimens; handwriting exemplars. Most Cited Cases

Testing urine sample, which can reveal host of private medical facts about government employee, and which entails process that itself implicates privacy interests, is search within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[15] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Basic question a court is required to answer when confronted with drug-testing policy is whether this search is reasonable within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[16] Searches and Seizures 349 79

349 Searches and Seizures
349I In General
349k79 k. Administrative inspections and searches; regulated businesses. Most Cited Cases

Searches and Seizures 349 113.1

349 Searches and Seizures
349II Warrants

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349k113 Probable or Reasonable Cause
349k113.1 k. In general. Most Cited Cases

While in criminal context, reasonableness usually requires showing of probable cause to obtain search warrant, that standard is unsuited to determining reasonableness of administrative searches where government seeks to prevent development of hazardous conditions. U.S.C.A. Const.Amend. 4.

[17] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases

To be reasonable under Fourth Amendment, search ordinarily must be based on individualized suspicion of wrongdoing. U.S.C.A. Const.Amend. 4 .

[18] Searches and Seizures 349 42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In general. Most Cited Cases

While individualized suspicion is normal requirement for conducting search, for Fourth Amendment purposes, particularized exceptions to main rule are sometimes warranted based on special needs, beyond normal need for law enforcement. U.S.C.A. Const.Amend. 4.

[19] Searches and Seizures 349 42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In general. Most Cited Cases

When government alleges that special needs justify Fourth Amendment intrusion, courts must undertake context-specific inquiry, examining closely competing private and public interests advanced by parties. U.S.C.A. Const.Amend. 4.

[20] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases

In limited circumstances, where privacy interests implicated by search are minimal, and where important governmental interest furthered by intrusion would be placed in jeopardy by requirement of individualized suspicion, search may be reasonable despite absence of such suspicion. U.S.C.A. Const.Amend. 4.

[21] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Applicable test in determining whether policy requiring government employees to undergo drug testing violates Fourth Amendment is job-category-by-category balancing of individual's privacy expectations against government's interests, with other relevant factors being character of intrusion, particularly whether collection method affords modicum of privacy, and efficacy of testing regime. U.S.C.A. Const.Amend. 4.

[22] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases

"Compelling interest" is one important enough to justify particular search at hand, for Fourth Amendment purposes, in light of other factors that show search to be relatively intrusive upon genuine expectation of privacy. U.S.C.A. Const.Amend. 4.

[23] Searches and Seizures 349 78

349 Searches and Seizures

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349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Government employees engaged in safety-sensitive tasks, particularly those involved with operation of heavy machinery or means of mass transit, may be subject to suspicionless drug testing under Fourth Amendment. U.S.C.A. Const.Amend. 4.

[24] Civil Rights 78 1455

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1455 k. Employment practices. Most Cited Cases

Declaratory Judgment 118A 395

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak395 k. Determination and disposition of cause. Most Cited Cases

District court's declaratory judgment, in action brought by union representing state employees, holding that governor's executive order (EO) calling for random drug testing of all state employees violated Fourth Amendment, and injunction coextensive with that declaration, were overly broad, requiring remand for district court to more precisely tailor its relief to extent EO might be unconstitutional. U.S.C.A. Const.Amend. 4.

[25] Statutes 361 1533

361 Statutes
361VIII Validity
361k1532 Effect of Partial Invalidity; Severability
361k1533 k. In general. Most Cited Cases

"Normal rule" is that partial, rather than facial, constitutional invalidation is required course, such that statute may be declared invalid to extent that it reaches too far, but otherwise left intact.

[26] Constitutional Law 92 1140

92 Constitutional Law
92IX Overbreadth in General
92k1140 k. In general. Most Cited Cases

Outside limited settings of free speech, right to travel, abortion rights, and legislation under § 5 of Fourteenth Amendment, and absent good reason, courts do not extend invitation to bring overbreadth claims. U.S.C.A. Const.Amends. 1, 14.

[27] Civil Rights 78 1455

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1455 k. Employment practices. Most Cited Cases

Declaratory Judgment 118A 395

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak395 k. Determination and disposition of cause. Most Cited Cases

Appellate court would decline to refashion district court's overly broad declaratory judgment holding that governor's executive order (EO) calling for random drug testing of all state employees violated Fourth Amendment, and injunction coextensive with that declaration, simply by cutting them down to cover only those categories of employees as to whom EO's application was unconstitutional; the sort of fact-intensive line-drawing required was task that properly belonged to district court. U.S.C.A. Const.Amend. 4.

[28] Federal Courts 170B 3766

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(L) Determination and Disposition of Cause
170Bk3765 Affirmance
170Bk3766 k. In general. Most Cited

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Cases
(Formerly 170Bk926.1)

Federal Courts 170B 3771

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(L) Determination and Disposition of Cause
170Bk3771 k. Modification. Most Cited Cases
(Formerly 170Bk931)
Appellate court undoubtedly has power to modify injunctions, or to affirm judgment as to some plaintiffs but not others.

[29] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases
State employees' alleged consent to suspicionless drug testing mandated by executive order (EO) by submitting to testing requirement rather than quitting their jobs did not, standing alone, render EO constitutional under Fourth Amendment. U.S.C.A. Const.Amend. 4.

[30] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Searches and Seizures 349 181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases
Government employees' submission to drug testing, on pain of termination, does not constitute consent, for Fourth Amendment purposes, under governing Supreme Court case law. U.S.C.A. Const.Amend. 4.

[31] Searches and Seizures 349 171

349 Searches and Seizures
349V Waiver and Consent
349k171 k. In general. Most Cited Cases

Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general. Most Cited Cases
Although search conducted pursuant to valid consent is permissible under Fourth Amendment, consent must be in fact voluntarily given, and not result of duress or coercion, express or implied. U.S.C.A. Const.Amend. 4.

[32] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Searches and Seizures 349 181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases
Government employees who must submit to drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion, for Fourth Amendment purposes. U.S.C.A. Const.Amend. 4.

[33] Searches and Seizures 349 180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary nature in general.

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Most Cited Cases

If search is unreasonable under Fourth Amendment, government employer cannot require that its employees consent to that search as condition of employment. U.S.C.A. Const.Amend. 4.

[34] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

State's alleged need for safe and efficient workplace did not establish special need for drug testing of state employees required to depart from Fourth Amendment's requirement of individualized suspicion for search. U.S.C.A. Const.Amend. 4.

[35] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

If safety is government employer's justification for drug testing policy, then public safety must be "genuinely in jeopardy" in order to establish special need required to depart from Fourth Amendment's requirement of individualized suspicion for search. U.S.C.A. Const.Amend. 4.

[36] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Governmental concern in general integrity of its workforce is insufficiently important to warrant random drug testing under special needs exception to Fourth Amendment's requirement of individualized suspicion for search. U.S.C.A. Const.Amend. 4
.

[37] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Government's need for suspicionless drug testing of its employees must be far more specific and substantial than generalized existence of societal drug problem in order for testing to be justified under special needs exception to Fourth Amendment's requirement of individualized suspicion for search. U.S.C.A. Const.Amend. 4.

[38] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

Although state does not need to present evidence of drug problem in group of employees it seeks to test, showing of existing problem would shore up an assertion of special need, as exception to Fourth Amendment's requirement of individualized suspicion for search. U.S.C.A. Const.Amend. 4
.

[39] Civil Rights 78 1405

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1405 k. Employment practices. Most Cited Cases

Union representing state employees ultimately bore burden of persuasion in its § 1983 action challenging executive order (EO) imposing random drug testing on Fourth Amendment grounds. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[40] Civil Rights 78 1401

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases

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In § 1983 action, plaintiff bears burden of persuasion on every element. 42 U.S.C.A. § 1983.

[41] Civil Rights 78 1401

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases

Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

In drug testing context, a plaintiff in § 1983 action may initially meet both burden of going forward and initial burden of persuasion by demonstrating that (1) there was search, and (2) it was conducted without individualized suspicion, which ordinarily is minimum requirement of Fourth Amendment; that showing creates presumption that search was unconstitutional and shifts burden of production to testing policy's proponent to make special-needs showing. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[42] Civil Rights 78 1401

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases

Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and tests; identification procedures. Most Cited Cases

If proponent of drug testing fails to respond, or fails to produce sufficient special-needs showing, in § 1983 action challenging testing policy on Fourth Amendment grounds, then plaintiff would prevail; however, if proponent does respond by demonstrating that it had special needs sufficiently important to justify suspicionless search, then district court must conduct special-needs balancing test, bearing in mind that ultimate burden of persuasion remains squarely on plaintiff. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[43] Civil Rights 78 1401

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases

Once § 1983 plaintiff proves that Fourth Amendment's ordinary requirements have not been met, it is presumed that search is unconstitutional; then, government, which is party against whom presumption is directed, must make sufficiently powerful showing to justify its intrusion on plaintiff's expectation of privacy. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[44] Evidence 157 89

157 Evidence
157II Presumptions
157k89 k. Rebuttal of presumptions of fact. Most Cited Cases

Evidence 157 94

157 Evidence
157III Burden of Proof
157k94 k. Extent of burden in general. Most Cited Cases

Consistent with general rule in § 1983 cases, federal evidentiary rule stating that, in civil case, party against whom presumption is directed has burden of producing evidence to rebut presumption does not shift burden of persuasion, which remains on party who had it originally. 42 U.S.C.A. § 1983; Fed.Rules Evid.Rule 301, 28 U.S.C.A.

[45] Civil Rights 78 1401

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78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1401 k. In general. Most Cited Cases
Shifting burden of production to government to justify warrantless search is familiar feature of § 1983 civil lawsuits raising Fourth Amendment claims. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

***856** Shalini Goel Agarwal, Randall C. Marshall, ACLU Foundation of Florida, Inc., Miami, FL, Peter G. Walsh, David W. Singer & Associates, Hollywood, FL, for Plaintiffs–Appellees.

***857** Jesse Panuccio, Florida Dept. of Economic Opportunity, Michael Sevi, Charles M. Trippe, Executive Office of the Governor, Tallahassee, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before MARCUS, BLACK and SILER,[FN*] Circuit Judges.

FN* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

MARCUS, Circuit Judge:

This appeal presents two closely related issues: first, the extent to which an executive order that mandates suspicionless drug testing of 85,000 state employees violates the Fourth Amendment; and, second, the propriety of the district court's decision to enjoin the Governor of Florida from testing all 85,000 covered employees. The district court, confronted with a suspicionless drug testing policy that almost certainly sweeps far too broadly and hence runs afoul of the Fourth Amendment in many of its applications, granted relief that also swept too broadly and captured both the policy's constitutional applications and its unconstitutional ones. We therefore vacate the district court's order and remand for further proceedings.

Confusion regarding the scope of the relief that the plaintiffs requested has plagued this lawsuit from its inception in 2011. In that year, Appellant Rick Scott, the Governor of Florida, issued Executive Order 11–58 ("EO"), which mandated two types of suspicionless drug testing: random testing of all employees at state agencies within his control, and pre-employment testing of all applicants to those agencies. Appellee American Federation of State, County, and Municipal Employees Council 79 ("Union"), which represents many employees covered by the EO, sued in the United States District Court for the Southern District of Florida to invalidate the EO, and to enjoin its implementation, as unconstitutional under the Fourth Amendment. Initially, as the Union itself has conceded, its challenge was exclusively facial in nature and sought to strike down the entire EO rather than to limit its applicability. By the summary-judgment stage, however, the Union urged the district court to construe its complaint as making both a facial and an as-applied challenge. The Union's as-applied challenge contended only that the EO was unconstitutional when applied to employees not occupying safety-sensitive positions—a group that the Union estimated to be roughly 60 percent of the covered employees.

The district court granted summary judgment to the Union and denied summary judgment to the State. In its order, the district court concluded that the State's justifications for testing all of its employees, including those in non-safety-sensitive positions, were insufficient. The court then turned to the question of what relief it would grant. The district court granted relief that it described as "as-applied" but that remained essentially facial in nature: the court invalidated the EO, and enjoined its implementation, as to all 85,000 current state employees. This relief covered every single employee and disregarded any distinction between

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safety-sensitive and non-safety-sensitive positions.

[1] Yet, as the Supreme Court has established, a party is entitled to facial invalidation of a law on Fourth Amendment grounds only if the party can demonstrate ***858** that there are no constitutional applications of that law. In this case, the district court declared the EO unconstitutional as to *all* current state employees. This relief swept too broadly, enjoined both constitutional and unconstitutional applications of the EO, and did so without examining the specific job categories to be tested. What the Supreme Court's case law requires, in contrast, is that the trial court balance the governmental interests in a suspicionless search against each particular job category's expectation of privacy. Among the covered state employees, for example, are law enforcement personnel who carry firearms as well as employees tasked with operating heavy machinery or large vehicles—groups that the Supreme Court has held, in a line of precedent beginning with *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), may be drug tested without individualized suspicion. As to those safety-sensitive employees, the EO's application would most likely be constitutional, and, therefore, the district court's order cannot stand as written.

The State, however, asks us to do more than vacate and remand. It argues that the Governor is entitled to summary judgment, and that we should reverse the district court, because the EO is constitutional as applied to all 85,000 state employees. At bottom, the State wants us to approve of a drug testing policy of far greater scope than any ever sanctioned by the Supreme Court or by any of the courts of appeals. In order to meet its burden of justifying the EO, the State offers several reasons, stated only at the highest order of abstraction, for why it can drug test all of its employees without any individualized suspicion. However, the Supreme Court has approved of suspicionless drug testing only when the government has demonstrated heightened interests, such as a serious threat to public safety, that apply narrowly to specific job categories of employees. Yet during the summary judgment proceedings, the State refused to provide reasons that apply narrowly to specific job categories, which undoubtedly hindered the district court from conducting its balancing calculus at the proper level of specificity. On remand, the State must meet its burden of demonstrating important special needs on a job-category-by-category basis. Its current arguments have failed to convince us to direct summary judgment in its favor.

I.

A.

On March 22, 2011, Governor Scott issued Executive Order 11–58. The EO directed all state agencies "within the purview of the Governor ... to provide for pre-employment drug testing for all prospective new hires and for random drug testing of all employees within each agency." The EO further instructed the agencies to "provide for the potential for any employee ... to be tested at least quarterly." Approximately 85,000 people, or 77 percent of the State's workforce, are covered by the EO.

Although the Executive Order does not specify a method of drug testing, the State indicated in the district court that urinalysis would be the method used to implement the testing program. The testing process would afford the person providing the sample "individual privacy" unless there is reason to believe that a particular individual intends to alter or substitute the sample. In addition, the results of the drug tests cannot be used as evidence, obtained in discovery, or otherwise disclosed in any public or private proceeding.

The EO represented a significant expansion of the State's employee drug testing ***859** regime. Prior to the EO's issuance, Florida's Drug–Free Workplace Act ("DFWA"), Fla. Stat. § 112.0455, *permitted* drug testing in more limited instances. State agencies were authorized to test: job applicants to "safety-sensitive position[s]," meaning "any position, including a supervisory or management posi-

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tion, in which a drug impairment would constitute an immediate and direct threat to public health or safety," § 112.0455(5)(f) & (m); current employees, if the employer had reasonable suspicion; current employees, if the test was "conducted as part of a routinely scheduled employee fitness-for-duty medical examination"; and current employees who entered "an employee assistance program for drug-related problems." *See* § 112.0455(7)(a)–(d). This version of the statute notably did not provide for random suspicionless testing of any current employees, even those employed in safety-sensitive positions.

Other statutes or administrative regulations provided for suspicionless testing of current employees in specific departments. The Department of Corrections ("DOC"), for instance, provided for random suspicionless testing of its employees. *See* Fla. Stat. § 944.474. The Department of Juvenile Justice ("DJJ") also required random suspicionless drug testing of its employees. The Department of Transportation ("DOT") and the Department of Environmental Protection ("DEP"), meanwhile, required random suspicionless testing of their safety-sensitive employees, particularly those who held commercial driver's licenses.

In 2012, the Florida Legislature amended the Drug–Free Workplace Act and substantially broadened it. The current version of Fla. Stat. § 112.0455 permits random testing of all employees at three-month intervals, *see* § 112.0455(7)(c) (2012), and expands the definition of "job applicant" to cover all job applicants, *see* § 112.0455(5)(f) (2012). In essence, the current version of the DFWA authorizes what the EO mandates.

The text of the Executive Order offers several justifications for this sweeping policy, including, among others, that: (1) "the State, as an employer, has an obligation to maintain discipline, health, and safety in the workplace"; (2) "illegal drug use has an adverse [e]ffect on job performance," including the risk of absenteeism, greater burden on state health benefit programs, and a decline in productivity; and (3) drug use poses a risk to the public, which "interacts daily with state employees."

Prior to the issuance of the EO, the State had collected data from random drug testing of job applicants and employees at three departments—the Department of Transportation, the Department of Juvenile Justice, and the Department of Corrections. Random testing at DOT and DJJ yielded positive results in less than one percent of cases between 2008 and 2011; random testing at DOC produced positive results in less than one percent of cases in 2008 and 2009, then increased to 2.4 and 2.5 percent in 2010 and 2011. The State presented this data as evidence that there was a preexisting drug problem among the state employee population.

B.

On May 31, 2011, before any agency implemented the EO, the Union filed suit, alleging that the EO violated the Fourth Amendment. Using the terminology of a facial challenge, the Union described its suit as "an action ... for a preliminary injunction and a permanent injunction against the Governor of the State of Florida, ordering him to cease, or not implement, all employee drug-testing mandated by his Executive Order Number 11–58," and also for "declaratory judgment declaring***860** that the drug-testing regime mandated by Executive Order 11–58 violates the Fourth Amendment of the Constitution." Compl. ¶ 1. The gravamen of the complaint was that "[t]he Supreme Court of the United States has held that suspicionless drug-testing by the government is an unreasonable search violative of the Fourth Amendment, except under certain special circumstances," none of which applied to the EO. Compl. ¶ 11. More precisely, the EO "violate[d] the Fourth Amendment ... because it command[ed] state agencies to conduct random, suspicionless searches of all employees, without limiting the searches in any way to employees in safety-sensitive positions where there is a concrete danger of real harm." Compl. ¶ 13.

Regarding its standing, the Union averred that

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it represented more than 50,000 employees at the agencies covered by the EO. Its members were subject both to the random testing requirement for current employees as well as the pre-employment testing requirement for new hires because "employees represented by [the Union] who seek a promotion to another job are considered new employees." Compl. ¶ 15. Thus, the Union "sue[d] on its own behalf" as well as "in its organizational capacity on behalf of those state employees it represent[ed]." Compl. ¶ 16.

In the final section of the complaint, the Union reiterated its request for facial relief. The Union first asked the district court to declare "that Defendant's Executive Order 11–58 is quashed because it violates the right of the people to be free from unreasonable searches, under the Fourth Amendment." The Union further urged the district court to issue a permanent injunction ordering "the Defendant [to] immediately direct all agencies and persons affected by Defendant's Executive Order 11–58 to cease all drug-testing implemented in compliance with the order." Compl. at 6–7.

C.

The parties filed cross motions for summary judgment. The Union argued that the Executive Order was unconstitutional because it failed to separate safety-sensitive from non-safety-sensitive positions and thus moved the district court to issue both a declaratory judgment declaring that the EO violated the Fourth Amendment and a permanent injunction barring the EO's implementation.

Notably, at this stage, the Union began recasting its complaint in the terminology of an as-applied challenge. The Union stressed that it "challenge [d] only the new drug-testing regime that tests the rest of the State's workers [not covered by the then-current version of Fla. Stat. § 112.0455]—those not suspected of drug abuse and those who don't hold safety-sensitive jobs." And, in its opposition to the State's cross-motion for summary judgment and its reply brief, the Union expressly insisted it had made an as-applied challenge. The Union argued that "the Complaint, fairly read, clearly put the Governor on notice that [the Union] was bringing both a facial and as-applied challenge," and that its as-applied challenge contended that the statute was "unconstitutional as applied to [Union] bargaining unit members who are not reasonably suspected of drug abuse and who are not in safety-sensitive positions." The Union further clarified that, for purposes of its as-applied challenge, it was "not challenging drug-testing of those in safety-sensitive positions."

In support of its motion, the State argued: (1) that the Union lacked standing; (2) that the Union could not succeed on what the State maintained was a facial challenge to the Executive Order; (3) that, ***861** on the merits, the EO was constitutional because individuals consented to the test; or, alternatively, (4) that the EO was constitutional because the State had a special need justifying suspicionless drug testing. In its special-needs analysis, the State offered its interest in a safe, productive, and efficient workplace as the primary need justifying the EO. The State expressly declined to specify which groups of employees presented heightened safety concerns, instead arguing generally that "even if safety concerns were the only permissible justification, the notion that only intoxicated employees with certain duties present a danger to others ... is untenable." Thus, according to the State, the proffered safety need applied across the board and to all employees:

> An employee need not drive a train, carry a gun, or interdict drugs to present a safety risk. Even a desk-bound clerk ... may become violent with other employees or the public, may present a danger when driving a car in the workplace parking lot, or may exercise impaired judgment when encountering any of the myriad hazards that exist in the workplace environment ....

The State also asserted that the privacy interests of state employees were diminished for several reasons. First, drug testing among private employers had become common. Second, Florida had

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a tradition of open government. Finally, the policy was clearly announced, so employees could not have any expectation of privacy. As for the Union's as-applied challenge, the State declined to meet it head-on. Instead, it argued only that the district court should reject the Union's attempt to recast its pleadings because "prior to the about-face in its [o]pposition [to defendant's motion for summary judgment], Plaintiff repeatedly relied on the solely facial nature of its claim." According to the State, therefore, the district court should consider and reject only the Union's facial challenge.

D.

On April 25, 2012, the district court granted summary judgment to the Union and, in turn, denied the State's motion. After finding that the Union had standing to challenge the Executive Order,[FN1] the district court conducted the special-needs balancing test established in *Skinner* and weighed the State's asserted public interests against the employees' privacy interests. The district court first determined that the public interests asserted were "notably broad and general compared to the interests that the Supreme Court ... held justify suspicionless drug testing." The court then rejected the State's assertion that state employees possessed a diminished privacy interest. The district court therefore concluded that the EO was unconstitutional.

> FN1. Scott has not appealed the district court's determination that the Union had standing to challenge the EO, and we are satisfied that the Union has standing to mount this challenge.

The district court turned to crafting the remedy. Although the State argued that the Union had mounted exclusively a facial challenge, the court pointed out that the Union had conceded that the Fourth Amendment permitted drug testing of state employees in safety-sensitive positions. However, the district court then characterized the Union's challenge "as consistent with an 'as-applied' challenge .... [that] asserts at most that the EO cannot be constitutionally applied to *any* current employee at a covered agency." (Emphasis added.) Accordingly, the district court granted far more sweeping relief***862** than was consistent with the Union's concession. The Court granted a declaratory judgment holding the EO unconstitutional and issued an injunction coextensive with that declaration, which barred drug testing of "both Union and non-Union employees .... currently employed at covered agencies" as of the date of the district court's order. In short, the district court struck down the EO insofar as it covered all 85,000 current state employees. The only thing that the judgment and injunction did not address was the application of the EO to "pre-employment testing of non-current employees," a group the district court labeled "prospective new hires," and "the random testing of those hired after the issuance of the EO."

The State timely appealed.

II.

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). We review a district court's grant of summary judgment *de novo*, viewing the facts and drawing all reasonable inferences in the light most favorable to the non-moving party. *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1231 (11th Cir.2011). We review the decision to grant a permanent injunction for abuse of discretion but review the district court's underlying legal conclusions *de novo*. *See Alabama v. Ctrs. for Medicare & Medicaid Servs.*, 674 F.3d 1241, 1244 n. 2 (11th Cir.2012).

A.

The parties first dispute whether the relief the district court granted in this case was facial or as-applied in nature. Although the boundary between these two forms of relief is not always clearly or easily demarcated, the district court's decision to strike down the EO and enjoin its implementation as to all 85,000 current employees has the essential characteristics of facial relief.

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From the outset, the Union mounted a facial challenge to the Executive Order. That much is apparent from the face of the complaint. We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature. *See Doe v. Reed,* 561 U.S. 186, 130 S.Ct. 2811, 2817, 177 L.Ed.2d 493 (2010). The heart of the Union's requested remedy was two-fold: first, that the district court broadly declare "that Defendant's Executive Order 11–58 is quashed because it violates the right of the people to be free from unreasonable searches, under the Fourth Amendment"; and, second, that the district court issue an injunction ordering "the Defendant [to] immediately direct *all* agencies and persons affected by Defendant's Executive Order 11–58 to cease all drug-testing implemented in compliance with the order." Compl. at 6–7 (emphasis added). There can be no doubt that this relief would be facial in nature. And, indeed, the Union expressly maintained that its challenge was facial prior to filing a motion for summary judgment.

However, the Union began requesting both facial and as-applied relief at the summary-judgment stage. In requesting as-applied relief, the Union explained that it "challenge[d] only the new drug-testing regime that tests ... those not suspected of drug abuse and those who don't hold safety-sensitive jobs," and that it was "not challenging drug-testing of those in safety-sensitive positions." The Union identified the non-safety-sensitive category of employees to be roughly 60 percent of all employees covered by the EO.

[2][3] Insofar as the Union mounted a facial challenge to the Executive Order— ***863** and it surely did that—it had to meet an especially demanding standard. "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir.2000). "[W]hen a plaintiff mounts a facial challenge to a statute or regulation, the plaintiff bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg., Inc. v. City of Miami Beach,* 486 F.3d 1254, 1262 (11th Cir.2007). Put another way, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Supreme Court reaffirmed *Salerno*'s validity as recently as 2010, *see United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010) (citing *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095), and, just last year, a panel of this Court reiterated that the strict "no set of circumstances" test is the proper standard for evaluating a facial challenge. *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1255 & n. 19 (11th Cir.2012).

[4] *Salerno* also applies when a court grants relief that is quasi-facial in nature—that is, relief that reaches beyond the plaintiffs in a case. In *Doe v. Reed,* for instance, the Supreme Court considered a challenge that a state law violated the First Amendment when applied to referendum petitions. 130 S.Ct. at 2817. The Court noted that characterizing the challenge as either facial or as-applied was problematic because the challenge "obviously ha [d] characteristics of both: The claim [wa]s 'as applied' in the sense that it d[id] not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim [wa]s 'facial' in that it [wa]s not limited to plaintiffs' particular case ...." *Id.* When a plaintiff brings this sort of quasi-facial challenge, "[t]he label is not what matters." *Id.* Where "an injunction ... reach[es] beyond the particular circumstances of these plaintiffs," it "must therefore satisfy [the Supreme Court's] standards for a facial challenge to the extent of that reach." *Id.*

[5][6][7][8] Prior to considering the propriety of the Union's facial challenge, the district court correctly attempted to construe the Union's complaint as making a more limited, as-applied challenge to the EO. The State objects that the district court could not have construed the Union's suit as an as-applied challenge at all because the Union's

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complaint requested only facial relief and the Union insisted during discovery that it was mounting a facial challenge. This objection is unconvincing. Ordinarily, it is true that, "[a]t the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment" or one advocating summary judgment. *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir.2004). In this case, however, the Union was not stating a new claim, only clarifying the scope of its desired remedy. As the Supreme Court has explained, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction ... goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *see* ***864***Jacobs v. Fla. Bar*, 50 F.3d 901, 905 n. 17 (11th Cir.1995) (we are not bound by a party's characterization of the complaint as facial, but rather look to whether "the complaint sets forth a cause of action for an as-applied challenge").

[9][10] As a general matter, courts strongly disfavor facial challenges, and for good reason:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (citations and internal quotation marks omitted). Thus, courts construe a plaintiff's challenge, if possible, to be as-applied. *See Jacobs*, 50 F.3d at 905 n. 17; *see also Stupak–Thrall v. United States*, 89 F.3d 1269, 1288 (6th Cir.1996) (Boggs, J., dissenting) ("[U]nless a plaintiff expressly disavows an 'as-applied' challenge, the complaint that a regulation is invalid should be construed, if possible, as an as-applied challenge.").

[11] However, despite explicitly saying that it was granting only as-applied relief, the district court in this case granted what effectively amounted to facial relief by declaring the Executive Order unconstitutional and enjoining its application to all 85,000 current employees. As the district court itself acknowledged, the concession that transformed the lawsuit into an as-applied challenge was the Union's admission that the Fourth Amendment permitted drug tests of state employees in safety-sensitive positions. Yet the district court did not follow that reasoning to its necessary conclusion, which was that the proper scope of the as-applied challenge—and the scope of the relief that it could have granted based on the Union's motion for summary judgment—was limited to those employees not occupying safety-sensitive positions. Instead, the district court characterized the Union's concession "as consistent with an 'as-applied' challenge .... [that] asserts at most that the EO cannot be constitutionally applied to *any* current employee at a covered agency." (Emphasis added.) In doing so, the district court attached an as-applied label to what essentially amounted to a facial challenge concerning all 85,000 current state employees.

This led the district court to grant both a declaratory judgment and a corresponding injunction that were too broad. In determining the scope of its relief, the court began by dividing the individuals

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subject to the EO into three groups: (1) employees at the covered agencies prior to the issuance of district court's order; (2) "prospective new hires," which meant "individuals who are not currently employed at covered agencies"; and (3) employees at the covered agencies hired after the district court's order. The district court then granted the Union declaratory judgment declaring the EO unconstitutional, and an injunction that mirrored the scope of that declaration, as to the first group. The court stated that its order left "unresolved" the question of the EO's constitutionality with regard to the latter two ***865** groups, since "[t]he Union ma[de] no claims as to the constitutionality of the EO as it relates to pre-employment testing of non-current employees, or the random testing of those hired after the issuance of the EO." This limitation, however, did not transform the district court's relief from facial to as-applied.

[12] As we've said, the line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation. The Supreme Court itself has weighed challenges with both facial and as-applied characteristics, *see, e.g.*, *Doe*, 130 S.Ct. at 2817, and perhaps the best understanding of constitutional challenges is that "[t]here is no single distinctive category of facial, as opposed to as-applied, litigation." Richard H. Fallon, Jr., *As–Applied and Facial Challenges and Third–Party Standing*, 113 Harv. L.Rev. 1321, 1321 (2000). As both parties acknowledged at oral argument, the district court's order has characteristics of both facial and as-applied relief. On the one hand, it reaches far beyond the scope of the Union's as-applied challenge and encompasses all current state employees. On the other hand, the district court did not invalidate the EO in its entirety.

Nonetheless, we conclude that the district court granted what effectively amounted to facial relief—or, at the very least, relief that had enough characteristics of facial relief to demand satisfaction of *Salerno*'s rigorous standard. The essential point is that the district court invalidated the EO across the board covering *all* 85,000 state employees, the overwhelming majority of those subject to the EO. The scope of the district court's judgment is extremely broad and, notably, its relief was not limited in any way by the concession the Union itself made: "[O]n March 22, 2011 (the date of promulgation) there was at least one employee ... who held a high-risk, safety-sensitive job, and was subject to EO 11–58. And we admit that the Fourth Amendment does not bar the random drug testing of government employees in high-risk, safety-sensitive jobs." Notwithstanding that concession, the district court's judgment and injunction bar the State from testing that employee and, indeed, any other current employee who, for example, occupies a law enforcement position that requires carrying a firearm.

Nor does the district court's cutoff of the scope of its judgment and the accompanying injunction transform that relief into as-applied relief. The district court invalidated the Executive Order and enjoined its implementation as to the vast majority of individuals covered by the EO. To be sure, the district court did not declare unconstitutional or enjoin the implementation of the entirety of the EO. But the district court's decision not to cover pre-employment testing of prospective new hires does not alter our view that the relief it did grant was facial as to all 85,000 current employees. If a statute has two distinct provisions, and a court strikes down one as unconstitutional (and indeed, one that covers so many employees), we would not say that the relief was as-applied simply because a part of the statute remains. Rather, we would say that, as to the provision the court struck down, the plaintiff obtained facial relief. *See Doe*, 130 S.Ct. at 2817. FN2 Here, that is precisely what the Union received. Rather than ***866** conducting any kind of job-category-by-category inquiry, and narrowly tailoring its decision to the precise contours of the constitutional violation, the district court facially invalidated the provision of the Executive Order that provides "for random drug testing of all em-

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ployees within each agency."

> FN2. The alternative is untenable. If a challenge to a statute only became facial in nature when it attacked every provision within a statute, then any moderately clever drafter could insulate an unconstitutional statute from a facial challenge simply by adding a provision to the statute that was clearly constitutional.

B.

Having established that the district court granted facial relief, the essential question becomes whether that relief could meet *Salerno*'s demanding standard. To uphold the scope of the relief, we would have to be convinced that the State could never constitutionally require any of the 85,000 current state employees protected by the injunction to submit to a suspicionless drug test. But the answer, plainly, is that there are some (how many is unclear) current state employees as to whom suspicionless drug testing is constitutionally permissible. This conclusion ineluctably follows from the line of Supreme Court precedent beginning with *Skinner*, which held that the Fourth Amendment permits suspicionless drug testing of certain safety-sensitive categories of employees—for instance, employees who operate or pilot large vehicles, or law enforcement officers who carry firearms in the course of duty.

[13][14][15][16] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, and applies to the states through the Due Process Clause of the Fourteenth Amendment. *See City of Ontario v. Quon*, 560 U.S. 746, 130 S.Ct. 2619, 2624, 177 L.Ed.2d 216 (2010). Testing a urine sample, which "can reveal a host of private medical facts about an employee," and which entails a process that "itself implicates privacy interests," is a search. *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402; *see also Chandler v. Miller*, 520 U.S. 305, 313, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). The basic question we are required to answer when confronted with a drug-testing policy is whether this search is reasonable. *Chandler*, 520 U.S. at 313, 117 S.Ct. 1295. While "[i]n the criminal context, reasonableness usually requires a showing of probable cause" to obtain a search warrant, that standard is "unsuited to determining the reasonableness of administrative searches where the 'Government seeks to *prevent* the development of hazardous conditions.' " *Bd. of Educ. v. Earls*, 536 U.S. 822, 828, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667–68, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)).

[17][18][19][20] The default rule in this context, therefore, is that "[t]o be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler*, 520 U.S. at 313, 117 S.Ct. 1295. While individualized suspicion is the normal requirement, "particularized exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.' " *Id.* (quoting *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402). When the government alleges that special needs justify this Fourth Amendment intrusion, "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314, 117 S.Ct. 1295. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402.

***867** [21][22] Therefore, the test we apply is a job-category-by-category balancing of "the individual's privacy expectations against the Government's interests," *Von Raab*, 489 U.S. at 665, 109 S.Ct. 1384, with other relevant factors being "the character of the intrusion"—particularly whether

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the collection method affords a modicum of privacy, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)—and the efficacy of the testing regime, *see Chandler*, 520 U.S. at 319–20, 117 S.Ct. 1295. At times, the Supreme Court has described the interests justifying suspicionless drug testing as "compelling." *See Von Raab*, 489 U.S. at 670, 109 S.Ct. 1384; *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. In *Vernonia*, the Court clarified that "[i]t is a mistake, however, to think that the phrase 'compelling state interest,' in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern," and therefore we cannot "dispose of a case by answering in isolation the question: Is there a compelling state interest here?" 515 U.S. at 661, 115 S.Ct. 2386. Rather, a compelling interest is one "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*

[23] The Supreme Court has had five occasions to evaluate suspicionless drug testing policies in the last twenty-five years. We therefore know the kinds of interests that are important enough to subject certain limited categories of individuals to suspicionless drug tests, and, moreover, we know that some of the 85,000 current state employees fall within those categories. In *Skinner*, the Supreme Court established that the government has a compelling need to test railroad employees. In that case, the Federal Railroad Administration ("FRA") required suspicionless drug testing of workers involved in railroad accidents. 489 U.S. at 606, 109 S.Ct. 1402. As for the first factor in the balancing test, the FRA's interest, the Court's inquiry focused intently on the special characteristics of the railroad industry, where on-the-job intoxication was "a significant problem" that had resulted in "21 significant train accidents" in a ten-year period. *Id.* at 607, 109 S.Ct. 1402. On the other side of the ledger, the Court reasoned that "the expectations of privacy of covered employees [we]re diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627, 109 S.Ct. 1402. As the Court pointed out, railroad "employees ha[d] long been a principal focus of regulatory concern," with various federal laws subjecting railroad employees' physical fitness to testing and regulation. *See id.* at 627–28, 109 S.Ct. 1402. The two other factors were the character of the intrusion and the efficacy of the policy. The FRA's urine testing was not overly intrusive because it did not require direct observation, *id.* at 626, 109 S.Ct. 1402, and testing was effective because it "deterr[ed] employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Id.* at 629, 109 S.Ct. 1402; *accord id.* at 631–32, 109 S.Ct. 1402. In light of these factors, most notably the serious risks to public safety implicated by this specific category of employees, the Court upheld the constitutionality of the FRA's policy. *See id.* at 633, 109 S.Ct. 1402. The principle we draw from *Skinner* is that government "employees ... engaged in safety-sensitive tasks," *id.* at 620, 109 S.Ct. 1402, particularly those involved with the operation of heavy machinery or means of mass transit, may be subject to suspicionless drug testing.

In *Von Raab*, the Supreme Court identified several other job categories that a suspicionless drug testing policy may cover.***868** At issue in that case was the United States Customs Service's required urinalysis testing for three job categories: first, those directly involved in drug interdiction; second, those who carried firearms; and third, those who handled classified material. 489 U.S. at 660–61, 109 S.Ct. 1384. The Court began by identifying the government's special needs with regard to the first two categories. *Id.* at 668, 109 S.Ct. 1384. Customs employees responsible for drug interdiction were "exposed to th[e] criminal element and to the controlled substances it s[ought] to smuggle into the country"; the Customs Service was concerned not only about those employees' "physical safety" but also the risk of bribery or corruption. *See id.* at 669, 109 S.Ct. 1384. Thus, the Supreme Court found that "the Government ha[d] a compelling interest in en-

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suring that front-line interdiction personnel [we]re physically fit, and ha [d] unimpeachable integrity and judgment." *Id.* at 670, 109 S.Ct. 1384. Similar logic applied to those who carried firearms. Employees "who may use deadly force plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* (internal quotation marks omitted).

As for the privacy interests implicated by the search, the Supreme Court began by noting that "certain forms of public employment may diminish privacy expectations even with respect to such personal searches." *Id.* at 671, 109 S.Ct. 1384. The Court explained that, "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.* at 672, 109 S.Ct. 1384. "Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness," and thus their privacy could not "outweigh the Government's compelling interests in safety and in the integrity of our borders." *Id.*

As for employees who handled classified information, however, the Court remanded. While noting that the protection of "truly sensitive information" is "compelling," *id.* at 677, 109 S.Ct. 1384, the Court questioned the Customs Service's designation of several classes of employees—for instance, baggage clerks and messengers—as belonging to this category. *See id.* at 678, 109 S.Ct. 1384. Since the Court could not determine "whether the Service ha[d] defined this category of employees more broadly than is necessary," it remanded for the lower courts to determine more precisely which employees truly dealt with sensitive information. *See id.*

The Supreme Court next approved of suspicionless drug testing in a far different context than government employment: schools. The Court upheld the constitutionality of two schools' policies of randomly drug testing student athletes, *Vernonia*, 515 U.S. at 648, 115 S.Ct. 2386, and students participating in competitive extracurricular activities, *Earls*, 536 U.S. at 825, 122 S.Ct. 2559. The Supreme Court found that there was a special need in the public school context, where teachers were responsible for their young charges. *See Vernonia*, 515 U.S. at 661, 115 S.Ct. 2386 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs ... or deterring drug use by engineers and trainmen ...."); *Earls*, 536 U.S. at 829, 122 S.Ct. 2559. As for the students' privacy interests, the Court noted that the students by definition were "(1) ***869** children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Vernonia*, 515 U.S. at 654, 115 S.Ct. 2386. The State, acting *in loco parentis*, exercised "a degree of supervision and control that could not be exercised over free adults." *Id.* at 655, 115 S.Ct. 2386; *see Earls*, 536 U.S. at 831, 122 S.Ct. 2559. Those diminished privacy interests could not overcome the government's important interests in protecting children from drug use. *See Vernonia*, 515 U.S. at 665, 115 S.Ct. 2386; *Earls*, 536 U.S. at 838, 122 S.Ct. 2559.

In contrast to the preceding cases, the Supreme Court rejected a Georgia statute that required all candidates for certain state offices to submit to a drug test at a time of their choosing prior to the election. *See Chandler*, 520 U.S. at 309–10, 117 S.Ct. 1295. Georgia attempted to justify its policy based on "the incompatibility of unlawful drug use with holding high state office," contending that illegal drug use "draws into question an official's judgment and integrity" and "jeopardizes the discharge of public functions." *Id.* at 318, 117 S.Ct. 1295. The Court dismissed these broad and general rationales, finding "[n]otably lacking ... any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 318–19,

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117 S.Ct. 1295. Unlike the railroad employees in *Skinner* or the law enforcement officers in *Von Raab,* "th[e Georgia] officials typically d[id] not perform high-risk, safety-sensitive tasks, and the required certification immediately aid[ed] no interdiction effort." *Id.* at 321–22, 117 S.Ct. 1295. Worse still, Georgia's testing program was not even well-crafted to detect drug use, since the candidates themselves scheduled the drug test and could easily evade a positive result. *Id.* at 319–20, 117 S.Ct. 1295. The Supreme Court therefore had little trouble declaring this policy unconstitutional.

Although this Court recently has addressed the constitutionality of suspicionless drug testing in a different context, *see Lebron v. Sec'y, Fla. Dep't of Children & Families,* 710 F.3d 1202, 1218 (11th Cir.2013) (affirming a preliminary injunction barring suspicionless testing of welfare recipients), we have not considered the propriety of testing current or potential government employees since *Chandler v. Miller,* 73 F.3d 1543 (11th Cir.1996), *rev'd,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Our sister circuits, however, have confronted a wide variety of drug testing policies and have identified several other safety-sensitive job categories. In cases similar to *Skinner,* the courts of appeals have upheld suspicionless drug testing of categories of employees whose work involves heavy machinery or the operation of large vehicles, such as planes, trains, buses, or boats. Thus, although *Skinner* itself addressed railroad employees, the courts of appeals have extended its logic to those involved in the operation of aircraft. *See, e.g., Bluestein v. Skinner,* 908 F.2d 451, 457 (9th Cir.1990); *Nat'l Fed'n of Fed. Emps. v. Cheney,* 884 F.2d 603, 610–11 (D.C.Cir.1989). Another category—a natural extension of the Supreme Court's holding in *Von Raab*—encompasses police officers, *see Carroll v. City of Westminster,* 233 F.3d 208, 213 (4th Cir.2000), correctional officers who interact with parolees or inmates in a prison, *see Int'l Union v. Winters,* 385 F.3d 1003, 1013 (6th Cir.2004), and firefighters, *see Hatley v. Dep't of the Navy,* 164 F.3d 602, 604 (Fed.Cir.1998).

The crucial point is that, to affirm the district court's declaration and injunction in this case, we would have to find that none of the 85,000 current employees covered by the district court's relief belong to the special-needs categories identified by the Supreme Court. However, the Union's***870** own submissions belie this. Indeed, the Union itself observed that, "[o]f the approximately 85,000 employees in 2010, 33,052 of them ... served in arguably safety-sensitive positions." More precisely, during discovery, the Union asked the State to identify:

- "How many employees affected by EO 11–58 regularly carry firearms on the job?" (Interrogatory 16)
- "How many employees affected by EO 11–58 are sworn law enforcement officers?" (Interrogatory 17)
- "How many employees affected by ... EO 11–58 regularly interact on the job with detainees in the correctional system?" (Interrogatory 18)
- "How many employees affected by EO 11–58 regularly interact on the job with primary or secondary school students?" (Interrogatory 19)
- "How many employees affected by EO 11–58 regularly work as mass transit operators?" (Interrogatory 20)
- "How many employees affected by EO 11–58 regularly work as transportation safety inspectors?" (Interrogatory 21)

The State provided fairly detailed figures in its responses, including, for example, the following categories of employees who carry firearms: 157 employees in the Department of Business & Professional Regulation, 146 inspectors in the Department of Corrections (along with another 1,088 employees who were authorized but not required to carry firearms), 136 employees in the Department of Environmental Protection, and 23 in the Department of Military Affairs. Based on the holding in *Von Raab,*

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it is apparent that, at least as to these employees, the EO is very likely constitutionally applicable. The State further identified several distinct categories of employees who operate heavy machinery or large vehicles, with almost a thousand working for the Department of Transportation alone. *Skinner* makes it likely that the State also may subject these, or at least some of these, employees to suspicionless drug testing. Yet by extending the declaratory judgment and injunction to *all* current employees, the district court effectively disregarded these portions of the record and barred testing of the safety-sensitive employees included among the 85,000 current employees.

[24] Under *Salerno,* the EO could not possibly be unconstitutional as to all current employees, and the district court's order therefore cannot "satisfy [the Supreme Court's] standards for a facial challenge to the extent of [the order's] reach." *Doe,* 130 S.Ct. at 2817. Since it is well-settled that a district court abuses its discretion when it grants relief that is improperly or even unnecessarily broad, *see Alley v. U.S. Dep't of Health & Human Servs.,* 590 F.3d 1195, 1205 (11th Cir.2009), we vacate and remand the judgment and the injunction for the district court to more precisely tailor its relief to the extent the Executive Order may be unconstitutional.

Nonetheless, the Union maintains that the scope of the injunction was proper anyhow and fell well within the district court's broad discretion. In fact, the Union continues to assert that the court "was also within its discretion to award facial relief" because the Union had demonstrated that no set of circumstances exists under which the EO would be valid. This places the Union's arguments in palpable tension. On the one hand, it concedes that suspicionless drug testing of safety-sensitive employees would be constitutional. On the other hand, it maintains that the EO is facially unconstitutional.

***871** The way that the Union squares the circle is by misapplying *Salerno*'s "no set of circumstances" test. According to the Union, the Executive Order requires suspicionless drug testing of all employees, and "there are no circumstances in which suspicionless drug testing of all employees and applicants would be constitutional." Therefore, the EO fails across the board. Under the Union's interpretation of *Salerno*'s test, a single application of the EO means its application to *all* employees. But under *Salerno* and our precedents, *see, e.g., Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1313 (11th Cir.2009) ("Th[e] mere possibility of a constitutional application is enough to defeat a facial challenge to [a] statute."), a single "application" of the EO must mean the suspicionless drug test of a *single* employee. The EO is facially valid, in other words, if the Fourth Amendment permits at least one covered employee to be tested. The Union's position completely inverts *Salerno* and renders a facial attack, far from being the "most difficult" of challenges, 481 U.S. at 745, 107 S.Ct. 2095, the easiest to make. To prevail under the Union's version of *Salerno,* the Union needs to show only one employee as to whom suspicionless drug testing is unconstitutional. Then, it would follow, the EO is unconstitutional as a whole because there is no way that testing of all employees is constitutional. [FN3] Under the correct understanding of *Salerno,* we are compelled to conclude that the EO is not facially invalid since safety-sensitive employees may be subjected to suspicionless drug testing.

FN3. The Union cites only one case in support of this understanding of facial challenges: *Baron v. City of Hollywood,* 93 F.Supp.2d 1337 (S.D.Fla.2000). The district court in *Baron* accepted an argument essentially identical to the one the Union makes in this case, *see id.* at 1339, and facially invalidated a suspicionless drug testing policy when the city could not justify its application as to all employees, *id.* at 1342. In the first place, *Baron* has no precedential value. Second, *Baron* makes the same mistake we have identified in the Union's argument. It implicitly defines the

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> application of a drug testing policy as the testing of *all* employees, rather than the testing of one employee. As the Ninth Circuit has explained in rejecting an argument that relied upon *Baron,* this mistake "would turn *Salerno* on its head." *See Lanier v. City of Woodburn,* 518 F.3d 1147, 1150 (9th Cir.2008).

[25][26] The Union offers another argument: that the district court was required to facially invalidate the EO because otherwise the court would have been "put in the untenable position of having to rewrite" it. The Union claims that the Supreme Court's case law cautions against partial invalidation and cites *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). *Ayotte,* however, hardly supports this proposition. As the Supreme Court stated in that case, "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact.' " *Id.* at 329, 126 S.Ct. 961 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). In *Sabri v. United States,* the Court identified the "few settings" in which it had "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)": free speech, the right to travel, abortion rights (the category to which *Ayotte* itself belongs), and legislation under § 5 of the Fourteenth Amendment. 541 U.S. 600, 609–10, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004). As the Court put it, "[o]utside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth claims." *Id.* at 610, 124 S.Ct. 1941. The Supreme ***872** Court has not sanctioned this type of facial invalidation in the Fourth Amendment context, and we can discern no basis to do so here.

C.

[27][28] As a fallback position, the Union suggests that we could refashion the judgment and injunction simply by cutting them down to cover only those categories of employees as to whom the Executive Order's application is unconstitutional. While an appellate court undoubtedly has the power to modify injunctions, *see United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454, 480, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), or to affirm a judgment as to some plaintiffs but not others, *see Allen v. Bd. of Pub. Educ.,* 495 F.3d 1306, 1320 (11th Cir.2007), we decline to do so because the sort of fact-intensive line-drawing required is a task that properly belongs to the district court. Unlike the typical case where we may affirm a judgment as to some plaintiffs but not as to others, we are dealing here not with a manageable number of individual plaintiffs but with a current workforce of some 85,000 state employees. Nor is the district court's order as amenable to modification as the injunction in *Nat'l Treasury Emps. Union,* which the Supreme Court altered solely to exclude non-plaintiffs. In sharp contrast, in order to modify the judgment and injunction before us, we would be required to "differentiate[ ] between job categories designated for testing," scrutinize the State's rationale for testing each job category, and "conduct[ ] the balancing test" laid out in *Skinner* and its progeny. *See Nat'l Fed'n of Fed. Emps. v. Vilsack,* 681 F.3d 483, 489 (D.C.Cir.2012). As it currently stands, the district court's order does not break down the covered employees on a job-category-by-category basis, which leaves us with little basis for determining which portions of the declaratory judgment and the injunction are proper. Thus, while we could simply enjoin the EO as to all employees except those in certain safety-sensitive job categories—those who carry firearms in the course of law-enforcement duties, for instance, or those who operate heavy machinery—and end up probably being right, we would be pronouncing the law without really knowing the facts. *Cf. United States v. Banks,* 347 F.3d 1266, 1271–72 (11th Cir.2003).

Although the Union did divide the covered employees at least into an "arguably" safety-sensitive group (encompassing roughly 40 percent of all

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covered employees) and a non-safety-sensitive group, we understand that the Union's position is that some of the employees in the arguably safety-sensitive group actually are not subject to suspicionless testing, while the State's position is that some employees in the non-safety-sensitive group are subject to suspicionless testing. Thus, for instance, the State included all employees at the Department of Corrections within its answer to the Union's interrogatories. The Union will undoubtedly contest whether some categories of DOC employees should be included within the safety-sensitive category. Meanwhile, the State may be able to identify job categories that the Union has labeled non-safety-sensitive but that actually present real, substantial, and immediate threats to public safety. The Union's interrogatories, for instance, never asked about the number of doctors or medical personnel employed by the State. Yet some courts of appeals have held that government-employed medical residents or emergency medical technicians are safety-sensitive employees. *See Pierce v. Smith,* 117 F.3d 866, 874 (5th Cir.1997); *Piroglu v. Coleman,* 25 F.3d 1098, 1102 (D.C.Cir.1994). In light of the wholly undefined nature of the non-safety-sensitive group, and the fact that the current division was ***873** found only in the submission of one party in an answer to some interrogatories rather than in the district court's own finding, we are convinced that determining the proper composition of those groups is a task best left to the district court in the first instance. In order for the district court to accomplish this task, the parties must provide the court with more extensive, job-category-specific facts than the record currently contains. It is difficult to imagine how this category-specific balancing task can be accomplished without additional discovery.

Thus, we vacate and remand both the declaratory judgment and the corresponding injunction in order for the district court to conduct further fact-finding and to recraft its relief to cover only those groups as to which the Executive Order's application is unconstitutional.

III.

The State does not ask us merely to vacate and remand; boldly, it urges us to reverse the denial of its summary judgment motion and to direct the district court to grant judgment in its favor. The State argues that there is no need for the district court to conduct the very job-category-by-category balancing that the Supreme Court's case law commands. Instead, the State offers several reasons that, it claims, can justify suspicionless drug testing of all 85,000 government employees regardless of the nature of their specific job functions. Based on these generic reasons, the State asks us to approve a testing policy of unprecedented scope. We are unpersuaded.

The State's arguments, which are stated so abstractly, cannot satisfy the special-needs balancing test laid out in *Skinner* and its progeny. Those cases conducted the special-needs balancing test not at a high order of generality but in a fact-intensive manner that paid due consideration to the characteristics of a particular job category (e.g., the degree of risk that mistakes on the job pose to public safety), the important privacy interests at stake, and other context-specific concerns (e.g., evidence of a preexisting drug problem). The State's arguments have not convinced us that *Skinner* and its progeny are inapplicable, nor can they obviate the need for job-category-by-category scrutiny. Just as we know that some subset of state employees almost certainly can be tested due to specific, important safety concerns, we know that there are some employees who almost certainly cannot be tested without individualized suspicion. Again, the problem is that the factual record is almost barren, and the balancing calculus required by Supreme Court case law cannot be exercised in a vacuum.

A.

[29] The State's first justification is that employees have consented to testing by submitting to the testing requirement rather than quitting their jobs, and that this consent renders the Executive Order's search reasonable and hence constitutional.

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In effect, the State is offering its employees this Hobson's choice: either they relinquish their Fourth Amendment rights and produce a urine sample which carries the potential for termination, or they accept termination immediately. Moreover, rather than treating this exacted consent as part of the special-needs balancing test, the State instead argues that this consent, standing alone, justifies suspicionless drug testing.

[30][31][32] To begin with, we do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law. *See* ***874***Lebron,* 710 F.3d at 1214– 15. Although a "search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), consent must be "in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248, 93 S.Ct. 2041; *see also Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (consent invalid when "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion. *See Bostic v. McClendon,* 650 F.Supp. 245, 249 (N.D.Ga.1986); *cf. Garrity v. New Jersey,* 385 U.S. 493, 497–98, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that the government cannot require its employees to relinquish their Fifth Amendment rights on pain of termination because "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination" was "the antithesis of free choice").

Moreover, consent has already been adequately incorporated into the special-needs balancing test, which obliges us to evaluate whether an employee's choice of profession necessarily diminishes her expectation of privacy. In *Skinner,* the Court weighed the railroad employees' "participation in an industry that is regulated pervasively to ensure safety," 489 U.S. at 627, 109 S.Ct. 1402, as a factor militating in favor of drug testing. In *Von Raab,* the Court explained that employees' choice of "certain forms of public employment may diminish privacy expectations even with respect to ... personal searches." 489 U.S. at 671, 109 S.Ct. 1384. For instance, "[e]mployees of the United States Mint ... should expect to be subject to certain routine personal searches when they leave the workplace every day." *Id.* Finally, the Court echoed this view of consent in *Vernonia,* in which the student athletes and their parents had signed explicit consent forms granting the school the right to test the athletes. *See* 515 U.S. at 650, 115 S.Ct. 2386. Nonetheless, the Court did not treat this factor as dispositive. Instead, as the Court saw it, the athletes' choice to participate was a choice to "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally," and amounted to "an additional respect in which school athletes have a *reduced* expectation of privacy." *Id.* at 657, 115 S.Ct. 2386 (emphasis added). Thus, there seems to be no way to square *Skinner* and its progeny with the argument that consent justifies the Executive Order's drug testing requirement.

This Court's recent decision in *Lebron* rejected a similar argument that welfare recipients had consented to suspicionless drug testing when the State required testing as a precondition to the receipt of their benefits. As the panel in *Lebron* put it, a welfare recipient's "mandatory 'consent' " was of no "constitutional significance" because it was a " 'submission to authority rather than ... an understanding and intentional waiver of a constitutional right.' " 710 F.3d at 1214–15 (quoting *Johnson,* 333 U.S. at 13, 68 S.Ct. 367). The panel in *Lebron* also canvassed the suspicionless drug testing cases and concluded that, to the extent consent was relevant, it had already been incorporated into the balancing calculus. While the context in *Lebron* was different because the State sought to test a population of private citizens, which implicates somewhat different privacy concerns, the panel's logic and reas-

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oning are fairly applicable to these circumstances. As the panel in *Lebron* explained, every time the Supreme Court has addressed a ***875** suspicionless drug testing policy—whether those tested were private citizens or government employees—it has analyzed the issue through the prism of *Skinner*'s special-needs balancing test. *See id.* at 1215. Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law. FN4

FN4. The State cites several cases that, it claims, compel us to conclude that this exaction of consent renders suspicionless drug testing reasonable notwithstanding *Skinner* and its progeny or our recent pronouncement in *Lebron*. Those cases are all readily distinguishable.

In *Wyman v. James,* the Supreme Court addressed whether a welfare beneficiary could refuse a caseworker home visit that was a requirement of receiving her benefits. 400 U.S. 309, 310, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971). James argued that the visitation requirement violated her Fourth Amendment rights, but the Supreme Court ultimately held that there was no Fourth Amendment violation because the caseworker visit was not a search. *See id.* at 317, 91 S.Ct. 381. Since the *Wyman* Court held the visit not to be a search, while the Supreme Court has repeatedly and squarely held that a drug test is a search, *see, e.g., Vernonia,* 515 U.S. at 652, 115 S.Ct. 2386, *Wyman* is inapposite.

United States v. Sihler concerned a warrantless search by prison officials of a guard who had smuggled drugs into the prison. 562 F.2d 349, 350 (5th Cir.1977) . The prison had a prominent sign that stated, "All persons entering upon these confines are subject to routine searches of their person, property or packages." *Id.* The Fifth Circuit held that "Sihler voluntarily accepted and continued an employment which subjected him to search on a routine basis," and, therefore, "the search ... was made with his consent." *Id.* at 351. Notably, *Sihler* preceded *Skinner* and its progeny. Nevertheless, *Sihler* is consistent with those cases because it dealt with a specific, safety-sensitive context—a federal penitentiary. Much like "[e]mployees of the United States Mint ... should expect to be subject to certain routine personal searches when they leave the workplace," *Von Raab,* 489 U.S. at 671, 109 S.Ct. 1384, a prison guard may fairly expect to be searched for contraband at work. *Sihler* cannot and does not stand for the far-reaching proposition that all 85,000 state employees have consented to drug testing simply by coming to work.

Finally, the State cites a Third Circuit case, *Kerns v. Chalfont–New Britain Twp. Joint Sewage Auth.,* where the plaintiff applied for a job that required a pre-employment drug test. 263 F.3d 61, 64 (3d Cir.2001). The plant hired him on a probationary basis after he failed one drug test but passed a second. *See id.* Later, when asked to submit to a third test, Kerns did so, failed again, and was fired. *Id.* at 64–65. Kerns sued, alleging that the plant violated his Fourth Amendment rights. The district court granted the township summary judgment after finding that Kerns had consented to the test. *See id.* at 65. The Third Circuit reviewed that factual finding for clear error and affirmed because the record provided some evidence to support the finding that Kerns had consented to the

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test. *Id.* at 65–66.

> *Kerns* cannot support the State's sweeping argument that all current employees consent to drug testing simply by choosing to remain employed. *Kerns* turned on a factual finding of consent in an individual case, which the Third Circuit reviewed for clear error. In this case, the State asks us to rule that, as a matter of law, all of its employees consent to drug testing by simply choosing to remain employed in their current position. Nothing we have read sustains this argument.

[33] Indeed, at least one court of appeals has rejected a similar argument to the one that the State has made here. In *McDonell v. Hunter,* a case decided even before *Skinner* and its progeny lent further support to our position, the Eighth Circuit squarely rejected the idea that "employees who signed consent forms have no legitimate expectation of privacy." *See* 809 F.2d 1302, 1310 (8th Cir.1987). "If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment." *Id.* (citing *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); *see also* ***876***United Teachers of New Orleans v. Orleans Parish Sch. Bd.,* 142 F.3d 853, 856–57 (5th Cir.1998). The courts of appeals have also applied the special-needs balancing test, rather than treating consent as the sole determinant of a policy's constitutionality, in cases where the government attempted to compel consent to drug testing as a condition for obtaining some privilege. *See, e.g., Joy v. Penn–Harris–Madison Sch. Corp.,* 212 F.3d 1052, 1055 (7th Cir.2000); *id.* at 1067 (upholding a policy insofar as it provided for alcohol testing of student drivers but striking it down insofar as it provided for nicotine testing, despite the fact that student drivers signed consent forms authorizing both).

In short, the State's consent argument cannot, standing alone, render the EO constitutional.

B.

[34] Next, the State argues, again at a high order of abstraction, that the Executive Order is constitutional under *Skinner*'s special-needs balancing test because the need for a safe and efficient workplace necessarily outweighs state employees' expectations of privacy. This argument, however, does not entitle the State to summary judgment. The State's abstract reasons do not fit within the narrow scope that the Supreme Court has given to the special-needs exception and, therefore, cannot justify testing every category of employee covered by the EO. Indeed, if those reasons could suffice, then there would never be any need to balance anything or consider any job-category-specific rationales.

We repeat that individualized suspicion is the normal requirement in this context, and the special-needs cases are only "particularized exceptions to the main rule." *See Chandler,* 520 U.S. at 313, 117 S.Ct. 1295. To the extent the State's justifications hinge on drug-related productivity loss and other expenses, such as medical care, they are insufficient. Although at oral argument, counsel suggested that the State's need to maintain an orderly and efficient workplace is enough of a special need to justify suspicionless testing, the authority cited—*O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987)—cannot sustain this proposition. *O'Connor* held only that, in the workplace context, the "need for supervision, control, and the efficient operation of the workplace" meant that a workplace search was not subject to the warrant or probable-cause requirements. *See id.* at 720–26, 107 S.Ct. 1492. *O'Connor* neither held nor remotely suggested that the need for an efficient workplace could justify searches without individualized suspicion.

[35] The only employment-related rationales that the Supreme Court has endorsed as being sufficient to justify suspicionless drug testing are a "substantial and real risk" to public safety or direct involvement in drug interdiction functions. *Chand-*

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ler, 520 U.S. at 323, 117 S.Ct. 1295; *see also Von Raab*, 489 U.S. at 670, 109 S.Ct. 1384. Indeed, if safety is the justification, then public safety must be "genuinely in jeopardy," *Chandler*, 520 U.S. at 323, 117 S.Ct. 1295; *see also Lanier v. City of Woodburn*, 518 F.3d 1147, 1151–52 (9th Cir.2008). Notably, in *Chandler*, the Court summed up the principle undergirding this line of precedent:

> [W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings. But where ... public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

***877** 520 U.S. at 323, 117 S.Ct. 1295 (citation omitted).

The State's safety argument, at least in its current, global form, is insufficient. The State does not advance specific concerns relating to particular job categories and instead asserts only a broad concern for safety that applies to all employees. But we have little doubt that a clerk, for example, cannot be subject to suspicionless drug testing under the theory that she presents some vague and indefinite safety risk. In comparison, the safety risks that justified suspicionless drug testing regimes in *Skinner* and its progeny were far more pressing. In *Skinner*, railroad accidents had led to 25 deaths, 61 non-fatal injuries, and extensive property loss. *See* 489 U.S. at 607, 109 S.Ct. 1402. In *Von Raab*, the concern was with law enforcement officers who carried firearms. *See* 489 U.S. at 671, 109 S.Ct. 1384. Here, the State offers the hypothetical examples of an office employee "present[ing] a danger when driving a car in the workplace parking lot" or falling prey "to the myriad hazards that exist in the workplace environment (from stacks of heavy boxes, to high stair cases, to files on high shelves, to wet floors, to elevators and escalators)." We reject the idea that a stack of heavy boxes or a wet floor falls within the same ballpark of risk as the operation of a ten-thousand-ton freight train or the danger posed by a person carrying a firearm.

[36][37] As the Supreme Court did in *Chandler*, the courts of appeals consistently have rejected testing policies that the government justified based only on generalized and indefinite safety concerns. Those cases underscore that, "where the government asserts 'special needs' for intruding on Fourth Amendment rights, ... the specific context matters." *Vilsack*, 681 F.3d at 492. "[T]he governmental concern in the general 'integrity of its workforce' [i]s insufficiently important to warrant random drug testing ...." *Id.* at 491–92. Thus, in *Vilsack*, the D.C. Circuit rejected a random drug testing policy that covered all Forest Service Job Corps Center employees. *Id.* at 499. Similarly, in *Lanier*, the Ninth Circuit prohibited the application of a city's drug-testing policy to a library page. *See* 518 F.3d at 1152. As the panel in *Lanier* explained, "the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal [drug] problem." *Id.* at 1150.

Indeed, if the State's rationale sufficed to justify suspicionless drug testing, then the exception would swallow the rule and render meaningless *Von Raab*'s distinction between those employees for whom physical fitness, mental sharpness, and dexterity are paramount and "government employees in general." 489 U.S. at 672, 109 S.Ct. 1384. Since the State's generic justifications could apply to all government employees in any context, there would be nothing left of the individualized-suspicion requirement in any type of government employment, and no interests to balance.

[38] Nor does the State shore up its case for across-the-board, suspicionless drug testing with evidence of a preexisting drug problem. Although the State does not need to present evidence of a drug problem in the group it seeks to test, *see Von Raab*, 489 U.S. at 674–75, 109 S.Ct. 1384, a showing of an existing problem "would shore up an assertion of special need," *Chandler*, 520 U.S. at 319,

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117 S.Ct. 1295. The problem with the State's evidence is that some of it is too broad to be of any use, and the rest is too specific to justify the breadth of the testing regime the EO mandates. The bulk of the evidence canvasses the prevalence and harms of drug use in the general population. But Supreme Court case law contemplates a ***878** more targeted showing of drug abuse *in the group to be tested*, not people as a whole. In *Skinner*, for instance, the Federal Railroad Administration identified a score of drug or alcohol-related train accidents, and industry participants admitted that there was a serious drug problem among railroad workers. 489 U.S. at 607–08, 109 S.Ct. 1402. The State's evidence is so general that, if accepted as evidence of a drug problem among state employees, it would have to be accepted in every other government employment context.

On the other hand, the relevant data the State presents is too narrow to justify the EO. First of all, the evidence actually suggests that drug use is a relatively small problem in the three departments already subject to random testing prior to the EO's issuance. The worst result the State obtained was when 2.5 percent of DOC employees tested positive in 2011. This hardly demonstrates the existence of a serious drug problem. In fact, as the State itself submitted, a 2010 national survey indicated that 8.4 percent of full-time employees nationwide were illicit-drug users. If anything, then, the results of the State's random testing reveals that there is substantially *less* of a drug problem among state employees than among the general working population as a whole. *Cf. Lebron*, 710 F.3d at 1211 n. 6 (evidence showed that Florida Temporary Assistance for Needy Families recipients tested positive at a 5.1 percent rate, which "was lower than had been reported in other national studies of welfare recipients").

There is still another problem with the State's submissions. The data, even assuming it did indicate a drug problem among employees at DOC, DOT, and DJJ, does not demonstrate the prevalence of drug abuse in other state agencies. Thus, even if those results could bolster a case for testing employees at those three agencies—testing which in any event is independently authorized by state statutes not at issue in this case—it would not provide strong support for extending testing to all state employees. In short, the State has fallen far short of showing a preexisting drug problem that pervades its entire workforce.

On the other side of the balancing test, the State also claims that state employees' expectations of privacy are diminished for two reasons other than consent. First, drug testing among private employers has become common, and this "customary social usage [has] a substantial bearing on Fourth Amendment reasonableness." *Georgia v. Randolph*, 547 U.S. 103, 121, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Second, Florida has a tradition of open government that diminishes state employees' expectations of privacy. We find neither argument persuasive.

The problem with the first one is that it confuses what the Supreme Court means by a diminished expectation of privacy—or, more precisely, what baseline courts should use to determine whether an employee's expectation of privacy is diminished. The proper baseline is the ordinary government employee's expectation of privacy. In *Von Raab*, for example, the Supreme Court concluded that Customs Service employees involved in drug interdiction had a diminished expectation of privacy precisely because, "[u]nlike most private citizens or *government employees in general*, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." 489 U.S. at 672, 109 S.Ct. 1384 (emphasis added). In other words, the appropriate inquiry is whether the employee being tested has a diminished expectation of privacy relative to the ordinary government employee because her position depends on physical fitness and ***879** judgment. The State's broad-based argument that all of its employees have a reduced expectation of privacy contradicts bind-

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ing case law.

The second argument is similarly unpersuasive. Open government laws require state employees to disclose certain financial information and also their official work product. The logical leap from disclosure of financial information and work product to a diminished expectation of privacy in an employee's physical body is a substantial one. All of the Supreme Court's cases discuss the diminished expectation of privacy specifically with regard to *physical* or *bodily* privacy, not privacy more broadly conceived. Thus, in *Skinner,* employees' expectations of privacy were "diminished" because of regulations pertaining to their "health and fitness." *See* 489 U.S. at 627, 109 S.Ct. 1402; *see also Von Raab,* 489 U.S. at 672, 109 S.Ct. 1384 (Customs Service employees should have expected inquiries into their "fitness" and "dexterity"). *Vernonia* is perhaps the clearest example of this focus on physical privacy. When explaining why athletes have a lower expectation of privacy, the Court pointed out that "[s]chool sports are not for the bashful" and require " 'suiting up' before each practice or event, and showering and changing afterwards" in "locker rooms ... not notable for the privacy they afford." 515 U.S. at 657, 115 S.Ct. 2386. It is readily apparent, then, that when courts analyze employees' expectations of privacy in this context, it is their physical privacy that is relevant.

None of the State's arguments demonstrate that all state employees, including those who have no reasonable relation to safety-sensitive tasks, have a reduced expectation of privacy. Just as the State must demonstrate job-category-specific interests, so too must it demonstrate why each particular job category it seeks to cover under the Executive Order has a diminished expectation of privacy compared to the ordinary government employee.[FN5]

FN5. The special-needs balancing test also considers the nature of the intrusion—in other words, how invasive the drug-testing protocol is—and the efficacy of the testing. Neither factor plays a determinative role in this case. The character of the intrusion here is very similar to that in *Skinner, Von Raab, Vernonia,* and *Earls.* The State's urinalysis protocol, which does not require direct observation and which shields results from being used as evidence or disclosed in any public or private proceeding, is no more invasive than those procedures that the Supreme Court characterized as "minimally intrusive" in *Earls* or as "negligible" in *Vernonia.* In those cases, a monitor accompanied the students to the bathroom, where they produced a sample without the monitor's direct visual inspection. *See Earls,* 536 U.S. at 832–34, 122 S.Ct. 2559; *Vernonia,* 515 U.S. at 658, 115 S.Ct. 2386; *see also Skinner,* 489 U.S. at 626, 109 S.Ct. 1402. The confidentiality of test results also weighs in favor of finding the intrusion more minimal. *See Von Raab,* 489 U.S. at 672 n. 2, 109 S.Ct. 1384. Thus, the nature of the intrusion poses no more of a barrier to a finding of reasonableness in this case than it did in those Supreme Court cases. Nor do the parties contest the policy's efficacy.

In sum, we cannot find that the State's proffered rationales warrant summary judgment in the State's favor concerning all job categories and all employees covered by the EO. In this case, the character of the intrusion is relatively noninvasive and, "if the 'special needs' showing had been made, the State could not be faulted for excessive intrusion." *Chandler,* 520 U.S. at 318, 117 S.Ct. 1295. However, the State has failed to make that showing. As the district court concluded, the State's case most closely resembles Georgia's failed justification of the policy held unconstitutional in *Chandler.* Unlike in *Skinner* or *Von Raab,* where the specific job categories subject to testing had a diminished ***880** expectation of privacy, the State has failed to demonstrate that all 85,000 state employees somehow have diminished privacy rights. Moreover, it has failed to provide a compelling or important

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reason for testing; indeed, it has offered only general and weak justifications regarding workplace efficiency and the possible—not "substantial and real," *see Chandler,* 520 U.S. at 323, 117 S.Ct. 1295 —risks to safety that any state employee may pose.

IV.

One final issue has been raised by the parties: who bears the burden in a suspicionless drug testing case. In light of limited authority on this issue, and in order to provide the district court with guidance on remand, we clarify the precise burdens each party bears.

[39][40] There are several different burdens that arise in this case. For starters, on a motion for summary judgment, "[t]he moving party bears the burden of showing that there are no ... genuine factual issues and that [it] is entitled to summary judgment as a matter of law." *Gossett v. Du–Ra–Kel Corp.,* 569 F.2d 869, 872 (5th Cir.1978).[FN6] Moreover, "in a [42 U.S.C.] § 1983 action, the plaintiff bears the burden of persuasion on every element." *Cuesta v. Sch. Bd. of Miami–Dade Cnty., Fla.,* 285 F.3d 962, 970 (11th Cir.2002). Thus, in *Cuesta,* when a § 1983 plaintiff alleged that she was subjected to a strip search without reasonable suspicion, it was "her burden to show that the County lacked reasonable suspicion to search her." *Id.* There is no question, therefore, that the Union ultimately bears the burden of persuasion in this case.

FN6. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[41][42] In the drug testing context, a plaintiff may initially meet both the burden of going forward and the initial burden of persuasion by demonstrating that (1) there was a search; and (2) it was conducted without individualized suspicion, which ordinarily is the minimum requirement of the Fourth Amendment. *See Chandler,* 520 U.S. at 313, 117 S.Ct. 1295. That showing creates a presumption that the search was unconstitutional and shifts the burden of production to the testing policy's proponent to make the special-needs showing explicated in *Skinner* and its progeny. If the proponent of testing fails to respond, or fails to produce a sufficient special-needs showing, then the plaintiff would prevail. If the proponent does respond by demonstrating that it had special needs sufficiently important to justify a suspicionless search, then the district court must conduct the special-needs balancing test, bearing in mind that the ultimate burden of persuasion remains squarely on the plaintiff. In this case, the Union met its initial burden because on its face the EO mandates random, suspicionless testing across the board. At this point, the burden of going forward—that is, the burden of production—then shifted to the State to articulate its justification for conducting those tests without individualized suspicion.

We apply this burden-shifting framework for several reasons. To begin with, a panel of this Court in *Lebron* held that the burden of producing the special-needs showing rests with the State. *See* 710 F.3d at 1211 n. 6 ("[T]he Supreme Court has unequivocally stated that it is the state which must show a substantial special need to justify its drug testing."). As the concurring opinion in *Lebron* noted, "[i]t is ***881** undisputed that a drug test is a search under the Fourth Amendment, and that the government generally has the burden of justifying a warrantless search." *Id.* at 1219 (Jordan, J., concurring) (citing *United States v. Bachner,* 706 F.2d 1121, 1126 (11th Cir.1983)); *accord id.* (explaining that "the government has the burden of establishing a 'special need' for a warrantless and suspicionless drug testing requirement."). And although there is scant authority outside this Circuit discussing the distribution of burdens in suspicionless drug testing cases, the D.C. Circuit has observed that, "[a]lthough neither *Von Raab* nor *Skinner* directly addressed this question, *Von Raab* may hint that the burden rests with the government." *Am. Fed'n of Gov't Emps. v. Skinner,* 885 F.2d 884, 894

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(D.C.Cir.1989).

Indeed, the relevant Supreme Court cases suggest that the government bears the burden of producing the special-needs showing once the plaintiff has made an initial showing of an unconstitutional search. In *Von Raab,* for example, the Supreme Court concluded that "*the Government has demonstrated* that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees." 489 U.S. at 677, 109 S.Ct. 1384 (emphasis added). Similarly, in *Chandler,* the Court stated, "[W]e note, first, that the testing method the Georgia statute describes is relatively noninvasive; therefore, if the 'special needs' showing had been made, the State could not be faulted for excessive intrusion." 520 U.S. at 318, 117 S.Ct. 1295; *accord id.* ("Georgia has failed to show, in justification of [its drug testing statute], a special need of that kind."). These passages imply that the burden rests with the proponent of the testing policy to come forward with evidence of a special need. This is true even though both cases were civil lawsuits in which the plaintiffs challenged the testing and thus bore the ultimate burden of persuasion. What happened in those cases is that the plaintiffs met their initial burden, and the burden of production then shifted to the government to demonstrate a special need sufficiently important to outweigh the plaintiffs' privacy interests.

[43][44] Moreover, this burden-shifting framework follows directly from Fed.R.Evid. 301, which states that, "[i]n a civil case ... the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." Once a § 1983 plaintiff proves that the Fourth Amendment's ordinary requirements have not been met, we presume that a search is unconstitutional. *Cf. Groh v. Ramirez,* 540 U.S. 551, 564, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (since a home search ordinarily requires a warrant, "a warrantless search of the home is presumptively unconstitutional"). Then, the government, which is the party against whom the presumption is directed, must make a sufficiently powerful showing to justify its intrusion on the plaintiff's expectation of privacy. Consistent with the general rule in § 1983 cases, Fed.R.Evid. 301 "does not shift the burden of persuasion, which remains on the party who had it originally."

[45] Shifting the burden of production to the government to justify a warrantless search is a familiar feature of § 1983 civil lawsuits raising Fourth Amendment claims. Thus, for example, when a plaintiff asserts that the police conducted an unconstitutional warrantless search, and the government claims that its search was legal under an exception to the warrant requirement, other courts of appeals have held that the plaintiff meets its initial burden by demonstrating the absence of a search warrant. At that point, it is the ***882** *government* that bears the burden of coming forward with evidence that an exception to the warrant requirement applied. *See Der v. Connolly,* 666 F.3d 1120, 1127–28 & n. 2 (8th Cir.2012) (when § 1983 plaintiff shows a search is presumptively violative of the Fourth Amendment, the government has the "burden of going forward with evidence to meet or rebut the presumption," e.g., "evidence of consent or of some other recognized exception"); *Valance v. Wisel,* 110 F.3d 1269, 1279 (7th Cir.1997); *Ruggiero v. Krzeminski,* 928 F.2d 558, 563 (2d Cir.1991).

Finally, this allocation of burdens makes sense. The proponent of testing is the party best positioned to come forward with its reasons for conducting suspicionless drug testing. We will not require plaintiffs to do the impossible: to speculate as to all possible reasons justifying the policy they are challenging and then to prove a negative—that is, prove that the government had no special needs when it enacted its drug testing policy. Here the plaintiff Union demonstrated that the State intended to conduct a suspicionless broad-based search, which shifted the burden of production to the State to justify itself based on a special-needs exception to the individualized-suspicion requirement. On remand,

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therefore, the State must come forward with the requisite special-needs showing for all categories of employees it seeks to test. For some categories, this showing may turn out to be quite simple and may amount simply to describing precisely the nature of the job and the attendant risks. Thus, for example, as to state law enforcement employees who carry firearms in the course of duty, the State likely will need to do little more than identify those employees. *Von Raab*'s holding makes it clear that those employees present the type of serious safety risk that justifies suspicionless drug testing. For other categories of employees, however, the State must make a stronger and more specific showing than it has produced thus far. Thus, as to run-of-the-mill office employees, for example, the State must demonstrate how those employees present a serious safety risk comparable to those recognized in *Skinner* and its progeny.

V.

To date, the parties' litigation strategies in this case seem to have focused on avoiding the kind of job-category-by-category balancing that *Skinner* and its progeny teach us is the proper modality for evaluating the constitutionality of a suspicionless drug testing policy. The Union originally sought, and ultimately received, facial relief that cannot be sustained in light of the Executive Order's constitutional applications. Meanwhile, the State has resisted providing the district court with any specific special-needs showings that apply to individual job categories and instead has insisted that a few broad, abstract reasons can justify the EO across the board. Admittedly, providing job-category-specific reasons and evidence—which the district court must have in order to conduct the proper analysis—is a substantial, even onerous, task. Nonetheless, convenience cannot override the commands of the Constitution.

Nor can the parties' desire for expediency allow a court to conduct the necessary calculus in the abstract and in the absence of any real factual record. Since the State has failed to meet its burden of production under the special-needs balancing test, we can discern no basis to reverse the district court's order and direct that judgment be entered in the State's favor. The State has fallen far short of justifying the breathtaking scope of the Executive Order, and we have found no precedent approving so indiscriminate a testing regime. ***883** On the other hand, the Union has presented a serious and substantial claim that large swathes of the EO's applications are unconstitutional. But we cannot affirm a judgment and injunction that forbid both constitutional and unconstitutional conduct.

Accordingly, we vacate both the declaratory judgment and the injunction and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

C.A.11 (Fla.),2013.
American Federation of State, County and Mun. Employees Council 79 v. Scott
717 F.3d 851, 35 IER Cases 1273, 24 Fla. L. Weekly Fed. C 305

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EXHIBIT E

Westlaw.

768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983
(Cite as: 768 F.3d 843)

H

United States Court of Appeals,
Ninth Circuit.
Veronica OLLIER; Naudia Rangel, by her next friends Steve and Carmen Rangel; Maritza Rangel, by her next friends Steve and Carmen Rangel; Amanda Hernandez, by her next friend Armando Hernandez; Arianna Hernandez, by her next friend Armando Hernandez, individually and on behalf of all those similarly situated, Plaintiffs–Appellees,
v.
SWEETWATER UNION HIGH SCHOOL DISTRICT; Arlie N. Ricasa; Pearl Quinones; Jim Cartmill; Jaime Mercado; Greg R. Sandoval; Jesus M. Gandara; Earl Weins; Russell Moore, in their official capacities, Defendants–Appellants.

No. 12–56348.
Argued and Submitted June 3, 2014.
Filed Sept. 19, 2014.

Background: Female high school athletes brought class action against public school district and its administrators and board members under Title IX, alleging unequal treatment and benefits in athletic programs, unequal participation opportunities in athletic programs, and retaliation. The United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, 604 F.Supp.2d 1264, granted partial summary judgment for plaintiffs, entered various pre-trial rulings, 267 F.R.D. 339 and 735 F.Supp.2d 1222, and then granted judgment for plaintiffs after bench trial, 858 F.Supp.2d 1093. School district appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:
(1) school district did not fully and effectively accommodate interests and abilities of its female athletes;
(2) district court did not abuse its discretion when it barred retired superintendent of different school district and assistant principal at different high school from testifying as expert witnesses at trial;
(3) school district did not satisfy its obligation to disclose its 30 employee and eight non-employee fact witnesses through other disclosed witnesses mentioning them at their depositions;
(4) district court did not abuse its discretion by declining to consider contemporaneous evidence at trial before issuing permanent injunction to require school district to comply with Title IX;
(5) athletes alleged judicially cognizable injuries flowing from public school district's retaliatory responses to Title IX complaints made by their parents and coach;
(6) athletes engaged in protected activities;
(7) validity of permanent injunction was not impaired on basis that portion of class were not members of softball team at time of retaliation, and yet they benefited from the relief; and
(8) causation was demonstrated.

Affirmed.

West Headnotes

[1] Federal Courts 170B 3733

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 k. Failure to mention or inadequacy of treatment of error in appellate briefs. Most Cited Cases

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768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983
(Cite as: 768 F.3d 843)

Public school district waived issue of whether district court's decision to grant class certification was proper, on Title IX unequal participation claim, by not including that issue in its briefs on appeal, although school district had given notice of its intent to appeal decision to certify proposed class. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[2] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Public school district did not fully and effectively accommodate interests and abilities of its female athletes, and thus violated Title IX, where female athletic participation was not substantially proportionate to overall female enrollment at school, there was no history or continuing practice of program expansion for women's sports at school, and school did not prove that interests and abilities of female students had been fully and effectively accommodated by present program. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[3] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

When making the determination under the Title IX "effective accommodation" test of whether athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments, a court counts only "actual athletes," not "unfilled slots," because Title IX participation opportunities are real, not illusory. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[4] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Second step of the analysis under the first prong of the three-prong "effective accommodation" test under Title IX is to consider whether the number of athletic participation opportunities, i.e., athletes, is substantially proportionate to each sex's enrollment; exact proportionality is not required, and there is no magic number at which substantial proportionality is achieved. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[5] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

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768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983

(Cite as: 768 F.3d 843)

Under the "effective accommodation" test under Title IX, substantial proportionality of each sex's enrollment to athletic participation opportunities, i.e., athletes, is determined on a case-by-case basis in light of the institution's specific circumstances and the size of its athletic program; as a general rule, there is substantial proportionality if the number of additional participants required for exact proportionality would not be sufficient to sustain a viable team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[6] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

The second prong of the Title IX "effective accommodation" test that considers whether an institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion; there are no fixed intervals of time within which an institution must have added participation opportunities, and a particular number of sports is not dispositive because the focus is on whether the program expansion was responsive to developing interests and abilities of female students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[7] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Under the Title IX "effective accommodation" test, an institution must do more than show a history of program expansion to show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes; it must demonstrate a continuing, i.e., present, practice of program expansion as warranted by developing interests and abilities. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[8] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

On Title IX unequal participation claim, public school district's decision to cut female field hockey twice during relevant time period, coupled with its inability to show that its motivations were legitimate, was enough to show sufficient interest, ability, and available competition to sustain field hockey team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[9] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohib-

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768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983

(Cite as: 768 F.3d 843)

ited in General

78k1059 Education

78k1067 Sex Discrimination

78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

When making the determination under Title IX as to whether interests and abilities of female students have been fully and effectively accommodated by the present program, a court must consider whether there is (1) unmet interest in a particular sport; (2) ability to support a team in that sport; and (3) a reasonable expectation of competition for the team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[10] Civil Rights 78 1067(2)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1059 Education

78k1067 Sex Discrimination

78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Under the Title IX "effective accommodation" test, when considering whether the interests and abilities of female students have been fully and effectively accommodated by the present program, if an institution has recently eliminated a viable team, a court presumes that there is sufficient interest, ability, and available competition to sustain a team in that sport absent strong evidence that conditions have changed. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

[11] Federal Courts 170B 3600

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

170Bk3600 k. Expert evidence and witnesses. Most Cited Cases

Federal Courts 170B 3610(2)

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

170Bk3610 Sanctions

170Bk3610(2) k. Discovery sanctions. Most Cited Cases

Federal Courts 170B 3695

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)4 Harmless and Reversible Error

170Bk3686 Particular Errors as Harmless or Prejudicial

170Bk3695 k. Preliminary proceedings; depositions and discovery. Most Cited Cases

Federal Courts 170B 3701(9)

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)4 Harmless and Reversible Error

170Bk3686 Particular Errors as Harmless or Prejudicial

170Bk3701 Evidence

170Bk3701(8) Exclusion of Evidence

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768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983

(Cite as: 768 F.3d 843)

170Bk3701(9) k. In general. Most Cited Cases

The Court of Appeals reviews a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal.

[12] Federal Civil Procedure 170A 2251

170A Federal Civil Procedure
170AXV Trial
170AXV(K) Trial by Court
170AXV(K)1 In General
170Ak2251 k. In general. Most Cited Cases

In a non-jury case, a district judge is given great latitude in the admission or exclusion of evidence.

[13] Federal Courts 170B 3610(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3610 Sanctions
170Bk3610(2) k. Discovery sanctions. Most Cited Cases

A district court's discretion to issue sanctions for failure to disclose or to supplement an earlier response is given particularly wide latitude. Fed.Rules Civ.Proc.Rule 37(c)(1), 28 U.S.C.A.

[14] Evidence 157 555.4(1)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(1) k. In general. Most Cited Cases

Evidence 157 555.4(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(2) k. Speculation, guess, or conjecture. Most Cited Cases

District court did not abuse its discretion when it barred retired superintendent of different public school district and assistant principal at different high school from testifying as expert witnesses at trial on Title IX unequal participation claim after finding their testimony to be inherently unreliable and unsupported by the facts; proposed experts based their proposed testimony on superficial inspections of defendant school district's facilities and their conclusions had been based on their personal opinions and speculation rather than on a systematic assessment of defendant's athletic facilities and programs. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[15] Evidence 157 508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited Cases

Evidence 157 534.5

157 Evidence

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768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983

(Cite as: 768 F.3d 843)

157XII Opinion Evidence
157XII(C) Competency of Experts
157k534.5 k. In general. Most Cited Cases

Bare qualifications alone cannot establish the admissibility of expert testimony; rather, expert testimony must be both relevant and reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[16] Evidence 157 508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited Cases

Evidence 157 555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases

A proposed expert's testimony must have a reliable basis in the knowledge and experience of his discipline; this requires district courts, acting in a "gatekeeping role," to assess whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue because it is not the correctness of the expert's conclusions that matters, but the soundness of his methodology. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[17] Evidence 157 505

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k505 k. Matters of opinion or facts. Most Cited Cases

Personal opinion testimony is inadmissible as expert opinion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[18] Evidence 157 555.4(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(2) k. Speculation, guess, or conjecture. Most Cited Cases

Speculative expert testimony is inherently unreliable, and thus is inadmissible.

[19] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to respond; sanctions. Most Cited Cases

Public school district did not satisfy its obligation to disclose its 30 employee and eight non-employee fact witnesses through other disclosed witnesses mentioning them at their depositions, on Title IX unequal participation claim, and thus district court did not abuse its discretion in excluding them on basis that failure to comply with disclosure requirement was neither substantially justified nor harmless; reopening discovery 15 months after discovery cutoff and only 10 months before trial would have burdened plaintiffs and disrupted court's and parties' schedules. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Fed.Rules Civ.Proc.Rule 26(a, e), 28

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U.S.C.A.

[20] Federal Civil Procedure 170A 1267.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1267 Discretion of Court
170Ak1267.1 k. In general. Most Cited Cases

A district court has wide discretion in controlling discovery.

[21] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to respond; sanctions. Most Cited Cases

A passing reference made by one witness in a deposition to a person with knowledge or responsibilities who conceivably could be a witness does not satisfy a party's disclosure obligations; an adverse party should not have to guess which undisclosed witnesses may be called to testify. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[22] Civil Rights 78 1452

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1452 k. Education. Most Cited Cases

Federal Civil Procedure 170A 2011

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In general. Most Cited Cases

District court did not abuse its discretion by declining to consider contemporaneous evidence at trial before issuing permanent injunction to require public school district to comply with Title IX; establishing cutoff date after which it would not consider supplemental improvements to facilities at school, especially one that was only 90 days before trial, aided orderly pre-trial procedure, and district court still could have issued injunction based on past harm in light of systemic problem of gender inequity in public school district athletics program even if contemporaneous evidence showed that school district was complying with Title IX at time of trial. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[23] Federal Civil Procedure 170A 1951.4

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.3 Role and Obligations of Judge
170Ak1951.4 k. In general. Most Cited Cases

A trial court's power to control the conduct of trial is broad.

[24] Federal Courts 170B 3585(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(2) k. Standing. Most Cited Cases

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Whether a party has standing to bring a claim is a question of law that is reviewed de novo, but a district court's fact-finding on standing questions is reviewed for clear error.

[25] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Article III of the Constitution requires a party to have standing to bring its suit. U.S.C.A. Const. Art. 3, § 1 et seq.

[26] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 k. Causation; redressability. Most Cited Cases

In order to have standing to bring its suit, a party must have suffered (1) an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, which means that the injury has to be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

[27] Federal Civil Procedure 170A 164

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak164 k. Representation of class; typicality; standing in general. Most Cited Cases

In a class action, standing is satisfied if at least one named plaintiff meets the requirements. U.S.C.A. Const. Art. 3, § 1 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[28] Civil Rights 78 1331(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(2) k. Education. Most Cited Cases

Civil Rights 78 1332(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1332 Third Party Rights; Decedents
78k1332(2) k. Education. Most Cited Cases

High school softball players' suit, alleging that

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their coach was fired in retaliation for making Title IX complaints on their behalf, asserted their own rights, rather than coach's, and thus was not subject to limitations on third-party standing. U.S.C.A. Const. Art. 3, § 1 et seq.; Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[29] Administrative Law and Procedure 15A 666

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak665 Right of Review
15Ak666 k. Interest in general. Most Cited Cases

An injured party may sue under the Administrative Procedure Act if he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. U.S.C.A. Const. Art. 3, § 1 et seq.; 5 U.S.C.A. § 551 et seq.

[30] Action 13 13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Any plaintiff with an interest arguably sought to be protected by a statute with an anti-retaliation provision has standing to sue under that statute.

[31] Civil Rights 78 1333(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1333 Injury and Causation
78k1333(2) k. Education. Most Cited Cases

Student softball players alleged judicially cognizable injuries flowing from public school district's retaliatory responses to Title IX complaints made by their parents and coach, and thus had Article III standing to claim that school district impermissibly retaliated against them by firing their coach, since coach gave players extra practice time and individualized attention, persuaded volunteer coaches to help them with specialized skills, and arranged for team to play in tournaments attended by college recruiters, and after termination school stripped team of its voluntary assistant coaches, canceled team's awards banquet, and forbade team from participating in tournament attended by college recruiters. U.S.C.A. Const. Art. 3, § 1 et seq.; Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[32] Federal Courts 170B 3616(1)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3612 Remedial Matters
170Bk3616 Injunction
170Bk3616(1) k. In general. Most Cited Cases

The Court of Appeals reviews a district court's decision to grant a permanent injunction for an abuse of discretion, but it reviews for clear error the factual findings underpinning the award of injunctive relief.

[33] Federal Courts 170B 3616(1)

170B Federal Courts
170BXVII Courts of Appeals

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170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3612 Remedial Matters
170Bk3616 Injunction
170Bk3616(1) k. In general. Most Cited Cases

Rulings of law relied upon by a district court in awarding injunctive relief are reviewed de novo.

[34] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

Title IX's private right of action encompasses suits for retaliation because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[35] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

The familiar framework used to decide retaliation claims under Title VII is applied to Title IX retaliation claims. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[36] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

Civil Rights 78 1418

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1418 k. Education. Most Cited Cases

On a claim of retaliation under Title IX, a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing that he or she was engaged in protected activity, that he or she suffered an adverse action, and that there was a causal link between the two; the burden on a plaintiff to show a prima facie case of retaliation is low in that only a minimal threshold showing of retaliation is required. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[37] Civil Rights 78 1402

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1402 k. Education. Most Cited Cases

On a claim of retaliation under Title IX, after a plaintiff who lacks direct evidence of retaliation has made a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate,

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non-retaliatory reason for the challenged action; if the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[38] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Female high school athletes engaged in protected activities under Title IX, as required for retaliation claim, where father of two of the named plaintiffs complained to high school's athletic director in May 2006 about Title IX violations, athletes' counsel sent demand letter to public school district in July 2006 regarding Title IX violations at high school, and athletes filed their class action complaint in April 2007. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[39] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

A private right of action under Title IX includes a claim for retaliation. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[40] Civil Rights 78 1452

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1452 k. Education. Most Cited Cases

Validity of permanent injunction was not impaired on basis that portion of class were not members of softball team at time of retaliation, and yet they benefited from the relief, in female high school athletes' class action against public school district and its administrators and board members under Title IX alleging retaliation, since relief of injunction was equitable and district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[41] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

Under Title IX, as under Title VII, the adverse action element of retaliation claim is present when a reasonable person would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable person from making or supporting a charge of discrimination. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[42] Civil Rights 78 1067(2)

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78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Causation was demonstrated on retaliation claim under Title IX in female high school athletes' class action against public school district and its administrators and board members, where athletes engaged in protected activity in May 2006, July 2006, and April 2007, and athletes' coach was fired in July 2006 and annual awards banquet was canceled in spring of 2007. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[43] Civil Rights 78 1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular activities; athletics. Most Cited Cases

Firing softball coach and replacing him with far less experienced coach, stripping team of its assistant coaches, canceling team's annual award banquet, prohibiting parents from volunteering with team, or not allowing team to participate in tournament attended by college recruiters were materially adverse actions in response to protected activity that significantly disrupted successful softball program to detriment of program and participants, any of which might have dissuaded reasonable person from making or supporting charge of discrimination, as required for retaliation claim under Title IX in female high school athletes' class action against public school district and its administrators and board members. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[44] Civil Rights 78 1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In general. Most Cited Cases

Under Title IX, the causal link element of the retaliation framework is broadly construed; a plaintiff merely has to prove that the protected activity and the adverse action are not completely unrelated. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[45] Civil Rights 78 1541

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1541 k. Retaliation claims. Most Cited Cases

In Title VII cases, causation on a retaliation claim may be inferred from circumstantial evidence, such as the defendant's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory conduct. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[46] Civil Rights 78 1252

78 Civil Rights

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78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1252 k. Causal connection; temporal proximity. Most Cited Cases

Education 141E 584(4)

141E Education
141EII Public Primary and Secondary Schools
141EII(D) Teachers and Education Professionals
141EII(D)5 Adverse Personnel Actions
141Ek571 Grounds for Adverse Action
141Ek584 Exercise of Rights: Retaliation
141Ek584(4) k. Causation. Most Cited Cases

Walk-on softball coach was fired in retaliation for Title IX complaints, not for legitimate, nonretaliatory reasons; although there was preference for certified teachers and coach played ineligible student which forced team to forfeit games as result, certified teacher preference was in place long before coach was hired and there was no certified teacher ready to replace him after he was fired, and coach was not reprimanded at time of playing ineligible student, he was not fired until more than one year later, and eligibility determinations were responsibility of school administrators, not coaches. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[47] Civil Rights 78 1418

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1418 k. Education. Most Cited Cases

On a retaliation claim under Title IX, shifting, inconsistent reasons for an adverse action may be evidence of pretext. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[48] Civil Rights 78 1252

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1252 k. Causal connection; temporal proximity. Most Cited Cases

Education 141E 584(4)

141E Education
141EII Public Primary and Secondary Schools
141EII(D) Teachers and Education Professionals
141EII(D)5 Adverse Personnel Actions
141Ek571 Grounds for Adverse Action
141Ek584 Exercise of Rights: Retaliation
141Ek584(4) k. Causation. Most Cited Cases

Softball coach was fired in retaliation for Title IX complaints, not for legitimate, nonretaliatory reasons; although unauthorized parent coached summer softball team and coach filed late paperwork for tournament, coach was absent when unauthorized coaching occurred, he forbade parent from coaching after learning of his ineligibility to do so, and summer team was not conducted under auspices of high school, and coach was not admonished for late paperwork when it was filed. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

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Appeal from the United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, Presiding. D.C. No. 3:07–cv–00714–L–WMC.

Before: RONALD M. GOULD and N.R. Smith, Circuit Judges, and ***851**MORRISON C. ENGLAND, JR., Chief District Judge.[FN*]

FN* The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.

OPINION

GOULD, Circuit Judge:

Defendants–Appellants Sweetwater Union High School District and eight of its administrators and board members (collectively "Sweetwater") appeal the district court's grant of declaratory and injunctive relief to Plaintiffs–Appellees Veronica Ollier, Naudia Rangel, Maritza Rangel, Amanda Hernandez, and Arianna Hernandez (collectively "Plaintiffs") on Title IX claims alleging (1) unequal treatment and benefits in athletic programs; [FN1] (2) unequal participation opportunities in athletic programs; and (3) retaliation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

FN1. Neither of Sweetwater's briefs on appeal includes argument on Plaintiffs' unequal treatment and benefits claim. Thus, Sweetwater has waived its appeal on that claim. *See Hall v. City of L.A.*, 697 F.3d 1059, 1071 (9th Cir.2012).

I

On April 19, 2007, Plaintiffs filed a class action complaint against Sweetwater alleging unlawful sex discrimination under Title IX of the Education Amendments of 1972 ("Title IX"), *see* 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment, *see* 42 U.S.C. § 1983. [FN2] They alleged that Sweetwater "intentionally discriminated" against female students at Castle Park High School ("Castle Park") by "unlawfully fail [ing] to provide female student athletes equal treatment and benefits as compared to male athletes." They said that female student athletes did not receive an "equal opportunity to participate in athletic programs," and were "deterred from participating" by Sweetwater's "repeated, purposeful, differential treatment of female students at Castle Park." Plaintiffs alleged that

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Sweetwater ignored female students' protests and "continued to unfairly discriminate against females despite persistent complaints by students, parents and others."

> FN2. Plaintiffs' 42 U.S.C. § 1983 sex-based discrimination claim dropped out of the case in July 2010, when the district court severed it from the Title IX claims upon agreement of the parties.

Specifically, Plaintiffs accused Sweetwater of "knowingly and deliberately discriminating against female students" by providing them with inequitable (1) practice and competitive facilities; (2) locker rooms and related storage and meeting facilities; (3) training facilities; (4) equipment and supplies; (5) transportation vehicles; (6) coaches and coaching facilities; (7) scheduling of games and practice times; (8) publicity; (9) funding; and (10) athletic participation opportunities. They also accused Sweetwater of not properly maintaining the facilities given to female student athletes and of offering "significantly more participation opportunities to boys than to girls [.]" Citing Sweetwater's "intentional and conscious failure to comply with Title IX," Plaintiffs sought declaratory and injunctive relief under 20 U.S.C. § 1681 *et seq.* for three alleged violations of Title IX: (1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.[FN3]

> FN3. Plaintiffs' retaliation claim was premised on (1) the July 2006 firing of Chris Martinez, "a highly qualified and well-loved softball coach," which occurred shortly after Castle Park received a formal Title IX complaint; (2) a ban on a parent-run snack stand during softball games; and (3) a ban on parental assistance in softball coaching.

***852 A**

In July 2008, Plaintiffs moved for partial summary judgment on their Title IX claim alleging unequal participation opportunities in athletic programs. Sweetwater conceded that "female athletic participation" at Castle Park was "lower than overall female enrollment," but argued that the figures were "substantially proportionate" for Title IX compliance purposes, and promised to "continue to strive to lower the percentage." As evidence, Sweetwater noted that there are "more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park.

The district court gave summary judgment to Plaintiffs on their unequal participation claim in March 2009. *See Ollier v. Sweetwater Union High Sch. Dist.*, 604 F.Supp.2d 1264 (S.D.Cal.2009). The court found that "substantial proportionality requires a close relationship between athletic participation and enrollment," and concluded that Sweetwater had not shown such a "close relationship" because it "fail[ed] to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males." *Id.* at 1272. Rejecting one of Sweetwater's arguments, the district court reasoned that it is the "actual number and the percentage of females participating in athletics," not "the number of teams offered to girls," that is "the ultimate issue" when evaluating participation opportunities. *Id.* After finding that Plaintiffs had met their burden on each prong of the relevant Title IX compliance test, the district court determined that Sweetwater "failed to fully and effectively accommodate female athletes and potential female athletes" at Castle Park, and that it was "not in compliance with Title IX based on unequal participation opportunities in [the] athletic program." *Id.* at 1275; *see Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767–68 (9th Cir.1999) (laying out the three-prong test for determining whether a school has provided equal opportunities to male and female students).

B

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Before trial, the district court decided three other matters at issue in this appeal. First, it granted Plaintiffs' motion to exclude the testimony of two Sweetwater experts because (1) the experts' conclusions and opinions "fail [ed] to meet the standard of Federal Rule of Evidence 702" because they were based on "personal opinions and speculation rather than on a systematic assessment of [the] athletic facilities and programs" at Castle Park, and (2) the experts' methodology was "not at all clear."

Second, it granted Plaintiffs' motion to exclude 38 of Sweetwater's witnesses because they were not timely disclosed, reasoning that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and non-cumulative witnesses is harmful and without substantial justification." Because Sweetwater "offered no justification for [its] failure to comply with" Federal Rule of Civil Procedure 26(a) and (e), the district court concluded that exclusion of the 38 untimely disclosed witnesses was "an appropriate sanction" under Federal Rule of Civil Procedure 37(c)(1).

Third, it considered Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as if it were a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss that claim, and denied it on the merits. *See Ollier v. Sweetwater Union High Sch. Dist.,* 735 F.Supp.2d 1222 (S.D.Cal.2010). In so doing, the district court determined that Plaintiffs had standing to bring their Title IX retaliation claim—a claim the court viewed as premised on harm to the class, not harm to the softball coach whose ***853** firing Plaintiffs alleged was retaliatory. *See id.* at 1226 ("Plaintiffs ... have set forth actions taken against the plaintiff class members after they complained of sex discrimination that are concrete and particularized."). The district court also concluded that Plaintiffs' retaliation claim was not moot after finding that class members were still suffering the effects of Sweetwater's retaliatory conduct and that Sweetwater's actions had caused a "chilling effect on students who would complain about continuing gender inequality in athletic programs at the school." *Id.* at 1225.

C

After a 10–day bench trial, the district court granted Plaintiffs declaratory and injunctive relief on their Title IX claims alleging (1) unequal treatment of and benefits to female athletes at Castle Park, and (2) retaliation. *See Ollier v. Sweetwater Union High Sch. Dist.,* 858 F.Supp.2d 1093 (S.D.Cal.2012).

The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising. *Id.* at 1098–1108, 1115. Among other things, the district court found that female athletes at Castle Park were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes. *Id.* at 1099–1104, 1107. The district court found that female athletes received unequal treatment and benefits as a result of "systemic administrative failures" at Castle Park, and that Sweetwater failed to implement "policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." *Id.* at 1108.

The district court also ruled that Sweetwater violated Title IX when it retaliated against Plaintiffs by firing the Castle Park softball coach, Chris Martinez, after the father of two of the named plaintiffs complained to school administrators about "inequalities for girls in the school's athletic programs." *Id.* at 1108; *see id.* at 1115. The district court found that Coach Martinez was fired six weeks after the Castle Park athletic director told him he could be fired at any time for any reason-a comment the coach understood to be a threat that he would be fired "if additional complaints were made about the girls' softball facilities." *Id.* at 1108.

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Borrowing from "Title VII cases to define Title IX's applicable legal standards," the district court concluded (1) that Plaintiffs engaged in protected activity when they complained to Sweetwater about Title IX violations and when they filed their complaint; (2) that Plaintiffs suffered adverse actions—such as the firing of their softball coach, his replacement by a less experienced coach, cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters—that caused their "long-term and successful softball program" to be "significantly disrupted"; and (3) that a causal link between their protected conduct and Sweetwater's retaliatory actions could "be established by an inference derived from circumstantial evidence"—in this case, "temporal proximity." *Id.* at 1113–14. Finally, the district court rejected Sweetwater's non-retaliatory reasons for firing Coach Martinez, concluding that they were "not credible and are pretextual." *Id.* at 1114. The district court determined that Sweetwater's suggested non-retaliatory justifications were *post hoc* rationalizations for its decision to fire Coach Martinez-a decision the district court said was impermissibly retaliatory. *See id.*

D

[1] Sweetwater timely appealed the district court's decisions (1) to grant partial***854** summary judgment to Plaintiffs on their Title IX unequal participation claim; (2) to grant Plaintiffs' motions to exclude expert testimony and 38 untimely disclosed witnesses; (3) to deny Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim; and (4) to grant a permanent injunction to Plaintiffs on their Title IX claims, including those alleging (a) unequal treatment of and benefits to female athletes at Castle Park, and (b) retaliation.[FN4]

FN4. Sweetwater also gave notice of its intent to appeal the district court's decision to certify the Plaintiffs' proposed class. However, neither of Sweetwater's briefs on appeal includes argument on the district court's decision to grant class certification. Sweetwater's appeal on that issue is waived. *See Hall,* 697 F.3d at 1071.

II

We review *de novo* a district court's grant of a motion for summary judgment to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to any material fact and whether the district court correctly applied the substantive law. *See* Fed.R.Civ.P. 56(a); *Cameron v. Craig,* 713 F.3d 1012, 1018 (9th Cir.2013).

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's implementing regulations require that schools provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). Among the factors we consider to determine whether equal opportunities are available to male and female athletes is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1). In 1979, the Office of Civil Rights of the Department of Health, Education, and Welfare—the precursor to today's Department of Health & Human Services and Department of Education—published a "Policy Interpretation" of Title IX setting a three-part test to determine whether an institution is complying with the "effective accommodation" requirement:

> (1) Whether ... participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

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> (2) Where the members of one sex have been and are underrepresented among ... athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among ... athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

See 44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979). We have adopted this three-part test, which by its terms provides that an athletics program complies with Title IX if it satisfies any one of the above conditions. *See Neal,* 198 F.3d at 767–68.[FN5]

> FN5. We give deference to the Department of Education's guidance according to *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Mansourian v. Regents of Univ. of Cal.,* 602 F.3d 957, 965 n. 9 (9th Cir.2010).

***855 A**

[2] Sweetwater contends that the district court erred in granting summary judgment to Plaintiffs on their Title IX unequal participation claim because (1) there is "overall proportionality between the sexes" in athletics at Castle Park; (2) Castle Park "expanded the number of athletic teams for female participation over a 10–year period"; (3) "the trend over 10 years showed increased female participation in sports" at Castle Park; and (4) Castle Park "accommodated express female interest" in state-sanctioned varsity sports. Relatedly, Sweetwater argues that there was insufficient interest among female students to sustain viable teams in field hockey, water polo, or tennis.

Plaintiffs, on the other hand, contend that (1) the number of female athletes at Castle Park has consistently lagged behind overall female enrollment at the school-that is, the two figures are not "substantially proportionate"; (2) the number of *teams* on which girls could theoretically participate is irrelevant under Title IX, which considers only the number of female *athletes;* and (3) "girls' interest and ability were not slaked by existing programs."

The United States as *amicus curiae* sides with Plaintiffs and urges us to affirm the district court's award of summary judgment. The Government says that the district court "properly analyzed" Castle Park's athletic program under the three-part "effective accommodation" test, and that it correctly concluded that Sweetwater "failed to provide nondiscriminatory athletic participation opportunities to female students" at Castle Park. The Government's position rejects Sweetwater's argument that Title IX should be applied differently to high schools than to colleges, as well as the idea that the district court's "substantial proportionality" evaluation was flawed. [FN6] We agree with the Government that the three-part test applies to a high school. This is suggested by the Government's regulations, *See* 34 C.F.R. § 106.41(a) (disallowing sex discrimination "in any interscholastic, intercollegiate, club or intramural athletics"), and, accordingly, apply the three-part "effective accommodation" test here. Although this regulation does not explicitly refer to high schools, it does not distinguish between high schools and other types of interscholastic, club or intramural athletics. We give *Chevron* deference to this regulation. *See* note 5, supra. *See also McCormick ex rel. McCormick v. School Dist. of Mamaroneck,* 370 F.3d 275, 300 (2d Cir.2004) (applying three-part test to high school districts); *Horner v. Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 272–75 (6th Cir.1994) (same).

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FN6. On appeal, Sweetwater propounds a new theory that, with respect to the first prong of the "effective accommodation" test, "the idea of proportionality relies on percentages, rather than absolute numbers." The Government calls this theory, which has no precedential support, "flatly incorrect."

B

[3] In 1996, the Department of Education clarified that our analysis under the first prong of the Title IX "effective accommodation" test—that is, our analysis of whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," 44 Fed.Reg. at 71,418—"begins with a determination of the number of participation opportunities afforded to male and female athletes." Office of Civil Rights, U.S. Dep't of Educ., ***856** *Clarification of Intercollegiate Athletics Policy Guidance: The Three–Part Test* (Jan. 16, 1996) ("1996 Clarification"). In making this determination, we count only "actual athletes," not "unfilled slots," because Title IX participation opportunities are "real, not illusory." Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Letter").

[4][5] The second step of our analysis under the first prong of the three-prong test is to consider whether the number of participation opportunities—*i.e.*, athletes—is substantially proportionate to each sex's enrollment. *See* 1996 Clarification; *see also Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir.2012). Exact proportionality is not required, and there is no "magic number at which substantial proportionality is achieved." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 110 (4th Cir.2011); *see also* 1996 Clarification. Rather, "substantial proportionality is determined on a case-by-case basis in light of 'the institution's specific circumstances and the size of its athletic program.' " *Biediger*, 691 F.3d at 94 (quoting 1996 Clarification).[FN7] As a general rule, there is substantial proportionality "if the number of additional participants ... required for exact proportionality 'would not be sufficient to sustain a viable team.' " *Id.* (quoting 1996 Clarification).

FN7. An institution that sought to explain a disparity from substantial proportionality should show how its specific circumstances justifiably explain the reasons for the disparity as being beyond its control.

Between 1998 and 2008, female enrollment at Castle Park ranged from a low of 975 (in the 2007–2008 school year) to a high of 1133 (2001–2002). Male enrollment ranged from 1128 (2000–2001) to 1292 (2004–2005). Female athletes ranged from 144 (1999–2000 and 2003–2004) to 198 (2002–2003), while male athletes ranged from 221 (2005–2006) to 343 (2004–2005). Perhaps more helpfully stated, girls made up 45.4–49.6 percent of the student body at Castle Park but only 33.4–40.8 percent of the athletes from 1998 to 2008. At no point in that ten-year span was the disparity between the percentage of female athletes and the percentage of female students less than 6.7 percent. It was less than 10 percent in only three years, and at least 13 percent in five years. In the three years at issue in this lawsuit, the disparities were 6.7 percent (2005–2006), 10.3 percent (2006–2007), and 6.7 percent (2007–2008).[FN8]

FN8. That there are "more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park is not controlling. We agree with Plaintiffs that counting "sham girls' teams," like multiple levels of football and wrestling, despite limited participation by girls in those sports, is "both misleading and inaccurate." It is the number of female athletes that matters. After all, Title IX "participation opportunities must be real, not illusory." 1996 Letter.

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There is no question that exact proportionality is lacking at Castle Park. Sweetwater concedes as much. Whether there is substantial proportionality, however, requires us to look beyond the raw numbers to "the institution's specific circumstances and the size of its athletic program." 1996 Clarification. Instructive on this point is the Department of Education's guidance that substantial proportionality generally requires that "the number of additional participants ... required for exact proportionality" be insufficient "to sustain a viable team." *Biediger*, 691 F.3d at 94 (internal quotation marks omitted).

At Castle Park, the 6.7 percent disparity in the 2007–2008 school year was equivalent to 47 girls who would have played ***857** sports if participation were exactly proportional to enrollment and no fewer boys participated. [FN9] As the district court noted, 47 girls can sustain at least one viable competitive team.[FN10] Defendants failed to raise more than a conclusory assertion that the specific circumstances at Castle Park explained the 6.7% disparity between female participation opportunities and female enrollment, or that Castle Park could not support a viable competitive team drawn from the 47 girls. As a matter of law, then, we conclude that female athletic participation and overall female enrollment were not "substantially proportionate" at Castle Park at the relevant times.

FN9. In 2005–2006 (6.7 percent; 48 girls) and 2006–2007 (10.3 percent; 92 girls), the disparity was even greater.

FN10. The Department of Education says only that a 62–woman gap would likely preclude a finding of substantial proportionality, but that a six-woman gap would likely not. 1996 Clarification.

C

[6][7] Participation need not be substantially proportionate to enrollment, however, if Sweetwater can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of" female athletes. 44 Fed.Reg. at 71,418; *see also Neal*, 198 F.3d at 767–68. This second prong of the Title IX "effective accommodation" test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 Clarification. The Department of Education's 1996 guidance is helpful: "There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of" female students. *Id.* The guidance also makes clear that an institution must do more than show a *history* of program expansion; it "must demonstrate a continuing (*i.e.*, present) practice of program expansion as warranted by developing interests and abilities." *Id.*

Sweetwater contends that Castle Park has increased the number of teams on which girls can play in the last decade, showing evidence of the kind "history and continuing practice of program expansion" sufficient to overcome a lack of "substantial proportionality" between female athletic participation and overall female enrollment. But Sweetwater's methodology is flawed, and its argument misses the point of Title IX. The number of *teams* on which girls could theoretically participate is not controlling under Title IX, which focuses on the number of female *athletes*. *See Mansourian*, 602 F.3d at 969 ("The [Prong] Two analysis focuses primarily ... on increasing the number of women's athletic opportunities rather than increasing the number of women's teams.").

The number of female athletes at Castle Park has varied since 1998, but there were more girls playing sports in the 1998–1999 school year (156) than in the 2007–2008 school year (149). The four most recent

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years for which we have data show that a graph of female athletic participation at Castle Park over time looks nothing like the upward trend line that Title IX requires. The number of female athletes shrank from 172 in the 2004–2005 school year to 146 in 2005–2006, before growing to 174 in 2006–2007 and shrinking again to 149 in 2007–2008. As Plaintiffs suggest, these "dramatic ups and downs" are far from the kind of "steady march ***858** forward" that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test. We conclude that there is no "history and continuing practice of program expansion" for women's sports at Castle Park.

D

[8] Female athletic participation is not substantially proportionate to overall female enrollment at Castle Park. And there is no history or continuing practice of program expansion for women's sports at the school. And yet, Sweetwater can still satisfy Title IX if it proves "that the interests and abilities of" female students "have been fully and effectively accommodated by the present program." 44 Fed.Reg. at 71,418; *see also Neal*, 198 F.3d at 767–68. This, the third prong of the Title IX "effective accommodation" test, considers whether a gender imbalance in athletics is the product of impermissible discrimination or merely of the genders' varying levels of interest in sports. *See* 1996 Clarification. Stated another way, a school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics.

[9][10] The Department of Education's 1996 guidance is again instructive: In evaluating compliance under the third prong, we must consider whether there is (1) "unmet interest in a particular sport"; (2) ability to support a team in that sport; and (3) a "reasonable expectation of competition for the team." *Id.* Sweetwater would be Title IX-compliant unless all three conditions are present. *See id.* Finally, if an "institution has recently eliminated a viable team," we presume "that there is sufficient interest, ability, and available competition to sustain" a team in that sport absent strong evidence that conditions have changed. *Id.; see also Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir.1996).

Sweetwater contends that (1) Plaintiffs were required to, but did not, conduct official surveys of female students at Castle Park to gauge unmet interest; (2) field hockey is irrelevant for Title IX purposes because it is not approved by the California Interscholastic Federation ("CIF"); and (3) in any event, field hockey was eliminated only because interest in the sport waned.

Sweetwater's arguments are either factually wrong or without legal support. First, Title IX plaintiffs need not themselves gauge interest in any particular sport. It is the school district that should evaluate student interest "periodically" to "identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex." 1996 Clarification. Second, field hockey *is* a CIF-approved sport.[FN11] But even if it were not, Sweetwater's position is foreclosed by Title IX's implementing regulations, which state that compliance "is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association." 34 C.F.R. § 106.6(c); *see also Biediger*, 691 F.3d at 93–94 (noting that we are to determine whether a particular "activity qualifies as a sport by reference to several factors relating to 'program structure and administration' and 'team preparation and competition' " (quoting Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008))). Third, the record makes clear that Castle Park cut its field hockey team not because interest in the sport waned, but because it was unable to ***859** find a coach. And the school's inability to hire a coach does not indicate lack of student interest in the sport.

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FN11. See Field Hockey, Cal. Interscholastic Fed'n, http:// www. cifstate. org/ index. php/ other- approved- sports/ field- hockey (last visited July 28, 2014).

Castle Park offered field hockey from 2001 through 2005, during which time the team ranged in size from 16 to 25 girls. It cut the sport before the 2005–2006 school year before offering it again in 2006–2007. It then cut field hockey a second time before the 2007–2008 school year. The Department of Education's guidance is clear on this point: "If an institution has recently eliminated a viable team ..., there is sufficient interest, ability, and available competition to sustain a[ ] ... team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists." 1996 Clarification; *see also Cohen*, 101 F.3d at 180. Castle Park's decision to cut field hockey twice during the relevant time period, coupled with its inability to show that its motivations were legitimate, is enough to show sufficient interest, ability, and available competition to sustain a field hockey team.

E

We conclude that Sweetwater has not fully and effectively accommodated the interests and abilities of its female athletes. The district court did not err in its award of summary judgment to Plaintiffs on their Title IX unequal participation claim, and we affirm the grant of injunctive relief to Plaintiffs on that issue.

III

[11] We review a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 462 (9th Cir.2014) (en banc); *see also United States v. Chao Fan Xu*, 706 F.3d 965, 984 (9th Cir.2013) (exclusion of expert testimony); *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1245 (9th Cir.2012) (imposition of discovery sanctions for Rule 26(a) and (e) violations).

[12][13] In non jury cases such as this one, "the district judge is given great latitude in the admission or exclusion of evidence." *Hollinger v. United States*, 651 F.2d 636, 640 (9th Cir.1981). The Supreme Court has said that district courts have "broad latitude" to determine whether expert testimony is sufficiently reliable to be admitted. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). And "we give particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which is "a recognized broadening of the sanctioning power." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001); *see also R & R Sails*, 673 F.3d at 1245 (same); *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir.2011) ("[A] district court has wide discretion in controlling discovery.") (alteration in original) (internal quotation marks omitted).

A

[14] We first address the exclusion of defense experts. Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if":

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

***860** (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and

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methods to the facts of the case.

Fed.R.Evid. 702.

[15][16] "It is well settled that bare qualifications alone cannot establish the admissibility of ... expert testimony." *United States v. Hermanek,* 289 F.3d 1076, 1093 (9th Cir.2002). Rather, we have interpreted Rule 702 to require that "[e]xpert testimony ... be both relevant and reliable." *Estate of Barabin,* 740 F.3d at 463 (alteration and ellipsis in original) (internal quotation marks omitted). A proposed expert's testimony, then, must "have a reliable basis in the knowledge and experience of his discipline." *Kumho Tire,* 526 U.S. at 148, 119 S.Ct. 1167 (internal quotation marks omitted). This requires district courts, acting in a "gatekeeping role," to assess "whether the reasoning or methodology underlying the testimony" is valid and "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592–93, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("*Daubert I* "). It is not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Estate of Barabin,* 740 F.3d at 463 (internal quotation marks omitted).

The district court excluded the proposed testimony of Peter Schiff—a retired superintendent of a different school district who would have testified about "the finances of schools and high school athletic programs, as well as equitable access to school facilities at Castle Park,"—because it could not "discern what, if any, method he employed in arriving at his opinions." The district court also found that Schiff's "conclusions appear to be based on his personal opinions and speculation rather than on a systematic assessment of ... athletic facilities and programs at [Castle Park]." Further, the district court called Schiff's site visits "superficial," and noted that "experience with the nonrelevant issue of school finance" did not qualify him "to opine on Title IX compliance."

Similarly, the district court excluded the proposed testimony of Penny Parker—an assistant principal at a different high school who would have testified about the "unique nature of high school softball and its role at Castle Park,"—because her "methodology is not at all clear" and "her opinions are speculative ... inherently unreliable and unsupported by the facts."

We assume without deciding that (1) Schiff and Parker's proposed testimony was relevant, and (2) Schiff and Parker were qualified as Title IX experts under Rule 702. Nonetheless, we conclude that the district court did not abuse its discretion when it struck both experts' proposed testimony. The record suggests that the district court's determination that Schiff and Parker's proposed testimony was based on, at best, an unreliable methodology, was not illogical or implausible.

Schiff did not visit Castle Park to conduct an in-person investigation until *after* he submitted his initial report on the case. And when he did visit, his visit was cursory and not inseason: Schiff only walked the softball and baseball fields. His opinion that the "girls' softball field was in excellent shape," then, was based on no more than a superficial visual examination of the softball and baseball fields. Schiff—who Sweetwater contends is qualified "to assess the state of the athletic facilities for both boys and girls teams" at Castle Park because of his "experience on the business side of athletics," his "extensive[ ]" work with CIF, and his high school baseball coaching tenure—did not enter the softball or baseball dugouts (or batting ***861** cages), and yet he sought to testify "on the renovations to the softball field, including new fencing, bleachers, and dugout areas."

Parker's only visit to Castle Park lasted barely an hour. And that visit was as cursory as Schiff' s: Parker—a former softball coach who Sweetwater offered as an expert on "all aspects of the game of soft-

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ball,"—"toured the Castle Park facilities," including the softball and baseball fields and boys and girls locker rooms, and "was present while both a baseball and a softball game were being played simultaneously." She "observed the playing surfaces, dugout areas, field condition, fencing, bleachers, and amenities," but only from afar. Like Schiff, Parker took no photographs and no measurements. She did not speak to anyone at Castle Park about the fields. And she admitted that her proposed testimony about the softball team's allegedly inferior fundraising and accounting practices was speculative.

[17][18] Schiff and Parker based their proposed testimony on superficial inspections of the Castle Park facilities. Even if a visual walkthrough, without more, *could* be enough in some cases to render expert testimony admissible under Rule 702, it certainly does not *compel* that conclusion in all cases. Moreover, as the district court found, Schiff and Parker's conclusions were based on their "personal opinions and speculation rather than on a systematic assessment of [Castle Park's] athletic facilities and programs." But personal opinion testimony is inadmissible as a matter of law under Rule 702, *see Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir.1995)(*"Daubert II"*), and speculative testimony is inherently unreliable, *see Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir.1997); *see also Daubert I*, 509 U.S. at 590, 113 S.Ct. 2786 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). We cannot say the district court abused its discretion when it barred Schiff and Parker from testifying at trial after finding their testimony to be "inherently unreliable and unsupported by the facts." The district court properly exercised its "gatekeeping role" under *Daubert I*, 509 U.S. at 597, 113 S.Ct. 2786.

B

[19] We next address the exclusion of fact witnesses. The general issue is whether witnesses not listed in Rule 26(a) disclosures—and who were identified 15 months after the discovery cutoff and only ten months before trial—were identified too late in the process.

The Federal Rules of Civil Procedure require parties to provide to other parties "the name ... of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed.R.Civ.P. 26(a)(1)(A)(i). And "[a] party who has made a disclosure under Rule 26(a) ... must supplement or correct its disclosure" in a "timely manner if the party learns that in some material respect the disclosure ... is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." *Id.* R. 26(e). A party that does not timely identify a witness under Rule 26 may not use that witness to supply evidence at a trial "unless the failure was substantially justified or is harmless." *Id.* R. 37(c)(1); *see also Yeti by Molly*, 259 F.3d at 1105. Indeed, Rule 37(c)(1) is "intended to put teeth into the mandatory ... disclosure requirements" of Rule 26(a) and (e). 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed.2014).

***862** The district court excluded 38 Sweetwater witnesses as untimely disclosed, in violation of Rule 26(a) and (e), in part because it found "no reason why any of the 38 witnesses were not disclosed to [P]laintiffs either initially or by timely supplementation." The district court concluded that "the mere mention of a name in a deposition is insufficient" to notify Plaintiffs that Sweetwater "intend[s] to present that person at trial," and that to "suggest otherwise flies in the face of the requirements of Rule 26." And the district court reasoned that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and noncumulative witnesses is harmful and without substantial justifica-

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tion."

[20] A "district court has wide discretion in controlling discovery." *Jeff D.*, 643 F.3d at 289 (internal quotation marks omitted). And, as we noted earlier, that discretion is "particularly wide" when it comes to excluding witnesses under Rule 37(c)(1). *Yeti by Molly*, 259 F.3d at 1106.

Sweetwater argues that exclusion of 30 of its 38 witnesses was an abuse of discretion because (1) "Plaintiffs were made aware" of those witnesses during discovery—specifically, during Plaintiffs' depositions of other Sweetwater witnesses, and (2) any violation of Rule 26 "was harmless to Plaintiffs." Of the remaining eight witnesses, Sweetwater contends that untimely disclosure was both justified because those witnesses were not employed at Castle Park before the discovery cutoff date, and harmless because they were disclosed more than eight months before trial. We conclude that the district court did not abuse its discretion by imposing a discovery sanction. The record amply supports the district court's discretionary determination that Sweetwater's lapse was not justified or harmless.

Initial Rule 26(a) disclosures were due October 29, 2007. At least 12 of Sweetwater's 38 contested witnesses were Castle Park employees by that date. The discovery cutoff was August 8, 2008, and lay witness depositions had to be completed by September 30, 2008. At least 19 of the 38 witnesses were Castle Park employees by those dates. And yet, Sweetwater did not disclose any of the 38 witnesses until November 23, 2009, more than 15 months after the close of discovery and less than a year before trial.

Sweetwater does not dispute that it did not formally offer the names of any of the 38 witnesses by the October 29, 2007, deadline for initial Rule 26(a) disclosures (or by the August 8, 2008, discovery cutoff, for that matter). Nor does it dispute that it did not "supplement or correct its disclosure or response," *see* Fed.R.Civ.P. 26(a)(1), by offering the witnesses' names in accord with Rule 26(e). Instead, Sweetwater contends that because other disclosed witnesses had mentioned the contested witnesses at their depositions, Plaintiffs were on notice that the contested witnesses might testify and were not prejudiced by untimely disclosure. Sweetwater contends, in essence, that it complied with Rule 26 because Plaintiffs knew of the contested witnesses' existence.

The district court did not abuse its discretion by rejecting Sweetwater's argument. The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush. After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts***863** are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

With these considerations in mind, we return to the governing rules. Rule 26 states that "a *party* must, without awaiting a discovery request, provide to the other parties ... the name and, if known, the address and telephone number of each individual likely to have discoverable information." Fed.R.Civ.P. 26(a)(1)(A) (emphasis added). Compliance with Rule 26's disclosure requirements is "mandatory." *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 (9th

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Cir.2014).

[21] The rule places the disclosure obligation on a "party." That another witness has made a passing reference in a deposition to a person with knowledge or responsibilities who could conceivably be a witness does not satisfy a party's disclosure obligations. An adverse party should not have to guess which undisclosed witnesses may be called to testify. We—and the Advisory Committee on the Federal Rules of Civil Procedure—have warned litigants not to " 'indulge in gamesmanship with respect to the disclosure obligations' " of Rule 26. *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 n. 3 (9th Cir.1994) (quoting Fed.R.Civ.P. 26 advisory committee's note (1993 amend.)). The record shows that the district court did not abuse its discretion when it concluded that Sweetwater's attempt to obfuscate the meaning of Rule 26(a) was just this sort of gamesmanship. There was no error in the district court's conclusion that "the mere mention of a name in a deposition is insufficient to give notice to" Plaintiffs that Sweetwater "intend[ed] to present that person at trial."

The district court did not abuse its discretion when it concluded that Sweetwater's failure to comply with Rule 26's disclosure requirement was neither substantially justified nor harmless. *See* Fed.R.Civ.P. 37(c)(1). Sweetwater does not argue that its untimely disclosure of these 30 witnesses was substantially justified. Nor was it harmless. Had Sweetwater's witnesses been allowed to testify at trial, Plaintiffs would have had to depose them—or at least to consider which witnesses were worth deposing—and to prepare to question them at trial. *See Yeti by Molly*, 259 F.3d at 1107. The record demonstrates that the district court's conclusion, that reopening discovery before trial would have burdened Plaintiffs and disrupted the court's and the parties' schedules, was well within its discretion. The last thing a party or its counsel wants in a hotly contested lawsuit is to make last-minute preparations and decisions on the run. The late disclosures here were not harmless. *See Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir.2008).

Nor did the district court abuse its discretion by finding that the untimely disclosure of the eight remaining witnesses also was not harmless. Allowing these witnesses to testify and reopening discovery would have had the same costly and disruptive effects. Nor was it substantially justified merely because the eight witnesses were not employed at Castle Park until after the discovery cutoff date. Sanctioning this argument would force us to read the supplementation requirement out of Rule 26(e). We will not do that.

***864** Sweetwater did not comply with the disclosure requirements of Rule 26(a) and (e). That failure was neither substantially justified nor harmless. The district court did not abuse its discretion when it excluded Sweetwater's 38 untimely disclosed witnesses from testifying at trial.

C

[22] The next issue concerns whether the district court abused its discretion by declining to consider contemporaneous evidence at trial. On April 26, 2010, the district court set a June 15, 2010, cutoff date for Sweetwater to provide evidence of "continuous repairs and renovations of athletic facilities at Castle Park" for consideration at trial. Improvements made after June 15, 2010, but before the start of trial on September 14, 2010, the district court explained, would not be considered. Sweetwater did not then object to the district court's decision.

On appeal, however, Sweetwater argues that injunctive relief should be based on contemporaneous evidence, not on evidence of past harm. And if the district court had considered contemporaneous evidence at trial, Sweetwater speculates, it would have found Castle Park in compliance with Title IX and would not have issued an injunction.

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[23] This argument fails for several reasons. First, a "trial court's power to control the conduct of trial is broad." *United States v. Panza*, 612 F.2d 432, 438 (9th Cir.1979). Establishing a cutoff date after which it would not consider supplemental improvements to facilities at Castle Park—especially one that was only 90 days before trial—aided orderly pre-trial procedure and was well within the district court's discretion.

Second, the district court *did* consider some of Sweetwater's remedial improvements, "particularly with respect to the girls' softball facility," but concluded that "those steps have not been consistent, adequate or comprehensive" and that "many violations of Title IX have not been remedied or even addressed." Sweetwater's contention that "the District Court appeared to ignore key evidence of changed facilities" is unpersuasive.

Third, even if contemporaneous evidence showed that Sweetwater was complying with Title IX at the time of trial, the district court *still* could have issued an injunction based on past harm. *See United States v. Mass. Mar. Acad.*, 762 F.2d 142, 157–58 (1st Cir.1985). The plaintiff class included *future* students, who were protected by the injunction. "Voluntary cessation" of wrongful conduct "does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (alteration in original) (internal quotation marks omitted).

Fourth, the district court found no evidence that Sweetwater had "addressed or implemented policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." In light of the systemic problem of gender inequity in the Castle Park athletics program, the district court did not abuse its discretion by issuing an injunction requiring Sweetwater to comply with Title IX.

IV

[24] We review *de novo* a district court's decision to deny a Rule 12(b)(6) ***865** motion to dismiss.[FN12] *See Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir.2010). Similarly, whether a party has standing to bring a claim is a question of law that we review *de novo*. *See Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir.2011). But we review a district court's fact-finding on standing questions for clear error. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir.2012).

FN12. Because the district court construed Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as a Rule 12(b)(6) motion to dismiss that claim, *see Ollier*, 735 F.Supp.2d at 1224, we do the same.

[25][26][27] Article III of the Constitution requires a party to have standing to bring its suit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The elements of standing are wellestablished: the party must have suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning the injury has to be "fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61, 112 S.Ct. 2130 (alteration, ellipsis, citations, and internal quotation marks omitted).[FN13] "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir.2007) (en banc).

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FN13. Sweetwater does not contest that Plaintiffs' alleged harm is "fairly traceable" to them. Sweetwater's argument against redressability is premised on the idea that prospective injunctive relief cannot redress past harm. Because Plaintiffs' harm is ongoing, that argument fails. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284–85 (2d Cir.2004); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 553 n. 15, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (Powell, J., dissenting). Only Plaintiffs' alleged injury in fact, then, is at issue in our analysis.

[28] The district court held that Plaintiffs had standing to bring their Title IX retaliation claim, but gave few reasons for its decision. *See Ollier*, 735 F.Supp.2d at 1226. On appeal, Sweetwater argues, as it did before the district court, that Plaintiffs lack standing to enjoin the retaliatory action allegedly taken against Coach Martinez because students may not "recover for adverse retaliatory employment actions taken against" an educator, even if that educator "engaged in protected activity on behalf of the students." Sweetwater contends that while Coach Martinez would have had standing to bring a Title IX retaliation claim himself, the "third party" students cannot "maintain a valid cause of action for retaliation under Title IX for their coach's protected activity and the adverse employment action taken against the coach."

We reject this argument. It misunderstands Plaintiffs' claim, which asserts that Sweetwater impermissibly retaliated against *them* by firing Coach Martinez in response to Title IX complaints he made on Plaintiffs' behalf. With their softball coach fired, Plaintiffs' prospects for competing were hampered. Stated another way, Plaintiffs' Title IX retaliation claim seeks to vindicate not Coach Martinez's rights, but Plaintiffs' own rights. Because Plaintiffs were asserting their own "legal rights and interests," not a claim of their coach, the generally strict limitations on third-party standing do not bar their claim. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

***866** Justice O'Connor correctly said that "teachers and coaches ... are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (alteration and internal quotation marks omitted). Sweetwater's position—that Plaintiffs lack standing because it was not they who made the Title IX complaints—would allow any school facing a Title IX retaliation suit brought by students who did not themselves make Title IX complaints to insulate itself simply by firing (or otherwise silencing) those who made the Title IX complaints on the students' behalf. We will "not assume that Congress left such a gap" in Title IX's enforcement scheme. *Id.*

[29] An injured party may sue under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (internal quotation marks omitted). Plaintiffs, of course, do not bring their suit under the APA, but the Supreme Court has extended its "zone of interests" jurisprudence to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whose antiretaliation provisions are analogous here. *See Thompson*, 131 S.Ct. at 870. And students like Plaintiffs surely fall within the "zone of interests" that Title IX's implicit antiretaliation provisions seek to protect. *See Jackson*, 544 U.S. at 173–77, 125 S.Ct. 1497.

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[30] Finally, the Supreme Court has foreclosed Sweetwater's position. Faced with the argument that anti-retaliation provisions limit standing to those "who engaged in the protected activity" and were "the subject of unlawful retaliation," the Court has said that such a position is an "artificially narrow" reading with "no basis in text or prior practice." *Thompson*, 131 S.Ct. at 869–70.[FN14] Rather, "any plaintiff with an interest arguably sought to be protected by" a statute with an anti-retaliation provision has standing to sue under that statute. *Id.* at 870 (alteration and internal quotation marks omitted). Students have "an interest arguably sought to be protected by" Title IX——indeed, students are the statute's very focus.

FN14. *Thompson v. North American Stainless, LP* was a Title VII case, but the Supreme Court's reasoning applies with equal force to Title IX.

[31] Coach Martinez gave softball players extra practice time and individualized attention, persuaded volunteer coaches to help with specialized skills, and arranged for the team to play in tournaments attended by college recruiters. The softball team was stronger with Coach Martinez than without him. After Coach Martinez was fired, Sweetwater stripped the softball team of its voluntary assistant coaches, canceled the team's 2007 awards banquet, and forbade the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on Plaintiffs. We agree.

Plaintiffs have alleged judicially cognizable injuries flowing from Sweetwater's retaliatory responses to Title IX complaints ***867** made by their parents and Coach Martinez. The district court's ruling that Plaintiffs have Article III standing to bring their Title IX retaliation claim and its decision to deny Sweetwater's motion to strike that claim were not error.

V

[32][33] We review a district court's decision to grant a permanent injunction for an abuse of discretion, but we review for clear error the factual findings underpinning the award of injunctive relief, *see Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir.2011), just as we review for clear error a district court's findings of fact after bench trial. *See Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665 (9th Cir.1996). However, we review *de novo* "the rulings of law relied upon by the district court in awarding injunctive relief." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177 (9th Cir.2011) (internal quotation marks omitted).

[34][35] We come to the substance of Plaintiffs' retaliation claim, an important part of this case. "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson*, 544 U.S. at 178, 180, 125 S.Ct. 1497. The Supreme Court "has often looked to its Title VII interpretations ... in illuminating Title IX," so we apply to Title IX retaliation claims "the familiar framework used to decide retaliation claims under Title VII." *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724–25 (9th Cir.2012), *cert. denied*, – — U.S. ——, 133 S.Ct. 1997, 185 L.Ed.2d 866 (2013) (internal quotation marks omitted).

[36][37] Under that framework, a "plaintiff who lacks direct evidence of retaliation must first make out a *prima facie* case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* at 724. The burden on a plaintiff to show a *prima facie* case of retaliation is low. Only "a minimal threshold showing of retaliation" is required. *Id.* After a plaintiff has made this

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showing, the burden shifts to the defendant to "articulate a legitimate, non-retaliatory reason for the challenged action." *Id.* If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. *See id.*

A

[38] The district court found that Plaintiffs had made out a *prima facie* case of retaliation: They engaged in protected activity when they complained about Title IX violations in May and July 2006 and when they filed their complaint in April 2007. They suffered adverse action because the softball program was "significantly disrupted" when, among other things, Coach Martinez was fired and replaced by a "far less experienced coach." And a causal link between Plaintiffs' protected conduct and the adverse actions they suffered "may be established by an inference derived from circumstantial evidence"—in this case, the "temporal proximity" between Plaintiffs' engaging in protected activity in May 2006, July 2006, and April 2007, and the adverse actions taken against them in July 2006 and spring 2007.

Sweetwater contends that these findings were clearly erroneous because (1) "At most, the named plaintiffs who attended CPHS at the time of the complaints can legitimately state they engaged in protected activity"; (2) the district court did not ***868** articulate the standard it used to determine which actions were "adverse" and did not, as Sweetwater says was required, evaluate whether Plaintiffs "were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation"; and (3) there was no causal link between protected activity and adverse action because Coach Martinez was fired to make way for a certified, on-site teacher, not because of any Title IX complaints.

"In the Title IX context, speaking out against sex discrimination ... is protected activity." *Id.* at 725 (alteration and internal quotation marks omitted). Indeed, "Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally." *Id.* That is precisely what happened here. The father of two of the named plaintiffs complained to the Castle Park athletic director in May 2006 about Title IX violations; Plaintiffs' counsel sent Sweetwater a demand letter in July 2006 regarding Title IX violations at Castle Park; and Plaintiffs filed their class action complaint in April 2007. These are indisputably protected activities under Title IX, and the district court's finding to that effect was not clearly erroneous.

[39][40] It is not a viable argument for Sweetwater to urge that a class may not "sue a school district for retaliation in a Title IX athletics case." As we have previously held: "The existence of a private right of action to enforce Title IX is well-established." *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 964 n. 6 (9th Cir.2010). Further, a private right of action under Title IX includes a claim for retaliation. As the United States Supreme Court has said: "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson*, 544 U.S. at 178, 180, 125 S.Ct. 1497. Nor is it a viable argument for Sweetwater to complain that only some members of the plaintiff's class who attended CPHS when complaints were made can urge they engaged in protected activity. That the class includes students who were not members of the softball team at the time of retaliation, and who benefit from the relief, does not impair the validity of the relief. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (holding that Title VII "enabl[es] suit by any plaintiff with an interest arguably sought to be protected.") (internal quotations and alteration omitted); *Mansourian*, 602 F.3d at 962 (approving a class of female wrestlers "on behalf of all current and future female" university students). The relief of injunction is equitable, and the

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district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. *See generally Dobbs on Remedies*, §§ 2.4, 2.9.

[41][42][43] Under Title IX, as under Title VII, "the adverse action element is present when 'a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.' " *Id.* at 726 (alterations in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). Sweetwater does not argue—because it cannot argue—that the district court's adverse action findings do not satisfy this standard. [FN15] The district court found that ***869** Plaintiffs' "successful softball program was significantly disrupted to the detriment of the program and participants" because: (1) Coach Martinez was fired and replaced by a "far less experienced coach"; (2) the team was stripped of its assistant coaches; (3) the team's annual award banquet was canceled in 2007; (4) parents were prohibited from volunteering with the team; and (5) the team was not allowed to participate in a Las Vegas tournament attended by college recruiters. It was not clear error for the district court to conclude that a reasonable person could have found any of these actions "materially adverse" such that they "well might have dissuaded [him] from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted).

FN15. Rather, Sweetwater contends that the district court applied the wrong standard and that Plaintiffs, to show adverse action, must prove "that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation." Our decision in *Emeldi v. University of Oregon*, however, illustrates that Sweetwater's position is simply not the law.

[44][45] We construe the causal link element of the retaliation framework "broadly"; a plaintiff "merely has to prove that the protected activity and the [adverse] action are not completely unrelated." *Id.* (internal quotation marks omitted). In Title VII cases, causation "may be inferred from circumstantial evidence, such as the [defendant's] knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory" conduct. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987). *Emeldi* extended that rule to Title IX cases. *See* 698 F.3d at 726 ("[T]he proximity in time between" protected activity and allegedly retaliatory action can be "strong circumstantial evidence of causation."). Plaintiffs have met their burden: They engaged in protected activity in May 2006, July 2006, and April 2007. Coach Martinez was fired in July 2006 and the annual awards banquet was canceled in Spring 2007. The timing of these events is enough in context to show causation in this Title IX retaliation case. That the district court found as much was not clearly erroneous. Plaintiffs state a *prima facie* case of Title IX retaliation.

B

[46] Sweetwater offered the district court four legitimate, nonretaliatory reasons for firing Coach Martinez: First, Castle Park wanted to replace its walk-on coaches with certified teachers. Second, Coach Martinez mistakenly played an ineligible student in 2005 and forced the softball team to forfeit games as a result. Third, he allowed an unauthorized parent to coach a summer softball team. Fourth, he filed late paperwork related to the softball team's participation in a Las Vegas tournament—a mishap that Sweetwater said created an unnecessary liability risk. The district court rejected each reason, concluding that all four were "not credible and are pretextual."

Sweetwater argues on appeal that the district court committed clear error by disregarding these

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legitimate, nonretaliatory reasons because it "failed to evaluate and weigh the evidence before it" when it "looked past the abundance of uncontradicted information preexisting the Title IX complaints ... and focused almost entirely" on Coach Martinez's termination. Sweetwater also adds that Castle Park did not renew Coach Martinez's contract in part because "he was a mean and intimidating person" who often spoke in a "rough voice" and could be "abrasive." Coach Martinez, Sweetwater contends, "did not possess the guiding principles required***870** of a coach because he constantly failed to follow the rules" at Castle Park.

[47] Sweetwater disregards the salient fact that the district court held a trial on retaliation. The district court could permissibly find that, on the evidence it considered, Sweetwater's non-retaliatory reasons for firing Coach Martinez were a pretext for unlawful retaliatory conduct. First, Sweetwater contends that Castle Park fired Coach Martinez "primarily" because he allowed an unauthorized parent to coach a summer league team, but also that this incident merely "played a role" in his firing, and that the reason given Martinez when he was fired was that Castle Park "wanted an on-site coach." These shifting, inconsistent reasons for Coach Martinez's termination are themselves evidence of pretext. *See Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 569 (9th Cir.2004) ("From the fact that Raytheon has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual.").

Second, the district court's findings underlying its conclusion that Sweetwater's "stated reasons for Martinez's termination are not credible and are pretextual" are convincing and not clearly erroneous. Coach Martinez was not fired as part of a coordinated campaign to replace walk-on coaches with certified teachers, as Sweetwater contends. There was a preference for certified teachers in place long before Coach Martinez was hired, and there was no certified teacher ready to replace him after he was fired. Nor was the district court required by the evidence to find that Coach Martinez was fired because he played an ineligible student and forced the softball team to forfeit games as a result. This incident occurred during the 2004–2005 school year, but Coach Martinez was not reprimanded at the time and was not fired until more than a year later. Also, eligibility determinations were the responsibility of school administrators, not athletics coaches.

[48] Sweetwater's argument that it fired Coach Martinez because he let an unauthorized parent coach a summer softball team is specious. Not only was Coach Martinez absent when the incident occurred, but he forbade the parent from coaching after learning of his ineligibility to do so. Moreover, the summer softball team in question "was not conducted under the auspices of the high school." Finally, while Coach Martinez did file late paperwork for the Las Vegas tournament, he was not then admonished for it. As with the ineligible player incident, the timing of his termination suggests that Sweetwater's allegedly nonretaliatory reason is merely a *post hoc* rationalization for what was actually an unlawful retaliatory firing. *See Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 452 (7th Cir.2006) (concluding that a district court's finding that "defendants first fired the plaintiffs and then came up with *post hoc* rationalizations for having done so" was not clearly erroneous).

On the record before it, the district court correctly could find that Coach Martinez was fired in retaliation for Plaintiffs' Title IX complaints, not for any of the pretextual, non-retaliatory reasons that Sweetwater has offered.

C

Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case of Title IX retaliation, and (2) that Sweetwater's purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for

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unlawful retaliation, we conclude that it was not an abuse of ***871** discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue.[FN16]

FN16. We also affirm the grant of injunctive relief to Plaintiffs on their Title IX unequal treatment and benefits claim, any objection to which Sweetwater waived on appeal by not arguing it. *See Hall*, 697 F.3d at 1071.

VI

We reject Sweetwater's attempt to relitigate the merits of its case. Title IX levels the playing fields for female athletes. In implementing this important principle, the district court committed no error.

AFFIRMED.

C.A.9 (Cal.),2014.
Ollier v. Sweetwater Union High School Dist.
768 F.3d 843, 89 Fed.R.Serv.3d 1292, 309 Ed. Law Rep. 624, 95 Fed. R. Evid. Serv. 544, 14 Cal. Daily Op. Serv. 11,066, 2014 Daily Journal D.A.R. 12,983

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EXHIBIT F

Westlaw.

608 F.3d 495, 83 Fed. R. Evid. Serv. 23, 10 Cal. Daily Op. Serv. 7316, 2010 Daily Journal D.A.R. 8773
(Cite as: 608 F.3d 495)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff–Appellant,
v.
Barry Lamar BONDS, Defendant–Appellee.

No. 09–10079.
Argued and Submitted Sept. 17, 2009.
Filed June 11, 2010.

Background: In perjury prosecution against former professional baseball player, defendant moved in limine to exclude certain testimony, laboratory blood and urine test results, and laboratory log sheets of test results. The United States District Court for the Northern District of California, Susan Illston, J., granted defendant's motion in part, and government filed interlocutory appeal.

Holdings: The Court of Appeals, Schroeder, Circuit Judge, held that:
(1) testimony of laboratory employee about alleged statements made by defendant's trainer was not admissible under residual exception to the hearsay rule;
(2) statements were not admissible as non-hearsay statements by authorized person
(3) statements were not admissible as non-hearsay statements by agent or employee; and
(4) laboratory log sheets were inadmissible under business records exception to hearsay rule.

Affirmed, and remanded.

Bea, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Criminal Law 110 419(2.5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.5) k. "Catch-all" or residual exception. Most Cited Cases

Testimony of laboratory employee about alleged statements made by former professional baseball player's trainer identifying certain blood and urine samples as having come from baseball player was not admissible under residual exception to the hearsay rule, in prosecution against player for perjury, arising out of statements player made under oath that he did not use performance-enhancing drugs; the trainer chose not to testify, his statements lacked significant indicators of trustworthiness, and no exceptional circumstances otherwise justified admission of the statements. Fed.Rules Evid.Rule 807, 28 U.S.C.A.

[2] Criminal Law 110 419(2.5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.5) k. "Catch-all" or residual exception. Most Cited Cases

The residual exception to the hearsay rule exists to provide judges a fair degree of latitude and flexibility to admit statements that would otherwise be hearsay. Fed.Rules Evid.Rule 807, 28 U.S.C.A.

[3] Criminal Law 110 410.40

110 Criminal Law

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110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases
(Formerly 110k410)

Rule of evidence providing that statement offered against a party by person authorized by that party is non-hearsay requires the declarant to have specific authority from a party to make a statement concerning a particular subject. Fed.Rules Evid.Rule 801(d)(2)(C), 28 U.S.C.A.

[4] Criminal Law 110 410.40

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases
(Formerly 110k410)

Rule of evidence providing that statement offered against a party by a party's agent or employee is non-hearsay authorizes admission of a statement against a party, but only if it is made within the scope of an employment or agency relationship. Fed.Rules Evid.Rule 801(d)(2)(D), 28 U.S.C.A.

[5] Criminal Law 110 1036.1(9)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(9) k. Exclusion of evidence. Most Cited Cases

Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and authorities. Most Cited Cases

Government preserved right to appeal District Court's ruling, that testimony of laboratory employee about alleged statements made by former professional baseball player's trainer identifying certain blood and urine samples as having come from baseball player was not admissible as non-hearsay statements against party by authorized person or employee, in prosecution against player for perjury, arising out of statements player made under oath that he did not use performance-enhancing drugs; the arguments were not raised for the first time on appeal, and although government's appellate brief contained little factual information explaining the nature of player's relationship with trainer, the government expressly raised the arguments during oral argument before the District Court. Fed.Rules Evid.Rule 801(d)(2)(C, D), 28 U.S.C.A.

[6] Criminal Law 110 410.40

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases

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(Formerly 110k410)

Testimony of laboratory employee about alleged statements made by former professional baseball player's trainer identifying certain blood and urine samples as having come from baseball player was not admissible as non-hearsay statements against a party by an authorized person, in prosecution against player for perjury, arising out of statements player made under oath that he did not use performance-enhancing drugs; there was no testimony from player or other evidence establishing that player expressly authorized trainer to identify the samples as his, and athletic trainers did not traditionally have any implicit authorization to speak on behalf of their trainees. Fed.Rules Evid.Rules 801(d)(2)(C, D), 28 U.S.C.A.

[7] Criminal Law 110 410.40

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases
(Formerly 110k410)

Testimony of laboratory employee about alleged statements made by former professional baseball player's trainer identifying certain blood and urine samples as having come from baseball player was not admissible as non-hearsay statements against a party by employee or agent, in prosecution against player for perjury, arising out of statements player made under oath that he did not use performance-enhancing drugs; trainer was independent contractor, rather than player's agent or employee, as there was no evidence that player directed or controlled any of trainer's activities, and trainer supplied his own equipment and material, and trainer did not act as agent or employee in delivering samples to lab, as the testing of the samples was done on trainer's own initiative. Fed.Rules Evid.Rule 801(d)(2)(D), 28 U.S.C.A.

[8] Criminal Law 110 410.40

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases
(Formerly 110k410)

To determine whether statements are admissible as non-hearsay statements against a party by an agent, the court must undertake a fact-based inquiry applying common law principles of agency. Fed.Rules Evid.Rule 801(d)(2)(D), 28 U.S.C.A.

[9] Labor and Employment 231H 23

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk23 k. In general. Most Cited Cases

Principal and Agent 308 1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the relation in general. Most Cited Cases

A court will look to the totality of the circumstances in determining whether an employment or agency relationship exists but the essential ingredient

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is the extent of control exercised by the employer.

[10] Criminal Law 110 410.40

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)5 Admissions by Agents or Representatives
110k410.40 k. In general. Most Cited Cases
(Formerly 110k410)

Evidence of an independent contractor relationship is insufficient in itself to establish an agency relationship for the purposes of rule of evidence providing that statements made by agent against party were non-hearsay. Fed.Rules Evid.Rule 801(d)(2)(D), 28 U.S.C.A.

[11] Criminal Law 110 436(5)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k436 Registers and Records
110k436(5) k. Medical and hospital records. Most Cited Cases

Laboratory log sheets purporting to show professional baseball player's blood and urine tested positive for steroid use were inadmissible under business records exception to hearsay rule, in prosecution against player for perjury, arising out of statements player made under oath that he did not use performance-enhancing drugs, absent non-hearsay testimony establishing that the samples tested related to player. Fed.Rules Evid.Rule 802, 28 U.S.C.A.

***497** Barbara Valliere, San Francisco, CA, for the plaintiff-appellant.

Dennis Riordan, San Francisco, CA, for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California, Susan Illston, District Judge, Presiding. D.C. No. 3:07–cr–00732–SI–1.

Before: MARY M. SCHROEDER, STEPHEN REINHARDT and CARLOS T. BEA, Circuit Judges.

Opinion by Judge SCHROEDER; Dissent by Judge BEA.

SCHROEDER, Circuit Judge:

In 2001, Barry Bonds hit 73 home runs for the San Francisco Giants. Also in 2001, as well as in prior and succeeding years, BALCO Laboratories, Inc. in San Francisco recorded, under the name "Barry Bonds," positive results of urine and blood tests for performance enhancing drugs. In 2003, Bonds swore under oath he had not taken performance enhancing drugs, so the government is now prosecuting him for perjury. But to succeed it must prove the tested samples BALCO recorded actually came from Barry Bonds. Hence, this appeal.

***498** The government tried to prove the source of the samples with the indisputably admissible testimony of a trainer, Greg Anderson, that Barry Bonds identified the samples as his own before giving them to Anderson, who took them to BALCO for testing. Anderson refused to testify, however, and has been jailed for contempt of court.

The government then went to Plan B, which was to offer the testimony of the BALCO employee, James Valente, to whom Anderson gave the samples. Valente would testify Anderson brought the samples to the lab and said they came from Barry Bonds. But the district court ruled this was hearsay that could not

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be admitted to establish the truth of what James Valente was told. *See* Fed.R.Evid. 802. Accordingly we have this interlocutory appeal by the United States seeking to establish that the Anderson statements fall within some exception to the hearsay rule.

The district court also ruled that because Anderson's statements were inadmissible, log sheets on which BALCO recorded the results of the testing under Bonds' name, were also inadmissible to prove the samples were Bonds'. The government challenges that ruling as well.

We have jurisdiction pursuant to 18 U.S.C. § 3731 which authorizes government interlocutory appeals of adverse evidentiary rulings. We review for abuse of discretion and affirm.

I. Background

BALCO Laboratories, Inc. was a California corporation that engaged in blood and urine analysis, and was located in San Francisco. In 2003, the IRS began to investigate BALCO, suspecting the company of first, distributing illegal performance enhancing drugs to athletes, and then, laundering the proceeds. In September 2003, the government raided BALCO and discovered evidence which it contends linked both trainer Greg Anderson ("Anderson") and BALCO to numerous professional athletes. One of these athletes was professional baseball player and Defendant Barry Bonds ("Bonds"). The government also found blood and urine test records which, it asserts, established that Bonds tested positive for steroids.

On multiple occasions Anderson took blood and urine samples to BALCO Director of Operations James Valente ("Valente") and identified them as having come from Bonds. According to Valente, when he received a urine sample from Bonds, he would assign the sample a code number in a log book, and then send the sample to Quest Diagnostics ("Quest") for analysis. Quest would send the result back to BALCO. BALCO would then record the result next to the code number in the log book. Also, according to Valente, BALCO would send Bonds' blood samples to LabOne & Specialty Lab ("LabOne") for analysis. The government seized the log sheets from BALCO, along with the lab test results.

Before the grand jury in the probe of BALCO, the questioning by the government focused extensively on the nature of Bonds' relationship with Anderson. Bonds testified that he had known Anderson since grade school, although the two had lost touch between high school and 1998. In 1998, Anderson started working out with Bonds and aiding him with his weight training. Anderson also provided Bonds with substances including "vitamins and protein shakes," "flax seed oil," and a "cream." According to the government, some or all of these items contained steroids. Anderson provided all of these items at no cost to Bonds. Bonds testified he took whatever supplements and creams Anderson gave him without question because he trusted Anderson as his friend. ***499** ("I would trust that he wouldn't do anything to hurt me."). Bonds stated that he did not believe anything Anderson provided him contained steroids. He specifically denied Anderson ever told him the cream was actually a steroid cream.

With respect to blood sample testing, Bonds testified before the grand jury that Anderson asked Bonds to provide blood samples on five or six occasions, telling Bonds he would take the blood to BALCO to determine any nutritional deficiencies in his body. Bonds said that he would only allow his own "personal doctor" to take the blood for the samples.

Bonds also testified he provided around four urine samples to Anderson and he believed the urine samples were also going to be used to analyze his nutrition. Anderson also delivered these samples to Valente at BALCO for analysis. ("Greg went [to BALCO] and dealt with it."). Bonds did not question Anderson about this process because they "were friends."

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The government showed Bonds numerous results of blood and urine tests but Bonds denied ever having seen them before. Rather Bonds contended that Anderson verbally and informally relayed the results of any tests to him. Bonds stated that Anderson told him that he tested negative for steroids. ("Greg just said: "You're—you're negative."). Bonds trusted what Anderson told him. ("He told me everything's okay. I didn't think anything about it.").

With respect to the relationship between Bonds and Anderson, Bonds admitted to paying Anderson $15,000 a year for training. Bonds stated that this payment was not formally agreed to. Rather, Bonds contended that he "felt guilty" and "at least [wanted to give Anderson] something." ("Greg has never asked me for a penny."). Bonds had several trainers and considered some of the trainers employees, but considered Anderson a friend whom he paid for his help. ("Greg is my friend.... Friend, but I'm paying you."). Bonds made his payments to Anderson in lump sums. In 2001, the year he set the Major League Baseball single season home run record, Bonds also provided Anderson, along with other friends and associates, a "gift" of $20,000. Bonds spent considerable time with Anderson in San Francisco but Bonds noted that Anderson only visited during weekends during spring training.

On February 12, 2004, a grand jury indicted Anderson and other BALCO figures for their illegal steroid distribution. Anderson pled guilty to these charges and admitted to distributing performance enhancing drugs to professional athletes. The government also commenced an investigation into whether Bonds committed perjury by denying steroid use during his grand jury testimony. Anderson, since that time, has continuously refused to testify against Bonds or in any way aid the government in this investigation and has spent time imprisoned for contempt.

II. Procedural History of this Appeal

On December 4, 2008, the government indicted Bonds on ten counts of making false statements during his grand jury testimony and one count of obstruction of justice. They included charges that Bonds lied when he 1) denied taking steroids and other performance enhancing drugs, 2) denied receiving steroids from Anderson, 3) misstated the time frame of when he received supplements from Anderson.

The next month, in January 2009, Bonds filed a motion in limine to exclude numerous pieces of evidence the government contends link Bonds to steroids. As relevant to this appeal Bonds moved to exclude two principal categories of evidence: the laboratory***500** blood and urine test results, and the BALCO log sheets of test results.

When the government sought to introduce as business records the lab test results from Quest (urine) and LabOne (blood) seized from BALCO, Anderson's refusal to testify created an obstacle. The essence of the government's identification proof was Anderson's identification of the samples to Valente as Bonds'. The government wanted to introduce Valente's testimony that Anderson told him for each sample that "This blood/urine comes from Barry Bonds," in order to provide the link to Bonds. Because the government was attempting to use Anderson's out of court statements to prove the truth of what they contained, Bonds argued that Anderson's statements were inadmissible hearsay and that the lab results could not be authenticated as Bonds' in that manner. *See* Fed.R.Evid. ("FRE") 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

The government sought to fit the statements within a hearsay exception. In its response to the defense motion in limine the government countered that

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Anderson's statements were admissible as statements against Anderson's penal interest (FRE 804(b)(3)), as statements of a co-conspirator (FRE 801(d)(2)(E)), and, alternatively, as admissible under the residual exception (FRE 807). At oral argument and in supplemental briefing before the district court, the government advanced two additional rationales as to how the court could admit the blood and urine samples: as statements authorized by a party (Anderson's statements authorized by Bonds) under FRE 801(d)(2)(C), or as statements of an agent (Anderson as Bonds' agent) under FRE 801(d)(2)(D). The court held that the government, as the proponent of hearsay, had failed to prove by a preponderance of the evidence that any of the exceptions or exemptions applied. *See Bourjaily v. U.S.*, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (holding that proponent of hearsay must prove exception or exemption by preponderance of the evidence).

The government also sought to introduce the log sheets from BALCO containing the Quest lab test results showing Bonds' urine testing positive for steroids, arguing that the log sheets were admissible as non-hearsay business records, or as statements of a conspirator, as statements against penal interest, or admissible under the residual exception to hearsay. The district court ruled the log sheets were also inadmissible to establish the samples tested were Bonds'. This appeal followed. On appeal, the government argues only that FRE 807, the residual exception, or FRE 801's exceptions for authorized statements (d)(2)(C) or for statements by an agent (d)(2)(D) apply.

III. Discussion

A. Admissibility of Anderson's Statements Under the Residual Exception to the Hearsay Rule

[1] The district court held that FRE 807, the residual exception, did not apply. The court observed that it was designed for "exceptional circumstances." *See Fong v. American Airlines*, 626 F.2d 759, 763 (9th Cir.1980). FRE 807, previously FRE 803(24), provides:

> A statement specifically not covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent***501** can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be served admission of the statement into evidence.

The court did not find Anderson's refusal to testify an exceptional circumstance because the effect was to make him an unavailable declarant, and FRE 804 already defines an "unavailable" declarant and lists exceptions to inadmissibility that the government does not contend are applicable in this case.

[2] FRE 807 involves discretion. It exists to provide judges a "fair degree of latitude" and "flexibility" to admit statements that would otherwise be hearsay. *See U.S. v. Valdez–Soto*, 31 F.3d 1467, 1471 (9th Cir.1994).

Our sister circuits have also given district courts wide discretion in the application of FRE 807, whether it be to admit or exclude evidence. *See, e.g., U.S. v. Hughes*, 535 F.3d 880, 882–83 (8th Cir.2008) (upholding district court decision not to admit evidence under FRE 807); *FTC v. Figgie Intern. Inc.*, 994 F.2d 595, 608–09 (9th Cir.1993) (upholding admission under residual exception even where trial court failed adequately to explain reasoning). Our research has disclosed only one instance where a circuit court reversed a district court to require admission of a statement under FRE 807. *See U.S. v. Sanchez–Lima*,

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161 F.3d 545, 547–48 (9th Cir.1998). However, the hearsay statements in that case were videotaped and under oath, and thus had indicators of trustworthiness that Anderson's statements do not. *See id.* More important, the circumstances were "exceptional" because the government had deported the witnesses, so the statements remained the only way the defendants could present their defense. Therefore, the government is asking this Court to take an unprecedented step in using 807 to admit the statements of a declarant who has chosen not to testify and whose statements lack significant indicators of trustworthiness.

The government argues that the district court adopted an improperly narrow view of FRE 807 by not taking into account that Anderson's statements "almost" fell within several other hearsay exceptions. It also asserts the court did not give enough weight to Anderson's unavailability.

The government contends that Anderson's statements "almost" met several other hearsay exceptions, and for that reason the district court erred in not admitting them under FRE 807. Specifically the government points out that Anderson's statements came close to qualifying as statements against his penal interest and statements of a coconspirator. The government relies on *Valdez–Soto.* In upholding the admission of out of court statements under the 807 exception in *Valdez–Soto,* we said that where a statement "almost fit [s]" into other hearsay exceptions, the circumstance cuts in favor of admissibility under the residual exception. *See* 31 F.3d at 1471. We did not, however, hold the factor was determinative, only that it supported the district court's application of FRE 807 in that case to admit the evidence. In this case, even though this was a "near miss" it was nevertheless a "miss" that may have permitted, but did not alone compel the trial court to admit Anderson's statements under FRE 807.

The government next suggests that Anderson's unavailability is "exactly the type of scenario" FRE 807 was intended to remedy, but cites no authority supporting the proposition. It argues the district court misunderstood the rule and applied it too narrowly. The district court, however, correctly noted that courts use FRE 807 only in exceptional circumstances and ***502** found this situation unexceptional because it involves statements of an unavailable witness like those FRE 804 excludes, with limited exceptions here not applicable.

In addition, FRE 807 requires that the admissible statements have trustworthiness. The district court concluded Anderson's statements were untrustworthy, in major part because Valente admitted that he once mislabeled a sample when Anderson asked him to do so. To the extent the government contends that the district court improperly focused on Valente's trustworthiness instead of on the trustworthiness of Anderson's statements, the government misinterprets the district court's opinion. The district court finding properly focused on the record of untrustworthiness of the out of court declarant, Anderson, as required under the rule. There was support for its conclusion that Anderson's statements about the source of samples were not trustworthy.

B. Admissibility of Anderson's Statements Under 801(d)(2)(C) and (D).

[3][4] FRE 801(d)(2)(C) provides that a statement is a non-hearsay party admission if it "is offered against a party and is ... a statement by a person authorized by the[defendant] to make a statement concerning the subject." FRE 801(d)(2)(D) provides that a statement is not hearsay if it "is offered against a party and is ... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Subsection (C) thus requires the declarant to have specific authority from a party to make a statement concerning a particular subject. Subsection (D) authorizes admission of any statement against a party, but only provided it is made within the scope of an employment or agency relationship.

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[5] As a threshold matter, Bonds contends that the government did not preserve its arguments under either subsection, because the government failed to timely raise the issues in its response to the defense motion in limine to exclude the statements; the government raised them for the first time in oral argument on the motion in the district court, and then filed a supplemental brief. Bonds cites *U.S. v. Chang*, 207 F.3d 1169 (9th Cir.2000), but *Chang* does not support Bonds' position. *Chang* states that if "a party fails to state the specific grounds upon which evidence is admissible, the issue is not preserved for review, and the court will review only for plain error." 207 F.3d at 1176 (citation omitted). *Chang* would bar a party from arguing for admissibility an appeal when it gave no justification under the rules to support admissibility in the district court. *Chang* further suggests a party can not contend on appeal that admissibility would have been proper under a different rule from that advocated in the district court. In this case, however, the government argued the points and the district court allowed the government and Bonds to file supplemental briefs to address the new contentions. They are not raised for the first time on appeal. Although the government's brief contained little factual information explaining the extent and nature of Bonds' relationship with Anderson, and that doubtless contributed to the district court's adverse ruling on the merits, the government preserved the right to appeal the district court's ruling that Subsections C and D did not apply.

[6] We turn first to the government's challenge to the district court ruling that the statements should not be admitted under Subsection (C) because Bonds did not specifically authorize Anderson to make the statements. Both parties agree that if the samples were Bonds', he *could* ***503** have authorized Anderson to make the statements. The question is whether the district court was within its discretion in ruling the record failed to establish sufficiently that he did.

The government acknowledges it cannot establish that Bonds explicitly authorized Anderson to identify the samples as his. Bonds was never asked the question during his grand jury testimony and Anderson, of course, is unavailable. The government's position is, in essence, that by authorizing Anderson to act as one of his trainers, Bonds implicitly authorized Anderson to speak to the lab on his behalf. The conclusion does not follow from the premise.

The district court correctly observed that certain relationships do imply an authority to speak on certain occasions. *See e.g.*, *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir.1989) (stating that lawyers have implied authority to speak outside of court on matters related to the litigation). Athletic trainers, however, as the district court went on to observe, do not traditionally have such any such implicit authorization to speak. The government suggests that by allowing Anderson to have the samples tested, Bonds impliedly authorized Anderson to identify them to BALCO, citing *United States v. Iaconetti*, 540 F.2d 574, 576–77 (2d Cir.1976). In *Iaconetti*, the defendant demanded a bribe from the president of a company. *Id.* The court held that by demanding the bribe, the defendant had provided implicit authorization for the president to discuss the bribe with his business partner. *Id.* Here, Bonds provided the samples after Anderson asked for them and thus *Iaconetti* does not apply. There is no evidence of discussions about how Anderson was to deal with the samples. The district court could have quite reasonably concluded that Bonds was accommodating the wishes of a friend rather than providing Anderson with "the authority to speak" on his behalf.

We cannot agree with the dissent's assertion that the nature of the task of testing blood and urine samples implies that the person who makes the necessary arrangements for the testing and delivers the samples is authorized to identify the samples' origin. Even assuming that Bonds allowed Anderson to have his blood and urine tested in order to obtain medical information rather than to accommodate Anderson's wishes, it was not necessary for Anderson to reveal

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Bonds' identity to accomplish that purpose. The samples could easily have been identified by a number or a code word. Indeed, there are many legitimate reasons to perform medical testing anonymously. The dissent's conclusion that Anderson was impliedly authorized to identify Bonds depends on the assumption that identifying Bonds by name was the only way to ensure accurate test results. Because we disagree with that assumption, we do not find the dissent's reasoning persuasive.

The district court also expressly found that the government had failed to carry its burden of showing that Bonds had provided Anderson the authority to identify the samples on each particular occasion, because Bonds could not remember how many samples he had provided. ("[Bonds'] equivocal answers about the number of samples he gave Anderson are not sufficiently certain to establish that Anderson had authority to speak with regard to the particular samples at issue here."). The district court thus concluded Bonds' lack of memory about the number of samples militated against his having conferred on Anderson authority to speak for each disputed sample in the case. Contrary to the government's theory, the court was not suggesting Bonds should have had a perfect memory.

***504** The government also focuses on a district court remark suggesting that to be admissible under Subsection C, the statements had to have been against Anderson's penal interest. The government is correct that had they been against Anderson's penal interest they may have been admissible under a different subsection of 801, but such a requirement does not appear in Subsection C. The district court may have misstated Subsection C's provision i.e., that the statement be "offered against a party," which these statements were, and incorrectly suggested the statements had to qualify as admissions against the penal interest of Anderson, which these statements were not. Any such misstatement had no bearing on the court's ruling, however, because the court clearly ruled that the government failed to show the statements were authorized by Bonds.

[7] It thus applied the correct standard. A tangential misstatement does not transform the ruling into error. There was no abuse of discretion in the court's refusing to admit the statements, under FRE 801(d)(2)(C), as statements authorized by Bonds. We now turn to whether the statements, though not specifically authorized, came within the scope of an agency or employment relationship that permitted their admission under FRE 801(d)(2)(D). That provision makes admissible "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The district court rejected the government's contention that Anderson's statements to Valente are admissible under this provision. Again, we may reverse only for abuse of discretion. *U.S. v. 4.85 Acres of Land*, 546 F.3d 613, 617 (9th Cir.2008).

[8] To determine whether Anderson's statements are admissible under Rule 801(d)(2)(D), we must "undertake a fact-based inquiry applying common law principles of agency." *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1096 (9th Cir.2008). For Anderson's statements to fall under this exception, he would have to have been Bonds' employee or agent.

The government provides two arguments in favor of admissibility of Anderson's statements under Rule 801(d)(2)(D). First, it argues that the district court erred in finding that, as a general matter, Anderson's work as a trainer was not that of an employee or agent. Next, it contends that even if Anderson did not generally act as an employee or agent, he assumed the status of an agent for the purpose of delivering Bonds' blood and urine to BALCO. We cannot accept either argument.

The record supports the district court's conclusion

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that Anderson was an independent contractor, rather than an employee. The parties briefed this issue under the Second Restatement of Agency, which sets forth ten factors that a court should consider: 1) the control exerted by the employer, 2) whether the one employed is engaged in a distinct occupation, 3) whether the work is normally done under the supervision of an employer, 4) the skill required, 5) whether the employer supplies tools and instrumentalities, 6) the length of time employed, 7) whether payment is by time or by the job, 8) whether the work is in the regular business of the employer, 9) the subjective intent of the parties, and 10) whether the employer is or is not in business. *Restatement (Second) Agency* § 220(2) (1958). Although the parties presented this issue primarily under the Second Restatement, we have independently reviewed the Third Restatement, which abandons the term independent contractor. *See Restatement (Third) Agency § 1.01 cmt. c.* We find nothing in the later Restatement's***505** provisions that would materially change our analysis or cause us to reach a different result than the district court.

[9] In applying the Second Restatement factors, a court will look to the totality of the circumstances, but the "essential ingredient ... is the extent of control exercised by the employer." *Friendly Cab,* 512 F.3d at 1096 (internal quotation marks and citation omitted). Virtually none of the Second Restatement factors favor the existence of an employment relationship in this case. Most important, there is no evidence that Bonds directed or controlled any of Anderson's activities. To the contrary, the facts on record regarding the Bonds–Anderson relationship evidence a lack of control exercised by Bonds. For example, Anderson seemingly had free reign to provide Bonds whatever muscle creams and supplements he felt appropriate. Bonds took these items without question on the basis of his friendship with Anderson. Rather than exercise control over Anderson's training program, Bonds testified that he had a "Dude, whatever" attitude to Anderson's actions. These facts make it clear that Anderson was, as the district court found, not an employee.

Other elements of the Second Restatement test also point to Anderson's acting as an independent contractor, not an employee. For example, Anderson provided his own "instrumentalities" and "tools" for his work with Bonds. *See Restatement (Second) Agency* § 220(2)(e). All of the aforementioned creams and supplements came from Anderson, not Bonds. There is no evidence that Bonds supplied any type of equipment or material related to Anderson's training regimen. As a trainer, Anderson was engaged in a "distinct occupation." *See id.* § 220(2)(b). He had many different clients and offered his services to others during the same period. Moreover, it is important in this context that Bonds testified that he considered Anderson a friend and not an employee. *See id.* § 220(2)(i) (noting subjective intent of parties relevant to determining whether one is an independent contractor).

The government is correct that certain, but limited, aspects of the Bonds–Anderson relationship may suggest an employer/employee relationship. For example, Bonds conceded that he paid Anderson annually, and not "by the job." *See id.* § 220(2)(g). Yet Bonds paid gratuitously, and not on the basis of any regular employment relationship. There is, thus, sufficient basis in the record to support the district court's conclusion that Anderson acted as an independent contractor rather than an employee.

[10] Unlike employees, independent contractors are not ordinarily agents. *See Dearborn v. Mar Ship Operations, Inc.,* 113 F.3d 995, 998 n. 3 (9th Cir.1997) (recognizing that "an independent contractor ... may be an agent" in limited circumstances in which he acts "subject to the principal's overall control and direction"). The district court was therefore correct to conclude that "independent contractors do not qualify as agents for the purposes of Rule 801(d)(2)(D)" in the sense that evidence of an independent contractor relationship is *insufficient* in itself to establish

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an agency relationship for the purposes of the rule. *See Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1440 (9th Cir.1990) (holding that statements of independent contractors were not admissible under Rule 801(d)(2)(D) when there was no showing that the contractors were also agents). However, a finding that a speaker is an independent contractor does not *preclude* a finding that the speaker is also an agent for some purposes.

The dissent thus incorrectly suggests the district court's ruling was the result of an incorrect application of a legal standard.***506** We have of course observed many times that a district court abuses its discretion when it makes an error of law. *See, e.g., Yokoyama v. Midland Nat. Life Ins. Co.,* 594 F.3d 1087, 1091 (9th Cir.2010) (citing cases); *U.S. v. Hinkson,* 585 F.3d 1247, 1261–62 (9th Cir.2009) (en banc). In this case, however, the district court did not base its ruling on a legal determination that independent contractors can never be agents. Rather the district court held that the government had not shown that the task of identifying Bonds' samples was within the scope of any agency relationship.

Accordingly, we must now address the government's argument that even if Anderson was an independent contractor, he acted as an agent in delivering Bonds' blood and urine to BALCO. An agent is one who "act[s] on the principal's behalf and subject to the principal's control." *Restatement (Third) Agency § 1.01*. To form an agency relationship, both the principal and the agent must manifest assent to the principal's right to control the agent. *Id.*

As is clear from the above description of Anderson's and Bonds' relationship, Anderson did not generally act subject to Bonds' control in his capacity as a some-time trainer, nor did he or Bonds manifest assent that Bonds had the right to control Anderson's actions as a trainer. There is no basis in the record to differentiate between Anderson's actions in his capacity as a trainer and his conduct in delivering the samples to BALCO. There is little or no indication that Bonds actually exercised any control over Anderson in determining when the samples were obtained, to whom they were delivered, or what tests were performed on them. Nor, contrary to the dissent's assertion, is there any indication that either Bonds or Anderson manifested assent that Bonds would have the right to instruct Anderson in these respects. It was Anderson who proposed to Bonds that he have his blood and urine tested. Bonds provided samples to Anderson when requested by the latter, and according to Bonds' testimony, "didn't think anything about it" after doing so. It was, further, Anderson who selected BALCO as the location for testing. In short, it was Anderson who defined the scope of the testing. Bonds provided Anderson no guidance or direction in terms of what specific tests BALCO would run on the samples. Bonds did not even inquire into the results of the tests. Rather, Anderson would, apparently on his own initiative, inform Bonds of results. The dissent says that Bonds instructed Anderson to deliver the samples to BALCO within 30 minutes of extraction, but this is not correct. The record shows that it was Anderson who told Bonds about the 30–minute time constraint. Moreover, the samples were taken at Bonds' house not because Bonds so ordered, but because his house was close to BALCO and taking the samples there made it possible for them to be delivered in time. Bonds quite understandably would allow only his own doctor to take the samples, but this does not show that he also had reserved the right to instruct Anderson as to what to do with the samples. *See Restatement (Third) of Agency § 1.01 cmt. f* (stating that the fact that a service recipient imposes some constraints on the provision of services does not itself mean that the recipient has a general right to instruct and control the provider).

While the dissent focuses on whether, as a practical matter, Bonds had the "capacity" to assess Anderson's performance and give Anderson instructions as to how to have the testing performed, it ignores the key question: whether Bonds and Anderson ever agreed that Bonds could do so. These are very different inquiries. Any time one person does something

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for ***507** another, the latter is in all likelihood capable of evaluating and instructing the first. The Restatement provision on which the dissent relies makes it clear, however, that not all service providers and recipients stand in agency relationships. *Restatement (Third) of Agency § 1.01 cmt f.* Rather, as we have seen, an agency relationship exists only if both the provider and the recipient have manifested assent that the provider will act subject to the recipient's control and instruction. *Id.* The question whether Bonds had the ability, in a practical sense, to prevent Anderson from having the testing carried out similarly fails to resolve the question whether Anderson was Bonds' agent. Obviously Bonds could have put an end to the testing by refusing to provide Anderson with samples of his blood and urine, but that does not establish an agency relationship. There is nothing in the record that requires a finding that Bonds actually controlled Anderson with respect to the testing or that Bonds and Anderson had agreed that Anderson would be obligated to follow Bonds' instructions if Bonds chose to provide them. Contrary to the dissent's contention, we do not maintain there needs to be an explicit agreement, but there must be at least some manifestation of assent to the principal's right to control. Here, the testing was performed on Anderson's own initiative and not at the request of Bonds. The dissent incorrectly assumes otherwise. Thus, the district court did not abuse its discretion in finding that Anderson was not an agent for the limited purpose of the drug testing.

The dissent incorrectly suggests our holding somehow conflicts with *Harris v. Itzhaki,* 183 F.3d 1043 (9th Cir.1999) and *U.S. v. Jones,* 766 F.2d 412 (9th Cir.1985). *Itzhaki* was a Fair Housing Act case in which we held that the jury, as trier of fact, should decide whether discriminatory statements were made by an agent of the defendant. *Id.* at 1054. That case has no relevance to the finding of a district court on a motion in limine. Our discussion is also fully consistent with *Jones.* There we found the district court did not abuse its discretion in admitting statements of 'bag men' in an extortion scheme. *Jones,* 766 F.2d at 415. *Jones* has no application to this case. The fact that this court deferred to a district court's decision to admit evidence in *Jones* does not compel us to refuse to defer to a district court's decision here and to admit Anderson's statements. Moreover, in this case the government was required to demonstrate that Anderson was an agent by a preponderance of the evidence. *See Bourjaily,* 483 U.S. at 175, 107 S.Ct. 2775. The applicable burden of proof was lower at the time the court decided *Jones. See* 766 F.2d at 415 ("Evidence of agency must be substantial, although proof by a preponderance is not necessary.").

To the extent that the dissent looks beyond the relevant time period to rely on a claim that on May 28, 2003, Bonds "asked Anderson to have Bonds tested for steroids to protect himself against false test results," the claim is both irrelevant and misleading. The government's arguments on appeal pertain to lab results from 2001 and 2002. What Bonds asked Anderson to do in 2003, is not relevant. The statement is misleading because the record only shows that, on that date, after being required to submit to a steroids test by Major League Baseball, Bonds told Anderson that he was suspicious of the test and that he "want[ed] to know what baseball's doing behind our backs." The dissent infers from this that Bonds must have asked Anderson to verify the test results by having BALCO independently test Bonds for steroids, but this is not the only possible interpretation of Bonds' testimony. In any event, it sheds no light on ***508** the nature of Bonds' and Anderson's relationship with respect to the tests performed in 2001 and 2002.

Although the district court might, in the exercise of its discretion, have reached a different decision, our standard of review is deferential, and we cannot say here that we are left with a "definite and firm conviction" that it made a "clear error in judgment" in ruling that Rule 801(d)(2)(D) did not apply. *4.5 Acres of Land,* 546 F.3d at 617. There was no abuse of discretion.

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C. The Log Sheets

[11] The district court excluded BALCO log sheets purportedly showing Bonds testing positive for steroids "because even if [the log sheets] qualify as business records, they are not relevant because the government cannot link the samples to [Bonds] without Anderson's testimony." The parties spar about whether this statement by the district court meant relevance in the literal sense that they did not on their face pertain to Bonds, or whether the district court meant they could not in fact relate to Bonds unless the data was authenticated as relating to Bonds. The district court meant the latter.

The log sheets were business records reflecting that BALCO recorded test results in the name of Barry Bonds. The records themselves, however, go no further toward showing the actual samples came from Barry Bonds than Valente's testimony about what Anderson told him. If anything the logs, when offered for the truth of the identification of the sample donor, created an additional level of hearsay rather than removing one. The district court did not abuse its discretion in refusing to admit the log sheets as evidence that the samples listed were Bonds'.

IV. Conclusion

The district court's evidentiary rulings are **AFFIRMED** and the case is remanded for further proceedings consistent with this opinion.

BEA, Circuit Judge, dissenting:

I dissent.

At a pretrial hearing, the district court granted defendant Barry Bonds's motion *in limine* to exclude statements of James Valente. Valente was an employee of BALCO, a laboratory that tested Bonds's blood and urine for steroids. He testified that Greg Anderson delivered samples of blood and urine to BALCO, and while doing so, Anderson identified the samples as being Bonds's blood and urine.

Without doubt, Anderson's statements to Valente were out-of-court statements, offered to prove the matter asserted—that the samples came from Bonds—and were neither made under oath nor subject to cross-examination by Bonds. Although the statements appear to be hearsay, they are defined as not hearsay by Federal Rule of Evidence 801(d) because they are, in law, statements or "admissions" of a party-opponent.[FN1] The statements are not hearsay for two reasons that were incorrectly disdained, first by the district court, and then by the majority.

FN1. Federal Rule of Evidence 801(d) begins: "A statement is not hearsay if—".

First, Anderson was an agent of Bonds; his statements to Valente concerned a matter within the scope of his agency; and, his statements were made during the existence of his agency. Rule 801(d)(2)(D).[FN2] Anderson acted as Bonds's agent for the collection of samples from Bonds, and in the delivery of those samples to BALCO for the purposes of their ***509** testing. Further, Anderson acted as Bonds's agent when he dealt with BALCO to procure the tests and the test results, and when he reported the results back to Bonds. Bonds's sole role was to give Anderson the samples. Everything else was up to Anderson and BALCO. Because the task Bonds entrusted to Anderson was to accomplish testing Bonds's blood and urine, from start to finish, Anderson's mid-task statements to Valente about *whose* samples were being tested concerned a matter within the scope of his authority as Bonds's agent. The statements were admissible in evidence as statements of Bonds—a party opponent to the United States—under Rule 801(d)(2)(D).

FN2. All references to "Rules" or a "Rule" in this dissent refer to the Federal Rules of Evidence.

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Second, a less frequently used rule: Anderson was authorized by Bonds to identify the samples as coming from Bonds under Rule 801(d)(2)(C). As it was normal and necessary to make sure accurate test results were procured, Anderson was impliedly authorized to identify the samples as coming from Bonds. Because Anderson made these statements for the purpose of insuring accuracy of the test results, they are imputed to party-opponent Bonds as authorized admissions, and were admissible in evidence against him under Rule 801(d)(2)(C).

The district court made several errors of law in granting Bonds's motion *in limine*, the most egregious of which was to hold that independent contractors are not agents as a matter of law. The majority compounds these errors by acknowledging the district court indeed erred, but then improperly reviewing that court's legal conclusion under a deferential standard of review. The correct approach to this case, under our standard of review as expressed in *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir.2009) (en banc), is first to identify whether the district court erred in identifying the correct legal standard or in applying the correct legal standard to the facts of a case. If the district court has so erred, then we do not defer to how the district court decided the case; we reverse—unless the error was harmless. Of course, no one claims an error in barring this evidence from admission is harmless.

Perhaps less egregious, but equally prejudicial in result, was the failure of the district court to identify and apply the correct rule of law to determine whether Anderson was authorized by Bonds to identify his samples to BALCO. Rather than consider the totality of the task entrusted by Bonds to Anderson—procure tests and their results—the district court characterized Anderson as solely a trainer and delivery courier. Failure properly to consider the task entrusted to Anderson by Bonds resulted in legal error under Rule 801(d)(2)(C).

I. Background

A. Procedural Background

Barry Bonds began playing professional baseball in 1985. He joined the San Francisco Giants in 1993, and in 2001 he set Major League Baseball's single-season home run record, hitting 73 home runs.

In 2003, the federal government began investigating the Bay Area Laboratory Corporation ("BALCO") and several individuals, including Bonds's trainer, Greg Anderson, for conspiracy to distribute steroids to professional athletes. The government executed a search warrant on BALCO's offices and seized laboratory reports and handwritten notes related to blood and urine tests of several individuals, ***510** including reports purporting to show Bonds tested positive for steroids.

On December 4, 2003, Bonds testified before a grand jury regarding Anderson and BALCO. Bonds denied he had taken steroids, at least knowingly. On December 4, 2008, a grand jury returned a second superseding indictment charging Bonds with ten counts of making false declarations before a grand jury and one count of obstruction of justice.

Bonds moved to suppress laboratory reports and other documents the government seized during a search of BALCO and other laboratories. The government contends these documents prove Bonds tested positive for steroids in 2001 and 2002.

The admissibility of the BALCO reports against Bonds depends on whether the government can prove the blood and urine tested were Bonds's. For this necessary proof, the government sought to introduce testimony from James Valente, a BALCO employee, that Anderson, Bonds's trainer and the man who brought blood and urine samples to BALCO, stated to Valente the blood and urine samples were Bonds's. The district court ordered excluded the BALCO reports before trial on the grounds the documents con-

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tained hearsay. From that order, this appeal followed.

B. Bonds and Anderson's Relationship

The following facts are drawn from Bonds's grand jury testimony: Anderson and Bonds have known each other since they met in grade school. They lost touch after high school, but reconnected in 1998. At that time, Bonds played for the San Francisco Giants; he began weight training with Anderson—a professional weight lifting trainer—as his coach. When Bonds testified to the grand jury in 2003, Bonds said he continued to work out daily under Anderson's coaching.

At some time in 2000 or 2001, Anderson suggested Bonds provide Anderson with samples of Bonds's blood and urine so Anderson could take the samples to be tested at BALCO and then report the results to Bonds. Bonds testified the purpose of the tests was to show whether he was deficient in certain nutrients, such as zinc or magnesium. The information provided by these tests would help Bonds alter his diet to regulate his nutrient levels. Bonds testified that before 2003 he had no idea BALCO may have sent his samples to be tested for steroids.

Bonds provided Anderson with blood samples five or six times, between approximately 2000 and 2003. He provided urine samples approximately four times. Each time, Anderson procured and provided the vials into which Bonds's samples were to be placed. Bonds had his personal doctor, Dr. Teng, draw his blood and collect his urine at Bonds's home and put the fluids in the vials brought there by Anderson. Dr. Teng then gave the samples to Anderson, at Bonds's home. Anderson had to deliver the blood and urine samples to BALCO within 30 minutes; otherwise, the samples would not yield valid test results. Bonds knew Anderson would drive the samples directly from Bonds's house to the BALCO labs. Bonds testified he did not instruct Anderson to put Bonds's samples under Anderson's name or otherwise preserve Bonds's anonymity.

Later, Anderson told Bonds the tests came back and "everything is fine." Anderson did not give Bonds any written reports explaining the test results and Bonds did not request additional details. Anderson did, however, tell him how much ***511** food to consume and what vitamins to take.

At some point after Bonds began to provide samples to Anderson, Bonds visited BALCO's offices with Anderson. The BALCO offices were very close to the gym where they exercised together. While at the BALCO laboratory, Bonds met Victor Conte, the CEO of BALCO. Conte, Bonds, and Anderson discussed how testing Bonds's blood and urine would help Bonds regulate his nutrient levels. Bonds testified they did not discuss any lotions or liquids that Anderson provided to Bonds.

During the 2003 season, Bonds was tested for steroids in two unannounced tests conducted by Major League Baseball. The government seized a document titled "NSIC Drug Testing Custody and Control Form," dated May 28, 2003, from Quest Diagnostic. Bonds testified the document was "one of my filled-out sheets from Major League Baseball."

The same day he was tested by Major League Baseball, Bonds specifically asked Anderson to have Bonds tested for steroids to protect himself against possible false test results. Bonds testified "I may have given [the Major League's document] to Greg [Anderson]. Because when I took the sample—when I took the test I wanted to make sure, like I said earlier, because I don't trust baseball, to make sure that they don't come back to me and try to say: 'X, Y, Z,' that I protect myself." In giving Anderson Major League Baseball's form, Bonds specifically directed Anderson to have BALCO verify or refute the results of Major League Baseball's steroids test. After the BALCO test results came back, Anderson told Bonds that Bonds had tested negative for steroids.

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In May or June 2003, Bonds posed for photographs with Conte and sat for an interview as part of an advertisement for BALCO in Muscle & Fitness magazine. In the advertisement, Bonds discussed the "drawing of blood" and "being able to analyze your levels of your body." Bonds appeared in the advertisement for free. No one testified before a grand jury that BALCO charged Anderson or Bonds for the blood and urine testing.

In 2002 or 2003, Anderson began providing Bonds with a liquid Bonds testified was flax seed oil, and with a cream. Bonds testified Anderson administered the cream to Bonds directly, and did not give Bonds the cream for Bonds to use on himself. Bonds testified he never knew what the cream or the liquid contained; Anderson never told him and Bonds never asked.

Bonds testified he never paid for the blood or urine testing, the cream, the flax seed oil, or any other product from Anderson or BALCO. Bonds did, however, pay Anderson $15,000 annually for Anderson's weight training services. [FN3] Bonds paid Anderson in cash, either in a single lump sum or sometimes "split up." Despite paying Anderson for several years, Bonds did not sign a contract with Anderson for his weight training services. After Bonds broke the single-season home run record, he gave Anderson, and several other people, such as his publicist, strength coach, and stretching coach, a $20,000 bonus each. After the 2002 season, Bonds gave Anderson, and several other people, a World Series ring, worth approximately $3,000. Bonds did not deduct any of these payments to Anderson from his taxable income.

FN3. Bonds also paid his two other trainers similar amounts. Unlike Anderson, Bonds testified he paid his other trainers as employees, but the similar, annual amount he paid Anderson was a "gift" because Anderson was Bonds's friend.

***512 II. Standard of Review**

We review a district court's ruling excluding evidence for abuse of discretion. *United States v. Alarcon–Simi*, 300 F.3d 1172, 1175 (9th Cir.2002). A district court must decide preliminary questions of evidence under Rule 104(b).[FN4] In criminal trials, the court must find a condition of fact, which constitutes such a preliminary question, by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

FN4. Rule 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

> [T]he first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we much conclude it abused its discretion.... [T]he second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. If any of these three apply, only then are we able to have a definite and firm conviction that the district court reached a conclusion that was a mistake or was not among its permissible options, and thus that it abused its discretion by making a clearly erroneous finding of fact.
>
> *Hinkson*, 585 F.3d at 1261–62 (internal citations and quotation marks omitted).

If the trial court did not apply the correct legal standard, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts

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in the record, then the trial court abused its discretion. *Id.* If the error was not harmless, then we must reverse. *Id.*

III. Analysis

A. Anderson's Statements Are Admissible Under Rules 801(d)(2)(D) (statements of an agent related to a matter within the scope of his authority) and 801(d)(2)(C) (authorized admissions).

The district court, and then the majority, err in holding Anderson's statements were hearsay. Statements made by a party's agent that are related to a matter within the scope of his agency or by a person's authorized speaker are not hearsay under Federal Rules of Evidence 801(d)(2)(D) and 801(d)(2)(C). Instead, such statements are considered admissions of a party litigant. The errors were not harmless and likely affected the outcome of the district court's decision whether to exclude the evidence. This is not a situation where overwhelming evidence supports the district court's holding, such that we should affirm despite the presence of one or two isolated errors in the district court's opinion. To the contrary, the evidence here strongly supports a finding that Anderson's statements were admissible in evidence because they (1) were statements about a matter related to a matter within the scope of Anderson's agency for Bonds, for the purposes of Rule 801(d)(2)(D); and (2) were impliedly authorized by Bonds as a necessary component to Anderson's task, for the purposes of Rule 801(d)(2)(C).

B. Anderson's Task

The district court and the majority's error, in holding that Anderson's statements are inadmissible under Rules 801(d)(2)(D) and (C), seems a consequence of their focus on Anderson's role ***513** as Bonds's trainer—a red herring—and their overly narrow characterization of the task the evidence proves Bonds entrusted Anderson to perform. It is not necessary for the government to rely on some professional label, such as trainer or coach, for Anderson's statements to be admissible. As I will discuss below, it is enough that Bonds authorized Anderson to be his agent for the purpose of the specific task of setting up tests and procuring accurate test results from BALCO, or, that Bonds authorized Anderson to make statements that would be usual and ordinary in accomplishing that task. For the sake of clarity, I set forth at the outset of this analysis a complete description of what I see as Anderson's task (the "Task").

Bonds assented that Anderson perform the following actions on Bonds's behalf: (1) procure the vials which were to contain the blood and urine samples, and furnish such vials to Bonds and Bonds's doctor; (2) once the vials were filled with Bonds's samples, collect such samples from Bonds at Bonds's home; (3) deliver the samples to BALCO within 30 minutes of collection of the bodily fluids; (4) deal with BALCO to procure testing of the samples; (5) learn the test results from BALCO; and (6) report the test results to Bonds. For Anderson to accomplish this Task successfully, it was necessary for him to identify the samples in a manner that would later allow BALCO accurately to report test results to Anderson and for Anderson to know the results were truly of Bonds's samples, so he could accurately report to Bonds his BALCO results. Anderson's Task included each and all of the above-enumerated actions.

C. Anderson's Statements Are Admissible Under Rule 801(d)(2)(D) (statements of an agent concerning a matter within the scope of the agency or employment). [FN5]

> FN5. I begin with Rule 801(d)(2)(D) because it is more broad than Rule 801(d)(2)(C) and our courts have more fully developed what statements are admissible under this rule.

"A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the rela-

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tionship" is not hearsay. Rule 801(d)(2)(D). The district court made two errors of law and one error of fact in deciding Anderson's statements were not admissible into evidence under Rule 801(d)(2)(D). First, the district court erred—and the majority here agrees—as to a matter of law in holding independent contractors could not be agents under Rule 801(d)(2)(D). Second, the district court erred as to a matter of law in holding Anderson's statements were inadmissible because making them was not *within the scope of Anderson's agency*, when the correct legal standard is whether an agent's [Anderson] statements *were related to a matter within the scope of his agency*. Finally, the district court erred as to a matter of fact in holding the government did not cite to any evidence of Bonds's relationship with Anderson and that there was no evidence that Bonds paid Anderson. The record is replete with evidence of Bonds's relationship with Anderson and that Bonds paid Anderson, regularly and significantly. These errors are not harmless and should compel us to reverse.

The district court erred as to a matter of law in holding: "In the Ninth Circuit, independent contractors do not qualify as agents for the purposes of Rule 801(d)(2)(D)." *United States v. Bonds*, No. 07–00732, 2009 WL 416445, at *5 (N.D.Cal. Feb.19, 2009) (citing ***514***Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir.1990)). And there the district court stopped its analysis of Rule 801(d)(2)(D). We review de novo the legal issue whether independent contractors may qualify as agents for the purposes of Rule 801(d)(2)(D). *See Hinkson*, 585 F.3d at 1262. The majority correctly holds that finding an independent contractor relationship is not *sufficient* to show agency, but the majority also recognizes that such a finding does not *preclude* the existence of an agency relationship. Majority Op. at 505. The majority is incorrect, therefore, in stating the district court identified the correct legal standard. *See* Majority Op. at 505. On the contrary, based on the law and even on the majority's view of the law, the district court was wrong as a matter of law when it held independent contractors were *categorically* non-agents.

The one benefit of the majority's opinion on the independent contractor issue, is that it explains away the somewhat careless language in *Merrick* and clarifies that independent contractors may indeed be agents for the purposes of Rule 801(d)(2)(D). Majority Op. at 505. Nevertheless, the majority still begins its analysis of that rule by citing *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1096 (9th Cir.2008), a decision that is entirely about distinguishing independent contractors from employees in the collective bargaining context and has nothing to do with those aspects of agency law that provide for the imputation of an agent's statement to his principal, here a defendant in a criminal case. The claim that independent contractors may not be *agents* for the purpose of Rule 801(d)(2)(D) is a legal error; cases that distinguish between independent contractors and *employees* are not relevant to the definition of an *agent*.[FN6]

> FN6. "The common law of agency ... additionally encompasses the employment relation.... The common term 'independent contractor' is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers.... This Restatement does not use the term 'independent' contractor." Restatement (Third) of Agency § 1.01 cmt. c (2006).

Because the district court erred as to a matter of law, we should review the record to determine whether its error was harmless; it was not. The evidence is sufficient to support a contrary finding: that Anderson *was* Bonds's agent. More than that, the evidence is compelling that Anderson's statements meet the requirements under Rule 801(d)(2)(D): Bonds's testimony shows that (1) Anderson was Bonds's agent for the Task; (2) Anderson's statements to Valente identifying the samples concerned a matter within the scope of the Task, hence Anderson's

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agency; and (3) Anderson made his statements during the existence of the agency relationship. Rather than categorically to have eliminated the possibility that Anderson could have been Bonds's agent because Anderson was an independent contractor, the district court should have applied the correct legal standards (see below) to the abundant evidence of Anderson's agency.

(1) *Anderson was Bonds's agent for the Task.* Agency is the fiduciary relationship that arises when one person, the principal, manifests assent to the agent for the agent to act on the principal's behalf and subject to the principal's control, and the agent agrees or otherwise consents. *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir.2003); *accord* Restatement (Third) of Agency § 1.01 (2006). In short, agency requires (a) the principal's assent; (b) the principal's right to control; (c) the agent acting on the principal's behalf or benefit; and (d) the agent's consent.

***515** (a) *Bonds assented to Anderson's performance of the Task.* Bonds testified that he agreed to have Anderson take his blood and urine samples to BALCO. Moreover, Bonds manifested such assent not only to Anderson, but to BALCO, for Bonds testified he met with Conte, CEO of BALCO, and Anderson at BALCO's facilities. There, Conte, Bonds, and Anderson discussed testing Bonds's bodily fluids and the consequent results as to his nutrient levels. Bonds did not object to Anderson's dealing with BALCO to procure the testing and results discussed. Bonds also asked Anderson to have him tested to check Major League Baseball's tests for errors.

(b) *Bonds had the right to control Anderson's performance of the Task.* "The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority." Restatement (Third) of Agency § 1.01 cmt. f (2006). This is a key point of dispute between my analysis and that of the majority; I think the evidence shows Bonds had the capacity to control Anderson's performance of the Task and the panel does not. Admittedly, Bonds testified he did not exercise much supervisory authority over Anderson. But our inquiry is not whether Bonds *exercised* his authority, but only whether Bonds *had* the authority to exercise in the first place. *Id.* cmt. c ("A principal's failure to exercise the right of control does not eliminate it."). For example, just because a movie actor does not exercise his right to reject a screen role through his agent does not mean that he no longer has an agent, or that he can no longer reject roles through the agent.

Here, Bonds had the capacity to assess Anderson's performance. For example, Bonds could have called BALCO to verify Anderson was procuring testing and successfully delivering the samples within 30 minutes of collection. Or, Bonds could have reviewed the test results documents. Bonds's own testimony creates an inference that Bonds could have done so: "So, I never saw the documents. I should have. Now that I think of it with the situation that is now, I should have." The fact that Bonds did not assess and modify or terminate Anderson's performance of the Task does not mean, as a matter of law, that Bonds lacked the *right* to do so.

Bonds also had the right to instruct Anderson. Not only did Bonds have that right, but he exercised it by instructing Anderson when and where Anderson was to collect Bonds's samples and when and where Anderson was to deliver the samples. The majority is correct that Bonds did not instruct Anderson regarding the 30–minute limit, but that limit did provide one measure by which Bonds could evaluate Anderson's actions. The point, however, is that Bonds did instruct Anderson when and where to collect his samples—at his home in San Francisco. The majority seems to argue that the fact that Bonds's house was also a suitable location under the 30–minute requirement is incompatible with Bonds's instructing Anderson,

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Majority Op. 506–07, but that is illogical. There were many places they could meet that were within 30 minutes of BALCO; Bonds instructed Anderson to come to Bonds's house and not to another location, most likely because it was a private place where Bonds's personal doctor would be comfortable drawing his blood and collecting his urine. Further, Bonds controlled when he could be tested because Anderson could not complete his task without Bonds's samples.[FN7]

> FN7. The majority contends that Anderson's flexibility in administering creams to Bonds shows that Bonds did not exercise control over Anderson as his trainer. Majority Op. at 505. Again, the Government does not need to rely on Anderson's relationship to Bonds as his trainer to show Anderson was Bonds's agent for the purposes of the Task. Moreover, Bonds had the *right* to exercise such control merely by telling Anderson not to rub cream on him.

***516** Moreover, the majority completely omits the fact that Bonds met with BALCO's CEO Conte to discuss, in Anderson's presence, the procedure for testing his blood and urine. This fact strongly supports the conclusion that Bonds was intimately familiar with BALCO's testing procedures, and therefore able to assess and instruct Anderson, even if he "didn't think anything about it" after doing so.

Most importantly, Bonds had the right and ability to terminate the agency relationship—a factor essentially ignored by the majority. Were Bonds to decide to terminate the relationship, he could simply have stopped giving samples of his blood and urine to Anderson. Without Bonds's samples, Anderson could not perform the Task. It would be implausible to find Anderson had access to some reserve of Bonds's blood or urine that he could have tested despite Bonds's terminating his agency relationship with Anderson. Besides, any such reserves could not meet the 30–minutes–from–draining "shelf life" requirement. The majority simply asserts, without explanation, that Bonds's right to terminate Anderson's role in dealing with BALCO was not enough to prove Bonds had control over Anderson's actions.

The majority also asserts Bonds and Anderson never manifested an agreement as to control. Majority Op. at 506–07. I can only interpret this point to be based on the majority's confusion between the requirement that the principal and agent respectively manifest assent and consent to the agency relationship and the requirement that the principal has the right to control the agent's actions. The majority suggests there must be an explicit agreement between a principal and agent that the principal may control the agent's actions. There is no support for that claim in the Restatement or the law generally. The majority points to the Restatement (Third) of Agency's distinction between agents and service providers. § 1.01 cmt. f. Nothing in the comment to the Restatement section cited states how the principal and agent must manifest assent and consent to the right of control; to the contrary "[a] principal's power to give instructions" is "created by the agency relationship." *Id.* Further, none of the illustrations provided in Restatement (Third) of Agency § 1.01, comment f, mention anything about an agreement as to control. Instead, the illustrations contemplate that an agent has a right to resign as the principal's agent if the agent does not wish to follow an instruction. *Id.* The reference to "service providers," relied on by the majority, is explained by turning to § 1.01, comment c, which distinguishes service providers on the basis that agents deal with third parties while service providers do not. *Id.* cmt. c. Here, Anderson dealt with a third party, BALCO; that is an attribute of an *agent*, not of a service provider.

By demanding affirmative evidence of a manifestation of assent and consent to the right to control, the majority puts the cart before the horse. As the Restatement explains:

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> If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further***517** communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent manifests an intention to the contrary or the circumstances so indicate.

Id. cmt. c. Bonds requested Anderson act on his behalf by taking his samples to BALCO and having them tested.[FN8] Anderson did so. There is no evidence Anderson manifested an intention to refuse the Task, nor are there circumstances that indicate he did not consent. Therefore, the evidence gives rise to a compelling inference that Anderson acted as Bonds's agent, subject to Bonds's control.

> FN8. Bonds requested Anderson perform this act even though Anderson initiated the idea for testing Bonds. It does not matter who came up with the idea. Once Bonds decided he should be tested, he requested Anderson to perform the Task.

The majority's application of the law of agency to the facts in this case imposes unwarranted obstacles to the government's showing that Anderson was Bonds's agent. The holding in this case is flatly inconsistent with how this court has handled similar cases in the past.

In *United States v. Jones,* 766 F.2d 412 (9th Cir.1985), Jones appealed his conviction for interference with commerce by threats of violence under 18 U.S.C. § 1951. 766 F.2d at 413. Jones called Kelsay, an accounts representative at a savings and loan, and told her to pay him $65,000 or else he would kill her daughter. *Id.* Jones arranged to pick up the extortion money from Kelsay. *Id.* At the arranged time and place, two other men arrived and attempted to collect the extortion money. *Id.* Kelsay testified the two men made out-of-court statements that showed they were paid by a third man to collect a bag. *Id.* The prosecution introduced evidence that Jones was observed meeting with the two men shortly before they met with Kelsay. *Id.* at 415.

On those facts, we affirmed the district court's holding that the two men were Jones's agents and that their statements that they had been paid by a third man to collect a bag were admissible in evidence under Rule 801(d)(2)(D) to prove the truth of the matter the two men had asserted in their out-of-court statements. *Id.* There was no evidence the two men were employed or paid regularly by Jones. The court did not analyze whether the two men were independent contractors, and from the facts recited in the opinion, it is unlikely the two men would be employees. It was enough the two men were performing a task for their principal, defendant-Jones, and were talking about matters related to the scope of their task.

In *Harris v. Itzhaki,* 183 F.3d 1043 (9th Cir.1999), Harris, an African–American woman, sued her putative landlords, the Itzhakis, for racial discrimination in letting an apartment, under the Fair Housing Act. 183 F.3d at 1049. Harris over-heard Ms. Waldman, an elderly tenant who performed several tasks for the landlords, say to a repairman/gardener: “The owners don't want to rent to Blacks.” *Id.* at 1048. Harris complained to her local housing council based on Ms. Waldman's statement. In response, the housing council tested the Itzhakis' apartments for racial discrimination through the use of black and white fair housing testers. *Id.* The testers reported that the black tester was treated in a discriminatory manner based on her race. *Id.* The district court granted summary judgment against Harris on the ground that Harris failed to produce admissible***518** evidence of racial discrimination. *Id.* at 1049.

We reversed, holding there was sufficient evi-

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dence from which a jury could reasonably find Ms. Waldman was an agent of the Itzhakis and that her statement that the Itzhakis did not want to rent to Blacks was admissible in evidence under Rule 801(d)(2)(D). *Id.* at 1054 ("[T]he question of agency should be submitted to the jury unless the facts are clearly insufficient to establish agency or there is no dispute as to the underlying facts."). Ms. Waldman assisted the Itzhakis by collecting rent checks and showing vacant units to prospective tenants; this evidence supported the finding of agency. *Id.* The court noted that Ms. Waldman received no payment or discount on rent for her services, but did not hold the lack of remuneration disqualified Ms. Waldman as an agent.[FN9] *Id.*

FN9. In *Itzhaki,* the court afforded deference to the definition of agency provided by HUD regulations. *See* 24 C.F.R. § 100.20. That regulation defines agency in a manner that is consistent with the federal law of agency. *Itzhaki,* 183 F.3d at 1054.

In *Jones* and *Itzhaki,* the evidence supporting a finding of agency was much weaker than it is in Bonds's case. In *Jones,* the defendant never testified he sent the two men to collect the swag from Kelsay; here, the entrustment of BALCO testing and reporting to Anderson is drawn directly from Bonds's own testimony.[FN10] In *Itzhaki,* the agent acted gratuitously, doing small favors for her landlords that did not even require her to leave her apartment complex; here, Anderson's Task was much more significant—it required him to drive between Bonds's home in San Francisco and BALCO's offices in Burlingame at specific times, negotiate the testing of Bonds's samples with BALCO, and then return to Bonds to report the results.[FN11] And, of course, Anderson did not act gratuitously; he was paid a yearly stipend, plus a bonus and a valuable ring for helping in Bonds's fitness program.

FN10. I acknowledge the applicable burden of proof on the government was lower in *Jones.* But, the case provides a clear example of an agency relationship in circumstances with much less evidence than in this case. *Jones* does not compel the majority to reverse, but it does show the majority's notion of agency is too narrow.

FN11. The majority writes *Itzhaki* has no relevance here because it involved an objection to evidence at trial and not a motion in limine. Majority Op. 507. The majority provides no authority for this distinction and there is none. The issue whether there is sufficient foundational evidence of the existence of an agency relationship to admit into evidence statements by the alleged agent is the same at trial and in a motion in limine. *See* Advisory Committee Notes, 2000 Amendment, Fed.R.Evid. 103 (equating "rulings on evidence whether they occur at or before trial, including so-called 'in limine' rulings").

I need not quarrel with the majority's analysis of whether Anderson was an employee; he was clearly an agent, which is enough to allow admission into evidence of his statements and have the issue of agency submitted to a jury. But even as to the employment issue, the majority misapplies the correct standard of review. Specifically, the majority admits that the fact Bonds paid Anderson annually supports finding an employment relationship, Majority Op. at 505–06, but omits the fact that the district court never considered that fact and worse—the district court found Bonds had *not* paid Anderson. The district court based its holding on its finding that it was not evident Bonds ever paid Anderson or that if he did, Bonds only gave Anderson a ring worth $3,000. *Bonds,* 2009 WL 416445, at *5.

This finding of fact is clearly erroneous. Bonds's testimony shows he did pay Anderson $15,000 annually for the six ***519** years beginning in 1998 and

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ending in 2003. Bonds also paid Anderson $20,000 as a bonus when Bonds broke the single season home run record in 2001. In response to a question from a grand juror, Bonds testified he paid his other trainers, whom he considered to be employees, similar amounts. The majority asserts "Bonds paid gratuitously," Majority Op. at 505, which suggests Bonds did not receive any return value from Anderson, but that claim is implausible: Bonds received, at a minimum, weight training coaching from Anderson, creams, and a liquid; and, performance of the sample testing Task. Of course, had the district court considered the evidence of Bonds's payments, it may also have found the payments were in part for Anderson to obtain the test results that helped Anderson monitor Bonds's nutritional requirements, and later to verify that Bonds had not taken steroids in case the tests run by Major League Baseball came back positive for steroids. Instead of acknowledging the district court's clear error and then deciding whether that error was prejudicial to the government, the majority ignores the error and reviews the district court's legal conclusion deferentially. Majority Op. at 505 (searching only for a "sufficient basis" for the district court's holding).

In summary then, the district court abused its discretion because, by holding that statements by independent contractors are inadmissible under Rule 801(d)(2)(D), the court failed to identify the correct legal standard: independent contractors can be agents for purposes of imputation of statements to a principal. *See Hinkson,* 585 F.3d at 1262. This is reversible error because it prejudiced the government's rights; in other words, the district court may have ruled in the government's favor had the district court applied the correct standard of law to these facts. The majority itself admits: "the district court might, in the exercise of its discretion, have reached a different decision." Majority Op. at 508. The error more likely than not prejudiced the rights of the government. *See Hinkson,* 585 F.3d at 1282. At the very least, we should remand to the district court to decide, for the first time, whether Anderson qualified as an agent irrespective of whether he was an independent contractor.

(c) *Anderson acted on Bonds's behalf, or for his benefit.* Anderson performed his Task so that Bonds would better be able to manage his nutrition and diet. The parties do not dispute that Anderson acted on Bonds's behalf.

(d) *Anderson consented to perform the Task.* Bonds testified that Anderson took Bonds's samples and reported back with the results, and Valente testified that Anderson arrived at BALCO with blood and urine samples that Anderson identified as Bonds's. Anderson's performance is sufficient to show his consent. Restatement (Third) of Agency § 1.01 cmt. c. Therefore, Anderson was Bonds's agent for the purpose of the Task. This conclusion is obvious if one considers similar facts in a slightly different legal context. Imagine that Anderson were not quite so loyal. Had Anderson sold documents showing Bonds tested positive for steroids to a celebrity gossip publication, would Bonds have a cause of action against Anderson for breach of Anderson's duty of confidentiality? Yes: "An agent's relationship with a principal may result in the agent learning information about the principal's health, life history, and personal preferences that the agent should reasonably understand the principal expects the agent to keep confidential. An agent's duty of confidentiality extends to all such information concerning a principal even when it is not otherwise connected with the subject matter of the agency relationship."***520** Restatement (Third) of Agency § 8.05 cmt. c. Bonds could assert a cause of action only if Anderson were his *agent,* but I have no doubt a court evaluating Bonds's relationship with Anderson in that context would hold Anderson was Bonds's agent for the purpose of the Task. It would not even be necessary for Bonds to adduce facts supporting the claim that Anderson was his friend or trainer.

(2) *Anderson's statements to Valente concerned, or were related to, a matter within the scope of Anderson's authority.* The district court erred on an issue

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of law in holding the government failed to show the task of identifying Bonds's samples was *within the scope* of the Task he gave Anderson. *See Bonds,* 2009 WL 416445, at *5 ("The government has not established by a preponderance of the evidence that Anderson was defendant's agent or that the task of identifying defendant's samples *was within the scope* of Anderson's agency" (emphasis added)). Under Rule 801(d)(2)(D), the proffering party must show the statement is *related to a matter* within the agent's scope of authority, not that making the statement is itself *within the scope* of authority. *Hoptowit v. Ray,* 682 F.2d 1237, 1262 (9th Cir.1982) (holding Rule 801(d)(2)(D) "does not require a showing that the statement is within the scope of the declarant's agency. Rather, it need only be shown that the statement be *related to a matter* within the scope of the agency." (emphasis added)). Anderson's statements are related to the scope of his agency because it was pertinent for Anderson to tell BALCO from whom the samples were taken to have BALCO accurately label the test results, so Anderson could accurately report to Bonds the results of the tests on the samples.

The district court's error is not harmless because it may have admitted into evidence Anderson's statements if it had considered whether they were related to a matter within the scope of his agency and did not take an incorrectly restrictive view of what types of statements were admissible into evidence under Rule 801(d)(2)(D).

(3) *It is undisputed the statements were made during the existence of the agency relationship between Bonds and Anderson.*

Therefore, as Anderson's statements meet the three requirements under Rule 801(d)(2)(D) for admitting in evidence Anderson's statements to Valente identifying the samples as Bonds's, the district court's decision to exclude such testimony should be reversed. The district court erred as to a matter of law by holding independent contractors could not be agents and by holding that statements admissible under Rule 801(d)(2)(D) must be made within the scope of the agency relationship. The district court also clearly erred when it found there was no evidence that Bonds paid Anderson, with the exception of a ring worth $3,000.

Because the district court erred as to a matter of law, the majority is wrong to apply a deferential standard of review. Moreover, the majority fails in its attempt to distinguish *Jones* or *Itzhaki,* two cases where the agency relationship at issue was far more attenuated than is the case here. Reviewing the record below to determine only if the district court's misstatements of law caused the government prejudice, the ineluctable conclusion is that the district court's error did prejudice the government and its decision should be reversed.

D. The evidence is also admissible under Rule 801(d)(2)(C) (authorized admissions) because Bonds authorized Anderson to tell BALCO the samples were Bonds's.

"A statement by a person authorized by the party to make a statement concerning ***521** the subject" is not hearsay. Rule 801(d)(2)(C). Anderson's statements to Valente identifying blood and urine samples are not hearsay under Rule 801(d)(2)(C) because Bonds impliedly authorized Anderson to make those statements. Bonds's testimony shows he impliedly authorized Anderson to have Bonds's bodily fluids tested by BALCO and to report the results to Bonds so Bonds could know the test results. Anderson's statements identifying Bonds's samples concerned the subject of his Task.

To qualify a statement under this rule, the proffering party must show the declarant had "authority to speak on a particular subject on behalf of someone else." *Precision Piping & Instr., Inc. v. E.I. du Pont de Nemours & Co.,* 951 F.2d 613, 619 (4th Cir.1991).[FN12] In practice, courts determine whether the declarant was authorized to speak based on the *nature of the*

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relationship between the party and the declarant, or based on the *nature of the task* the declarant was to perform. *See* Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 8:50 (2008). The majority errs in stating the applicable law by importing, without citation, the requirement the authority to speak on behalf of the principal be "specific" or done "specifically," whatever that might mean.[FN13] Majority Op. at 502–04.

> FN12. There is a dearth of Circuit case law explaining Rule 801(d)(2)(C). Because there are few pertinent cases, I turn to out-of-circuit authority to examine the dimensions of this rule.
>
> FN13. It is not clear whether the "specific" requirement is meant in the sense of "expressly" authorized (as opposed to "impliedly" authorized), or in the sense of "particularly" authorized (as opposed to "generally" authorized).
>
> For purposes of determining what was authorized there is no rule of agency law of which I know that determines an agent is unauthorized unless he is given "specific" authority to do a task. When a clerk is asked to mail a letter, is he not authorized to place a stamp on it unless he is "specifically" told to use a stamp?

Courts have admitted in evidence statements made by declarants authorized to perform a particular task, when the nature of the task implies the authority to speak. *E.g. United States v. Iaconetti,* 540 F.2d 574, 577 (2d Cir.1976); *see also Reid Bros. Logging Co. v. Ketchikan Pulp Co.,* 699 F.2d 1292, 1306 (9th Cir.1983). In these cases, the scope of authority was much narrower than in the cases where the role of the declarant—i.e., the nature of the *relationship*—was to speak for the party against whom the statement was offered. Yet in each case, the nature of the *task* entrusted to the declarant impliedly carried with it the authority to speak for the party who had authorized the task. The extent of the authority to speak is implied from the nature of the task and not exclusively by the occupation of the declarant, nor the nature of the relationship between the declarant and the person who impliedly authorized him to speak.

In *Iaconetti,* a government inspector was convicted of having solicited and received a bribe. 540 F.2d at 575. Defendant Iaconetti was assigned to conduct a survey of a company to determine whether it was capable of performing a contract upon which it had successfully bid. *Id.* at 576. Iaconetti met with Lioi, President of the company, and intimated he would assure a favorable report on the company if the company paid Iaconetti one percent of the contract price. *Id.* Lioi told two of his business partners, Babiuk and Goldman, and his lawyer Stern, about Iaconetti's solicitation of a bribe. *Id.* Lioi then told the FBI, who had him audio-record his meeting with Iaconetti where Lioi gave Iaconetti the bribe money. *Id.* The FBI arrested ***522** Iaconetti after he received the money from Lioi. *Id.*

The government's chief witness at trial was Lioi. *Id.* Defense counsel sought to impeach Lioi by suggesting on cross-examination that Lioi, rather than defendant Iaconetti, had initiated the scheme to pay the bribe. *Id.* To rebut this defense assertion and to corroborate Lioi's testimony, the government put on Goldman and Stern, who testified that Lioi had told them Iaconetti had asked for the bribe. *Id.* The district court denied Iaconetti's post-conviction motion for a new trial made on the grounds that Goldman's testimony was inadmissible hearsay. *Id.* at 576–77.

The Second Circuit affirmed, holding Goldman's testimony was admissible under Rule 801(d)(2)(C) because "by demanding the bribe Iaconetti necessarily authorized the persons who ran the business to discuss his demand among themselves." *Id.* at 577.[FN14] At-

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torney Stern's testimony, that Lioi had told him of Iaconetti's bribe request, however, was inadmissible under Rule 801(d)(2)(C) because it was not necessary for Lioi to consult with his personal attorney as to whether to pay Iaconetti the bribe. On the other hand, it *was* necessary for Lioi to relay the bribe request to his business associates because their assent was necessary to get the money to pay the bribe. *Id.* at 577–78.

> FN14. Note that the Second Circuit held Iaconetti "necessarily authorized" Lioi, not "specifically" authorized, nor "expressly authorized." *Id.* at 577. In determining what, under the circumstances, was impliedly authorized, one considers what was necessary or normal. One does not insert requirements of "specificity," from sources unidentified, as a consideration.

Similarly, by asking Anderson to deliver blood samples to BALCO for testing and to report the results back to Bonds, Bonds necessarily authorized Anderson to identify the source of the blood; otherwise, Bonds could not be assured of the accuracy of the results, which was the whole purpose of the Task entrusted by Bonds to Anderson. Without identification of who had supplied the samples, Anderson's Task would have been a fool's errand.

Our most extensive discussion of Rule 801(d)(2)(C) is found in *Reid Bros.* Reid Brothers Logging Co. sued two pulp companies for violations of the Sherman Act. 699 F.2d at 1295. The district court found the pulp company defendants had conspired to dominate all segments of the southeast Alaska timber industry. *Id.* On appeal, the defendants challenged on hearsay grounds the district court's admission of a report that was material to show defendants engaged in predatory pricing. *Id.* at 1306 ("[T]he report ... provided the sole support for the district court's finding that the defendants purposefully set log prices at levels below market value."). We held the report was admissible under Rule 801(d)(2)(C). *Id.* The report had been prepared by an employee of the Oji Paper Company of Japan. *Id.* Oji Paper Company was a shareholder of defendant-ALP's parent company. *Id.* The report was prepared at the request of ALP's chairman. *Id.* The Oji Paper Company employee who prepared the report was given access to ALP's books and records and accompanied ALP employees to logging camps. *Id.* He presented the report to a meeting of the ALP Log Committee and the report was circulated to ALP officers and managers. *Id.* Based on those facts, we held "there can be little question that [the employee] was 'authorized' by ALP to make statements regarding the entire scope of ALP's woods operations." *Id.*

In *Reid Brothers,* ALP authorized declarant—the Oji Paper Company employee***523** —to produce a report of ALP's woods operations, including the price structure for the purchase of logs, to further ALP's knowledge of how best to conduct its business. Similarly, Bonds authorized Anderson to deal with BALCO to produce test results of Bonds, to further Bonds's knowledge of how best to modify his nutritional intake. Oji Paper Company employee's statements regarding the price structure of ALP's purchase of logs were necessary to make his report accurate. Anderson's statements regarding Bonds's name were necessary to make his report of Bonds's test results accurate. In *Reid Brothers,* it was not necessary for the plaintiffs who offered into evidence the Oji Paper Company employee's statements to show ALP specifically authorized Oji Paper Company employee's statements regarding the price structure of log purchases; it was sufficient that ALP authorized a survey of its own log operations from which said price information came. Here, Bonds authorized a review of his nutritional levels and Anderson's statements in furtherance of accurately assessing his nutritional levels were thereby impliedly authorized.

With these cases in mind, I turn to the district court's analysis of whether Anderson's statements are admissible under Rule 801(d)(2)(C).

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I begin with the district court's most serious error, which pervades its analysis of the admissibility into evidence of Anderson's statements—that it focused solely on whether the nature of Anderson's role *as a trainer* authorized him to speak on Bonds's behalf. In doing so, the district court overlooked the undisputed evidence as to the full nature of Anderson's Task with BALCO. So does the majority. *See* Majority Op. at 502–03. Anderson's formal label as a trainer should not trump the actual function he performed for Bonds. For Anderson to accomplish his Task successfully, it was necessary for Anderson to identify the samples in a manner that would later allow BALCO accurately to report test results back to Anderson and for Anderson to know the results were of Bonds's samples, so he could accurately report to Bonds his BALCO results.

But the district court did not look to the full Task; it stated: "[t]he rationale for Rule 801(d)(2)(C) simply does not apply here. If a party authorizes a declarant to speak on his behalf and the declarant makes an admission, Rule 801(d)(2)(C) provides a mechanism for that admission to be used against the party. Trainers, unlike lawyers, brokers, sales personnel, and those with supervisory responsibilities, are not generally authorized to speak for principals." 2009 WL 416445, at *5. The district court's standard—that trainers are not generally authorized to speak for their trainees—is correct, but only if read in isolation. The district court does not explain how that *general* standard applies to this particular case. We are left to guess why the district court reached the conclusion that Anderson was not authorized based on this general standard.

One possible interpretation of the district court's opinion is that the district court simply ignored the word "generally" in its statement of the law. If the district court proceeded with its analysis on the grounds that "trainers ... are not [ ] authorized to speak for principals," that is a ruling on a question of law; we then review that ruling de novo. *See Hinkson*, 585 F.3d at 1262. The holding that trainers are not authorized to speak for trainees is incorrect because no rule of law prohibits a trainee from authorizing his trainer to speak for the trainee. It is true only that the duties of a trainer do not usually include making statements to third ***524** parties. Furthermore, this holding is incorrect because a person may be authorized to speak on behalf of a principal independently from that person's role as a trainer. The fact that Anderson was also Bonds's trainer should not preclude the district court from holding that Bonds authorized his friend Anderson to perform the Task. For instance, if Bonds had told a John Smith to speak on his behalf at a press conference, and John Smith happened to be the batboy for the San Francisco Giants, John Smith's profession as batboy would not undercut Bonds's authorization of Smith to speak on his behalf, although batboys as a group and profession are not usually thought of as ballplayers' spokesmen.

The other possible interpretation of the district court's opinion is that the district court applied the correct standard of law, but found the facts on this record were inadequate to fit Anderson's statements into an exception to the general standard that trainers are not generally authorized to speak on behalf of their trainees. This is an application of the law to the facts, which we review for clear error under *Hinkson*, 585 F.3d at 1262. The district court clearly erred because its application was illogical; all reasonable inferences that may be drawn from facts in the record show that Anderson was authorized to speak, not as Bonds's trainer, but as the person Bonds entrusted to complete the Task. It was clear error for the district court to limit its consideration to Anderson's *role* as a trainer, without considering what facts established his implied authority to speak for Bonds: the *nature of the Task* entrusted to Anderson by Bonds.

Earlier in the district court's opinion, it described the nature of the task Anderson was required to perform as "the delivery of defendant's samples to BALCO." 2009 WL 416445, at *5. This is a finding of fact, as to what constituted Anderson's task, which we

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review for clear error. *Hinkson*, 585 F.3d at 1263. But, the district court did clearly err in finding Anderson's task was mere delivery of samples to BALCO because the record shows Anderson's Task included far more—from procuring the vials to reporting the results to Bonds—as discussed earlier in this dissent. *See* discussion *supra* p. 512–13.

The district court committed another error of law in holding Anderson was not authorized to identify Bonds by name because Bonds provided Anderson with blood and urine samples in response to requests *from Anderson*, rather than had the request originated *from Bonds*. The district court stated: "[Bonds's] testimony establishes that he provided the samples in response to a request from Anderson, not that defendant hired Anderson to perform this task." *Bonds*, 2009 WL 416445, at *5. Although the district court's statement is phrased as a finding of fact, the district court implicitly holds that, as a matter of law, admission into evidence of statements under Rule 801(d)(2)(C) requires that (1) the person authorizing the speaker must not be acting in response to a request from the speaker himself and (2) that authorization is synonymous with *hiring* a speaker to perform a task. These are legal issues that we review de novo. There is no support for a requirement that an impliedly authorized declarant cannot suggest the task in the first place. In *Reid Bros.*, we did state that the report admitted under Rule 801(d)(2)(C) was conducted at the request of the company's CEO, but I see no reason why our analysis would have been different if Oji Paper Company of Japan had approached ALP first and offered to draft the report, so long as the principal assented to the declarant's performance of the task. *See* 699 F.2d at 1306. The reference in *Reid Bros.* to the ***525** company's request shows only that party-ALP actually authorized the report and that the consultant did not write it spontaneously on his own. Here, Bonds's own testimony shows he authorized Anderson to procure BALCO testing of Bonds's bodily fluids; Bonds impliedly authorized Anderson to identify the samples to insure the accuracy of the test results as to *his* bodily fluids. The only determinative factor is whether Bonds *agreed* to Anderson's suggestion, which he did.[FN15]

FN15. The fact that Anderson suggested the task might be relevant if there were some dispute over the *scope* of the task. In that case the issue of who initially suggested the task might be probative of whether there was a meeting of the minds as to the scope of Anderson's authority. Here, however, we consider the scope of the task solely from Bonds's own testimony and it is Bonds who claims he entrusted Anderson with the Task. Therefore, there is no dispute over the scope of the task and we may properly decide solely from Bonds's testimony to the grand jury what statements were impliedly authorized as part of that Task.

The majority attempts to distinguish *Iaconetti* on the same grounds. Majority Op. at 502–03. Whereas defendant-Iaconetti demanded a bribe, it was Anderson who raised the possibility of testing Bonds's blood. But, the majority misses the point of *Iaconetti*. Iaconetti gave Lioi, the company president, the task of getting the bribe money from the company. To accomplish that task, Iaconetti impliedly authorized Lioi to pass his demand for money to the people who controlled the company's money, including witness-Goldman. Here, Bonds gave Anderson the task of testing Bonds's bodily fluids and reporting the results. Just as it was necessary for Lioi to pass on Iaconetti's demands to the people in the company who could pay the money, it was necessary for Anderson to identify the source of the bodily fluids to the laboratory that would test the samples. Otherwise, Anderson could not achieve an accurate completion of the Task of testing and reporting.

Moreover, the majority simply has its facts wrong when it writes the steroid testing was all Anderson's idea, Majority Op. at 502–03: Bonds testified it was

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his idea to have his blood tested for steroids at BALCO after Major League Baseball collected his blood on May 29, 2003. Bonds wanted to keep Major League Baseball honest. The majority contends this fact, and presumably anything that occurred after 2002, is not relevant, but does not explain why. Evidence that Bonds expected Anderson to be able to test his blood for steroids, and that he would initiate a request for such testing, is probative of his entire relationship with Anderson, where there is not a scintilla of evidence the relationship between Anderson and Bonds changed after 2002. To the contrary, it was in 2003, after the World Series of 2002, and when Bonds hit 73 home runs, that Bonds bestowed a World Series ring and a $20,000 bonus on Anderson.

There is likewise no support for the district court's implicit holding that a party must have *hired* a speaker for the speaker's statements to be authorized. "To hire" suggests payment. *See* Webster's Third New International Dictionary 1072 (1965) (Hire: "To engage the personal services of for a fixed sum: employ for wages"). But payment is not a requirement under Rule 801(d)(2)(C). *Iaconetti*, 540 F.2d at 575–76 (finding statements were authorized even though Iaconetti did not pay Lioi to relay his bribe money demand to Lioi's business associates).

Next, the district court clearly erred when it found Bonds's "equivocal answers ***526** about the number of samples[Bonds] gave Anderson [were] not sufficiently certain to establish Anderson had authority to speak with regard to the particular samples at issue here." *Bonds*, 2009 WL 416445, at *5. The majority adopts and repeats this error. Majority Op. at 503–04. Without further analysis, this is simply a non-sequitur. Neither the district court nor the majority explain why Bonds's uncertain memory as to the *number* of samples given cuts against a finding that he authorized Anderson. As such, the district court clearly erred by misapplying the law to these facts because it is illogical to hold Anderson's statements are not admissible into evidence based on a non-sequitur.

I can imagine one situation where the number of times Bonds authorized Anderson to perform the Task would matter. If Bonds testified he gave Anderson samples on only *three* occasions, and Anderson submitted to BALCO samples on *four* occasions—samples that he claimed were Bonds's—then there would be some reason to suspect Anderson was not authorized to make identifying statements on one occasion. In that situation, the district court might not be able to identify and rule out which test was unauthorized, and therefore it might be reasonable to exclude all of Anderson's identifying statements.

But that situation is not relevant here. Not only was a "three of four" situation not discussed by Bonds before the district court or this court, but the record does not provide any basis for a claim that Anderson delivered more samples than Bonds authorized to be tested. Remember, the record is clear and undisputed that *each* sample was gathered from Bonds's doctor at Bonds's home contemporaneously, in Bonds's presence, with Bonds donating the sample. As Bonds testified regarding the collection of his blood and urine samples: "[W]e just gave it to Greg [Anderson]." The factual record is without dispute: Each and every sample was collected with Bonds's cooperation and consent. There is not a word in the record that Anderson handled anybody else's samples, or what possible motivation he could have had to frame Bonds with another's blood. Just the opposite. Anderson has been willing to stay in jail for an extended period for contempt of court to avoid testifying against Bonds.

The district court also erred—and here the majority agrees—on an issue of law in holding Anderson's statements were not an "admission" because the statement was not against Anderson's interest. Rule 801(d)(2)(C) does not require the statement to be against the declarant's interest. There is no requirement an authorized statement must be against the interest of either the speaker or the principal. *See, e.g., Reid Bros.*, 699 F.2d at 1306. I concede this error

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would not alone compel us to reverse the decision below, but it is cumulative with the numerous errors of law and fact in the district's court decision.

The majority adds a whole new erroneous contention to the district court's errors: it relies on the notion that Bonds was just "accommodating the wishes of a friend." Majority Op. at 503. Perhaps I spend my time in the wrong social circles, but in my experience "accommodating the wishes of a friend" has never quite included giving friends my blood or urine; a screwdriver or a ride if his car breaks down, sure, but not vials of my bodily fluids. But, even if giving away blood and urine is something now done among friends, I do not see how "accommodating the wishes of a friend" is necessarily exclusive of "providing Anderson with the authority to speak." *Id.* (internal quotation marks omitted). The majority suggests Bonds had nothing to gain from ***527** Anderson's Task. That is flat wrong: Bonds testified he gave Anderson his blood and urine samples for the ostensible reason that he expected the test results to help him improve his nutrition. Bonds testified: "I was just baffled like, you know, should have been doing this a long time ago, you know, drawing blood, finding out what you're lacking and stuff, you know, keep your energy up if you're this or that." Later, Bonds expected the test results to keep Major League Baseball honest when it performed its unannounced steroid test.

Finally, the majority contends Anderson was not impliedly authorized to identify Bonds's samples because Anderson *could* have provided BALCO the samples anonymously. The majority does not rely on any authority for its contention, which is inconsistent with *Iaconetti* and *Reid Bros.;* in neither of those cases did the court rule out all hypotheses as to how the statements could have been made, but were not. In *Iaconetti,* for example, the speaker, Lioi, told his business partners that he needed to collect company money to pay Iaconetti's bribe. Although the Second Circuit found those statements were necessarily authorized, the majority's analysis here would compel a different result. Lioi *could* have lied to his business partners about the need for the money. He *could* have said it was needed for an unexpected emergency—e.g., that a valued employee needed uncovered medical treatment. This type of second-guessing whether a statement is strictly necessary would eliminate the admissibility of all statements impliedly authorized, because whenever the party authorizing a statement does not draft the exact words of a statement, another formulation of the statement is possible. Instead, *Iaconetti* and *Reid Bros.* hold that statements may be impliedly authorized so long as they are made to complete a task in the ordinary and usual manner.

The assertion that Anderson could provide Bonds's samples anonymously is also unsupported on the record. It is not evident that BALCO would have tested random samples provided by Anderson, without the cachet of Bonds's name. Moreover, Bonds testified that he did not request or expect Anderson to keep his identity confidential. To the contrary, Bonds revealed his identity when he met with the CEO of BALCO to discuss his testing and when he publicly spoke about it in an advertisement for BALCO.

If Anderson's sole task were to deliver the samples to BALCO, I would agree with the district court's determination as to lack of authorization of Anderson to speak for Bonds to identify the donor of the samples: couriers and postal workers are not impliedly authorized to make statements as to the parcel's provenance on behalf of the people from whom they take parcels and make deliveries. *See* Restatement (Third) of Agency § 1.01 cmt. h (2006). It is not necessary for a courier to identify the source of a letter or package. Indeed, in most cases the courier has no personal knowledge who delivered the goods to the office for the final delivery. But, as the elements of Anderson's Task reveal—when that Task is at last fully described—Anderson was much more than a courier. He was responsible for *dealing* with BALCO under highly specific conditions of deliv-

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ery—conditions set by Bonds (samples to be picked up at Bonds's home) and BALCO (samples to be tested within thirty minutes of extraction), but *not* set by Anderson. He was also responsible for reporting back the results of Bonds's tests. Bonds testified: "[Greg Anderson] came in with the vials, my doctor drew the blood, we just gave it to Greg. Greg went down there and *dealt* with it" (emphasis added). ***528** The authority to *deal* with a third party is a classic element of authorizing a person to act for another.[FN16] *See* Restatement (Third) of Agency § 1.01 cmt. c ("Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties.... [A] relationship of agency always contemplates three parties—the principal, the agent, and the third party with whom the agent is to *deal*." (internal quotation marks omitted) (emphasis added)).

FN16. Admittedly, the distinction between an authorized speaker under Rule 801(d)(2)(C) and an agent under Rule 801(d)(2)(D) appears blurry when discussing "authorization." These roles are distinguished, however, by the fact that an authorized speaker under Rule 801(d)(2)(C) is not necessarily subject to the other requirements necessary for agency under Rule 801(d)(2)(D).

The district court's errors of law and fact require reversal. In deciding an interlocutory appeal, we will reverse an evidentiary ruling for abuse of discretion only if such nonconstitutional error more likely than not would affect the outcome of the case. *See Hinkson,* 585 F.3d at 1282. A preponderance of the evidence proves Bonds authorized Anderson to perform the task, which impliedly authorized Anderson to identify the origin of the samples he delivered to BALCO. The district court's incorrect reading of the law and clear errors of fact affected and effected its erroneous decision. Therefore, I would reverse the district court's decision not to admit Anderson's statements under Rule 801(d)(2)(C).

IV. Conclusion

The district court's errors in labeling Anderson's statements—identifying blood and urine samples handed by Anderson to Valente at BALCO as Bonds's—as hearsay contravene Rules 801(d)(2)(C) (authorized admissions) and 801(d)(2)(D) (statements of an agent related to the subject of his agency). As to both Rules, the district court has erred as to (1) the correct legal standard to be applied, and (2) its findings of fact.

First, upon the more commonly visited hearsay exception, Anderson's statements to Valente: (1) were made while Anderson was Bonds's agent, in dealing with BALCO for the production of accurate test results of Bonds's bodily fluids; and (2) were related to the scope of his agency—to help Bonds get accurate readings of his nutritional levels. *See* Rule 801(d)(2)(D).

Second, upon the less common hearsay exception, Anderson's statements to Valente were impliedly authorized by Bonds as a normal and necessary action for the procurement of accurate test results of Bonds's bodily fluids. *See* Rule 801(d)(2)(C).[FN17]

FN17. Finally, like the majority, I do not think the district court erred in deciding the government's evidence was not admissible under the business records exception, Rule 803(6), or the residual exception, Rule 807.

We should reverse the district court's decision to exclude Anderson's foundational statements regarding the provenance of the blood and urine samples that Anderson brought to BALCO. Those statements are admissible in evidence under both Rules 801(d)(2)(C) and 801(d)(2)(D). But, even if I am wrong to think the evidence is conclusive in the government's favor, it is at least strong enough to merit remanding this issue to the district court to decide whether, under the cor-

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rect standard of law, Anderson was Bonds's agent, or whether Bonds authorized Anderson to perform his Task.

***529** Although we should reverse as to Anderson's statements, that does not mean we should hold the BALCO logs and test results admissible in evidence at this point. Bonds raised before the district court several other reasons why that evidence should not be admitted in evidence. The district court did not reach those issues because it decided that Anderson's statements were inadmissible. Thus, if this case were remanded, the district court would have to decide whether the evidence proffered by the government is admissible in evidence *if* Anderson's statements are admissible in evidence.

C.A.9 (Cal.),2010.
U.S. v. Bonds
608 F.3d 495, 83 Fed. R. Evid. Serv. 23, 10 Cal. Daily Op. Serv. 7316, 2010 Daily Journal D.A.R. 8773

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EXHIBIT G

Westlaw

441 F.3d 864, 69 Fed. R. Evid. Serv. 904, 06 Cal. Daily Op. Serv. 2623, 2006 Daily Journal D.A.R. 3748
(Cite as: 441 F.3d 864)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ozine BRIDGEFORTH, Defendant-Appellant.

No. 04-50183.
Argued and Submitted Feb. 6, 2006.
Filed March 29, 2006.

Background: Defendant was convicted in the United States District Court for the Central District of California, Stephen V. Wilson, J., of distribution of controlled substance and conspiracy to distribute controlled substance. Defendant appealed.

Holdings: The Court of Appeals, Trott, Circuit Judge, held that:
(1) limitation on defendant's right to impeach informant did not violate defendant's rights under confrontation clause;
(2) co-conspirator's statements to informant upon her request to buy drugs were made in furtherance of the conspiracy; and
(3) defendant's prior California conviction for assault with deadly weapon was not a felony.

Convictions affirmed; sentence vacated and remanded.

West Headnotes

[1] Criminal Law 110 662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.7 k. Cross-Examination and Impeachment. Most Cited Cases

A limitation on a defendant's ability to conduct cross examination does not violate the Confrontation Clause unless it limits relevant testimony and prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

Criminal Law 110 1168(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1168 Rulings as to Evidence in General
110k1168(2) k. Reception of Evidence. Most Cited Cases

Claims of Confrontation Clause violations are reviewed de novo and are subject to harmless error analysis. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence

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110k662 Right of Accused to Confront Witnesses
110k662.7 k. Cross-Examination and Impeachment. Most Cited Cases

District court's limitation on defendant's right to impeach informant, by precluding information regarding informant's misrepresentations about prior drug activity, did not violate defendant's rights under the confrontation clause during his drug prosecution, since jury had sufficient information to appraise informant's motivations and biases; informant testified that she became an informant because she needed money, informant admitted she was a long-time drug user, that she had not paid taxes on money made as informant, and jury heard that marijuana and methamphetamine was found in her purse after a car accident. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 423(3)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k423 Furtherance or Execution of Common Purpose
110k423(3) k. Character of Acts or Declarations. Most Cited Cases

Co-conspirator's statements to informant upon her request to buy drugs of “there he go right here” and “my boy just left” were made in furtherance of the conspiracy to facilitate informant's purchase, and thus were admissible during defendant's drug prosecution; co-conspirator was an intermediary to the drug sales and was telling informant that his supplier was present in the first instance, and that supplier just left in second instance, and informant testified that after she paid co-conspirator for drugs, she saw him pass money to defendant. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[5] Criminal Law 110 662.11

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.11 k. Coconspirators' Statements. Most Cited Cases

The requirements for admission of a co-conspirator's statement under the federal evidentiary rules are identical to the requirements of the Confrontation Clause; therefore, if a statement is admissible under the federal rules as an admission by a co-conspirator, the defendant's right of confrontation is not violated. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[6] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

The Court of Appeals reviews de novo the question of whether a prior conviction falls within the scope of the career offender sentencing enhancement. U.S.S.G. § 4B1.1(a), 18 U.S.C.A.

[7] Sentencing and Punishment 350H 1254

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1252 Grade or Degree of Offense

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350Hk1254 k. Felony or Misdemeanor in General. Most Cited Cases

The actual sentence is irrelevant to the categorization of a prior conviction as a felony under the career offender sentencing enhancement. U.S.S.G. § 4B1.1(a), 18 U.S.C.A.

[8] Sentencing and Punishment 350H 1285

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1285 k. Particular Offenses. Most Cited Cases

Defendant's prior California conviction for assault with deadly weapon was not a felony conviction of a crime of violence for purposes of sentencing defendant as a career offender for subsequent federal drug offense; even though statute of conviction allowed for maximum penalty of more than one year, offense was "wobbler" offense and once state court sentenced defendant to county jail, offense automatically became misdemeanor for all purposes. West's Ann.Cal.Penal Code §§ 17(b), 245(a); U.S.S.G. §§ 4B1.1(a), 4B1.2(a), 18 U.S.C.A.

***865** Michael Tanaka, Suzanne M. Lachelier, Monica Knox, Deputy Federal Public Defenders, Los Angeles, CA, for the defendant-appellant.

Nancy Kardon, Assistant United States Attorney, Los Angeles, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CR-00-01220-SVW-02.

***866** Before ALEX KOZINSKI, STEPHEN S. TROTT, and CARLOS T. BEA, Circuit Judges.

TROTT, Circuit Judge.

Ozine Bridgeforth was convicted of two counts of distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846. On appeal, Bridgeforth argues that his right to confrontation was violated when the district court limited cross-examination of a paid informant and admitted two out-of-court statements as admissions of a co-conspirator. He argues also that his sentence violates the Sixth Amendment and that the court erred in sentencing him as a career offender. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm his convictions. However, because Bridgeforth was improperly sentenced as a career offender, we vacate his sentence and remand for resentencing.

BACKGROUND

This case arises out of two drug transactions observed and recorded by agents of the Federal Bureau of Investigation (FBI). On August 20, 1999, Deshonda Aldridge, a paid informant for the FBI, drove to the 1800 block of East Pine Street in Compton, California, to purchase an ounce of crack cocaine. Aldridge was looking for a man named Steven Rhodes, with whom she had conducted narcotics transactions in the past. While Aldridge was unable to find Rhodes, she did happen upon Ronald Daniels, who offered to sell her the crack. Daniels, an apparent middleman, did not have the drugs that Aldridge requested. Daniels paged his supplier and, when Bridgeforth showed up on his motorcycle, Daniels told Aldridge, "There he go right here." Bridgeforth rode his motorcycle to the driver's side of Aldridge's car while Daniels was leaning on the passenger-side door. Aldridge gave Daniels $540 for the crack. After Aldridge paid for the drugs, she claimed that Daniels handed the money to Bridgeforth. Daniels and Bridgeforth then left Aldridge for a time. A surveillance agent saw Bridgeforth lead

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Daniels toward the back of Daniels's house, from where Daniels returned and gave Aldridge the crack she had purchased.

The second transaction took place on September 16, 1999. Aldridge again drove to East Pine Street to purchase drugs from Daniels. FBI Agent Todd Holliday testified that, about three minutes before Aldridge's arrival, Bridgeforth had left the neighborhood on his motorcycle. When Aldridge arrived at the scene and initiated the drug transaction, he told her, "My boy just left." Daniels asked Aldridge to accompany him to his supplier to get the drugs, but, when she refused, he left the area. Bridgeforth then returned and went into Daniels's house. Glenn Owens, who identified himself as Daniels's uncle, came out of the same house and sold Aldridge four ounces of crack for $2,100. The jury heard tape recordings and saw photographs of both drug transactions, although they never saw Bridgeforth actually touch either the drugs or the cash, nor did they hear Bridgeforth incriminate himself on the tape.

When Aldridge had first approached the FBI about becoming a paid informant, she told the FBI agent interviewing her that she had past experience as a drug courier in Michigan. Although the agent inferred that Aldridge had worked for a small-time street hustler, in reality Aldridge had made substantial amounts of money working for a large-scale heroin ring. Aldridge also told the FBI that she had ceased her drug courier activity upon the birth of her ***867** daughter; in reality, however, Aldridge continued to participate in the heroin ring for another two years.

Bridgeforth wanted to impeach Aldridge with her alleged misstatements, arguing that the statements bore on her credibility as a witness. After hearing testimony from the FBI agent who had interviewed Aldridge, however, the district court ruled that Bridgeforth could not cross-examine Aldridge about her statements to the FBI. The court concluded that, because the FBI agent had never asked Aldridge the details of her drug courier activity, Aldridge had not lied.

Bridgeforth also requested permission to impeach Aldridge with evidence of bias stemming from a car crash she had suffered in Nevada prior to Bridgeforth's trial. Shortly after the accident, Nevada police had found alcohol, marijuana, and methamphetamine in Aldridge's blood, as well as marijuana and methamphetamine in her purse. At the time of Aldridge's testimony, she had not been charged in connection with the Nevada incident. Bridgeforth asserted that Aldridge might give biased testimony in order to curry favor with the government and avoid prosecution.

The district court initially ruled that, although defense counsel could ask questions regarding the drugs that Nevada police had found in Aldridge's purse and blood after her car crash, counsel could not inquire about the alcohol or introduce extrinsic evidence of the drugs. However, the court later indicated that it would admit a stipulation into evidence if Aldridge denied using drugs on the day of the crash. The court held also that extrinsic evidence of bias was inadmissible, reasoning that Bridgeforth had failed to make an adequate showing of potential bias because an FBI agent had told Aldridge that the FBI could not help with her problems in Nevada.

On the witness stand, Aldridge denied that she had ever used any drug other than marijuana and stated that she had not used any drugs the day of her car crash. The court then allowed defense counsel to read to the jury a stipulation that Nevada police had found both marijuana and methamphetamine in Aldridge's purse, as well as in her blood.

The jury found Bridgeforth guilty of two counts of distributing a controlled substance and one count of conspiracy to distribute a controlled substance. Bridgeforth moved for a new trial; the district court denied this motion.

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During sentencing, the court explored Bridgeforth's criminal history. In 1989, Bridgeforth was convicted under California Health and Safety Code section 11351.5 of possessing cocaine base for sale. In 1995, he was convicted of assault with a deadly weapon under California Penal Code section 245(a). Section 245(a)(1), assault with a deadly weapon other than a firearm, is punishable either with a term of two, three, or four years in state prison, or with a maximum sentence of one year in county jail. Cal.Penal Code § 245(a)(1). On September 27, 1995, the state court suspended imposition of sentence and placed Bridgeforth on probation. On December 15, 1995, the court terminated probation and imposed a sentence of 365 days in the county jail. After Bridgeforth was convicted in the instant case, he attempted to avoid being sentenced as a career offender by applying to the state court to have his 1995 conviction declared a misdemeanor. On April 16, 2003, the state court declared Bridgeforth's section 245(a) offense a misdemeanor.

Although the Probation Office initially recommended that Bridgeforth be sentenced as a career offender, it later amended the Presentence Report and ***868** found that, because the state court had treated Bridgeforth's 1995 conviction as a misdemeanor, the offense did not qualify as a felony crime of violence under the career offender enhancement. Nevertheless, relying on the language of the United States Sentencing Guidelines (Guidelines), the district court concluded that Bridgeforth's 1995 conviction was punishable by a term of imprisonment exceeding one year. The district court thus found that Bridgeforth had been convicted of the requisite two qualifying felonies and sentenced him as a career offender under section 4B1.1 of the Guidelines. Because the court sentenced Bridgeforth before the Supreme Court issued *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), it treated the Guidelines as mandatory. The court sentenced Bridgeforth to 360 months.

DISCUSSION

I The District Court's Limitations on the Impeachment of Informant Aldridge Did Not Violate the Confrontation Clause.

[1][2] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. However, a defendant is not entitled to limitless cross-examination. "A limitation on cross examination 'does not violate the Confrontation Clause unless it limits relevant testimony and prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness.' " *United States v. Holler*, 411 F.3d 1061, 1066 (9th Cir.2005) (quoting *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir.1999)). Bridgeforth argues that the district court violated his Confrontation Clause rights when it (1) did not allow him to cross-examine Aldridge on her alleged misstatements to the FBI, and (2) excluded extrinsic evidence of Aldridge's potential bias stemming from her car crash in Nevada. Claims of Confrontation Clause violations are reviewed de novo and are subject to harmless error analysis. *United States v. Shryock*, 342 F.3d 948, 979 (9th Cir.2003).

[3] That Aldridge may have misrepresented or downplayed to the FBI the extent and length of her prior drug activity is relevant because it reflects upon her veracity. Her car crash in Nevada is also relevant because she might have thought the FBI could help her avoid prosecution in Nevada, even though she had been told otherwise.

However, neither limitation left the jury without sufficient information to appraise Aldridge's motivations and biases. Aldridge testified that one reason she became a paid informant was because she "needed the money." Bridgeforth was able to impeach Aldridge's credibility by eliciting testimony that she was a long-time drug user, that she had received payment for her services in this case, and that she had not paid

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taxes on any money she made as an informant. While Aldridge testified that she had never done any drugs other than marijuana and that she had not used drugs on the day of the car crash, defense counsel read into evidence a stipulation that Nevada police had found marijuana and methamphetamine in Aldridge's purse and in her blood following the accident. Thus, the jury heard sufficient evidence, including extrinsic evidence that the district court had previously excluded, from which to appraise Aldridge's motivations. Accordingly, there was no Confrontation Clause violation.

II The Admission of the Statements of Co-Conspirator Ronald Daniels Did Not Violate the Confrontation Clause.

[4][5] The requirements for admission of a co-conspirator's statement under ***869**Federal Rule of Evidence 801(d)(2)(E) are identical to the requirements of the Confrontation Clause. *Bourjaily v. United States,* 483 U.S. 171, 182, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Therefore, if a statement is admissible under Rule 801(d)(2)(E), the defendant's right of confrontation is not violated. *Id.* In order for a statement to qualify for admission as the statement of a co-conspirator, the following preliminary facts must be shown: (1) there was a conspiracy, (2) the defendant and the declarant were participants in the conspiracy, and (3) the statement was made by the declarant during and in furtherance of the conspiracy.[FN1] Fed.R.Evid. 801(d)(2)(E); *see Bourjaily,* 483 U.S. at 175, 107 S.Ct. 2775. The statement alone is insufficient to prove these preliminary facts. Fed.R.Evid. 801(d)(2). Because Bridgeforth did not object at trial to the district court's decision to admit a co-conspirator's statements, we review their admission for plain error. *See United States v. Musacchio,* 968 F.2d 782, 791 (9th Cir.1992).

FN1. This rule survives *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because "co-conspirator statements are not testimonial." *United States v. Allen,* 425 F.3d 1231, 1235 (9th Cir.2005).

Bridgeforth argues that Daniels's statements, "There he go right here," and "My boy just left," were merely idle conversation. He relies on *United States v. Eubanks,* in which we held that certain statements were not made in furtherance of a conspiracy because they were not "designed to induce [the witness's] continued participation in the conspiracy or to allay her fears." 591 F.2d 513, 521 (9th Cir.1979) (per curiam). In *Eubanks,* the witness testifying to the statements was the common-law wife of the conspirator who had made the statements. *Id.* at 520. The conspirator had told her, among other things, that he was going to Tucson to obtain drugs from another conspirator, that he had spoken to several people on the telephone, and that he was taking her to Phoenix to pick up heroin. *Id.* We held that these statements were not made in furtherance of the conspiracy because they were mere "conversations between conspirators that did nothing to advance the aims of the alleged conspiracy." *Id.* at 521.

Daniels's statements are quite different from the statements at issue in *Eubanks.* When Daniels told Aldridge, "There he go right here," he, as an intermediary, was telling her that his supplier was present. This furthered the purpose of the conspiracy because it informed Aldridge, the potential buyer, that Daniels could obtain and deliver the drugs. When Daniels said, "My boy just left," he was telling Aldridge that, although he had a supplier, his supplier was not then present and Aldridge would have to go with Daniels to purchase the drugs. Therefore, because Daniels's statements were designed to facilitate Aldridge's purchase of the drugs, they were made in furtherance of the conspiracy. There was no error, much less plain error, in the admission of the statements.

Bridgeforth argues also that there was no independent evidence of the conspiracy. However, both Aldridge and Agent Holliday testified that Bridgeforth drove his motorcycle up to Aldridge's driver's-side door while Daniels was leaning on her passenger-side

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door. In addition, Aldridge testified that after she paid Daniels for the drugs, she saw Daniels pass the money to Bridgeforth. Consequently, independent evidence established both the existence of the conspiracy and Bridgeforth's and Daniels's participation in that conspiracy.

***870 III Bridgeforth's Sentence Was Improperly Enhanced under the Career Offender Provisions of the Guidelines.**

[6] A defendant is considered a career offender under the Guidelines

> if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). In this case, there is no dispute that the first two requirements are satisfied. At issue is the third requirement, regarding Bridgeforth's prior convictions. Bridgeforth concedes that his 1989 conviction for possession of cocaine base qualifies as a felony conviction of a controlled substance offense for purposes of the career offender enhancement. He contends, however, that his 1995 conviction for assault with a deadly weapon is not a felony conviction of a crime of violence because it is a misdemeanor under California law. We review de novo the question of whether a prior conviction falls within the scope of the career offender enhancement. *United States v. Davis*, 932 F.2d 752, 763 (9th Cir.1991).

[7] To qualify as a "crime of violence," the prior conviction must involve the use or threatened use of force and must be "punishable by imprisonment for a term exceeding one year." U.S.S.G. § 4B1.2(a). The actual sentence is irrelevant to the categorization of the conviction as a felony under the career offender enhancement. *Davis*, 932 F.2d at 764. The application notes to section 4B1.2 define "prior felony conviction" as "a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 cmt. n. 1.

Assault with a deadly weapon under California Penal Code section 245(a) is known as a "wobbler" and is punishable either as a felony or a misdemeanor:

> Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by *imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year* ....

Cal.Penal Code § 245(a)(1) (emphasis added).[FN2] Under California law, a wobbler "is a misdemeanor for all purposes" when the judgment results in a punishment "other than imprisonment in the state prison" or when, after a grant of probation without imposition of sentence, the state court "declares the offense to be a misdemeanor." Cal.Penal Code § 17(b)(1), (3).[FN3]

> FN2. It is unclear from the record whether Bridgeforth was charged under section 245(a)(1) or section 245(a)(2), which is reserved for assault with a firearm other than a machine gun. *See* Cal.Penal Code § 245(a)(2). While the underlying facts of the assault involved a handgun, it was Bridgeforth's accomplice who had the gun. Because sections 245(a)(1) and 245(a)(2) both carry a maximum sentence of either four years in the state prison, or one year in county jail when punished as a misdemeanor, however, this uncertainty does not affect our resolution of

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this case.

FN3. In its entirety, Section 17(b) provides as follows:

> When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> (1) After a judgment imposing a punishment other than imprisonment in the state prison.
>
> (2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.
>
> (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
>
> (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
>
> (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872[finding probable cause that the defendant committed the offense], the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.
>
> Cal.Penal Code § 17(b).

***871** We have previously considered whether a wobbler was a felony for purposes of the career offender enhancement. In *United States v. Robinson*, the defendant argued that his prior conviction for a wobbler, battery on a peace officer, was a misdemeanor because he had received a suspended sentence. 967 F.2d 287, 292-93 (9th Cir.1992). The state court had suspended the imposition of Robinson's sentence and placed him on three years' probation on the condition he serve nine months in jail, but the court later revoked the probation. *Id.* at 292. We noted that neither a grant of probation, nor a suspension of the imposition of sentence, is a judgment imposing a punishment of imprisonment for a term not exceeding one year. In either case, no judgment is actually rendered; only if the state court were to impose sentence and then order its execution stayed would there be a judgment. *Id.* at 293. Because the wobbler did not meet the requirements of California Penal Code section 17(b), we held that Robinson's prior conviction qualified as a felony under the career offender enhancement. *Id.* at 293-94.

We have also considered whether wobblers are felonies for purposes of other federal statutes. *See Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir.2004) (holding that a wobbler was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because the state court had imposed a sentence of imprisonment in the county jail, and thus the conviction was a misdemeanor under section 17(b)(1) of the California Penal Code); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 845 (9th Cir.2003) (holding that a wobbler qualified for the petty offense exception to deportation under 8 U.S.C. § 1182(a)(2)(A)(ii)(II) because the state court had declared it a misdemeanor under section

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17(b)(3)); *United States v. Qualls*, 172 F.3d 1136, 1137-38 (9th Cir.1999) (en banc) (holding that a conviction for assault with a deadly weapon under California Penal Code section 245(a) was a felony for purposes of a felon-in-possession violation under 18 U.S.C. § 922(g)(1) because it did not qualify as a misdemeanor under section 17(b)). In all of these cases, we had to determine the maximum potential penalty for the conviction at issue. To answer that question, we looked to how the state court treated the wobbler.

[8] Unlike the prior conviction in *Robinson*, Bridgeforth's prior conviction did result in a judgment imposing a punishment. Although Bridgeforth was initially granted probation, the state court terminated that probation on December 15, 1995, and imposed a sentence of 365 days ***872** in county jail. Upon imposition of that sentence, the wobbler became a misdemeanor "for all purposes" under section 17(b)(1). Therefore, pursuant to *Robinson*, Bridgeforth's 1995 conviction did not subject him to the career offender enhancement because it was a misdemeanor under California law.

The government argues that *Robinson* is distinguishable, but we are not persuaded. *Robinson's* rationale rested on an inquiry into the state court's treatment of a wobbler, and we are bound by that reasoning. To determine whether a conviction for a wobbler is an offense punishable by a term of imprisonment exceeding one year under the career offender provisions of the Guidelines, the sentencing court must look to state law: Did the California court's treatment of the offense convert it into a "misdemeanor for all purposes" under California Penal Code section 17(b)? If so, then the conviction does not qualify as an offense "punishable by imprisonment for a term exceeding one year." U.S.S.G. § 4B1.2(a).

It is true that the actual sentence imposed is irrelevant to whether a crime is a felony under the career offender enhancement; the crime need only be *punishable* by a imprisonment for more than one year. *Davis*, 932 F.2d at 764. However, *Robinson* requires us to hold that a state court's subsequent treatment of a wobbler is controlling for purposes of the career offender enhancement. When the California court sentenced Bridgeforth to 365 days in county jail, section 17(b)(1) of the California Penal Code operated to convert that offense to a misdemeanor "for all purposes." We hold, therefore, that Bridgeforth's conviction for violating California Penal Code section 245(a) was not a felony conviction for a crime of violence under sections 4B1.1 and 4B1.2 of the Sentencing Guidelines, and that Bridgeforth was improperly sentenced as a career offender. Because we hold that the 1995 conviction was a misdemeanor under California Penal Code section 17(b)(1), we do not reach Bridgeforth's contention that the conviction also qualified as a misdemeanor under section 17(b)(3). Additionally, because we vacate the sentence and remand for resentencing, we need not consider Bridgeforth's arguments under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

CONCLUSION

Because Bridgeforth's right of confrontation was not violated by the limitations placed on cross-examination or by the admission of his co-conspirator's statements, we affirm his convictions. However, because the district court improperly concluded that Bridgeforth's 1995 conviction was a felony, we vacate the sentence and remand for resentencing.

AFFIRMED IN PART, SENTENCE VACATED, and REMANDED IN PART.

C.A.9 (Cal.),2006.
U.S. v. Bridgeforth
441 F.3d 864, 69 Fed. R. Evid. Serv. 904, 06 Cal. Daily Op. Serv. 2623, 2006 Daily Journal D.A.R. 3748

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441 F.3d 864, 69 Fed. R. Evid. Serv. 904, 06 Cal. Daily Op. Serv. 2623, 2006 Daily Journal D.A.R. 3748
(Cite as: 441 F.3d 864)

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EXHIBIT H

Westlaw

564 F.Supp.2d 1109
(Cite as: 564 F.Supp.2d 1109)

H

United States District Court,
N.D. California.
In re NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION.
This order pertains to: Al–Haramain Islamic Foundation et al v. Bush et al (C–07–0109 VRW).

MDL No. 06–1791 VRW.
July 2, 2008.

Background: Islamic organization and two of its attorneys brought action alleging, inter alia, that United States government violated the Foreign Intelligence Surveillance Act (FISA) by conducting warrantless electronic surveillance of their communications. The District Court, 451 F.Supp.2d 1215, denied government's motion to dismiss but granted its motion to prevent access to a sealed classified document that had been inadvertently released to plaintiffs. On interlocutory appeal the Court of Appeals, 507 F.3d 1190, remanded. Government again moved to dismiss.

Holdings: The District Court, Vaughn R. Walker, Chief Judge, held that:
(1) FISA preempted the state secrets privilege;
(2) plaintiffs could not use sealed classified document to establish their status as "aggrieved persons" within meaning of FISA; and
(3) plaintiffs would be granted leave to amend complaint.

Claim dismissed with leave to amend.

West Headnotes

[1] Telecommunications 372 1429

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1427 Constitutional and Statutory Provisions
372k1429 k. Purpose. Most Cited Cases

By passing the Foreign Intelligence Surveillance Act (FISA) and Title III, Congress intended to displace entirely the various warrantless wiretapping and surveillance programs undertaken by the executive branch and to leave no room for the president to undertake warrantless surveillance in the domestic sphere in the future. 18 U.S.C.A. § 2511(2)(f); Foreign Intelligence Surveillance Act of 1978, §§ 101-111, 50 U.S.C.A. §§ 1801-1811.

[2] States 360 18.81

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.81 k. Telecommunications; wiretap. Most Cited Cases

Telecommunications 372 1433

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1433 k. Preemption. Most Cited Cases

Foreign Intelligence Surveillance Act (FISA) preempted the state secrets privilege for purposes of action, brought by an Islamic organization and two of its attorneys, alleging that government violated FISA by engaging in warrantless electronic surveillance of

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their communications; action concerned electronic surveillance for intelligence purposes. Foreign Intelligence Surveillance Act of 1978, §§ 101-111, 50 U.S.C.A. §§ 1801-1811.

[3] United States 393 125(5)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(5) k. Mode and sufficiency of waiver or consent. Most Cited Cases

Foreign Intelligence Surveillance Act (FISA) contains an implicit waiver of government's sovereign immunity. Foreign Intelligence Surveillance Act of 1978, §§ 101-111, 50 U.S.C.A. §§ 1801-1811.

[4] States 360 18.81

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.81 k. Telecommunications; wiretap. Most Cited Cases

Telecommunications 372 1433

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1433 k. Preemption. Most Cited Cases

Foreign Intelligence Surveillance Act (FISA) preempts the state secrets privilege insofar as it pertains to electronic surveillance for intelligence purposes. Foreign Intelligence Surveillance Act of 1978, §§ 101-111, 50 U.S.C.A. §§ 1801-1811.

[5] Telecommunications 372 1445

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1442 Actions
372k1445 k. Parties in general; standing. Most Cited Cases

In light of fact that plaintiffs, an Islamic organization and two of the organization's attorneys, whose communications were allegedly subjected to warrantless electronic surveillance, could not use a sealed classified document that had inadvertently been disclosed to them to establish their status as "aggrieved persons" within meaning of the Foreign Intelligence Surveillance Act (FISA), plaintiffs lacked standing to bring action alleging that the surveillance to which they were subjected violated FISA. Foreign Intelligence Surveillance Act of 1978, § 101(k), 50 U.S.C.A. § 1801(k).

[6] Process 313 63

313 Process
313II Service
313II(A) Personal Service in General
313k63 k. Time for service. Most Cited Cases
(Formerly 170Ak417)

Determinations required to adjudicate a motion for an extension of time to serve defendants are committed to the discretion of the court. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 392

170A Federal Civil Procedure
170AII Parties
170AII(J) Defects, Objections and Amend-

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ments

170Ak392 k. Amendments. Most Cited Cases

Process 313 ⚿6

313 Process
313I Nature, Issuance, Requisites, and Validity
313k3 Necessity and Use in Judicial Proceedings
313k6 k. After amendment of pleading or other proceeding. Most Cited Cases
(Formerly 170Ak417)

United States 393 ⚿136

393 United States
393IX Actions
393k136 k. Process. Most Cited Cases
(Formerly 170Ak417)

Islamic organization and two of its attorneys, whose communications were allegedly subjected to warrantless electronic surveillance, in violation of the Foreign Intelligence Surveillance Act (FISA), would be granted leave to amend complaint so as to name certain government officials in their individual capacities, and to extend the time for serving those officials; even though over two years had passed since complaint was filed, little had occurred in the litigation that would prejudice the late-served defendants, and dismissal would needlessly complicate the litigation and would not advance the interests of justice. Foreign Intelligence Surveillance Act of 1978, §§ 101-111, 50 U.S.C.A. §§ 1801-1811; Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

***1110** ORDER

VAUGHN R WALKER, Chief Judge.

The court of appeals has remanded the above case for this court "to consider ***1111** whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." *Al–Haramain Islamic Foundation, Inc. v. Bush,* 507 F.3d 1190, 1206 (9th Cir.2007).

Plaintiffs' complaint alleges six causes of action of which the first is under the Foreign Intelligence Surveillance Act, 50 USC §§ 1801–71 ("FISA"). In that claim, plaintiffs allege in pertinent part:

> Defendants' engagement in electronic surveillance to monitor conversations between and among plaintiffs as targeted persons without obtaining prior court authorization, and defendants' subsequent use of the information obtained against plaintiffs, is in violation of the civil and criminal provisions of FISA. As a result, all evidence obtained by this illegal surveillance must be suppressed pursuant to 50 USC § 1806(g). Further, plaintiffs are entitled to liquidated and punitive damages pursuant to 50 USC § 1810.

Complaint, *Al–Haramain Islamic Foundation, Inc v. Bush,* No C 06–0274 KI Doc # 1 ¶ 27, United States District Court for the District of Oregon, filed February 28, 2006.

Plaintiffs' other causes of action are for alleged violations of the "separation of powers" principle in the Constitution, the First, Fourth and Sixth amendments and the International Covenant on Civil and Political Rights. But it is to plaintiffs' FISA claims that the parties have directed their arguments and the court of appeals its attention. All of plaintiffs' claims would appear to depend on FISA. This order, therefore, devotes itself exclusively to FISA and the question posed by the court of appeals remand.

For the reasons stated herein, the court has determined that: (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs'

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claims; and (2) FISA nonetheless does not appear to provide plaintiffs a viable remedy unless they can show that they are "aggrieved persons" within the meaning of FISA. The lack of precedents interpreting the remedial provisions of FISA, the failure of the parties to consider the import of FISA preemption and the undeveloped factual record in this case warrant allowing plaintiffs to attempt to make that showing and, therefore, support dismissal of the FISA claim with leave to amend.

Plaintiffs are the Al–Haramain Islamic Foundation, Inc, an Oregon non-profit corporation, and two of its individual attorneys, Wendell Belew and Asim Ghafoor, both United States citizens ("plaintiffs"). Plaintiffs brought suit in the United States District Court for the District of Oregon against "George W Bush, President of the United States, National Security Agency, Keith B Alexander, its Director, Office of Foreign Assets Control, an office of the United States Treasury, Robert W Werner, its Director, Federal Bureau of Investigation, Robert S Mueller, III, its Director" ("defendants"). Complaint at 1.

Along with their complaint, plaintiffs filed under seal a copy of a classified document that had inadvertently been disclosed by defendant Office of Foreign Assets Control ("OFAC") to counsel for Al–Haramain as part of a production of unclassified documents relating to Al–Haramain's potential status as a "specially designated global terrorist." *Al–Haramain Islamic Foundation, Inc. v. Bush*, 451 F Supp 2d 1215, 1218 (D.Or.2006).[FN1] This document, ***1112** which has proven central to all phases of this litigation including the issues now before this court, will be referred to herein as the "Sealed Document."

FN1. On June 19, 2008, the United States Department of the Treasury designated "the entirety" of the Al–Haramain Islamic Foundation including its headquarters in Saudi Arabia, having previously designated branch offices in thirteen individual countries, including the United States. See http:// www. treasury. gov/ press/ releases/ hp 1043. htm.

The complaint alleges that the National Security Agency ("NSA") conducted warrantless electronic surveillance of communications between a director or directors of Al–Haramain and the two attorney plaintiffs without regard to the procedures required by FISA, that the NSA turned over logs from this surveillance to OFAC and that OFAC then consequently froze Al–Haramain's assets. *Id.*

The Oregon district court entertained motions by the Oregonian Publishing Company to intervene in the suit and unseal records, by plaintiffs to compel discovery of information about the electronic surveillance of plaintiffs and regarding the reasons for classifying the Sealed Document and by defendants to prevent plaintiffs' access to the Sealed Document and to dismiss or, in the alternative, for summary judgment based on the state secrets privilege.

On September 7, 2006, the Oregon district court issued a lengthy opinion and order. Several points in that order remain salient to the matter now before this court. The court held that "plaintiffs need some information in the Sealed Document to establish their standing and a prima facie case, and they have no other available source for this information." *Id.* at 1221. It also held that given defendants' many public acknowledgments of the warrantless electronic surveillance program beginning in 2005, the program was not a secret. *Id.* at 1221–23. It rejected defendants' contention that litigation concerning the program would necessarily compromise national security and held that, contrary to defendants' contention, "the very subject matter of the case" was not a state secret. It ordered plaintiffs to deliver to the court all copies of the Sealed Document in their possession or under their control, to be deposited in the sealed compartmented information facility ("SCIF") provided by the Portland FBI office for the storage of classified documents. *Id.* at 1229. It denied without prejudice plaintiffs' request

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for discovery and denied the Oregonian's motion to unseal records. *Id.* at 1232.

The Oregon district court ruled that there was "no reasonable danger that the national security would be harmed if it is confirmed or denied that plaintiffs were subject to surveillance, but only as to the surveillance event or events disclosed in the Sealed Document" while also ruling that "disclosing whether plaintiffs were subject to *any other* surveillance efforts could harm the national security." *Id.* at 1224 (emphasis added). On the rationale that plaintiffs should be allowed to proceed based on the surveillance already disclosed to them, substantiated by evidence in a form yet to be determined, the court denied defendants' motion to dismiss: "plaintiffs should have an opportunity to establish standing and make a prima facie case, even if they must do so in camera." *Id.* at 1226–27.

The Oregon district court declined to reach one further issue presented to it by the parties—the issue this court is charged to decide on remand from the court of appeals:

> Plaintiffs argue * * * that FISA preempts the state secrets privilege. Specifically, plaintiffs argue that FISA vests the courts with control over materials relating to electronic surveillance, ***1113** subject to "appropriate security procedures and protective orders." 50 USC § 1806(f). As a result, plaintiffs contend that Section 1806(f) renders the state secrets privilege superfluous in FISA litigation.

Id. at 1229.

The Oregon district court summarized defendants' argument to be that section 1806(f) only benefits the government—that it exists, in essence, for the sole purpose of providing for in camera review of documents and information the government intends to use against a criminal defendant. The Oregon district court quoted section 1810, FISA's civil liability provision, together with FISA's definition of an "aggrieved person" entitled to sue under section 1810 (see infra Part III) and observed: "[t]o accept the government's argument that Section 1806(f) is only applicable when the government intends to use information against a party *would nullify FISA's private remedy* and would be contrary to the plain language of Section 1806(f)." *Id.* at 1231 (emphasis added).

Concluding that "[t]he question becomes then whether Section 1806(f) preempts the state secrets privilege," the Oregon district court wrote, "I decline to reach this very difficult question at this time, which involves whether Congress preempted what the government asserts is a constitutionally-based privilege." *Id.* The Oregon district court certified its other rulings for immediate appeal. Defendants appealed and, during the pendency of the appeal, this case was reassigned by the Judicial Panel on Multidistrict Litigation ("MDL") to the undersigned.

The court of appeals granted interlocutory review and consolidated the appeal in this matter with the interlocutory appeal from an order by the undersigned concerning the state secrets privilege and related issues in *Hepting v. AT & T Corp.*, 439 F Supp 2d 974 (N.D.Cal.2006). The cases were argued on the same day before the same panel, but the court of appeals later determined that "the claimed facts and circumstances of each case are distinct" and entered an order concurrently with the opinion in the instant matter stating that "the cases are no longer consolidated for any purpose." 507 F.3d at 1196 n. 3. The court of appeals subsequently issued an order withdrawing the submission of the *Hepting* appeal; that matter remains on appeal. Order, *Hepting v. AT & T Corporation, Inc*, No 06–17137 Doc # 128, United States Court of Appeals for the Ninth Circuit, filed November 16, 2007.

In its opinion in this case, the court of appeals determined that review of a district court's rulings on the state secrets privilege should be de novo, having

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previously only "intimated" as much. 507 F.3d at 1196. After considering the history of the state secrets privilege, the court of appeals considered three contentions by the government on appeal: (1) the very subject matter of the litigation is a state secret; (2) Al–Haramain cannot establish standing to bring suit, absent the Sealed Document; and (3) Al–Haramain cannot establish a prima facie case, and the government cannot defend against Al–Haramain's assertions, without resorting to state secrets. In a footnote, the court of appeals observed that the third issue had not been addressed by the district court. 507 F.3d at 1197 & n. 4.

As to the first issue, the court of appeals made note of the government's extensive, intentional public disclosures by President George W Bush, Attorney General Alberto Gonzales and especially General Michael V Hayden, which had "provided to the American public a wealth of information about the [Terrorist Surveillance Program]," and declined to follow either *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.1998) or ***1114***El–Masri v. United States*, 479 F.3d 296 (4th Cir.2007), both cases in which dismissals based on the state secrets privilege were affirmed on appeal. The court held that while Al–Haramain's case involved privileged information, "that fact alone does not render the very subject matter of the action a state secret" and affirmed the district court's denial of dismissal on that basis. 507 F.3d at 1201.

Before turning to the second issue on appeal, the court of appeals next considered whether the state secrets privilege had been properly invoked and determined that it had. Based on that determination, the court of appeals concluded that Al–Haramain's "showing of necessity" or "admittedly substantial need for the document to establish its case," *United States v. Reynolds*, 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953), required an in camera review of the Sealed Document. 507 F.3d at 1203. After describing in general terms the nature of the in camera review, the court wrote: "We are satisfied that the basis for the privilege is exceptionally well documented" and that disclosure of "information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." 507 F.3d at 1204. The court of appeals then held that the Oregon district court's compromise allowing plaintiffs to submit sealed affidavits attesting to the contents of the document from their memories was "contrary to established Supreme Court precedent"—specifically *Reynolds*, 345 U.S. at 11, 73 S.Ct. 528—and wrote that "the state secrets privilege * * * does not lend itself to a compromise solution in this case." *Id.*

Regarding use of the Sealed Document in this litigation, the court of appeals held: "The Sealed Document, its contents, and any individuals' memories of its contents, even well-reasoned speculation as to its contents, are completely barred from further disclosure in this litigation by the common law state secrets privilege." *Id.*

Having thus dealt with the first issue, the court of appeals turned to the government's second issue on appeal—Al-Haramain's standing—and held that plaintiffs could not establish standing to proceed with their lawsuit without the Sealed Document because they could not establish a "concrete and particularized" injury-in-fact under the principles of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992): "Al–Haramain cannot establish that it has standing, and its claims must be dismissed, unless FISA preempts the state secrets privilege." 507 F.3d at 1205.

Citing *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), that a court of appeals should not ordinarily consider an issue not ruled on in the district court, the court of appeals declined to decide whether FISA preempts the state secrets privilege. Instead, writing that "the FISA issue remains central to Al–Haramain's ability to proceed with this

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lawsuit," it remanded the case to this court to consider that question "and for any proceedings collateral to that determination." 507 F.3d at 1206. The court of appeals did not consider the consequences of FISA preempting the state secrets privilege and the implications of such a determination for possible use in this litigation of the Sealed Document.

In accordance with orders entered at a status conference in this matter on February 7, 2008, defendants filed a second motion to dismiss plaintiffs' claims on the grounds that FISA does not preempt the state secrets privilege and that plaintiffs lack standing to seek prospective relief and are barred from seeking relief under ***1115** FISA by the doctrine of sovereign immunity. Doc # 432/17.[FN2] Plaintiffs filed an opposition (Doc # 435/20) and the court accepted two amicus briefs, one by plaintiffs in other MDL cases and the other by certain telecommunications defendants in the MDL cases (Doc 440/23 & 442/25).

FN2. Citations to documents in the docket of this case will be cited both to the MDL docket (No M 06–1791 VRW) and to the individual docket (No C 07–0109) in the following format: Doc # xxx/yy.

II

A

The enactment of FISA was the fruition of a period of intense public and Congressional interest in the problem of unchecked domestic surveillance by the executive branch. In 1975, Congress formed the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities known as the "Church Committee" for its chairman, Senator Frank Church, to investigate alleged intelligence-gathering abuses in the domestic sphere by the various executive branch agencies with intelligence-gathering authority. The Church Committee's two-volume final report was transmitted to Congress in 1976; the following passage from among the report's conclusions and recommendations illustrates the tone and substance of the findings:

> Our findings and the detailed reports which supplement this volume set forth a massive record of intelligence abuses over the years. Through the use of a vast network of informants, and through the uncontrolled or illegal use of intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the Government has collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans.

Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee Report") Book II: Intelligence Activities and the Rights of Americans, S Rep No 94–755, 290 (1976).

The Church Committee Report further concluded that "intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied." *Id.* at 289. The Church Committee Report set the stage for Congress to begin the effort to enact comprehensive legislation to address the intelligence-related abuses identified therein. That effort began in the very next Congress.

In 1978, after the introduction of several competing bills and extensive deliberation and debate, Congress enacted FISA. To summarize FISA's provisions in a brief and general manner, FISA set out in detail roles for all three branches of government, providing judicial and congressional oversight of the covert surveillance activities by the executive branch combined with measures to safeguard secrecy necessary to protect national security. FISA set out procedures by which the executive branch could undertake electronic surveillance and physical searches for foreign intelligence purposes in the domestic sphere. Any

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application for electronic surveillance was required, among other things, to establish probable cause justifying the surveillance, describe the information being sought and aver that the information could not be obtained through normal investigative techniques. 50 USC § 1804(a).

***1116** FISA also provided for the creation of two courts staffed by federal judges to conduct sealed proceedings to consider requests by the government for warrants to conduct foreign intelligence surveillance. 50 USC §§ 1803(a), (b). The Foreign Intelligence Surveillance Court ("FISC") was established to consider applications in the first instance, with the Court of Review reviewing denials of applications by the FISC and the Supreme Court acting as the final appellate court. Id. FISA allowed the United States attorney general to authorize electronic surveillances in emergency situations without FISC approval if the appropriate judge was informed and an application made within twenty-four hours after authorization. 50 USC §§ 1802, 1805(f).

FISA provided for continuing oversight of the government's foreign intelligence surveillance activities by Congress, requiring regular, highly detailed reports to Congress of all actions taken under FISA. E.g., 50 USC §§ 1808, 1826. The reporting requirements are discussed in more detail in Part III A below.

[1] Of special relevance to the court's present inquiry, Congress included in the FISA bill a declaration that the FISA regime, together with the Omnibus Crime Control and Safe Streets Act of 1968 codified at chapter 119 of Title 18 of the United States Code, 18 USC §§ 2510–22 ("Title III"), were to be the "exclusive means" by which domestic electronic surveillance for national security purposes could be conducted:

> procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

18 USC § 2511(2)(f). This provision and its legislative history left no doubt that Congress intended to displace entirely the various warrantless wiretapping and surveillance programs undertaken by the executive branch and to leave no room for the president to undertake warrantless surveillance in the domestic sphere in the future.

The Report of the Senate Select Committee on Intelligence stated that the FISA bill's "exclusive means" statement "puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in chapters 119 and 120." Foreign Intelligence Surveillance Act, S Rep No 95–701, 95th Cong 2d Sess 71, reprinted in 1978 USCCAN 3973, 4040. That report cited Congress's authority over FISA's subject matter in Article I section 8 of the Constitution and the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." US Const cl 1, 18. The report also both discussed Justice Jackson's concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) and included the following passage from the opinion:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional power of Congress over the matter.

See also Foreign Intelligence Surveillance Act, H Conf Rep No 95–1720, 95th Cong 2d Sess 35, reprinted in 1978 USCCAN 4048, 4064. ("The intent of the conferees is to apply the standard set forth in Jus-

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tice Jackson's concurring opinion in [Youngstown Sheet & Tube].")

***1117** A lesser-known provision of FISA also expressly limited presidential power to conduct foreign intelligence surveillance by repealing 18 USC section 2511(3) which had provided:

> Nothing in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack * * * or to protect national security against foreign intelligence activities. * * * The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing [sic], or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

18 USC § 2511(3)(1976). The Report of the Senate Select Committee on Intelligence explained that the repeal of this section "eliminat[ed] any congressional recognition or suggestion of inherent Presidential power with respect to electronic surveillance." S Rep 95–701, 72.

In the floor debate on Senate Bill 1566, Senator Gaylord Nelson related the history of the Senate's efforts to enact a foreign intelligence surveillance law to curb the abuses reported by the Church Committee; he noted that a "principal issue" with prior, unsuccessful legislative proposals was the reservation or reference to "inherent Presidential power," but that Senate Bill 1566 had no such reservation or reference: "Once enacted, it would represent the sole authority for national security electronic surveillance in the United States." Foreign Intelligence Surveillance Act, S 1566, 95th Cong, 2d Sess, in 124 Cong Rec S 10903 (April 30, 1978). Senator Nelson further stated: "Along with the existing statute dealing with criminal wiretaps, this legislation blankets the field. If enacted, the threat of warrantless electronic surveillance will be laid to rest." *Id.*

B

"Preemption" usually refers to Congress asserting its authority under the Supremacy Clause to override state law that interferes with federal interests. In the present context, "preemption" refers to Congress overriding or replacing the interstitial lawmaking that judges create through federal common law. In *Milwaukee v. Illinois,* 451 U.S. 304, 314, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) the Supreme Court explained the latter type of preemption: "Federal common law is a 'necessary expedient' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." The Court further explained that federal courts need not find a "clear and manifest purpose" to replace or displace federal common law as would be required for a determination that Congress had pre-empted state law because there are no corresponding concerns for "our embracing federal system, including the principle of diffusion of power * * * as a promoter of democracy." *Id.* at 316–17, 101 S.Ct. 1784. On the contrary, the Court noted that federal courts are not general common-law courts and do not possess "a general power to develop and apply their own rules of decision." *Id.* at 312, 101 S.Ct. 1784, citing *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Federal common law applies "[u]ntil the field has been made the subject of comprehensive legislation." 451 U.S. at 314, 101 S.Ct. 1784.

In *Milwaukee v. Illinois,* the Court held that the 1972 amendments to the Federal Water Pollution Control Act preempted the application of the common law of nuisance***1118** by federal courts in disputes over water pollution. In so holding, the Court looked to the legislative history, making special note of remarks by the Act's sponsors, in determining that

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Congress's purpose was to establish an "all-encompassing program of water pollution regulation" 451 U.S. at 318, 101 S.Ct. 1784. The Court noted that "[n]o Congressman's remarks were complete without reference to the 'comprehensive' nature of the Amendments." *Id.* "The establishment of such a self-consciously comprehensive program by Congress * * * strongly suggests that there was no room for courts to attempt to improve on that program with federal common law." *Id.* at 319, 101 S.Ct. 1784.

Both the plain text and the legislative history make clear that Congress intended FISA to "occupy the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317, 101 S.Ct. 1784. Congress through FISA established a comprehensive, detailed program to regulate foreign intelligence surveillance in the domestic context. The establishment of the specialized FISA courts specifically dedicated to considering requests for foreign intelligence surveillance by the executive branch paralleled the "expert administrative agency" referred to with approval in *Milwaukee v. Illinois.*

The present preemption analysis departs from that in *Milwaukee v. Illinois* with respect to the scope and nature of what is being displaced. The court is charged with determining whether FISA preempts or displaces not a common-law set of rules for conducting foreign intelligence surveillance, but rather a privilege asserted by the government to avoid public and judicial scrutiny of its activities related to national security. In this case, those activities include foreign intelligence surveillance, the subject matter that Congress through FISA sought comprehensively to regulate. This imperfect overlap between the preempting statute and the common-law rule being preempted does not, however, create serious problems with finding the state secrets privilege preempted or displaced by FISA in the context of matters within FISA's purview. FISA does not preempt the state secrets privilege as to matters that are not within FISA's purview; for such matters, the lack of comprehensive federal legislation leaves an appropriate role for this judge-made federal common law privilege.

"The state secrets privilege is a common law evidentiary privilege that protects information from discovery when disclosure would be inimical to the national security. [It] has its modern roots in *United States v. Reynolds.*" *In re United States,* 872 F.2d 472, 474 (D.C.Cir.1989). "The state secrets privilege is a common law evidentiary privilege that permits the government to bar the disclosure of information if 'there is a reasonable danger' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.' " *Al–Haramain Islamic Foundation v. Bush,* 507 F.3d at 1196, citing *Reynolds,* 345 U.S. at 10, 73 S.Ct. 528. The undersigned discussed the history and operation of the state secrets privilege at some length in *Hepting v. AT & T Corp.,* 439 F Supp 2d 974 at 980–85 (N.D.Cal.2006).

Reynolds largely demarcated the state secrets privilege as it is understood today, that is: it belongs to the government; it must be properly invoked by means of a "formal claim of privilege, lodged by the head of the department which has control over the matter" after "actual consideration"; the court must then "determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very ***1119** thing the privilege is designed to protect"; the precise nature, extent and manner of this inquiry depends in part on the extent of a party's need for the information sought tested against the strength of the government's claim of privilege; and in camera review might be appropriate in some cases, but not all. "When compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged, * * * the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 7–10, 73 S.Ct. 528.

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Plaintiffs argue that the in camera procedure described in FISA's section 1806(f) applies to preempt the protocol described in *Reynolds* in this case. Doc # 435/20 at 11–14. The court agrees. Section 1806(f), which is quoted in full and discussed at greater length in Part III B below, provides that in cases in federal courts in which "aggrieved persons" seek to discover materials relating to, or information derived from, electronic surveillance, the United States attorney general may file "an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." In that event, the court "shall" conduct an in camera, ex parte review of such materials relating to the surveillance "as may be necessary to determine whether the surveillance * * * was lawfully authorized and conducted." The procedure described in section 1806(f), while not identical to the procedure described in *Reynolds,* has important characteristics in common with it—enough, certainly, to establish that it preempts the state secrets privilege as to matters to which it relates. Section 1806(f) is Congress's specific and detailed prescription for how courts should handle claims by the government that the disclosure of material relating to or derived from electronic surveillance would harm national security; it leaves no room in a case to which section 1806(f) applies for a *Reynolds*-type process. Moreover, its similarities are striking enough to suggest that section 1806(f), which addresses a range of circumstances in which information derived from electronic surveillance might become relevant to judicial proceedings, is in effect a codification of the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect Congress's precise directive to the federal courts for the handling of materials and information with purported national security implications. In either event, the *Reynolds* protocol has no role where section 1806(f) applies. For that reason, the court of appeals' reliance on *Reynolds* in connection with the Sealed Document, while perhaps instructive, would not appear to govern the treatment of that document under FISA.

The legislative history, moreover, buttresses the court's reading of the statutory text as intending that FISA replace judge-made federal common law rules:

> [T]he development of the law regulating electronic surveillance for national security purposes has been uneven and inconclusive. This is to be expected where the development is left to the judicial branch in an area where cases do not regularly come before it. Moreover, the development of standards and restrictions by the judiciary with respect to electronic surveillance for foreign intelligence purposes accomplished through case law threatens both civil liberties and the national security because that development occurs generally in ignorance of the facts, circumstances, and techniques of foreign intelligence electronic surveillance not present in the particular case before the court. * * * [T]he tiny window to this area which a ***1120** particular case affords provides inadequate light by which judges may be relied upon to develop case law which adequately balances the rights of privacy and national security.

Foreign Intelligence Surveillance Act of 1978, HR Rep No 95–1283 Part I at 21. This legislative history is evidence of Congressional intent that FISA should displace federal common law rules such as the state secrets privilege with regard to matters within FISA's purview.

Defendants advance essentially three points in support of their contention that "nothing in FISA indicates any intention by Congress * * * to abrogate the state secrets privilege" in the case of intelligence-driven electronic surveillance. Doc # 432/17 at 13. First, defendants argue that the privilege derives, not only from the common law, but also from the president's Article II powers, so that a "clear expression" of congressional intent is required to abrogate that privilege; furthermore, abrogation would raise

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fundamental constitutional problems which should be avoided. Doc # 432/17 at 13–14. Second, defendants note the common law origins of the state secrets privilege and advert to the principle that abrogation of common law requires a "clear and direct" legislative expression of intent, which they contend is absent. *Id.* at 14–15. Finally, defendants contend that section 1806(f) serves a fundamentally different purpose from the state secrets privilege and that the former cannot therefore "preempt" the latter because section 1806(f) governs disclosure by the government of intelligence derived from electronic surveillance whereas the state secrets privilege is fundamentally a rule of non-disclosure. *Id.* at 15–22. The court disagrees with all three of these contentions, the second and third of which have been fully addressed in the paragraphs above.

The weakness of defendants' first argument—that the Constitution grants the executive branch the power to control the state secrets privilege—is evident in the authorities they marshal for it. Defendants rely on *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), in which the Supreme Court rejected President Nixon's efforts to quash subpoenas under Federal Rule of Criminal Procedure 17(c) seeking tape recordings and documents pertaining to the Watergate break-in and ensuing events. The Court rejected the president's "undifferentiated claim of public interest in the confidentiality of [White House] conversations" between the president and his advisors, contrasting the need for confidentiality of these conversations with "a claim of need to protect military, diplomatic or sensitive national security secrets." *Id.* at 706, 94 S.Ct. 3090. In the course of making this comparison, the Court observed that privileges against forced disclosure find their sources in the Constitution, statutes or common law. At bottom, however, *Nixon* stands for the proposition that in the case of a common law privilege such as that asserted by President Nixon, it is the judiciary that defines the metes and bounds of that privilege and even the confidential communications of the president must yield to the needs of the criminal justice system. This hardly counts as authority that the president's duties under Article II create a shield against disclosure.

Even the Court's comparative weighing of the imperatives of confidentiality for "undifferentiated" presidential discussions and "military, diplomatic or sensitive national security secrets" affords defendants little help in this case. *Department of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), upon which defendants rely, confirms that power over national security information does not rest ***1121** solely with the president. *Egan* recognized the president's constitutional power to "control access to information bearing on national security," stating that this power "falls on the President as head of the Executive Branch and as Commander in Chief" and "exists quite apart from any explicit congressional grant." *Id.* at 527, 108 S.Ct. 818. But *Egan* also discussed the other side of the coin, stating that "*unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530, 108 S.Ct. 818 (emphasis added). *Egan* recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch. When Congress acts to contravene the president's authority, federal courts must give effect to what Congress has required. *Egan's* formulation is, therefore, a specific application of Justice Jackson's more general statement in *Youngstown Sheet & Tube.*

It is not entirely clear whether defendants acknowledge Congress's authority to enact FISA as the exclusive means by which the executive branch may undertake foreign intelligence surveillance in the domestic context. While their papers do not explicitly assert otherwise, defendants' attorney in this matter stated in open court during the hearing herein held on April 23, 2008 that, while he conceded that "Congress sought to take over the field" of foreign intelligence surveillance (Doc # 452 at 29:2–3), whether the

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president actually had constitutional authority under Article II to order such surveillance in disregard of FISA remained an open question: "[D]oes the president have constitutional authority under Article II to authorize foreign intelligence surveillance? Several courts said that he did. Congress passed the FISA, and the issue has never really been resolved. That goes to the issue of the authority to authorize surveillance." *Id.* at 33:7–12. Counsel repeatedly asserted that this issue was entirely separate from the preemption inquiry relevant to the state secrets privilege and urged the court not to "conflate" the two inquiries. E.g., *id.* at 32:8–10.

To the contrary, the court believes that the two areas of executive branch activity pertaining to foreign intelligence surveillance are not distinct for purposes of this analysis as defendants' counsel asserts. Congress appears clearly to have intended to—and did—establish the exclusive means for foreign intelligence surveillance activities to be conducted. Whatever power the executive may otherwise have had in this regard, FISA limits the power of the executive branch to conduct such activities and it limits the executive branch's authority to assert the state secrets privilege in response to challenges to the legality of its foreign intelligence surveillance activities.

Of note, many Congressional enactments regulate the use of classified materials by the executive branch, putting FISA in good company. Title 50 chapter 15 of the United States Code relates to national security generally and national security information in particular. Some of its provisions restrict disclosure and impose minimum security requirements on the executive branch. Fifty USC section 435 requires the president to "establish procedures to govern access to classified information," such as background checks. Others authorize disclosure. Fifty USC section 403–5d, part of the USA PATRIOT Act [FN3], permits federal law enforcement officials***1122** to share foreign intelligence information obtained as part of a criminal investigation. Other provisions allocate control of classified material among executive branch agencies. For instance, 50 USC section 435a(d) gives the director of the Central Intelligence Agency the power to control the State Department's use of classified information. Congress elsewhere requires the executive branch to disclose national security information to Congressional intelligence committees. 50 USC §§ 413(a), 413b(c). Congress left the executive branch no "authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods." 50 USC § 413(e). See also 50 USC § 425 ("Nothing" in subchapter IV, which pertains to "Protection of Certain National Security Information," "may be construed as authority to withhold information from the Congress or from a committee of either House of Congress.") And 50 USC section 413(b) requires that "[t]he President shall ensure that any illegal intelligence activity is reported promptly to the intelligence committees * * *." Congressional regulation of the use of classified information by the executive branch through FISA and other statutes is therefore well-established.

FN3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub L No 107–56, § 215, 115 Stat 287, amended by USA Patriot Improvement and Reauthorization Act of 2005, Pub L 109–178, 120 Stat 282 (2006).

As part of their argument that the state secrets privilege has a constitutional basis in Article II, defendants contend that a "clear statement of congressional intent" to abrogate the privilege is required, citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). *Franklin* held that the office of the president was not an executive "agency" whose actions were subject to judicial review under the Administrative Procedures

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Act. The APA broadly described its scope to include "each authority of the Government of the United States" except Congress, the courts, the governments of United States territories and the government of Washington, DC. The Court nonetheless held that, when the APA did not explicitly include the president and the legislative history did not suggest that Congress intended for courts to review the president's actions under the APA, the APA's "textual silence" was insufficient to infer that Congress intended to subject the president to lawsuits under the APA: "We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. *Nixon v. Fitzgerald,* 457 U.S. 731, 748, 102 S.Ct. 2690, 73 L.Ed.2d 349, n. 27 (1982) (Court would require an explicit statement by Congress before assuming Congress had created a damages action against the president)." *Franklin,* 505 U.S. at 800–01, 112 S.Ct. 2767.

Franklin is readily distinguishable. The impetus for the enactment of FISA was Congressional concern about warrantless wiretapping of United States citizens conducted under a justification of inherent presidential authority under Article II. Congress squarely challenged and explicitly sought to prohibit warrantless wiretapping by the executive branch by means of FISA, as FISA's legislative history amply documented. This was a different situation from Franklin, in which the Court required certainty about Congressional intent to regulate the office of the president that was absent on the record before it.

***1123** In the case of FISA, Congress attempted not only to put a stop to warrantless wiretapping by the executive branch but also to establish checks and balances involving other branches of government in anticipation of efforts by future administrations to undertake warrantless surveillance in some other manner:

> In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties. This committee is well aware of the substantial safeguards respecting foreign intelligence electronic surveillance currently embodied in classified Attorney General procedures, but this committee is also aware that over the past thirty years there have been significant changes in internal executive branch procedures, and there is ample precedent for later administrations or even the same administration loosening previous standards.

H R Rep No 95–1283(I) at 21. Given the possibility that the executive branch might again engage in warrantless surveillance and then assert national security secrecy in order to mask its conduct, Congress intended for the executive branch to relinquish its near-total control over whether the fact of unlawful surveillance could be protected as a secret.

Reynolds itself, holding that the state secrets privilege is part of the federal common law, leaves little room for defendants' argument that the state secrets privilege is actually rooted in the Constitution. *Reynolds* stated that the state secrets privilege was "well-established in the law of evidence." 345 U.S. at 6–7, 73 S.Ct. 528. At the time, Congress had not yet approved the Federal Rules of Evidence, and therefore the only "law of evidence" to apply in federal court was an amalgam of common law, local practice and statutory provisions with indefinite contours. John Henry Wigmore (revised by Peter Tillers), I *Evidence* § 6.1 at 384–85 (Little, Brown & Co 1983). The Court declined to address the constitutional question whether Congress could limit executive branch authority to withhold sensitive documents, but merely interpreted and applied federal common law. See *Reynolds,* 345 U.S. at 6, 73 S.Ct. 528 & n9.

Defendants' attempt to establish a strict dichotomy between federal common law and constitutional

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interpretation is, moreover, misconceived because all rules of federal common law have some grounding in the Constitution. "Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present." *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson concurring). The rules of federal common law on money and banking, for instance, all derive from the Constitution. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 87 L.Ed. 838 (1943) (in disbursements of funds and payment of debts, United States exercises a constitutional function or power). The federal common law pertaining to tort suits brought by United States soldiers against private tortfeasors flows from Congress's powers under Article I section 8. *United States v. Standard Oil Co.*, 332 U.S. 301, 306, n. 7, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947). Accordingly, all rules of federal common law perform a function of constitutional significance.

In the specific context of the state secrets privilege, it would be unremarkable ***1124** for the privilege to have a constitutional "core" or constitutional "overtones." See Robert M Chesney, *State Secrets and the Limits of National Security Litigation*, 75 George Wash L Rev 1249, 1309–10 (2007). Article II might be nothing more than the source of federal policy that courts look to when applying the common law state secrets privilege. But constitutionally-inspired deference to the executive branch is not the same as constitutional law.

[2] In any event, the parties' disagreement over the origins of the state secrets privilege is of little practical significance. Whether a "clear statement," a comprehensive legislative scheme or something less embracing is required, Congress has provided what is necessary for this court to determine that FISA preempts or displaces the state secrets privilege, but only in cases within the reach of its provisions. This is such a case.

C

In addition to their more substantial arguments, defendants advance two arguments why the court should not even take up the issue remanded by the court of appeals. Defendants' first such argument in this regard may be easily dispatched. Defendants argue that the court may not reach the question remanded for consideration by the court of appeals because the court lacks jurisdiction over plaintiffs' claims. Wholly apart from the disregard for the court of appeals—whose decisions bind this court, after all—that acceptance of defendants' argument would entail, defendants' argument lacks merit.

Defendants premise their argument on plaintiffs' lack of standing to obtain prospective relief; that is, because plaintiffs cannot show that they have been injured or face a "real and immediate threat" of harm in the future, defendants conclude that Article III standing is absent. Doc # 432/17 at 7–8. Plaintiff cannot show injury, contend defendants, because the state secrets privilege prevents the government from confirming or denying that plaintiffs have been subjected to unlawful surveillance.

The circularity of defendants' argument to one side, defendants conflate the state secrets privilege with the "aggrieved person" requirement of section 1810, discussed in Part III *infra*. If plaintiffs can show that they are "aggrieved" as section 1810 contemplates, then plaintiffs have adequately demonstrated injury for purposes of establishing Article III standing.

Somewhat more substantially, defendants argue that plaintiffs cannot pursue their claims because section 1810 does not waive the United States' sovereign immunity against suits naming the government or individuals acting in their official capacity. Employing a variety of arguments, defendants assert that civil

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liability under section 1810 is "linked to intentional misconduct by individual federal employees and officials." Doc # 446/29 at 7. They also assert that "[t]he Complaint does not name any of the individual defendants in their individual capacity." Doc # 432 at 9. And they point out that plaintiffs have not served defendants in their individual capacities, an assertion that plaintiffs do not dispute. Doc # 450/31 at 2.

Plaintiffs counter that defendants made similar arguments before the court of appeals but that the court of appeals did not address those points in its disposition of defendants' appeal. Doc # 435/20 at 24. Plaintiffs also contend that for the court to take up this issue and, especially, to entertain defendants' assertion that governmental immunity bars adjudication of the other issues before the court, would violate the court of appeals' instructions to this court in its order remanding the case. *Id.*

***1125** [3] It is, of course, true that section 1810 does not contain a waiver of sovereign immunity analogous to that in 18 USC section 2712(a) which expressly provides that aggrieved persons may sue the United States for unlawful surveillance in violation of Title III. But FISA directs its prohibitions to "Federal officers and employees" (see, e.g., 50 USC §§ 1806, 1825, 1845) and it is only such officers and employees acting in their official capacities that would engage in surveillance of the type contemplated by FISA. The remedial provision of FISA in section 1810 would afford scant, if any, relief if it did not lie against such "Federal officers and employees" carrying out their official functions. Implicit in the remedy that section 1810 provides is a waiver of sovereign immunity.

Of no small moment to this court's consideration of defendants' sovereign immunity contention, it appears that defendants asserted the same argument in the court of appeals which seems simply to have ignored it, presumably as insubstantial or premature given the present state of the record.

In Part IV of this order, the court discusses whether plaintiffs should be granted leave to serve defendants in their individual capacities.

III

The determination that FISA preempts the state secrets privilege does not necessarily clear the way for plaintiffs to pursue their claim for relief against these defendants under FISA's section 1810. That section provides:

> An aggrieved person, other than a foreign power or an agent of the foreign power * * * who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall be entitled to recover—
>
> (a) actual damages * * *
>
> (b) punitive damages; and
>
> (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

50 USC § 1810. An "aggrieved person" is "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 USC § 1801(i). Section 1809, violation of which forms the basis for liability under section 1810, criminalizes two types of conduct: (1) intentionally "engag[ing] in electronic surveillance under color of law except as authorized by statute" and (2)

> disclos[ing] or us[ing] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

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A host of obstacles, however, make section 1810 a mostly theoretical, but rarely, if ever, a practical vehicle for seeking a civil remedy for unlawful surveillance.

A

Before an aggrieved person can bring an action for damages under section 1810, the person must learn somehow of the electronic surveillance and thus the cause to be "aggrieved." The primary circumstance FISA describes in which a person learns of this surveillance arises from a criminal proceeding—i.e., if and when the individual is arrested and charged with a crime. For example, section 1806(c) provides:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other ***1126** proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

Nearly identical requirements applicable to state governments require notification to the attorney general of the United States as well as to the aggrieved party and the court. § 1806(d). An analogous pair of notification provisions pertaining to evidence obtained pursuant to physical searches applies to the United States and to state governments, respectively. § 1825(d) and (e). See also § 1845(c) and (d)(pertaining to pen registers and trap and trace devices) and 50 USC § 1861(h)(part of the USA PATRIOT Act enacted in 2001 and amended in 2006, pertaining to "information acquired from tangible things").

FISA's section 1806(j) provides for notice to be given to the United States person targeted for surveillance when "an emergency employment of electronic surveillance is authorized under section 1805(e) * * * and a subsequent order approving the surveillance is not obtained." In that circumstance, the judge "shall cause to be served" on the affected United States persons notice of the fact of the application, the period of the surveillance and "the fact that during the period information was or was not obtained." The notice provided for under section 1806(j) may be postponed or suspended once for up to ninety days upon an ex parte showing of good cause by the government. Upon a further ex parte showing of good cause, the notice requirement under section 1806(j) may be forever waived.

FISA contains a provision requiring direct notification to a "United States person" whose residence has been searched under FISA's section 1824 if "at any time after the search the Attorney General determines there is no national security interest in continuing to maintain the secrecy of the search." 50 USC § 1825(b). In that event, the attorney general "shall provide notice to the United States person * * * of the fact of the search conducted * * * and shall identify any property of such person seized, altered, or reproduced during such search." *Id.*

Intelligence-gathering related to national security is generally not for law enforcement; in fact, the initiation of law enforcement actions may work at cross-purposes to the goals of the intelligence-gathering by disrupting surveillance that is more valuable to national security goals if left intact. The sense that intelligence-gathering under FISA was rarely for the purpose of criminal prosecution emerges from the text of FISA as crafted in Congress and from its legislative history. In the context of allowing the destruction of surveillance records acquired under FISA, the Senate Report distinguished FISA from

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Title III, noting:

> Although there may be cases in which information acquired from a foreign intelligence surveillance will be used as evidence of a crime, these cases are expected to be relatively few in number, unlike Title III interceptions the very purpose of which is to obtain evidence of criminal activity. The Committee believes that in light of the relatively few ***1127** cases in which information acquired under this chapter may be used as evidence, the better practice is to allow the destruction of information that is not foreign intelligence information or evidence of criminal activity. This course will more effectively safeguard the privacy of individuals * * *.

Foreign Intelligence Surveillance Act of 1978, S Rep No 95–604 Part I, 95th Cong 2d Sess 39 (1978), reprinted in 1978 USCCAN 3940–41. Situations in which individuals subject to FISA warrants would be notified of such warrants are therefore narrowly circumscribed under FISA and this appears to be by design.

FISA also contains reporting requirements to facilitate Congressional oversight of FISA, but these are of little help to an individual seeking to learn of having been the subject of a FISA warrant: sections 1808 (electronic surveillance), 1826 (physical searches), 1846 (pen registers and trap and trace devices) and 1862 (requests for production of tangible things). Each of these provisions, under the heading "Congressional oversight," requires semiannual reporting by the United States attorney general to Congress.

As relevant to the subject matter of the instant action, section 1808(a)(1) requires that the attorney general on a semiannual basis "fully inform" certain Congressional committees "concerning all electronic surveillance under this subchapter." Section 1808(a)(2) requires that each report under section 1808(a)(1) include a description of:

> (A) the total number of applications made for orders and extensions of orders approving electronic surveillance under this subchapter where the nature and location of each facility or place at which the electronic surveillance will be directed is unknown;
>
> (B) each criminal case in which information acquired under this chapter has been authorized for use at trial during the period covered by such report; and
>
> (C) the total number of emergency employments of electronic surveillance under section 1805(f) of this title and the total number of subsequent orders approving or denying such electronic surveillance.

Of note, these provisions only require itemized information about surveillances to be reported to Congress if the information pertains to criminal cases in which the information is intended to be used at trial. All other surveillances and/or uses need be reported in the form of aggregate numbers only.

A further reporting requirement newly adopted in 2004 as part of the Intelligence Reform and Terrorism Prevention Act of 2004, PL 108–458, requires the attorney general to report semiannually to the Congressional intelligence committees:

> (1) the aggregate number of persons targeted for orders issued under this chamber [broken down by type of warrant or search];
>
> (2) the number of individuals covered by an order issued pursuant to [§ 1801(b)(1)(C) (i.e. non-United States persons who are "agent[s] of a foreign power" engaged in "international terrorism or activities in preparation therefor")];
>
> (3) the number of times that the Attorney General has authorized that information obtained under this

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chapter may be used in a criminal proceeding * * *;

(4) a summary of significant legal interpretations of this chapter involving matters before the FISC or the FISCR * * *; and

(5) copies of all decisions (not including orders) or opinions of the FISC or FISCR that include significant construction***1128** or interpretation of the provisions of this chapter.

50 USC § 1871(a). These reports are presumably not available to the press or the public; in any event, they do not provide any means for an individual to learn of having been subject to surveillance or search under a FISA warrant.

A provision requiring periodic reporting to Congress by the Department of Justice of the number of pen register orders and orders for trap and trace devices applied for under 18 USC § 3123 and under FISA by law enforcement agencies of the Department of Justice was enacted in 1986 as part of the Electronic Communications Privacy Act of 1986, Pub L 99–508, 100 Stat 1871. 18 USC §§ 3121(a), 3126. The report to Congress must include certain specifics as to each order: the period of interceptions, including extensions, the offense, the number of investigations, the number and nature of facilities affected and the identity of the applying agency and the person authorizing the order. *Id.* § 3126. There are, however, no specific notification requirements in that chapter (Chapter 206).

By contrast, Title III, 18 USC §§ 2510–22, the federal wiretapping statute used by law enforcement to conduct electronic surveillance domestically, provides not only for reporting to Congress to facilitate oversight of the executive branch's surveillance activities, but also for notice as a matter of course to individuals surveilled and for civil liability to such individuals in the event of unlawful surveillance.

Reporting to Congress on electronic surveillance under Title III is the responsibility of the judiciary, the Department of Justice and the individual states' attorneys general. All three are separately and independently obligated to provide data about applications for electronic surveillance to the Administrative Office of the United States Courts, which in turn must transmit annually to Congress "a full and complete report concerning the number of applications for orders and extensions granted or denied pursuant to this chapter during the preceding calendar year." 18 USC § 2519. "The reports are not intended to include confidential material [but] should be statistical in character * * * It will assure the community that the system of court-order electronic surveillance envisioned by the proposed chapter is properly administered * * *." Omnibus Crime Control and Safe Streets Act of 1968, S Rep No 1097, 90th Cong 2d Sess (1968), reprinted in 1968 USCCAN at 2196.

Regarding notice to surveilled individuals, 18 USC section 2518(d) provides that, "within a reasonable time but not later than ninety days after the filing of an application [for interception of electronic communications]," whether successful or unsuccessful, the judge in the matter "shall cause to be served" on the individuals affected "an inventory" notifying them of the fact, date and disposition of the order or application and whether or not wire, oral or electronic communications were intercepted. The statute further authorizes the judge, upon motion by an individual so notified, to allow inspection of "such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice." Id. The serving of the inventory may be postponed "on an ex parte showing of good cause * * *." *Id.*

The legislative history of this provision both acknowledges and addresses the potential implications for national security of section 2518(d)'s notice requirement and expressly contemplates civil actions based on the inventories:

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> [W]here the interception relates, for example, to a matter involving or touching on the national security interest, it ***1129** might be expected that the period of postponement could be extended almost indefinitely. Yet the intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress for example, under section 2520 * * * if he feels that his privacy has been unlawfully invaded.

1968 USCCAN at 2194. In describing the civil damages available under section 2520, the Senate report stated that Congress expressly contemplated the provisions requiring notice to affected individuals to form the basis for civil suits: "It is expected that civil suits, if any, will instead grow out of the filing of * * * inventories under section 2518(8)(d)." *Id.* at 2196.

Eighteen USC section 2520, in turn, provides for civil remedies in the form of injunctive relief, declaratory relief and damages and sets out specific measures of damages based on the number of violations ($50–500 for the first finding of liability, $100–1000 for the second and, for the third or other subsequent finding of liability, actual damages and profits reaped or $100 per day or $10,000). 18 USC § 2520(c). Defenses include, *inter alia,* good faith reliance on a court warrant or order, grand jury subpoena or legislative or statutory authorization. Id.

In summary, FISA makes little provision for notice to surveilled individuals except when the government chooses to disclose surveillance materials and the provisions that exist are easy for the government to avoid. This must be presumed to be part of Congress's design for FISA because the notification procedure in Title III—which, moreover, contemplated special handling of cases involving national security concerns—predated FISA by a decade. Congress could have modeled FISA on Title III in this regard, but did not do so. In consequence, the cases are few and far between in which an individual ever learns of having been subject to electronic surveillance within FISA's purview and therefore possibly having standing as an aggrieved party for FISA section 1810 purposes.

One of the few cases in which an individual surveilled under a FISA warrant became aware of his status as an "aggrieved party" is that of Brendan Mayfield, an American-born United States citizen, attorney and former United States Army officer who brought suit against the United States after being arrested and imprisoned in 2004 upon suspicion of involvement in the conspiracy to detonate bombs on commuter trains in Madrid, Spain. *Mayfield v. United States,* 504 F Supp 2d 1023 (D.Or.2007). The Mayfield case is instructive. The investigation leading to the arrest and the arrest itself were apparently the result of a false fingerprint match which led the FBI, among other things, to seek and obtain from the FISC an order authorizing electronic surveillance of Mayfield's home and his law office. *Id.* at 1028. The published opinion in *Mayfield* noted, without providing specifics, that Mayfield had settled claims for "past injuries," *id.* at 1033; Mayfield, however, continued to press his claims for a declaration that FISA, as amended by the USA PATRIOT Act, violated the Fourth Amendment by undermining the requirement of probable cause as a pre-condition for obtaining a search warrant and for collecting, disseminating and retaining information thus obtained. Mayfield also claimed that FISA violated the Fourth Amendment by permitting warrants to be issued under FISA without a showing that the "primary ***1130** purpose" of the search is to obtain foreign intelligence information. *Id.* at 1032.

The district court agreed with Mayfield and granted, on summary judgment, a declaration finding FISA unconstitutional. The United States appealed

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this order and the appeal is now pending before the court of appeals.

The district court drew particular attention to the "notice problem" under FISA:

> Nor does FISA require notice. The Fourth Amendment ordinarily requires that the subject of a search be notified that the search has occurred. Although in some circumstances the government is permitted to delay the provision of notice, the Supreme Court has never upheld a statute that, like FISA, authorizes the government to search a person's home or intercept his communications without ever informing the person that his or her privacy has been violated. Except for the investigations that result in criminal prosecutions, FISA targets never learn that their homes or offices have been searched or that their communications have been intercepted. Therefore, most FISA targets have no way of challenging the legality of the surveillance or obtaining any remedy for violations of their constitutional rights.
>
> *Id.* at 1039.

Ironically, the Mayfield case seems an ideal one for the government to provide notification under section 1825(b), discussed above, which directs the attorney general to notify United States persons whose residences have been subjected to physical search after the attorney general "determines there is no national security interest in continuing to maintain the secrecy of the search." Yet the government leaned toward secrecy rather than candor. Only after Mayfield had filed litigation and moved to compel notification did the government notify him of the physical search and, in doing so, contended that both the fact and the extent of notification were entirely within the attorney general's discretion. Agency Defendants' Reply In Support Of Motion to Dismiss Counts Twelve and Thirteen and Opposition to Motion to Compel, *Mayfield v. Gonzales*, CV 04–1427–AA Doc # 72 at 6–10, United States District Court for the District of Oregon, filed April 15, 2005. Mayfield later challenged the sufficiency of the government's disclosure. *Mayfield v. Gonzales*, 2005 WL 1801679, *17 (D.Or.2005). The Mayfield case illustrates the limited effectiveness of FISA's narrowly-defined notice provision relating to physical searches. Limited and imperfect as FISA's notification provision for physical searches may be, FISA contains no comparable provision for United States persons who have been subjected to electronic surveillance as opposed to physical search.

In the Al–Haramain case, notification to plaintiffs of their potential status as "aggrieved parties" came in the form of an accident: the inadvertent disclosure of the Sealed Document during discovery proceedings, a disclosure that the various United States entities involved took immediate and largely successful steps to undo. To speak metaphorically, the inadvertent disclosure by OFAC of the Sealed Document amounted to a small tear in the thick veil of secrecy behind which the government had been conducting its electronic surveillance activities. The Oregon district court refused to allow plaintiffs to learn more by conducting discovery, but held that no further harm could result from working with the salient information divulged thus far. By refusing to allow the use of the Sealed Document in any form for the adjudication of plaintiffs' claims in this matter, the court of appeals required that the small tear be stitched closed, leaving plaintiffs with actual but ***1131** not useful notice and without the sole item of evidence they had offered in support of their claims.

B

Difficult as it is to learn of one's status as an aggrieved party for section 1810 purposes, an aggrieved party needs more than mere knowledge of the surveillance to be able to proceed with a lawsuit under section 1810. The next major obstacle to seeking civil remedies under FISA is the lack of a practical vehicle

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for obtaining and/or using admissible evidence in support of such claims. An aggrieved party must be able to produce evidence sufficient to establish standing to proceed as an "aggrieved party" and, later, to withstand motions for dismissal and/or summary judgment. This effort is encumbered with legal and practical obstacles.

As noted above in Part III A, FISA does not provide for the preservation of recordings and other information obtained pursuant to a FISA warrant. Rather, Congress intended to allow such material to be destroyed, the idea being that to allow destruction would better protect the privacy of individuals surveilled than to require preservation. S Rep No 95–604 Part I at 39. By contrast, Title III expressly requires intercepted communications to be recorded and expressly prohibits destruction of the recordings except upon an order of the issuing or denying judge. Also, "in any event [they] shall be kept for ten years." 18 USC § 2518(8)(a). It provides, moreover, that "custody of the recordings shall be wherever the judge orders." *Id.* These provisions ensure that a body of evidence establishing the fact of the surveillance is brought into existence and safeguarded under a judge's control. By failing to impose parallel obligations on the government agencies and officials who are the putative defendants in an action alleging FISA violations, FISA provides little help to "aggrieved persons" who might seek to become civil plaintiffs.

Plaintiffs and plaintiff amici contend that FISA's section 1806(f) provides the means for them to overcome this evidentiary hurdle. The court has carefully studied section 1806(f) and does not agree.

As relevant here, section 1806(f) provides:

> whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States * * * before any court * * * of the United States * * * to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court * * * shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

The parties have argued at length in their papers and in court about the meaning and application of this convoluted pair of sentences. Both plaintiff amici and telecommunications carrier defendant amici ("defendant***1132** amici") have devoted their entire amicus briefs to this subject. Doc # 440/23, 442/25.

[4] Defendants contend that section 1806(f) does not come into play unless and until the government has acknowledged that it surveilled the "aggrieved person" in question (by, for example, initiating criminal proceedings), but that it is not available as a means for an individual to discover having been surveilled absent such governmental acknowledgment. See, e.g., Doc # 432/17 at 16–20. Defendants further assert that, assuming *arguendo* that FISA "preempts" the state secrets privilege, as this court holds it does for purposes of electronic surveillance, plaintiffs would still be unable to establish their standing as "aggrieved persons" for section 1810 purposes without "inherently risk[ing] or requir[ing] the disclosure of state secrets to the plaintiffs and the public at large."

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Id. at 22–23.

The defendant amici present more detailed arguments about section 1806(f) that are in accord with defendants' position. They assert that the "motion * * * to discover" provision at issue in this case "creates no rights for aggrieved persons; it provides procedures to implement their existing right to seek discovery in support of efforts to suppress evidence obtained or derived from electronic surveillance." Doc # 442/25 at 5. Defendant amici further assert that section 1806(f)'s purpose was to preserve for the prosecution a "dismiss option" when the legality of surveillance evidence is challenged, so that the prosecution could choose not to proceed rather than risk the disclosure of classified information. *Id.* at 10–11. In support of this contention, they point to section 1806(f)'s language providing for the United States attorney general to invoke its procedures and argue that the section does not provide for courts to compel the disclosure of information absent the attorney general's involvement. *Id.* at 11.

Defendant amici also contrast FISA's section 1806(f) with 18 USC section 3504(a)(1), enacted in 1970 as part of the Organized Crime Control Act. The latter establishes a procedure by which "a party aggrieved" seeking to exclude evidence based on a claim that it was obtained illegally may obligate "the opponent of the claim" (i.e., the government) "to affirm or deny the occurrence of the alleged unlawful act." Defendant amici argue that "[t]he existence of the carefully circumscribed discovery right in § 3504 negates any suggestion that § 1806(f) implicitly covers the same ground" and cite *United States v. Hamide,* 914 F.2d 1147 (9th Cir.1990) for the proposition that section 3504(a) and section 1806(f) can be used together but that they accomplish different objectives and cannot be construed as serving similar purposes. Doc # 442/25 at 15–16.

In *Hamide,* an immigration judge had entertained a motion under section 3504(a)(1) by an individual in deportation proceedings requesting that the government affirm or deny the existence of electronic surveillance. After the government disclosed that it had conducted electronic surveillance of the individual, it filed in the district court a "Petition of the United States for Judicial Determination of Legality of Certain Electronic Surveillance" under FISA's section 1806(f), together with the FISA materials relevant to the authorization of the surveillance filed under seal and a request that the matter be handled ex parte for national security reasons. 914 F.2d at 1149. The district court then ruled ex parte in the government's favor. *Id.* at 1149–50.

Defendant amici argue that Congress could have incorporated into FISA a procedure like that provided for in ***1133**section 3504(a)(1) by which an individual could require the executive branch to confirm or deny the existence of electronic surveillance and, since Congress did not do so, it must be presumed not to have intended such a procedure to be available under FISA. Doc # 442/25 at 16.

Plaintiff amici counter defendants' arguments against plaintiffs' proposed use of section 1806(f) with several major contentions. First, they argue that section 1806(f)'s scope is expansive enough to provide for in camera review in *any* civil or criminal case—not merely cases arising under FISA—in which a claim of unlawful surveillance is raised. Doc # 440/23 at 11–13, 17. They point out that the text of section 1806(f) referring to "any motion or request * * * pursuant to any other statute or rule of the United States" does not suggest a limitation to criminal statutes. *Id.* at 11. They also point to language in the conference report on the final version of FISA stating "[t]he conferees agree that an in camera and ex parte proceeding is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases." *Id.* at 13, citing H Conf Rep 95–1720 at 32. And plaintiff amici find support in the District of Columbia Circuit's opinion in *ACLU Foundation of Southern California v. Barr,* 952 F.2d 457, 465 n. 7 (D.C.Cir.1991), which cited FISA's legislative history

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for the proposition that Congress had intended a court's in camera, ex parte review under section 1806(f) to "determine whether the surveillance was authorized and conducted in a manner that did not violate any constitutional or statutory right." Thus, plaintiff amici contend, section 1810 is one such "other statute" referred to in section 1806(f) under which in camera review is available.

Next, plaintiff amici characterize defendants' contention that section 1806(f) is only available in cases in which the government has acknowledged having surveilled a party as "look[ing] at section 1806(f) through the wrong end of the telescope." Doc # 440/23 at 14. Plaintiff amici correctly observe that section 1806(f) only comes into play when the attorney general notifies the court that "disclosure or an adversary hearing would harm the national security"—for example, in opposing a discovery request. A "motion or request * * * by an aggrieved person" alone is not sufficient to trigger in camera review. Therefore, they argue, defendants' position that the government must have acknowledged surveillance sets the bar higher than FISA prescribes.

Third, plaintiff amici address what they believe the bar should be—that is, what an individual must show to establish being "aggrieved" for section 1806(f) purposes. They assert that a person need only have a "colorable basis for believing he or she had been surveilled." Doc # 440/23 at 11–16. Lacking examples arising directly under section 1806(f), plaintiff amici look to cases decided under 18 USC section 3504(a)(1) (discussed above), including *United States v. Vielguth,* 502 F.2d 1257, 1258 (9th Cir.1974). In *Vielguth,* the Ninth Circuit held that the government's obligation to affirm or deny the occurrence of electronic surveillance under section 3504(a)(1) "is triggered by the mere assertion that unlawful wiretapping has been used against a party." Plaintiff amici argue that the standard articulated in *Vielguth* is the applicable standard for an "aggrieved person" for purposes of FISA's section 1806(f). Doc # 440/23 at 16.

The court agrees with plaintiffs that section 1806(f) is not limited to criminal proceedings, but may also be invoked in civil actions, including actions brought under section 1810. The court disagrees with defendants' proposed limitation of section 1806(f) to cases in which the government ***1134** has acknowledged the surveillance at issue. The plain language of the statute, which the court must use as its primary compass, *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1988), does not support defendants' purported limitations.

The court parts company with plaintiffs, however, with regard to what an individual must show to establish being "aggrieved" for section 1806(f) purposes and, consequently, the availability of section 1806(f) to plaintiffs in this case in its current posture. As the court reads section 1806(f), a litigant must first establish himself as an "aggrieved person" before seeking to make a "motion or request * * * to discover or obtain applications or orders or other materials relating to electronic surveillance [etc]." If reports are to be believed, plaintiffs herein would have had little difficulty establishing their "aggrieved person" status if they were able to support their request with the Sealed Document. But the court of appeals, applying the state secrets privilege, has unequivocally ruled that plaintiffs in the current posture of the case may not use "the Sealed Document, its contents, and any individuals' memories of its contents, even well-reasoned speculation as to its contents." 507 F.3d at 1204. Plaintiffs must first establish "aggrieved person" status without the use of the Sealed Document and may then bring a "motion or request" under § 1806(f) in response to which the attorney general may file an affidavit opposing disclosure. At that point, in camera review of materials responsive to the motion or request, including the Sealed Document, might well be appropriate.

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The court disagrees with plaintiff amici's suggestion that *Vielguth,* an opinion that established a claimant's burden to invoke 18 USC section 3504(a)(1), should also be relied on to define the burden for an individual to establish standing as an "aggrieved person" for purposes of FISA section 1806(f). The bar set by *Vielguth* is too low given the text and structure of FISA. Moreover, a review of other Ninth Circuit cases reveals that *Vielguth* did not define the standard for all purposes under section 3504(a)(1). The court in *Vielguth* was at pains to distinguish its earlier decision in *United States v. Alter,* 482 F.2d 1016 (9th Cir.1973), which, while stating that a witness "does not have to plead and prove his entire case to establish standing and to trigger the Government's responsibility to affirm or deny," nonetheless established a stringent test for making out a prima facie issue of electronic surveillance of counsel for a grand jury witness. The court held required affidavits that established:

> (1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
>
> (2) the dates of such suspected surveillance;
>
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;
>
> (4) the identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
>
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.

Id. at 1026. *Vielguth* distinguished *Alter* by limiting the latter to "a claim by the person under interrogation that questions put to him are tainted by unlawful surveillance of conversations in which he did not participate" and did so only over the dissent***1135** of one of the three panel members. 502 F.2d at 1259–61.

Not long after *Vielguth,* the Ninth Circuit clarified the standard, but only slightly. In *United States v. See,* 505 F.2d 845, 855–56 (9th Cir.1974), the court rejected a claim under section 3504 as "vague to the point of being a fishing expedition" and held that correspondingly little was required of the government. The court noted that "a general claim requires only a response appropriate to such a claim" and that "varying degrees of specificity in a claim will require varying degrees of specificity in a response." *Id.* at 856 & n. 18.

[5] The flexible or case-specific standards articulated by the Ninth Circuit for establishing aggrieved status under section 3504(a)(1), while certainly relevant, do not appear directly transferrable to the standing inquiry for an "aggrieved person" under FISA. While attempting a precise definition of such a standard is beyond the scope of this order, it is certain that plaintiffs' showing thus far with the Sealed Document excluded falls short of the mark. Plaintiff amici hint at the proper showing when they refer to "independent evidence disclosing that plaintiffs have been surveilled" and a "rich lode of disclosure to support their claims" in various of the MDL cases. Doc # 440 at 16–17. To proceed with their FISA claim, plaintiffs must present to the court enough specifics based on non-classified evidence to establish their "aggrieved person" status under FISA.

C

It is a testament to the obstacles to seeking civil remedies for alleged violations of FISA that section 1810 has lain "dormant for nearly thirty years." Andrew Adler, Note, *The Notice Problem, Unlawful*

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Electronic Surveillance, and Civil Liability Under the Foreign Intelligence Surveillance Act, 61 U Miami L Rev 393, 397 (2006–07). Dormant indeed. The print version of the United States Code Annotated contains no case notes under section 1810. The parties have cited no other case in which a plaintiff has actually brought suit under section 1810, let alone secured a civil judgment under it. By contrast, the civil liability provisions of Title III, 18 USC § 2520, have been used successfully by "aggrieved persons" with regularity since they were enacted in 1968. See, e.g., *Jacobson v. Bell Telephone Co.,* 592 F.2d 515 (9th Cir.1978), *Dorris v. Absher,* 179 F.3d 420 (6th Cir.1999).

While Congress enacted section 1810 in order to provide a private cause of action for unlawful surveillance, section 1810 bears but faint resemblance to 18 USC section 2520. While the court must not interpret and apply FISA in way that renders section 1810 superfluous, *Dole Food Co. v. Patrickson,* 538 U.S. 468, 476–77, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), the court must be wary of unwarranted interpretations of FISA that would make section 1810 a more robust remedy than Congress intended it to be. As noted, Title III predated FISA by a full decade. If Congress had so intended, it could have written FISA to offer a more fulsome and accessible remedy patterned on Title III. Congress may therefore be presumed to have intended *not* to provide such a remedy and the court should not strain to construe FISA in a manner designed to give section 1810 greater effect than Congress intended. See id. The same applies with regard to the procedure set forth in 18 USC section 3504(a)(1), enacted in 1970. This is not to say that it is impossible to obtain relief under section 1810, but the fact that no one has ever done so reinforces the court's reading of the plain terms of the statute: section 1810 is not ***1136** user-friendly and the impediments to using it may yet prove insurmountable.

IV

On April 17, 2008, less than a week before the hearing on defendants' second motion to dismiss, plaintiffs filed a motion for an order extending the time to serve defendants Bush, Alexander, Werner and Mueller individually, presumably in response to defendants' sovereign immunity arguments in their moving and reply papers. Doc # 447/30. In that motion, plaintiffs do not specifically state whether they intended to sue defendants in both their official and individual capacities, but they assert that "a nonspecific complaint may be characterized as alleging both official and personal capacity liability." *Id.* at 2. Plaintiffs explain their failure to serve the individual defendants individually within the 120–day deadline for service under Federal Rule of Civil Procedure 4(m) as follows: "Within weeks [of serving their complaint upon the Attorney General] this case became focused on the classified document that Plaintiffs filed under seal with the Complaint." *Id.* at 1. They assert that issues pertaining to the Sealed Document, including defendants' assertion of the state secrets privilege, "have driven this litigation to date in the trial and appellate courts and have overshadowed all other aspects of this case." *Id.*

Plaintiffs also contend that the individual defendants will not be prejudiced by late service of the complaint because: (1) they have been on notice of the litigation either through personal, open participation in the defense (e g, Declaration of NSA Director & Declaration of Keith B Alexander, *Al–Haramain,* No C 06–0274 KI Doc # 55–2, 59, United States District Court for the District of Oregon, filed June 21, 2006) or due to the large amount of publicity surrounding these cases and (2) because the case has advanced little due to the courts' focus on the Sealed Document, the state secrets privilege and legal issues under FISA. Doc # 447/30 at 2–3.

Defendants vigorously oppose plaintiffs' motion, asserting that plaintiffs have failed to establish "good cause" warranting relief from the 120–day deadline. They assert that plaintiffs have been on notice of the defendants' sovereign immunity defense for well over a year and of the particular point that individual de-

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fendants had not been served for "at least nine months." Doc # 448/31 at 3. Defendants assert that they will be prejudiced by the proposed late service because the suit has been pending and actively litigated without notice to defendants as individuals for over two years. *Id.* at 5.

Defendants also point out—correctly—that plaintiffs' motion is not in accordance with this court's local rules as it was filed less than one week before the April 23 hearing without a hearing date specified on the moving papers. Defendants filed a short opposition the day before the hearing requesting, *inter alia*, that the motion be placed on the calendar and briefed in accordance with the local rules.

Plaintiffs' motion mentions Civil Local Rule 6–3 (Doc # 447/30 at 1), but does not properly invoke or comply with it. Rule 6–3 provides the procedure for obtaining a hearing on shortened time. It requires the filing of a motion to shorten time and sets forth detailed requirements for such a motion. Plaintiffs filed no such motion. On the other hand, plaintiffs did not expressly seek to have their motion heard on shortened time and, at the April 23 hearing, it was defendants' attorney who first sought to be heard on the matter. Hearing transcript, Doc # 452 at 44–45.

Notwithstanding the inartful manner in which plaintiffs brought their motion, the court finds the briefing and arguments for ***1137** and in opposition to plaintiffs' motion adequate. No further briefing on this matter will be required. Plaintiffs, however, are admonished to review the local rules of this court and to abide by them for the duration of this litigation.

[6] Rule 4(m) provides two alternative courses for a court to follow if a plaintiff has failed to serve one or more defendants within the 120–day time limit. As something like 680 days had elapsed between plaintiffs' filing of their action and the date of their motion for an extension of time to serve the individual defendants individually, plaintiffs have indisputably exceeded the 120–day limit by a wide margin. Rule 4(m) requires the court to dismiss the action without prejudice against the particular defendants in question "or order that service be made within a specified time." If plaintiff shows good cause for the failure, however, the court "must extend the time for service for an appropriate period." The determinations required to adjudicate the motion for an extension of time to serve defendants are committed to the discretion of the court. *Puett v. Blandford*, 912 F.2d 270, 273 (9th Cir.1990).

[7] The court agrees with plaintiffs that although more than two years have elapsed, little has occurred in the litigation that would prejudice a late-served individual defendant. This is particularly the case given the specific individuals at issue, all of whom are high-level government officials closely and publicly connected to the policies and practices at issue in this litigation. Dismissal on the ground of failure to serve individual defendants would needlessly complicate the litigation and would not advance the interests of justice in this case. Without reaching the question whether plaintiffs have established "good cause" for their failure to serve the individual defendants, the court instead GRANTS the motion to extend time for service. Should plaintiffs choose to amend their complaint in accordance with this order, they may serve all unserved defendants with their amended complaint within fifteen (15) days of filing it with the court.

V

The lack of precedents under section 1810 complicates the task of charting a path forward. The court of appeals reversed the Oregon district court's plan for allowing plaintiffs to proceed with their suit, but did not suggest a way for plaintiffs to proceed without using the Sealed Document. Nonetheless, the court believes that dismissal with prejudice is not appropriate. Accordingly, plaintiffs' FISA claim will be dismissed with leave to amend. Plaintiffs should have the opportunity to amend their claim to establish that they

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are "aggrieved persons" within the meaning of 50 USC § 1801(k). In the event plaintiffs meet this hurdle, the court will have occasion to consider the treatment of the Sealed Document under section 1806(f) and the significant practical challenges of adjudicating plaintiffs' claim under section 1810.

For the reasons stated herein, plaintiffs' claim under FISA is DISMISSED with leave to amend. Plaintiffs shall have thirty (30) days to amend their complaint in accordance with this order. Should plaintiffs seek to amend their non-FISA claims, they shall do so by means of a noticed motion before this court in accordance with the local rules.

IT IS SO ORDERED.

N.D.Cal.,2008.
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